

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

*In the matter of an Application in terms of Article 121,
read with the other applicable and relevant Articles of
the Constitution, for a determination, as to whether any
one or more provisions of the Bill titled: "Appropriation
Bill 2007" is / are inconsistent with and / or ultra-vires
the Constitution.*

Nihal Sri Ameresekere
167/4, Vipulasena Mawatha
Colombo 10.

PETITIONER

SC/SD No. 7/2007

Vs.

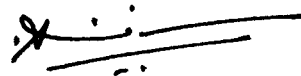
Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

**TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS & LADYSHIPS THE OTHER HONOURABLE
JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

I respectfully tender for the kind information of Your Lordships' Court my Letter of even date addressed to the Addl. Solicitor General, in the circumstances referred to at paragraph 2 thereof, and I respectfully Move that Your Lordships' Court be pleased to accept the same.

On this 22nd day of October 2007



Petitioner

BY COURIER

22nd October 2007

Urgent / Important

Mr. P.A. Ratnayake P.C.,
Addl. Solicitor General,
Attorney General's Department,
Hulfstdorp,
Colombo 12.

Dear Mr. Ratnayake,

SC/ SD No. 7/2007
Appropriation Bill for Year 2008

I attach copy of my Letter of even date forwarded to the Auditor General, contents of which, I believe are materially relevant to proceedings on 17.10.2007 at the Hearing in the Supreme Court.

As you are aware, I hardly had any time, when my turn came to deal with my Application, at about 3.00 p.m., by which time I was 'famished' [*I am under medication for hypertension, diabetes and cholesterol now for over 13 years*] ! In such circumstances, I could not focus and develop my cohesive argument, with the lights also failing, even though I had devoted much time with strenuous efforts, as evidenced by the formulation of my Petition, filed in the public interest.

It is led to be believed that the Budget Head – "Department of National Budget" is for specified public expenditure for specific purposes. Please clarify, as to whether this is so ? If so, as per Clause 6, what is the need to have the specific right to transfer administratively, without disclosure to Parliament ? You would recall, that in the course of the proceedings it was suggested that this was to afford some 'flexibility'. Could Parliament approve funds for unspecified public expenditure for unspecified purposes ?

In terms of Article 149(1) of the Constitution, funds of the government not allocated by law to specific purposes, in aggregate form the Consolidated Fund.

As per Articles 150(1) & (2), the Minister of Finance could withdraw from the 'Consolidated Fund', only where Parliament has approved such funds for specified public services.

Therefore, would not Parliament be prohibited from approving funds for unspecified and/or unspecified public services ? In terms of Article 149 funds not allocated for specific purposes, in fact, form the 'Consolidated Fund'.

The only exception is in terms of Article 151, which stipulates that, notwithstanding the provisions of Article 149 i.e. the prohibition, that Parliament could, however, create a 'Contingencies Fund' for unspecified expenditure and/or unspecified public services, where after expending funds for such purposes, the Minister of Finance is required to obtain the approval of Parliament, through a Supplementary Estimate.

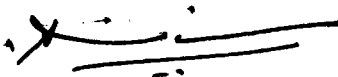
I also draw your kind attention to Clause 7 of the Appropriation Bill, where the satisfaction of the Minister and approval of the Government is mandated, where original funds for a particular purpose are no longer required.

I reiterate the dicta of the Supreme Court cited in paragraphs 10 and 11 of my Petition and draw your kind attention, particularly to the following:

- "It is to be borne in mind that public revenue is held in trust for the People of Sri Lanka, who cannot be denied its benefit"
- "Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution."
- "If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective"

I appeal to you, to please apprise yourself of the facts from the Auditor General *vide* - my attached Letter, and to consider the foregoing, such facts and the prayers in my Petition, in tendering to your Written Submissions to the Supreme Court in this matter.

Kind regards,



Nihal Sri Ameresekere

BY COURIER

22nd October 2007

Urgent / Important

Mr. P.A. Pematilaka, FCA, BCom, PDFM, MBA
Auditor General,
Auditor General's Department,
Torrington Square,
Colombo 7.

Dear Mr. Pematilaka,

**Appropriation Bill for Year 2008
Annual Report 2006
Financial Statements for Year 2006**

I draw your kind attention to the annexed copy of my Petition dated 11.10.2007, filed in the public interest in the Supreme Court, in terms of Article 121 of the Constitution, *vis-à-vis*, the Appropriation Bill for the Year 2008, placed on the Order Paper of Parliament on 10.10. 2007. I also draw your kind attention to the Appropriation Bill for Year 2008, Annual Report 2006 and the Financial Statements for Year 2006.

In terms of Sections 13, 14 and 15 of the Fiscal Management [Responsibility] Act No. 3 of 2003, the final Budget Position Report i.e. the Annual Report has to contain statements comparing the estimated and the actual expenditures, revenues, cash flows and borrowings, stating the reasons for shortfalls and excesses. [Section 15]. I draw your kind attention to the 'Head-wise' Summary of Expenditure Account with Budgetary Provisions for the Year 2006 at pages 28 – 32 of the Financial Statements for Year 2006 audited by you.

The total actual expenditure for Year 2006 has been given as Rs. 1072.8 billion, against a 'provisional expenditure' of Rs. 1177.8 billion. The expenditure for Year 2006, as per the Appropriation Act No. 39 of 2005 had been Rs. 609.3 billion. There would be expenditure provided for by the Constitution, itself, *vide* – paragraph 4(c) of my Petition, other Laws (*under what Law are payments made in respect of Borrowings in the absence of 'sinking funds' as provided for in the Constitution*) and Supplementary Estimates.

Therefore, ought not the original estimated expenditure of Rs. 609.3 billion, as per the Appropriation Act, together with the other expenditure provided by the Constitution and/or other Laws, be compared with the actual expenditure incurred for the Year 2006 of Rs. 1072.8 billion, and the reasons stated in respect of each 'Head' of expenditure, including the reasons for Supplementary Estimates under each 'Head' ? Would this not be the statutory stipulation in terms of Section 15 of the said Act No. 3 of 2003 ? Addl. Solicitor General, Mr. P.A. Ratnayake P.C. was instructed that the contents of Page 70 [*copy attached*] of the Annual Report 2006, which deals with only a few items of expenditure, complies with the aforesaid statutory obligation. In the public interest, I shall be grateful, if you could urgently, please clarify the correct position to the Addl. Solicitor General.

The same obligation to compare the actual expenditure with the original budgeted 'Head-wise' expenditure, would also be similarly applicable to the estimated revenues, cash flows and borrowings, in terms of Section 15 of the said Act No. 3 of 2003, which lays down a 'scheme' for public disclosure and accountability, of the fiscal management of public funds, to enable the public to evaluate; which therefore ought be in a simplified format, where public could evaluate exercising their right, in terms of the provisions of Act No. 3 of 2003.

Sections 4, 5 and 6, and Sections 7, 8, and 9, of the said Act No. 3 of 2003 mandate the release of a Fiscal Strategy Statement and Budget Economic Fiscal Position Report, respectively, to be released to the public and tabled on the first day of the 2nd reading of the Appropriation Bill. Hence, would not the Annual Report necessarily have to compare the estimates at the stage of the Appropriation Bill, with the actuals applicable for the Year, giving the reasons therefor in terms of Section 15 of the said Act No. 3 of 2003 ?

I also draw your kind attention to Paragraph 15(b) of my annexed Petition, wherein the Budget for 'Head' 801-'Department of National Budget' was given as Rs. 23.3 billion in the detail Budget Estimates, as Rs. 62.2 billion in the Appropriation Act No. 39 of 2005 and as Rs. 77.9 billion in the Committee Stage Amendments, (*This appears to be different to the sum in the Appropriation Act ?*), whereas only Rs. 4.6 billion had been incurred in respect of 'Head' 801, as per the Financial Statements for Year 2006 audited by you. I had stated them, as per the Parliamentary Documents [*copies attached for convenience*] [P6(a)], [P6(b)] [P6(c)] and Financial Statements [P7] audited by you, attached to my Petition.

I understand that additionally Rs. 109 billion had been provided as Supplementary Estimates, which together with the Rs. 62.2 billion in the Appropriation Act, would amount to Rs. 171 billion. I further understand that Rs. 166 billion has been transferred out through administrative actions, which therefore reveals the actual expenditure as Rs. 4.6 billion under this 'Head' in the said Financial Statements. Would not this give rise to the need to disclose, as to how, the balance Rs. 166 billion had been utilised, giving the reasons therefor, as mandated by the said Act No. 3 of 2003 ?

Here again, the Addl. Solicitor General had been instructed that the said 'data' were erroneous. Similarly, in the public interest, I shall be grateful, if you could urgently please clarify the correct position to the Addl. Solicitor General.

This is important, since as per Section 6 of Appropriation Act No. 39 of 2005 for the Year 2006, the Secretary to the Treasury or any other officer authorised by him, had been authorised to transfer funds from the 'Head' 'Department of National Budget' to any other purpose, without a Supplementary Estimates being approved by Parliament. So also in Appropriation Act No. 47 of 2006 for the Year 2007. This Clause 6 in the Appropriation Bill was one of the contentious issues before the Supreme Court.

I draw your kind attention to Clauses 3, 4, 8 and 9, which deal with the Second Schedule to the Appropriation Act *vis-à-vis* Advance Accounts;

	Maximum Limit of Expenditure Rs.Mn.	Minimum Limit of Receipts Rs.Mn.	Maximum Limit of Debit Balances Rs.Mn.	Minimum Limit of Liabilities Rs.Mn.
Year 2008 As at 31.12.2008	14,200	10,200	41,485	510
Year 2007 As at 31.12.2007	13,424	9,424	40,514	560

You would note that even though the above amounts are 'comparatively negligible', when compared with the volume of funds falling within the ambit of the First Schedule, Clauses 3, 4, 8 and 9 of the Appropriation Bill provide for strict control over such funds by the Minister of Finance and Parliament. Hence, what could be the rationale for not having such similar control over much larger values of funds, included in the First Schedule ?

It is led to be believed that the Budget 'Head' - "Department of National Budget" is for specified public expenditure for specific purposes. Please clarify, as to whether this is so ? If so, as per Clause 6, what is the need to have the specific right to transfer administratively, without disclosure to Parliament ? Could Parliament approve funds for unspecified public expenditure for unspecified purposes ?

In terms of Article 149(1) of the Constitution, funds of the government not allocated by law to specific purposes, in aggregate form the Consolidated Fund. Articles 150(1) & (2) enable the Minister of Finance to withdraw from the 'Consolidated Fund', only where Parliament has approved such funds for specified public services. Therefore, would not Parliament be prohibited from approving funds for unspecified and/or unspecified public services ? In terms of Article 149 funds not allocated for specific purposes, in fact, form the 'Consolidated Fund'.

The only exception is in terms of Article 151, which stipulates that, notwithstanding the provisions of Article 149 i.e. the prohibition, that Parliament could however create a 'Contingencies Fund' for unspecified expenditure and/or unspecified public services, where after expending funds for such purposes, the Minister of Finance is required to obtain the approval of Parliament, through a Supplementary Estimate to the Appropriation Act.

In the aforesaid Financial Statement, as per the Statement of Financial Position as at 31.12.2006, Rs. 140 million is stated as 'Contingency Fund', whereas there does not appear to be an 'investment' / 'bank funds' to such extent shown on the said Statement of Financial Position, whereby would it not be a mere conceptual allocation ? Therefore, could not this limit of Rs. 140 million be increased by Parliament to meet present day needs ? This would ensure that any expending of funds not approved by Parliament for any specific public purposes and/or specific public expenditure, would require at least subsequent approval by Parliament in terms of Article 151 of the Constitution, thereby overcoming the objection to transfer of funds by administrative action without Parliament approval.

I draw your kind attention to Paragraph 8 of my Petition giving extracts from a recent Report of the former Auditor General, present Project Director of the Office of the Committee on Public Accounts and Committee on Public Enterprises, titled – "Proposals for the Strengthening of Parliamentary Control over Public Finance". In terms of Article 148, Parliament is mandated to have full control over Public Finance. The said Report, a copy of which I believe you have, *inter-alia* states thus –

"This position has led to an aggravated situation due to the very wide gap between the Budget approved by our Parliament and the budget actually executed and the practice of not obtaining a special approval or authority of Parliament for such variances.

The revision of the Budget approved by the Parliament for the year 2006 by Rs. 220.2 Billion at the discretion of the Officers, as explained in detail in (2) Paragraph of Part II of this report can be cited as an example.

The revision of the budget by Rs.220.2 Billion at the discretion of the officers in terms of provisions in Section 5 of the Appropriation Act, No. 39 of 2005 including Rs.166 Billion in terms of authority granted under Section 6 of the said Act raises the question whether it tantamount to a partial abdication of the powers of full control over the Public Finance vested in the Parliament by Article 148.

As compared with Rs.609 Billion originally approved for expenditure for the year 2006 and Rs.1,072.8 Billion stated as the actual expenditure, that sum of Rs.220.2 Billion represents a very high percentage.

- This becomes more serious as this form of version left to the discretion of the Officers has been arranged in such manner, it does not need the approval or sanction of the Parliament as well as that of the Cabinet of Ministries or even the Minister."

Table 98 (*copy attached*) of the Central Bank Annual Report gives the 'over expenditure' and 'under expenditure' for both 'recurrent' and 'capital' expenditure in respect of the Ministries for the Year 2006. Would not the 'over expenditure' have required Supplementary Estimates approved by Parliament, and 'under expenditure' come under the ambit of Clause 7 of the Appropriation Bill ?

Ought not the Appropriation Bill specifically disclose the other funds of the Government, referred to in the Constitution and the utilisation of the funds thereof ?

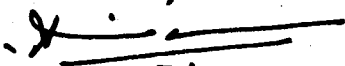
I also draw your kind attention to Section 22 of the said Act No. 3 of 2003, whereby disclosures in the aforesaid Reports released for public accountability and evaluation, mandates disclosure to be made, as required by the said Act, of Companies in which Government owns Shares. Has the Annual Report 2006 made such mandated disclosures in respect of such Companies in terms of the said Act ?

I note that you have given an unqualified Audit Report on the Financial Statements for the Year 2006. I draw your kind attention to the Special Audit Report given by the Auditor General to Parliament in July 2006 *inter-alia*, reporting thus in the 'Executive Summary' thereof –

"According to test checks carried out during the course of audit it was observed that the annual loss of the Government Tax Revenue is extraordinarily large. According to audit test checks the computable value of the loss of Government Tax Revenue and the failure to collect in accordance with the legal provisions during the last few years amounts to about Rs.389 billion while the amount that cannot be computed is extremely large."

Compared with the total revenue of Rs. 477 billion for the Year 2006, you would no doubt concede that Rs. 389 billion is very material. I trust that such non-qualification has been an oversight on your part.

Kind regards,



Nihal Sri Ameresekere

cc: Mr. P.A. Ratnayake P.C., Addl. Solicitor General