

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

SC. (SD) No. 02/2009

“DEFAULT TAXES (SPECIAL PROVISIONS) BILL”

PRESENT : J.A.N. de Silva, Judge of the Supreme Court
D.J.de S. Balapatabendi, Judge of the Supreme Court
P.A. Ratnayake, Judge of the Supreme Court

COUNSEL : A.P. Niles with Champaka Ladduwahetty instructed by
Chithrananda Gemunu Liyanage for Petitioner.

Nihal Sri Amarasekera - Intervenient- Petitioner
Present in person.

Indika Demuni de Silva, DSG. With Nerin Pulle, SSC. for
A.G.

Court assembled for hearing on 29th April 2009. at 10.00 a.m.

A Bill titled “Default Taxes (Special Provisions) Bill” has been presented to Parliament and was placed on the Order Paper of Parliament on 7th April 2009.

The Petitioner has challenged its constitutionality by the papers presented to this Court and has thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution.

Hon. Attorney General was given due notice of the Petition and Mrs. Indika Demuni De Silva, Deputy Solicitor General assisted Court in considering the constitutionality of the Bill and its Provision.

The Bill seeks to give effect to a 2008 Budget Proposal which is to provide for a stream lined and speedier process for the recovery of taxes in default. It also provides for the writing off of taxes in default in certain circumstances.

The Petitioner and the Intervening Petitioner objected to Clause 6 of the Bill on the basis that the write off of default taxes in respect of the institutions enumerated therein is discriminatory vis-à-vis other defaulters such as private entities and therefore it violates Article 12(1) of the Constitution.

It was submitted on behalf of the Attorney General that the classification is based on intelligible criteria and that it bears a reasonable and a rational relation to the object and effects sought to be achieved. In this regard it was further submitted that the write off of "Taxes in Default" is confined to those institutions enumerated under Clause 6 of the Bill and which are dependent on Government funding to meet their tax liabilities.

In SC. Special Determination 28/2004 the Court states as follows:-

"However, it is to be borne in mind that in terms of Article 15(7) of the Constitution, the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to certain restrictions prescribed by law. These restrictions according to Article 15(7),

".....subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of **meeting the just requirements of the general welfare of a democratic society** (emphasis added)."

The main purpose of the Bill, as pointed out earlier is to implement the Budget proposals of 2004, and it is undoubtedly for the purpose of 'general welfare of a democratic society'. To that extent the Clause would come within the exception granted in terms of Article 15(7) of the Constitution. "

In our opinion, the same could be said in respect of the Provisions of this Bill.

In SC. SD. 03/80 "Inland Revenue (Amendment) Bill" where exemptions of Income Tax were given only in respect of undertakings which has a capital of over Rs.500 million this Court has held as follows:-

"It may be considered that the exemption from income tax of profits and income of undertakings which has a capital of over Rs.500 million when undertakings with more modest capital are liable to pay income tax on their profits and income is discriminatory and offends against the provisions relating to equality in the Constitution. This is, however, fiscal legislation and it is a matter for the Legislature to decide what

considerations relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to. Presumably, this provision is sought to be enacted on the basis of economic consideration in respect of which the decision must largely be left to the Legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made."

Based on the above reasoning, we are of the view that as submitted on behalf of the Attorney General that the classification made in Clause 6 is based on intelligible criteria and that it bears a reasonable and a rational relation to the object and effects sought to be achieved.

It was further submitted on behalf of the Petitioner that the Provisions of the Bill effects Parliamentary control over Public Finance. Reference was drawn to Article 148 of the Constitution. Article 148 states as follows:-

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

It was contended that discretion was vested with the Commissioner General of Inland Revenue without proper guidelines under the Provisions contained in Clause 7 of the Bill. The Deputy Solicitor General took up the position that the said Provision in Clause 7 do not provide any discretion to the Commissioner General of Inland Revenue. In any event, attention of Court was drawn to

actions 145, 165 (13) and 175(3)(c) of the Inland Revenue Act No. 10 of 2006 and also to Section 113 of the Financial Regulations where discretion has been given to the Commissioner General of Inland Revenue in dealing with public revenue.

However, the Court observed that the application of Clause 7(1) (b) in its present form would give a discretion to the Commissioner General of Inland Revenue to obtain the certification from the Secretary to the Treasury only in circumstances where he deems it necessary. Such a wide discretion vested on the Commissioner General of Inland Revenue would be arbitrary.

Accordingly this Provision would be violative of Article 12(1) of the Constitution. However, The said inconsistency would cease if the words "where necessary" is deleted. In this context, the Learned DSG. agreed to suggest an amendment to delete the said words at the Committee Stage of the Parliament. In the absence of such an amendment the Bill would require a special majority as laid down by Article 84(2) of the Constitution.

Clause 2 of the Bill deals with the application of the Provisions of the Act and applies to the recovery, discharge or write off of taxes, charged and levied on or before 31.12.2007 under any of the laws specified in the schedule to the Bill and which are in default for a period of over two or more years. This Clause provides a definition for "Tax in Default".

In this context, Court is of the view that the term "Tax in Default" may be appropriately amended in order to ensure that the Statutory Appellate

procedures where applicable should be exhausted prior to a person being deemed "defaulter" for the purposes of Clause 2 of the Bill.

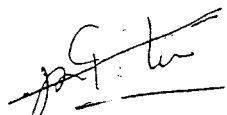
For the reasoning stated above, we make a determination, in terms of Article 123 of the Constitution that Clause 7(1)(b) of the Bill in its present form is inconsistent with Article 12(1) of the Constitution and therefore this Bill may only be passed by the special majority as provided for in Article 84(2) of the Constitution.

We make a further determination in terms of Article 123 of the Constitution that the inconsistency stated above would cease if Clause 7(1)(b) is replaced by a Provision on the following lines.

"having obtained the confirmation of the Secretary to the Treasury, that such categories of institutions are dependent on Government funding to meet their tax liabilities."

Apart from Clause 7(1)(b) none of the other Provisions of the Bill are inconsistent with the Provisions of the Constitution.

We wish to place on record our appreciation of the assistance rendered to Court by the Deputy Solicitor General, the Counsel for the Petitioner and Mr. Nihal Sri Amarasekera who appeared in person.


Sgd. J.A.N. de Silva
Judge of the Supreme Court