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

In the matter of an appeal by way of a Stated Case under section 11A of the Tax Appeals Commission Act, No. 23 of 2011 as amended by Act, No. 29 of 2013.

Central Finance Company PLC,
84, Raja Veediya,
Kandy.

Appellant

Case No. CA/TAX/0008/2018
Tax Appeals Commission
No. TAC/IT/007/2015

Vs.

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

Respondent

Before : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

: Dr. Shivaji Felix with Nayantha Satharasinghe for the Appellant

Sumathi Dharmawardena, P.C.. Additional Solicitor General with Amasara Gajadeera and Pramod Perera for the Respondent.

Argued on : 10.12.2011, 31.03.2022, 06.05.2022, 02.11.2022 & 04.05.2023

Written Submissions filed on : 03.01.2019 & 16.05.2023 (by the Appellant)

17.01.2019 & 12.05.2023 (by the Respondent)

Decided on : 19.05.2023

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by way of a Case Stated against the determination of the Tax Appeals Commission dated 20.03.2018 confirming the determination made by the Commissioner-General of Inland Revenue on 05.12.2014, and dismissing the Appeal of the Appellant. The taxable period related to the appeal is the year of assessment 2009/2010.

Factual Background

[2] The Appellant submitted its return of income for the assessment year 2009/2010 on 30.11.2010, but the assessor by letter dated 26.11.2012 did not accept the return of income and estimated the amount of the assessable income accordingly. The notice of assessment was issued on 30/11.2012 in respect of the year of assessment 2009/2010. The Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the "Respondent") against the said assessment. The Respondent by its determination dated 05.12.2014 confirmed the assessment and dismissed the appeal (pp. 1 and 16-24 of the Tax Appeals Commission brief).

Appeal to the Tax Appeals Commission

[3] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission, and the Tax Appeals Commission by its determination dated 20.03.2018 confirmed the determination made by the Respondent and dismissed the appeal, subject to the qualification that the Commissioner General should decide on the reasonable amount that can be allowed as bad debts, and also expenses to be allowed as bungalow expenses, business promotion expenses and legal expenses in consultation with the Appellant.

Questions of Law for the Opinion of the Court of Appeal

[4] Being dissatisfied with the said determination of the Tax Appeals Commission, the Appellant requested the Tax Appeals Commission to state a case, and the Tax Appeals Commission formulated the following questions of law in the Case Stated for the opinion of the Court of Appeal.

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

(2) Is the assessment bad in law in as much as it is time barred?

(3) Is the assessment of income tax and penalty as determined by the Tax Appeals Commission excessive and without lawful justification?

(4) Has the Tax Appeals Commission erred in law when they concluded that the transfer of vehicles to vehicle stock, consequent to a non-performing contract, constitutes a disposal of assets within the contemplation of section 25(7)(v) of the Inland Revenue Act, No. 10 of 2006 (as amended)?

(5) In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law in arriving at the conclusion that they did?

[5] On 10.12.2021, the learned Counsel for the Appellant, Dr. Shivaji Felix, who commenced submissions intimated to Court that the special leave has been granted by the Supreme Court against the decision of the Court of Appeal in *Seylan Bank v. Commissioner General of Inland Revenue* (CA/Tax No. 23/2013) on the identical issue with regard to the retrospective effect of the amendments made to section 163(5) of the Inland Revenue Act, No. 10 of 2006. Both Counsels agreed to argue the question of law with regard to the time bar of the assessment after the delivery of the Supreme Court judgment. After the delivery of the Supreme Court judgment, both Counsels made extensive submissions on the applicability of the judgment of the Supreme Court in *Seylan Bank v. Commissioner General of Inland Revenue* (SC Appeal, No. 46/2016) to the present case before us.

[6] On 04.05.2013, both Counsels invited this Court to express our opinion on the question of law No. 2 relating to the time bar of the assessment, reserving the right to make submissions on the rest of the questions of law later. The Court decided to consider, at the outset, the question of law, No. 2, and consider

the rest of the questions of law at a later date. The question of law No. 2 reads as follows:

2- Is the assessment bad in law in as much as it is time barred?

Question of Law No. 2- Time Bar of the Assessment

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

1. The return of income for the year of assessment 2009/2010 was filed on 30.11.2010 and the intimation letter dated 26.11.2012 was received by the Appellant on 30.11.2012. The notice of assessment dated 30.11.2012 was received by the Appellant on 10.12.2012;

2. The return of income was filed for the year of assessment 2009/2010 on 30.11.2010 under the provisions of the Inland Revenue (Amendment) Act, No. 19 of 2009, and therefore, the Appellant is entitled under the Inland Revenue (Amendment) Act, No. 19 of 2009 to have the assessment made on or before 31.03.2012. The time bar for making the assessment for the year of assessment expired on 31.03.2012 under the Inland Revenue (Amendment) Act, No. 19 of 2009;

3. For the purpose of determining the time bar of the assessment, the relevant date is the date on which the notice of assessment was posted and not the date on which the assessment was made. A lawfully valid assessment can only be made if it is served on the taxpayer prior to the expiry of the statutory time bar for making the assessment. The reasons for making the assessment must also be served on the taxpayer prior to the expiry of their time bar;

4. It is the notice of assessment which gives validity to the assessment and the failure to send a notice of appeal within the statutorily contemplated period would result in the assessment being devoid of legal effect. The notice of assessment dated 30.11.2012 was received by the Appellant on 10.12.2012 after the expiry of the time bar period for making the assessment, and therefore, the assessment is time barred under section 163(5) of the Inland Revenue Act;

5. Assuming without conceding that the assessment was made on 26.11.2012, as asserted by the Respondent, the appeal would nevertheless be time barred for the year of assessment 2009/2010 for the failure to make the assessment on or before 31.03.2012, in contravention of section 163(5) of the Inland Revenue (Amendment) Act, No. 19 of 2019. The Inland Revenue (Amendment) Act, No. 19 of 2019 does not provide that the amendment made to section 163(5) of the principal enactment had retrospective effect. Thus, the assessor could not have extended the time period for making the assessment beyond 31.03.2012 on the basis of the Inland Revenue (Amendment) Act) No. 22 of 2011, which applied to the year of assessment 2011/2012;

6. The Inland Revenue (Amendment) Act, No. 22 of 2011, which came into force on 01.04.2011 was not intended to have retrospective effect, and all provisions of that amendment which were to have retrospective effect were expressly specified in section 56 of the Inland Revenue (Amendment(Act, No. 22 of 2011.

7. The statutory amendments to section 163(5) of the Inland Revenue Act, No. 10 of 2006, made by the Inland Revenue (Amendment) Act, No. 22 of 2011, relating to the extended time bar only applies to returns furnished after amending legislation can into effect, and therefore, the amendment made to section 163(5) of the principal enactment by the Inland Revenue (Amendment) Act, No. 22 of 2011 does not have a retrospective operation;

[8] Dr. Felix strongly relied on the judgment of the Court of Appeal in *A. M. Ismail v. Commissioner General of Inland Revenue* (1980) IV Sri Lanka Tax Cases 156, *D.M.S. Fernando and another v. A.M. Ismail (1982)* Sri Lanka Tax cases, Vol IV 156, p. 184, *Chettinad Corporation Ltd* (1954) 1 CTC 515 and *Wijewardene v. Kathiragamar* (1991) IV Sri Lanka Tax Cases 313, in support of his contention. During the course of further argument, he relied on the decisions of the Supreme Court in *Seylan Bank v. Commissioner General of Inland Revenue (SC Appeal* No. 46 of 2016 decided on 16.12.2021, the decisions of the Court of Appeal in *John Keels Holdings PLC v. Commissioner General of Inland Revenue* (CA Tax 26/2013 decided on 16.03.2022 and *ACL Cables v. Commissioner General of Inland Revenue* (CA Tac 07/2013 decided on 16.03.2022, which held that whilst making an assessment and sending a notice of assessment are two

different things, a valid assessment cannot be made in time unless the notice of assessment is served in the tax payer.

[9] On the first question whether the statutory time bar applies for both the assessment and the notice of assessment, Mr. Dharmawardena's submission was that there is a clear difference between the making of the assessment and the notice of assessment, and the time bar relates to the making of the assessment, and not to the service of the notice of assessment. His contention was that there can be no notice without an actual and valid assessment, which precedes the notice of assessment, and therefore, it is in no way dependent on the notice or the service thereafter. He relied on the decisions in *Honig & Others (Administrators of Emmanuel Honig) v. Sarsfield (H. M. Inspector of Taxes)* Ch. Div. (1985) STR 31 (CA) /(CA) (1986) STC 246), *Commissioner of Income Tax v. Chettinand Corporation,* 55 NLR 556 and *Stafford Motors v. Commissioner General of Inland Revenue* CA Tax 17/2017 decided on 15.03.2019, which held that the making of assessment and serving of the notice of assessment are two different acts.

[10] On the second question, whether the assessment is time barred in terms of the provisions of section 163(5) of the Inland Revenue Act, Mr. Dharmawardena's submission was that the Inland Revenue Act, No. 10 of 2006 was further amended by the Inland Revenue (Amendment) Act, No. 22 of 2011, which was certified by the Speaker on 31.03.2011. He submitted that the Inland Revenue (Amendment) Act, No. 22 of 2011 further extended the time period for making the assessment from 31.03.2012 to 30.11.2012. His contention was that the assessor has a right to make the assessment during that extended period given to the assessor, and accordingly, the assessment was lawfully made on 26.11.2012 in terms of section 163(5) of the Act, No. 22 of 2011. On that basis, he submitted that the assessment is within the time stipulated in the Inland Revenue (Amendment) Act, No. 22 of 2011. The Respondent relied on a Privy Council decision and a number of Indian decisions in support of its argument.

[11] The questions to be considered are:

1. Whether, on the facts and in the circumstances of this case, the assessment for the assessment year 2009-2010 was made on 26.11.2012 or the service of the notice of assessment dated 30.11.2012 on the Appellant on 18.12.2012 constituted a valid assessment;

2. Even if the assessment was made on 26.11.2012, whether, on the facts and in the circumstances of this case, and the law, the assessment for the assessment year 2009-2010 was time barred in terms of section 163(5) of the Inland Revenue Act (as amended).

Whether the assessment has been validly made on or before 26.11.2012 or a lawfully valid assessment has only been made when the notice of assessment dated 30.11.2012 has been served on the taxpayer

[12] I shall consider the first question, whether the assessment has been made on or before 26.11.2012 or the service of the notice of assessment dated 30.11.2013 on the taxpayer constitutes a valid assessment in terms of the provisions of the Inland Revenue Act (as amended).

Best judgment of the assessment-section 163

[13] Section 163 of the Inland Revenue Act, No 10 of 2006 (as amended) relates to the power of the assessor to make an assessment (i) using the best judgment rule by performing the duties honestly and above board; (ii) considering fairly all material put before it; (iii) considering the material that is in possession reasonably and not arbitrarily; and (iv) without being required to do the work of the taxpayer (See- *Van Boeckel v C&E QB* [1981] STC 290; VAEC 1420). Section 163(1) reads as follows:

> *"(1) Where any person who in the opinion of an Assessor or Assistant Commissioner is liable to any income tax for any year of assessment, has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, an Assessor Assistant Commissioner may, subject to the provisions of subsection (3) and (5) and after the fifteenth day of November immediately succeeding that year of assessment, assess the amount which in the judgment of the Assessor Assistant Commissioner ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith–*
>
> *(a) the amount of tax so assessed, if such person has not paid any tax for that year of assessment; or*
>
> *(b) the difference between the amount of tax so assessed and the amount of tax paid by such person for that year of assessment, if such person has paid any amount as tax for that year of assessment:*

Provided that an Assessor or Assistant Commissioner may, subject to the provisions of subsections (3) and (5), assess any person for any year of assessment at any time prior to the fifteenth day of November immediately succeeding that year of assessment, if he is of opinion that such person is about to leave Sri Lanka or that it is expedient to do so for the protection of revenue, and require such person to pay such tax to the Commissioner-General earlier than as required under subsection (1) of section 113:

Provided further that any assessment in relation to the tax payable by a company under sub-paragraph (i) of paragraph (b) of subsection (1) of section 61 or paragraph (c) of subsection (1) of section 61 or paragraph (b) of subsection (1) of section 62 shall be made after the expiry of thirty days from the due date for payment of such tax".

[14] It is manifest that section 163 (1) imposes the following duties on the assessor:

1. First to make an assessment-amount of tax which such person in the judgment of the assessor, ought to have paid for that taxable period (making the assessment); and

2. Send the notice in writing requiring the taxpayer to pay such amount forthwith (sending the notice).

[15] On the other hand, section 163(2) applies to an additional assessment to be made by an assessor where the assessor is of the opinion that a person chargeable with tax has paid as tax, an amount less than the proper amount of the tax payable by him or chargeable from him for that taxable period. In such case, the assessor may make an additional assessment and give such person notice of the assessment. It reads as follows:

"Where it appears to an Assessor or Assistant Commissioner that any person liable to income tax for any year of assessment, has been assessed at less than the proper amount, the Assessor or Assistant Commissioner may, subject to the provisions of subsection (3) and subsection (5), assess such person at the additional amount at which according to his opinion such person ought to have been assessed, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to such additional assessment and to the tax charged there under".

[16] Section 163(1) imposes a duty on the assessor to make the assessment and section 163(2) imposes an assessor to make an additional assessment. Section 163(3) deals with the duties of the assessor in making an assessment or

additional assessment, and steps to be taken where the return is either accepted or not accepted. It reads as follows:

> *"163(3). Where a person has furnished a return of income, the Assessor or Assistant Commissioner may in making an assessment on such person under subsection (1) or under subsection (2), either–*
>
> *(a) accept the return made by such person; or*
>
> *(b) if he does not accept the return made by that person, estimate the amount of the assessable income of such person and assess him accordingly:*
>
> > *Provided that where an Assessor or Assistant Commissioner does not accept a return made by any person for any year of assessment and makes an assessment or additional assessment on such person for that year of assessment,* ***he shall communicate to such person in writing his reasons for not accepting the return****".*

[17] Section 164 requires the assessor who **made the assessment** to give notice of assessment to each person and each partnership **who or which has been assessed,** stating the amount of income assessed and the amount of tax charged. It reads as follows:

> *"164. As Assessor or Assistant Commissioner shall give notice of assessment to each person and each partnership who or which has been assessed, stating the amount of income assessed and the amount of tax charged:*
>
> *Provided that where such notice is given to an employer under the provisions of Chapter XIV, it shall be sufficient to state therein the amount of tax charged".*

[18] The making of the assessment is, thus, different from sending the notice of assessment as there can be no notice without an assessment which precedes the notice. Accordingly, the assessment is not dependent on the notice of assessment and the notice of assessment arises only upon the making of the assessment (See-further the decision of *Stafford Motor Company (Private) Limited v. Commissioner General of Inland Revenue* CA Tax 17/2017, decided on 15.03.1919, *Illukkumbura v. Commissioner General of Inland Revenue*, CA/Tax 0005/2016 decided on 29.09.2022 and *Unilever Sri Lanka Limited, v. Commissioner General of Inland Revenue,* CA/TAX/0004/2013 decided on 04.11. 2022).

[19] The Appellant relied on the decision of the Court of Appeal in *A. M. Ismail v. Commissioner General of Inland Revenue* (supra) and part of the passage from the judgment of Samarakoon C.J in *D.M.S. Fernando and another v. A.M. Ismail*

(supra), in support of its argument that the notice must be sent to the taxpayer prior to the expiry of the time bar. In A*. M. Ismail v Commissioner General of Inland Revenue* (supra), Victor Perera J. stated at p. 182:

> *"It is necessary that the respondents should realise that the specific duties imposed on them as these provisions have been repeated in the Inland Revenue Act, No. 28 of 1979, which is the law now in operation in the year commencing 1st April, 1978, so that the Inland Revenue Department could recover the tax found to be due from taxpayers with expedition as provided in this law without jeopardising the rights of the State to collect the revenue due to it. The law given to an Assessor a period of 3 years to examine and investigate a return while an assessee keeps on paying the tax installments on the specified dates.*
>
> ***In regard to the date of the notice of assessment, it was conceded that the relevant date is the date of posting as a notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received** in the ordinary course of business. In this case, the notice was admittedly posted on 31st April, 1979, long after the effective date referred to in section 96 (C) (3), namely 31st March 1979 1979. In this case it cannot be considered a valid notice under section 96(C) (3) or even a valid notice under section 95 as there has been an absolute non-compliance with the mandatory provisions of section 93(2) even if the assessment was made on 30.03.1979. ".*

[20] Accordingly, the Court of Appeal issued a writ of certiorari quashing the assessment of tax. Now it is necessary to consider the facts and circumstances under which Victor Perera, J. stated that that notice of assessment was not a valid notice of assessment under section 93(2) of the Inland Revenue (Amendment) Act, No. 30 of 1978. In M.*Ismail v. Commissioner General of Inland Revenue* (supra), the taxpayer submitted his return and in August, 1977 and had an interview with the assessor. Thereafter, the taxpayer, by letter dated 10.08.1977, forwarded a statement disclosing an additional income and other information with a view to finalising his income tax matters with an explanation for non-disclosure of this additional income earlier. The taxpayer had another interview with the assessor in January 1978 and in October, 1978. The taxpayer made payments towards settling the liability arising from the additional income disclosed., but after the interview with the Deputy commissioner in October, 1978, **the taxpayer received no further communication.**

[21] In 1979, the taxpayer received a notice of assessment dated 30.03.1979 showing a larger amount of assessable income and wealth than was returned or declared by him and the said notice of assessment was posted on 21.04.1979.

Under such circumstances, the taxpayer sought a writ of certiorari and/for prohibition quashing this assessment. The Revenue (Respondents) relied on a copy of a letter dated 04.04.1979 allegedly sent by the assessor to the taxpayer stating "reasons for rejecting the returns and accounts have already been intimated to you..." The Respondents were however, unable to prove that such a letter was sent to the taxpayer, or to give evidence as to how and when the letter was sent. The Respondents also filed an affidavit which stated, *inter alia,* that "at these in his return and statement for the relevant year of assessment will not be accepted".

[22] Section 93(2) of the Inland Revenue Act, 04 of 1963 reads as follows:

> *"Where a person has furnished a return of income, wealth or gifts, the assessor may*
> *(a) either accept the return and make an assessment accordingly;*
>
> *(b) if he does not accept the return, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly, and communicate to such person in writing the reasons for not accepting the return".*

[23] By the Inland Revenue (Amendment) Act, No. 30 of 1978, section 93(2) was amended, and it made it obligatory for the assessor "to communicate to the assessee in writing the reasons for not accepting the return. Section 93(C)(3) reads as follows:

> *"Where, in the opinion of the Assessor, any person chargeable with any tax....has paid as the quarterly instalment of that tax.....an amount less that the proper amount which he ought to have paid....the Assessor may assess the amount which in the judgment of the Assessor ought to have been paid by such person and shall by notice in writing require such person to pay forthwith the difference between the amount so assessed and the amount paid by that person".*

[24] The proviso (d) to section 96(C)(3) reads as follows:

> *"Where an assessor does not accept a return made by any person for any year of assessment and makes an assessment on that person for that year of assessment, he shall communicate to such a [person in writing his reasons for not accepting the return".*

[25] It was absolutely clear that after the two interviews were held and the additional income and other information with an explanation for not disclosing them earlier, were sent to the assessor by the taxpayer, **the assessor did not communicate in writing with his reasons** for not accepting the return as required by section 93(2) of the Act. The Respondents (Revenue) were unable to prove that a letter dated 04.04.79 was sent to the taxpayer with reasons for rejecting the returns, and accordingly, the notice of assessment dated 30.03.1979 was sent to the taxpayer **without communicating reasons for not accepting the return** in **total non-compliance with the provisions of section 93(2) and 93(C)(3)** of the Inland Revenue Act.

[26] In the present case, however, the letter of the assessor dated 26.11.2012 states "**Please treat that this letter is issued in terms of section 163 of the Inland Revenue Act, No. 10 of 2006".** (See -letter of the assessor dated 26.11.2012 at p. 43 of the TAC file). There was no complaint whatsoever that the reasons for not accepting the return were not communicated to the Appellant by the assessor and the complaint was that it was received on 06.12.2012 (p. 49 of the TAC brief). In fact, the letter dated 26.11.2012 with reasons for not accepting the return has been sent to the Appellant before the notice of assessment dated 30.11.2012 was sent to the Appellant. The Appellant admits that the notice of assessment dated 30.11.2012 was received on 18.12.2012. Accordingly, I am of the view that the circumstances under which Victor Perera, J. made the above quoted statement is not applicable to the facts of the present case.

[27] It is to be noted that the assessor and the Commissioner General of Inland Revenue appealed to the Supreme Court against the said order of the Court of Appeal which issued a writ of certiorari quashing the assessment of tax (See- *D.M.S. Fernando and another v. A.M. Ismail* Sri Lanka Tax Cases, Vol. IV, p. 184). His Lordship the Chief Justice Samarakoon in *D.M.S. Fernando and another v. A.M. Ismail* (supra) considered the duty imposed on an assessor under section 93 (2) of Inland Revenue Act, No. 4 of 1963, as amended by the Inland Revenue (Amendment) Acts, No. 17 of 1972 and 30 of 1978, in case the assessor rejects a return.

[28] His Lordship the Chief Justice, having considered section 93(2) of the amended Act, held that where the assessor rejects the return, **he should state his reasons and communicate them to the taxpayer** at or about the time he sends his assessment on an **estimated income**. His Lordship referring to section 115(3) of the Inland Revenue Act, No. 4 of 1963 as amended by Act No. 17 of 1972 and Act,

No. 30 of 1978 in relation to the duty of the assessor in not accepting the return held at p. 194:

> *"Section 115(3) is an empowering section. It empowers the Assessor to do one of two things. He may accept the return, in which event he makes the assessment accordingly. Or else he* ***may not accept the return****. In such an event* ***he*** *is obliged to do two things:*
>
> 1. *Estimate the assessable income, taxable income or taxable gifts and* ***assess him*** *accordingly (the underlining is mine); and*
> 2. ***He*** *must* ***communicate to the Assessee in writing*** *the reasons for not accepting the return.*
>
> *To my mind these are all part of one exercise. There is nothing in the provision which indicates that the estimation of assessable income, wealth and gifts must be postponed for some time long after the non-acceptance. Even if one transposes the words "and communicate to such persons in writing the reasons for not accepting the return" to the first line of the section after the word "return" and before the word "estimate" it will not make it a condition precedent. One has still to read more words into it to have the effect of postponing the rest of the exercise to sometime later. This would be doing violence to the section.* ***The section imposes a duty, but does not impose a time limit within which it should be done.*** *To my mind the section merely states that if the Assessor does not accept a return, he may assess on an estimate.* ***His exercise is not complete till he has also communicated his reasons for not accepting the return****. In effect he also justifies his act of assessing on an estimate. The plain meaning of the section is clear. ' (Emphasis added)*

[29] These words clearly imply that all what the assessor has to do, where he does not accept the return, is (i) to estimate the assessable income,...; (ii) assess him accordingly; and (iii) state reasons, and communicate such reasons to the taxpayer in writing. The words of section 163(3) of the Inland Revenue Act are, however, identical to section 93(2) and section 93(C)(3) of the repealed Inland Revenue (Amendment) Acts, No. 17 of 1972 and 30 of 1978. It only imposes a duty on the assessor who made the assessment or additional assessment to communicate the reasons to the taxpayer through a registered post for not accepting the return.

[30] The Appellant's argument is that the making of assessment and serving the notice of assessment are inseparable parts of the assessment which shall be made simultaneously before the expiration of the period for the making of the

assessment relying on the part of the following statement made by Samarakoon C.J. in *D.M.S. Fernado v. A.M. Ismail* (supra). It is apt to reproduce the entirety of the statement made by Samarakoon C.J. in *D.M.S. Fernado v. A.M. Ismail (*supra) at pp. 193-194:

> *"A duty is now imposed on the Assessor not only to give reasons for non-acceptance of a return, but also to communicate them to the assessor. The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly unfair assessments which many Assessors had been making as "a protective measure". An unfortunate practice had developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a "return till" the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment. The law, I think, enabled the department to make recoveries pending any appeal on such assessments. The overall effect of this unhappy practice was to pressurize the taxpayer to such an extent that he was placed virtually at the mercy of the tax authorities. The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the assessee. The provisions for the giving of reasons and the written communication of the reasons, contained in the amendment is to ensure that in fact the new procedure would be followed. More particularly, the communication of the reason at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not give him the latitude to chop and change thereafter.* ***It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them h. His reasons must be communicated at or about the time he sends his assessment on an estimated income.*** *Any later communication would defeat the remedial action intended by the amendment" (emphasis added).*

[31] The Appellant's argument is that the substance of the statement made by Samarakoon C.J. is that "a duty is now imposed on the Assessor who rejects the return and makes an assessment to state reasons for such rejection, communicate the same to the taxpayer, issue and serve the notice of **assessment before the expiration of the period for the making of the assessment**". In my view, all what His Lordship Samarakoon CJ said in *D.M.S. Fernando and another v. A.M. Ismail (supra)* was that the assessor who rejected a return should state his reasons and communicate them at or about the time he sends his assessment on an **estimated income** to the taxpayer. I am afraid, there is nothing to indicate or gather from His

Lordship Samarakoon C. J's statement that His Lordship has said that the notice of assessment shall also be sent to the taxpayer at or about the time he sends his assessment or that the notice of assessment shall be sent to the taxpayer before the expiration of three years for the making of the assessment.

[32] All what section 163(3) requires the assessor who rejects the return and made the assessment or additional assessment is to communicate to the tax payer by letter sent through the registered post, why he is not accepting the return, his reasons for not accepting the return. Having made the assessment, the assessor in the present case, by letter dated 09.09.2013 communicated to the taxpayer the **assessment** and the **reasons** in writing for not accepting the return as required by section 163(3). At the end of the letter, assessor states:

> *"Please treat this letter as an intimation made under section 163(3) of the Inland Revenue Act, No. 10 of 2006".*

[33] It is manifest that the assessor could have communicated the reasons for not accepting the return only after making the assessment, and therefore, the time bar applies to the making of the assessment or additional assessment, and not to the notice of assessment which is not dependent on the making of the assessment. On the other hand, section 164 of the Inland Revenue Act imposes a duty on the assessor who made the assessment to send a notice in writing requiring the person who was assessed stating the **amount of income assessed** and **the amount of tax charged.** Section 163 also imposes a duty on the assessor who assessed any person **who failed to furnish a return**, by notice in writing requiring him to pay on or before a date the amount specified in that notice, the amount of the tax so assessed, if such person has not paid any tax, or the difference between the amount of tax so assessed and the amount of the tax paid by such person. Furthermore, section 163 (2) imposes a duty on the assessor who made an additional assessment to serve the notice of assessment on the taxpayer. Both sections do not specify a time limit within which the notice of assessment shall be served on the assessor.

[34] The Appellant argued that the date on which the notice of assessment dated 30.11.2012 was served on the taxpayer should be regarded as the date for the making of the assessment, completely ignoring the letter of communication dated 26.11.2012 issued by the assessor to the Appellant in terms of section 163(3) of the Inland Revenue Act, which contains **an assessment and reasons for not accepting the returns.** It is obvious that the communication of the reasons for not accepting of the return cannot be issued unless the assessor had in fact made the

assessment by 26.11.2012 under section 163(3) or an additional assessment under section 1632).

[35] One cannot fathom from the language of section 163 (3) that the notice of assessment should also be sent together with the communication of the reasons for non-acceptance of the return. Once the assessment or additional assessment had been made, the assessor is fixed to a definite assessment, a position which cannot be changed thereafter. Accordingly, what is communicated to the taxpayer under section 163(3) is the definite assessment made by the assessor with reasons signed by the assessor. In the circumstance, the communication of such assessment or additional assessment with reasons is the clear proof that the assessment had been made on a definite position, and therefore, the notice of assessment, under section 164 will only be sent to the taxpayer who has been assessed under section 163(3). In the absence of any statutory obligation imposed on the assessor, I am not inclined to accept the argument that the notice of assessment shall also be sent to the taxpayer under section 163(3) before the time bar period expires to make the assessment.

[36] In order to buttress the argument that though the making of assessment and sending of notice of assessment are two different things, a valid assessment cannot be made in time unless notice of assessment is served on the taxpayer prior to the expiry of the statutory time bar for making an assessment, the Appellant relied on the decision of the Court of Appeal in *ACL Cables v. CGIR* (supra) and *John keels Holdings v. CGIR* (supra). The issue in both cases (*ACL Cables v. CGIR* and *John keels Holdings v. CGIR* (supra) was whether the assessment in question was made within the meaning of section 163(3) of the Inland Revenue Act, No. 10 of 2006. The argument in both cases, related to the question whether the effective date for the commencement of the time bar is the date of making the assessment or the date of sending the notice of assessment to the taxpayer.

[37] Having considered the views expressed by Perera J. In *A. M. Ismail v. Commissioner General of Inland Revenue* (supra) and the views expressed by His Lordship Samarakoon C.J in *D. M. S. Fernando v. A. M. Ismail, (supra)*, Samarakoon J., in *ACL Cables PLC v. Commissioner General of Inland Revenue* (supra) held that the "making of the assessment" is same as "giving of assessment" and therefore, no lawfully valid assessment can be made without first serving a notice of assessment. Samarakoon J., stated at pp. 24-25 as follows:

"Therefore, both Justice Victor Perera and the learned Chief Justice have based their judgments in the premise that "making the assessment" is same as "giving notice of assessment". This was why it had been argued in CA Tax 17/2017 that no lawfully valid assessment can be made without first serving a valid notice of assessment. The Division of this Court in C.A. Tax 17/2017 though that this is a practical impossibility. A letter cannot be sent without being written. But what was meant is not this. The argument of the appellant is that an "assessment" becomes valid only when the "notice" is given. This position was the basis of Ismail despite those two cases were concurred with the duty to give reasons. The position of the appellant is that an "assessment" is no "assessment" until "notice of assessment" is given. The position could have been otherwise, viz. an "assessment" could have been a valid assessment, as soon as an estimate is made. If like in Honig (administrators of Emmanuel Honig) v Sarasfield (H.M. Inspector of Taxes), the Commissioners Inland Revenue also maintained a register in which an assessment is entered. In the absence of such procedure in this country. It cannot be accepted that the making of an assessment without giving notice of assessment is a valid assessment. Hence, notice of assessment must be given to make the assessment validly made for the purpose of the stipulated time period".

[38] The Court in *ACL Cables PLC v. Commissioner General of Inland Revenue* (supra) *further* stated that there cannot be a valid assessment made without there being a notice of assessment at pp 30-31 as follows:

"The lucidity in the aforequoted passage is characteristic of the age in which it was written. The taxpayer could have instituted a suit and recovered the tax paid because there was no "assessment". There was no "assessment" because there is no notice, a demand, a charge within the limited period. ***This shows that "assessment becomes a valid assessment" only when notice of assessment is given. For the application of the time limit, what must be there is a valid assessment. Such an assessment cannot come into being without there being notice of assessment" [Emphasis added].***

[39] In *John Keels Holdings PLC v. Commissioner General of Inland Revenue* (supra) Samarakoon J. held that the time bar commences with the sending of the notice of assessment, and not with the making of the assessment unless a book or a register is maintained to indicate the evidence of the date of the making of the assessment and therefore, the sending of the notice of assessment has to be done within the time bar period. His Lordship stated at p. 32:

"Hence, the argument of the Tax Appeals Commission in the present case that the effective date for the commencement of the time bar is the date of "making "the assessment not the date of sending the notice could have been accepted

if there was a book or a register maintained by the Commissioner of Inland Revenue which will be evidence of the date of making of assessment".

[40] His Lordship Samarakoon J., further took the view that section 163(1) is subject to the provisions of subsection (3) and (5) and section 163(5) is also subject to time limits. Hence, sending of notice must be made within the prescribed time. His Lordship stated at page 30 as follows:

"But section 163(1) refers to "asses the amount...and shall by notice in writing require such person to pay forthwith. ....Section 163(1) also says subject to the provisions of subsection (3) and (5). It is section 165(5) which has the time limit. hence, sending of notice must be done within the prescribed time".

[41] In both cases, Samarakoon, J. held that no valid assessment can be made until notice of assessment is sent to the taxpayer, or no lawfully valid assessment can be made without first serving a notice of assessment on the taxpayer unless the assessor could have maintained a book or register in which an assessment is entered. Accordingly, Samarakoon J. held that in the absence of such a practice in Sri Lanka, making of an assessment without giving notice of assessment within the time bar period is not valid.

[42] The question that arose in *Ismail v. Commissioner of Inland Revenue* (supra) and in *D.M.S. Fernando and another v. Ismail* (supra) was whether the duty is imposed on the Assessor who rejects a return in terms of section 93(5) of the Inland Revenue Act No. 4 of 1963 (as amended) to state reasons, and if so, whether the communication of reasons in writing is mandatory and requires compliance. The question of whether the time bar applies to the making of the assessment or the notice of assessment was considered in *Stafford Motor Company (Pvt) Limited v. Commissioner General of Inland Revenue (CA Tax 17 of 2017 decided on 15.03.2019). Janak de Silva J., stated in Stafford Motor Company (Pvt) Limited v. Commissioner General of Inland Revenue (supra) that the* question of whether the time bar applies to the making of assessment or the notice of assessment did no arise for determination either in the Court of Appeal case, or in the Supreme Court case, and therefore, there is no binding precedent established in the said two cases on the said issue (Vide-page 9 of the judgment).

[43] It is relevant to note that the Court of Appeal in *Cables v. CGIR (supra) and John keels Holdings v CGIR* (supra) refused to follow the decision of the Court of Appeal in *Commissioner General Tax v. Chettinand Corporation* 55 NLR 556, Honig & Others (*Administrator of Emmanuel (Honig) v. Sarsfield (H. M. Inspector of Taxes)* Ch. Div. (1985) STRC 31 (CA) / (CA) (1986 STC 246 and *Stafford Motors v. CGIR* (supra). The decisions in all these cases were based on the well established

proposition that the making of the assessment and serving of notice of assessment are two different acts.

[44]*In Honig & Others (Administrators of Emmanuel (Honig) v. Sarsfield (H. M. Inspector of Taxes)* (supra), some weeks before the time limit in section 40 of the Taxes Management Act, 1970, the Inspector of Taxes on 16.03.1970 raised assessments against the administrators of Emanuel Honig by signing certificates to that effect where he entered into the assessment book stating that he had made assessments on the administrators. The notices of assessment were issued on 16.03.1970 but did not reach the administrators until after 07.04.1970. The time bar for the making of the assessment was 06.04.1970 under sections 34(1) and 40 of the Taxes Management Act, 1970.

[45] The Special Commissioners held that (i) the assessments were made on 16.03.1970 when the duly authorised Inspector signed the certificate and that they were not out of time. The Chancery Division, dismissing the appeal held that the making of an assessment was not dependent on the service of the notice of assessment, as the assessment was made on 16.03.1970 and so, it was within the time limit prescribed by section 34 and 40(1) of the Act. The Court of Appeal in dismissing the appeal held that the assessments were made on 16.03.1970 when the Inspector of Taxes signed the certificate in the assessment book. The fundamental question that arose for decision before the Court of Appeal was this: Is an assessment effectively made until notice of it has been given to the taxpayer? Section 29(1) of the Act provided as follows: "Except as otherwise provided, all assessments for tax shall be made by the Inspector. Section 29(5) provided that notice of any assessment of tax shall be served on the person assessed, and shall state the time within which any appeal against the assessment may be made. Section 29(6) provided that "After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.."

[46] The Court of Appeal in Honig answered the question whether an assessment effectively made until notice of it has been given to the taxpayer and held at paragraph F:

> *"It seems to me that the words in s. 29(5) "notice of any assessment to tax..." necessarily imply that there is a difference between the notice of assessment and the assessment.* ***One cannot have a notice of an assessment until there has been an actual and valid assessment****. In subs (6) one finds the words* ***"After the notice of assessment has been served on the person assessed....". The reference there to "the person assessed" implies to my mind that there has been an***

assessment. It is clear that that subsection contemplates that an assessment is different from and will be followed by the notice of assessment and that its validity in no way depends on the latter. They are two wholly different things. ....

That section again draws a clear distinction between the assessment and the notice of assessment and shows that they are different, the assessment being in no way dependent upon the service of the notice" [emphasis added].

[47] The ratio of the decision was that the assessment is different from the notice of assessment, and it is in no way dependent on the service of the notice of assessment. When the Inspector of Taxes signed a certificate in the assessment book stating that he had made an assessment, is good evidence that an assessment had been made under the Taxes Management Act. The reason is obvious. It has the effect of fixing the Inspector of Taxes to a definite position, and not give him the latitude to chop and change thereafter, echoing the quoted words used by Samarakoon C.J. in *D.M.S. Fernando v A.M. Ismail* (p. 194). But, the fact that the assessment is made when the certificate recording its entry in the assessment book is signed by the Inspector of Taxes cannot be taken into account in displacing the distinction between the making of the assessment and the sending of the notice of assessment under the Inland Revenue Act.

[48] The Inland Revenue Act of Sri Lanka goes a step forward and imposes a mandatory statutory obligation on the assessor who made the assessment to **communicate his reasons in writing to the taxpayer** why his return was not accepted. The assessor who makes the assessment in Sri Lanka need not produce any assessment register to establish that an assessment was made when he communicated the assessment, with his reasons in writing to the taxpayer under his signature, why he is not accepting the return.

[49] In England, the certificate made by the Inspector of Taxes in the assessment book may fix the Inspector of Taxes to a definite position that an assessment has been made under the provisions of the Taxes Management Act. In Sri Lanka, once the assessment made by the assessor is communicated to the taxpayer in writing (by registered letter dated 26.11.2012) signed by the assessor with reasons for not accepting the return, the assessor is fixed to a definite position that an assessment had been made, which cannot be changed or chopped thereafter. When that happens, there is no way for the taxpayer to argue that no assessment has been made until the notice of assessment is received.

[50] The fact that the Inspector of Taxes signed the certificate in the assessment book stating that an assessment was made under the Taxes Management Act, cannot be applied in displacing its ratio of Honig that the "making of the assessment was not dependent on the service of the notice of assessment, which are two different things." Accordingly, it is not possible to distinguish the decision in Honig from the present case and accept the Appellant's argument that unless the notice of assessment is served, there is no valid assessment.

[51] The Appellant argued that unless the notice of assessment is served on the assessee within the period for the making of the assessment, the assessor could indefinitely delay the sending of the notice of assessment, and issue the same at any time as he wishes. If that is the intention of Parliament, the legislature should have specifically stated so in the Inland Revenue Act that the letter of communication as required by section 163(3) of the Inland Revenue Act shall be accompanied by the notice of assessment or that the notice of assessment shall be served within the period for the making of the assessment. In this context, the question whether the notice of assessment should also be sent before the expiration of the time period for the making of the assessment is the exclusive province of the Parliament.

[52] It is settled law that courts cannot usurp legislative function under the disguise of interpretation and rewrite, recast, reframe and redesign the Inland Revenue Act, because this is exclusively in the domain of the legislature. This proposition was lucidly explained by Lord Simonds in *Magor and St Mellons Rural District Council v. Newport Corporation* [1952] AC 189, HL. Referring to the speech of Lord Denning MR, Lord Simonds said at page 191: "

> *"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited.."*

[53] MR, Lord Simonds further said at page 192:

> *"It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act".*

[54] The same proposition was echoed by Arijit Pasayat, J. in the Indian Supreme Court case of *Padmasundara Rao and Ors. v. State of Tamil Nadu and Ors.* AIR (2002) SC 1334, at paragraph 14 as follows:

"14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary".

[55] In *Commissioner of Income Tax v. Chettinand Corporation* 55 NLR 553, the Court considered the distinction between the assessment and the notice of assessment under the provisions of the Income Tax Ordinance No. 2 of 1932 (as amended).Gratien J., at 556 stated:

"The distinction' between an " assessment " and a " notice of assessment " is thus made clear: the former is the departmental computation of the amount of tax with which a particular assessee is considered to be chargeable, and the latter is the formal intimation to him of the fact that such an assessment has been made".

[56] In *Stafford Motors Company (Pvt) Ltd v Commissioner General of Inland Revenue* (supra), the Court of Appeal considered the question whether (i) the serving a notice of assessment is a necessary precondition that must be satisfied to confer validity on the assessment; and (ii) the notice of assessment must be served on the taxpayer prior to the expiry of the time bar. Janak de Silva J. stated at page 8:

"*Sections 163(1) and (2) of the 2006 Act provide for making of assessments of Sections any person while section 164 therein requires a notice of assessment to be given to a person who has been so assessed.* ***Therefore, Court rejects the submission made by the learned counsel for the Appellant that no lawfully valid assessment can be made without first serving a valid notice of assessment.*** *There is no requirement to give notice of assessment before making an assessment. Practically, it cannot be done as the assessment must first be made followed by a notice of assessment".*

The time bar to making of an assessment is set out in section 163(5) of the 2006 Act. The section clearly states that "no assessment" shall be made after the time specified therein. Given that the 2006 Act recognizes a distinction between an "assessment" and "a "notice of assessment" , it would have been convenient for the legislature to refer to the "notice of Assessment" rather than "assessment" in section 163(5) of the 2006 Act. On the contrary, it has been made effective for the making of an "assessment". Therefore, Court rejects the submission that the date of the posting of the "notice of assessment" is the relevant date for the purpose of determining the time bar for making an assessment. Court determines that the date of making the assessment is the relevant date for the purpose of determining the time bar".

[57] In *Illukkumbura Industrial Automation (Private) Limited v Commissioner General of Inland Revenue* CA Tax 5/2016) decided on 29.09.2022, the issue before the Court of Appeal was, *inter alia,* whether the intimation letter dated 28.11.2011 issued by the assessor with reasons for not accepting the return under section 163(3) of the Inland Revenue Act, No. 10 of 2006 can be treated as evidence of making an assessment, or whether no valid assessment can be made until after the notice of assessment is issued to the assessee. Rejecting the argument of the Appellant that no valid assessment can be made until after the notice of assessment is issued to the assessee, Wijeratne J., stated at page 16:

> *"The letter of intimation dated 28.11.2011 contains an assessment on an estimated income and, therefore, the letter of intimation satisfies both the requirements, the reasons for rejecting the return and the assessment on an estimated income. Hence, the assessment had been made before, or at least on the 28th November 2011".*

[58] The words in section 163 (1) of the Inland Revenue Act state "Assesor, Assistant Commissioner may, subject to the provisions of subsection (3), and (5), ….assess the amount which in the judgment of the Assessor, Assistant Commissioner..". The words in sections 163(3) state "the Assessor of Assistant Commissioner …... makes an assessment or additional assessment…" Those words necessarily imply that first, there has to be an assessment made by the assessor and such assessment shall be communicated to the taxpayer in writing with reasons for not accepting the return.

[59] On the other hand, the words in section 164, "An Assessor or Assistant Commissioner shall give notice of assessment to each person . stating the amount of income assessed and the amount of tax charged..." necessarily imply that after making the assessment, the notice of assessment in writing has to be served on such person assessed. There cannot have a notice of assessment until there has been an actual and valid assessment made by the assessor. It is that assessment that has to be communicated to the taxpayer in writing with reasons as required by section 163(3). Upon making the assessment, the notice of assessment must be given to the taxpayer as required by section 164 demanding to pay the **amount of income assessed** under section 163(3) and the amount of tax charged.

[60] If it was the intention of the legislature that the relevant date for the validity of the assessment is the date of posting of the notice of assessment, the legislature could have referred to the "notice of assessment" in section 163(3) rather than the "assessment". Section 163 (3). In my view, section 163(3) and section 164 of the

Inland Revenue Act Act clearly recognises the distinction between the "assessment" and the "notice of assessment"..

[61] It is crystal clear that the Inland Revenue Act contemplates a distinction between the making of the assessment and the serving of the notice of assessment and the validity of the assessment in no way depends on the notice of assessment. It is the making of an assessment that has to be considered to determine the question of time bar under section 163(5) and not the serving of the notice of assessment. I am inclined to follow the decisions in *Honig & Others (Administrators of Emmanuel (Honig) v. Sarsfield (H. M. Inspector of Taxes)* (supra), *Commissioner of Income Tax v. Chettinand Corporation* (supra), *Stafford Motors Company (Pvt) Ltd v. Commissioner General of Inland Revenue* (supra), *Illukkumbura Industrial Automation (Private) Limited v. Commissioner General of Inland Revenue* (supra) and *Unilever Sri Lanka Limited, v Commissioner General of Inland Revenue,* (supra).

[62] For those reasons, I hold that the time bar of the assessment in section 163 (5) of the Inland Revenue Act applies to the making of the assessment and not to the serving of the notice of assessment, and the serving a notice of assessment is not a precondition for the validity of the assessment. In the present case, it is absolutely clear that the assessor who rejected the return estimated the amount of the assessable income of the taxpayer, and made the assessment accordingly and thereafter, the reasons for non accepting the return were communicated to the taxpayer by the same letter.

[63] I reject the contention of the Appellant that a valid assessment can only be made if the notice of assessment is served on the taxpayer and the letter dated 26.11.2012 is only a source document which is referred to in the notice of assessment. In the present case, the letter of intimation dated 26.11.2012 which contains the proof of assessment made by the assessor, and the reasons in detail for not accepting the returns. The assessor has communicated reasons for not accepting the return as required by section 163(3) of the Inland Revenue Act. In the circumstance, the assessments shall be deemed to have been made by the assessor **on or before 26.11.2012**, and such date shall be regarded as the relevant date to determine the time bar of the assessment under section 163(5).

Whether the assessment is nevertheless time barred in terms of section 163(5) of the Inland Revenue Act

[64] The next crucial question is to consider, even if the assessment was made on 26.11.2012, whether the assessment should have been made on or before 31.03.2012 and if so, whether the assessment made on 26.11.2012 is nevertheless time barred under section 163(5) of the Inland Revenue Act (as amended).

[65] During the course of the further argument on the applicability of the judgment of the Supreme Court in *Seylan Bank PLC v. Commissioner General of Inland Revenue* (supra), Dr. Felix submitted that even if the assessment was made on 26.11.2012, as submitted by the Respondent, the applicable law for the year of assessment 2009/2010 commenced on 01.04.2009 and ended on 31.03.2010 and thus, the statutory amendment applied in respect of the said year of assessment was the Inland Revenue (Amendment) Act, No. 19 of 2009, which applied to any year of assessment **on or after 1, April 2009**. He further submitted that section 27 of the Inland Revenue (Amendment) Act, No. 19 of 2009, which changed the time bar relating to assessment, but it did not provide that the amendment made to section 163(5) of the principal enactment had retrospective effect. Dr. Felix strenuously argued that the Inland Revenue (Amendment) Act. No. 22 of 2011 came into effect on **01.04.2011,** which further changed the time bar relating to assessment, but it applied to any year of assessment on or after **01.04.2011** and the amendment made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 had no retrospective effect in terms of section 56 of the said Act, No. 22 of 2011.

[66] He further submitted that the said amendment was prospective in nature, which has no effect on any year of assessment prior to 1, April 2011, and section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011 did not provide that the amendment made to section 163(5) of the principal enactment had retrospective effect. He relied on the decision of the Supreme Court in *Seylan Bank PLC v. Commissioner General of Inland Revenue* (supra) in support of his contention.

[67] On the other hand, Mr. Dharmawardena submitted that (i) the Inland Revenue Act, No. 10 of 2006 provided that no assessment shall be made after the expiry of 18 months from the end of the immediately succeeding year of assessment (i.e. until 30th September of the following year; (ii) this section was amended by the Act No. 19 of 2009 which provided that no assessment shall be made after the expiry of a period of 2 years from the end of the immediately succeeding year of assessment (i.e. until 31st March of the second year following the year of assessment); (iii) a further amendment was made by the Act. No. 22 of 2011, which

came into operation on 01.04.2011, which provided that no assessment shall be made after the expiry of a period of 2 years from the 30th day of November of the immediately succeeding year of assessment (i.e. until 30th November of the second year following the year of assessment); (iv) the return was submitted on 30.11.2010 and the Inland Revenue Act was amended by the Act, No. 22 of 2011 and thus, the legal regime applicable to the said return required the assessment to be made on or before 30th November 2012; (v) the assessment was made on 26.11.2012 and accordingly, the assessment is within the time stipulated in the Inland Revenue (Amendment) Act, No. 22 of 2011. He submitted that the decision of the Supreme Court in *Seylan Bank PLC v. Commissioner General of Inland Revenue* (supra) is inapplicable to the present case.

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

1. If the assessment was made on 26.11.2012, whether the Inland Revenue (Amendment) Act, No. 19 of 2009 applied to the year of assessment 2009/2010;

2. If the Inland Revenue (Amendment) Act, No. 19 of 2009 applied to the year of assessment 2009/2010, whether the assessment should have been made on or before 31.03.2012 and if so, whether the assessment that was made on 26.11.2012 is time barred;

3. If the Inland Revenue (Amendment) Act, No. 22 of 2011 applied to the year of assessment 2009/2010, with retrospective effect, whether the period given to the assessor to make the assessment for the year of assessment 2009/2010 had been extended from 31.03.2012 to **30.11.2012,** in terms of the Inland Revenue (Amendment) Act, 22 of 2011.

4. If so, whether the assessor was entitled to make the assessment during the extended period given to the assessor to make the assessment on or before 30.11.2012, and if so, whether the assessment made on 26.11.2012 is not time barred in terms of the Inland Revenue Act, (as amended).

Inland Revenue Act, No. 10 of 2006 before the amendment by Act, No. 19 of 2009

[69] At this stage, it may be pertinent to consider the relevant provisions of the Inland Revenue Act in relation to the period within which the assessment shall be made by the assessor. Under section 106 of the Inland Revenue Act, No. 10 of 2006, the assesee had to submit his return on or before the 30th of September of that assessment year. The Inland Revenue Act, No. 10 of 2006 in its original form reads as follows:

> *"106. (1) Every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the* ***thirtieth day of September*** *immediately succeeding the end of that year of assessment, furnish to an Assessor, either in writing or by electronic means, a return in such from and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child".*

Amendment to section 106 of the Inland Revenue Act, No. 10 of 2006 by the Inland Revenue Act, No. 19 of 2009

[70] Section 106 (1) of the Inland Revenue Act, No. 10 of 2006 was amended by the Inland Revenue Amendment Act No. 19 of 2009, which extended the time period given to the assessee to furnish a return from the 30th day of September to the 30th day of November immediately succeeding the end of that year of assessment. The Amended section 106 (1) of the The Inland Revenue Amendment Act No. 10 of 2009 reads as follows:

> *"Every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the* ***thirtieth day of November*** *immediately succeeding the end of that year of assessment, furnish to an Assessor or Assistant Commissioner, either in writing or by electronic means, a return in such form and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child:*
>
> *Provided however, the preceding provisions shall not apply to an individual whose income for any year of assessment comprises solely of one or a combination of the following:*
>
> *(a) Profits from employment as specified in section 4 and chargeable with income tax does not exceed rupees four hundred and twenty thousand, and income tax under Chapter XIV has been deducted by the employer on the gross amount of such profit and income;*
> *(b) Dividends chargeable with tax on which tax at ten per centum has been deducted under subsection (1) of section 65;*

(c) Income tax from interest chargeable with tax on which tax at the rate of ten per centum has been deducted under section 133",

Time bar for Making the Assessment before the Amendments made to the Inland Revenue Act, No. 10 of 2006

[71] Section 163 (5) of the Inland Revenue Act, No. 10 of 2006, which deals with the time bar relating to assessments, provided as follows:

"(5) Subject to the provisions of section 72, no assessment of the income tax payable under this Act by any person or partnership-

(a) *who or which has made a return of his or its income* ***on or before the thirtieth day of September*** *of the year of assessment immediately succeeding that year of assessment,* ***shall be made after the expiry of eighteen months from the end of that year of assessment; and***

(b) who has failed to make a return on or before such date as referred to in paragraph (a), shall be made after the expiry of a period of three years from the end of that year of assessment:.

Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person of any arrears relating to the profits from employment of that person for that year of assessment:

Provided further that, where in the opinion of the Assessor, any fraud, evasion or wilful default has been committed by or on behalf of, any person in relation to any income tax payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment.

[72] Accordingly, the original Inland Revenue Act enacted that no assessment shall be made after the expiry of eighteen months from the end of the immediately succeeding year of assessment (i.e. until 30th September of the following year.

Time bar for making the assessment after the amendments made to section 163(5) by the Inland Revenue (Amendment) Act, No. 19 of 2009

[73] Section 163 (5) of the Inland Revenue Act, No. 10 of 2006 was amended by the Inland Revenue (Amendment) Act, No. 19 of 2009, which changed the time bar relating to assessment, and enacted as follows:

"(5) Subject to the provisions of section 72, no assessment of the income tax payable under this Act by any person or partnership-

*(a) who or which has made a return of his or its income on or before the "**thirtieth day of November"** of the year of assessment immediately succeeding that year of assessment, shall be made **after the " expiry of a period of two years", from the end of that year of assessment;** and*

(b) who has failed to make a return on or before such date as referred to in paragraph (a), shall be made after the expiry of a period of four years. *from the end of that year of assessment:.*

Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person of any arrears relating to the profits from employment of that person for that year of assessment:

Provided further that, where in the opinion of the Assessor, any fraud, evasion or wilful default has been committed by or on behalf of, any person in relation to any income tax payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment.

[74] The Inland Revenue (Amendment) Act, No. 19 of 2009 extended both the time periods given to a taxpayer to submit a return of his income for a given year of assessment **by two months,** and the assessor to make an assessment for such year of assessment **by six months** respectively. The Inland Revenue (Amendment) Act, No. 19 of 2009 however, provided that no assessment shall be made **after the expiry of a period of 2 years from the end of the immediately succeeding year of assessment** (i.e. until 31st March of the second year following the year of assessment).

Year of Assessment-2009/2010

[75] In the present case, the assessment related to the year of assessment **2009/2010**, which commenced on **01.04.2009** and ended on **31.03.2010**. It is relevant to note that income tax is charged for every year of assessment commencing on or April 1, in respect of the profits and income of every person for that year of assessment (see- section 2(1) of the Inland Revenue Act, No. 10 of 2006). The return is filed by the taxpayer for every year of assessment and the assessment is made by the assessor for that relevant year of assessment (see- section 106(1) section 163(1) and section 163(5) of the Inland Revenue Act). In terms of section 217 of the Inland Revenue Act (as amended), **"year of assessment"** means "the period of twelve months commencing on the first day of April of any year and ending on the thirty-first day of March of any year and ending on the thirty-first day of March in the immediately succeeding year".

[76] The Inland Revenue (Amendment) Act, No. 19 of 2009 came into effect on **01.04.2009,** and *prima facie*, the law for the year of assessment 2009/2010 is the Inland Revenue (Amendment) Act, No. 19 of 2009. The assessee was required to file its return in terms of the extended period granted to file the return by the Inland Revenue (Amendment) Act, No. 19 of 2009 on or before **30.11.2010** and the assessee filed its return on **30.11.2010.** The assessor was required to make the assessment on or before **31.03.2012** for the year of assessment 2009/2010 under the Inland Revenue (Amendment) Act, No. 19 of 2009. In terms of the Inland Revenue (Amendment) Act, No. 19 of 2009, the assessment will be, *prima facie*, time barred within a period of 2 years from the end of the relevant year of assessment (2009/2010), which means by **31.03.2012.**. The assessment was made on 26.11.2012. The time bar that will be triggered in the year of assessment 2009/2010 under the Inland Revenue Act, No. 19 of 2009 is as follows:

Year of assessment	-	2009-2010
Return to be filed for the year of assessment 2010/2011	-	30.11.2010
End of the year for 2009/2010	-	31.03.2011
Assessment must be made on or before	-	31.03.2012
Assessment was made on	-	26.11.2012

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

[77] After the taxpayer filed return of income on 30.11.2010, and while the said time period given to the assessor to make his assessment for the year of assessment 2009/2010 under the Inland Revenue (Amendment) Act, No. 19 of 2009 was in operation, the Inland Revenue (Amendment) Act, No. 22 of 2011 was enacted by Parliament. The said amendment was certified by the Speaker on 31.03.2011. But, the amendment made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 came into force on 01.04.2011 (see-section 56 of the Act, No. 22 of 2011). By that time, the assessee had already filed its return on 30.11.2010.

[78] By the Inland Revenue (Amendment) Act, No. 22 of 2011, section 163(5) of the Inland Revenue Act, No. 10 of 2006 was further amended by extending the time period given to the assessor to make his assessment for the year of assessment from March 31st March to 30th November immediately succeeding that year of assessment. The Inland Revenue (Amendment) Act, No. 22 of 2011 thus, provided that where a return is made on or before **30th November** of the year of assessment immediately succeeding that year of assessment, no assessment shall be made **after the expiry of a period of 2 years from the 30th of November of the immediately succeeding year of assessment** (i.e. 30th November). In terms of the Inland Revenue (Amendment) Act, No. 19 of 2009, the assessor was required to make the assessment for the year of assessment **2009/2010** on or before **31.03.2012** but the assessor made the assessment for the year of assessment **2009/2010** on **26.11.2012** on the basis that the amending Act (Inland Revenue (Amendment) Act, No. 22 of 2011) extended the time period given to the assessor to make the assessment for the year of assessment 2009/2010 from **31.03.2012 to 30.11.2012**.

[79] The question before us is to decide whether the assessment issued for the year of assessment 2009/2010 on 26.11.2012, was time barred for the failure to make the assessment on or before 31.03.2012 under the Inland Revenue (Amendment) act, No. 19 of 2009, or whether the amending Act (Inland Revenue (Amendment) Act, No. 22 of 2011) extended the time period from **31.03.2012 to 30.11.2012** with retrospective effect to make the assessment for the year of assessment **2009/2010**

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

[80] Section 80(1) of the Constitution provides that a Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon and thus, by operation of Article 80(1) of the Constitution, it should have come into force from that date as the Speaker certified the Bill on 31.03.2009. However, section 27(6) of the Act, No. 19 of 2009 provides that the amendments made to the principal enactment by the Act, No. 19 of 2009, other than the amendments specifically referred to in subsections (1)-(5) of section 27 shall come into force **on April 1, 2009.** The amendment made to section 163(5) of the principal enactment is not a section that is specifically referred to in subsections (1)-(5) of section 27. Accordingly, the amendment made to section 163(5) of the principal enactment came into force on **01.04.2009.**

Retrospective and prospective amendments

[81] Section 75 of the Constitution confers power on the legislature to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution. It is relevant to note that a substantive law defines and provides for rights, duties and liabilities whereas the procedural law deals with the application of substantive law to particular cases (*Izhar Ahmed Khan v. Union of India* AIR 1962 1052) (e.g. law of evidence or practice of courts or limitation).

General Rule- Presumption against retrospective construction- prospective effect

[82] There is a presumption of retrospective construction and a presumption against retrospective construction. The cardinal principle of construction is that every statute is prima facie, prospective unless it is expressly or by necessary implication made to have a retrospective operation (*Keshvan v. State of Bombay* AIR 1951 SC). The general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective (TAXMANN'S Interpretation of Statutes, p. 860). The retrospective operation should not be given to a statute unless by express words or necessary implication, it appears that this was the intention of the legislature. (Supra, p. 840, 846).

[83] The general rule or presumption against retrospective operation of statutes applies where it deals with substantive rights, or existing rights or obligations or where the object of the statute is to affect vested rights or to impose new burdens or impair existing obligations (Justice G P Singh, Principles of Statutory Interpretation, 12th Ed, p. 524). Retrospective effect should not be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature (*ITO v T.S. Devinatha Nadar* (1938) 68 ITR 252 (SC). Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only (Justice G P Singh, Principles of Statutory Interpretation, 12th ed, p. 524). If the enactment is expressed in the language which is fairly capable of either interpretation, it is ought to be construed as prospective only (*In re Athlumney* (1898 2 QB 547).

[84] The real issue is to look at the scope of the particular enactment having regard to its language and the object discernible from the statute read as a whole. It is necessary to keep in mind that in order to decide whether an Act is retrospective or prospective, to consider the legislative intention in making the provisions of an Act, retrospective or prospective. The courts will consider the following two principles:

1. If is necessary implication from the language employed that the **legislature intended a particular section to have a retrospective operation,** the courts will give it such an operation because it is obviously competent for the legislature if it pleases in its wisdom to make the provisions of an Act retrospective;

2. If, on the other hand, the language employed by the legislature is ambiguous or not clear and explicit, the court must not give a construction which would take away vested rights, or in other words, should treat the Act as prospective (TAXMANN'S TAXMANN'S Interpretation of Statutes, p. 846).).

The presumption of retrospective operation-retrospective effect

[85] The presumption against retrospective construction applies only in respect of substantive law and not against the procedural law but the presumption of retrospective operation applies when the statute deals with the procedure or practice of the courts. In Maxwell on the Interpretation of Statutes, 12th Edn., the statement of law in this regard is stated thus:

"Perhaps no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

[86] If the new Act affects only matters of procedure, *prima facie*, it applies to all actions-pending, as well as future. The principle applies to-(a) the forms of procedure; (b) the admissibility of evidence; and (c) the effect which the courts give to evidence of a particular category (*Blyth v. Blyth* (No. 2) (1966) AC 643). Accordingly, the alterations in the form of procedure are always retrospective, **unless there are some good reasons or otherwise, they should not be such as it is expressly stated so.** (TAXMANN'S Interpretation of Statutes, supra). If the law deals with matters of **procedure only, it is deemed to be retrospective unless such inference is likely to lead to unjust results** (supra).

[87] In Francis Bennion's Statutory Interpretation, 2nd Edn, the statement of the law is stated as follows:

"...............The true principle is that lex prospicit non respicit (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

[88] In *Hitendra Vishnu Thakur v. State Of Maharashtra* 994 AIR 2623, 1994 SCC (4) 602, DR ANAND, J. of the Supreme Court of India held:

"26......From the law settled by this Court in various cases, the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given

an extended meaning and should be strictly confined to its clearly defined limits.

(ii) *Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*

(iii) *Every litigant has a vested right in substantive law, but no such right exists in procedural law.*

(iv) *A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*

(v) ***A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication".***

Retrospectivity and Prospectivity in Amending Acts

[89] It is relevant to note that where a repeal of statutory provision dealing with substantive rights is followed by new legislation by enactment of an amending Act, such new legislation is prospective in operation. (Texmann, p. 863). Such an amendment will not affect the substantive or vested rights of parties unless it is made retrospective expressly or by necessary implication. (supra). Thus, an amendment of substantive law is not retrospective unless expressly laid down or by necessary implication inferred (*Bhagai Ram Sharma v. Union of India* AIR 1988 SC 740). An amending Act that deals with substantive rights is only retrospective if there is a clear indication in the legislative language to that effect.

[90] I would now proceed to examine whether section 163(5) of the amending Act (Act, No. 22 of 2011) is retrospective as urged by learned counsel for the Respondent, and thus, whether the assessor is given a new lease of life to extend the period given to make the assessment from 31.03.2012 to 30.11.2012. A perusal of the amendments made to the Inland Revenue (Amendment) Act, No. 22 of 2011 reveals that they deal with both procedural and substantive amendments. The amendments made to section 163(5) of the principal enactment are **prima facie**, presumed to have retrospective effect and the question is whether such presumption of retrospectivity applies to the present case, in view of section 56 of the Act, No. 22 of 2011.

[91] It was contended on behalf of the Respondent that the purpose of the Amending Act was designed to give more time to the assessor as the assessor had only 1 year and 4 months to make the assessment in terms of the previous Act, which was highly inadequate. It was also submitted that the new Act was passed for the purpose of supplying an omission in the previous act, and therefore the new Act would relate back to the time when the prior Act was passed.

[92] Dr. Felix strongly relied on the decision of the Supreme Court in *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (supra) in support of his contention that the amendment made to section 163(5) by the Inland Revenue (Amendment) Act, No. 22 of 2011 applied with prospective effect and applied to any year of assessment on or after 1 April 2011. He submitted that, therefore, the assessment that expired on 31.03.2012 for the year of assessment 2009/2010 cannot be extended under section 163(5) of the Amending Act, No. 22 of 2011, in view of the express provisions in section 56 of the Amending Act.

[93] In the case of *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (supra), the assessor was required to make the assessment for the year of assessment 2007/2008 on or before 30.09.2009 in terms of section 163(5) (a) of the principal Inland Revenue Act, No. 10 of 2006. While the said period was still in operation, the Inland Revenue (Amendment) Act, No. 19 of 2009 was enacted by parliament and it was certified by the Speaker on 31.03.2009, but it came into force on 01.04.2009. By the amending Act, the time period given to the asseesee to file a return was extended by two months and the time period given to the assessor to make the assessment was extended by six months (till **31.03.2011).** The assessor made the assessment for the year of assessment 2007/2008 on **09.03.2010** and it was served on the assessee on **26.03.2010.** The assessor made the assessment on the basis that the amending Act extended the time period given to the assessor to make the assessment for the year of assessment 2007/2008 by another 6 months, i.e. from 30.09.2009 to 31.03.2010.

Dates on which the Inland Revenue (Amendment) Act, No. 19 of 2009 came into force

[94] Section 27 of the Inland Revenue (Amendment) Act, No. 19 of 2009 specifically sets out the dates on which the amendments made by the amending Act come into force. Section 27 of the amending Act provides:

> *"(1) The amendments made to paragraph (e) of subsection (2) of section 34, subsection (3) of section 78, subsection (4) of section 113, subsection (2) of section 153 and subsection (2) of section 173 of the principal enactment, by*

sections 10(2),section 15, section 17, section 19 and section 21, respectively, of this Act, shall be deemed for all purposes to have come into force on April 1, 2006.

(2) The amendment made to the Second Schedule to the principal enactment by section 25 of this Act, shall be deemed for all purposes to have come into force on April 1, 2007.

(3) The amendment made to section 8, section 40A and section 57 of the principal enactment, by section 3(1) and (2), section 11 and section 13 respectively, of this Act, shall be deemed for all purposes to have come into force on April 1, 2008.

(4) The amendment made to section 13 of the principal enactment by section 5(2) of this Act, shall be deemed for all purposes to have come into force on October 21, 2008.

(5) The amendment made to section 13 by section 5(4) of this Act, shall be deemed for all purposes to have come into force, on February 1, 2009.

(6) The amendments made to the principal enactment by this Act, other than the amendments specifically referred to in subsections (1), (2), (3), (4) and (5) of this section, shall come into force on April 1, 2009.

[95] In terms of the Inland Revenue Act, No. 10 of 2006, the assessor was required to make the assessment for the year of assessment 2007/2008 on or before 30.09.2009. The issue arose before the Court of Appeal (CA/Tax/23/2013 decided on 25.05.2015) was whether the deadline for the assessor to make the assessment for the year of assessment 2007/2008 was extended with prospective effect from the 30.09.2009 to 31.03.2010 in terms of the amending Act, No. 19 of 2009. The Court of Appeal held that even though amendment made to section 163 of the principal enactment operated from **01.04.2010** in terms of section 27(6), the law of the country was changed from 01.04.2009 authorising the assessor to extend the time period to make the assessment by another 6 months and therefore, the assessment made for the year of assessment 2007/2008 on 26.03.2010 is not time barred. The Court of Appeal on an identical issue held:

1. As per section 27(6) of the Amendment Act, the amendment brought into the section 163 of the principal enactment is **in operation from 01st of April 2009.** Therefore, the law of the country from the 1st of April 2009 in

relation to sending an assessment to the assessee by the assessor is the amended section 163 of the Inland Revenue Act (p.4);

2. Irrespective of whether the asssesee had to submit the tax return on or before the 30th September 2009 or 30th November 2009, the assessor can send the assessment to the assessee within two years immediately succeeding that year of assessment (p.4);

3. As per section 27(6) of the Amending Act, section 163 of the principal enactment was amended from 1st April 2009 and the amending Act did not operate with retrospective effect but it operated from **01.04.2009**. The law of the country was, however, changed from that date (01.04.2009) and from that date, the new law applied (p.5);

4. In terms of the amending Act, the time period given to the assessor to make the assessment for the year of assessment 2007/2008 was extended from 30.09.2009 to 31.31.03.2010 (p. 4), and therefore, the assessment dated 26.03.2010 made for made for the year 2007/2008 and issued against the Assessee is not time barred (p.6).

[96] It was the submission of Dr. Felix that the Supreme Court rejected this proposition of law enunciated by the Court of Appeal in *Seylan Bank v. The The Commissioner General of Inland Revenue* (supra), which held that when the law was changed extending the period of assessment, the assessor was entitled to make the assessment within the extended period of limitation, irrespective of the fact that the amending law applied with prospective effect.

[97] The issue before the Supreme Court was, despite the fact that the amendments made to section 163(5) are presumed to have retrospective effect, whether such presumption of retrospective operation was applied to the amendments made to the section 165(3)(a) of the Inland Revenue (Amendment) Act, No. 19 of 2009, in view of the provision in section 27(6), and if so, whether the assessment dated 26.03.2010 for the for the year of assessment 2007/2008 was time barred under and in terms of section 163(5) of the Inland Revenue Act. The Supreme Court, having considered the effect of section 27(6) of the amending Act, and the absence of express provisions to the contrary held:

> *"Accordingly, the amendments referred to in section 27(1) to (5) of the amending Act are given a retrospective effect from the dated specified therein, in terms of Article 75 of the Constitution.*

On the other hand, the amendments that are not referred to in section 27(1) to (5) of the amending Act operate with prospective effect from the 1st April, 2009, in terms of section 27(6) of the amending Act.

Further, although there is a general distinction between substantive law and procedural law, section 27(6) of the amending Act does not distinguish between the amendments made to the substantive law and procedural law of the principal Act (p. 15).

Thus, in the absence of any reference to a segregation between the two branches of law in the said section, it is not possible to read the words in the said section by a judicial interpretation, and segregate the amendments made to the substantive law and the procedural law of the principal Act.

In the circumstances, I am of the view that section 27(6) of the amending Act was intended to give prospective effect to both the amendments made to the substantive and procedural law of the principal Act, other than those expressly referred to in section 27(1) to (5) of the amending Act;

***Therefore, although the amendments made to section 106(1) and 163(5) (a) of the principal Act are procedural in nature, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption that procedural laws be given retrospective effect** (pp 15-16) [Emphasis added).*

***Hence, the amendments made to both sections 106(1) and 163(5) (a) of the principal Act will operate with prospective effect from the 1st April, 2009, in terms of section 27(6) of the amending Act** (pp.15-16) [Emphasis added].*

[98] Having held that section 27(6) of the amending Act is intended to give prospective effect to both procedural and substantive provisions, and it excludes the applicability of the general presumption, and therefore, the amendment made to section 163(5) will operate with prospective effect from 01.04.2009, the Supreme Court further considered the second question. The second question was whether the assessor alone could benefit from the amendment, while the assessee could not, in view of the principle enshrined in Article 12(1) of the Constitution. The Supreme Court held at p.19 that:

"Thus, since the appellant had furnished the return of income in accordance with section 163(5)(a) of the principal Act, prior to the said section being amended, a right had accrued to the appellant under the said section to have an assessment of income tax made (if any) within eighteen months from the end of that year of assessment.......

Thus, it is necessary to interpret both the said amendments to have prospective effect, to secure equality between the taxpayer and revenue officer in terms of Article 12(1) of the Constitution" (p. 20)".

[99] At the further hearing before us, Mr. Dharmawardena however, argued that the judgment of the Supreme Court is inapplicable in the present case and it should not be followed for the following reasons.

1. The Supreme Court held that the assessment was time barred on the basis that the return of income had already been submitted by the assessee when the Act, No. 19 of 2009 came into operation, and thus, the assessee could not benefit from the amending Act while the assessor could benefit from the provisions that extended the time within which the assessment could be submitted;

2. In the present case, however, the assessment had not been done by the time the Act, No. 22 of 2011 came into force and therefore, the time within which an assessment is to be issued was extended by the amending Act, and thus, the assessor is entitled to issue an assessment within the time so extended provided that the amendment became operative prior to the lapse of the timeline under the earlier provision (*The Colonial Sugar Refining Company Limited and Irving* (1905) A.C. 469) P.C, *Super Cast Alloy Foundries Ltd v. Commissioner of Income Tax* (2005) 275 IER 195), *Commissioner of Income Tax v Royal Motor car Company* 1977 107 ITR 752 Guj., *Commissioner of Income Tax v. Royal Motor Car Company*, 1977 107 ITR 753 Guj;

3. The Supreme Court considered the combined effect of section 106(1) and section 163(5) of the Act and thus, the basis of the judgment related to the inability of the taxpayer to benefit from the extended period of time given to the taxpayer to file return while the assessor could benefit from the extended period given to make the assessment, since the taxpayer had already filed return by the time the Act. No. 19 of 2000 came into force;

4. The intention of the legislature by amending section 163(5) of the principal enactment by the Act No. 22 of 2011 was to grant a right only to the assessor, and thus, the assessor has a right to make the assessment within the extended period of time;

5. The time limit within which an act is required to be done, ought to be ascertained with reference to when that particular act was done (making of

the assessment) and not by reference to the impact of the law would have on another act (tendering the return) as held in the aforesaid Indian cases. The Supreme Court failed to consider the principle enunciated in the said indian cases and the Privy Council case;

[100] In view of these submissions, it is necessary to identify the ratio on which the Supreme held that the amendments made to section 163(5)(a) of the Act, No. 19 of 2009 have no application to the year of assessment 2007/2008, and the assessment made by the assessor is time barred. A careful reading of the Supreme Court judgement in *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (supra) reveals that the Supreme Court judgment has the following two parts.

1. Although the amendment made to section 163(5) of the Act, No. 19 of 2009 is presumed to have retrospective effect, such presumption of retrospective effect will not apply when the **express provision in section 27(6) of the amending Act excludes the applicability of the general presumption** (i.e. that procedural laws be given retrospective effect) and hence, the amendment made to section 163(5) **will operate with prospective effect from 01.04.2009 for the year of assessment 2007/2008 in terms of section 27(6) of the amending Act;**

2. The taxpayer had furnished the return prior to the amending Act came into force, and thus, a right had accrued to the taxpayer under section 163(5) (a) to have an assessment made within 18 months from the end of that year of assessment. If the year of assessment is extended with retrospective effect, it would only benefit the assessor but it deprived the taxpayer who is unable to file a return within the extended period under section 106(1), that infringes Article 12 (1) of the Constitutio that guarantees the equal protection of the law;

[101] It is crystal clear that it is only the first part of the Supreme Court decision that reprersents ratio decidendi of the decision-the reason and the spitit of the decision. Namely that (i) although the amendment made to section 163(5) is presumed to have retrospective effect, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption of retrospectivity, or the <u>**retrospective operation of**</u> **that** section was rebutted by the express exclusion in section 27(6); and (ii) the amending Act **operates with prospective effect from 01.04.2009.** The effect of this part of the decision is that the amendment made to section 163(5) of the principal enactment is only prospective and applicable for any year of assessment on or after 1 April 2009

and not before 01.04.2009 and hence, it has no application to the year of assessment 2007/2008.

[102] Section 106(1) of the Inland Revenue (Amendment) Act, No. 19 of 2009, extended the time period given to the taxpayer to furnish a return by two months from 30.09.2010 to 30.11.2010. In the present case, the assessee furnished its return on 30.11.2010 and the Act, No. 22 of 2011 came into force on 01.04.2011 and the assessment was made on 26.11.2012. Thus, by the time the Act, No. 22 of 2011 came into force, the taxpayer had already filed its return. With regard to the second part of the decision, it is not in dispute that the time period for making the assessment had not expired by the time the amendment was made to section 163(5) of the principal enactment. The second part of the judgment related to the inability of the assessee to benefit from the extended period given to file the return under the Act, No. 19 of 2009, and therefore, the law should not be interpreted to give an advantage to an assessor, and deprive an assessee in violation of Article 12 (1) of the Constitution. It is an additional factor in that individual case for the Supreme Court to hold that the law should not be interpreted to give an advantage to an assessor and deprive an assessee in violation of Article 12 (1) of the Constitution. In view of the inability of the assessee to benefit from the extended period given to file the return under the Act, No. 19 of 2009, the Supreme Court further held that the assessee had a right to have the assessment passed within the 18 months from the end of that year. It is only an additional factor in that **particular case**, in holding that the amendments made to section 163(5) have no application to the year of assessment 2007/2008.

[103] It was argued on behalf of the Respondent that (i) the purpose of the amendment made to section 163(5) of the principal enactment by the Act, No. 19 of 2009 was to benefit both the assesseee and the assessor whereas the purpose of the amendment made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 was only to extend the time period given to the assessor to make the assessment from 31st March to 30th November. On that basis, the Respondent argued that the judgment of the Seylan Bank, which is based on the interpretation of the amendments made to both sections 106(1) and 163(5) of the principal enactment by the Act, No. 19 of 2009, would not apply to the present case and, therefore, the assessor, in the present case, has a right to extend the period given to make the assessment from 31st March to 30th November in terms of the Act, No. 22 of 2011. The Respondent has, however, **failed to explain the legal effect of** section 27(6) of the Act, No. 19 of 2009, which

expressly excludes the retrospective operation of that amendment and provides that the effective date of the amendment shall be 01.04.2009.

[104] Although the Supreme Court considered the combined effect of section 106(1) and section 163(5) of that Act, No. 19 of 2009, the Supreme Court was clearly guided by the legislative intention in section 27(6) of the amending Act, No. 19 of 2009. As noted, the Supreme Court clearly held that section 27(6) expressly excludes the applicability of the general presumption that procedural laws be given retrospective effect and that the amendments made to the principal enactment, (which includes s. 163(5)), other than the amendments specifically referred to in section 27, shall come into force on April 1, 2009. (see- pp 15-16 of the Supreme Court judgment).

[105] The Supreme Court clearly held in *Seylan Bank v. The The Commissioner General of Inland Revenue* (supra) that **although the amendment made to section 163(5)** is presumed to have retrospective effect**, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption** of retrospectivity, and therefore, the amendment made to section 163(5) of the principal enactment does not apply to the year of assessment 2007/2008, in terms of section 27(6) of the Act, No. 19 of 2009. Accordingly, it is not possible to disregard the first part of the decision of the Supreme Court in *Seylan Bank v. The Commissioner General of Inland Revenue* (supra), and apply only the second part of the decision as against the express statutory provision in section 56 of the Act, No. 56 of 2011 in the present case.

The Colonial Sugar Refining Company Limited v. Irving

[106] The Respondent strongly relied on the decision of the Privy Council decision in *The Colonial Sugar Refining Company Limited and Irving* (1905) A.C. 469) and other Indian decisions in support of the contention that (i) the amendments made to the Inland Revenue Act related to a mere matter of procedure; (ii) the time bar for the assessor to make the assessment had not expired by the time the amending Act was enacted; (iii) the assessor gests an extended lease of life 31.03.2012 to 30.11.2012. It is necessary to decide whether those decisions apply to decide the time bar of the assessment in the present case under the Inland Revenue Act of Sri Lanka.

[107] In *Colonial Sugar Refining Company v. Irving* [supra), deals with the vested right of appeal in suit pending when a New Act was passed by Parliament and the issue was whether a right of appeal given by the order in Council, 1860 to the Supreme Court has been taken away by the Judicature Act, 1903 which

confines the appeal to the High Court. It was contended that Judiciary Act, 1903 did not operate with retrospective effect so as to defeat a right in existence at the time when the Act received the Royal Assent. At page 372, the Privy Council stated:

> *"If the matter in question be a matter of procedure, it applies with retrospective effect and if it touches a right in existence at the passing of the Act, it appellant would be entitled to succeed as the Judiciary Act is not retrospective by express enactment or by necessary intendment. ....And therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellant at the date of the passing of the Act, or was it a mere procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right in a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested".*

[108] The principle has been well recognised that though the right of appeal is a procedural right, it is a vested right and it becomes vested at the time when the proceedings are initiated in the Tribunal or the Court of First instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue to him in spite of the change in the jurisdiction of the different Tribunals or forums.

[109] It appears to me that the decision in *Colonial Sugar Refining Company v. Irving* (supra) has been followed by the Supreme Court in India in numerous cases, and thus, the assessor would continue to have the jurisdiction in matters which were then pending before him, **unless the Amendment Act in express words or by implication has indicated that the effect of such amendment was to be affected.**

Commmmissioner of Income Tax v Royal Motor car Company

[110] In the Indian case of *Commissioner of Income Tax v. Royal Motor Car Co.* (supra), the facts reveal in that case that under section 275, as it stood before the Amendment Act of 1970 which came into force with effect from April 1, 1971, the period of limitation was two years from the date of the initiation of penalty proceedings. Hence, if the law had stood unamended, the Inspecting assistant

Commissioner was required to pass the order of penalty before October 3, 1971. However, the new amendment Act namely, the Taxation Laws (Amendment) Act, 1970 was brought into force with effect from April 1, 1971, and as a result the period of limitation was enlarged from two years from the date of the initiation of penalty proceedings to two years from the end of the financial year in which the penalty proceedings passed the order of penalty on October 12, 1971, levying a penalty of Rs. 6,810. The Tribunal held that if the Amendment Act of 1970 were to apply, then the Inspecting Assistant Commissioner had no jurisdiction to hear the case and if the Amendment Act were not to apply, then the order of penalty was barred by limitation.

[111] Under section 274 as it stood before the amendment no order imposing a penalty under that Chapter could be passed after the expiration of two years from the date of the completion of the proceedings in the course of which the proceedings for the imposition of penalty had been commenced. Under new section 275(b) The Taxation Laws (Amendment) Act, 1970 (42 of 1970), provides that no order imposing a penalty under this Chapter shall be passed after the expiration of two years from the end of the financial year in which the proceedings, in the course of which action for imposition of the penalty has been initiated, are completed. In that case, the Inspecting Assistant Commissioner had passed the order of penalty on October 12, 1971, and, therefore, if the new section is to apply, then the order of penalty would be within the time limitation.

[112] In *Commissioner of Income Tax v Royal Motor car Company (supra),* the Gujarat High Court held that it is well-settled law that as regards matters of procedure, the legislature can make changes and those changes would apply, so far as the limitation is concerned, to pending proceedings unless a vested right has accrued to any party by reason of the old period of limitation having expired. Thus, the Full Bench has laid down that if the period of limitation has already expired, then the amending Act extending the period of limitation will not apply retrospectively but if the period of limitation has not expired, then the amending Act extending the period of limitation will have retrospective effect. While holding that when the legislature makes changes to the procedural limitation period in pending proceedings, the new section would apply after the Amendment where the entire old section was substituted by the new section, **unless there is something in the context or by express words the legislature has**

<u>expressed it</u>. In *Commissioner of Income Tax v. Royal Motor Car Co. (supra), it was stated:*

> *4. At least so far as the question of limitation is concerned, it is obvious that the old section cannot apply after the Amendment Act since the entire old section was substituted by the new section and what we are concerned with in the present case is the application of the well-settled rule of law that limitation is a matter of procedure and* ***unless there is something in the context or by express words the legislature has expressed it,*** *new period of limitation would always apply to pending proceedings as well. Under these circumstances, at least in one out of the two alternatives, the position is very clear, namely, that the order of the Inspecting Assistant Commissioner, was within limitation.*

Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.

[113] In *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd*. (Supra), the High Court was interpreting section 154 of Income Tax Act of India, 1961. The issue was whether on the facts and in the circumstances, the Appellate Tribunal was right in law in holding that rectification order dated.31.3.86 under Section 154 of the Income Tax Act of India 1961 in respect of the assessment order dated 25.3.82 was barred by time on the ground that un-amended provisions of Section 154(7). Section 154 - Rectification of mistake

> *"1a[(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may, -*
>
> *(a) amend any order passed by it under the provisions of this Act ;*
>
> *1[(b) amend any intimation or deemed intimation under sub-section (1) of section 143]].*
>
> *1aa[(bb) the Inspecting Assistant Commissioner may amend any order passed by him in any proceeding under]*
>
> *4[(c) amend any intimation under sub-section (1) of section 200A.]*
>
> *9[(d) amend any intimation under sub-section (1) of section 206CB.]*
>
> *1aa[(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.]*
>
> *(2) Subject to the other provisions of this section, the authority concerned -*

(a) may make an amendment under sub-section (1) of its own motion, and
(b) shall make such amendment for rectifying any such mistake which has been brought to its notice 5[by the assessee or by the deduct or [or by the collector],], and where the authority concerned is [the Joint Commissioner (Appeals) or the Commissioner (Appeals)], by the 2b[Assessing Officer] also.
[Proviso omitted by the Finance Act, 1994, with effect from 1st June, 1994.];

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of [the assessee or the deduct or [or the collector]], shall not be made under this section unless the authority concerned has given notice to 6[the assessee or the deduct or 9[or by the collector]] of its intention so to do and has allowed [the assessee or the deduct or 9[or by the collector]] a reasonable opportunity of being heard.
(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

(5) Where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deduct or 9[or the collector], the Assessing Officer shall make any refund which may be due to such assessee or the deduct or [or the collector].]

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund [already made or otherwise increasing the liability of the assessee or the deduct or [or the collector], the Assessing Officer shall serve on the assessee or the deduct or [or the collector], as the case may be] a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186 no amendment under this section shall be made after the expiry of four years 3a[from the end of the financial year in which the order sought to be amended was passed].

(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made 5[by the assessee or by the deduct or 9[or by the collector]] on or after the 1st day of June, 2001 to an income-tax authority referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it, -

> *(a) making the amendment ; or*
> *(b) refusing to allow the claim.]*

[114] The Assessment Year was 1979-80 and the relevant accounting period was 31st December, 1978. The assessment order was made under Section 143(3) of the Act on **25th March, 1982.** The Assessing Officer passed an order under

Section 154 of the Act for the purposes of reworking the depreciation allowance to which the assessee was entitled and the said order was made on **31st March, 1986**. The case of the assessee was that the period of limitation for passing an order of rectification is prescribed under Section 154(7) of the Act and that provision was amended by Taxation Laws (Amendment) Act, 1984 w.e.f. 1st October, 1984, but the time limit of four years from the date of assessment order had to be taken into consideration and not the **amended provision**. On the other hand, the Revenue, argued that once the provision was amended, the **extended period of limitation would apply** and if the said amended provision was applied to the facts of the case, the order of rectification under Section 154 of the Act was within the period of limitation. The question, therefore, was whether the rectification order made on 31.03.1986 was time barred in terms of section 155(4) by virtue of the amended Act, which came into effect from 1st October.The relevant provision before the amendment reads as under :

*"(7) Save as otherwise provided in Section 155 or sub-section (4) of Section 186 no amendment under this section shall be made after the expiry of four years **from the date of the order sought to be amended.**"*

[115] The relevant provision after the amendment reads as under :

*"(7) Save as otherwise provided in Section 155 or sub-section (4) of Section 186 no amendment under this section shall be made after the expiry of four years **[from the end of the financial year in which the order sought to be amended was passed.**]"*

[116] Section 155 (4) of the INCOME-TAX ACT, 1961 reads as follows:

*(4) Where as a result of proceedings initiated under section 147, a loss or depreciation has been recomputed and in consequence thereof it is necessary to recompute the total income of the assessee for the succeeding year or years to which the loss or depreciation allowance has been carried forward and set-off under the provisions of sub-section (1) of section 72, or sub-section (2) of section 73, or 1e[sub-section (1) or sub-section (3) of section 74,] 1f[or subsection (3) of section 74A,] the 1g[Assessing Officer] may proceed to recompute the total income in respect of such year or years and make the necessary amendment ; and the provisions of section 154 shall, so far as may be, apply thereto, **the period of four years specified in sub-section (7) of that section being reckoned 1b[from the end of the financial year in which the order was passed]** under section 147.*

[117] The assessment order was dated **25th March, 1982**. The Assessor under the provision before the amendment was permitted to amend an order within the

period of four years from the date of the order sought to be amended. The original period of limitation under the unamended provision would have expired on 24th March, 1986. The amendment of Section 154(7) of the Act which came into effect from **1st October, 1984.** By virtue of the amended provision, the period of limitation within which an order could be rectified stood extended in as much as the period of four years had to be computed **from the <u>end of the financial year in which the order sought to be amended was passed</u>.** By virtue of the amendment, the said period stood extended to **31st March, 1986** and the **rectification order has admittedly been made on 31st March, 1986.**

[118] The assessment order was dated 25th March, 1982. The original period of limitation under the unamended provision would have expired on 24th March, 1986. However, by virtue of the amendment carried out by the Taxation Laws (Amendment) Act the said period stood extended to 31st March, 1986 and the rectification order has admittedly been made on 31st March, 1986. Under such circumstances, the High Court held that (i) the original period of limitation under the unamended provision that would have expired on 24th March, 1986, stood extended to 31st March, 1986 under the Taxation Laws (Amendment) Act; (ii) therefore, the order of the Tribunal holding that the rectification order was barred by limitation is not correct as t**<u>here is no indication in the context of the Amendment Act, nor is there any express provision which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation</u>.** The High Court in fact looked for rebuttal evidence in the Act itself, either to prohibit the assessor from passing an order within the extended period of limitation or allow the assessor to pass an order in the absence of such express provision.

[119] Significantly, the High Court considered whether the limitation provision in section Section 154(7) of the Income Tax Act, 1961 has been rebutted **by any express provision in the Amendment Act itself** or where there is any express provision in the Amending Act, which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation. The High Court held that there is no any express provision which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation. The High Court stated at paragraph 10:

"10. In light of the aforesaid settled position of law, the impugned order of the Tribunal holding that the rectification order was barred by limitation is not correct. There is no indication in the context of the Amendment Act, nor is

there any express provision which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation".

S.C. Prashar, Income Tax Officer, Market Ward, Bombay and AN v Vasantsen Dwarkadas and others

[120] The Respondent further relied on the decision of the Indian Supreme Court in S.*C. Prashar, Income Tax Officer, Market Ward, Bombay and AN v Vasantsen Dwarkadas and others* 1963 AIR 1356. In that case, the notice of reassessment made under section 34 of the Indian Income Tax Act, 1953 (as amended) was challenged on the ground, *inter alia,* that the Income Tax Officer had no jurisdiction to issue a notice after the expiry of the limit of time fixed by subsection 34 which did not apply to the case. The validity of the notice was sought to be sustained on the grounds that it could not be challenged by reason of the amendments made in s. 34 of the Income Tax (Amendment) act, 1953, s. 18 of the Finance Act, 1956 and s. 4 of the Income Tax (Amendment) Act., 1959. The majority decision held:

1. Under the Indian Income-tax and Business Profits Tax (Amendment) Act, 1948, which came into force on March 30,1948,the Income-tax Officer could take action retrospectively in all cases in which the assessment years ended within eight years of the date of his action and in which there was an escapement of an assessment for the reasons indicated in cl. (a) o s. 34 (1), as amended;

2. The Income-tax (Amendment) Act, 1953, enabled action at any time if there was a finding or direction of the character indicated in the second proviso to sub-s. (3) of s. 34, and s. 31 of the Amendment Act applied the 'amended s. 34 to all assessments commenced after September 8, 1948,and saved all notices issued and assessments made in respect of any year prior to April 1, 1948, whether the notices were issued or the assessments made before or after April 1,1952;

3. The second proviso to s. 34 (3), as amended in 1953, was not discriminatory and did not offend Art. 14 of the Constitution;

4. The notice issued against the firm P. L. was validly issued under the amended second proviso to s. 34 (3).

[121] Hidayatulla J. referred to sub-s. (4) of s. 34 of the Amended Act that gave power to issue fresh notices which under the 1948 amendment would have been

barred, and said that the last words definitely refer to a year which would be governed by the 1938 amendment. Sub-s. (4) of s. 34 reads:

> *"A notice under clause (a) of sub-section (1) may be issued* ***at any time*** *notwithstanding that at the time of the issue of the notice, the period of 8 years specified in that sub-section before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice relates". [emphasis added]*

[122] Having referred to statutory provisions relevant to the issue, Hidayatulla J. stated that:

> *"..Parliament passed the 1959 Act nullifying that decision. By the same Act, Parliament gave power to issue a notice at any time in all these cases in which the 8 year period under the principal Act as it stood prior to the 1956 Amendment had expired. The words "at any time" mean what they say. There is no special meaning to be attributed to them. "Ant time" thus meant action to be taken without any limit of time. ......*
>
> *The effect of the amendment of the year 1953 on this case may be stated shortly thus: The assessment year being 1942-43, the notice under s. 34 had to issue in 1951 at the latest. After that year notice could not issue unless the limit of time was increased or removed. But the fact that the notice could not be issued after 1951 did not clothe the assesee with a right not to pay the tax if it became legally claimable again. If the law conferred a power on the income-tax Officer to deal with such a case, the assessee would again be exposed to proceedings, provided it said in clear terms that the law was retrospective. This is what the law did in precise and clear terms. In 1953 an Act was passed amending s. 34 which enabled action* ***at any time*** *if there was a finding or direction of the character indicated in the second proviso to sub-s. (3) of s. 34. Section 31 also made this position clear by applying the amended s. 34 to all assessments commenced after September 8, 1948, and saved all notices issued and assessments made* ***in respect of any year prior to April 1. 1948, whether the notices were issued or the assessments were made before or after April 1, 1952.*** *............But a Court is required to take judicial notice of statutes and if s. 31 of the Act of 1953 said that sub-ss. (1), (2) and (3) of s. 34 of the principal Act (including of course the amendments as made by the 1953 Act) shall apply and shall be deemed always to have applied* ***to any assessment or re-assessment for any year ending before April, 1948,*** *it is the duty of Court and Tribunal to read s. 34 in that manner and in no other. In our opinion it was not open to the High Court to read s. 34, without s. 31 which contained a legislative construction and made s. 34 retrospective..."*[Emphasis added]

[123] It is crystal clear that the Amended provisions of the Indian Income Tax Act saved all notices issued and assessments made in respect of any year prior to April 1. 1948, whether the notices were issued or the assessments were made before or after April 1, 1952. Therefore, the statutory regime applicable to Indian Income Tax Act is different from the Inland Revenue Act of Sri Lanka. On the other hand, the principle of law enunciated by Hidayatulla J. that the Income Tax Officer could take action retrospectively **in all cases or for any year of assessment in which the assessment years ended within 8 years of the date of his action** applies **unless there is any express provision restricting action by a time limit**. Hidayatulla J. stated at p. 43 of the judgment:

> *"That liability of the State is independent of any consideration of time and, in the absence of any provision restricting action by a time limit, it can be enforced ay any time…."*

[124] The Privy Council and Indian decisions lay down that if the period of limitation had already expired, then any amendment relating to limitation will not be applicable in such cases and that if by amendment, the limitation period is extended when it has not expired, then such an Amending Act will have a retrospective operation of being procedural law. It is true that it has been laid down time and again by the Privy Council and Indian Courts that a statute will not affect the rights which had accrued before a statute came into force **unless there are express words in the statute affecting such rights or where a retrospective effect to the statute has been expressly excluded by that statute itself.** From all the decisions cited above, it is evident that the law of limitation being a procedural law, has always retrospective effect **unless the amending statute provides otherwise or there are clear words to that in the statite itself that excludes the retrospective operation of such amendments.**

Existence or absence of any express provision and rebuttal of presumption of retrospectivity

[125] In my view, an amending Act which only affects procedure is presumed to be retrospective unless the Act provides otherwise-meaning, the Court should at the question whether its retrospective operation has been rebutted by any express provision in the same Act (*Shyam Sunder v. Raj Kumar* (2001) 8 SCC 24). In *Shyam Sunder v. Raj Kumar* (supra), it was stated:

> *"From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation such legislation does not effect the substantive rights of the parties on the date of suit or*

adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. However, the position in law would be different in the matters which relate to procedural law, but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. ***We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless amending Act provides otherwise" (emphasis added).***

Rebuttal of Presumption of Retrospectivity

[126] This raises the question whether the presumption of retrospective operation of any procedural enactment made by Act, No. 22 of 2011 has been rebutted by any express provision of the same Act. There is no dispute that the period of limitation for making the assessment had not expired when the amendment was made to the Inland Revenue Act by the Inland Revenue (Amendment) Act, No. 22 of 2011. Even if it is assumed that the period of limitation for making the assessment had not expired when the amendment was made to the principal enactment by the Act, No. 22 of 2011, the crucial question is whether the legislature has expressed something **by express words that would prohibit the assesser from using such amendment and making an assessment within such extended period of limitation**. In short, the question is whether the presumption of retrospectivity in relation to procedural limitation made to **the principal enactment by the Act, No. 22 of 2011 has been rebutted by any express provision in that Act itself.**

[127] In regard to the rebuttal of the presumption, it is relevant to note that any amending Act may provide either by any express provision or by implication affecting the procedure that is presumed to be retrospective effect. It is true that where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute would generally relate back to the time when the prior Act was passed **unless the provides otherwise** indicating the

legislative intention against retrospective operation. Although an Amending Act affecting procedure is presumed to be retrospective, **the presumption could be rebutted when the Amending Act in section 56 expressly or by implication, indicates in the legislative language** to the effect that the amendment made to the principal enactment by the provisions of the Act, No. 22 of 2011 [(including section 163(5)], shall be deemed for all purposes to have come into force on April 1, 2011. Now the question is whether the presumption of retrospective operation of the limitation period has been rebutted by any express provision in the Inland Revenie (Amendment) Act, No. 22 of 2011 itself.

Exclusivity of Retrospective operation by section 56 of the Act No. 22 of 2011

Dates on which the amendments made to section 163(5) came into force

[128] Similar to section 27 of the Inland Revenue (Amendment) Act, No. 19 of 2009, section 56 of the Act, No 22 of 2011 specifically sets out the dates on which the amendments made to the Inland Revenue Act, shall come into force. Section 56 of the Amending Act provides that certain amendments are procedural in nature while amendments made to sections 7, 21, 21, and 21A of the principal enactment by the Amending Act are of substantive in nature. Section 56 of the amending Act provides:

> ***"56. The amendments made to the principal enactment by the provisions of this Act, shall be deemed for all purposes to have come into force on April 1, 2011.***
>
> *Provided that-*
>
> *(a) the amendments made to section 7 of the principal enactment by subsection (2) of section 3 of this Act, shall be deemed for all purposes to have come into force on April 1. 2008;*
>
> *(b) the amendments made to sections 20, 21 and 21a of the principal enactment by section 10, section 11 and section 12 respectively of this Act, shall be deemed for all purposes to have come into force on April 1, 2009".*

Effect of section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011

[129] Section 56 of the Act, No. 22 of 2011 clearly provides that the amendments made to the principal enactment by the Inland Revenue (Amendment) Act, No. 22 of 2011**, other than the amendments specifically referred to in the proviso to section 56** of the said Act, **shall come into force on April 1, 2011.** The legislative intention is to ensure that the amendments that are specifically referred to in the

proviso to section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011, operate with retrospective effect from the dates specified therein while all other amendments made to the principal enactment, including the amendments made to section 163(5) operate with prospective effect from April, 1, 2011. If the legislative intention was to extend the period given to the assessor from 31.03.2012 to 30.11.2012 for **any year of assessment prior to 01.04.2009**, there was no reason for the legislature to provide in express terms that the amendments made to the principal enactment [which includes section 163(5)] by the provisions of the Act No, 22 of 2011, other than the amendments referred to in section 56, shall be deemed **for all purposes to have come into force on April 1, 2011.** If a gap is disclosed in the Legislature, the remedy lies is an amending Act, and not in a usurpation of the legislative function under the thin disguise of interpretation, and read the words into the section, which are not there, by a judicial interpretation and to defeat the intention of the legislature.

[130] Although the amendment made to section 163(5) of the principal enactment is of a procedural nature, and is presumed to have retrospective effect, the presumption of retrospectivity has been excluded or rebutted by the express provision in section 56 of the same Act. Section 56 expressly provides that the amendment made to section 163(5) applies with prospective effect (w.e.f. 01.04.2011) and thus, it is not possible for the assessor to extend the time period for making the assessment for the year of assessment 2009/2010 from 31.03.2012 to 30.11.2012.

[131] A perusal of the decision in *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.,* and the relevant provisions of section 154 or 155 of the Income Tax Act of India reveal that the is nothing to indicate that the limitation provisions of the Income Tax Act of India restrict the effective date of the limitation provisions similar to section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011. In the present case, the assessment was made on 26.11.2012 and the notice of assessment is dated 30.11.2012. The amendments made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 operates with prospective effect from 01.04.2011, which means that the amendments made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 is applicable for any year of assessment on or after 1 April 2011, and not to the year of assessment 2009/2010 in terms of section 56 of the Act, No. 22 of 2011. Accordingly, it is not possible to disregard the first part of the decision of the Supreme Court in *Seylan Bank v. The Commissioner General of Inland Revenue*

(supra), and apply only the second part of the decision, as against the express statutory provision in section 56 of the Act, No. 22 of 2011.

[132] For those reasons, I hold that the amendment made to section 163(5) by the Inland Revenue (Amendment) Act, No. 22 of 2011 operates with prospective effect from 01.04.2011 in terms of section 56 of the said amending Act. Accordingly, the amendments made to section 163(5) of the principal enactment by the Inland Revenue (Amendment) Act, No. 22 of 2011 has no effect relating to the year of assessment 2009/2010. The assessor does not get an extended lease of life to make the assessment for the year of assessment 2009/2010 after the time period for making the assessment expired on 31.03.2012.

[133] Before I part with this judgment, I must place on record that for the reasons stated in this judgment, this Court is bound by the judgment of the Supreme Court in *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (Supra). This Court is not bound by the judgments of the Indian Courts, when there is a statutory provision in the Act, No. 22 of 2011, which expressly provides that the amendment made to section 163(5) of the principal enactment, shall for all purposes, come into force from 01.04.2011. In any event, the said Indian decisions applied unless there is any express provision in the Amendment Act itself which prohibits the assessor from passing an order of rectification within the extended period of limitation. For those, reasons, I am not inclined to agree with the Respondent's argument that the amending Act, No. 22 of 2011 extended the time period given to the assessor to make the assessment for the year of assessment 2009/2010 from 31.03.2012 to 30.11.2012, after the time bar period expired on 31.03.2012.

Conclusion

[134] For those reasons, I hold that although the assessment was made on 26.11.2012, the assessment for the year of assessment 2009/2010 was time barred when it was not made on or before 31.03.2012 in terms of section 163(5) of the Inland Revenue Act (as amended). For those reasons, the question of law No. 2 is answered in favour of the Appellant. In these circumstances, I answer question of law No. 2 as follows:

Question of Law No 2- Yes

[135] In view of the answer given to the question of law No. 2 in favour of the Appellant, I annul the determination made by the Tax Appeals Commission dated 20.03.2018. The Registrar is directed to send a certified copy of this order to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL