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)

Lanka IOC PLC,
Level 20, West Tower,
World Trade Centre, Echelon Square,
Colombo 01.

Case No: CA/TAX/027/2021
Tax Appeals Commission No:
TAC/NBT/022/2016

Appellant

Vs.

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

Respondent

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

Hon. Neil Iddawala, J.

Counsel: Dr. Shivaji Felix with Mr. Nivantha Satharasinghe for the Appellant.

Miss Amasara Gajadeera, State Counsel, for the Respondent.

Argued on: 03.08.2023

Written submission tendered on: 13.10.2023 by the Appellant.
11.05.2023 by the Respondent.

Decided on: 15.12.2023

D.N. Samarakoon, J

The appellant Lanka IOC (Indian Oil Company) PLC has preferred a Case Stated to be referred to this Court on the following questions of law,

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

(02) Did the Tax Appeals Commission err in law when it concluded that the assessment was valid despite the fact that the assessor who made the assessment was not the same person who has sent the notice of assessment?

(03) Did the Tax Appeals Commission err in law when it ignored the fact that the tax assessed and the tax declared as per the notice of assessment was one and the same and therefore the assessment was invalid in law?

(04) Is assessment of Nation Building Tax and penalty as determined by the Commissioner General of Inland Revenue and confirmed by the Tax Appeals Commission excessive, arbitrary and unreasonable in view of the fact that it came within the scope of section 3(2)(iv)(8) of the Nation Building Tax Act No. 09 of 2009 (as amended)?

(05) Did the Tax Appeals Commission err in law when it failed to consider the appellant's alternative argument that it could be regarded as a manufacturer of the relevant products?

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

Question No.01:

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

(a) Construction of section 10 of the Tax Appeals Commission Act:-

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

The date of the determination being 19th April 2021, it was 558 dates.

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

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

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

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

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

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

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

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

"13.

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

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

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

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

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

"7.

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

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

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

> "14.
>
> (1) The amendments made to the principal enactment [other than the amendments made to section 2, the proviso to subsection (1) of section 7 and the amendments made in relation to the appeals under the Customs Ordinance
> (Chapter 235)] by the provisions of this Act shall be deemed for all purposes to have come into force on April 1, 2011".

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

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

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

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

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

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

> "(2) The amendment made to section 2 of the principal enactment by the Tax Appeals Commission Act, No.4 of 2012 shall be deemed for all

purposes to have come into force on March 31, 2011 and any act or decision made by the Commission during the period commencing on March 31, 2011 up to the date of coming into operation of this Act shall be deemed to have for all purposes to have been validly made".

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

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

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

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

In its written submissions dated 11th May 2023, the respondent refer this Court to **Kegalle Plantations PLC vs. Commissioner General of Inland Revenue C. A. Tax 09 2017 dated 04th September 2018** and **Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue C. A. Tax 17/2017** decided on 15th March 2019, both judgments written by Justice Janak de Silva.

It appears that, in respect of the case of Stafford Motor Company (Private) Ltd., vs. Commissioner General of Inland Revenue, C. A. Tax 17/2017 decided on 15th March 2019 the Supreme Court has granted special leave to appeal in SC SPL

LA 138/2019 on 15th November 2021. In that case the Court of Appeal considered whether the limit of 270 days is mandatory or directory and it was said,

> The TAC Act does not spell out any sanction for the failure on the part of the TAC to comply with the time limit set out in section 10 of the TAC Act. If the Appellant is correct in submitting that the time bar on the TAC is mandatory, it will result in the validity of the impugned determination made by the Commissioner General of Inland Revenue been maintained for no fault of the aggrieved party where the TAC fails to adhere to the time limit. Such deprivation of rights of the aggrieved party cannot be implied in the absence of clear and unambiguous statutory provisions.
>
> On the other hand, if the failure on the part of the TAC to adhere to the time limit should result in the aggrieved party obtaining the relief claimed, the legislature would have specifically stated so. For example, the second proviso to section 34(8) of the VAT Act specifically provides that "the appeal shall be deemed to have been allowed and the tax charged accordingly" where the appeal to the Commissioner-General against an assessment made by the Assessor is not determined within the stipulated time of two years.
>
> The learned counsel for the Appellant upon Court pointing this out responded by submitting that Court should then declare that the appeal made to the TAC is deemed to be allowed where the TAC fails to adhere to the time limit specified ins section 10 of the TAC Act. We do not agree as that would be in the words of Lord Simonds in *Magor & St. Mellons vs. Newport Corporation* [(1951) 2 All.E.R. 839 at 841] "a naked usurpation of the legislative function under the thin guise of interpretation...If a gap is disclosed, the remedy lies in an amending Act."

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

Another facet of this question could be posed as follows:

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

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

As the appellant has cited in Written Submissions dated 13th October 2023 at paragraph 112, in respect of the substantive question in this appeal, in **Vallibel Lanka (Private) Limited vs. Director General of Customs, S. C. Appeal 26/2008 [2008] 1 SLR 219** in which Kanagasabapathy J. Sripavan J., (later Hon. Chief Justice) (with Sarath Nanda Silva C. J. and Gamini Amaratunge J., agreeing) said,

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

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

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

The question whether section 10 (as amended) is directory or mandatory is one question. The question as to what will happen if it is held to be mandatory, **for if it is held to be directory the tribunal will have unlimited time of determining the appeal,** is another. There is no doubt that there is a close connection with the two questions. But answer to one question must affect the answer to the other only when the rules of interpretation so permits in the view of this Court.

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

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

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

> "1. Golden Rule Warburton's case; Becke v. Smith —Burton, J., in Warburton v. Loveland, (1928) 1 Hudson and B. Irish cases 623,648, observed 'I apprehend it is a rule in the construction of statutes, that, in

the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further. The elementary rule is that words used in a section must be given their plain grammatical meaning."

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

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

For example section 7(2) says,

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

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

The basis here, not to follow the basic precept "What is good for the goose is good for the gander" does not find its foundation just because one is a citizen and the

other is the state. Its footing, as it would appear, is based on much firmer grounds.

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

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

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

is mandatory or directory.

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

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

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

> "This application was taken up for hearing by a Bench of Five judges of this Court on 8th September, 1983. The argument was not concluded on that day and was resumed on the next day. **Counsel for the Petitioners was making his submissions when one of my brother judges who was**

reading a copy of the Act which had reached us two days earlier brought it to my notice that the provisions of section 157A of the Act contained a requirement that the judges of the Supreme Court and the court of Appeal should take their oaths in terms of the Seventh Schedule before the President which in fact had not been done by any of the judges. The judges of both courts therefore considered this matter and wrote to the President, inter alia that in their opinion the period of one month expired at midnight on the same day (i.e. the 9th September) and that they were thus prepared to take their oaths. There was no reply from the President. However, I was informed by the Minister of justice that he had contacted the president on this matter and he had been told that the President had been advised by the Attorney-General that the period of one month had expired on the 7th. In the result no oath could be administered. **On Monday the 12th I was informed that the Courts of the supreme Court and Court of Appeal and the Chambers of all judges had been locked and barred and armed police guards had been placed on the premises to prevent access to them.** The judges had been effectively locked out."

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

vehemently objected to proceedings de novo. This matter was referred to a Bench of 09 Judges, as referred to above, which had to consider whether it was mandatory for the judges to have taken their oath before the President of the Republic.

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

> "Two other major crises – one involving the whole Supreme Court and the Court of Appeal and the other involving the Chief Justice – had to be weathered before the first 185 years were completed.
>
> The first was described by Chief Justice Samarakoon in Karthigesu Vishvalingam and others vs. Don John Francis Liyanage and others, S. C. Application No. 47 of 1983, as
>
> > "a classic example of the uncertainties of litigation and the vicissitudes of human affairs. The annals of the Supreme Court do not record such a unique event and I venture to hope there never will be such an event in the years to come." (page 97 – 98)

Dr. Amerasinghe added,

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

Whereas one who is interested in the details of this episode, which was, with profound respect to the learned Chief Justice, not unprecedented in the annals of the Supreme Court may read Dr. Amersainghe's aforesaid work; for the

information of the new generation of Judges and Lawyers, who perhaps do not know about it, I venture to record here, that, when our first Chief Justice Sir Codrington Edmund Carrington presided with one other Judge in the court of equity, which became the Supreme Court of British Ceylon, Edmund Henry Lushington, due to a dispute arose between the Court and the Army due to the use of "parade grounds" in Fort, Major General David Douglas Wemyss, the lieutenant governor of Ceylon ordered the closure of "every entrance into the Fort" from 8 o'clock in the morning till 12 noon or 1 p.m., ostensibly on security reasons, which disrupted the Court and Wemyss, who ranked in the protocol next to the Governor was summoned before the Court, examined for eight hours and released on a recognizance of a hundred thousand Rix dollars to keep the peace and to be in good behaviour for one year. It was as a result of this incident, that, the Judges had to come to Hulftsdorp from Fort. Incidentally, that too happened in the month of September in the year 1804 on 24th. It is recorded, that, on 03rd October, when Wemyss, the Commander of the Forces and Lieutenant Governor of Ceylon appeared, in Court, surrounded by the officers of the Garrison and armed and the ground around the Court and the Parade Ground were filled with soldiers who were talking aloud, the Chief Justice having inquired of Wemyss what was meant by so unusual an assemblage, added that if it was intended to intimidate the Judges, not all the guns at the Garrison levelled at their Lordships would have that effect. The Commander disclaimed such intentions and orders were given forthwith to the soldiers to disperse and keep the peace. The Crier of the Court was directed to proclaim the order that no one was to remain in the Court premises with their swords or bayonets, on which order there was compliance by all including the General and his suite[1]. (Dr. Amerasinghe at page 459)

[1] I know that one might question the relevance of this passage. But having quoted Chief Justice Samarakoon in Visuvalingam vs. Liyanage, 1983, that it was the first time such an incident took place I only thought it is appropriate to relate this story from the time of Ceylon's First Chief Justice and the profundity and splendor of that incident, as I think, if included in a "foot note" will be an insult to the great foundations on which the Supreme Court of this country is built. Dr. Amersinghe describes this incident in his above book from page 446 onwards as

Although C. A. Tax 27/2017 referred to the decision of the learned Chief Justice in regard to the effect of Article 126(5) of the Constitution, this Court is of the view now that the 09 Bench judgment of **Visuvalingam and others vs. Liyanage** and others was referred to in C. A. Tax 17/2017 and as the learned Chief Justice who wrote the lead judgment of the majority of the Judges said at page 214 that "**The principle of interpretation that govern ordinary law are equally applicable to the provisions of a Constitution**", it is pertinent to also consider the basis of the decision of the majority of the Judges, as envisaged from the judgment of the learned Chief Justice as to how it was interpreted that the requirement of taking the oath before the President himself was not mandatory.

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

As the judgment said,

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

"Coming to Hulftsdorp". I myself had alluded to this episode in my Article "Legend, Legacy and Lucence of Hulftsdorp" published in the Judge's Journal in September 2017 and also used as the introduction to the "self running" PowerPoint presentation I prepared under the title "Judiciary's Decade of Resurgence 1999 – 2009", which was shown to a gathering of Judges and other distinguished guests at function held to commemorate the services rendered by the then incumbent Chief Justice in a renowned Hotel in the Fort of Colombo on the evening of 16th May 2009. The Original source of this episode is "The Ceylon Law Review."

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

Article 107(4) provided that a person appointed as a Judge of the Supreme Court or a Judge of the Court of Appeal "shall not enter upon the duties of his office until he takes and subscribes or makes and subscribes before the President", the required oath or the affirmation.

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

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

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

> "…**Any such public officer, judicial officer, person or holder of an office *failing to take and subscribe such oath or make and subscribe such affirmation* after the commencement of the Constitution on or before such date as may be prescribed by the Prime Minister by Order published in the Gazette *shall cease to be in service or hold office."***

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

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

"…submitted that the mutation must be done in this manner delete all the words in Article 165(1) except the words "failing to take and subscribe such oath or make and subscribe such affirmation" and the words "shall cease to be in service or hold office" and for those words that have been deleted substitute the words "Any such person or officer". So that the mutation results in the following article

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

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

The learned Chief Justice said, (at page 216)

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

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

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

His Lordship added,

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

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

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

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

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

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

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

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

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

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

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

[2] **Mohammad Hidayatullah** OBE (pronunciation; 17 December 1905 – 18 September 1992) was the 11th Chief Justice of India serving from 25 February 1968 to 16 December 1970, and the sixth vice president of India, serving from 31 August 1979 to 30 August 1984. He had also served as

The learned Judge decided,

> "The section speaks of sixty days, and the starting point is certain and there can be no dispute. Since the application under section 66(1) is to "require" the Tribunal to refer a case the obvious construction is that the "requiring" must be within 60 days. Now a person is "required" to do something only when he knows of it and not while the letter is lying in a post office unknown to him. The Tribunal is "required" to refer the questions when the application reaches the Tribunal and not before. The sub section nowhere uses the phrase "require by an application made within 60 days", which has been expounded in the Orissa High Court. The sub section read grammatically means only that the Tribunal must be "required" within 60 days to refer the questions, and then the Tribunal must within 90 days make the reference. There is really no hiatus [a pause] between terminus ad quem [the point at which something ends] of the limitation for applications and the terminus a quo [starting point] of the 90 days in which the reference has to be made. For this second period the terminus a quo [starting point] is also the receipt of the application. The section, in my opinion, is quite clear and does not admit of any other construction." (page 225 – 226)

The learned Judge Mohammad Hidayatullah concluded his judgment saying,

> "…In my opinion even the Tribunal cannot by rules extend the period and the remedy is only with the legislature as was pointed out by Chagla C. J., in the Bombay case referred to above. I agree with the Bombay Chief

---

the acting president of India from 20 July 1969 to 24 August 1969 and from 6 October 1982 to 31 October 1982 and from 25 July 1983 to 25 July 1983 and from 25 July 1984 to 25 July 1984.[1] He is regarded as an eminent jurist, scholar, educationist, author and linguist.[2][3]

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

Justice that some amendment is absolutely necessary, but till that is done Courts must give effect to the law as it stands".

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

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

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

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

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

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

Supreme Court in the Special Determination pertaining to the Amendment to the Tax Appeals Commission Act in 2013.

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

> "The Tax Appeals Commission was created under the Tax Appeals Commission Act No. 23 of 2011. Appeals that were pending under the Inland Revenue Act No. 10 of 2006, the Value Added Tax Act No. 14 of 2002, Nation Building Tax Act No. 09 of 2009 and the Economic Service Charge Act No. 13 of 2006 stood removed by operation of law to the newly created Tax Appeals Commission".
>
> "However, the Inland Revenue Act No. 28 of 1979 and the Inland Revenue Act No. 38 of 2000 had not been included. This left a lacunae in the law because, there were indeed tax appeals arising out of these two statutes which ought to have stood removed to the Tax Appeals Commission which was now the exclusive body created for the hearing of tax appeals. As the respondent submitted, Clause 07 amends section 10 of the principal enactment and provides for the lacunae in the law in relation to appeals from the Inland Revenue Act No. 28 of 1979 and Inland Revenue Act No. 38 of 2000".
>
> "Clause 07 seeks to clarify the period of time given to the Commission to determine the appeal by stating as follows:-
>
> > "Two hundred and seventy days from the date of the commencement of the sittings for the hearing of such appeal."
>
> "Clause 07 also inserts a proviso which provides that all appeals pending before the respective Board or Boards of review in terms of the provisions of the respective enactments shall with effect from the date of operation of this Act, be deemed to stand transferred to the Commission and the

Commission shall notwithstanding any provision contained in any other written law, make its determination within twenty four months of the date on which the Commission shall commence its sittings for the hearing of each such appeal".

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

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

It was said,

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

The grouse of the learned President's Counsel was that whereas an appellant appealing against a decision of the Commissioner General of Inland Revenue must deposit either 10% of the tax determined as payable which is non refundable or an equivalent of 25% Bank guarantee which shall remain valid

until the appeal is determined by the Commission, there was no such requirement in respect of an appellant appealing against a decision of the Director General of Customs. It was argued that this is a violation of Article 12(1) and 12(2) of the Constitution.

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

The Supreme Court said,

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

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

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

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

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

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

> "Before I deal with the preliminary issues I desire to deal with the issue raised on the time limit of two months set out in Article 126(5) which states that the Supreme Court "Shall hear and finally dispose of any petition or reference within two months of the filling of such petition or the making of such reference". **The Deputy Solicitor General submitted that this provision was mandatory so that even a fault of the Court is no excuse.** An examination of the relevant provisions of the Constitution indicates that this provision is merely directory. **Fundamental Rights are an attribute of the Sovereignty of the People.** The constitution commands that they "Shall be respected, secured and advanced by all the organs of Government and shall not be abridged, restricted or denied save in the manner and to the extent (thereinafter) provided" (Article 4(d)). It is one of the inalienable rights of Sovereignty (Article 3). **By Article 17 every person is given the right to apply to the Supreme Court to enforce such right against the executive provided the complains to Court within one month of the infringement or threatened infringement** (Article 126). **These provisions confer a right on the citizen and a duty on the Court.** <u>If that right was intended to be lost because the Court fails in its duty the constitution would so have provided</u>. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed but fell short of punishment if disobeyed. I am of opinion that the provisions of Article 126(5) are directory and not mandatory. **Any other construction would deprive a citizen of his fundamental right for no fault of his.** <u>While I can read into the</u>

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

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

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

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

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

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

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

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

> "Although the above case was one involving of a fundamental right, the logic of the reasoning of Samarakoon C. J., is compelling and applicable to the present case as well. In terms of section 8(1) of the Tax Appeals Commission Act, it is only a person who is aggrieved by the determination of the Commissioner General of Inland Revenue in relation to the imposition of any tax, levy, charge, duty or penalty or the Director General of Customs under subsection (1B) of section 10 of the Customs Ordinance who can prefer an appeal to the Tax Appeals Commission. Section 9(10) of the Tax Appeals Commission Act allows the Tax Appeals Commission on appeal to confirm, reduce, increase or annul, as the case may be, the assessment determined by the Commissioner General of Inland Revenue or to remit the case to the Director General of Customs".

> "The Tax Appeals Commission Act does not spell out any sanction for the failure on the part of the Tax Appeals Commission to comply with the time limit set out in section 10 of the Tax Appeals Commission Act. If the appellant is correct in submitting that the time bar on the Tax Appeals Commission is mandatory, it will result in the validity of the impugned determination made by the Commissioner General of Inland Revenue been maintained for no fault of the aggrieved party where the Tax Appeals Commission fails to adhere to the time limit. Such deprivation of rights of the aggrieved party cannot be implied in the absence of clear and unambigouous statutory provisions."

Therefore the Court of Appeal commenced applying the passage from the judgment in **Visuvalingam vs. Liyanage** saying, "Although the above case was one involving of a fundamental right,..." the Court, it appears, took for granted, that, both situations are similar or identical. It is the position of this Court that it is not so due to following reasons.

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

On the other hand, under the system of self assessment of income tax by a citizen prevalent under the law on Income Tax, a citizen has been conferred with a right to pay the amount of tax he assesses, unless and until he is deprived of doing so by the assessor rejecting his self assessment. But it does not stop at the assessor under the law. From there it goes to the Commissioner General and to the Tax Appeals Commission. This is the end of it as far as the disputing (or not disputing) of the self assessment is concerned. Can anyone dispute this simple argument? The answer is no, because from the Tax Appeals Commission

onwards there lies no appeal either by the citizen (taxpayer) or the Commissioner General on the factual dispute on the self assessment. What goes up from the Tax Appeals Commission up to this Court is only a Case Stated on Questions of Law. What goes up from there to the Supreme Court is only an appeal which assesses the correctness or otherwise of the answers given by this Court to those Questions of Law.

In fact, unlike in the Fundamental Rights case, there is no adjudication at any stage either by a Court or a Tribunal or any other body, in whatever name it may be called, in the sense of an exercise of judicial power under Articles 4(c) and 105 of the Constitution. But in a Fundamental Right application the alleged infringement of a fundamental right or the language right is adjudicated under Article 126 by the highest court of the land under Article 105(1)(a) the Supreme Court of the Republic of Sri Lanka. The learned Chief Justice in **Visuvalingam vs. Liyanage** said,

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

So, 09 Judges of the Supreme Court, on the strength of Article 126(5) of the Constitution, which was added to the Constitution by the legislature in the exercise of a part of sovereignty, but not otherwise, decided, that, they can "read into the constitution a duty on the Supreme Court to act in a particular way". But the Supreme Court said, that, it will not do so to deprive "a citizen's guaranteed right due to circumstances beyond his control." **Because, the citizen's guaranteed right required adjudication, the Court did not hold that the time limit was mandatory. But here, the citizen has been conferred a right to pay on his self assessment unless and until it is validly disputed.** If it needed adjudication under the Constitution it could have been done only in terms of Article 4(c) and 105. Adjudication cannot be done otherwise since the Preamble to the Constitution enunciates INDEPENDENCE OF THE JUDICIARY

as an intangible heritage that guarantees the dignity and well being of succeeding generations of the People of Sri Lanka which includes tax payers. His Lordship Kanagasabapathy J. Sripavan, Chief Justice in the course of His Lordship's determination on the 19th Amendment to the Constitution said that the Preamble is a part of the Constitution. It is a long standing principle too. In *The London County Council vs. The Bermondsey Bioscope Company Limited, 08th and 09th December 1910, [1911] 1 K. B. 445,* C. A. Russell K. C. for the cinema argued, that, "**The title of the Act is part of the Act: Fielding vs. Morley Corporation [1899] 1 Ch. 1".**

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

> "(3) Where a person has furnished a return of income, the Assessor or Assistant Commissioner may in making an assessment on such person under subsection (1) or under subsection (2), either–
>
> (a) **accept the return made by such person; or**
>
> (b) if he does not accept the return made by that person, **estimate the amount of the assessable income** of such person and assess him accordingly:..."

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

The Assessor or the Assistant Commissioner under section 163(3)(b) is not an independent body such as a Court or a Tribunal or other institution under Article

4(c) and Article 105. He is the one who started the dispute of disputing the tax payer's self assessment. It could be that a particular tax payer on receiving an intimation of non acceptance of the self assessment may make representations to the Assessor or to the Assistant Commissioner and the latter accepts the position of the tax payer. This position which was succinctly explained by **Justice Victor Perera** in **Ismail vs. Commissioner of Inland Revenue (1981) 2 SLR 78** was considered by me in **ACL Polymers (Pvt) Limited vs. Commissioner General of Inland Revenue, C. A. Tax 09/2023 decided on 09.12.2022.** In the same judgment the case of **D. M. S. Fernando vs. Mohideen Ismail**, the appeal of the above case to the Supreme Court was also considered. From the decision of the Assessor or the Assistant Commissioner the tax payer appeals to the Commissioner General, who is the superior of the former. The contest is between the self assessment and the estimate prepared by his subordinate officer. Before the Tax Appeals Commission too, the only appellant is the taxpayer as the Commissioner General was the decision maker. The Commissioners, although they include retired Judges of the Superior Courts because the legislature in establishing the Tax Appeals Commission in 2011 wanted it to consist of non tax officers as well, are neither appointed by the Head of the State or the Judicial Service Commission, as done in Courts, Tribunals and other institutions under Articles 4(c) and 105 of the Constitution.

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

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

Taxes are required for the maintenance of a welfare government. But the days that considered that all time limits are for the citizen and not for the official, unfortunately for some, are at an end. The officialdom and bureaucracy, which are remnants of feudalism are taking their due place on the face of Sovereign People in other parts of the world too. Despite the "citizen" under the Constitutional Monarchy in Great Britain is called a "subject" in **Sadiq Ahmed vs. The Commissioners for Her Majesty's Revenue and Customs [2020] UKFTT (United Kingdom First tier Tribunal) 337 (TC)** allowed the taxpayer's appeal against a penalty for failing to comply with an information notice because the penalty notice was not issued within 12 months of the taxpayer becoming liable to a penalty and HMRC could not refresh the time period by issuing a subsequent information notice. **Judge Anne Redston** decided,

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

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

The article "**Managing Income Tax compliance through Self Assessment**," by **Andrew Okello** dated 11th March 2014 published in **IMF eLibrary**[3] says, among other things, the following,

> **"**B. Self-assessment Implementation
>
> 12. **The self-assessment system accepts the reality that no tax administration has, or ever will have, sufficient resources to determine the correct liability of every taxpayer.** It also recognizes that taxpayers themselves—with appropriate assistance from the tax department—are in the best position to determine their tax liabilities, given that they have first-hand knowledge of their business affairs and financial transactions, and have ready access to underlying accounting records.
>
> 13. **Self-assessment is based on the idea of voluntary compliance.** In a self-assessment system, taxpayers calculate and pay their own taxes without the intervention of a tax official. If this is not done appropriately and within the prescribed timeframes, the tax administration detects this failure and takes appropriate enforcement action, including applying the penalties provided for in the law. Tax administrations generally accept tax returns at face value (i.e. not subjected to technical scrutiny) at the time of filing, at which time the tax due is paid. Some simple checks may be performed; however, the focus is to ensure arithmetical accuracy and that the taxpayer has completed the appropriate items on the tax return form.
>
> .....
>
> 17. **Internationally, there has been a steady movement towards self-assessment and away from administrative assessment practices.** Self-assessment for tax purposes is not a new phenomenon. Canada and the United States first implemented self-assessment in the 1910s, followed by

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

Japan in 1947 (Loo et al., 2005). In the last 30 years, however, the spread of self-assessment for income tax has been a common phenomenon—Sri Lanka (1972), Pakistan (1979), Bangladesh (1981), Indonesia (1984), Australia (1986-87), Ireland (1988), New Zealand (1988) and the United Kingdom (UK) in 1996-97 (Noor et al., 2013). Presently, around half (18) of revenue bodies in the OECD, for example, apply self-assessment principles for the PIT while 22 apply self-assessment for CIT (OECD, 2013)".

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

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

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

"

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

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

In the speech, " STARE DECISIS By Honorable Edward D. Re Chief Judge, United States Customs Court[4]", it was said,

> "Of course, the issues raised in a case stem from the facts presented. **The facts of the case, therefore, are of the utmost importance.** The Latin maxim, **ex facto oritur jus**, tells us that **the law arises out of the facts**. Of particular relevance are the following observations by Professor Brumbaugh[5]:
>
> > Decisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between litigants. Their use in after cases is an incidental aftermath. A decision, therefore, draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has presumed to adjudicate. In order, therefore, that this quality may be rendered with **the highest measure of accuracy**, it sometimes becomes necessary to **expressly limit its application to the peculiar set of circumstances out of which it springs**.
>
> Hence, the authority of the precedent depends upon, and is limited to, "the particular facts and conditions of the case" that the prior case "presumed to adjudicate." Precedents, therefore, are not to be applied blindly. The precedent must be analyzed carefully to determine whether there exists a similarity of facts and issues, and to ascertain the actual holding of the court in the prior case".

Therefore the words of Lord Simonds,

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

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

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

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

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

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

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

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

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

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

Despite the majority in the House of Lords and the Court of Appeal thinking, that, the amalgamation of "Magor" and "St. Mellons" would extinguish their rights independently of each other they had to claim compensation and what Parliament would have provided could only be a

matter of guesswork [Lord Simonds said at page 841, "If a gap is disclosed, the remedy lies in an amending Act"] Denning L. J., was not deceived by "labels", "Magor", "St. Mellons" and now "Magor and St. Mellons". He said,

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

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

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

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

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

"My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Morton of Henryton, is about to deliver and I fully concur in his reasons and conclusion, as I do in those of Parker J. and the majority of the Court of Appeal. Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of Denning L. J., appears to invite some comment.

My Lords, the criticism which I venture to make of the judgment of the learned lord justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions and I am content to say that I agree with my noble and learned friend. But it is on the approach of the lord justice to what is a question of construction and nothing else that I think is desirable to make some comment, for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned lord justice lays down for the guidance of himself and, presumably, of others. He said: ([1950] 2 All E. R. 1236):

"We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment **than by opening it up to destructive analysis."**

The first part of this passage appears to be an echo of what was said in Heydon's case (1584) 3 Co. Rep. 7a; 76 E. R. 637; 42 Digest 614, 143, three hundred years ago and, so regarded, is not objectionable. But in a way in which the learned lord justice summarises **the broad rules laid down by SIR EDWARD COKE in that case**[6] may well induce grave misconception of the function of the court. The part which in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need re statement. It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament – and not only of Parliament but of Ministers also – cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: see, for instance, Assam Railways & Trading Co., Ltd. vs. Inland Revenue Commissioners [1935] A. C. 445 and particularly, the observations of LORD WRIGHT [1935] A. C. 458.

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

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

refers) cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act. For the reasons to be given by my noble and learned friend I am of opinion that this appeal should be dismissed with costs."

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

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

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

intent of the makers of the Act, *pro bono publico*[7]." [Emphasis added in this judgment]

[End of the Quotation]

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

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

If, the facts of Heydon's case about 439 years ago is stated in a very simple form, the religious college Ottery College leased a manor also called Ottery to Ware the father and Ware the son for their lives. But it later leased the same parcel to Heydon for eighty years. Suppression of Religious Houses Act of 1535 brought by Henry[8] VIII dissolved many religious houses including the Ottery College. The college lost its lands to the king. But a provision in the Act kept alive any grant made more than an year before the enactment of the statute, for a term of life. The Court of Exchequer found that the grant to the Wares is valid whereas the grant to Heydon was not.

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

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

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

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

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

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

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

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*. **And it was said, that in this case the common law was, that religious and ecclesiastical persons might have made leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases:** now the stat of 31 H. 8. doth provide the remedy, and principally for such religious and ecclesiastical houses which should be dissolved after the Act (as the said college in our case was) that all leases of any land, whereof any estate or interest for life or years was then in being, should be void; and their reason was, that it was not necessary for them to make a new lease so long as a former had continuance; and therefore the intent of the Act was to avoid doubling of

estates, and to have but one single estate in being at a time: for doubling of estates implies in itself deceit, and private respect, to prevent the intention of the Parliament. And if the copyhold estate for two lives, and the lease for eighty years shall stand together, here will be doubling of estates *simul & semel* which will be against the true meaning of Parliament[9]."

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

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

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

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

> "(03) **Any transfer to a tenant of any burden or liability previously borne by the landlord** shall, for the purpose of this Act be treated as an alteration of rent and where, as the result of such a transfer, the terms on which a dwelling house is held are on the whole less favourable to the

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

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

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

> "Was the tenant previously under any "burden" which now falls on the landlords? It is said that during the previous tenancy the landlords did in fact provide the hot water and that therefore the tenant was under no burden. This is where the rub comes I confess that according to the ordinary meaning of the word "burden" the tenant was under no burden previously to provide hot water. But neither were the landlords. There was no legal obligation on the landlords to provide hot water and if they for any reason, good or bad, decided to cut it off, the tenant would have no legal ground of complaint. When the price of the fuel rose the landlords would both legally and morally have been justified in saying that they would not provide hot water unless they were paid a contribution towards the increase in cost. **The tenant was therefore under the contingent burden, as a matter of practice, of providing the hot water himself, or paying a contribution towards the increased cost, or going without.** Under the changed terms all that burden falls on the landlords. No matter how much the price of fuel rises, no matter how difficult it is to obtain, the landlords can no longer cut off the hot water or ask the tenant for a

contribution towards the increase in cost. The change of terms does therefore put on the landlords a burden which previously fell contingently on the tenant."

He continued,

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

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

Lord Simonds, it appears with respect, was not only incorrect in dividing Denning L. J.'s statement into two and purporting to apply the rules in Haydon's case only to the first part, but also wrong in saying that Sir Edward Coke[10] decided that case. **It is ironical, that, people who are averse to "filling in the gaps and making sense of the enactment" readily accept "ironing out the creases" without knowing that it all comes in one.**

In the article "**ON ASSESSING THE ROLE OF COURTS IN SOCIETY**," by Dr. Shimon Shitreet[11], published in Volume 10, 1980 of the Manitoba Law Journal it is said,

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

[10] 1584 was the reign of Elizabeth. Coke was knighted by her successor James I who came to the throne in 1603

[11] LL.B., LL.M. (Jerusalem); M.C.L., D.C.L. (Chicago); of the Faculty of Law, Hebrew University of Jerusalem; Visiting Professor, Faculty of Law, University of Manitoba (1977-1978).

After I have incorporated the above passage from Denning L. J., in **Seaford Court Estates Ld. Vs. Asher [1949] K. B. 481, at page 498,499,** which was done in this case but before that in another case[12], where the draft was prepared about two months ago[13], it was found that Mahinda Samayawardhena J., in the Supreme Court 07 Judge Bench case **S. C. Appeal 11 2021** delivered on 14th November 2023 has also cited with approval the same passage from Seaford Court Estates Ltd., giving a "purposive interpretation" to Act No. 04 of 1990[14].

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

Charles Stephens in his book "**The Jurisprudence of Lord Denning A Study in Legal History Volume III Freedom under the Law: Lord Denning as Master of the Rolls, 1962-1982**", Cambridge Scholars Publishing, 2009 in its INTRODUCTION THE OBITUARIES OF LORD DENNING in Notes under No. 01 says,

> "Lord Denning was first appointed to the Court of Appeal in 1948. He was promoted to the House of Lords by Harold Macmillan on 24th April 1957. **In his Romanes lecture of 1959, delivered in the University of Oxford, Lord Denning seemed to go so far as to claim that the House of Lords, in its judicial capacity, should appropriate legislative powers to itself enabling it to change the law when it needed changing, rather than having to wait on the more leisurely process of Parliamentary law making.** Although the Practice Statement of 1966 was a move in this direction, in 1959 such radicalism was anathema to the senior Law Lord, Lord Simonds. Although Lord Denning often dissented from the majority decision in the Lords, his dissent could make little or no impact.

[12] C. A. Tax 17 2015.
[13] Which has not been delivered up to now.
[14] Recovery of Loans by Banks Act No. 04 of 1990.

Frequently he was at odds with Lord Simonds in particular who once memorably expressed his distaste for Lord Denning's preference for 'filling in the gaps' left by poor or confusing drafting as 'a naked usurpation of the legislative function under the thin disguise of interpretation.' **According to the Sunday Times obituary, it was the frustration which resulted from conflict with Lord Simonds that led Lord Denning to accept the apparent demotion from the House of Lords consequent on his acceptance of the office of Master of the Rolls in April 1962.** In the Court of Appeal, Lord Denning's judgments, even the dissenting ones, could have much more impact on the shaping of the law than was possible in the House of Lords. It is also worth noting that Lord Denning's appointment to the Court of Appeal on 19th April 1962 was made by Harold Macmillan. Macmillan was an unorthodox Conservative who was the author of a number of relatively radical initiatives between 1957 and 1962 ranging from the creation of Life Peerages, the setting up of the National Economic Development Council, the establishment of new Universities and, most radically of all, the application, in 1961 of the United Kingdom to join the European Economic Community[15].

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

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

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

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

---

quoting from the letter which Harold Macmillan wrote to him on his retirement on 28th July 1982 in which he praised him for his 'commonsense, fair play and justice' and concluded 'as Lord Mansfield and Lord Camden, so Lord Denning'. Lord Denning then commented that 'Macmillan was a very great man'. Landmarks in the Law [London 1984 p. 365].

that disability[16], to determine whether there should be a change in that law and what the change should be."

Justice Micheal Kirby also says,

> "Needless to say Lord Denning's view of his role frequently drove him into dissent from other more conventional judges. Even where, in the Court of Appeal, he carried the day, he was sometimes reversed in the House of Lords in chilling language. One of his abiding concerns was to reform the law of contract. **He waged a battle over a quarter of a century against the unfair exclusion of claims by written terms, sometimes found obscurely on the back of a ticket or form.** But to his 1951 plea for the law to look at the reality of contract relationships, the Lords answered coldly. "Phrases occur", said Viscount Simon[17] "which give us some concern." (British Movietone News Ltd. v. London and District Cinemas Ltd. [1952] A.C. 166, 181-182.) Lord Simonds added, "It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to saying that there has been or need be any change in the well-known principles of construction of contracts."

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

But as far as this case and section 10 of the Tax Appeals Commission Act are concerned, no mischief rule or a "purposive interpretation" is required. In fact no interpretation at all is required but the application of the provision. Sir Roger Manwood, Chief Baron in Heydon's case said, "<u>that for the sure and true interpretation of all statutes in general</u>." Narotam Singhe Bindra says, as it would be seen, in Chapter 07 page 297, that "...General

[16] It is not that the legislature does not have that disability, but what it legislates subject to that infirmity also goes as law.

[17] This is not Viscount Simonds but another Law Lord.

and comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment…" (State of Bombay vs. Ali Gulshan AIR 1955 SC 810) Also, as it would be seen and as Rowlatt J., said in Cape Brandy Syndicate vs. Inland Revenue Commissioners (1921) 12 TC 358 at page 366, "In taxation you have to look simply at what is clearly said. There is no room for any intendment;…"

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

Sometime ago, this judgment referred to the Golden Rule of interpretation in Chapter 03 of the book of **Narotam Singh Bindra.** He says at Chapter 07 page 297, "…General and comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment…" (State of Bombay vs. Ali Gulshan AIR 1955 SC 810) He discusses in Chapter 11 the situation when the language is plain. He says,

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

order to defeat its object rather than with a view to carry its object into effect." (page 441)

He also says,

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

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

"**It must also be remembered that the rule of strict construction of penal statutes as modified in the modern times is not so rigid or unbending as it was in times gone by when the cutting down of a cherry tree in an orchard or the begging or wandering without a pass by a soldier or sailor was punishable in the United Kingdom with death.** During the present times the rules mean very little more than that such statutes are to be fairly construed like all others according to the legislative intent as expressed by the statute itself or arising out of it by necessary implication. (Emperor vs. Noor Mohamed AIR 1928 Sind. 1,7 (FB)). What that 'little more' is, has been stated by Pollock, B., in Parry v. Croydon Commercial Gas Co., ((1863) 15 CB (NS) 568) in the following passage

> "It appears to me that in construing a penal statute of any kind, we are bound to take care that the party is brought strictly within it, and to give no effect to it beyond what it is clear that the Legislature intended. If there be any fair and legitimate doubt, the subject is not to be burthened. Though no doubt in modern times, the old distinction between penal and other statutes has, in this respect,

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

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

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

In Chapter 21 page 652 he says,

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

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

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

It says,

> "Court assembled for hearings at 10.00 a.m. on 13.07.2017, 18.07.2017, 20.07.2017, 21.07.2017, 24.07.2017 and 25.07.2017. Determination : A Bill entitled 'Inland Revenue' was published in the Government Gazette on 19.06.2017 and placed on the Order Paper of the Parliament on 05.07.2017.
>
> .....
>
> Clause 200
>
> This Clause refers to the interpretation of the provisions of the Act. This applies also to Court of law in interpreting the provisions of the Act. This refers to the manner of interpreting the Act and its provisions and the material to be considered for the purpose of interpreting the Act. Interpretation of status is a part of the Judicial power. The Learned President Counsel for the Petitioner in SC/SD/9/2017 strenuously argued that Clause 200 encroach upon the judicial power and it violates Article 3 and 4 of the Constitution. Clause 200 is reproduced below:
>
> Interpretation and avoidance of doubts
>
> 200. (1) In interpreting a provision of this Act, a construction that would promote the purpose or object underling the provision or the law (whether that purpose or object is expressly stated in the law or not), shall be preferred to a construction that would not promote that purpose or object.

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

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

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

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text and taking into account its context in this Act and the purpose or object underlying this Act, leads to a result that is manifestly absurd or its unreasonable.

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

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

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

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

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

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

It is well settled law that interpreting statutes is power vested in Courts and considered as part of the judicial power. When interpreting statutes Courts will follow the well established rules of interpretations. **If the language is clear and unambiguous there is no need for interpretation and it is a matter of applying the Law.** When Court interpreting statutes it will consider the purpose and object of the Act as disclosed in the preamble, long title or in the body of the Act. Therefore any Act requiring Court to follow a particular method of interpretation or consider material not forming part of the Act amounts to encroaching upon powers of the Judiciary and repugnant to the doctrine of separation of powers recognized in the Article 3 and 4 of the Constitution.

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

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

and other material not forming part of the Act, to be considered in interpreting the provisions of the Act. We are of the view this Clause violates Articles 3 and 4 of the Constitution".

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

It is also noted, that, in C. A. Tax 17 of 2021, the Commissioner General of Inland Revenue, the respondent, has filed a written submission dated 25th January 2023 in which at paragraph 31 reference has been made to the case Mr. S. P. Muttiah vs. The Commissioner General of Inland Revenue, C. A. Tax 46/2019 decided on 30th July 2021. It is submitted, that, in that case the Court based on Caldow vs. Pixcell (1877) 1 CPD 52 566 and Dharendra Krisna vs. Nihar Ganguly AIR 1943 Calcutta 266 stated that,

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

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

For the plaintiff it was argued, that, the effect of holding the period of three months to be imperative is to cast upon the plaintiff the cost of all repairs and

that the primary object of the legislature was that the buildings of a benefice should be kept in repair, which object will be defeated if section 29 is construed to be imperative.

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

Denman J., said

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

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

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

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

Now what is a tax statute?

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

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

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

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

> ""42. The scope and object of a statute are the only guides in determining whether its pro-visions are directory or imperative. In the absence of an

express provision, the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. No universal rule can be laid down for the construction of statutes as to whether any en-actment shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed: Liverpool Borough Bank v. Turner (1860) 2 De. F. & J. 502 at p. 507, per Lord Campbell L.C. In each case the subject-matter is to be looked to and the importance of the provision in question in relation to the general object intended to be secured by the Act, is to be taken into consideration in order to see whether the matter is compulsive or merely directory. In the particular case before us, the statute secures to zemin-dars the extraordinary power of realising what they claim as balance due before the claim is established in any Court of justice. In securing this extraordinary power the statute lays down certain formalities to be observed by the zemindars and expressly makes them solely responsible for the observance thereof. Where powers, rights or im. munities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred and it is therefore probable that such was the intention of the Legislature (Maxwell on the Interpretation of Statutes, Edn. 7, p. 316.)".

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

The appellant in this case in its Written Submissions dated 14th October 2023 at paragraph 32 cites the following,

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

"Where a statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act to be done as mandatory, but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement. But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time."

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

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

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

"It is thus well-established that an enactment in form mandatory might in substance be directory and that the use of the word "shall" does not conclude the matter (Hari Vishnu Kamath v Ahmad Ishaque AIR 1955 SC 233 referring to Julius v. Bishop of Oxford (1880)

5 A.C. 214 HL. Section 10 of the Tax Appeals Commission Act does not say what will happen if the Tax Appeals Commission fails to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended. Dr. Shivaji Felix referring to in the five-judge decision of D.M.S. Fernando and another v. A.M. Ismail (1982) IV Reports of Sri Lanka Tax Cases 184, 193 submitted that penal consequences need not be laid down in order for a provision to be held mandatory and that in such case, the Court has to consider the natural consequences that would follow where Parliament had not prescribed a sanction for breach of a mandatory provision".

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

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

As Lord Denning, M. R. said in the Court of Appeal the dairy farmers of England and Wales sold their milk to the Milk Marketing Board. The Board paid a higher price to dairy farmers in the South Eastern region than those in the Far Western region. The reason was because the South Eastern are much nearer to London and if they were free, they would sell their milk in London and would have to bear their own costs of transport. The cost of Sussex farmers in transporting their milk to London will be much less than that of Cornish farmers. The Board

recognized this and paid a "differential" to the South Eastern farmers. They complained that this, which was fixed long ago by the Minister during the war, was too low.

Lord Reid referring to each party's arguments said,

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

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

In regard to the contention of the Minister, for such a contention was raised, that he "is not bound to give any reasons for refusing to refer a complaint to the committee" Lord Reid having examined the case of Julius vs. Bishop of Oxford [1880] 5 App. Case, 214, H. L. (E)[18] said,

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

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

The words material in Julius' s case were,

> "…It "shall be lawful" for the Bishop of the diocese "on the application of any party complaining thereof" to issue a commission for inquiry". (page 1033)
>
> "…It was held that the words "it shall be lawful" merely conferred a power.
>
> "But there may be something in the **nature** of the thing empowered to be done, something in the **conditions** under which it is to be done, something in the **title of the person or persons for whose benefit the power is to be exercised**, which may couple the power with a duty and make it the duty of the person on whom the power is reposed, to exercise that power when called upon to do so" (per Lord Cairns L. C. 222 – 223)

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

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

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

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

> "[30] He referred to the proposition of law that was lucidly explained by Samarakoon C.J, at pp.184, 190 wherein His Lordship stated as follows:
>
> > "The statute itself contains no sanction for a failure to communicate reasons. If it had the matter would be easy of decision. But the matter does not rest there. One has to make a further inquiry. "If it appears that Parliament intended disobedience to render the Act invalid, the provision in question is described as "mandatory", "imperative" or "obligatory"; if on the other hand compliance was not intended to govern the validity of what is done, the provision is said to be "directory" (Halsbury's Laws of England, Ed 3 Vol. 36-page 434 S. 650). Absolute provisions must be obeyed absolutely whereas directory provisions may be fulfilled substantially (Vide- Woodward vs Sarson (1875) (L.R.10 cp 733 at 746). No universal rule can be laid down for determining whether a provision is mandatory or directory. "**It is the duty of Courts of Justice to try to get at the intention of the legislature by carefully attending to the whole scope of the Statute to be construed per Lord Campbell in Liverpool Borough Bank vs Turner (1860) (2 De CF. & J 502 at**

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

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

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

"Where a power or authority is conferred with a direction that certain regulation or formality shall be complied with, **it seems neither unjust**

nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority. Lord Campbell, L.C., formulated the test to be adopted in regard to this question, in the case of The Liverpool Borough Bank vs. Turner, (1860) 30 LJ Ch. 379., as : "..... in each case you must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory." (page 269)

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

> "An analogous difficulty presents itself here in the question whether the Merchant Shipping Act 1854 having omitted the prohibitory words "otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity", is to be considered as mandatory or merely directory with respect to the mode which it prescribes for carrying contracts into effect; **because, if the Legislature enacts that a transaction must be carried out in a particular way, the words that otherwise it shall be invalid at law and in equity are mere surplusage[19]**". (page 707)

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

Question No. 02:

(02) Did the Tax Appeals Commission err in law when it concluded that the assessment was valid despite the fact that the assessor who made

[19] excessive or nonessential matter

the assessment was not the same person who has sent the notice of assessment?

The letter of intimation setting out the reasons for rejecting the assessment is dated 13th October 2014 and is signed by P. D. S. D. Jayananda, Assistant Commissioner. This is the reasons that should go with the notice of assessment. The notice of assessment, which is the charge due to which the tax becomes due has been signed by Mrs. H. H. T. Priyanthi, Commissioner. It is dated 22nd December 2014. Therefore the question is whether a notice of assessment can be issued to the appellant by a person other than the person who sent the reasons for making the assessment.

The appellant relies on sections 163 and 164 of the Inland Revenue Act No. 10 of 2006.

Section 163(1) says,

> "…an Assessor Assistant Commissioner may,… assess the amount which in the judgment of the Assessor Assistant Commissioner ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith–…"

Section 164 provides,

> "An Assessor or Assistant Commissioner shall give notice of assessment to each person and each partnership who or which has been assessed, stating the amount of income assessed and the amount of tax charged:…"

Section 194(1) provides,

> "(1) Every notice to be given by the Commissioner- General, a Deputy Commissioner, or an Assessor or Assistant Commissioner under this Act, shall bear the name of the Commissioner-General or Commissioner or Assessor or Assistant Commissioner, as the case may be, and every such notice shall be valid if the name of the Commissioner-General, Deputy

Commissioner, or Assessor or Assistant Commissioner is duly printed or signed thereon".

Furthermore section 08 of the Nation Building Tax Act No. 09 of 2009 provides, among other things, that, provisions in Chapter XXII relating to Assessments shall mutatis mutandis apply to furnishing of returns, assessments, appeal against assessments, finality of assessments and penalty for incorrect returns, tax in default and sums added thereto, recovery of tax, miscellaneous, penalties and offences, administration and general matters under this Act subject to the following modifications.

The argument of the appellant is that the function of making an assessment and sending a notice of assessment are functions that must be performed by one and the same person in view of the fact that section 163(1) clearly contemplates that these functions should be performed by the same person.

It is also argued, that, as the requirement for making an assessment is set out in section 163(1) of the Act the amount of tax which in the judgment of the Assessor ought to be paid must be determined by the Assessor and by notice in writing require such person to pay the tax forthwith. The position of the appellant is that the power to make the assessment is coupled with a duty of sending the notice of assessment.

In the judgment of the case **ACL Polymers (Pvt) Limited vs. Commissioner General of Inland Revenue, C. A. Tax 09/2013 decided on 09th December 2022**, I have referred to the case of **Ismail vs. Commissioner of Inland Revenue (1981) 2 SLR 78**, in which Justice Victor Perera in the Court of Appeal analysed the procedure to be followed when an assessor decides not to accept a particular return.

It was said, [in ACL Polymers case]

"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[20]) (page 19 – 20 of my judgment) [Emphasis added in this judgment]

Immediately thereafter in case No. C. A. 09/2013 I have considered the position taken by the Supreme Court, in appeal, in **D. M. S. Fernando vs. Mohideen Ismail (1982) 1 SLR 222** and said, [in ACL Polymers case]

"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,

[20] Copy that was available in the Law Net Website, which is currently not functioning.

“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 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." (page 20 – 21 of my judgment)

Then I said at page 21 of my earlier judgment,

"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".

Then at page 23 I said,

"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) [Emphasis made in C. A. Tax 09/2013 judgment]

Then I further said at page 24, [in ACL Polymers case]

"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) 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." [Emphasis as in case No. C. A. Tax 09/2013 except the underlining of the words, "was changed in the Supreme Court".]

I continued at page 24, [in ACL Polymers case]

"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)

Therefore, it would be very clear, that, as to why learned Victor Perera J., said that communication of reasons by the Assessor as to why he is not accepting the self assessment should be prior to the statutory notice of assessment, or the "charge" was to give an opportunity for the tax payer to make representations to the Assessor. Sometimes, then, they could arrive at a compromise. That would expedite the recovery of tax and avoid litigation. But on an interpretation of the relevant provision, the learned Chief Justice in the Supreme Court said that reasons could be sent at or about the time statutory notice or the "charge" is sent.

In the passage from the judgment of the learned Chief Justice N. D. M. Samarakoon, Q. C., which I reproduced above as from page 23 of my earlier judgment, His Lordship said, "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". Therefore the learned Chief Justice has expressly considered that view before His Lordship came to the view that reasons could be sent at or before the time statutory notice or the "charge" is sent.

What the learned Chief Justice said was,

"The learned Chief Justice said, "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."

I have said this at paragraph 13 of the summary attached to the judgment in C. A. Tax 09/2013.

Now if as Justice Victor Perera said, the tax payer should be given an opportunity to make representations to the Assessor, between the serving of reasons and the serving of statutory notice, there seems to be a justification that the one who sends the reasons and the one who sends statutory notice should be the same one. But still for all there could be exceptions. What if the Assessor leaves the Inland Revenue Department after sending reasons and before sending statutory notice?

But currently the law is, that, reasons could be sent at or about the time statutory notice is sent. It cannot be later than that. Therefore it appears that on the basis of reasons sent by one Assessor another Assessor or any other officer of that department can send the statutory notice.

The appellant argues that the sending of statutory notice is not a mere ministerial act because such an act is one which does not require discretion and can be enforced by a writ of mandamus. (vide., Lord Woolf, Sir Jeffery Jowell et al in De Smith's Judicial Review, London: Sweet & Maxwell, 08th Edition, 2018 at page 1078).

But in the case of *Padfield and others vs. The Minister of Agriculture, Fisheries and Food, [1968] A. C. 997,* referred to above, although the Court of Appeal did not issue a mandamus to compel the Minister doing the act the omission of which was complained because his power was discretionary Lord Reid in the House of Lords said judicial review can be brought to address discretionary powers.

Section 194(1) requiring the name of the Assessor who send the statutory notice printed or signed on it does not mean that it should be the same Assessor who sent reasons.

Furthermore section 163(1) says,

> "163. (1) Where any person who in the opinion of **an Assessor or Assistant Commissioner** is liable to any income tax for any year of assessment, has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, **an Assessor Assistant Commissioner may,** subject to the provisions of subsection (3) and (5) and after the fifteenth day of November immediately succeeding that year of assessment, **assess the amount which in the judgment of the Assessor Assistant Commissioner ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith–..."**

It always say "an Assessor or Assistant Commissioner". The section does not say,

> "Where any person who in the opinion of **an Assessor or Assistant Commissioner** is liable to any income tax...**the** Assessor or Assistant Commissioner may..."

On the same basis this Court followed in respect of Question No. 01, that when the section imposes a time limit, but does not confer power to extend it, the Court cannot read into the section, here too the Court cannot impose a condition that the same Assessor who sent reasons must send the statutory notice.

Hence this Court is unable to agree with the contention of the appellant in respect of Question No. 02.

Therefore Question No. 02 must be answered as "No".

Question No. 03:

(03) Did the Tax Appeals Commission err in law when it ignored the fact that the tax assessed and the tax declared as per the notice of assessment was one and the same and therefore the assessment was invalid in law?

The appellant has also argued that the notice of assessment is incorrect. The reason is that the figures indicated as per computation for the assessment (vide page 59 of the Tax Appeals Commission's brief) and the actual figures in the return (vide page 56 of that brief) as set out in the notice of assessment (vide page 60 of the said brief) do not tally. Hence according to the notice of assessment, the amount in the return and the assessment are the same. It is also submitted for the appellant that the Tax Appeals Commission has not referred to this question in its determination.

It appears to this Court that the respondent does not have an answer to give to controvert this position appearing in black and white. What is submitted in written submissions dated 11th of May 2023 is that Inland Revenue Act supports that precedence need to be given to substance over form. But the question of the arithmetical figures is not a matter of form but of the substance.

It is also submitted for the respondent that if the power exercised by the Commissioner General or the Assessor is referable to a jurisdiction that confers validity on such power, any omission to refer to the section under which he exercises such power will not itself render such exercise of power invalid or void. Whereas the non reference to the empowering section is excusable the wrong exercise of jurisdiction (as the amount is incorrect) cannot be the right exercise of the jurisdiction.

Therefore the appellant is entitled to obtain an answer to this question as prayed for.

Question No. 04:

(04) Is assessment of Nation Building Tax and penalty as determined by the Commissioner General of Inland Revenue and confirmed by the Tax Appeals Commission excessive, arbitrary and unreasonable in view of the fact that it came within the scope of section 03(2)(iv)(08) of the Nation Building Tax Act No. 09 of 2009 (as amended)?

Prior to examining the effect of section 03(2)(iv)(08) it is pertinent to refer to the case of **Vallibel Lanka (Private) Limited vs. Director General of Customs, S. C. Appeal 26/2008 [2008] 1 SLR 219** in which Kanagasabapathy J. Sripavan J., (later Hon. Chief Justice) (with Sarath Nanda Silva C. J. and Gamini Amaratunge J., agreeing) said,

> "It is the established rule in the interpretation of statutes levying taxes and duties, not to extend the provisions of the statute by implication, beyond the clear import of the language used or to enlarge their operation in order to embrace matters not specifically pointed out. **In case of doubt, the provisions are construed most strongly against the state and in favour of the citizen thus, the intention to impose duties and or taxes on imported goods must be shown by clear and unambiguous language and cannot be inferred by ambiguous words.** The court cannot give a wider interpretation to section 16 as claimed by the learned Deputy Solicitor General merely because some financial loss may in certain circumstances be caused to the state. Considerations of hardship, injustice or anomalies do not play any useful role in construing fiscal statutes. One must have regard to the strict letter of the law and cannot import provisions in the Customs Ordinance so as to apply and assume deficiency".

In his Written Submissions dated 11th May 2023, the respondent argues, that,

> "17. The appellant agrees that the additional Nation Building Tax liability assessed on the sale of lubricants and the sale of Bitumen and the relevant tax has already been paid accordingly."

"18. The appellant contests that the additional Nation Building Tax liability assessed on the sale of petrol and diesel in third party filling stations as the turnover derived from manufactures petrol and diesel are exempted articles under Part 1 of the First Schedule of Nation Building Tax Act and non manufactured petrol and diesel are excluded articles under section 3(2)(iv) of the Nation Building Tax Act".

It is further stated in that Written Submission at paragraph 19 as follows,

"19. The appellant's argument is that the appellant's products of brands such as Xtrapremium and Tramila go through a chemical process, falls within the meaning of manufactured according to the definition of the term "manufacture" in the Nation Building Tax Act."

It appears to this Court, that, what was said in paragraph 19, that the appellant argues that it is a manufacturer is actually the alternative argument.

The main substantive argument of the appellant is based on the provisions of section 03(2)(iv)(08) itself.

Prior to examining these sections it is appropriate to examine section 02 of the Act as to "**Persons to whom this Act applies**" according to the "side note".

2. (1) The provisions of this Act shall apply to every person who –

(a) imports of any article, other than any article comprised in the personal baggage of the passenger, into Sri Lanka, ["baggage" shall have the same meaning as in section 107A of the Customs Ordinance (Chapter 235)]; or

(b) carries on the business of manufacture of any article; or

(c) carries on the business of providing a service of any description: or

(d) **carries on the business of wholesale or retail sale of any article other than such sale by the manufacturer of that article being a manufacturer to whom the provisions of paragraph (b) applies…" [Emphasis in the Original]**

Then section 03 under the "side note" "**Imposition of a Nation Building Tax**" refers to the "**liable turnover**". It says,

"3. (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged from **every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner:- [Emphasis in the Original]**

(i) in the case of a person referred to in paragraph (a) of subsection (1) of section 2, who imports any article into Sri Lanka on or after January 1, 2009 the tax shall be chargeable in respect of the **liable turnover** of such person arising from the importation into Sri Lanka of such article; and [Emphasis added in this judgment]

(ii) in the case of a person referred to in paragraph (b) (c) or (d) of subsection (1) of section 2, for every quarter commencing on or after January1, 2009 (hereinafter referred to as "relevant quarter", the tax shall be chargeable in respect of the **liable turnover** of such person for such relevant quarter". [Emphasis added in this judgment]

Section 03(2) goes on to define the term "**liable turnover**". It says,

"(2) In this section "liable turnover"

(i) with reference to any person referred to in **paragraph (a) of subsection (1) of section 2** arising from the importation of any article, means the value of that article ascertained for the purpose of Value Added Tax under section 6 of the Value Added Tax Act, No.

14 of 2002, but does not include the value of any excepted article referred to in the First Schedule to this Act;

(ii) with reference to any person and to any relevant quarter referred to in **paragraph (b) of subsection (1) of section 2**, means the sum receivable whether received or not from the sale in Sri Lanka, in that quarter, of every article manufactured by such person , other than any excepted article referred to in the First Schedule to this Act;

(iii) with reference to any person referred to in **paragraph (c) of subsection (1) of section 2** and to any relevant quarter means the sum receivable, whether received or not, from the provision in Sri Lanka of any service referred to in that paragraph other than any excepted service referred to in the First Schedule to this Act;

(iv) with reference to any person referred to in **paragraph (d) of subsection (1) of section 2** and to any relevant quarter means the sum receivable whether received or not from the sale in that quarter, of any article, other than—

(1) pharmaceuticals;

(2) sugar, dhal, potatoes, onions, dried fish, milk powder or chilies under the provisions of the Special Commodity Levy Act, No. 48 of 2007, where such article is subsequently sold by the importer of such article; and

.....

(8) petrol, diesel or kerosene sold in a filling station".

The appellant submits at paragraph 83, that,

"It must be noted that Nation Building Tax is not a transaction or supply based tax but is a tax that is imposed on the liable turnover of a person to whom the Act applies."

The appellant "Lanka IOC PLC" sells wholesale items at a filling station.

Hence the appellant comes under Section 02(1)(d) of the Act which says,

> "(d) **carries on the business of wholesale or retail sale of any article other than such sale by the manufacturer of that article being a manufacturer to whom the provisions of paragraph (b) applies..." [Emphasis in the Original]**

Therefore in regard to the appellant section 03(2)(iv) applies.

Therefore the cumulative effect of the relevant parts in section 03 subsection 01 and subsection 02 are as follows,

> " "3. (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged from **every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner:- [Emphasis in the Original]**

.....

> (ii)in the case of a person referred to in paragraph (b) (c) or (d) of subsection (1) of section 2, for every quarter commencing on or after January1, 2009 (hereinafter referred to as "relevant quarter", the tax shall be chargeable in respect of the **liable turnover** of such person for such relevant quarter". [Emphasis added in this judgment]

"(2) In this section "liable turnover"

.....

> (iv)with reference to any person referred to in **paragraph (d) of subsection (1) of section 2** and to any relevant quarter means the sum receivable whether received or not from the sale in that quarter, of any article, other than—

.....

(08)petrol, diesel or kerosene sold in a filling station".

Hence upon the plain reading of the relevant parts of the section, which learned Sripavan J., (later Hon. Chief Justice) advocated, the appellant is not liable. As the reference in the relevant parts of section 03(1) and (2) are to section 02(1)(d) the exemption includes "the business of wholesale or retail sale". There is nothing more, there is nothing less.

The cases in England consonant with Justice K. J. Sripavan's decision, as the appellant has cited, are **Cape Brandy Syndicate vs. Inland Revenue Commissioners (1921) 12 TC 358 at page 366** in which the immortal words of Rowlatt J., said,

> "In taxation you have to look simply 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; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."

Inland Revenue Commissioners vs. Ross and Coulter [1948] 1 All E R 617 at page 625 in which Lord Thankerton said,

> "On the other hand if the provision is reasonably capable of two alternative meanings the court will prefer the meaning more favourable to the subject" and

In **Partington vs. Attorney General (1969) LR 4 HL 100 at page 122** in which Lord Cairns said,

> "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown seeking to recover the tax cannot bring the subject within the letter of the law the subject is free however apparently within the spirit of the law the case might otherwise appear to

be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Simply adhering to the relevant parts in section 03(1) and 03(2) with section 02(1)(d) is what this Court did.

Therefore Question No. 04 must be answered "Yes".

Question No. 05:

> **Did the Tax Appeals Commission err in law when it failed to consider the appellant's alternative argument that it could be regarded as a manufacturer of the relevant products?**

As discussed under Question No. 04, the respondent has confused this position with the aforesaid position under the plain application of section 03(1) and 03(2) with section 02(1)(d).

In as much as the respondent in paragraph 19 above said that appellant argued that brands such as Xtrapremium and Tramila go through a chemical process, it is submitted for the appellant that,

> "132. The appellant blends **Lanka Auto Diesel, Lanka Petrol 92 Octane** and **Lanka Petrol 92 (Euro III)** in order to make **Xtramile** [not Tramila] **Xtra premium EURO 3** and **Xtra premium 95** respectively. For the manufacturing of premium products the appellant imports various additives and blends and normal diesel and petrol with additive. The appellant does the blending of the product only in respect of the order quantity. No stocks are maintained for blended premium products since blending is done as per the specific specification with the tank trucks which are used to transport product from terminal to retail outlets. These products come within the scope of the term manufacture."

Under section 10 of the relevant Act it is provided, that,

"**Manufacture**" means any process for -…

(ii)assembling or joining any article whether by chemical process or otherwise;…"

Therefore it is clear that the appellant can, in the alternative, come under the meaning of a "manufacturer" too.

Then the following statutory regime will apply.

"2. (1) The provisions of this Act shall apply to every person who –

……

(b) carries on the business of manufacture of any article; or

……

" "3. (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged from **every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner:- [Emphasis in the Original]**

……

(ii)in the case of a person referred to in paragraph (b) (c) or (d) of subsection (1) of section 2, for every quarter commencing on or after January1, 2009 (hereinafter referred to as "relevant quarter", the tax shall be chargeable in respect of the **liable turnover** of such person for such relevant quarter". [Emphasis added in this judgment]

"(2) In this section "liable turnover"

……

(ii)with reference to any person and to any relevant quarter referred to in **paragraph (b) of subsection (1) of section 2**, means the sum

receivable whether received or not from the sale in Sri Lanka, in that quarter, of every article manufactured by such person , other than any excepted article referred to in the First Schedule to this Act;

……."

The First Schedule includes,

"(xi) Petroleum and Petroleum products;…"

Therefore under the alternative argument too, the appellant is exempted.

Question No. 06:

In view of the facts and circumstances of the case did the Tax Appeals Commission err in law in arriving at the conclusion that it did?

The appellant submits, that, the notice of assessment is dated 22nd December 2014, the appeal on 20th January 2015, the determination of the Commissioner General on 28th November 2016 and the determination of the Tax Appeals Commission on 19th April 2021.

Section 02 of the Nation Building Tax (Amendment) Act No. 03 of 2020 provides, that,

"Section 03 of the Nation Building Tax Act No. 09 of 2009 as last amended by Act No. 20 of 2019 is hereby further amended in subsection (1) by the substitution for the words "be charged from every person" of the words and figures "be charged prior to December 1,2019 from every person".

How that section appeared prior to the amendment was as follows,

" "3. (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged from **every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner:- [Emphasis in the Original]**

Therefore it would now read as,

> " "3. (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged prior to December 01, 2019, from **every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner:- [Emphasis in the Original]**

The appellant cites the case Whitney vs. The Commissioners of Inland Revenue (1925) 10 TC 89 in which the three stages of imposition of a tax was identified as (01) declaration of liability (02) the assessment and (03) the method of recovery.

On that basis it appears to this Court, that, after 01st December 2019 the particular tax cannot be recovered.

Therefore Question No. 06 must be answered "Yes. The Tax Appeals Commission failed to take into account Nation Building Tax (Amendment) No. 03 of 2020".

Hence the Questions of Law are answered as follows:-

(01) Is the determination of the Tax Appeals Commission time barred by operation of law?
Yes.

(02) Did the Tax Appeals Commission err in law when it concluded that the assessment was valid despite the fact that the assessor who made the assessment was not the same person who has sent the notice of assessment?
No.

(03) Did the Tax Appeals Commission err in law when it ignored the fact that the tax assessed and the tax declared as per the notice of assessment was one and the same and therefore the assessment was invalid in law?
Yes.

(04) Is assessment of Nation Building Tax and penalty as determined by the Commissioner General of Inland Revenue and confirmed by the Tax Appeals Commission excessive, arbitrary and unreasonable in view of the fact that it came within the scope of section 3(2)(iv)(8) of the Nation Building Tax Act No. 09 of 2009 (as amended)?

Yes.

(05) Did the Tax Appeals Commission err in law when it failed to consider the appellant's alternative argument that it could be regarded as a manufacturer of the relevant products?

Yes.

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

"Yes. The Tax Appeals Commission failed to take into account Nation Building Tax (Amendment) No. 03 of 2020".

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

Judge of the Court of Appeal.

Hon. Neil Iddawala J.,

I agree.

Judge of the Court of Appeal.