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

JMC Jayasekara Management
Centre (Pvt) Limited,
No. 65/2A,
Sir Chittampalam A. Gardiner
Mawatha, Colombo 02.
Respondent-Petitioner-Appellant

SC/APPEAL/05/2021
WP/HCCA/COL/29/2018/RA
DC COLOMBO 83900/TAX

Vs.

Commissioner General of Inland
Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardinder
Mawatha, Colombo 02.
Claimant-Respondent-Respondent

Before: Hon. Chief Justice Murdu N.B. Fernando, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena
Hon. Justice Arjuna Obeyesekere
Hon. Justice Priyantha Fernando

Counsel: Johann Corera with Janathri Weeratunga and Shiyara Dassanayake for the Appellant.
Nirmalan Wigneswaran, D.S.G., with Thitumatuhan Amirthalingam, S.C., for the Respondent.

Argued on: 16.10.2024

Written Submissions on:

By both parties on 20.12.2024

Decided on: 05.03.2025

Samayawardhena, J.

The Commissioner General of Inland Revenue filed a certificate of tax in default dated 30.06.2016 in the District Court of Colombo seeking to recover a sum of Rs. 53,632,639 from the appellant under section 43(1) of the Value Added Tax Act, No. 14 of 2002.

Upon service of summons, the appellant taxpayer took up three main objections to the maintainability of the application but the learned Additional District Judge of Colombo by order dated 06.09.2018 overruled them and decided to recover the aforesaid tax in default as a fine. He also imposed a six-month term of imprisonment in the event of default in payment and granted a date to pay the fine.

The revision application filed against this order was dismissed by the High Court of Civil Appeal of Colombo by judgment dated 16.07.2020.

This appeal with leave obtained is against the judgment of the High Court. In essence, the question of law on which leave to appeal was granted by this Court is whether the District Court of Colombo lacked jurisdiction to entertain and decide on an application filed under section 43(1) of the VAT Act, which explicitly confers such jurisdiction upon the Magistrate's Court.

Provisions similar to section 43(1) of the VAT Act are found in several other tax statutes. The same argument has been repeatedly taken up since at least 1986, when it was addressed and answered in the negative in *Y.C. Costa v. Deputy Commissioner of Inland Revenue* (1986) Vol. IV, Reports of Sri Lanka Tax Cases 268. Despite being raised continuously

for nearly 40 years, I have not come across a single judgment where this issue has been answered in the affirmative. All the Courts have answered the question in the negative, ruling in favour of the Commissioner General of Inland Revenue. To bring finality to this issue, the Chief Justice appointed a Divisional Bench to hear this appeal.

The argument advanced by learned counsel for the appellant can be summarised as follows: The recovery of tax in default is mainly governed by two distinct regimes—one through the District Court and the other through the Magistrate's Court. If the Commissioner General of Inland Revenue decides to recover tax in default through the District Court, the District Judge is empowered to make only those orders authorised under the relevant statute (in this instance, section 42(6) of the VAT Act) and cannot exercise powers that are exclusively reserved for a Magistrate (in this instance, section 43(1) of the VAT Act). The Commissioner General could not have filed the certificate under section 43(1) of the VAT Act before the District Court, and the Additional District Judge lacked the jurisdiction to make orders to recover the tax in default as a fine. The jurisdiction to recover the tax in default as a fine is vested only in the Magistrate's Court.

The Administration of Justice Law, No. 44 of 1973, was the predecessor to the Judicature Act, No. 2 of 1978. As evidenced by sections 25 to 27 of the Administration of Justice Law, at that time, District Courts exercised both civil and criminal jurisdiction and had concurrent jurisdiction with Magistrates' Courts. The revenue jurisdiction of the District Court was separately recognised by section 28.

Concurrent jurisdiction. *25. Every District Judge shall have concurrent jurisdiction with every Magistrate of divisions situated within the limits of the district for which the District Court is constituted.*

Civil jurisdiction.

26. A District Court shall within its district have original jurisdiction in all civil, revenue, matrimonial, insolvency and testamentary matters, except such of the aforesaid matters as are by this or any other written law exclusively assigned by way of original jurisdiction to any other court or vested in any other authority, and shall, in like manner, also have jurisdiction over the persons and estates of persons of unsound mind, minors, and wards, over the estates of cestuis que trust, and over guardians and trustees, and in any other matter in which jurisdiction may hereafter be given to District Courts by law.

Criminal jurisdiction.

27. (1) A District Court shall have jurisdiction and is hereby required to hear, try, and determine in the manner provided for by written law, all prosecutions upon indictment instituted therein against any person in respect of any offence committed wholly or in part within its district.

(2) A District Court may impose any of the following sentences:-

(a) imprisonment for a term not exceeding five years;

(b) fine not exceeding five thousand rupees;

(c) whipping;

(d) any lawful sentence combining any two of the sentences aforesaid.

(3) In every case of a continuing offence in respect of which a District Court may exercise jurisdiction, it shall also have the power and authority to remove or abate the act, matter, or thing complained of.

Revenue Jurisdiction

28. A District Court shall have jurisdiction to entertain causes affecting the revenue, and to inquire into all offences against the revenue laws of Sri Lanka committed wholly or in part within its district and to hear, try, and determine all actions and prosecutions commenced by the State against any person in respect of any such offences, and to impose the fines, penalties and forfeitures appertaining to such offences, although the same may exceed the sum which such court is authorized to impose in the exercise of its ordinary criminal jurisdiction.

Similarly, in terms of sections 29 to 31 of the Administration of Justice Law, the Magistrates' Courts also exercised both criminal and civil jurisdiction.

Chapter 1 of the Administration of Justice Law which contained the above sections was repealed by section 62 of the Judicature Act. Under the Judicature Act now in force, the District Courts no longer exercise criminal jurisdiction, and *vice versa*, the Magistrates' Courts do not exercise civil jurisdiction. Accordingly, under the Judicature Act, unlike under the Administration of Justice Law, District Judges do not exercise concurrent jurisdiction with Magistrates of divisions situated within the limits of the district for which the District Court is constituted.

Section 19 of the Judicature Act reads as follows:

> *Every District Court shall be a court of record and shall within its district have unlimited original jurisdiction in all civil, revenue, trust, insolvency and testamentary matters, save and except such of the aforesaid matters as are by or under Chapter VA of this Act or by virtue of the provisions of any other enactment exclusively assigned by way of original jurisdiction to any other court or vested in any other authority and in the exercise of such jurisdiction to impose fines, penalties and forfeitures and shall, in like manner also have jurisdiction over the persons and estates of persons of unsound mind and wards, over the estates of cestuis que trust; and over guardians and trustees and in any other matter in which jurisdiction is given to District Court by law.*

In reference to this section, learned Deputy Solicitor General submits that "*Insofar as revenue matters are concerned, the jurisdiction of the District Court is unlimited and there is no necessity for any specific power to be conferred upon the District Court by any existing law to give effect to any provision in such law relating to revenue matters*." I am unable to agree. According to section 19 of the Judicature Act, every District Court shall, *inter alia*, have unlimited original jurisdiction in all revenue matters, except where original jurisdiction has been exclusively assigned to any other Court or authority by any written law.

In terms of section 43(1) of the VAT Act, the original jurisdiction of the recovery of tax in default as a fine is vested in the Magistrate's Court within the jurisdiction of which the defaulter resides or his place of business is situate.

> *Where the Commissioner-General is of opinion in any case that recovery of tax in default by seizure and sale is impracticable, or inexpedient or where the full amount of the tax in default has not been recovered, he may issue a certificate containing particulars of*

such tax and the name and last known place of business or residence of the defaulter, to a Magistrate having jurisdiction in the division in which such place of business or residence of the defaulter is situate. The Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the tax should not be taken against him, and in default of sufficient cause being shown, the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only or not punishable with imprisonment and the provisions of subsection (1) of section 291 (except paragraphs (a), (d) and (i) thereof) the Code of Criminal Procedure No 15 of 1979, relating to default of payment of a fine imposed for such an offence shall thereupon apply, and the Magistrate may make any direction which, by the provisions of that subsection, he could have made at the time of imposing such sentence:

Provided that nothing in this section shall authorize or require the Magistrate in any proceeding thereunder to consider, examine or decide the correctness of any statement in the certificate of the Commissioner-General or to postpone or defer such proceeding for a period exceeding thirty days, by reason only of the fact that an appeal is pending against the assessment in respect of which the tax in default is charged.

If the Commissioner General of Inland Revenue intends to recover the tax in default through the seizure and sale of the property of the defaulter, as opposed to recovery as a fine, the original jurisdiction, in terms of section 42(6) of the VAT Act, is vested in the District Court where the property of the defaulter is situate.

Section 60 of the Judicature Act read with section 61 empowers the Minister of Justice, with the concurrence of the Chief Justice, to make regulations designating any Court or Courts in Sri Lanka to hear and determine specified categories of cases or other matters. These regulations shall be published in the Gazette and presented to Parliament for approval.

The regulations made by the Minister under section 61 read with section 60 of the Judicature Act were published in the Government Gazette (Extraordinary) No. 43/4 dated 02.07.1979, and thereafter amended from time to time by Gazette (Extraordinary) No. 1195/10 dated 01.08.2001 and No. 1380/17 of 16.02.2005.

Gazette No. 1380/17 of 16.02.2005 confers island-wide jurisdiction on the District Court of Colombo over "*All actions, proceedings or matters arising within any **Judicial District** in Sri Lanka in relation to [several tax statutes including] the Value Added Tax Act, No. 14 of 2002*". The same Gazette confers island-wide jurisdiction on the Magistrate's Court of Colombo over "*All actions, proceedings or matters arising within any **Judicial Division** in Sri Lanka in relation to [several tax statutes including] the Value Added Tax Act, No. 14 of 2002*".

The District Court of Colombo	*All actions, proceedings or matters arising within any Judicial District in Sri Lanka in relation to the Customs Ordinance (Chapter 235), the Exchange Control Act (Chapter 423), the Income Tax Ordinance (Chapter 242), the Estate Duty Ordinance (Chapter 241), the Stamp Ordinance (Chapter 247), the Personal Tax Act, No. 14 of 1959, the Surcharge on Income Tax Act, No. 6 of 1961, the Land Tax Act, No. 27 of 1961, the Finance Act, No. 65 of 1961, the Finance (No. 2), Act No. 2 of 1963 the*

Inland Revenue Act, No. 4 of 1963, the Finance Act, No. 11 of 1963, the Import and Export Control Act, No. 1 of 1969, the Capital Levy Act, No. 51 of 1971, the Surcharge on Income Tax Act, No. 25 of 1979, the Inland Revenue Act, No. 28 of 1979, the Estate Duty Act, No. 13 of 1980, the Surcharge on Income Tax, No. 31 of 1981, the Turnover Tax Act, No. 69 of 1981, the Surcharge on Wealth Tax Act, No. 25 of 1982, the Surcharge on Income Tax Act, No. 26 of 1982, the Stamp Duty Act, No. 43 of 1982, the Rehabilitation Levy Act, No. 53 of 1983, the Surcharge on Income Tax Act, No. 12 of 1984, the Betting and Gaming Levy Act, No. 40 of 1988, the Surcharge on Income Tax Act, No. 7 of 1989, the Surcharge on Wealth Tax Act, No. 8 of 1989, the Excise (Special Provisions) Act, No. 13 of 1989, the Defence Levy Act, No. 52 of 1991, the Tax Amnesty (Housing and Commercial Buildings) Act, No. 30 of 1992, Foreign Exchange Amnesty Act, No. 32 of 1993, the Finance Act, No. 16 of 1995, the Save the Nations Contributions Act, No. 5 of 1996, the Goods and Services Act, No. 34 of 1996, the Tax and Foreign Exchange Amnesty Act, No. 47 of 1998, the Tobacco Tax Act, No. 8 of 1999, the Inland Revenue Act, No. 38 of 2000, the Finance Leasing Act, No. 56 of 2000, the Finance Act, No. 11 of 2002, the Value Added Tax Act, No. 14 of 2002, the Debits Tax Act, No. 16 of 2002, the Finance Act, No. 25 of 2003, the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 and the Finance Act, No. 11 of 2004.

The Magistrate's

All actions, proceedings or matters <u>arising within any Judicial Division in Sri Lanka</u> in relation to the Customs

Court of Colombo

Ordinance (Chapter 235), the Exchange Control Act (Chapter 423), the Income Tax Ordinance (Chapter 242), the Estate Duty Ordinance (Chapter 241), the Stamp Ordinance (Chapter 247), the Personal Tax Act, No. 14 of 1959, the Surcharge on Income Tax Act, No. 6 of 1961, the Land Tax Act, No. 27 of 1961, the Finance Act, No. 65 of 1961, the Finance (No. 2), Act No. 2 of 1963 the Inland Revenue Act, No. 4 of 1963, the Finance Act, No. 11 of 1963, the Import and Export Control Act, No. 1 of 1969, the Capital Levy Act, No. 51 of 1971, the Surcharge on Income Tax Act, No. 25 of 1979, the Inland Revenue Act, No. 28 of 1979, the Estate Duty Act, No. 13 of 1980, the Surcharge on Income Tax, No. 31 of 1981, the Turnover Tax Act, No. 69 of 1981, the Surcharge on Wealth Tax Act, No. 25 of 1982, the Surcharge on Income Tax Act, No. 26 of 1982, the Stamp Duty Act, No. 43 of 1982, the Rehabilitation Levy Act, No. 53 of 1983, the Surcharge on Income Tax Act, No. 12 of 1984, the Betting and Gaming Levy Act, No. 40 of 1988, the Surcharge on Income Tax Act, No. 7 of 1989, the Surcharge on Wealth Tax Act, No. 8 of 1989, the Excise (Special Provisions) Act, No. 13 of 1989, the Defence Levy Act, No. 52 of 1991, the Tax Amnesty (Housing and Commercial Buildings) Act, No. 30 of 1992, Foreign Exchange Amnesty Act, No. 32 of 1993, the Finance Act, No. 16 of 1995, the Save the Nations Contributions Act, No. 5 of 1996, the Goods and Services Act, No. 34 of 1996, the Tax and Foreign Exchange Amnesty Act, No. 47 of 1998, the Tobacco Tax Act, No. 8 of 1999, the Inland Revenue Act, No. 38 of 2000, the Finance Leasing Act, No. 56 of 2000, the

> *Finance Act, No. 11 of 2002, the Value Added Tax Act, No. 14 of 2002, the Debits Tax Act, No. 16 of 2002, the Finance Act, No. 25 of 2003, the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 and the Finance Act, No. 11 of 2004.*

According to section 3 of the Judicature Act, for the purpose of the administration of justice, Sri Lanka shall be divided into judicial zones (High Court jurisdiction), judicial districts (District Court jurisdiction) and judicial divisions (Magistrates' Court jurisdiction) within such territorial limits as may in consultation with the Chief Justice and the President of the Court of Appeal from time to time be determined by the Minister by Order published in the Gazette.

The territorial jurisdiction of the District Court of Colombo extends to the judicial district of Colombo, while the territorial jurisdiction of the Magistrate's Court of Colombo extends to the judicial division of Colombo. Through Gazette No. 1380/17 of 16.02.2005, the Minister extended only the territorial jurisdiction of the District Court of Colombo to cover all judicial districts of Sri Lanka in respect of matters falling under the Acts specified therein including the VAT Act. Similarly, the Minister extended only the territorial jurisdiction of the Magistrate's Court of Colombo to cover all judicial divisions of Sri Lanka in respect of matters falling under the Acts specified therein including the VAT Act.

There is a difference between territorial jurisdiction and subject matter jurisdiction. Apart from expanding the territorial jurisdiction, the Minister did not, and could not, confer new subject matter jurisdiction on the District Court of Colombo by this Gazette. To be more specific, the Minister did not, and could not, confer jurisdiction over matters falling within the jurisdiction of the Magistrate's Court to the District Court and

vice versa. This is the function of the legislature, of which the Minister is a member, but not the sole decision-maker.

In terms of the first proviso to section 60 of the Judicature Act, the expansion of the territorial jurisdiction of the District Court of Colombo and the Magistrate's Court of Colombo in that manner does not affect the relevant Court, which ordinarily has territorial jurisdiction, exercising concurrent jurisdiction over such matters.

This legal position was accepted by the learned High Court Judge in the impugned judgment when he stated:

> *It is correct to argue that the purpose of this regulation is to give the Magistrate of Colombo the power to determine matters under section 43(1) of the Value Added Tax Act and the District Judge of Colombo to determine matters under section 42(6) of the same Act respectively, and therefore, a District Judge has no power to determine an action instituted under section 43(1).*

In accordance with the foregoing analysis, the correct legal position is that the District Court cannot recover the tax in default as a fine under section 43 of the VAT Act as that jurisdiction is exclusively vested in the Magistrate's Court. If such an order is made by the District Court, it is *ultra vires*. If a decision is *ultra vires*, it is a nullity for all intents and purposes; it is void, not voidable. In *Anthony Naide v. The Ceylon Tea Plantation Co. Ltd. of London* (1966) 68 NLR 558 at 560, Sansoni C.J. stated "*It is clear law that a judgment given without jurisdiction is a nullity, for judicial power is capable of being exercised by a court only when it is a court of competent jurisdiction, and that means competent under some law.*"

There is a distinction between an act without jurisdiction and an error within jurisdiction. The non-existence of jurisdiction (patent lack of

jurisdiction) and the irregular exercise of jurisdiction (latent lack of jurisdiction) are distinct concepts.

The issue at hand constitutes a patent lack of jurisdiction, which is fatal and can be raised at any stage of the proceedings, including for the first time on appeal. No amount of acquiescence, waiver or inaction will cure such defect, as parties cannot expressly or impliedly confer jurisdiction on a Court where none exists.

Conversely, if the lack of jurisdiction is latent, such as an objection to territorial jurisdiction or to procedure, the objection must be raised at the earliest possible opportunity. In such situations, the Court undoubtedly has plenary jurisdiction to deal with the matter but has not invoked it in the proper way. A party cannot raise such an objection belatedly, once he finds that the decision is unfavourable to him.

In the oft-quoted case of *Beatrice Perera v. The Commissioner General of Inland Revenue of National Housing* (1974) 77 NLR 361 at 366, Tennekoon C.J. articulated this principle in the following manner:

> *Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent,*

> *no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction.*

This brings me to consider the second part of the High Court judgment. While the learned High Court Judge held that the District Judge lacked jurisdiction to recover the tax in default under section 43(1) of the VAT Act as a fine, he nonetheless declined to allow the revision application of the taxpayer on the basis that:

> *However, it has to be noted that all the District Judges appointed for a particular judicial zone are also Additional Magistrates to that area and, vice versa, all the Magistrates are Additional District Judges by their appointment. In view of the above, since the certificate has been issued under section 43(1) of the Value Added Tax Act, and addressed to Magistrate/District Judge of Colombo, it is my considered view that the Additional District Judge was correct when he determined that he has the jurisdiction, although he has failed to address more elaborately as to the basis of his jurisdiction in the order.*

Although the learned High Court Judge arrived at that finding, it is important to note that the Additional District Judge did not order the recovery of the tax in default as a fine on that basis. In the impugned order, the Additional District Judge identifies three objections raised on behalf of the taxpayer. The second objection relates to tax exemption and the third objection relates to prescription. The first, which is directly relevant to the issue at hand, reads as follows:

> පනතේ 43(1) වගන්තිය ප්‍රකාරව මහේස්ත්‍රාත්වරයාට අධිකරණ බලය පනත මගින් ලබා දී තිබියදී දිසා අධිකරණයට මෙම නඩුකරය පවරා පවත්වාගෙන යාමට අධිකරණ බලයක් නොමැති වීම.

The Additional District Judge rejects this objection on the following basis:

> 1978 අංක 02 දරණ අධිකරණ සංවිධාන පනත සම්බන්ධයෙන් වර්ෂ 2005 පෙබරවාරි 16 වන දින නිකුත් කර ඇති අංක 1380/17 දරණ ගැසට් පත්‍රය මත කොළඹ දිසා අධිකරණය වෙත අධිකරණ බලය මෙම නඩු කටයුතු සම්බන්ධයෙන් පවරා ඇති අතර එවැනි තත්වයක් මත මෙම අධිකරණයේ මෙම නඩුව පවරා පවත්වාගෙන යාමට නෛතික වලංගු තාවයක් නොමැති බවට ගෙන ඇති තර්කය ප්‍රතික්ෂේප කරමි.
>
> ඒ අනුව වගඋත්තරකරු විසින් ඉදිරිපත් කරන ලද විරෝධතාවයන් නීතිය ඉදිරියේ වලංගු විරෝධතාවයක් ලෙසට සැලකීමේ හැකියාවක් නොමැති අතර, එවැනි තත්වයක් මත උක්ත පනතේ 43(1) වගන්තියේ ප්‍රතිපාදන ප්‍රකාරව චිත්තිකාර වගඋත්තරකරුගෙන් සහතිකයේ දක්වා ඇති මුදල දඩයක් ලෙස අයකර ගැනීමට තීරණය කරමි. අදාළ දඩ මුදල් නොගෙවන්නේ නම් අපරාධ නඩු විධාන සංග්‍රහයේ 291 වගන්තියේ ප්‍රතිපාදන ප්‍රකාරව මාස 06ක සිරදඩුවම් වගඋත්තරකරුට පැණවීමට නියම කරමි.

It is abundantly clear that the Additional District Judge held that he had jurisdiction to recover the tax in default as a fine on the sole basis that the District Court of Colombo was conferred with jurisdiction to entertain applications under section 43(1) of the VAT Act by Gazette No. 1380/17 of 16.02.2005. He signed the impugned order as the Additional District Judge of Colombo and never assumed the jurisdiction of a Magistrate at

any stage of the case. Hence, the justification of the learned High Court Judge on this point cannot be accepted.

If a certificate of tax in default, which, according to the statute, should be filed in the Magistrate's Court, is instead filed in the District Court and entertained by the District Judge on the basis that he also serves as an Additional Magistrate, it would inevitably result in serious confusion as to territorial and subject matter jurisdiction. This would potentially lead to lawyers filing civil actions in the Magistrate's Court and criminal actions in the District Court, arguing that Additional District Judges are also Additional Magistrates and *vice versa*. Furthermore, it would enable lawyers to institute actions in any District Court or Magistrate's Court within the Judicial District, thereby encouraging "forum shopping" or "judge shopping" to select judges they perceive as favourable.

Learned Deputy Solicitor General heavily relied on *Vanik Incorporation Ltd v. L.D. Silva* [2001] 1 Sri LR 110 in defending the judgment of the High Court on this point. In *Vanik's* case, an application for the enforcement of an arbitral award was filed in the "Western Province Commercial High Court" in Colombo. Upon objection being taken, the Judge of the Commercial High Court declined to entertain the application stating that the invocation of its jurisdiction was a nullity since, under the Arbitration Act, a Judge of the High Court of Sri Lanka holden in the judicial zone in Colombo is the appropriate Judge to entertain such an application. This reasoning, however, was rejected by S.N. Silva C.J., who observed at pages 115–116:

> *The Judge who made the impugned order has at all material times been a Judge of the High Court of Sri Lanka holding Court under the territorial limits of the Judicial Zone of Colombo. In addition to that the records show that on 10.10.1996 the Chief Justice has*

nominated him to exercise the jurisdiction of the High Court in terms of the Arbitration Act, No. 11 of 1995.

In the circumstances the Judge who made the impugned order and the Court in which he presided was amply seized with jurisdiction to hear and determine the application for the enforcement of the arbitral award. The proceedings of 14.11.1997 referred to above have been taken on a clear assumption of jurisdiction. The Judge appears to have swayed to the contrary view by the description of the Court in the caption as the "Commercial High Court". This leads me to advert to the last description of the High Court mentioned at the commencement of the Judgment. The High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 was enacted to empower the Provincial High Court to exercise jurisdiction in respect of certain civil matters. The First Schedule to the Act specifies that such jurisdiction shall be exercised in relation to actions where the cause of action has arisen out of commercial transactions. The Minister has in terms of section 2(1) of the Act appointed the High Court of the Western Province and in terms of section 2(2)(a) the High Court of the Western Province sitting at Colombo will exercise that jurisdiction. For administrative convenience one of the Judges of the High Court of the Western Province sitting at Colombo is specially designated for this purpose and for similar reasons there is a separate Registry. These administrative arrangements have resulted in the Court exercising this jurisdiction being described as the "Commercial Court". The appendage "Commercial" should be taken merely as a reference to the administrative arrangements referred above and no more. The Petitioner was in error when he described the Court in the caption as "Western Province Commercial High Court" as noted above. However, immediately beneath that description the Petitioner has recited that the application is being made in terms of Parts 7 and

> *8 of the Arbitration Act, No. 11 of 1995. Therefore in my view there is a proper invocation of the jurisdiction of the High Court. There was certainly no basis to consider the application to be a nullity as stated in the impugned order. The proper course of action would have been for the Judge, who is vested with jurisdiction, to direct an amendment of the caption to bring it in line with the recital that appears beneath the name of the Court.*

The issue in *Vanik's* case and the instant case are incomparable. In *Vanik's* case, unlike in the instant case, the High Court before which the application for the enforcement of the arbitration award was made had jurisdiction to entertain the application, except for the incorrect description of the name of the High Court in the caption of the application. The Supreme Court held that there was no lack of jurisdiction. In contrast, in the instant case, there was a clear lack of jurisdiction on the part of the District Court to recover the tax as a fine under the certificate of tax in default filed before it.

In *Jayaseeli v. Dayawathi* (SC/APPEAL/29/2016, SC Minutes of 28.02.2019), the revision application filed against an order of the District Court of Homagama in the Provincial High Court of Civil Appeal in Colombo was refused on the ground that the District Court of Homagama falls within the High Court Zone of Avissawella, and thus the application should have been filed in the High Court of Civil Appeal in Avissawella. The Supreme Court, however, set aside this decision, stating that the High Court of Civil Appeal in Colombo, established under section 5A(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, has jurisdiction to hear appeals from judgments of the District Court of Homagama, as it is situated within the Western Province. Although this interpretation is technically correct, I must hasten to add that the attention of that Bench had not been drawn to: (a) the grave danger of

this interpretation being misused for "judge shopping" or "forum shopping" to select favourable judges, which must be stopped at any cost; (b) the fact that appointment letters issued by the Chief Justice do not authorise a High Court Judge to exercise criminal and civil jurisdiction throughout the Province; (c) the inconvenience such a liberal interpretation causes to certain parties to the action due to the distance they have to travel; and (d) the administrative issues arising from such an interpretation, including the unequal distribution of cases among High Courts in the Province. As this decision is already being misused by some Attorneys, the broad interpretation suggested in *Jayaseeli v. Dayawathi* need not be followed.

This, however, does not absolve the appellant taxpayer from the payment of the tax in default. While the VAT Act does not empower the District Court to recover tax in default as a fine, it does empower the District Court to recover the tax in default through the seizure and sale of the defaulter's property by issuing a writ of execution. In other words, had the Commissioner General of Inland Revenue filed the certificate of tax in default in the District Court and sought to recover the tax in default under section 42(6) of the VAT Act, instead of section 43(1), the District Court would have had jurisdiction to initiate the recovery process through seizure and sale. Section 42(6) of the VAT Act reads as follows:

> *Where any tax is in default and the Commissioner-General is of opinion that the recovery by the means provided in subsection (2) is impracticable or inexpedient he may issue a certificate to a District Court having jurisdiction in any district where, the defaulter resides or in which any property movable or immovable owned by the defaulter situate containing such particulars of tax and the name and address of the person or person by whom, the tax is payable, and the Court shall thereupon direct a writ of execution to issue to*

> *the Fiscal authorizing and requiring him to seize and sell all or any of the property movable and immovable of the defaulter, or such part thereof as he may deem necessary for recovery of the tax, and the provisions of sections 226 to 297 of the Civil Procedure Code shall, mutatis mutandis, apply to such seizure and sale.*
>
> *For the purpose of this section "movable property" shall include plant and machinery whether fixed to a building or not.*

As stated in *Devi Prasad Khandelwal & Sons Ltd. v. Union of India*, AIR 1969 Bom 163 at 173:

> *It is a well-settled principle of interpretation that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong provision of law. The order made can always be justified by reference to the correct provision of law empowering the authority making the order to make such order.*

Solicitor-General v. Perera (1914) 17 NLR 413 was a criminal case filed under the Excise Ordinance where the licence to sell liquor was cancelled for failure to make some payment due. The Government Agent cancelled the licence under section 26(1)(a) of the Ordinance when the correct section was section 26(1)(b). When the conviction for selling liquor without a licence was challenged in appeal on this basis, Walter Pereira J. rejected that argument stating at page 416:

> *[T]he fact that sub-section (a) of section 26 was cited did not render the cancellation of the license any the less effectual. The Government Agent was not bound to cite any section at all.*

In *Peiris v. The Commissioner of Inland Revenue* (1963) 65 NLR 457 it was held that a certificate issued to the Magistrate in recovery proceedings under section 80(1) of the Income Tax Ordinance was not invalidated by

the mistake of the Assistant Commissioner of Inland Revenue where he had purported to act under section 64(2)(b) although the correct procedure would have been under section 65. Sansoni J. (as he then was) stated at page 458:

> *It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.*

This principle has consistently been adopted by our Courts including in *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd* [1981] 2 Sri LR 373 at 379-380, *Kumaranatunga v.* Samarasinghe [1983] 2 Sri LR 63 at 73-74, *Jayawardane v. Ranaweera* [2004] 3 Sri LR 37 at 41, *Jayathilaka v. People's Bank* (SC/APPEAL/92/2011, SC Minutes of 02.04.2014) and *Gifuulanka Motors (Pvt) Limited v. Commissioner General of Inland Revenue* (SC/HCCA/LA/51/2017, SC Minutes of 27.07.2021).

In light of the foregoing, the Additional District Judge could assume jurisdiction under Section 42(6) of the VAT Act to recover the tax specified in the certificate of tax in default through the seizure and sale of the defaulter's property.

This view is further fortified by the following analysis. In the interpretation of taxing statutes, when the issue pertains to charging provisions that impose tax liability, as opposed to machinery provisions that outline the procedure for quantification and enforcement of such liability, the Court must adhere strictly to the letter of the law rather than its spirit. If the language of a charging provision is clear and unambiguous, the Court is bound to give effect to it and cannot interpret

the words differently on the basis that the literal interpretation does not reflect the real intention of Parliament. If the wording of a charging provision is ambiguous, permitting one interpretation favourable to the taxpayer and another to the tax collector, the Court should adopt the interpretation that favours the taxpayer until such ambiguity is resolved by legislative amendment. Conversely, when interpreting machinery provisions, a more liberal approach is warranted to give effect to the legislative intent. Machinery provisions are not subject to strict construction where such interpretation would defeat the purpose of the statute. If the language of a machinery provision is ambiguous, permitting one interpretation favouring the taxpayer and another favouring the tax collector, the Court should adopt the interpretation favouring the tax collector until the legislature resolves the ambiguity through an amendment.

In *Commissioner of Income Tax, Central Calcutta v. National Taj Traders* (AIR 1980 SC 485 at 491) the Supreme Court of India stated:

> *[I]t is well settled that the principle that the fiscal statute should be construed strictly is applicable only to taxing provisions such as a charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions.*

In *Commissioner of Income Tax-III v. M/S. Calcutta Knitwears, Ludhiana* (AIR 2014 SC 2970), the Supreme Court at para 37 emphasized the duty of the Court to depart from the rule of strict interpretation when construing machinery provisions of a fiscal statute:

> *It is the duty of the court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose. Wherever the intention to impose liability is clear, the Courts ought not be hesitant in espousing a commonsense interpretation to the*

> *machinery provisions so that the charge does not fail. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same.*

The fact that machinery provisions should be construed by ordinary rules of construction giving effect to the intention of the legislature was stressed by the Supreme Court of India in *Gursahai Saigal v. Commissioner of Income Tax, Punjab* (AIR 1963 SC 1062 at 1064-1065):

> *Now it is well recognised that the rule of construction on which the assessee relies applies only to a taxing provision and has no application to all provisions in a taxing statue. It does not, for example, apply to a provision not creating a charge for the tax but laying down the machinery for its calculation or procedure for its collection. The provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the legislature which is to make a charge levied effective.*

The necessity of adopting harmonious construction in the interpretation of machinery provisions was stressed in *Film Exhibiters' Guild v. State of Andhra Pradesh* (AIR 1987 AP 110 at 117):

> *But in construing the machinery provisions for assessment and collection of the tax to make the machinery workable ut res valeat potius quam pereat, i.e., the Court would avoid that construction which would fail to relieve the manifest purpose of the legislation on the presumption that the legislature would enact only for the purpose of bringing about an effective result. It is not the function of court to hunt out ambiguities by strained and unnatural meaning, close reasoning to be adopted; harmonious construction is to be adhered*

> *to; all the relevant provisions are to be read together to gather the intention from the language employed, its context, and give effect to the intention of the legislature. Ingenious attempt to avoid tax is to be thwarted.*

In *India United Mills Ltd v. Commissioner of Excess Profits Tax Bombay* (AIR 1955 SC 79 at 82), the Supreme Court of India underscored the significance of interpreting machinery provisions to complement the charging provisions, stating: "*That section is, it should be emphasized, not a charging section, but a machinery section, and a machinery section should be so construed as to effectuate the charging sections*."

Eminent writers share the same view. *Halsbury's Laws of England*, 4th Edition (1978) Butterworths, Vol 23, para 86 states:

> *It is important to distinguish between charging provisions, which impose the charge to tax, and machinery provisions, which provide the machinery for the quantification of the charge and the levying and collection of the tax in respect of the charge so imposed. Machinery provisions do not impose a charge or extend or restrict a charge elsewhere clearly imposed. (….) Although not of less moment or authority than other sections, machinery sections are not subject to a rigorous construction, so the court will seek not so to construe a machinery section as to defeat a charge to tax.*

N.S. Bindra, *Interpretation of Statutes,* 13th Edition (2023) LexisNexis, page 861 supports this view:

> *It is true that a taxing provision must receive a strict construction at the hands of the courts and if there is any ambiguity, the benefit of that ambiguity must go to the assessee. But that is not the same thing as saying that a taxing provision should not receive a reasonable construction. The tendency of modern decisions upon the whole is to narrow down materially the difference between what is*

> *called a strict and beneficial construction. The principle of strict construction is applicable only to charging provisions or a provision imposing penalty, and is not applicable to parts of the taxing statute which contain machinery provisions.*

E. F. Mannix and J. E. Mannix, *Australian Income Tax Guide*, 26th Edition (1981) Butterworths, para 206 states:

> *A distinction must be drawn between a taxing section and a machinery section, an illustration of the latter being provided by the provisions relating to the amendment of assessments. Machinery sections are not subject to especially rigorous construction so that the courts will not tend to construe a machinery section as to defeat the charge of tax although it has been held that the absence of appropriate machinery provisions tends to show that profits do not come within a charging provision.*

J.G. Sutherland, *Statutes and Statutory Construction*, 3rd Edition (1943), Callaghan and Company, Vol 2, pages 77-78 notes the trend of deviating from the traditional literal interpretation in favour of the taxpayer:

> *Many courts once adhered to the general rule that tax statutes should be strictly construed in favour of the taxpayer, but the present trend shows a breaking away with liberality of interpretation resulting in more favourable decisions for the government. As indicated by Cooley, revenue acts which point out the subjects to be taxed, and indicate the time, circumstances, and manner of assessment and collection need not strictly construed, while statutes imposing burdensome penalties and harsh enforcement by summary proceedings require interpretation in favor of the taxpayer.*

The learned author, in Vol 3, page 297 succinctly set out the need for reasonable construction in tax statutes in the following words:

> *The long-range objectives of all tax measures is the accomplishment of good social order. Although the variant forms of taxation may sometimes produce individual hardships, a too stilted interpretation of tax laws for the benefit of the taxpayer may result in the loss of revenue at the expense of government and operate to the disadvantage of others contributing to it support. (…..) Therefore, a reasonable construction of all tax measures should be preferred. Emphasis belongs upon the general objectives of such laws with the view to accomplish uniformity and equality among the class of persons sought to be taxed. Some courts have even subscribed to a liberal policy in the construction of revenue laws. Thus it has been stated, "If a reason can be discovered for a particular construction of a statute, and especially of a revenue statute, which construction would deprive the treasury of revenue, such construction will be discarded in favour of one that will apply uniformly to all persons engaged in the same calling or business and so as to raise revenue."*

It is pertinent to observe that assessment does not fall under the charging provisions. In the House of Lords decision of *Whitney v. Commissioners of Inland Revenue* (1925) UKHL 10 Tax Cases 88 at 110, Lord Dunedin remarked:

> *I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is assessment. Liability does not depend on assessment. That, ex-hypothesi, has already been*

fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery. If the person taxed does not voluntarily pay.

In the instant case, the appellant's grievance, based on sections 42 and 43 of the VAT Act, relates to machinery provisions, and therefore the Court cannot lean towards the appellant but must interpret the provisions in a manner that gives effect to the intention of the legislature.

The questions of law on which leave to appeal was granted and the answers thereto are as follows:

(a) Has the High Court erred in rejecting the appellant's jurisdictional objection by holding that all District Judges appointed to a particular judicial zone are also Additional Magistrates for that area, and *vice versa*, that all Magistrates are Additional District Judges by virtue of their appointment?
Yes.

(b) Has the High Court erred in failing to consider that the learned Additional District Judge has no jurisdiction to impose a term of imprisonment of six months?
Yes.

(c) Has the High Court erred in Law by holding that the District Court has jurisdiction to entertain a certificate filed under section 43(1) of the VAT Act, No. 14 of 2002, as amended?
Yes.

For the foregoing reasons, the order of the learned Additional District Judge of Colombo dated 06.09.2018 and the judgment of the High Court of Civil Appeal of Colombo dated 16.07.2020 are set aside and the appeal is allowed.

The District Court has no jurisdiction to recover the tax in default as a fine under section 43(1) of the VAT Act.

However, for the reasons stated above, the Additional District Judge is directed to take appropriate steps to recover the tax in default, as set out in the certificate of tax in default filed in the District Court dated 30.06.2016, through the seizure and sale of the appellant's property in terms of Section 42(6) of the VAT Act. The Commissioner General of Inland Revenue is also directed to make appropriate applications to the District Court for the Court to make suitable orders in that regard.

I shall place on record the significance of the arguments advanced by learned counsel for the appellant with commendable clarity and force, notwithstanding the resolute endeavours of learned Deputy Solicitor General in countering them.

Let the parties bear their own costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., C.J.
I agree.

Chief Justice

E.A.G.R. Amarasekara, J.

I am in agreement with the judgment of my brother, Justice Samayawardhena. However, if I have stood in agreement with a different opinion previously, with elaborate reasoning set out in this judgment, I now choose to depart from that stance and agree with the judgment written by my brother.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

Priyantha Fernando, J.

I agree.

Judge of the Supreme Court