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

"VALUE ADDED TAX (AMENDMENT) BILL"

SC (SD) No. 62/2022

Petitioners:

(1) Heiyanthuduwage Don Indika Ajith Wijesinghe,
178/3, Mabima, Heiyanthuduwa.

(2) Brahmanage Premalal,
Chairman,
Condominium Developers Association of Sri Lanka,
C/O, Ceylon Chamber of Commerce,
50, Nawam Mawatha, Colombo 2.

(3) Sellaperumage Pinsiri Fernando,
Secretary,
Condominium Developers Association of Sri Lanka,
C/O, Ceylon Chamber of Commerce,
50, Nawam Mawatha, Colombo 2.

Counsel: Dr. K. Kanag-Isvaran, PC with Lakshmanan Jeyakumar

SC (SD) No. 63/2022

Petitioner: M. Victor,
149/44, Graceland City,
Diwulapitiya Road,
Demanhandiya, Negombo.

Counsel: Dharshana Weraduwage with Dhanushi Kalupahana and Ushani Atapattu

Respondent: Attorney General

Counsel: Nirmalan Wigneswaran, Deputy Solicitor General with Shiloma David, State Counsel

BEFORE:	Jayantha Jayasuriya, PC	Chief Justice
	S. Thurairaja, PC	Judge of the Supreme Court
	Arjuna Obeyesekere	Judge of the Supreme Court

The Court assembled for hearing at 10.00 a.m. on 26th October 2022.

A Bill titled, "Value Added Tax (Amendment) Bill" [*the Bill*] was published as a Supplement to Part II of the Gazette of 23rd September 2022, issued on 27th September 2022. It was presented in Parliament by the Hon. Prime Minister and Minister of Public Administration, Home Affairs, Provincial Councils and Local Government, and was placed on the Order paper of Parliament on 18th October 2022.

Articles 120, 121 and 123 of the Constitution

Article 120 of the Constitution provides that, "*The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution*."

Article 121(1) goes on to state that:

> "*The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament and a copy thereof shall at the same time be delivered to the Speaker …*"

In terms of Article 123(1), "*The determination of the Supreme Court shall be accompanied by the reasons therefor and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution*."

Where a primary determination is made as provided in Article 123(1) that the bill or any provision thereof is inconsistent with the Constitution, the consequential determinations that the Court is required to make are specified in Article 123(2).

Four Petitioners have accordingly invoked the jurisdiction of this Court in terms of Article 121(1) by filing the above numbered petitions in the Registry of the Supreme Court on 21st and 25th October 2022. Upon receipt of the said petitions, the Registrar of this Court issued notice on the Hon. Attorney General as required by Article 134(1) of the Constitution.

The Bill

The Bill comprises of five clauses including Clause 1 (short title) and Clause 5 (Sinhala text to prevail in case of inconsistency). According to the Statement of Legal Effect, the purpose of the amendments proposed in Clauses 2, 3 and 4 are as follows:

(a) Clause 2 – Increase the rate of the Value Added Tax [*VAT*] specified in Section 2 of the Value Added Tax Act, No. 14 of 2002, as amended [*the VAT Act*] on the value of goods or services supplied, or goods imported, in the following manner:

  (i) from 8% to 12% with effect from 1st June 2022 to 31st August 2022; and

  (ii) from 12% to 15% with effect from 1st September 2022.

(b) Clause 3 – Decrease the threshold for registration specified in Section 10 of the VAT Act from Rs. 300 million to Rs. 80 million per annum with effect from 1st October 2022.

(c) Clause 4 – Remove the exemption from VAT specified in Part II of the First Schedule of the VAT Act on the supply of condominium residential accommodation with effect from 1st October 2022.

While none of the Petitioners have any grievance over the provisions contained in Clauses 2 and 3 of the Bill, they claim that Clause 4 is retrospective in application and in any event, is violative of the Rule of Law, the Directive Principles of State Policy and Articles 3, 4, 12 and 14(1)(h) of the Constitution, and hence needs to be approved by the special majority of Parliament and by the People at a Referendum.

The learned Deputy Solicitor General submitted that:

(a) Clause 2 only seeks to confirm the VAT rate stipulated by way of Orders made under Section 2A of the VAT Act, and hence, although the said rates have already been implemented, the issue of retrospectivity does not arise in respect of Clause 2;

(b) An amendment will be moved at the Committee Stage of Parliament to the second proviso to Section 10(1) by specifying that the fifteen day period provided therein for a person to be registered for the purposes of Section 10 shall commence only from the date of enactment of the Bill;

(c) The Bill was formulated on the basis that it would be enacted by Parliament by 1st October 2022 and as such Clause 4(2) specified 1st October 2022 as the effective date from which condominium residential accommodation will be liable for VAT. However, due to the delay in presenting the Bill, he submitted that an amendment will be moved at the Committee Stage of Parliament to amend "September 30, 2022" referred to in Sub Clause (1) of Clause 4 to read as "November 30, 2022" and "October 1, 2022" referred to in Sub Clause 2 of Clause 4 to read as " December 1, 2022".

In these circumstances, the issue of retrospectivity arising from Clause 4 which had been raised in the two petitions was not pursued by the Petitioners, and for that reason, this Court shall refrain from making any determination on this issue.

Absence of a Minister of Finance

Mr. Dharshana Weraduwage, the learned Counsel for the Petitioner in SC (SD) Application No. 63/2022, submitted at the outset that even though the Cabinet Memorandum relating to the Bill has been presented to the Cabinet of Ministers by the *Minister of Finance, Economic Stabilization and National Policies*, a Member of Parliament is yet to be appointed to the said Cabinet Ministerial portfolio of Finance, Economic Stabilization and National Policies, and for that reason:

(a) there is no valid decision by the Cabinet of Ministers;

(b) there is non-compliance with the provisions of Article 152 of the Constitution, Standing Order No. 133 and Paragraph 5(vi) of the "Guidelines on Submission of Cabinet Memoranda/Notes."

He therefore submitted that this Court cannot proceed to determine the constitutionality of the Bill in terms of Articles 121 and 123 of the Constitution since due process leading up to the presentation of the Bill in Parliament has not been followed.

Article 78(2) provides that the passing of a Bill by Parliament shall be in accordance with the provisions of the Constitution and the Standing Orders of Parliament. The Guidelines referred to by Mr. Weraduwage are only an informal set of instructions in the preparation of Cabinet Memoranda, and is outside the purview of Article 78(2). In any event, the submission of Mr. Weraduwage that paragraph 5(vi), which specifies that a Cabinet Memorandum shall be listed only once the observations of the Ministry of Finance are obtained, has no application as the relevant Memoranda have been submitted by the Minister of Finance.

The learned Deputy Solicitor General, whilst submitting that a Minister of Finance does exist, submitted that in any event, the appointment of a Minister of Finance is within the executive power of the President, and therefore forms no part of the legislative process and is outside the jurisdiction conferred on this Court by Article 121.

Articles 44(1) and (2), as it stood prior to the 21st Amendment to the Constitution, and re-produced below, are relevant in considering whether a Minister of Finance did exist at the time the Cabinet of Ministers considered the Bill.

Article 44(1)

" *The President shall, from time to time, in consultation with the Prime Minister, where he considers such consultation to be necessary –*

(a) determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers; and

(b) appoint from among the Members of Parliament, Ministers to be in charge of the Ministries so determined."

Article 44(2)

" The ***President may assign to himself any subject or function*** *and* ***shall remain in charge of any subject or function not assigned to any Minister*** *under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45 and may for that purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President*" [emphasis added].

The cumulative effect of Article 44(1) and (2) is that (a) while the President may assign any subject or function to himself, (b) the President shall remain in charge of any subjects or functions not assigned to any Minister. Thus, Article 44(2) makes it clear that the President can hold a ministerial portfolio in one of the two ways specified therein.

By a notification published in Gazette Extraordinary No. 2289/43 dated 22nd July 2022, the President, acting in terms of Article 44(1)(a) of the Constitution, had determined the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions, and Departments, Public Corporations and Statutory Institutions to the said Ministries. The said notification stipulated further that:

> "*All such subjects and functions and Departments, Public Corporations and Statutory Institutions that are not specifically assigned to any Minister will continue to remain in my charge as the President*."

The Schedule annexed to the said notification includes the Ministry of Finance, Economic Stabilisation and National Policies, which has been vested, *inter alia*, with the duty of "*Formulation, implementation, monitoring and evaluation of policies, programmes and projects, in relation to the subjects of Finance, Economic Stabilization*

and Taxation." It is observed that the VAT Act is one of the many laws that are to be implemented by the Minister in charge of the said Ministry.

By a further notification published in Gazette Extraordinary No. 2290/17 dated 26th July 2022, the President, acting in terms of Article 44(1)(b) of the Constitution, had appointed twenty three Ministers and assigned to such Ministers the Ministries mentioned against their names. The portfolio of Finance, Economic Stabilization and National Policies has not been assigned to any Minister. When the aforementioned notifications are considered together, it is clear that the President has retained to himself the portfolio of Finance, Economic Stabilization and National Policies, as permitted by Article 44(2) and the President therefore is the Minister of Finance.

In these circumstances, we are not in agreement with the submission of the learned Counsel for the Petitioner that a Minister of Finance did not exist at the relevant time.

Compliance with Article 152 of the Constitution

Article 152 of the Constitution reads as follows:

> *"No Bill or motion, authorising the disposal of, or the imposition of charges upon, the Consolidated Fund or other funds of the Republic, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in Parliament except by a Minister, and unless such Bill or motion has been approved either by the Cabinet of Ministers or in such manner as the Cabinet of Ministers may authorise."*

Standing Order No. 133 provides as follows:

> *"Parliament shall not proceed upon the consideration of any motion, Bill or amendment thereto authorizing disposal or imposition of charges upon the Consolidated Fund or other funds of the Republic or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force unless introduced by a Minister of the Cabinet of Ministers who shall, before making such motion, introducing such Bill or moving such amendment, signify to Parliament the approval of the Cabinet of Ministers to such motion, Bill or*

amendment. ***An indication on the Order Paper of Parliament that "Cabinet approval is signified" shall be deemed sufficient in compliance to this requirement****"* [emphasis added].

In the **Value Added Tax (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2016-2017), Vol. XIII, 57 at pages 59-60] this Court, having considered the above two provisions, held as follows:

"*The combined effect of Article 152 read with Standing Order 133 makes it abundantly clear that prior to the presentation of a Bill in Parliament, it is mandatory that:*

(i) The approval of the Cabinet of Ministers on such Bill has to be obtained;

(ii) When introducing, the Bill has to signify to Parliament the approval of the Cabinet of Ministers; and

(iii) The Bill has to be introduced to Parliament by a Minister."

The learned Deputy Solicitor General submitted that:

(a) On 30th May 2022, the Cabinet of Ministers had approved the Cabinet Memorandum dated 28th May 2022 submitted by the then Minister of Finance, Economic Stabilisation and National Policies, seeking *inter alia* to increase the VAT rate from 8% to 12%; decrease the VAT threshold from Rs. 300 million to Rs. 120 million per annum; and remove the exemption on condominium residential accommodation;

(b) On 30th August 2022, the Cabinet of Ministers had approved the Cabinet Memorandum of the same date submitted by the Minister of Finance, Economic Stabilisation and National Policies, seeking *inter alia* to implement the revision of the VAT rate specified in the Interim Budget, 2022;

(c) On 12th September 2022, the Cabinet of Ministers had approved the Cabinet Memorandum dated 5th September 2022 submitted by the Minister of Finance,

Economic Stabilisation and National Policies, seeking *inter alia* to further lower the VAT threshold from Rs. 120 million to Rs. 80 million per annum;

(d) On 22nd September 2022, the Cabinet of Ministers had approved the Cabinet Memorandum of the same date submitted by the Minister of Finance, Economic Stabilisation and National Policies, and the draft Bill to amend the VAT Act that was annexed to the said Memorandum.

Thus, it is clear that the Bill itself had been presented to the Cabinet of Ministers by the Minister of Finance, Economic Stabilisation and National Policies, and that the Cabinet of Ministers have approved the amendments that are now sought to be effected by the Bill to the VAT Act, and the Bill itself.

Furthermore, (a) the Order Paper of Parliament for 18th October 2022, which has been produced with both petitions, confirms that at the time the Bill was introduced to Parliament, the fact that such Bill had been approved by the Cabinet of Ministers had been signified to Parliament; (b) the Bill presented in Parliament contains an endorsement that it has been presented by a Minister on 18th October 2022.

In the above circumstances, we are satisfied that the Bill complies with the provisions of Article 152 of the Constitution.

Clause 4 of the Bill

We shall now consider the submissions of the learned Counsel for the Petitioners in relation to Clause 4, which proposes to remove the exemption from VAT in the supply of any condominium residential accommodation.

The 2nd and 3rd Petitioners in SC (SD) Application No. 62/2022 are the Chairman and Secretary, respectively, of the Condominium Developers Association of Sri Lanka. The 1st Petitioner in the said application and the Petitioner in SC (SD) Application No. 63/2022 are persons who had entered into agreements to purchase condominium residential accommodation.

At the time the VAT Act was introduced in 2002, the supply, lease or rent of residential accommodation was exempt from VAT in terms of item (xxiii) of the First Schedule to

the original VAT Act. The only exclusion was the supply of residential accommodation by an enterprise that had entered into an agreement with the Board of Investment and where the total cost of the project relating to such agreement was not less than USD 10 million and the project related exclusively to the said supply, lease or rental. Thus, a mixed development project was exempt from VAT. The provisions of the Value Added Tax (Amendment) Act, No. 11 of 2015 extended VAT liability to mixed development projects, by excluding projects that related exclusively or partially to residential accommodation from the exception to the VAT exemption *(Item (xi) paragraph (b), Part II, Schedule I).*

The Value Added Tax (Amendment) Act, No. 20 of 2016 granted an exemption from VAT only on the supply of residential accommodation after 1st November 2016. Lease and rent of residential accommodation were therefore made subject to VAT. *(Item (xi) paragraph (b), Part II, Schedule I)*

The Value Added Tax (Amendment) Act, No. 25 of 2018 limited the application of the above position to the commencement date of the 2018 Act (16th August 2018). It then proceeded to provide that from 1st April 2019 the following would apply:

(a) Lease or rent continued to be subject to VAT;

(b) The supply of residential accommodation not relating to condominium housing was exempt;

(c) The supply of condominium housing in any projects where the cost of any single housing unit in that project was not more than Rs. 15 million was exempt.

Therefore, the supply of condominium property where any single unit exceeded Rs. 15 million was liable to VAT. The said threshold was increased to Rs. 25 million by the Value Added Tax (Amendment) Act, No. 19 of 2019 and was applicable until 1st December 2019.

The 2018 Act appears to have inadvertently not made any provision for the period commencing from 16th August 2018 to 1st April 2019. However, the 2019 Amendment extended the application of the provisions introduced in 2016, until just prior to 1st

April 2019. The 2019 Amendment also exempted the following categories of the supply of residential accommodation:

(a) The sale of a condominium housing unit where a notarially executed agreement to sell had been executed prior to the date of commencement of the 2019 Act (31st October 2019);

(b) The sale of a condominium housing unit where a certificate of conformity had been issued prior to the date of commencement of the 2019 Act.

In terms of the Value Added Tax (Amendment) Act, No. 9 of 2021, from 1st December 2019, the supply of all residential accommodation, other than lease or rent, has been exempt from the payment of VAT. Thus, all supplies of condominium residential accommodation regardless of the value of any unit in the project were exempt from VAT.

It is therefore clear that while the supply of residential accommodation has consistently been exempt from VAT, the legislature has from time to time thought it fit to exempt from VAT, all or some categories of condominium residential accommodation.

Clause 4 of the Bill (read together with the amendment that is proposed to be moved at the Committee Stage of Parliament to Clause 4 with regard to the date) seeks to remove the aforementioned exemption from VAT referred to in Part II of the First Schedule to the Act, relating to the supply of condominium residential accommodation with effect from 1st December 2022. The result is that from 1st December 2022 the supply of condominium residential accommodation would no longer be exempt from VAT. The supply of a condominium residential accommodation after 1st December 2022 would therefore be liable for VAT.

The complaint of the Petitioners representing the Condominium Developers Association is that the imposition of VAT would result in an increase in the cost of condominium residential accommodation, thus affecting sales and an eventual slowdown of the construction industry which employs a large majority of its workforce from poor and marginalised segments of society. The complaint of those Petitioners

who had entered into agreements for the purchase of condominium residential accommodation is that they entered into such agreements based on their financial capacity in order to achieve their lifelong goal of owning a house, and that the effect of Clause 4 would be to increase the cost of such accommodation, which additional cost would be beyond their means. In essence, the complaint of all Petitioners is that the removal of the said exemption is unfair and would affect them financially.

Date of Supply

Responding to the submission of Mr. Weraduwage that Clause 4 seeks to impose VAT on the total purchase consideration that had been agreed with the developer even though part of the agreed purchase consideration has already been made, the learned Deputy Solicitor General submitted that in terms of Section 4(5) of the VAT Act, the time of supply in an agreement which provides for periodical payments (other than a hire purchase agreement) would be when the payment is due or when the payment is received, whichever is earlier. He submitted further that this position is made clear by the use of the words, "*if such supply has taken place on or after December 1, 2022*," in Clause 4(2) of the Bill and that accordingly, VAT shall be charged only on payments made after 1st December 2022. Therefore, while any sums of money paid to a developer in terms of a Sale and Purchase Agreement for the purchase of a condominium unit prior to 1st December 2022 will not be liable for VAT, it is only payments that fall due after 1st December 2022 that will be liable for VAT.

Article 14(1)(h)

Dr. K. Kanag-Isvaran, President's Counsel, appearing for the Petitioners in SC (SD) Application No. 62/2022 presented two arguments before us.

The first was that while the Universal Declaration of Human Rights recognises that, "*everyone has the right to own property alone as well as in association with others*", in terms of Article 14(1)(h) of the Constitution, every citizen is entitled to choose his residence within Sri Lanka. It was therefore sought to be argued that the imposition of VAT affects the fundamental right guaranteed by Article 14(1)(h), and hence, Clause 4 requires to be passed by the special majority of Parliament. We are of the view that while the imposition of VAT on the supply of condominium residential accommodation

is an issue that relates to the affordability on the part of a citizen to purchase such accommodation, it certainly does not take away the right of a citizen to own property, nor does it fetter or restrict in any manner the right of a citizen to choose his residence within Sri Lanka.

Article 27 – Directive Principles of State Policy

The second argument of Dr. Kanag-Isvaran, PC was based on (a) Chapter VI of the Constitution, titled 'Directive Principles of State Policy and Fundamental Duties' comprising of Articles 27 – 29, and (b) more particularly Articles 27(1) and 27(2)(c), which are re-produced below:

Article 27(1)

"*The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers* ***in the enactment of laws*** *and* ***the governance of Sri Lanka for the establishment of a just and free society***" [emphasis added].

Article 27(2)(c)

"*The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include –*

(c) the realisation ***by all citizens*** *of an adequate standard of living for themselves and their families, including adequate food, clothing and* ***housing****, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities;*" [emphasis added]

In order to place in perspective the said submission, it is perhaps important to state that in terms of Article 29, "*The provisions of this Chapter do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal*."

While correctly conceding that the Directive Principles of State Policy are not enforceable, Dr. Kanag-Isvaran, PC nonetheless submitted that this Court has held that the Directive Principles of State Policy are the *conscience of the Constitution* and

provide important guidance and direction to the various organs of the State in the enactment of laws. He submitted further that the Rule of Law requires the legislature to be guided by the said Directive Principles of State Policy in the enactment of laws, and the manner in which a financial burden has been imposed on the Petitioners by this Bill is contrary to the Rule of Law and is therefore a violation of Articles 3 and 4 of the Constitution.

Dr. Kanag-Isvaran, PC cited the judgment in **Seneviratne and Another v University Grants Commission and Another** [(1978-79-80) 1 Sri LR 182] where Wanasundera, J referring to the role played by the Directive Principles of State Policy stated as follows at pages 214-215:

> "*In Kesavananda Bharati v. State of Kerala [AIR 1973 SC 1461] all the Judges constituting the Bench had in one voice given the Directive Principles a place of honour in the Constitution. The Directive Principles, they said, "constitute the conscience of the Constitution." In State of Kerala v. Thomas, [AIR 1976 SC 490] Fazal Ali, J., observed –*
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> > *"In view of the principles adumbrated by this Court, it is clear that the Directive Principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these Directive Principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Arts. 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the Directive Principles*.""

Justice Wanasundera went onto state as follows:

> "*It is a settled principle of construction that when construing a legal document the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a constitutional provision is under consideration and, when relevant; this must necessarily include the Directive Principles. It has been said that the Directive Principles are in the nature of an instrument of instructions which both the Legislature and executive must respect and follow. The expressive language in the above citations is*

intended to emphasise the fact that these provisions are part and parcel of the Constitution and that the courts must take due recognition of them and make proper allowance for their operation and function."

In **Re Thirteenth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1987) Vol. III 21] two important but contrasting observations relating to the effect of the Directive Principles were made.

The first was by Sharvananda, CJ who delivered the opinion of the majority, who stated [at page 35] that, "*True the Principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government.*" Wanasundera, J delivering the minority judgment stated [at page 57] that, "*While the Indian Courts have leaned on these principles to resolve matters of doubt, I do not think that they should have any controlling effect on any provision of the Constitution. These Directive Principles are really ethical or moral principles to guide the State. If any kind of legal importance is to be given to them, this would make the constitution unworkable*."

More progressive views as to the role of the Directive Principles of State Policy have been taken by this Court in later years.

In **Haputhanthirige and Others v Attorney General** [(2007) 1 Sri LR 101], Sarath Silva, CJ held that:

"*The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. … Hence the restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert*."

The above position was reiterated in **Watte Gedara Wijebanda v Conservator General of Forests and Others** [(2009) 1 Sri LR 337 at 356] when this Court stated that, "*although the Directive Principles of State Policy are not specifically enforceable against the State,* ***they provide important guidance and direction*** *to the various*

organs of State in the enactment of laws and in carrying out the functions of good governance." [emphasis added]

In **Kirahandi Yeshin Nanduja De Silva and Another v. Sumith Parakramawansha and Others** [SC (FR) Application No. 50/2015; SC minutes of 2nd August 2017], Priyantha Jayawardena, PC, J observed as follows:

> "*The effect and the applicability of Directive Principles have been considered by Justice S. Sharvananda in his book titled Fundamental Rights in Sri Lanka (A Commentary) at page 55 where it states:*
>
> > *"Although [Directive] principles are expressly made unenforceable, that does not affect their importance and relevance. They are as important as the fundamental rights of an individual. They are relevant considerations in the enactment of laws.* ***They represent the aspirations of the people in Sri Lanka****. There is no disharmony between directive principles and the fundamental rights as they complement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare state. These principles are constitutionally binding on the State, even though they are not enforceable but are only to be taken into account in determining the validity of a law. Hence****, to determine the ambit and dimension of fundamental rights and what kind of restrictions that can be legitimately imposed on them by law, the directive principles set out in Article 27 are relevant***." [emphasis added]

It is clear that what has been laid down as the Directive Principles of State Policy are noble and laudable objectives that shall guide the legislature and the executive not only in the enactment of laws but also in the governance of the Country in order to establish a just and free society. The Principles, although directory, are indeed the conscience of the Constitution and would be instructive when they are used to interpret other provisions of our Constitution, or to determine the ambit and dimension of fundamental rights and what kinds of restrictions can legitimately be imposed on them by law.

As pointed out by the learned Deputy Solicitor General, the use of the words, '*all citizens*' in Article 27(2)(c) makes it clear that it is a pledge that the State has made to each and every citizen of this Country that its objective is to ensure an adequate standard of living for all citizens and their families. This pledge is not directed at an individual, a few of its citizens or to a class of persons but to **all citizens**. To claim that in the enactment of laws, the State must give preference to one group of persons – in this instance those who purchase condominium residential accommodation – over and above the rights of the rest of the citizens, without any basis to grant such preferential treatment, is not only unconstitutional but untenable.

Although it was submitted by Dr. Kanag-Isvaran, PC that the genesis of the Bill is irrelevant, the wording of Article 27(2)(c) brings into focus the submission made by the learned Deputy Solicitor General that the amendments to the VAT Act are being brought in to generate the much needed revenue to overcome the present economic circumstances faced by Sri Lanka, direct economic activity to the general welfare of society and thereby improve the living conditions of all citizens. This position of the learned Deputy Solicitor General needs no elaboration at this juncture, suffice to state that as at 2021, (a) the revenue to GDP ratio is 8.7%; (b) the budget deficit is 12.2% of the GDP; and (c) the debt to GDP ratio is at 104.6%.

The learned Deputy Solicitor General submitted that the fundamental truth is that the primary source of revenue for the State is the money which people earn themselves. He submitted further that in order to provide all citizens with an adequate standard of living and continuously improve the living conditions of its People, as well as achieve the other Principles set out in Article 27(2) and meet its expenditure, the State requires money, which can be generated *inter alia* by borrowing the money of its people or by resorting to foreign borrowing, by imposing taxes, charges, duties, levies, royalties etc., or by charging the people more for the services provided by the State. The learned Deputy Solicitor General therefore submitted that the Bill, while giving effect to the Government's overall taxation policy, is entirely consonant with the objective of the State to provide an adequate standard of living for its people and establish a just society, even though the proposed amendments in Clause 4 impose additional financial burdens on a selected few.

Control of Parliament over Public Finance

We shall now consider if the imposition of a tax is contrary to the Rule of Law and is therefore a violation of Articles 3 and 4 of the Constitution.

In terms of Article 148 of the Constitution, "*Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law*."

That the expansion of the tax regime, including the policies and methodologies that underpin such legislation is within the full control of Parliament has been emphasised by this Court over the years in several determinations.

In the **Inland Revenue (Amendment) Bill** [SC (SD) Nos. 1-3/2021; at pages 6-7], it was held that:

> *"It is an established principle that,* ***in fiscal Legislation, the Legislature has the greatest freedom of classification in imposing liability and granting concessions****, and such classifications in imposing liability or granting concessions have not been held inconsistent with Article 12(1) of the Constitution."* [emphasis added]

A similar view was expressed in the **Inland Revenue (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2004-2006), Vol. VIII, 29 at page 31], where this Court stated as follows:

> "*It is clear from the observations made consistently by the Constitutional Court and this Court that* ***in revenue matters in making classifications for the purpose of granting concessions or imposing liability there is a wide discretion****. These measures are taken not only to raise resources necessary for the State but also to direct economic activity projected to the general welfare of society.* ***Such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory*** *…"* [emphasis added].

In the **Valued Added Tax (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2016-2017), Vol. XIII, 76 at pages 78-79], this Court, addressing an amendment that sought to remove an exemption which was previously afforded to "*healthcare services provided by medical institutions or professionally qualified persons*," stated as follows:

> *"As we observed, in taxation matters, it is well established that the legislature has the greatest freedom in classification. The State has a wide discretion in selecting the persons, or objects it will tax and a Statute is not open to attack on the ground that it taxes some persons or objects and not others.* ***The law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the legislature and not for the Courts.*** *Legislative measures which Parliament intends to introduce in the exercise of its legislative power to pass tax statutes, could be considered as being in violation of Article 12 of the Constitution only where such measures are manifestly unreasonable or manifestly discriminatory. Other than in such strictly limited circumstances, it is no part of the function of a court to inquire into the exercise of legislative power of taxation with regard to the amount or persons or property on which a tax is imposed"* [emphasis added].

In the **Special Goods and Services Tax Bill** [SC (SD) Application Nos. 1-9/2022; at pages 9-10] it was held that:

> *"It is important that this Court places on record its view that (a) formulation of policy is very much the prerogative of the Executive and the Legislature, (b) it appears that the declared purposes for which the Bill is sought to be enacted (explained to this Court by the learned DSG) is very much in national and public interests, (c) it is within the exclusive domain of the legislative power of Parliament to convert policies into legislation, and (d) it is not the intention of this Court nor does it possess the jurisdiction to approve, critique or quash policies adopted by the Executive and the Legislature or comment regarding their appropriateness in comparison with what the Court believes to be in national and public interests.*

Following on with the comment made by the Supreme Court in the Nation Building Tax (Amendment) Bill [SC (SD) 34/2016], it is necessary for this Court to observe that this Court is devoid of jurisdiction to comment on the prudence or otherwise of a particular policy formulated by the Executive and sought to be converted into legislation by the enactment of a law by Parliament."

The caution that should be exercised when considering fiscal legislation was discussed in the **Surcharge Tax Bill** [SC (SD) Application Nos. 19-21/2022, 23-29/2022], where this Court cited the following passage from the opinion of the Supreme Court of the United States of America in **San Antonio Independent School District v Rodriguez** [(1973) 411 US 1 at page 41]:

"No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."

The position therefore is clear. This Court has consistently taken the view that the latitude given to the legislature to impose taxes is wide and that any decision to tax or exclude from tax any person/s would not give rise to an issue of constitutionality, except where the Bill transgresses the fundamental principles of equality without a rational nexus to the objective of the law or where such amendments are manifestly unreasonable or manifestly discriminatory.

Dr. Kanag-Isvaran, PC strenuously urged this Court, being the watchful guardian of the Constitution, and of the fundamental rights of the People to adopt a more pragmatic approach when examining the Bill and to consider Clause 4 in the context of the hardships that would be faced by the Petitioners if the exemption is removed as proposed by Clause 4. He went one step further by proposing that this Court impose the threshold over which condominium residential accommodation would be liable for VAT, similar to what was done by the legislature in 2018 and 2019 through the Amendment Acts.

In support of his submission, Dr. Kanag-Isvaran, PC referred us to the judgment of this Court in **Seneviratne and another v University Grants Commission** [supra; at page 215] where Wanasundera, J cited with approval the following passage relied on by counsel for the respondent from the main judgment in **Pathumma v. State of Kerala** [AIR 1987 SC 771] which four Judges concurred with:

> *"Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic, and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people.""*

The judgment in **Pathuamma**, however, continued to state in the very next sentence that:

> *"This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such a right clashes with the larger interest of the country, it must yield to the latter."*

While the Petitioners concede that the Country is facing an economic crisis of proportions hitherto not seen, the policy of the State in introducing the Bill, as well as several other revenue-raising legislation with a view to stabilising the economy, have been carefully set out in the aforementioned Cabinet Memoranda dated 28th May 2022, 30th August 2022 and 5th September 2022. While those who built individual residential accommodation and were therefore outside the exemption were liable for the payment of VAT on the goods purchased as well as on services provided, the conferring of an exemption from VAT on the supply of condominium residential accommodation resulted in preferential treatment being meted out to the latter.

Whether the conferment of such an exemption was in accordance with sound economic policy is not a matter that falls within the jurisdiction of this Court in terms of Article 121. What is clear however is that the conferring of an exemption was within the power of the legislature and its control over fiscal matters. Similarly, the proposed removal of the aforementioned exemption is also within the power of the legislature as contemplated by Article 148.

In the above circumstances, we are of the opinion that the removal of the aforementioned exemption in terms of Clause 4 is a measure that is being taken to raise resources necessary for the State and to direct economic activity projected to the general welfare of society and in the greater interests of the citizens of this Country. It neither transgresses the fundamental principles of equality nor is it manifestly unreasonable or manifestly discriminatory. Hence, we are of the opinion that the Bill is not inconsistent with the provisions of Articles 3, 4 and 12 of the Constitution.

Before we conclude, we must state that the wide latitude given to the legislature to impose taxes on the recommendation of the executive brings with it a whole host of responsibilities and duties, both for the legislature and for the executive. The legislature, entrusted with the responsibility of being in full control over public finance must demand that the executive rationalise to its satisfaction the necessity for a particular tax and the manner in which the monies raised by such tax would be expended. The executive on the other hand must, *inter alia,* act with great responsibility, manage all resources frugally and without wastage, and ensure that the monies generated by taxation are used to direct economic activity in such a manner that would benefit all citizens of this country. In this context, a greater responsibility lies on executive and administrative institutions to act in accordance with their mandate in the performance of their duties. This Court shall continue to exercise its Constitutional role as the *sentinel on the qui vive* over executive and administrative action.

Summary of the Determination

We are of the opinion that subject to the following amendments being moved at the Committee Stage of Parliament as proposed by the learned Deputy Solicitor General, the Bill as a whole is not inconsistent with the provisions of the Constitution:

Clause 3

The insertion of the following proviso after the second proviso in Section 10(1) – "*provided further, for the purposes of paragraph (vii), the requirement for the registration shall arise from the date on which this (Amendment) Act comes into operation.*"

Clause 4(1)

The reference to "*September 30, 2022*" to be deleted and substituted with "*November 30, 2022*".

Clause 4(2)

The reference to "*October 1, 2022*" to be deleted and substituted with "*December 1, 2022*".

We place on record our appreciation of the assistance given by the learned Deputy Solicitor General who represented the Hon. Attorney-General, the learned President's Counsel and the learned Counsel who appeared for the Petitioners.

JAYANTHA JAYASURIYA, PC
CHIEF JUSTICE

S. THURAIRAJA, PC, J
JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J
JUDGE OF THE SUPREME COURT