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

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

WALKERS TOURS LIMITED,
No. 117, Sir Chittampalam A. Gardiner Mawatha,
World Trade Center,
Colombo 2.

APPELLANT

CA Case No.:
CA/TAX/029/2023
Tax Appeals Commission No:
TAC/IT/096/2019

-Vs-

THE COMMISSIONER GENERAL OF INLAND REVENUE,
Department of Inland Revenue,
Inland Revenue Building,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

RESPONDENT

Before : **JUSTICE M.CHAMATH.B.S. MORAIS**
JUSTICE ANNALINGAM PREMASHANKER

Counsel: **Dr. Shivaji Felix, President's Counsel with Nivantha Satharasinghe, Attorney at Law, with Sajith Nawaratne, Attorney at Law instructed by N.W Tambiah and others, Attorneys at Law for the APPELLANT.**

Manohara Jayasinghe, Deputy Solicitor General, Maithri Amarasinghe, Senior State Counsel, with Abigail Sooriyakumar Jayakody, State Counsel, for the RESPONDENT.

Written Submissions of the Appellant :- 13.10.2023
Written Submissions of the Respondent :- 06.02.2024
Argued on :- 22.09.2025
Judgement on :- 14.05.2026

JUDGEMENT

ANNALINGAM PREMASHANKER, J.

A. INTRODUCTION

A1. APPEAL

This is an appeal by **Walkers Tours Ltd** (**Hereinafter sometimes referred to as The Appellant/Tax Payer**) from the determination of the Tax Appeals Commission dated 23.02.2023 made in TAC

appeal no. TAC/IT/096/2019. The Respondent is **the Commissioner General of Inland Revenue** (**Hereinafter sometimes referred to as The Respondent/CGIR**).

A2. CASE STATED

The Appellant being dissatisfied with the determination of Tax Appeals Commission (**Hereinafter sometimes referred to as TAC**) requested for an appeal by a case stated for the opinion of the Court of Appeal by their communication dated 07.03.2023.

B. ARGUMENT

On 22nd September 2025, both parties concluded the argument. It is found that the Appellant has furnished written submissions on 13.10.2023. The Respondent has furnished the written submissions on 06.02.2024.

C. ANALYSIS

C1. QUESTIONS OF LAW

There were five questions of law presented for the opinion of the Court of Appeal, in the case stated dated 14. 05. 2024. They are:

I. "***In view of the facts and cirumstances of the case did the Assistant Comissioner/ Commissioner misdirected***

himself in fact and in law when making the assessment?"

II. ***"Is the assessment of income tax payable and the penalty imposed thereon is arbitrary and grossly excessive?"***

III. ***"Has the Assisstant Commissioner and / or the Deputy Commissioner erred in fact and in law when coming to the conclusion that section 13 (ddd) of the Inland Revenue Act No.10 of 2006 (as amended), was inapplicable to the Appellant?"***

IV. ***"Is the assessment time barred and therefore of no force or avail in law?"***

V. ***"In view of the facts and circumstances relating to the case has the Commissioner General of Inland Revenue erred in law in coming to the conclusion that he did?***

C2. TAX RETURN

The tax payer submits its return for the year of 2014/2015, claiming an income tax exemption on profit and income under section 13 (ddd) of IRA No. 10 of 2006. This claim was rejected by the Assessor and the return is not accepted and issued an assessment.

C3. **FIRST APPEAL**

Having aggrieved by the said Assessment, the tax payer made an appeal to the CGIR. The Tax Payer made the same agitation before the CGIR. CGIR by his determination dated 05.07.2019 determined the appeal by confirming the assessment.

C4. **SECOND APPEAL**

The tax payer having not satisfied with the determination of the CGIR, made an appeal to the TAC. In the appeal before the TAC the tax payer raised the same issues. TAC by its determination dated 23.02.2023, confirmed the determination made by the Respondent and dismissed the appeal.

C5. **QUESTIONS OF LAW No. I, II, III AND V**

In view of the facts and cirumstances of the case did the Assistant Comissioner/ Commissioner misdirected himself in fact and in law when making the assessment?

Is the assessment of income tax payable and the penalty imposed thereon is arbitrary and grossly excessive?

Has the Commissioner General of Inland Revenue erred in fact and in law when coming to the conclusion that section 13 (ddd) of the Inland Revenue Act No.10 of 2006 (as amended), was inapplicable to the Appellant?

In view of the facts and circumstances relating to the case has the Commissioner General of Inland Revenue erred in law in coming to the conclusion that he did?

It is the Appellant's position that, for the reasons more fully set out in their submissions, the income tax payable imposed thereon is arbitrary and grossly excessive.

C6. AGREEMENT

There is an agreement between the Walking Tours Limited and the Foreign Tour Operator (**Hereinafter sometimes referred to as FTO**), who is domiciled in a foreign country.

C7. SECTION 13 (ddd) OF IRA

"Section 13 – *There shall be exempt from Income Tax* **–**

> ***13 (ddd) - the profits and income earned in foreign currency by any resident company, any resident individual or any partnership in Sri Lanka, from any service rendered in or outside Sri Lanka to any person or partnership outside Sri Lanka, other than any commission, discount or similar receipt for any such service rendered in Sri Lanka, if such profits and income (less such amount, if any, expended outside Sri Lanka as***

is considered by the Commissioner-General to be reasonable expenses) <u>are remitted to Sri Lanka through a bank</u>"

C8. REQUIREMENTS

The requirements for eligibility for tax exemption under Section 13 (ddd):

(a) Income should be in foreign currency.
(b) Tax Payer should be a resident company.
(c) Service should be **rendered in or outside Sri Lanka**.
(d) Service receiver should be a **person or partnership outside Sri Lanka**.
(e) Other than any commission, discount or similar receipts for any such services rendered in Sri Lanka;
(f) Should be remitted to Sri Lanka through a bank.

C9. FULFILLMENT OF REQUIREMENTS

In the case in hand, the income received by the Appellant is in **foreign currency through a bank** – Requirement (a) and (f).

The Appellant is a **Resident Company** – Requirement (b).

Render services in or outside Sri Lanka – Requirement (c).

Services rendered to **a person or partnership who is operating** from **outside Sri Lanka** – Requirement (d).

The **Income** earned by the Appellant **does not** include **any commission, discount or similar receipt** – Requirement (e).

Income should be remitted to Sri Lanka through a Bank – Requirement (f).

C10. FOREIGN TOUR OPERATOR

There is no dispute that the Appellant has to fulfill the above stated statutory requirements specified under Section 13 (ddd) of the IRA. There is also no dispute that the Appellant has fulfilled the requirements relating to earning the income and profit in foreign currency, by a resident company, resident individual or partnership in Sri Lanka from any services rendered in or outside Sri Lanka, and also that Appellant has fulfilled the requirements to remit such profit and income to Sri Lanka through a bank.

The question remains as to whether the services were provided by the Appellant to a person or partnership outside Sri Lanka and also whether any commission, discount or similar receipt for any such service rendered in Sri Lanka were included in the payments the Appellant had so received. The Appellant's argument is that his contracting party is the Foreign Tour Operator who is outside Sri Lanka and he received payments in foreign currency through a

bank. However, he also admits in his submission that his services are provided and consumed in Sri Lanka by the tourists.

The TAC also observes that the said Section 13 (ddd) specifically excludes any commission, discount or similar receipt for any such service rendered in Sri Lanka and the Appellant had not produced any supporting documents such as the agreements he has entered into with Foreign Tour Operators either to the IRD or to this Commission to prove that he had not performed any agency function to the Foreign Tour Operator where his payment would have included a commission, discount or similar receipt.

The contention of the Respondent is that the Commission also observes that the responsibility to prove his eligibility under this section entirely lies with the Appellant and he should have submitted all necessary supporting documents for perusal of the relevant authorities, in claiming such eligibility.

C11. **SCOPE OF AGREEMENT**

The Foreign Tour Operator enters into an agreement with the foreign tourist for providing vacation packages in Sri Lanka, for which consideration is **paid by the tourist to the Foreign Tour Operator**. The FTO obtains the services of the Appellant (local company) to provide the services undertaken by them to the tourist. The **Appellant receives the payment directly in foreign currency through a bank from the Foreign Tour Operator**.

For example, as per the request of the FTO, the Appellant would arrange the package with hotels, transport services and other excursions, etc, which will be sold by the FTO to the tourist arriving in Sri Lanka. In return, the Appellant **receives a payment from the Foreign Tour Operator** according to the terms of the agreement between FTO and the Appellant. The payment is received **in foreign currency** and is received via **the banking channels**. This is the Appellant's income.

C12. THE INCOME OF THE APPELLANT COMPANY

The Foreign Tourist, the customer of FTO pays the consideration to the Foreign Tour Operator and not to the Appellant. This payment by the Foreign Tourist to the Foreign Tour Operator is made in the home country of the tourist. This shows that the Foreign Tour Operator is the supplier of the service and the tourist is the recipient of the service. The Appellant receives payment according to the agreement between the Appellant and the Foreign Tour Operator not from the foreign tourist. The Appellant provides its services to the Foreign Tour Operator. The income is remitted to the Appellant only by the FTO and not by the tourist. Thereby, the services enjoyed by the tourist are immaterial within the ambit of the Section 13 (ddd) of the IRA.

The Foreign Tourist **does not** make any **payments** or provide any **commission to the** Appellant. They **directly** deal with the Foreign

Tour Operator **only**. Therefore, there is **no privity of contract** between the Foreign Tourist and the Appellant.

Therefore, it is clear that the payment is received from the Foreign Tour Operator and **not** from the tourist and the payment is made in **foreign currency** through **bank**.

C13. REAL SERVICE

The **contract** between **the Appellant** and **the FTO** is **quite apart and distinct** from **the contract** between the **FTO** and **The tourist**. **The Appellant has no contractual obligations** whatsoever **towards the tourist**. Therefore it is incorrect to allege **the Appellant** was **providing the services to the tourist**.

Entire service of that package is priced with Value Added Tax and invoiced to our operator in abroad. In terms of Section 13 (ddd) of IRA, the exemption is available for the "profit and income" earned

1. In foreign currency
2. By any resident company, any resident individual or partnership in Sri Lanka
3. From any service rendered in or outside Sri Lanka
4. To any person or partnership outside Sri Lanka
5. Other than any commission, discount or similar receipt for any such service rendered in Sri Lanka
6. Such profit and income are remitted to Sri Lanka through a bank.

C14. **SCOPE OF AGREEMENT**

The Assistant Commissioner has conceded that the Appellant has tendered the relevant Returns and Statement of Accounts relating to this issue. The tour packages are sold to Foreign Tour Operators (Hereinafter sometimes referred to as FTOs) abroad and the Appellant provides agreed specified services for the tour packages to such tourists when they arrive to Sri Lanka. This issue has not been properly understood by the Tax Appeals Commission. The Assistant Commissioner's intimation of reasons letter indicates that the appellant provided services to the tourist on behalf of FTOs who were physically present in Sri Lanka. However, the contract for services was made by the Appellant with the FTO and not with the tourists. No payment was received by the Appellant from the tourists. The payment in foreign currency was received from the non-resident FTO. The fact that a tourist is in Sri Lanka indicates that the Appellant was tendering services in Sri Lanka to a FTO who is outside Sri Lanka. No service is provided to the foreigner by the Appellant for which a payment is received by the Appellant directly. This issue had not been properly understood by either the Respondent or the Tax Appeals Commission. The disputed issue does not relate to commission received by the Appellant. What in issue is whether services provided to FTO, for which payments are received in foreign currency, comes within the scope of section 13 (ddd) of the IRA.

C15. SECTION 13 (ddd) of IRA

Section 13 (ddd) of the IRA, exempts from income tax, inter alia, the profits and income of a resident company that is earned in foreign currency by rendering any service in or outside Sri Lanka to any person or partnership outside Sri Lanka. However, the section excludes any commission, discount or other similar receipt earned for any service rendered in Sri Lanka. The tax exemption is available to qualified services rendered in or outside Sri Lanka in the event that the profits and income (less any amount expended outside Sri Lanka for reasonable expenses) earned from such activity is remitted to Sri Lanka through a bank.

C16. SUPPLY OF SERVICE

It is relevant to note that the supply of a service has certain distinctive feature. These include;

(i) Lack of ownership
(ii) Intangibility
(iii) Inseparability
(iv) Perishability
(v) Heterogeneity

These characteristics serve to distinguish a service from a physical product. A person cannot own and store a service like you can with a product. For example, once an air ticket is used the service received is incapable of being retained by the receiver. A service is

intangible because one cannot hold or touch a service like a product. A service is inseparable because you cannot separate the service from the service provider. A service is perishable because it lasts for a specific time and cannot be stored like a product for later use. If there is an empty seat on an aircraft which has completed its flight this seat cannot be sold later. In the case if a product it can be manufactured and sold later. Services are heterogeneous (i.e., not homogeneous) because it very difficult to make each service experience identical.

C17. TAX EXEMPTION

It is the Appellant' position that section 13 (ddd) of the IRA, exempts from income tax, inter alia, the profits and income of a resident company that is earned in foreign currency by rendering any service in or outside Sri Lanka to any person or partnership outside Sri Lanka. However, the section excludes any commission, discount or other similar receipt earned for any service rendered in Sri Lanka. The tax exemption is available to qualified service rendered in or outside Sri Lanka in the event that the profits and income (less any amount expended outside Sri Lanka for reasonable expenses) earned from such activity is remitted to Sri Lanka through a bank.

For the purpose of enjoying the statutory tax exemption it is imperative that, whist the service can be rendered either in Sri

Lanka or outside Sri Lanka, the person who is in receipt of the service must be outside Sri Lanka.

Section 13 (ddd) of IRA, applies to resident individuals, partnerships and companies. However, section 13 (ddd), which is similar in scope, applies only to resident companies and the Appellant in this case is a resident company. It must be noted that any commission, discount, or similar receipt for any such service rendered in Sri Lanka is not exempt from income tax. In the instant case the income received by the Appellant does not come within the scope of any commission, discount or similar receipts. Therefore, the Appellant comes within the scope of section 13 (ddd) of the IRA. Section 13(ddd) cover income tax in respect of any commission, discount or similar receipt in addition to any other exemption covered by section 13 (ddd) of IRA.

C18. QUESTION OF LAW No. IV

Is the assessment time barred and therefore of no force or avail in law?

The Appellant filed its return of income for the year of assessment 2013/2014 on 27 November 2014. The notice of assessment was dated 30 May 2016. It was received by the Appellant registered post on June 3 2016. The date of receiving notice of assessment on 3 June 2016 has not been disputed by the Commissioner General of Inland Revenue in his Reasons for making the Determination. The time bar was engaged by operation of law on 30 May 2016 and the

notice of assessment has been posted after the expiry of the time bar for making an assessment.

C19. ASSESSMENT

The notice of assessment particularises the assessment. Therefore, it is a mandatory precondition for making a valid assessment. The time bar imposed for the making of an assessment is also applicable to sending the notice of assessment. There cannot be a valid assessment without sending a notice of assessment. Therefore, there is no question of making a valid assessment if the relevant notice of assessment has not been sent to taxpayer. Section 163(1) of the IRA, makes it imperative that the power to make the assessment is coupled with the duty to send a notice of assessment. Therefore,, the power to make an assessment is devoid of legal effect if the prescribed duty of assessment has not been performed.

It is common ground that the notice of assessment is dated 30 May 2016 and was received by the Appellant on June 3 2016. It is the Appellant's position that no lawfully valid assessment can be made without serving a valid notice of assessment. Serving a notice of assessment is necessary condition that must be satisfied to confer validity on the assessment. The notice of assessment must be served on the taxpayer prior to the expiry of the time bar.

C20. **FONTERRA JUDGEMENT 1**

The Supreme Court in the case of ***Fonterra Brands Lanka (Pvt) v. Commissioner General of Inland Revenue*** (SC Appeal No. 187/2014) has held that:

> ***"....as assessment is not complete, nor binding, until it is notified to the taxpayer within the statutory period...."***
>
> ***"It is fundamental precept of a just legal system that a public authority must act not only within its statutory mandate but also with transparency and accountability. To allow the state to held taxpaying entities in a state of perpetual uncertainty....would be to subvert the purpose of the law."*** (p11)

C21. **FONTERRA JUDGMENT 2**

The Supreme Court has also rejected the argument that a letter of intimation could constitute an assessment.

> **"...I find that although styled as an "intimation, the said letter cannot by any measure be equated with a Notice of Assessment within the meaning of Section 134 of the Act. While it contains certain preliminary calculations, these workings cannot be framed as a final and binding determination of liability." (p 21)**
>
> **"..the letter before us is no more than a preliminary communication-a step antecedent to assessment-and**

cannot be given the legal effect of a Notice of Assessment."

C22. FONTERRA JUDGMENT 3

The Respondent's position is contradictory to Fonterra case, where the Supreme Court held the following:

> "***These authorities read together, I hold that an 'assessment' is not complete until it is communicated to the taxpayer by a notice of assessment served within the time limit... A letter of intimation is not an assessment, nor is it an internal departmental calculation***." *(p21)*

C23. STEPS UNDER SECTION 135 (5) OF IRA

The section 135(5) of the IRA states the following:

"(5) Where the Assistant Commissioner has made an amended or additional assessment under this section, he shall serve the taxpayer with notice, in writing, of the amended assessment specifying the following:-

a) the original assessment to which the amended assessment relates;
b) the amount of tax assessed and the basis upon which the amended or additional assessment has been made;

c) the amount assessed as penalty (if any) in respect of the tax assessed;
d) the amount of late payment interest (if any) payable in respect of the tax assessed;
e) the tax period to which the assessment relates;
f) the due date for payment of any tax, penalty, and interest being a date that is not less than thirty days from the date of service of the notice; and
g) the manner of objecting to the assessment

In this instance, the above actions were not followed. The notice of assessment not served in time.

C24. PURPOSE OF NOTICE OF ASSESSMENT

Section 164 of the Inland Revenue Act as follows:

> ***"An 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...."***

The contention of the Respondent is that the section 164 makes it clear that a notice of assessment is required to be given only when income tax is been charged. In fact, by its very

definition, a notice of assessment is a document by which the taxpayer is informed of the amount of income assessed and "the amount of tax charged".

C25. **SECTION 163 OF IRA**

Section 163 (1) of the IRA requires that when an assessment is made by an Assessor (Assistant Commissioner) he shall " assess the amount which in the judgment of the Assessor/ Assisstant Commissioner ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith". This statutory duty of sending a notice of assessment forthwith is further confirmed by section 164 of the IRA, which provides as follows:

> "***An 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***"

C26. **CASE REFERENCE**

His Lordship Justice Janak De Silva in ***Commissioner General of Inalnd Revenue v Atiken Spence Travels Limited*** CA TAX 4/2014 stated as follows:

> **The transaction that led to the Respondent providing two different types of service, firstly to the FTO of the right to have the services agreed between the FTO and the**

Respondent rendered to the foreign tourist in Sri Lanka and secondly the provision of agreed services to the foreign tourist in Sri Lanka was done when the FTO and the foreign tourist were physically out of Sri Lanka. Accordingly, any profits and income the Respondent earned from the provision of both these services fall within the scope and ambit of the exemption in section 13 (ddd) of IRA.

The FTOs/ Travel Agents that the Appellant provides services to are incorporated outside Sri Lanka. The fact that customers of foreign Tour Operators/ Travel Agents come to Sri Lanka for the purpose of having a holiday in Sri Lanka does not prevent the tax exemption from being applicable provided that the Appellants contracting party is outside Sri Lanka. Section 13 (ddd) permits the service to be rendered in or outside Sri Lanka but the person engaging the Appellant (who is the other contracting party) must be outside Sri Lanka.

The Appellant charges a composite fee from its customers (the Foreign Tour Operators/ Travel Agents) who are outside Sri Lanka for all services provided. This includes the cost of hotels, transport, guide fees, entrance fees plus the profit element. This may not be the amount that the

Tour Operator/ Travel Agent charges from its customer (the foreign tourist). Furthermore, the tourist visiting Sri Lanka may be travelling to other countries as well based on the package contracted with the Tour Operator/ Travel Agent and the Appellant has no involvement in this matter.

Therefore, it is the Appellant's position that since the service is provided in Sri Lanka to a person outside Sri Lanka the income tax exemption conferred by section 13 (ddd) of IRA, can lawfully be engaged. The tourist who visits Sri Lanka is not the Appellant's customer. The Appellant's customer/ contracting party is the Tour Operator or Travel Agent. There is no privity of contract between the Appellant the tourist visiting Sri Lanka. The contract is between the Appellant and the Tour Operator or Travel Agent based on a previously agreed price.

C27. QUALIFICATION

The resulting position is that the Appellant is providing the service (and may, in the course of supplying such a service, engage other service providers). The composite fee charged for its service is paid by a person or entity that is outside Sri Lanka. The service is, however, provided and consumed in Sri Lanka but payment is made in foreign currency and is remitted to Sri Lanka through a bank.

Therefore, all the elements of section 13 (ddd) are fully satisfied for the purpose of qualifying for the tax exemption.

Section 13 (ddd) does not impose a statutory requirement that the service needs to be consumed outside Sri Lanka to be eligible for the tax exemption. What it requires is that the service must be provide to a person outside Sri Lanka. The service is provided to the person who makes the payment to the Appellant which is the Tour Operator or Travel Agent – not the tourist who visits Sri Lanka. In any event, even the tourist who visits Sri Lanka are persons outside Sri Lanka.

Therefore, the Appellant fully complies with the requirements imposed by section 13 (ddd) of IRA and is lawfully entitled to the tax emption claimed.

C28. **JETWING CASE**

This court has held in **CGIR Vs JETWING TRAVELS (PVT) LTD CA TAX 83/2024**, what are the eligibilities to have the exemption under section 13 (ddd) of IRA. The said judgement is quoted by the Appellant in his consolidated written submission to support their argument. The considerable factors are same in both cases and in the absence of any reasons to deviate from the said judgement, the same should be applied for this matter as well.

C29. ANSWERS TO THE QUESTIONS OF LAW

For the reasons adumbrated above, the questions of law are answered as follows:

Q.N.1. Yes.

Q.N.2. Yes.

Q.N.3. Yes.

Q.N.4. Yes.

Q.N.5. Yes.

D. CONCLUSION

As analyzed above and as the five questions raised in the case stated are answered as above, the determination of the TAC dated 23. 02. 2023 is set aside, the appeal is allowed. But considering the circumstances of the case no cost is ordered.

The Registrar is directed to forward a copy of the judgment to the Tax appeal commission.

On this 14th day of May 2026

JUDGE OF THE COURT OF APPEAL

M. C. B. S. MORAIS

I agree.

JUDGE OF THE COURT OF APPEAL