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

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

ACL Metals and Alloys (Pvt) Ltd,
60, Rodney Street,
Colombo 08.

Appellant

Case No: C.A. (Tax) 16/2016

Vs.

Tax Appeals Commission No:
TAC/IT/009/2016

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

Respondent

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

Hon. Sasi Mahendran, J.

Counsel: Mr. Nihal Fernando P.C. with Mr. Johann Corera instructed by Sivananthan and Associates for the Appellant.

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

Argued on: 21.02.2022

Written submission tendered on: 11.10.2018 by the Appellant.

27.09.2018 and 01.04.2022 by the Respondent.

Decided on: 30.11.2023

D.N. Samarakoon, J

The appellant ACL Metals and Alloys (Pvt) Ltd., who is aggrieved by the order of the Tax Appeals Commission has suggested the questions of law stated below for the opinion of this court.

(01) Whether in terms of section 194(2) and (3) of the Inland Revenue Act No. 10 of 2006 every notice of assessment under section 163 served by registered 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 by post?

(02) Whether the notice of assessment is not made within the time provided under section 163(5) read together with section 194(2) and (3) of the Inland Revenue Act No. 10 of 2006?

(03) (a) Whether the amendment made to section 163(5) of the Inland Revenue Act No. 10 of 2006 by the Inland Revenue (Amendment) Act No. 22 of 2011 shall be deemed for all purposes to have come into force on April 1, 2011?

(b) Whether the amendment to section 163(5) of the Inland Revenue Act No. 10 of 2006 by the Inland Revenue (Amendment) Act No. 22 of 2011 is not applicable to the Year of Assessment 2010/2011?

(04) Whether the purported reason for rejecting the return and issuing the assessment made by the assessor (manufacturing of a product which serves as a raw material for another is not entitled for the exemption under section 17 of the Inland Revenue Act) is correct?

(05) Whether the Commissioner General of Inland Revenue has communicated the proper reasons for his determination?

(06) Whether the phrase "industrial and machine tool manufacturing" inter alia appearing in section 17 of the Inland Revenue Act No. 10 of 2006 can be interpreted as "industrial manufacturing" and "machine tool manufacturing"?

(07) Whether the manufacturing of Aluminum Wire Rods falls within the meaning of "industrial manufacturing"?

Question No. 01:

(01) Whether in terms of section 194(2) and (3) of the Inland Revenue Act No. 10 of 2006 every notice of assessment under section 163 served by registered 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 by post?

Sections 194(2) and 194(3) of the Inland Revenue Act No. 10 of 2006 are as follows,

"(2) Every notice given by virtue of this Act may be served on a person either personally or by being delivered at, or sent by post to, his last known place of abode or any place at which he is, or was during the year to which the notice relates, carrying on business:

Provided that a notice of assessment under section 163 shall be served personally or by registered letter sent through the post to any such place as aforesaid.

(3) **Any 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 by post."**

Hence the answer is "Yes".

Question Nos: 02 and 03 (a) and (03) (b):

(02) Whether the notice of assessment is not made within the time provided under section 163(5) read together with section 194(2) and (3) of the Inland Revenue Act No. 10 of 2006?

(03) (a) Whether the amendment made to section 163(5) of the Inland Revenue Act No. 10 of 2006 by the Inland Revenue (Amendment) Act No. 22 of 2011 shall be deemed for all purposes to have come into force on April 1, 2011?

(b) Whether the amendment to section 163(5) of the Inland Revenue Act No. 10 of 2006 by the Inland Revenue (Amendment) Act No. 22 of 2011 is not applicable to the Year of Assessment 2010/2011?

The relevant year of assessment is 2010/2011. It commences on 01st April 2010 and ends on 31st March 2011. The appellant filed its return on 29th November 2011. The assessor did not accept the return and issued an intimation letter on 28th October 2013. It said, "…assessment will be issued in due course". The time period of two years permitted for issuing assessment under section 163(5)(a) ended on 31st March 2013. The notice of assessment was served on 29th March 2013.

Section 163 (1) of the Inland Revenue Act No.10 of 2006 is as reproduced below.

"where any person who in the opinion of the Assessor is liable to any income tax for any 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 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 ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith."

Section 163(5) reads as reproduced below,

"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) ……."

By Amendment Act 19 of 2009 the period was extended to two years.

The year of assessment relevant to this appeal is year of assessment 2010/2011

Hence the relevant year of assessment ends on 31.03.2011. The period of two years stipulated in section 163(5) of the Act has to be calculated from 31.03.2011 and hence ends on 30.03.2013.

The position of the appellant is that the Notice of Assessment for 2010/2011 which is dated 29.11.2013 was served on the appellant thereafter and the Postal Department date stamp on the envelope was 04.12.2013. Hence the appellant argues that it is on out of time. It is after the expiry of two years.

There is an amendment Act No.22 of 2011 which amended section 163(5) (a). This substituted in paragraph (a), for the words "from the end of that year of assessment:", of the words "from the thirtieth day of November of the immediately succeeding year of assessment:";…"

The Inland Revenue (amendment) Act No. 22 of 2011 was endorsed by the Speaker on 31st March 2011.

As Inland Revenue (amendment) Act No.22 of 2011 was endorsed by the Speaker on 31.03.2011, it has come into operation **after** the year of assessment relevant to this case. **The relevant year ended on 31.03.2011.**

In CA (TAX) 23/2013[1] decided by another division of this court on 25.05.2015, (Judgment of Justice Dehideniya) the respondent, the Commissioner General of Inland Revenue (who is also the respondent in this appeal) had taken a two fold argument. It is said at page 3 of the said case. "**one argument is that the amendment came into force within the eighteen month period where the assessor was entitled to send the assessment against the assessee and therefore the extension of time period is applicable.** The other argument is that it is a procedural law and any change in the procedural law can be considered as an amendment with retrospective effect."

The first argument aforesaid, if correct, will apply to the year of assessment in this appeal, because the eighteen month period ended on 30.09.2009 and the amendment came before that on 31.03.2009. In the said case CA (TAX) 23/2013 it was decided at page 5.

> "As I have pointed out earlier, the Speaker has endorsed the bill on 31st March 2009. As per section 27(6) of the Amendment Act, section 163 of the principal enactment is amended from 1st of April 2009. The amended section does not apply retrospect. It operates only from the date specified in it. The law of the country has changed from that date. Therefore, from that date onwards, the new law shall apply."

However, the court in that case accepted the second argument of the respondent in that case on procedural law and held in page 5 itself,

[1] Seylan Bank PLC vs. Commissioner of Inland Revenue

> "The section 163(5) of the Inland Revenue Act is a procedural law. It regulates the procedure of sending an assessment against the assessee by an assessor in the event that the tax return sent by the assessee is not accepted by the assessor. Even if the amendment has a retrospective effect, it applies, if the amendment is only on procedural law. No party can have vested right on procedure."

The appellant contended in oral arguments that the amendment by Act No.19 of 2009 does not apply to the year of assessment relevant to this appeal because of the title of the Inland Revenue Act No.10 of 2006 which says,

> "AN ACT TO PROVIDE FOR THE **IMPOSITION OF INCOME TAX FOR ANY YEAR OF ASSESSMENT** COMMENCING ON OR AFTER APRIL 1, 2006."

Hence it was submitted that **the applicability of the Act is year on year.**

Hence it was further submitted that since the amendment Act 22 of 2011 was certified on 31.03.2011, the amendment to section 163(5) (a) was brought into force prospectively with effect from 01st April 2011 which is the date on which the year of assessment 2011/2012 begins. **The year of assessment 2010/2011 had already ended.**

This is an acceptable argument because the title to the Inland Revenue Act No.10 of 2006 says "FOR THE **IMPOSITION OF INCOME TAX FOR ANY YEAR OF ASSESSMENT** COMMENCING ON OR AFTER APRIL 1,2006."

Hence it appears that the operations of Act "is year on year." The intention of the legislature appears to be to enact the law on the basis of separate years of assessment.

Hence this court cannot accept the argument on procedural law which was accepted in CA TAX 23/2013. In fact, in that case itself at page 6 it is stated,

Maxwell on "The Interpretation of Statutes," 12th edition page 222 says;

"The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode. Alterations in the form of procedure are always retrospective, **unless there is some good reason or other why they should not be**". (emphasis added in this judgment)

In that case the court also has said at page 6 itself,

"Bindra at page 1469 refers to Grander v. Lucas [1878] 3 AC 582 p. 603 and cites;

It is perfectly settled that if the legislature intended to frame a new procedure that instead of proceeding in this form or that, you should proceed in another and a different way, clearly then bygone transactions are to be sued and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, **unless there is some good reason or other why they should not be".** (emphasis added in this judgment)

It is further stated in that page, "Then he goes to explain the citation;

In other words, if a statute deals merely with the procedure in an action, and does not affect the rights, the new procedure will prima facie apply to all such proceedings as well as future. No party has a vested right to a particular procedure or to a particular forum. All procedural laws are retrospective, unless the legislature expressly says that they are not. Hence, when a suit of or proceeding comes on for hearing or disposal, the procedural law in force at that time must be applied. (emphasis added in this judgment)

The Inland Revenue Act No.10 of 2006 operating "year on year" is a good reason as to why an amendment which was certified on 31.03.2009 would operate from 01st April 2009 to the year of assessment 2009/2010 and not to the former years of assessment. Furthermore, due to this "year on year" operation of the Act it cannot be said that it "deals merely with the procedure" because within the year of operation it vests rights.

In appeal to the Supreme Court in respect of C.A. (TAX) 23/2013, the Supreme Court in the judgment of S.C. Appeal No. 46/2016 dated 16.12.2021 has said at page 17,

> "As stated above, the purpose of the amendment made to section 163(5)(a) read with section 106(1) of the principal Act was not only to grant additional time for an assessor to consider the return of income filed by the taxpayer and make an assessment (if necessary), but also to grant additional time for a taxpayer to prepare a return of income in compliance with the said Act….
>
> If the amendments made to section 163(5)(a) read with section 106(1) of the principal Act are interpreted to apply to the year of assessment 2007/2008 with retrospective effect, the taxpayers are deprived of filing income tax returns for such year of assessment within the extended time period, as such extended time period has passed by the time the said amendments came into operation. Thus such an interpretation defeats the purpose of the aforesaid amendment.
>
> Accordingly it is necessary to give prospective effect to both of the aforesaid amendments in order to give effect to the purpose of legislation".

The Supreme Court has therefore **set aside** the judgment of the Court of Appeal in C. A. (TAX) 23/2013.

The extension given to the assessor by an amendment not being afforded to the assessee, will not arise, if it is decided that the application of the Act is "year on year."

In the present case[2], in oral arguments on 24.01.2022, the respondent has taken another argument which it appears had not been taken in CA (TAX) 23/2013. That is that the time bar focuses on the date of making the assessment and not sending the assessment. It was contended that the Act provides separate provisions for making of assessments and sending of Notice of Assessments and whereas the legislature has intentionally provided a time frame for making the assessment it has intentionally not provided a time frame for sending the Notice of assessment.

In this regard the case **Commissioner of Income Tax vs. Chettinad Corporation Ltd., 55 NLR 553 at 556** was cited.

In that case Gratiaen J., said,

> "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".

If this argument is accepted, it means that the assessor only has to make the assessment within the stipulated time but he can indefinitely delay the sending of the Notice of Assessment.

But as it was seen section 163(1) refers to "assess 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)**.

[2] In Tax 09 2013.

This shows that the duty to "assess" is not only coupled with the duty to serve "notice in writing" but both are subject to the provisions of subsection (3) and (5) of section 163 of the Act.

As I have said in John Keels Holding PLC vs. Commissioner General of Inland Revenue, C. A. Tax 26/2013, the first case in which I considered this question, dated 17th March 2022, at page 31,

> "Furthermore, E. Goonaratne, says in "INCOME TAX IN SRI LANKA," first edition at page 393, **"Making an assessment culminates in the notice on the person assessed.** An assessment is made when the assessment is sent."

If not the assessor will be able to make an assessment even after the stipulated period and send Notice of Assessment to the assessee. If the assessee takes the position that the assessment was not made within the prescribed time the assessor will be free to produce a document made after the prescribed time but incorrectly bears a date within the prescribed time as evidence of making the assessment.

The learned President's Counsel for the appellant in oral arguments on 13.07.2021 referred to[3] section 194 (2) proviso and section 194 (3). Those provisions are as reproduced below.

> 194 ..... (2) Every notice given by virtue of this Act may be served on a person either personally or by being delivered at, or sent by post to, his last known place of abode or any place at which he is, or was during the year to which the notice relates, carrying on business:
>
> Provided that a notice of assessment under section 163 shall be served personally or by registered letter sent through the post to any such place as aforesaid.

[3] In tax 09 2013

(3) **any 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 by post.**

Hence the appellant argues that the provisions demonstrate the timing when the Notice of Assessment is deemed to be served and **it is so because the time of service is material.** The appellant questions that if it were otherwise why would the legislature make such specific provisions relating to the deemed time of serving Notice of Assessment. If it were not intended to be adhered to and if the assessment was not to be made and served simultaneously there is no reason for the existence of such provisions.

This shows that the contention of respondent that "once" the assessment is made Notice of Assessment can be served at any time later is not valid.

The appellant also cites at paragraph 47 of the Written Submissions, **C.I.T. Bombay vs. Khemchand Ramdas (1938) 6 ITR 414,423 (PRIVY Council)** which is cited in Law and Practice of Income Tax by Dinesh Vyas, 9th edition, Volume II at page 1741 where it says,

> " The method prescribed by the Act for making an assessment to tax- using the word assessment in its most comprehensive sense as including the whole procedure for imposing liability upon the taxpayer- consists of the following steps. In the first place, the taxable income of the assessee has to be computed. In the next place, the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served on the assessee".

The parties have also referred to case No. C. A. (TAX) 17/2017[4] decided by another division of this court on 15.03.2019. In that case the appellant had filed his return for the year of assessment 2009/2010 by 30th November 2010. It

[4] Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue

appears that the said division of this court had two questions to be determined in regard to the question of time bar pertaining to the making of the assessment. One is whether the applicable date for time bar is the "date of making the assessment" or the "date of notice of assessment." The other is whether the two year period [unlike in the present case where the period of time bar is eighteen months, in that case it was two years since the Amending Act No. 19 of 2009 had come into force] end in counting two periods of 365 days or on two calendar years.

In regard to the first question the court decided that the applicable date for the time bar is the "date of making the assessment". It said at page 08 of the judgment,

> "The time bar to making 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 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."

The court cited **Commissioner of Income Tax vs. Chettinad Corporation Ltd., 55 NLR 553 at 556**, where Gratiaen J., said,

> "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".

Perusal of that judgment of Gratiaen J., shows that the aforesaid passage merely refer to an "assessment" and a "notice of assessment" whereas it is clear even without citing the said passage that there are two distinct words as "assessment" and a "notice of assessment". In other words, to say that "assessment" is different from "notice of assessment" the aforesaid passage is not required. But whether an "assessment" to be a valid one it should actually accompany with a "notice of assessment" is a deeper question.

As the court said in C. A. (TAX) 17/2017 aforesaid, it found Chettinad Corporation judgment, from reference made to it in **Ismail vs. Commissioner of Inland Revenue (1981) 2 SLR 78**, cited in that case by the appellant. That is a case decided by the Court of Appeal on a writ application where the main question for decision was whether reasons must be mandatorily given for the rejection of a return of income tax. The appellant in that case had also cited the appeal of **Ismail vs. Commissioner of Inland Revenue 1981** to the Supreme Court which is **D.M.S. Fernando and another vs. Ismail 1982 1 SRL 222**. The Supreme Court by a majority of 03 to 02 held that such reasons are mandatory upholding the decision of the Court of Appeal, on that point.

The division of this court in C. A. (TAX) 17/2017 then cited Cross on Precedents and another authority on ratio decidendi and obiter dictum and decided that neither the Court of Appeal in **Ismail vs. The Commissioner of Inland Revenue 1981**, nor the Supreme Court in **D.M.S. Fernando vs. Ismail 1982** have decided any question that came for decision in C. A. (TAX) 17/2017 and hence those cases are not binding authorities. <u>This is correct on a perfunctory analysis</u>. **But those two cases decided in early 1980s are important since in those cases the superior courts of this country examined in detail the procedures followed by the Inland Revenue Department in estimating, assessing,**

sending notice of assessment and giving reasons for non acceptance of the return.

The division of this court in coming to the aforementioned decision in C. A. (TAX) 17/2017 that the effective date for the commencement of the time bar is the "date of assessment" has based its decision on the English case of **Honig and others vs. Sarsfield (Inspector of Taxes) (1986) BTC 205**.

The division of this court observed, having referred to that case, that Fox L.J., drew a distinction in making of an assessment and the notice of assessment and held them to be different, the assessment being no way dependent on the service of notice. The division of this court said, "He (Fox L. J.) held that giving of the notice is independent of the making of a valid and independent assessment".

As already said in the present judgment, the passage quoted from the Chettinad case having shed no additional light to the decision contained in C. A. (TAX) 17/2017, it appears that the entire decision to base the effective date for the commencement of time bar on the "date of assessment" has been based on **Honig and others vs. Sarsfield (Inspector of Taxes) (1986) BTC 205**.

In the law report of **Honig and Others (administrators of Emmanuel Honig) vs. Sarsfield (H. M. Inspector of Taxes) Reported (Ch.D) [1985] STC 31; (CA) [1986] STC 246** it is said,

> "….A back duty enquiry was instituted in 1970 and, on 16th March 1970, an Inspector of Taxes signed a certificate in volume 1 of his District Assessment books stating that he had made assessments on the administrators for the years 1960-61 to 1966-67 inclusive. The notices of assessment were issued on 16th March 1970, but did not reach the administrators until after 07th April 1970. It was common ground that the assessments would be out of time unless made before 06th April 1970 by reason of the provisions of section 34 and section 40(1) of the Taxes Management Act of 1970. The administrators appealed.

The Special Commissioners held that (1) the assessments were "made" on 16th March 1970, when a duly authorized Inspector signed the certificate in volume 1. They were therefore not out of time; (2) the increases to the assessments contended for by the Inspector were supportable. They did not accept the oral evidence of the son, M. Honig, one of the administrators, that the increases in capital disclosed by the statements were attributable to rental income arising to the son, not the deceased.

The Chancery Division, dismissing the appeal, held that on the first point, it was clear on a proper construction of sections 29 and 114 of the Taxes Management Act of 1970, that the making of the assessment was not dependent on the service of the notice of assessment. The Special Commissioners were plainly right to hold that the assessments were made on 16th March 1970 and so within the time limit prescribed by sections 34 and 40 (1) of that Act. On the second point, there was no possible ground on which the court could hold that the Special Commissioners conclusion was perverse; there was ample evidence before them on which to make their findings of fact.

The administrators appealed to the Court of Appeal on the first point only, namely the date when the assessments were made.

Held, in the Court of Appeal, dismissing the appeal, that the assessments were made on 16th March 1970 when the Inspector of Taxes signed the certificate in volume 1 of the assessment book".

Thus it is clear that the procedure in England was different. The assessment was "made" when the Inspector of Taxes authorized to make such assessment signs the certificate in the assessment book. It is because under the Taxes Management Act of 1970 the Inspector of Taxes was obliged to maintain an assessment book. In this country the Inland Revenue Act No. 10 of 2006 does not require the assessor or the Commissioner of Inland Revenue to maintain such a register.

Hence the argument of the respondent in the present case that the effective date for the commencement of the time bar is the date of "making" the assessment and 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.

It is said at page 09 of C. A. (TAX) 17/2017 that,

> "The question that arose for determination in Ismail vs. Commissioner of Inland Revenue and D.M.S. Fernando and another vs. Ismail is whether the duty imposed on the assessor in terms of section 93(2) of the Inland Revenue Act No. 04 of 1963 as amended is mandatory and whether that duty has been complied with. The relevant provision is similar to section 163(3) of the 2006 Act which requires an assessor to give reasons in writing to a person whose return has not been accepted by him. Both courts held that it was mandatory. The Supreme Court (by majority) held that the reasons must be communicated at or about the time the assessor sends his assessment on the estimated income.…The question of whether the time bar for making an assessment applies to the making of assessment or the notice of assessment did not arise for determination in those cases".
>
> "Section 93(2)[5] provided that where a person has furnished a return of income, wealth or gifts, the assessor may….if he does not accept the return estimate the amount of assessable income, taxable wealth or taxable gifts of such person and assess him accordingly". (page 166 of Ismail vs. Commissioner of Inland Revenue 1981)

But as the passage quoted from C. A. (TAX) 17/2017 said, section 163(3) of the 2006 Act requires the assessor, if the return of income tax was not accepted, to give reasons in writing. **Section 93(2) of Act No. 04 of 1963, as it originally**

[5] Of Act No. 04 of 1963

stood, did not require the assessor to give reasons. It was by an amendment brought by Law No. 30 of 1978 that sections 93(2)(b) and 96(c)(3) were amended thus including a requirement of giving reasons when the assessor decides to reject a return of income tax.

It was said that in C. A. (TAX) 17/2017 the division of this court decided that **Ismail vs. Commissioner of Inland Revenue 1981** has not decided the question of time bar. But that case has analysed the procedure to be followed when an assessor decides not to accept a particular return.

Justice Victor Perera in **Ismail vs. Commissioner of Inland Revenue 1981** said,

> "Before I deal with the changes brought about by the amendment of the Revenue Law, No. 30 of 1978, I would refer to the bounds within which an Assessor could have rejected and substituted his own assessment under section 93 and section 94 of the Inland Revenue Law prior to 1978. The courts have considered the far reaching arbitrary powers granted to an Assessor under the existing law in several cases and have from time to time commented on the improper approach made by assessors in exercising those powers. **The areas of dispute between an assessor and assessee would necessarily revolve around the reasons of the Assessor for, and the basis of his making the arbitrary assessment of income or wealth.** But the assessee was completely in the dark in regard to the reasons or basis for not accepting the return even when the notice of assessment was served on him under section 95. An assessee, when he filed his appeal could therefore not formulate his grounds of appeal except in general terms. However, under the provisions dealing with the appeal in section 97 (2) he was obliged to set out the precise grounds of such appeal and necessarily he had to confine himself to such grounds when

the appeal was considered by the Commissioner". (page 94-95 of the judgment[6])

Although Justice Victor Perera's reasoning, that reasons for not accepting the return should precede sending of the notice of assessment was refuted by the learned Chief Justice in appeal, in **D.M.S. Fernando vs. Mohideen Ismail**, the learned Chief Justice expressed similar views as to the purpose of giving reasons, which was introduced by amendment of revenue law effected by law No. 30 of 1978. His Lordship said,

> "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 pressurise the tax payer 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 provision 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

[6] Copy available in Lawnet website

reasons 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 latitude: to chop and change thereafter.** It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them. 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**".

It may be noted that when the learned Chief Justice said, "His reasons must be communicated at or about the time he sends his assessment on an estimated income," His Lordship referred as "sends his assessment" to the "sending of the notice of assessment," since the assessment without the notice, [the document in the possession of the assessor] which is just the "estimate" itself is not sent.

Justice Victor Perera in the Court of Appeal said,

"Up to 1978, therefore, the position was that an Assessor could under the law act arbitrarily though he was expected to act according to the principles of justice and fair play, honestly to come to a conclusion on the basis of existing material and to exercise his judgment with responsibility. **When the Assessor did form such a judgment, the burden is shifted on the assessee to displace the assessment he had decided to make, according to his judgment.** But still as the law stood, the taxpayer was given no opportunity to know beforehand the reasons for not accepting a return or the basis of an estimate made against him nor had he an opportunity of setting out the grounds of an appeal precisely, if he decided to lodge an appeal". (page 97[7])

[7] Copy available in Lawnet website

Hence when there was no obligation to give reasons also, once the assessor forms his judgment, the burden shifted on the assessee.

The learned Chief Justice also said,

> "Furthermore one has to consider this amendment in the light of the law as it then existed. The Assessor was then not bound to disclose any reasons either on the file or by communication to the Assessee. All was left to the good sense of the Assessor and his sense of justice and fairness. The Assessee could only appeal against the quantum of assessment **and the onus of proof lay on the Assessee.** He could only speculate on the reasons for such assessment for the purposes of his appeal. The picture is now different. 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 Assessee".

Justice Victor Perera further said,

> "The amended section 93, sub-section (2) imposed a duty on the Assessor who rejected a return furnished by any person to communicate to such person in writing the reasons for not accepting the return. This section clearly dealt with the assessment of income, wealth and gifts, the rejection of a return and a communication had to be done **before** the notice of assessment stating the amount of the assessment of income, wealth and gifts and the amount of the tax charged is sent under section 95. (page 99)

The learned Chief Justice said,

> "At this stage it would be convenient to deal with the opinion of Perera J. that "the amending law clearly contemplated that the notice communicating the reasons for not accepting of a return should be an exercise before the actual assessment of income, wealth or gifts is made for the purpose of sending the Statutory Notice of Assessment referred to

in Section 95." I have quoted him verbatim because it appears to me that he considered this communication to be a condition precedent to making an estimate of assessable income. Perera J. was of the view that the intent of the provision was to give the Assessee an opportunity to meet the Assessor-so as to convince him, if possible, that his non-acceptance was erroneous."

Justice Victor Perera continued,

> "**The amending law clearly contemplated that the *notice* communicating the reasons for not accepting of a return should be an exercise before the actual assessment of income, wealth or gifts is made for the purpose of sending the statutory notice of assessment referred to in section 95. No useful purpose would be served if the *notices* communicating the reasons for non-acceptance of a return are sent simultaneously *or*** *at any time after the notice of assessment is issued under section 95***. The purpose of communicating the reasons for the rejection of a return could only be for the purpose of giving the taxpayer an opportunity** before he receives the statutory notice of assessment under section 95**, to put the assessee in possession of full particulars of the case he is expected to meet, in order that he could assist the Assessor if he does not accept the return to reconsider his rejection if satisfactory reasons are urged by the assessee before the final assessment is made**". (page 99-100[8])

It is to be noted that Justice Victor Perera uses the term "notice" interchangeably to mean "notice communicating the reasons" and the "notice of assessment" sent under section 95, which he sometimes referred to as "statutory notice of assessment". Whenever he referred to the notice of assessment, in the aforequoted passage it is reproduced in plain (not bold)

[8] Copy available in Lawnet website

letters. The ***notice*** in bold italics has referred to the notice of giving reasons. Why Victor Perera J., has opined that ***notice*** of giving reasons must be before the notice of assessment was to give an opportunity for the tax payer to fully enlighten the assessor, prior to the **charge** sent in the statutory notice of assessment. It is correct that this position of having to send ***notice*** of giving reasons prior to the statutory notice of the assessment [***which appears to be based on very sound logic***] was changed in the Supreme Court. But even the decision of the majority in the Supreme Court, where the lead judgment was written by the learned Chief Justice shows that the Supreme Court also appreciated the difference between the ***notice*** of giving reasons and the statutory notice of the assessment, without which there is only an "estimate" and not a valid "assessment."

The learned Chief Justice also said,

> "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." (page 227)

His Lordship continued,

> "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*."

In the aforequoted two passages one can see the learned Chief Justice did not accept the proposition of Justice Victor Perera that the ***notice*** of giving reasons should precede the statutory notice of assessment. But what is significant is to note that the learned Chief Justice said, "To my mind the section merely states that if the Assessor does not accept a return **he may assess on an estimate**." What is an "estimate" was defined by the judgment of Justice Victor Perera. It is given below. It was not altered by the majority judgment of the Supreme Court.

Justice Victor Perera defined the term “estimate” as,

> “According to the Shorter Oxford Dictionary 'estimate' means an 'approximate calculation based on probabilities' and therefore the 'estimate' becomes the basis of the assessment of the taxable income. This was the definition adopted by Canakaratne, J. in the case of Silva v. Commissioner of Income Tax, ! 1) at page 340”.

Thus, if the assessor does not accept a return he may assess on an “estimate,” means he may make an “*approximate calculation based on probabilities*.” It can become the basis of the assessment of the taxable income, as the passage of Justice Victor Perera further said. But it can never become an assessment [***in the sense of a valid assessment***] without it being sent with the statutory notice of assessment.

Hence it appears that although the learned Chief Justice did not agree with Justice Victor Perera, that giving reasons must be prior to the sending of notice of assessment, both justices agreed on several salient points, such as,

(a) An assessor could arrive at an arbitrary decision since he was not bound to disclose any reasons,
(b) The assessee was kept in the dark and hence was in a position of disadvantage when he has to appeal against a notice of assessment,
(c) Once the assessor forms his judgment, the burden shifts on to the assessee,
(d) The purpose of the amendment brought by law No. 30 of 1978 was to remedy the aforesaid position,
(e) Both Judges considered that the “making of an assessment” is synonymous with “the giving of statutory notice (not the reasons) of assessment.” [Eg. **the actual assessment of income, wealth or gifts is made for the purpose of sending the statutory notice of assessment referred to in section 95]**

(f) In any event, the giving of reasons cannot be after the sending of notice of assessment,

(g) If giving reasons is after the sending of notice the purpose of the amendment by law No. 30 of 1978 will be defeated

Hence whereas Justice Victor Perera said giving reasons should precede sending notice of assessment, the learned Chief Justice said "His reasons must be communicated at or about the time he sends his assessment on an-estimated income[9]." He further said, "**Any later communication would defeat the remedial action intended by the amendment**." Hence whereas the Court of Appeal said giving reasons must precede notice of assessment and the Supreme Court said reasons can be given at the time of the notice of assessment, both courts agreed that giving reasons cannot be after the sending of the **notice of assessment, which both courts considered as synonymous with making the assessment**.

Hence although it is correct to say that both the aforesaid cases [Ismail vs. Commissioner of Income Tax, as well as D.M.S. Fernando vs. Ismail] were not on the point whether "making the assessment" as well as "giving notice of assessment," must be within the stipulated time period, they both took it for granted, in their analysis of the procedure, that "*making the assessment*" is same as "*giving notice of assessment*". Whereas Justice Victor Perera said that giving reasons for non acceptance of the return should precede the notice of assessment, the learned Chief Justice said that reasons should be sent at or about the time of giving notice of assessment and any later communication would defeat the remedial action intended by the amendment.

Therefore both Justice Victor Perera and the learned Chief Justice have based their judgments on the premise that "making the assessment" is same as "giving notice of assessment". This was why it had been argued in C.A. (Tax) 17/2017 that no lawfully valid assessment can be made without first

[9] Statutory Notice

serving a valid notice of assessment. The Division of this court in C.A. (Tax) 17/2017 thought that this is a practical impossibility. A letter cannot be sent without it 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 vs. Commissioner of Income Tax** as well as **D.M.S. Fernando vs. Ismail**, despite those two cases were concerned 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) vs. Sarsfield (H.M. Inspector of Taxes)** the Commissioner of Inland Revenue also maintained a register in which an assessment is entered. **The register which is a public document.** In the absence of such a 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.

The case of **Philip Upali Wijewardene (Appellant) vs. C. Kathiragamer and another (Respondent)** decided in 1992, was cited by the respondents at paragraph 36 of the Written Submissions and it has to be considered. The facts and the decision in that case is summarized as given below.

"Assessment for the years of assessment 1972/73, 1973/74, 1974/75, 1975/76 were dated 29.03.1979 and received by the assessee on 04.04.1979. Section 96 (c) of the Inland Revenue Act as amended by Act 30 of 1978 states that no assessment of income tax or wealth tax or gift tax for the Y/A 01st April 1972 01st April 1973 and 01st April 1974 shall be made after 31st March 1979. The aforesaid assessments were dated 29.03.1979. Therefore they were made within the stipulated time".

Purportedly following the Supreme Court case of D.M.S. Fernando vs. Ismail 1982 (1) SLR 272, W.N.D. Perera J., said,

*"Communication of **reasons** for rejecting a return is mandatory and has to be done "at or about the time", an assessment is made on an estimated income. In the instant case the **assessments** have been sent to the assessee "at or about the time," the assessments were made. There is therefore substantial compliance with the requirement of the law."*

The said judgment cannot be accepted for two reasons, one is intrinsic whereas the other is extrinsic. D.M.S. Fernando vs. Mohideen Ismail 1982 and the Court of Appeal decision on which it was based, Ismail vs. Commissioner of Income Tax 1981, dealt with the question whether giving reasons for not accepting a return is mandatory. Both courts decided that it was mandatory. The Court of Appeal decided that reasons must be given before sending the notice of assessment. The Supreme Court decided that the reasons can be given "at or about the time" when the notice of assessment is sent. It is from that decision the court in **Philp Upali Wijewardene (appellant) vs. C. Kathiragamer and another in 1992** has taken the phrase "at or about the time". The Supreme Court in **D.M.S. Fernando vs. Mohideen Ismail 1982** did not say that "notice" or the "assessment" can be sent "at or about the time". This intrinsic defect is even seen in the last quoted passage from Justice W.N.D. Perera's judgment. In the aforequoted passage the first sentence refers to "reasons" while the second sentence refers to the "assessment." **Please see the highlighting of the second quotation from the judgment.** This is, with respect, the inherent defect in that decision. The extrinsic reason for the inability of this court to apply that decision lies in the difference between the relevant revenue legislations then and now. The case of **Philp Upali Wijewardene (appellant) vs. C. Kathiragamer and another (respondent) 1992** was decided on Inland Revenue Act No. 04 of 1963 as amended by Inland Revenue (amendment) Law No. 30 of 1978. The said amendment dealt with the duty to give reasons for not accepting the return

which was not a requirement in the law as existed prior to the said amendment. Giving of the notice was referred to in section 95(1) of the Act which said,

(1) An Assessor shall give notice of assessment to each person who has been assessed stating the amount of income, wealth or gifts assessed and the amount of tax charged."

Hence a separate provision dealt with the duty to give notice of assessment. But in the present Inland Revenue Act No. 10 of 2006, the same provision deals with the making of the assessment and giving notice of assessment while both requirements operate subject to the provision that stipulate the time limit.

The early case of **COMMISSIONER OF INCOME TAX v. SAVERIMUTTU CHETTY (1937) 39 NLR 01**, offers ***evidence of how the process of assessment worked in practice***, at a time when Income Tax Ordinance No. 02 of 1932 was only four years old and also at an age where there was no duty to give reasons for non acceptance of the return. The judgment of Abrahams C. J. said,

> "This is a case stated by the Board of Review under section 74 of the Income Tax Ordinance, No. 2 of 1932. The facts, so far as they are material to the consideration of the point of law on which the case has been stated, are as follows:- M. Saverimuttu Chetty, who may be called for convenience the assessee, was originally assessed for Income Tax for the year of assessment 1934-1935 on the basis that his assessable income was Rs. 9,413, and his taxable income was Rs. 4,913. Upon his taxable income he was called upon to pay Rs. 245.65 as income tax. His taxable income was reached by deducting certain allowances amounting to Rs. 4,500. The assessee appealed against this assessment of the Commissioner of Income Tax under the provisions of section 69 (1) of the Ordinance, which enable any person aggrieved by an assessment made under this Ordinance to appeal to the Commissioner within twenty one days from the date of the notice of such assessment. This must be done by what the section calls a

"notice of objection". The Commissioner, acting under section 69 (2) of the Ordinance, directed the assessor to make further inquiry. By virtue of the provisions of this sub-section an agreement may be reached as to amount at which the assessee is liable to be assessed, and this in fact happened, and, as a result, the assessable income was assessed at Rs. 8,745, the taxable income at Rs. 2,496, and the income tax payable was reduced to Rs. 124.80 This revision was effected by an allowance to the assessee of the sum of Rs. 1,749 as earned income allowance under the provisions of section 16 (1) (b) of the Ordinance".

The judgment further said,

"Section 69 of the Ordinance contemplates the following procedure whereby an assessee who has been wrongly assessed in any respect can obtain a redress of his grievance. He can file an objection in writing to the assessment. This done, the Commissioner may direct an assessor to make further inquiry and the assessor and the assessee may between themselves settle the matter or, in the language of sub-section (2) to section 69, make the "necessary adjustment" as a result of their agreement. If no agreement is reached, the Commissioner hears the appeal and decides accordingly. There is therefore a contrast drawn in the body of section 75 between an agreement as to the amount of the assessable income and the determination of the assessable income on appeal".

Therefore, it appears that there was a practice of the Commissioner of Income Tax directing the assessor to reconsider and the assessee can make representations to the assessor. If they can arrive at an adjustment that will expedite the process of recovering the tax. As per Justice Victor Perera's judgment too, if reasons are given before sending the "notice of assessment," the tax payer has an opportunity of fully enlightening the assessor. However as the learned Chief Justice refuted this position, as at today there is no compulsory requirement to send reasons prior to the "notice of assessment". However the

question in the present case is not as to when reasons has to be given, but as to whether an assessment becomes a valid one only when "notice of assessment" is given. Hence what was said in this passage was said in orbiter.

Hence it is clear that giving reasons (letters of intimation as they are sometimes referred to in arguments) is ***ideally*** before making an assessment. Hence further there is no "assessment" at the time of giving reasons, unless, as opined by the learned Chief Justice, reasons accompany the statutory notice. As per section 163(5) the time bar has to be counted from the "assessment". This is a valid "assessment," not an "estimate." Therefore it cannot be the letter giving reasons or a letter of intimation, because there cannot exist an "assessment" at the stage of the said letter. The "assessment" comes later after the taxpayer, is given the statutory notice of assessment.

The same principal adopted in **Ismail vs. Commissioner of Income Tax** and **D.M.S. Fernando vs. Mohideen Ismail**, that "assessment" becomes valid only when statutory "notice of assessment" is given, was followed in the Indian Case of **The Secretary of State for India in Council vs. Seth Khemchand Thaoomal and others, 1923** decided in the Court of the Judicial Commissioner, Sind, Reports of Income Tax cases, Vol. I (1886-1925) printed at the Madras Law Journal press, Maylapore, Madras, 1926. (A copy of the said judgment is attached to the present judgment)

The summary of the case said,

> "Where the **notice of demand** in respect of an assessment to super tax for the year 1918-1919 was served on the assessee in May 1919 after the expiry of the year charged for and the assessee instituted a suit to recover the tax collected from him on the ground that the assessment was illegal:
>
> Held, that **there was no charge**, recovery or payment of super tax within the year of assessment as laid down by section 03 of the Super tax Act and

consequently there being no assessment under the Act, section 39 of the Income Tax Act was no bar to the suit". (page 26)

The words "notice of demand" and "there was no charge" must be noted. This shows that only when there is a "notice," that there is a "demand" and a "charge." This is the ingredient that gives life to an assessment, distinguishing it from a mere estimate, which has no such life.

Except for the name "super tax" in the said kind of tax involved, there is no difference in the principal applicable.

The court said,

> "The main point for consideration is whether the assessment of super tax was an assessment under the Act, for it is only in that event the jurisdiction of the civil court is barred".....(page 27)
>
> "As observed in Maxwell on the Interpretation of Statutes, 04th Edition page 429 : Statutes which impose pecuniary burden are subject to the 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".....(page 27)
>
> "Section 06 of Act VIII of 1917 provided that when in the collectors opinion a person is chargeable with super tax a notice shall be served upon him calling upon him to pay the amount specified therein or to apply to have the assessment reduced or cancelled. **The only way that an assessee could be said to be charged is by a demand notice issued by the income tax officials, for till then it cannot be argued that he has been charged with the payment of any tax.** But the respondents admittedly received notice of demand only in May 1919, that is after the year 1918-1919 was over and even if he was chargeable with super tax he ceased to be so after the expiry of the year. The demand notice, therefore, having

been issued after the year was over, there was neither payment nor recovery of the super tax within the year 1918-1919". (page 27)

The lucidity in the aforequoted passage is characteristic of the age in which it was written. **The tax payer could have instituted a suit and recovered the tax paid because there was no "assessment."** There was no "assessment" because there was no notice, a demand, a charge, within the limited period. This shows that an "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.

The court further said,

> "Mr. Elphinston [who appeared for the state] attempted to invoke the aid of a confidential note dated the 23rd March 1919 wherein the Mukhtiarkar had made the calculation of the assessment and as this was done before the expiry of the year, he argued that the tax was charged within the year. This argument has no substance in it. **It is unarguable that the contents of a confidential document were communicated to the assessee, nor is it even alleged that the latter was aware before the end of the year that he was chargeable with any super tax**." (page 27)

Similarly, the argument for the respondent in the present case that when the assessment is made it is an "assessment" for the purposes of the time limit and there is no time period within which notice of assessment must be given, cannot succeed.

The court also said,

> "Mr. Elphinston pressed upon us the serious prejudice to the Crown, if section 03 were interpreted literally but in a fiscal statute we must look to the letter of the law and cannot introduce equitable considerations". (page 27)

"There is a patent error of law in the assessment of the super tax and therefore, the assessment was not one under the Act ; the suit therefore is not barred". (page 27)

Hence the court considered the failure to give notice of assessment as a patent error in the assessment which makes the assessment invalid.

It further shows that when notice of assessment is not given within the time limit, the tax payer obtains a vested right not to be taxed, the reason why in that case he was able to successfully sue for tax illegally paid.

The position therefore is that in the present case there is no tax validly imposed for both the years of assessment in question. Hence question of law No. 02 has to be answered in favour of the appellant.

Interestingly, another division of this Court in Central Finance Company PLC vs. The Commissioner General of Inland Revenue, C. A. Tax 08/2018 dated 19.05.2023 in its paragraphs 36 to 41 has considered the judgments of John Keels Holdings vs. The Commissioner General of Inland Revenue, C. A. Tax 26/2013 and ACL Cables vs. The Commissioner General of Inland Revenue, C. A. Tax 07/2013 decided by this Bench. In paragraph 38 in C. A. Tax 08/2018, that division reproduces the following passage from page 30 – 31 of the ACL Cables case, which was already referred to above too, which is,

"The lucidity in the aforequoted passage is characteristic of the age in which it was written. The tax payer could have instituted a suit and recovered the tax paid because there was no "assessment." There was no "assessment" because there was no notice, a demand, a charge, within the limited period. **This shows that an "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."** [The highlighting as added in C. A. Tax 08/2018]

But, in paragraph 61 of that judgment, that division purported to follow Honig & Others (Administrators of Emmanuel Honig) vs. Sarsfield (H. M. Inspector of Taxes) and basically, several other cases which followed it. But in Honig, it was a public register. Unfortunately, the attention of that division does not seem to have been drawn to the other passage from **The Secretary of State for India in Council vs. Seth Khemchand Thaoomal and others, 1923,** which said about a register which is not a public document,

> " "Mr. Elphinston [who appeared for the state] attempted to invoke the aid of a confidential note dated the 23rd March 1919 wherein the Mukhtiarkar had made the calculation of the assessment and as this was done before the expiry of the year, he argued that the tax was charged within the year. This argument has no substance in it. **It is unarguable that the contents of a confidential document were communicated to the assessee, nor is it even alleged that the latter was aware before the end of the year that he was chargeable with any super tax**." (page 27)

The argument is simple. The "notice" is the "demand" and the "charge" without which there is no valid assessment. In Honig there was a public register, which is a public notice. In **The Secretary of State for India in Council vs. Seth Khemchand Thaoomal and others, 1923** there was none and in this country under Act No. 10 of 2006 there was none.

In C. A. Tax 08/2018, the other division of this Court has said at paragraph 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."

This Court agrees with the first sentence in the above passage in "bold" print. That is why the "assessment book" is a public document. This Court is unable to agree with the rest of the passage, where reference has been made "a letter of intimation", because of the following reasons,

(01) According to the early case of Commissioner of Income Tax vs. Saverimuttu Chetty (1937) 39 NLR 01, decided under the first tax statute, Income Tax Ordinance No. 02 of 1932, Sir Sidney Abrahams Chief Justice said, (as was quoted above too)

" "Section 69 of the Ordinance contemplates the following procedure whereby an assessee who has been wrongly assessed in any respect can obtain a redress of his grievance. He can file an objection in writing to the assessment. This done, the Commissioner may direct an assessor to make further inquiry and the assessor and the assessee may between themselves settle the matter or, in the language of sub-section (2) to section 69, make the "necessary adjustment" as a result of their agreement. If no agreement is reached, the Commissioner hears the appeal and decides accordingly. There is therefore a contrast drawn in the body of section 75 between an agreement as to the amount of the assessable income and the determination of the assessable income on appeal".

(02) Justice Victor Perera, in the Court of Appeal in Ismail vs. Commissioner of Inland Revenue 1981 said, (as was quoted above too)

"The amended section 93, sub-section (2) imposed a duty on the Assessor who rejected a return furnished by any person to communicate to such person in writing the reasons for not accepting the return. This section

clearly dealt with the assessment of income, wealth and gifts, the rejection of a return and a communication had to be done **before** the notice of assessment stating the amount of the assessment of income, wealth and gifts and the amount of the tax charged is sent under section 95. (page 99)".

The learned Chief Justice, who wrote the lead judgment in appeal, in D. M. S. Fernando vs. Mohideen Ismail, 1982 said, (as was quoted above too)

"At this stage it would be convenient to deal with the opinion of Perera J. that "the amending law clearly contemplated that the notice communicating the reasons for not accepting of a return should be an exercise before the actual assessment of income, wealth or gifts is made for the purpose of sending the Statutory Notice of Assessment referred to in Section 95." I have quoted him verbatim because it appears to me that he considered this communication to be a condition precedent to making an estimate of assessable income. **Perera J. was of the view that the intent of the provision was to give the Assessee an opportunity to meet the Assessor-so as to convince him, if possible, that his non-acceptance was erroneous."**

The learned Chief Justice, however, did not accept the position of Victor Perera J., that, giving reasons for non acceptance of the return should precede the statutory notice of assessment. At page 26 of this judgment, having quoted what Justice Victor Perera said at page 99 – 100 of Ismail, this Court said,

"**It is to be noted that Justice Victor Perera uses the term "notice" interchangeably to mean "notice communicating the reasons" and the "notice of assessment" sent under section 95,** which he sometimes referred to as "statutory notice of assessment".

Although Justice Victor Perera used the term "notice" to mean more than one thing, he was not confused which is which. It must be remembered that Ismail's case was not a Tax appeal arising from a Case Stated but a Writ Application on the question of giving reasons for a decision. The confusion of "communication of reasons" and the "notice of assessment" was seen in the judgment of W. N. D. Perera J., in Philip Upali Wijewardene (Appellant) cs. C. Kathiragamer and another 1992, which was considered in detail in this judgment at page 29 et. Seq. The following passage from that case shows that, (as was quoted above too)

> *"Communication of **reasons** for rejecting a return is mandatory and has to be done "at or about the time", an assessment is made on an estimated income. In the instant case the **assessments** have been sent to the assessee "at or about the time," the assessments were made. There is therefore substantial compliance with the requirement of the law."*

The first sentence refers to "reasons" whereas the second sentence refers to the "assessment". There was a serious confusion, hence, that they are not two but one, which is wrong.

It may not be forgotten, as to how, Justice Victor Perera, being the Third in seniority on that Divisional Bench of the Court of Appeal, nevertheless writing the principal judgment commenced by saying,

> "This application for writ of certiorari and/or prohibition on the Commissioner of Inland Revenue has raised a very important issue which affects the Inland Revenue Department and all persons liable to pay income tax, wealth tax or gifts tax and which requires a careful consideration of the present administrative procedure and machinery for the assessment of income, wealth or gifts and the assessment of the tax chargeable and the collection thereof in the light of the Inland Revenue. It will therefore be necessary to examine the provisions dealing with income tax from its inception in this country and the various amendments in the law from time to time in order to appreciate the need for, the purpose and

effect of the amendments of the law that became necessary and to consider whether in that context the amendments embodied in the Law No. 30 of 1978 in some positive way, had altered the administrative procedures and imposed mandatory duties on assessors in regard to assessments and the effect of a non-compliance with such procedures and such duties. This is the question that arises for decision on this application before us."

The salient feature of the long standing practice Justice Victor Perera recognized, was to give an assessee an opportunity to bring to the notice of the assessor any matters that would make both of them enter into a compromise, which would expedite the recovery of income tax without embarking upon a journey that involves the cost and the delay in litigation. Of course, if they do not agree, the next alternative was litigation. In refuting Justice Victor Perera's proposition to the above effect, the learned Chief Justice in D. M. S. Fernando vs. Mohideen Ismail, 1982, wittingly or unwittingly thought this practice was not essential, as his lordship said, "His reasons must be communicated at or about the time he sends his assessment…" But, this does not, it is respectfully submitted, would elevate a communication of reasons, "a letter of intimation" to the status of the "statutory notice of assessment". Unless, of course, the same confusion as Justice W. N. D. Perera, with respect, was made which is the cause for paragraph 49 of C. A. Tax 08/2018.

Also, in regard to the time limit in section 163(5) of Act No. 10 of 2006, the following is applicable.

It was said in **Tara Art Press vs Collector of Customs on 15 April, 1986,** decided in the **Customs, Excise and Gold Tribunal – Delhi** as,

"The Rule of construction applicable to a taxing statute was well expressed in the classic words of Rowlett. J. in the **Cape Brandy Syndicate v. I.R.C.** (1971) 2 WLR 39(PC) P.42 as follows:

"In a taxing Act one has to look merely at what is already 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".

The above passage from the judgement of Rowlett. J. has been quoted times out of number and approved by the House of Lords, Privy Council and Supreme Court in a number of cases".

Some of the synonyms for "fairly" are, neutrally, disinterestedly, by the book, without bias and with an open mind.

It may be noted, that, **Cape Brandy Syndicate** case was not decided in 1971, but in 1921 (50 years before) as it was the time the learned Lord Justice adorned the Bench of the English Court of Appeal.

Rowlatt J., was not only instrumental in deciding on fiscal statutes, but had Lord Greene M. R. in mistakenly celebrated **Wednesbury** case in 1949 given due prominence to the case of **Theatre de Luxe (Halifax) Limited vs. Gledhill, 16th December 1914, [1915] 2 K. B. 49[10],** in which Lush J. and Rowlatt J. excellently analysed the statute and the decision of the local authority, which purported to prohibit the attendance of children under a certain age at a cinema after a certain hour, which case was relied upon by the cinema (the appellant) in

[10] Instead Lord Greene M. R. said, "I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was Theatre de Luxe (Halifax), Ld. v. Gledhill [1915] 2 KB 49 . That was a decision of a Divisional Court as to the legality or a condition imposed under the Act to the following effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Atkin JJ. The majority, consisting of Lush and Rowlatt JJ. held that the condition was ultra vires as there was no connexion, as the headnote says, "between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled".

Wednesbury case; and more so, had the English judges and lawyers thought of applying "Theatre de Luxe reasonableness" instead of "Wednesbury unreasonableness" as a yardstick of their Administrative law, the principle of proportionality, which is regarded today as something started in the continent and of relatively recent origin could have been an English administrative law principle originated 108 years ago (i.e., on 16th December 1914)

In **Theatre de Luxe (Halifax)** Rowlatt J., in the King's Bench Division said,

> "The condition accepts the position that children of any age may come in either accompanied or unaccompanied by grown up people up to 9 o'clock, but after that hour it says that no children shall be there at all under ten and if over ten and under fourteen the child must be accompanied by its parent or guardian. It is perfectly obvious that, looking at it apart from what appears in the case, the authority was addressing itself to a social question entirely independent of the management of this place as a picture theatre, a very broad and important question on which one may have opinions and if the council could enter into it one would not say that the conclusion to which they had come was unreasonable. If they are the judges whether children under ten should go to a cinematograph exhibition after 9 o'clock, it would be very difficult to say that the condition was unreasonable, <u>but it seems to me that under this Act they are not the judges of that question of public policy</u>".

The case of Wednesbury itself was a cinematograph case, where the question was whether the Associated Provincial Picture Houses, Limited, could admit children under 15 years to Gaumont cinema on Sundays, accompanied by their parents or not and whatever the nature of the film. Although Sunday Entertainments Act of 1932, which replaced the Sunday Observance Act 1781 (21 Geo. 3, c.49) imposed restrictions, had Lord Greene M. R. considered the principle laid down by Rowlatt J., that, "but it seems to me that under this Act they are not the judges of that question of public policy", his lordship would not

have based his decision on the premise, "Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider", which could not be taken into account, on Lord Greene's own decision, that, "He must exclude from his consideration matters which are irrelevant to what he has to consider".

What is relevant is what the statute says and if the court traverses outside that limit, it treads into the area of "public policy making," which is a question for the legislature, not the judiciary; and more so, in a fiscal statute, as Rowlatt J., very correctly said in Cape Brandy Syndicate. **Having missed the opportunity of following Rowlatt J., in Theatre de Luxe (Halifax) case, in which he clearly identified the difference between an authority exercising the power conferred upon it by the legislature and traverses into the sphere of public policy, what the learned Lord justice said in Cape Brandy Syndicate, which unlike his dictum in the other case had a better fate of being followed by the House of Lords, the Privy Council, the Supreme Court of India and some courts of this country must be preserved.**

Question Nos. (04) (05) (06) and (07):

(04) Whether the purported reason for rejecting the return and issuing the assessment made by the assessor (manufacturing of a product which serves as a raw material for another is not entitled for the exemption under section 17 of the Inland Revenue Act) is correct?

(05) Whether the Commissioner General of Inland Revenue has communicated the proper reasons for his determination?

(06) Whether the phrase "industrial and machine tool manufacturing" inter alia appearing in section 17 of the Inland Revenue Act No. 10 of 2006 can be interpreted as "industrial manufacturing" and "machine tool manufacturing"?

(07) Whether the manufacturing of Aluminum Wire Rods falls within the meaning of "industrial manufacturing"?

In regard to this question, the learned President's Counsel for the Appellant has argued in oral submissions[11] that, an "**industrial tool**" does not mean only a screwdriver or a wrench, etc., but it includes cables.

The learned Deputy Solicitor General who appeared for the respondent has argued in her oral submissions that the aforesaid position of the appellant regarding an "**industrial tool**," is not what is in the case stated.

This appears to be correct because question of law No. 05 attempts to interpret the phrase "industrial and machine tool manufacturing" as "industrial manufacturing" and "machine tool manufacturing".

The plain reading of the phrase shows that it means, "industrial tool manufacturing" and "machine tool manufacturing."

Section 17 of the Inland Revenue Act No. 10 of 2006 reads thus,

> "17(1) The profits and income within the meaning of paragraph (1) of section 3 (other than any profits and income from the sale of capital assets) of any company from any specified undertaking referred to in subsection (2) and carried on by such company after 01st April 2002, shall be exempt from income tax for a period of five years reckoned from the commencement of the year of assessment in which the undertaking commences to make profits or any year of assessment not later than two years reckoned from the date on which the undertaking commences to carry on commercial operations whichever is earlier.

[11] In C. A. Tax 09/2013

(2) For the purpose of sub section (1) "specified undertaking" means –

(a) An undertaking carried on by a company-

(i)incorporated before 01st April 2002, with a minimum investment of rupees fifty million invested in such undertaking; or

(ii) incorporated with a minimum investment of rupees ten million invested in such undertaking,

and which is engaged in agriculture, agro processing, **industrial and machine tool manufacturing**, machinery manufacturing, electronics, export of non traditional products, or information technology and allied services".

Even the Tax Appeal Commission has decided this question in the same way. It says at page 06 of its determination[12],

"It is to be noted that in section 17(2)(a)(ii) even though some terms such as "agriculture", "agro processing", "non traditional products" and "deemed export" are defined, the phrase "industrial and machine tool manufacturing" is not defined. Therefore it is necessary to look for a meaning to be attributed to this phrase "industrial and machine tool manufacturing". It would appear that in the phrase "industrial and machine tool manufacturing" the main item referred to is the term "tool" and the words "tool manufacturing" are qualified by the words industrial and machine. Therefore in this phrase "industrial and machine tool manufacturing" the term "tool" can be understood to mean either an "**industrial tool**" or a "machine tool"".

[12] In Tax 09/2013

But having correctly understood the question, the Tax Appeal Commission erred in looking at the meaning of the term "tool" in dictionaries whereas it should have considered the meaning of the phrase "industrial tool manufacturing."

It considered the meaning of the term "tool" in the Oxford Dictionary, which it gave as "an instrument such as a hammer, screw driver, saw, etc., that you hold in your hand and use for making things, repairing things, etc. garden tools, cutting tools or power tools (using electricity)."

Hence it concluded at page 07 of its determination[13],

> "However, PVC Compound, as submitted by the Representative for the Appellant is, "used as a raw material in producing wire and cables, aluminium beadings, three wheeler beading and furniture beading etc". Once the PVC Compound is used, it becomes a permanent fixure and will not be available for repeated use, as in the case of a hammer, a saw, or a screw driver etc."

But this would not have happened had the Tax Appeal Commission considered the meaning of the phrase "industrial tool manufacturing," which shows that "PVC Compound" are such tools. **All tools, especially "industrial tools" need not be hand held tools in the popular meaning, as the Tax Appeal Commission said. Furthermore, the "test" that a "tool" must be able to be used on more than one occasion is not always true, especially in regard to an "industrial tool".**

The Tax Appeal Commission said, "In this regard, it is a very useful rule in the interpretation of a statute, to adhere to the ordinary meaning of the word used

[13] In Tax 09/2013

and to the grammatical construction, unless that is at variance with the intention of the legislature, to be derived from the statute itself."

Here using the word in its ordinary meaning was in variance with the intention of the legislature, which was to be derived from the statute itself, because the term used was not "tool" as the Tax Appeal Commission thought but "industrial tool manufacturing."

The use of the prefix "industrial" before the term "tool manufacturing" alters its ordinary meaning.

Therefore it is clear that the appellant is entitled to the exemption from tax because it is engaged in "industrial tool manufacturing" which is a "specified undertaking".

However, the question of law No. 06 is not correctly formulated, in the sense, it should have referred not to "industrial manufacturing", but to "industrial tool manufacturing". Hence while the said question of law has to be answered in the negative, the answer must accompany with an explanation that the term "industrial and machine tool manufacturing" can be interpreted as "industrial tool manufacturing" and "machine tool manufacturing", in which the appellant's product comes within the former.

Therefore the Questions of Law are answered as follows,

Question No. 01 – "Yes"

Question No. 02 – "Yes"

Question No. 03(a) – "Yes"

Question No. 03(b) – "Yes"

Question No. 04 – “No”

Question No. 05 – “No”

Question No. 06 – “No. It has to be interpreted as “industrial tool manufacturing” and “machine tool manufacturing”. The appellant’s product comes within the former”.

Question No. 07 – “It falls within “industrial tool manufacturing”.

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

Judge of the Court of Appeal.

Hon. Sasi Mahendran

I agree.

Judge of the Court of Appeal.