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

John Keells Holdings PLC,
No.117, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
Petitioner

CASE NO: CA/WRIT/357/2015

Vs.

1. Kalyani Dahanayake,
Commissioner General of Inland
Revenue Secretariat,
Inland Revenue Building,
Department of Inland Revenue,
Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.

1A. Ivan Dissanayake,
Commissioner General of Inland
Revenue Secretariat,
Inland Revenue Building,
Department of Inland Revenue,
Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.

1B. Nadun Guruge,
Commissioner General of Inland
Revenue Secretariat,
Inland Revenue Building,
Department of Inland Revenue,
Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.

2. R.M.R.W. Manchanayake,
Former Commissioner General of
Inland Revenue Secretariat,
Inland Revenue Building,
Department of Inland Revenue,
Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
And presently of:
Ministry of Finance Secretariat,
Colombo 01.

3. P.A. Buddhadasa,
Commissioner Stamp Duty,
Department of Inland Revenue,
Inland Revenue Building,
Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.

4. P.L.S. Liyanage,
   Senior Commissioner,
   Legal Stamp Duty and Taxpayers Service,
   Department of Inland Revenue,
   Inland Revenue Building,
   Sir Chittampalam A.
   Gardiner Mawatha,
   Colombo 02.
5. P.R.N. Wijeratne,
   Assessor,
   Department of Inland Revenue,
   Inland Revenue Building,
   Sir Chittampalam A.
   Gardiner Mawatha,
   Colombo 02.

   Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Maithri Wickremesinghe, P.C., with Rakitha Jayatunge for the Petitioner.
Nirmalan Wigneswaran, S.S.C., with Dr. Charuka Ekanayake, S.C., for the Respondents.

Argued on: 10.06.2020

Decided on: 20.07.2020

Mahinda Samayawardhena, J.

The short point to be decided in this application is whether, at the time material to this dispute, stamp duty payable on a share certificate issued for a bonus issue of shares should have been calculated on par value of the shares or on market value of the shares. The Petitioner Company says par value, whereas the Respondents, including the 1st Respondent Commissioner General of Inland Revenue, say market value. The Petitioner's attempt to pay stamp duty on a bonus issue of shares on par value was rejected by the 1st Respondent, thereby compelling the former to pay on market value. The Petitioner made the said payment under protest, with a claim of refund. Subsequently, the Supreme Court, in the case of *Associated Motorways PLC v. Commissioner General of Inland Revenue*,[1] held calculation of stamp duty on share certificates at the time material to this application shall be on par value of the shares and not on market value. The Respondents say the said Supreme Court decision is *per incuriam* and need not be followed.

The Stamp Duty (Special Provisions) Act, No.12 of 2006, reintroduced payment of stamp duty, which had been abolished by the Finance Act, No.11 of 2002.

Section 3(1) of the Stamp Duty (Special Provisions) Act enacts:

> *From and after the date of the coming into operation of this Act, there shall be charged a duty (hereinafter to be called "stamp duty") at such rate as the Minister may determine*

[1] SC Appeal 40/2010, SC Minutes of 04.04.2014.

> *by Order published in the Gazette on every "specified instrument".*

According to section 4(f) of the Stamp Duty (Special Provisions) Act, "specified instrument" includes:

> *a share certificate on new or additional issue or on transfer or assignment.*

The Minister's Order applicable to the matter at hand was published in Gazette No.1465/19 dated 05.10.2006. For convenience, let me hereinafter refer to this Gazette as the "second Gazette". Item 6 thereof reads:

> *Any share certificate issued consequent to the issue, transfer or assignment of any number of shares of any company*
>
> *for every Rs.1,000 or part thereof of the aggregate value of such Number – Rs. 5.00* (emphasis added)

The term "aggregate value" is not defined in the second Gazette. Nor is it defined in the Stamp Duty (Special Provisions) Act or in the Stamp Duty Act, No. 43 of 1982, as amended.

The contention of the Respondents is:

> *[T]he term "aggregate value" has no special meaning and simply means the total value. The word value will have to be interpreted with reference to the parent Act, i.e. the Stamp Duty Act, which as explained above refers to the market value.*

Let me elaborate the position of the Respondents.

The Respondents say, as the second Gazette does not specify the meaning of the word "value", section 13 of the Stamp Duty (Special Provisions) Act read with section 71 of the Stamp Duty Act shall be relied on to interpret "value" as "market value".

Section 13 of the Stamp Duty (Special Provisions) Act enacts:

> *From and after the date of the coming into operation of this Act, the provisions of the Stamp Duty Act, No. 43 of 1982, relating to the Imposition of Stamp Duty (other than any instrument relating to the transfer of immovable property, the transfer of motor vehicles or documents filed in Court), Exemptions and any other provision in the aforesaid Act, shall, in so far as the same are inconsistent with the provisions of this Act, have no operation and the provisions of this Act shall prevail.*

Section 71 of the Stamp Duty Act, which is the interpretation section, contains the following:

> *In this Act, unless the context otherwise requires…"value" with reference (a) to any property (other than immovable property which is gifted) and to any date, means the price which in the opinion of the Assessor, that property would have fetched in the open market on that date;* (emphasis added)

I find myself unable to agree with the Respondents' argument that the term "aggregate value" in the second Gazette has no special meaning and it simply means "total value".

As *Maxwell*[2] points out "*Every word in a statue [is] to be given a meaning*" and "*A construction which would leave without effect any part of the language of a statue will normally be rejected*."

Bindra holds a similar view:[3]

> *Words in a statute should not be brushed aside as the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. No words or expressions used in any statute can be said to be redundant or superfluous.*

The word "aggregate" has been used in the Stamp Duty Act in several places,[4] and it may be interesting to note that in section 14(2), perhaps ironically, both "total" and "aggregate" are used in distinction. Section 14(2) reads:

> *The total stamp duty chargeable in respect of the documents filed in any proceedings in any court shall not exceed the aggregate of the stamp duty chargeable on the first ten documents filed by each party to the proceedings.* (emphasis added)

The Respondents' submission in this regard essentially invites the Court to replace "aggregate value", which the Respondents say is equivalent in meaning to "total value", with "market value". The terms "total value" and "market value" are neither comparable nor synonymous. Such an interpretation is, in my

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[2] *Maxwell on The Interpretation of Statutes*, 12th Edition, p.36.
[3] *N.S. Bindra's Interpretation of Statutes*, 9th Edition, p.370.
[4] E.g. sections 3, 13(1)(h)(iii).

view, completely obnoxious to the basic principles of interpretation of taxing statutes.

I fully understand that the words "*for every Rs.1,000 or part thereof of the aggregate value of such number [of shares] Rs.5.00*" found in item 6 of the second Gazette is meaningless unless the Minister specifically states how the aggregate value of such number of shares shall be decided: whether multiplied by par value per share or market value per share.

It is to be noted, at the time the second Gazette was in force and when the instant share transaction took place, the concepts of par value and market value of shares were both in existence, although the former concept was later done away with by section 49(4) of the Companies Act, No.7 of 2007, which states "*No share in a company shall have a nominal or par value*." Therefore, at the time of issuing the second Gazette, if the Minister intended market value as the method of calculation for stamp duty payable on a share certificate, he should have expressly stated so.

In fact, in the immediately preceding Gazette, No.1439/1 dated 03.04.2006 (which had been in operation until it was rescinded by the second Gazette), the Minister not only expressly refers to "market value" but also states who shall determine the market value. For convenience, let me hereinafter refer to Gazette No.1439/1 as the "first Gazette". Item 6 of the first Gazette reads as follows:

> *On the issue, transfer or assignment of any share of a company, other than a quoted public company on the*

> *market value determined by the Commissioner General of Inland Revenue on the date of such issue, transfer or assignment of such share*
>
> *for each of Rs.1,000 or part thereof of such market value of the value of the shares – Rs. 5.00* (emphasis added)

The Respondents submit:

> *The Minister's intention was always to maintain Market Value as the basis for valuation. The reason for market value being expressly referred to in the first Gazette was because that Gazette was limited to private companies only. There is no readily available market value for those shares. Thus the assessor had to determine the market value. The reference to the market value was simply additional language and had no special meaning. The [second] Gazette was made applicable to all companies and as such there was no necessity to specify that the Assessor will determine the market value. Public Quoted companies have a ready market value available.*

Here again, the Respondents say "*The reference to the market value was simply additional language and had no special meaning.*" The Respondents made a similar submission in respect of the word "aggregate" in the first Gazette. It appears when the language is unfavourable to their position, the Respondents say it has no meaning and can be disregarded. This is unacceptable in interpreting statutes.

Why did the Minister remove the part of the first Gazette which states the Commissioner General of Inland Revenue shall determine the market value of the shares in order to calculate the stamp duty payable?

The explanation of the Respondents is "*The [second] Gazette was made applicable to all companies and as such there was no necessity to specify that the Assessor will determine the market value. Public Quoted companies have a ready market value available.*"

There is no dispute that shares of public quoted companies have a readily available market value ascertainable by their trading price on the Stock Exchange. But what about private companies, which have no such readily available market value on their shares? Who shall determine the market value of the shares of private companies under the second Gazette? Unless the Minister specifies who shall do so, the transferor or transferee of the shares, for instance, can also lay claim to determining the market value in order to obtain a more favourable rate.

The Respondents cannot say the Minister had already manifested his intention in the first Gazette, and therefore the taxpayer cannot be allowed to take advantage of an omission in the second Gazette, and the practice under the former shall continue.

Bindra states:[5]

> *A statute is not to be construed according to some notion of what the legislature might have been expected to have said, or what this court might think it was the duty of the legislature to have said or done…the court cannot aid deficiencies, if any, in a statute, or add or annul or by construction make up deficiencies found in the enactment.*

It is also significant to note, although section 71 of the Stamp Duty Act states "market value" shall be decided by "the Assessor", the Minister in the first Gazette states "market value" shall be decided by "the Commissioner General of Inland Revenue". "Assessor" and "Commissioner General" are defined separately in the Stamp Duty Act.

Given the Respondents' emphasis on the fact that the shares of private companies have no readily available market price, it might also be relevant to note that section 19 of the Stamp Duty Act provides for "*Stamp duty where value of subject-matter is indeterminate*". The said section without the proviso reads:

> *Where the amount or value of the subject matter of any instrument chargeable with stamp duty cannot be ascertained, then, subject to the provisions of section 18, nothing shall be claimable under such instrument more than the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would at the date of such execution, have been sufficient:*

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[5] *N.S. Bindra's Interpretation of Statutes*, 9th Edition, p.407.

If the argument of the Respondents is correct, the Minister could have easily removed the part "*other than a quoted public company on the market value determined by the Commissioner General of Inland Revenue on the date of such issue, transfer or assignment of such share*" from the first Gazette, and left the remaining part intact without changing the language. What is quoted below will clearly explain what I endeavour to emphasise.

> *On the issue, transfer or assignment of any share of a company, ~~other than a quoted public company on the market value determined by the Commissioner General of Inland Revenue on the date of such issue, transfer or assignment of such share~~*
>
> *for each of Rs.1,000 or part thereof of such market value of the value of the shares – Rs. 5.00*

Instead, in the second Gazette, the Minister seems to have introduced a new formula using different language. Let me requote the same for convenience:

> *Any share certificate issued consequent to the issue, transfer or assignment of any number of shares of any company*
>
> *for every Rs.1,000 or part thereof of the aggregate value of such Number – Rs. 5.00*

In the second Gazette, the Minister gives prominence to "share certificate", whereas the first Gazette refers to "share(s)". The inclusion of "share certificate" in the second Gazette is attributable to sections 3 and 4 of the Stamp Duty (Special

Provisions) Act. If I may repeat, section 3(1) states "*From and after the date of the coming into operation of this Act, there shall be charged a duty (hereinafter to be called "stamp duty") at such rate as the Minister may determine by Order published in the Gazette on every "specified instrument*". Section 4(f) states "*For the purpose of section 3, "specified instrument" means - (f) a share certificate on new or additional issue or on transfer or assignment*". Section 3(1) read with section 4(f) makes it clear that it is the Minister who shall determine the rate of stamp duty payable on share certificates.

The Respondents, drawing the attention of the Court to sections 15(1) and 15(4) of the Stamp Duty Act, say stamp duty on a share certificate shall be charged on the value of the shares conveyed. The Respondents further say the Minister can only change the rate of stamp duty but not the basis of valuation, and "*if the Minister bases his rate on par value such a gazette would be liable to be struck down as ultra vires*". Whether or not the Minister is empowered to do so is an altogether separate matter, which this Court is not called upon to decide in this application. It is elementary that such a matter cannot be decided without a hearing being given to the Minister. The Minister is not a party to this application.

The Minister also changed the latter part of the relevant item from the first Gazette to the second Gazette. In the first Gazette, it is absolutely clear and unambiguous that stamp duty shall be calculated on "market value".

The first Gazette states:

> *for each of Rs.1,000 or part thereof of such market value of the value of the shares – Rs. 5.00*

In the second Gazette, the above was changed to:

> *for every Rs.1,000 or part thereof of the aggregate value of such Number – Rs. 5.00*

Why the change from "market value" to "aggregate value"? I cannot accept the aforementioned explanation of the Respondents in this regard. Moreover, how can the Respondents, including the Commissioner General of Inland Revenue, speak to the intention of the Minister? If at all, the Minister shall state what he intended.

Bindra[6] states:

> *An amended statute remains the same statute as originally amended, but from that proposition, it does not follow that the law contained in the amended statute is the same law as was contained in the original one. When the phraseology of the law is changed by an amending Act, the presumption will be that some change in the law is intended. It is an ordinary rule of construction that a change of language in the Code or Act may be presumed to indicate a change of intention on the part of the legislature.*

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[6] *N.S. Bindra's Interpretation of Statutes*, 9th Edition, p.219.

Bindra goes on to state:[7]

> *When enacting a new law the legislature is presumed to have had in contemplation the existing statutes on the same subject, and to have framed its enactment in reference thereto.*

Subsequent to the second Gazette, a third Gazette, No.1864/2, was issued on 26.05.2014. The Respondents say the third Gazette was necessitated by the aforesaid Supreme Court decision. The third Gazette reads as follows:

> *Any share certificate issued consequent to the issue, transfer or assignment of any number of shares of any company*
>
> *For every Rs.1,000 or part thereof, of the aggregate value of such shares being the value, which in the opinion of the Assessor/Assistant Commissioner/Deputy Commissioner/ Senior Deputy Commissioner, that such shares would have fetched in the open market on the date of such issue, transfer or assignment – Rs. 5.00* (emphasis added)

The third Gazette explicitly states "aggregate value" is "market value". The third Gazette also clearly states who shall decide the "market value", differing in this regard from both section 71 of the Stamp Duty Act, which stipulates "the Assessor" shall decide the market value, and the first Gazette, which states "the Commissioner General of Inland Revenue" shall so decide.

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[7] *N.S. Bindra's Interpretation of Statutes*, 9th Edition, p.778.

In light of the third Gazette, the question that begs to be answered is, as I have already posed, why was the language in the second Gazette changed from "market value" to "aggregate value" when the Minister could have left the language unaltered, in which event there would not have been any issue at all?

The Respondents might ask, if it is not market value, is it then par value upon which stamp duty shall be calculated on a share certificate under the second Gazette?

I must say the contention of the Petitioner that "aggregate value" means "par value" in the second Gazette is also not explicitly clear to me.

However, one thing is crystal clear. Item 6 of the second Gazette is ambiguous – one interpretation favours the taxpayer, and the other favours the tax collector. In such a situation, it is well settled law a taxing statute shall be strictly interpreted and any ambiguity shall be resolved in favour of the taxpayer, not the tax collector.

Maxwell[8] emphasises:

> *Statutes which impose pecuniary burdens are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and language must not be strained in order to*

[8] *Maxwell on The Interpretation of Statutes*, 12th edition, p.256.

> *tax a transaction which, had the legislature thought of it, would have been covered by appropriate words. "In a taxing Act," said Rowlatt J., "one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." Cape Brandy Syndicate v. I.R.C. [1921] 1 KB 64 at 71, approved by Viscount Simon LC in Canadian Eagle Oil Co. Ltd. v. R [1946] AC 119.* (emphasis added)

The Supreme Court in *The Manager, Bank of Ceylon, Hatton v. The Secretary, Hatton Dickoya Urban Council*,[9] cited the above quotation with approval in interpreting a taxing statute in favour of the taxpayer.

Bindra[10] states:

> *Taxing Acts must be construed strictly. One must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed. If there are two views possible, the one favourable to the assessee in matters of taxation has to be preferred. The assessee should be given the benefit of the doubt and the opinion which is in its favour should be given effect to. In interpreting a fiscal statute the court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in the case of a doubt, in a manner favourable to the tax-payer.*

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[9] [2005] 3 Sri LR 1.
[10] *N.S. Bindra's Interpretation of Statues*, 9th Edition, p.1036.

In *Sohli Eduljee Captain (Secco Brushes Corporation) v. Commissioner General of Inland Revenue*,[11] the Supreme Court, citing several local and foreign authorities, held:

> *Express and unambiguous language is indispensable in a statute passed for the purpose of imposing a tax. In a Taxing Statute, if two constructions are possible, one in favour of the assessee and the other in favour of the assessor, the Court must adopt the construction which is favourable to the assessee.*

In *Perera & Silva Ltd. v. Commissioner General of Inland Revenue*,[12] the Supreme Court, although holding against the taxpayer, reiterated the above in the following terms:

> *The law on this point is set out succinctly in C. N. Beatie - Elements of the Law of Income and Capital Gains Taxation at page 2;*
>
> *"It has frequently been said that, there is no equity in a taxing statute. This means that tax being the creature of statute, liability cannot be implied under any principle of equity but must be found in the express language of some statutory provision. The ordinary canons of construction apply in ascertaining the meaning of a taxing statute: "the only safe rule is to look at the words of the enactments and see what is the intention expressed by these words." If in so construing the statute the language is found to be so ambiguous that it is in doubt whether tax is attracted or*

[11] (1974) 77 NLR 350.
[12] (1978) 79(2) NLR 164 at 167-168.

> *not, the doubt must be resolved in favour of the taxpayer, because it is not possible to fall back on any principle of common law or equity to fill a gap in a taxing statute." The subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. However, this does not prevent the court from construing a taxing statute against the subject, where that appears to be the correct interpretation of a provision the meaning of which it may be difficult to understand. Difficulty does not absolve the court from the duty of construing a statute; it is only when ambiguity remains after the statute has been properly construed that the court is entitled to decide in favour of the taxpayer.*

In *Ameen v. Malship (Ceylon) Ltd.*,[13] the Supreme Court held "*The levy of stamp duty is governed by the letter of the law and not by its spirit.*"

This Court, in the case of *Nanayakkara v. University of Peradeniya*,[14] held "*The Stamp Duty Act imposes a pecuniary burden on the people. Therefore it is subject to the rule of strict construction.*"

In my view, the issue before this Court in the instant application cannot be resolved by the simple formula presented by the Respondents, i.e. the word "value" is not defined in the Stamp Duty (Special Provisions) Act and therefore the Commissioner General of Inland Revenue is entitled to look to the Stamp Duty Act to give meaning to the said word.

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[13] [1982] 2 Sri LR 483.
[14] [1991] 1 Sri LR 97 at 101.

It is my considered view the construction most beneficial to the taxpayer ought to be adopted in reading the second Gazette, and therefore the ambiguity created thereby shall be resolved in favour of the Petitioner to mean stamp duty on the share certificate in dispute was payable on par value of the shares.

By this application, the Petitioner seeks certiorari to quash the decision of the Respondents not to refund the excess stamp duty paid, and mandamus to compel the Respondents to refund the excess amount with interest.

The only substantive defence the Respondents take up in the statement of objections is "*the decision of the Respondents to refuse the refund together with the interest thereon is not contrary to law, as that there is no breach of the express provisions of statutory law.*"[15] The Respondents further state "*[the Respondents] have not violated any statutory duty, nor have they failed to comply with the Supreme Court judgment.*"[16]

Having taken up such a position in the pleadings, the Respondents for the first time at the argument came out with myriad high-flown technical objections to defeat the Petitioner's application at the threshold level. In judicial review, we speak of a fair hearing. Where is the fair hearing if one party to the proceedings presents at the hearing a substantially different case from that which he has placed on record, and which his opponent is prepared to meet? A party shall not be allowed to raise preliminary objections for the first time at the hearing,

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[15] *Vide* paragraph 8 of the statement of objections.
[16] *Ibid.*

unless there are compelling, cogent reasons to do so. This is one of the main causes for law's delays.

The Respondents' firm position at the argument was the Supreme Court decision is *per incuriam*. But the position of the Respondents in the pleadings is different. In the statement of objections, the Respondents say the said Judgement "*was delivered by the Supreme Court on 4th April 2014*" and "*the said judgment was not enforced with effect from date of Stamp Duty part payment or date of issue bonus shares*" and the Respondents "*[have not] failed to comply with the Supreme Court judgment.*"[17]

For the reasons I have given above, which are independent of the Supreme Court Judgment, and in light of the decision already arrived at, there is no necessity for me to consider whether the said Supreme Court decision is *per incuriam*.

As the Respondents highlight in the written submissions, writ is a discretionary remedy and the conduct of the parties is intensely relevant in deciding a writ application.

One of the technical objections taken up by the Respondents is laches on the part of the Petitioner in invoking the writ jurisdiction of this Court. In my view, the Respondents are guilty of laches for taking up technical objections including laches at the point of the argument! There is no necessity to consider the belated technical objections of the Respondents one by one.

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[17] *Vide* paragraphs 5(1)(c) and 8(b) of the statement of objections.

Before I part with this Judgment, I must state, as I always do, disposing of cases on technical grounds is easy and speedy. But that is not what the aggrieved party expects from the Court. The aggrieved party wants the case to be disposed of on merits rather than on technical grounds. I fully endorse the following observation of Justice Wigneswaran in *Senanayake v. Siriwardene*:[18]

> *Courts are fast making use of technical grounds and traversing of procedural guidelines to dispose of cases without reaching out to the core of the matters in issue and ascertain the truth to bring justice to the litigants. This tendency is most unfortunate. It could boomerang on the judiciary as well as the existing judicial system.*

I grant the reliefs to the Petitioner as prayed for in paragraphs (b)-(f) and (h) of the prayer to the amended petition.

The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal

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[18] [2001] 2 Sri LR 371 at 375.