

BY COURIER

9th May 2008

Mr. S. Swarnajothy, A.C.A., B.Sc (Mgt), F.S.C.M.A.,
Auditor General,
Auditor General's Department,
Independence Square,
Colombo 7.

Dear Mr. Swarnajothy,

**Supreme Court Determination on the Appropriation Bill
Annual Report 2006**

I attach copy of my Memo dated 15.11.2007 forwarded to the Secretary to the Treasury, *without the attachments thereto.*

I draw your kind attention to paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of my said Memo in relation to the necessity for transparent disclosure of transfers made by Secretary to the Treasury, in terms of Section 5(3) and Section 6 of the Appropriation Act, as morefully referred to therein. *I attach a copy of the Supreme Court Determination for your kind information, and draw your kind attention to the direction given in the last paragraph thereof.*

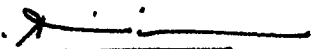
I have reason to believe that from Account Head 801 - 'Department of National Budget' - Rs. 1,500,000,000/- had been transferred to Lanka Puthra Development Bank in terms of Section 6 of Appropriation Act No. 39 of 2005, and from Account Head 240 - 'Department of National Budget' - Rs. 250,000,000/- had been transferred to Mihin Lanka in terms of Section 6 of Appropriation Act No.47 of 2006, both by the Director General of National Budget, *under the powers exercised by the Secretary to the Treasury, deeming to be Supplementary Estimates passed by Parliament.* 'Supplementary Estimates', as you know, in terms of Article 151 of the Constitution, *specifically pertain to 'contingency payments'.*

I wish to ascertain, as to whether the details of the transfers referred to in my aforesaid Memo, in respect of the Financial Year 2006, reported to have amounted to Rs. 220.2 billion, as referred to at paragraph number 6 of my aforesaid Memo, have been duly disclosed to Parliament and the public, in compliance with the said Supreme Court direction, to which said compliance, I drew the specific attention of the Secretary to the Treasury, at paragraph number 8 of my aforesaid Memo.

I shall be grateful, if you would kindly confirm, as to where such information has been disclosed, as had been directed by the Supreme Court, and in conformity with the statutory stipulations in Fiscal Management (Responsibility) Act No. 3 of 2003, so that I could avail myself of copies thereof.

On the other hand, if such information in respect of Year 2006 have not been disclosed, I shall be grateful for your kind confirmation thereof, since I am considering taking this matter up in the Supreme Court.

Kind regards,



Nihal Sri Amefesekere

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

"APPROPRIATION BILL 2007"

S.C(SD) 7 – 13/2007

BEFORE : Sarath N Silva, Chief Justice
N.E. Dissanayake Judge of the Supreme Court
A.M. Somawansa Judge of the Supreme Court

- No.7/07 Petitioner : Nihal Sri Amarasekera (in person)
- No.8/07 Petitioner : Sunil Handunneththi
Counsel : Manohara de Silva, P.C., with Sunil Watagala
- No.9/07 Petitioner : Centre for Policy Alternatives (Guarantee)Ltd.
Counsel : M.A.Sumanthiran with Vira Corea, B. Fonseka and S.
Fernando
- No.10/07 Petitioner : L.O.K.G. Fernando
Counsel : Romesh de Silva, P.C., with M.A.Sumanthiran, Sugath
Caldera and Eraj de Silva, instd. By G.G. Arulpragasam
- No.11/07 Petitioner : A.M. Susiri Adikari
Counsel : Ikram Mohamed, P.C., with M.S.A. Wadoood,
Champaka Ladduwahetty and Palitha Subasinghe
- No.12/07 Petitioner : Institute of Human Rights
Counsel : J.C.Weliamuna with Maduranga Ratnayake, Uma
Wijesinghe and Rashani Meegama
- No.13/07 Petitioner : Themiya L. B. Hurulle
Counsel : Sanjeewa Jayawardena with Senany Dayaratne
P.A.Ratnayake, Addl. Solicitor General with Ms.Indika
Demuni de Silva, Deputy Solicitor General and Janak de
Silva, S.S.C., for Attorney General

Court assembled for hearing on 17.10.2007 at 10.30 a.m

The above petitions presented in terms of Article 121(1) of the Constitution were taken up before this Court and considered together since the grounds of constitutionality in respect of the Bill are common. The Petitioners challenge the content of Clauses 5 and 6 of the Bill. The basis is that, the provisions of these Clauses are inconsistent with Article 148 and the connected Articles of the Constitution that provide for full control of public finance by Parliament. It was submitted that the impugned provisions detract from Parliamentary control amounting to an abdication of power by Parliament.

It would be convenient to first deal with the submissions as to clause 6. This clause provides that any money allocated to Recurrent Expenditure or Capital Expenditure under the "Development Activities Programme" appearing under the Head "Department of National Budget" may be transferred to any other Programme under any other Head by Order of the Secretary to the Treasury or any other officer authorized by him. It further provides that the money so transferred shall be deemed to have been covered by a supplementary estimate submitted by the appropriate Minister.

A similar clause had been contained in all preceding years commencing from the Appropriation Act No. 44 of 2003. In that Act Section 5(3) provided for the transfer from the "Public Resources Management Program" appearing under the Head "Department of National Budget" to any other Programme under any other Head by Order of the Secretary to Treasury. The money so transferred was deemed to have been covered by a supplementary estimate.

Identical provision was contained in the Appropriation Act No. 15 of 2004 as Section 5(3). In the Appropriation Act No. 39 of 2005 the identical provision was Section 6. The Appropriation Act No. 47 of 2006 provided for a transfer from the "Development Activities" Programme as in the present Bill instead of a transfer

from the "Public Resources Management" Programme specified in the Acts of 2003, 2004 and 2005. This is only a change of nomenclature and not a budgetary innovation of any significance.

The crux of the submissions of the Petitioners is that by this provision the Secretary to the Treasury is vested with an unfettered discretion to transfer funds voted for "Development Activities" to meet expenditure under other Programmes and Heads.

That, if there is unexpected additional expenditure under any other Head and Programme, the proper procedure would be for a supplementary estimate to be presented to Parliament for withdrawal from the Consolidated Fund in terms of Article 150(2) of the Constitution or to establish a Contingencies Fund in terms of Article 151 to provide for urgent and unforeseen expenditure. It was further submitted in particular that the final sentence in clause 6, which reads as :

"The money so transferred shall be deemed to have been covered by a supplementary estimate submitted by the appropriate Minister"

is an abdication of Parliamentary control.

The Additional Solicitor General submitted that there is no abdication of Parliamentary control of public finance, since money could be transferred by the Secretary to the Treasury in terms of Clause 6, only dependent on the amount voted by Parliament for "Development Activities" (Head 240 - Department of National Budget - Programme 2). He submitted that the amount would be voted in terms of Rule 131 of the Standing Orders after a specific consideration of the budgeted expenditure under the Programme. In doing so a Committee of the whole Parliament would in terms of the Standing Orders take cognizance and deliberate not only whether the amount appearing under the Programme of "Development Activities" should be approved but also take cognizance of the fact that the Secretary to the

Treasury is authorized in terms of the principal Clause to transfer any sum under that Programme to meet expenditure under any other Head and Programme.

On this basis it was submitted that the vesting discretion by Parliament in the Secretary to the Treasury would only be after due and proper consideration and cannot amount to an abdication of Parliamentary control of public finance as contended by the Petitioners.

It was further submitted that in any event the amount so transferred by the Secretary to the Treasury would be to meet expenditure under any other Head and Programme already included in the Appropriation Bill.

In answer to this contention Counsel for the Petitioners submitted that there should be included in the Clause 6 a specific reservation as in Clause 7 that such transfer by the Secretary to the Treasury should only be for the purpose of meeting authorized expenditure.

The submissions of Counsel focus on the allocation for Recurrent and Capital expenditure to the Ministry of Finance and Planning.

The immediate responsibility of meeting unexpected expenditure under other Heads and Programmes would finally rest on the Department of National Budget. In this context it appears that from the year 2003 a budgetary method has been adopted in which a relatively large sum is allocated under the Head "Department of National Budget" with an attendant reduction under other Heads and at times a further cut proposed by the Minister to balance the Budget, on the premise that urgent and immediate excess expenditure under other Heads be met by a transfer from the Head, Department of National Budget. The submission of Addl. Solicitor General is that such action is necessary in view of the volatile state of the country's financial position resulting from a variety of factors, including the escalating defence expenditure caused

by the war, steeply rising oil prices, inflation and an unfavourable balance of payments situation resulting in the downward trend of the Rupee vis-a-vis other currencies.

We have to accept the submissions of the Additional Solicitor General as to the context in which Parliament has passed into law clauses to the same effect consistently from the year 2003 onwards. The volatile situation may not provide the space and time for a supplementary estimate and the machinery of Government could otherwise come to a halt. A degree of flexibility may therefore be necessary as contended. We are also inclined to agree with the submissions of the Additional Solicitor General that the establishment of a Contingencies Fund to meet urgent and unforeseen expenditure as envisaged by Article 151 is farfetched in the current fiscal context plainly due to a lack of resources.

The sentence referred to above in Clause 6, which drew much criticism by the Petitioners provides that the money transferred shall be deemed to have been covered by a supplementary estimate submitted by the appropriate Minister. This provision is necessary in our view to ensure accountability by the officer who is actually responsible for the expenditure. In any event the expenditure would be subject to audit and the Auditor General would report on the matter to Parliament in terms of Article 154 of the Constitution.

A qualification as in Clause 7 that the transfer should be to meet authorized expenditure cannot be included. The transfer to meet authorized expenditure is covered by Clause 5(1). The provision that the transfer in terms of Clause 6 is deemed to be a supplementary estimate connotes that it is not intended to cover authorized expenditure. The qualification suggested could therefore be a contradiction in terms.

Our attention has also been drawn to the Fiscal Management (Responsibility) Act No.3 of 2003. The Act provides for extensive Parliamentary supervision of the fiscal position at different stages.

Section 7 provides for the "Budget Economic and Fiscal Position Report" to be tabled in Parliament in respect of each year when the Appropriation Bill is taken up for the second reading. The object of this requirement is to provide information to Parliament for the evaluation of the government's fiscal performance as against the strategy which had been previously laid down.

Section 10 provides for a "Mid-Year Fiscal Position Report" by the end of June in the current year.

In terms of Section 12 this Report should contain a statement of estimated and actual expenditure for the first four months.

Section 13 requires Final Budget Position Report to cover the entire year

In terms of Section 15(a) this Report should contain a statement of the estimated and actual expenditure and Section 15(2) requires reasons to be stated for any deviations from the estimates.

It is thus seen that although a discretion is vested by Clause 6 in the Secretary to the Treasury to transfer money voted under Head 240 of the Department of National Budget" to meet expenditure under any other Head and Program, any such transfer could come within the purview of the Parliament pursuant to the reporting mechanisms as contained in the Fiscal Management (Responsibility) Act No.3 of 2003. Thus the vesting of discretion in the Secretary to the Treasury from the year 2003 as noted

above, has been matched by the reporting mechanisms introduced to ensure Fiscal Management Responsibility from the same year.

In the circumstances Clause 6 would not in our view be inconsistent with Article 148 of the Constitution and the connected Articles, since the Parliament finally retains full control of public finance not only in the matter of allocation of expenditure but also by supervision of the actual expenditure for which there is adequate legislative provision in Article 154 of the Constitution and the Fiscal Management (Responsibility) Act No. 3 of 2003.

All the Reports presented to Parliament under the said Act have not been produced in Court. There is no requirement to do so. But we note that in the Reports submitted there is no specific reference to the transfers made by the Secretary, in terms of Sections 5(3) or 6 of the previous Appropriation Acts. It is not feasible or permissible for this Court to go into the matter of accounting to ascertain the actual transfers as contended by the Petitioner appearing in person. We have to restrict our review to the area of constitutionality. But, considering the severe criticism made, we have to observe that for purposes of ensuring transparency and prudential financial management, the transfers made in terms of Clause 6 that are deemed to be supplementary estimates should be specifically included in the relevant reports submitted in terms of the Fiscal Management (Responsibility) Act No. 3 of 2003, with reasons for the particular deviation.

The challenge in respect of Clause 5(1) also relate to the authority vested in the Secretary to the Treasury. The first part of Clause 5(1) provides for a transfer of unexpended money allocated to Recurrent Expenditure in any Programme, to meet Capital Expenditure in that Programme. This is a blanket authority which can be exercised by the Accounting Officer in respect of that Head. The second part of the

Clause permits transfer of any unexpended allocation for Recurrent Expenditure to meet Recurrent Expenditure or the Capital Expenditure under any other Programme within the Head by order of the Secretary to the Treasury or any other officer authorized by him. Similarly provisions had been included in all preceding appropriation accounts referred to above.

The submission of Counsel was that although such transfer may be necessary, the vesting of authority only in the Secretary to the Treasury in this regard would be unconstitutional and that there should be specific provision for the Secretary's power to be exercised in consultation with or on the recommendation of the Secretary of the appropriate Ministry in respect of which the transfer is made. It appears that this submission is made without taking into account the ordinary administrative procedure. In practise the Secretary to the Treasury would necessarily act on the basis of a request for such transfer by the Accounting Officer of the particular Head of expenditure. In the absence of such a request the Secretary to the Treasury would have no basis or reason to make an order for transfer as empowered in Clause 5(1).

It was further submitted that an officer who may be authorized by the Secretary to the Treasury to make such order should ^{be} from amongst officers to be specified in the Clause.

In this regard have to observe that the Secretary to the Treasury would finally be responsible for the order and he would delegate this power only to an officer of suitable standing. Counsel did not pin point any particular provision of the Constitution in relation to which Clause 5(1) could be held to be inconsistent.

The submissions were made based on the need to introduce sufficient guidelines and limitations that would apply to the exercise of power by the Secretary to the Treasury.

We have to note that these are matters of inveterate practice in the Treasury.

We are unable to agree with the submission that there is now a need to ignore the well accepted norms as to administrative procedure and to introduce additional guidelines and limitations. Accordingly we see no merit in the submissions made in respect of Clause 5(1) of the Bill.

For the reasons stated above we make a determination in terms of Article 123 of the Constitution that the above Bill is not inconsistent with the Constitution.

We wish to however note the observation stated above that any transfer made from the "Development Activities" Program, in terms of Clause 6 to any other Programme under any other Head by order of the Secretary to the Treasury should be specifically included in the respective Reports submitted in terms of Fiscal Management Responsibility Act No. 3 of 2003 with reasons for such deviation.

Sgd.

Sarath N Silva
Chief Justice.

Sgd.

N.E. Dissanayake
Judge of the Supreme Court

Sgd.

A.M. Somawansa
Judge of the Supreme Court