

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

In the matter of an Application in terms of Rule 63(2)(iii), read with Rule 63(2)(ii) of the Supreme Court Rules of 1978 to be heard at the proceedings on 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: “Default Taxes (Special Provisions) Bill” is / are inconsistent with and / or ultra-vires the Constitution.

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

INTERVENIENT-PETITIONER

SC/SD No. 2/2009

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 tender herewith my Petition and Affidavit together with Documents marked "X1", "X2", "X3", "X4", "PX5", "X6(a)", "X6(b)" and "X7", and respectfully MOVE that Your Lordships’ Court be pleased to :

- a) accept the same, and
- b) permit me to be heard at the Hearing;

I very respectfully draw the kind attention of Your Lordships’ Court to the following paragraphs 4 (c) (i) to (v) of my Petition and appeal to Your Lordships’ Court to make a ruling thereon as Your Lordships’ Court shall seem meet.

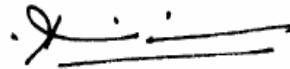
“4(c) (i) On the other hand, the “Default Taxes (Special Provisions) Bill” had been placed on the Order Paper of Parliament on 7.4.2009, and was to have been taken-up for the Second Reading on 20.4.2009.

- (ii) With the intervening seasonal and statutory holidays, with the public holidays i.e. 9th, 10th, 11th, 12th, 13th, 14th, 18th and 19th, there were only 4 working days in between.

- (iii) However, out of an abundance of caution, this Application is made under and in terms of the aforesaid Supreme Court Rules 63(2)(iii), read with 63(2)(ii) of 1978.
- (iv) In the context of the intervening public holidays referred to at (iii) above, the kind attention of Your Lordships' Court is very respectfully drawn to the relevant provisions of the Interpretation Ordinance, and the Petitioner, in the public interest, very respectfully appeals to Your Lordships' Court to interpret and/or determine the last date of the period of '*within one week*' as stipulated in Article 121 of the Constitution, prior to which an Application in terms of Article 121 of the Constitution ought to have been made, in this instant case by a citizen.
- (v) Should the Petitioner's Application be within the time limit so determined by Your Lordships' Court, the Petitioner very respectfully prays that Your Lordships' Court be pleased to deem and accept this Application of the Petitioner, as an original Petition, and not as an intervening Petition."

A copy hereof, together with copies of the aforesaid Petition, Affidavit and Documents marked therewith, having been sent to the Hon. Attorney General and the Hon. Speaker of Parliament by Registered Post, Registered Postal Article Receipts are attached hereto.

On this 21st day of April 2009



Intervenant-Petitioner

**IN THE SUPREME COURT
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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

On this 21st day of April 2009

The **Petition** of the **Interventient Petitioner** above-named, (hereinafter referred to as the “**Petitioner**”) appearing in person, states as follows:

1. Petitioner is a –
 - a) citizen of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the “**country**”)
 - b) Member of the -
 - Institute of Chartered Accountants, Sri Lanka,
 - Chartered Institute of Management Accountants, UK.
 - Institute of Certified Management Accountants, Australia
 - Association of Certified Fraud Examiners, USA
 - International Consortium on Governmental Financial Management
 - International Association of Anti-Corruption Authorities
 - c) Consultant exposed to both the private and public sectors

- d) public interest activist, particularly, *vis-à-vis*, fraud, corruption and combating the pillage and plunder of the resources of the people of the country

A true photostat copy of the National Identity Card of the Petitioner is annexed marked (“X1”), pleaded as part and parcel hereof.

2. Petitioner being a person interested in the Determination of the questions involved to be heard at the proceedings, makes this Application in terms of Rule 63(2)(iii), read with Rule 63(2)(ii), of the Supreme Court Rules 1978.
3. (a) The Bill – “Default Taxes (Special Provisions) Bill” is of utmost concern to the public of the country and the Petitioner, who is presenting this Petition for himself, on his own behalf, and for and on behalf of the people of the country, having previously filed the following Applications in relation to the impugned Inland Revenue (Special Provisions) Act No. 10 of 2003:

- (i) SC (SD) No. 11 of 2003, which Your Lordships’ Court, on the objection of the Hon. Attorney General, declined to exercise jurisdiction, on the premise that, the said Application had been filed, outside the very limited period of ‘*within one week*’ stipulated in Article 121 of the Constitution of the Bill, having been placed on the Order Paper of Parliament.

Furthermore, material modifications and/or additions had been made to the aforesaid Bill at the Committee Stage of Parliament, thus denying the constitutional right of a citizen under Article 121 of the Constitution.

- (ii) SC (SD) No. 20 of 2003 on the extension of the above Act, by Inland Revenue Special Provisions (Amendment) Bill, which Your Lordships’ Court Determined was only a ‘change of a date’ and not a fresh enactment of the provisions, though re-enacted for a new period; the said Bill subsequently became Inland Revenue Special Provisions (Amendment) Act No. 31 of 2003.

Nevertheless, subsequently in SC (SD) No. 22/2003, in which the Petitioner was an Interventor-Petitioner, a Full Bench of Your Lordships’ Court determined - **“However, an amendment cannot be viewed in isolation. It certainly cannot derive a stamp of constitutionality from the Act that is in force”.**

- (iii) Intervening Application in SC Reference No. 1/2004, which the Petitioner caused the then President of the Republic to be referred, in terms of Article 129 of the Constitution, to Your Lordships’ Court, making submissions in person at the Hearing.

A true copy of the Opinion of March 2004 of a Full Bench of Your Lordships’ Court is annexed hereto marked (“X2”), pleaded as part and parcel hereof.

- (b) Petitioner, as requested by the then President of Republic, assisted in the drafting of the Inland Revenue (Regulation of Amnesty) Bill in 2004, repealing the aforesaid Acts Nos. 10 of 2003 and 31 of 2003, and which said Bill was referred to Your Lordships’ Court by the Cabinet of Ministers, as an urgent Bill, for a Determination in terms of Article 122 of the Constitution.

In the said Determination Your Lordships' Court, *inter-alia*, reiterated the following extract of the aforesaid Opinion of March 2004

"It is our Opinion, based upon the preceding analysis that, the provisions contained in the Inland Revenue (Special Provisions) Act No. 10 of 2003, as amended, are inconsistent with Article 12(1) of the Constitution which guarantees to every person equal protection of the law; in that its grants immunities and indemnities to persons who had contravened the laws that have been referred to and the rebuy defrauded public revenue causing extensive loss to the State"

In the said Determination Your Lordships' Court made determinations as follows:

"Furthermore, the clause seeks to vest in the Minister a discretionary power without adequate guidelines. It is therefore in our opinion inconsistent with Article 12(1) of the Constitution and the provisions of Chapter IX of the Constitution, as amended by the 17th Amendment.

For the reasons stated above we make a determination as follows:

- (a) that clause 2(2) is inconsistent with Article 80(1) of the Constitution;
- (b) the proviso to clause 4(2) is inconsistent with Article 55 of the Constitution as amended by the 17th Amendment
- (c) clause 6 is inconsistent with Article 55 of the Constitution, as amended by the 17th Amendment and Article 12(1) of the Constitution."

we make a further determination in terms of Article 123 of the Constitution that inconsistencies stated above would cease if clause 2(2) is replaced by a provision on the following lines; And the proviso to clause 4(2) and clause 6 are deleted from the Bill"

A true copy of the Determination in SC (SD) No. 26/2004 of August 2004 of Your Lordships' Court is annexed hereto marked ("X3"), pleaded as part and parcel hereof.

- (c) Petitioner filed an Application in SC (SD) No. 3/2008 for a Determination of Your Lordships' Court on the "Appropriation Bill 2008", making submissions in person at the Hearing.

In the said Determination Your Lordships' Court, *inter-alia*, observed as follows:

"Be that as it may, assuming the premise presented by the State, the Government is caught in a veritable "debt trap" in which debt service payment for the current year are met by raising further debt in that year, thereby increasing the debt service payments for the succeeding years"

A true copy of the Determination of October 2008 of Your Lordships' Court is annexed hereto marked ("X4"), pleaded as part and parcel hereof.

- (d) Petitioner discloses SC (FR) No. 194/2003, which was filed in the context of the impugned Inland Revenue Special Provisions Act No. 10 of 2003, and was not pursued in the circumstances of the repeal of the said impugned Statute.

4. (a) The Bill - "Default Taxes (Special Provisions) Bill" is of significant importance in the public interest, in the context of the Court of Appeal Writ Application No. 1661/2003 instituted by the Petitioner, *which is still pending settlement from as far back as July 2006 though agreed thereto by the Hon. Attorney General, for the due and proper enforcement of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004, and the provisions of the Inland Revenue Acts.*

A true copy of Letter dated 19.3.2009 addressed to the Hon. Attorney General by the Attorneys-at-Law of the Petitioner, together with the annexures thereto, is annexed hereto marked ("X5"), pleaded as part and parcel hereof.

- (b) Such 'inordinate delay' and 'stalling' of the settlement in CA Writ Application No. 1661/2003 is as a consequence of the Officers of the Inland Revenue Department, *having been questionably indifferent and tardy, in agreeing to give undertakings in the Court of Appeal, for the due and proper enforcement of the aforesaid statutory provisions* in terms of a Settlement Motion finalised with the Hon. Attorney General.
- (c) (i) On the other hand, the "Default Taxes (Special Provisions) Bill" had been placed on the Order Paper of Parliament on 7.4.2009, and was to have been taken-up for the Second Reading on 20.4.2009.
- (ii) With the intervening seasonal and statutory holidays, with the public holidays i.e. 9th, 10th, 11th, 12th, 13th, 14th, 18th and 19th, there were only 4 working days in between.
- (iii) However, out of an abundance of caution, this Application is made under and in terms of the aforesaid Supreme Court Rules 63(2)(iii), read with 63(2)(ii) of 1978.

True copies of the respective Pages 10 and 11, together with the corresponding First Pages, of the Order Papers of Parliament of 7.4.2009 and 20.4.2009, respectively, marked ("X6(a)") and ("X6(b)"), together with a true copy of the "Default Taxes (Special Provisions) Bill" marked ("X7"), are annexed hereto pleaded as part and parcel hereof.

- (iv) In the context of the intervening public holidays referred to at (iii) above, the kind attention of Your Lordships' Court is very respectfully drawn to the relevant provisions of the Interpretation Ordinance, and the Petitioner, in the public interest, very respectfully appeals to Your Lordships' Court to interpret and/or determine the last date of the period of '*within one week*' as stipulated in Article 121 of the Constitution, prior to which an Application in terms of Article 121 of the Constitution ought to have been made, in this instant case by a citizen.
- (v) Should the Petitioner's Application be within the time limit so determined by Your Lordships' Court, the Petitioner very respectfully prays that Your Lordships' Court be pleased to deem and accept this Application of the Petitioner, as an original Petition, and not as an intervening Petition.
5. (a) In SC (FR) Applications Nos. 10/07, 11/07, 12/07 and 13/07 Your Lordships' Court, *inter-alia*, held as follows:

"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. Article 27 of Chapter VI lays down that the 'Directive Principles of the State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministries in the enactment of 'laws and the governance of Sri Lanka for establishment of a just and free society." 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." (Emphasis added)

- (b) In SC (SD) No. 22/2003 a Full Bench of Your Lordships' Court, citing Indian precedent, determined as follows:

"The principle therefore is that the **Court will strike down** harsh, oppressive or **unconscionable law prescribing a procedure other than the ordinary procedure**"
(*Emphasis added*)

- (c) A 7-Member Bench of Your Lordships' Court in the Determination made in October 2002 on the aborted 19th Amendment to the Constitution, *inter-alia*, determined as follows: (*Emphasis added*)

"**The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People.** This is not a novel concept. **The basic premise of Public Law is that power is held in trust.** From the perspective of Administrative Law in England, the 'trust' that is implicit in the conferment of power has been stated as follows:

"Statutory power conferred for public purposes is conferred as if it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended" – (Administrative Law 8th Ed. 2000 – H.W.R. Wade and C.F. Forsyth p, 356)

It had been firmly stated in several judgments of this Court that **'rule of law' is the basis of our Constitution.**

"A.V. Dicey in Law of the Constitution" postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings one of which is described as follows:-

"It means, in the first place, ***the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative***, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone"

"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"
(*Cited from Indian Judgment*)

6. For easy reference of Your Lordships' Court, the 'Title' and the 'Preamble' in the "Default Taxes (Special Provisions) Bill" "X7" is set out below:

"AN ACT TO PROVIDE FOR A STREAMLINED AND SPEEDIER PROCESS FOR THE RECOVERY OF TAXES IN DEFAULT IN A TIME BOUND MANNER ; TO PROVIDE FOR THE WRITING-OFF OF TAXES IN DEFAULT IN CERTAIN CIRCUMSTANCES AND FOR MATTERS CONNECTED THEREWITH AND INCIDENTAL THERETO .

WHEREAS it has become imperative to formulate a mechanism for the speedy recovery of taxes imposed under certain specified laws and which have been in default for over a long period of time :

AND WHEREAS it has become necessary in order to facilitate such process, to evolve a method for the recovery of some of these default taxes in a manageable and justifiable manner and to ensure that in the future, taxes in arrears are maintained at a reasonable limit and the officials entrusted with this task be made more accountable towards the collection of these taxes :

AND WHEREAS it has also become necessary to write-off some of the taxes which are in default, adopting a transparent and an accountable process"

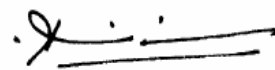
7. Petitioner respectfully states that:
- (a) Clauses of “Default Taxes (Special Provisions) Bill” “X7” go beyond the scope of the objectives and policies contained in the 'Title' and the 'Preamble' thereof, demonstrating that it is misleading and a deception.
 - (b) Clauses of “Default Taxes (Special Provisions) Bill” “X7” are violative of equality before the law in terms of the Article 12(1) of the Constitution, and would facilitate public revenue to be defrauded, causing extensive loss to the State.
 - (c) One or more Clauses of the “Default Taxes (Special Provisions) Bill” “X7” is / are violative of the previous Determinations of Your Lordships’ Court.
 - (d) One or more Clauses of the “Default Taxes (Special Provisions) Bill” “X7” is / are inconsistent with the provisions of the Constitution.
 - (e) One or more Clauses of the “Default Taxes (Special Provisions) Bill” “X7” require/s a special majority of Parliament , to be enacted into law.
 - (f) One or more Clauses of the “Default Taxes (Special Provisions) Bill” “X7” require/s a special majority of Parliament and approval by the People at a Referendum, to be enacted into law.
 - (g) One or more Clauses of the “Default Taxes (Special Provisions) Bill” “X7” could not be legitimately passed by Parliament to be enacted into law, in view of specific prohibitions in the Constitution.
8. (a) In the foregoing premises, it has necessitated the Petitioner to intervene , and accordingly , the Petitioner respectfully appeals to Your Lordships’ Court, in terms of Supreme Court Rules 62(2)(iii), read with 62(2)(ii) of 1978, to be heard at the proceedings for the Determination on the “Default Taxes (Special Provisions) Bill” “X7”, to enable the Petitioner to morefully explain and clarify the foregoing.
- (b) This matter being of grave and serious national and public importance, **cannot be viewed in isolation**, without regard to the reality of prevalent facts, more particularly taking into cognisance the provisions of Articles 27 and 28 of Chapter VI of the Constitution; some of which relevant facts are cited below.
 - (c) In the Budget presented to Parliament in November 2007 for the Year 2008, budgeted Revenue for 2008 was **Rs. 750.7 billion** , and in the Budget presented in November 2008 this was revised to **Rs. 709.3 billion**; and as per Central Bank Report released on 31.3.2009, the Revenue for 2008 is given only as **Rs. 655.3 billion** .
 - (d) The scandalous VAT fraud of 'unfathomable values' reported in July 2006 to Parliament through a Special Report by the Auditor General, *still being investigated*, including by a Presidential Commission; *the said Special Report to Parliament deplored the Revenue Administration and the non-collection of State Revenue*.
 - (e) Given the scandalous manner in which colossal fraudulent VAT refunds had been made , it is respectfully submitted, that Officers of the Inland Revenue Department **cannot be given arbitrary power to write-off taxes of whom they please, that too, without any guidelines and/or criteria**.

- (f) Taxes such as GST and VAT are in fact revenues of the State collected on behalf of the State by persons, in fiduciary capacity as agents, and hence it would be prohibited for them to retain and misappropriate such public funds, in terms of Article 28 of the Constitution, and the provisions of Offences Against Public Property Act No. 12 of 1982.
- (g) Questionable 'reluctance' and/or 'unwillingness' and/or 'stalling' on the part of the Officers of the Inland Revenue Department, to enforce the prevalent statutory provisions of the Inland Revenue Acts, as morefully disclosed by "X5", which bears out the persistent endeavours made by the Petitioner in that behalf.

9. Affidavit of the Petitioner in support of averments contained herein is annexed hereto.

WHEREFORE the Petitioner respectfully prays that Your Lordships' Court be pleased to determine that:

- (a) Clauses of "Default Taxes (Special Provisions) Bill" "X7" go beyond the scope of the objectives and policies contained in the 'Title' and the 'Preamble' thereof, demonstrating that it is misleading and a deception.
- (b) Clauses of "Default Taxes (Special Provisions) Bill" "X7" are violative of equality before the law in terms of the Article 12(1) of the Constitution, and would facilitate public revenue to be defrauded, causing extensive loss to the State.
- (c) One or more Clauses of the "Default Taxes (Special Provisions) Bill" "X7" is / are violative of the previous Determinations of Your Lordships' Court.
- (d) One or more Clauses of the "Default Taxes (Special Provisions) Bill" "X7" is / are inconsistent with the provisions of the Constitution.
- (e) One or more Clauses of the "Default Taxes (Special Provisions) Bill" "X7" require/s a special majority of Parliament, to be enacted into law.
- (f) One or more Clauses of the "Default Taxes (Special Provisions) Bill" "X7" require/s a special majority of Parliament and approval by the People at a Referendum, to be enacted into law.
- (g) One or more Clauses of the "Default Taxes (Special Provisions) Bill" "X7" could not be legitimately passed by Parliament to be enacted into law, in view of specific prohibitions in the Constitution.
- (h) communicate to the Hon. Speaker of Parliament any or all the Determinations made by Your Lordships' Court,
- (i) grant such other and further reliefs as to Your Lordships' Court shall seem meet,



Intervent-Petitioner