SC (SD) No. 2/2009
"Default Taxes (Special Provisions) Bill"

WRITTEN SUBMISSIONS TENDERED WITH ORAL SUBMISSIONS

I very respectfully tender these Written Submissions with my Oral Submissions, morefully clarifying and explaining the relevant matters, to save the time of Your Lordships' Court, and to assist Your Lordships' Court in the determination on this matter.

Preamble

1. The 'Title' and 'Preamble' in the "Default Taxes (Special Provisions) Bill" (hereinafter sometimes referred to as the "**Bill**") are 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"**

2. 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**.

3. In the Determination in SC (SD) No. 3/2008 on the "Appropriation Bill 2008, 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"**
>
> **"In other words it is expected to meet the debt service payments due in the Financial Year 2009 amounting to Rs. 722 Billion by raising further debt"**

4. Averments in the Petition are reiterated, more particularly ;

- the applicability of citations from the previous Determinations made by Your Lordships' Court to the Clauses of the Bill,
- citation from the Judgment of Your Lordships' Court on the **relevance of Chapter VI** of the Constitution i.e. **Articles 27 and 28** on the **'Directive Principles of State Policy'** & **'Fundamental Duties'**;
- the relevance of the provisions of the Offences Against Public Property Act No. 12 of 1992, particularly in relation to indirect taxes, such as VAT, GST, Turnover Tax and Debits Tax.

Clauses in the Bill

5. **Clause 2** - **overrides any other law to the contrary**, whilst the provisions of the ***Bill shall apply for the recovery, discharge or write-off of taxes, charged and levied on or before 31.12.2007*** under any of the laws in the Schedule to the Bill, and ***which are in default for a period of over two years***. **This is stipulated to be "tax in default" in the Bill.**

   The term **"tax in default"** is used in over 25 places in the Bill, i.e. in addition to in the 'Title' and 'Preamble', in Clauses 2, 4, 6, 7, 8, 9, 10, 11 and 16, and *intriguingly* **it had not been clearly and unambiguously defined !** Such definition is **vital and essential** for the due and proper interpretation and enforcement of the several provisions of the Bill.

   Does the term **"tax in default"** include (1) **penalties** and (2) **taxes held-over or deferred on Appeals ?** This is not precisely clear from what is stated in **Clause 2,** and as to what is to *comprise* '**taxes in default',** in the report in terms of **Clause 6.**

   The Bill is **silent on the recovery** of (1) **penalties** and (2) **taxes held-over or deferred on Appeals as at 31.12.2007**. *What is the position vis-a-vis example given on page 9 herein ?*

   Clauses 12 and 13 refer to aggregate of taxes, ***not including any penalty or any part of tax held-over or deferred*. As per Sections 127 and 173 of Inland Revenue Act No. 10 of 2006 Penalties for Tax in Default would be 50% (i.e. 10% on default + 2% per month, restricted to 50%).** *(Also in Sections 118 and 144 of Inland Revenue Act No. 38 of 2000 and Section 125 of Act No. 28 of 1979).*

   If **'taxes in default'** exclude (1) **penalties** and (2) **taxes held-over or deferred pending Appeals,** how would the Objectives of the Bill in terms of its 'Title' and 'Preamble' for the '**speedy recovery of taxes'** and '**tax arrears be maintained at a reasonable limit',** be achieved through the Bill ?

   If (1) **penalties** and (2) **taxes held over or deferred pending Appeals** are excluded from the arrears of **"taxes in default"** as at **31.12.2007** referred to at **Clause 2,** then what would be the lawful procedure for the recovery of the same, **particularly given that the provisions of this Bill shall apply, *notwithstanding anything to the contrary in any other law,* which would include Inland Revenue Act No. 10 of 2006 and the previous Acts ?**

   "Defaulter", as per **Clause 16**, means **any person** (***not restricted to the institutions referred to at Clause 6 of the Bill***), whose **'tax is in default'** in terms of Clause 2, as above.

   Clause 2 - has a proviso in respect of a **defaulter**, who has come to an arrangement to pay such "**tax in default"** in instalments, and has **thereafter failed to comply therewith**, thereby attracting the provisions of the Bill.

6. **Clause 6** - discloses that the Commissioner General **requires a further 6 months** from the date of appointment of the Advisory Committee referred to in **Clause 3**, to prepare and finalise a report, **identifying taxes in default** of, -

   a) Public Corporations
   b) Government Owned Business Undertakings
   c) Government Owned Business Undertakings, established under Act No. 22 of 1987
   d) Government Ministries
   e) Government Departments (**this would also include the Inland Revenue Department**); and
   f) Co-operative Societies registered under Law No. 5 of 1972, including Co-operative Rural Banks

7. **Clause 7 (1)** - empowers/mandates (**shall**) the Commissioner General **to take all necessary steps to write-off any of the taxes in default of any of the above institutions** identified under Clause 6 referred to above, after -

   a) *having* ***verified from the persons concerned of the accuracy*** of the amount recorded as being due as "**tax in default"** ; and

   b) having obtained ***where necessary*** (**that is, *it would not be necessary* in the case of 'other persons', i.e. other than the institutions referred to at Clause 6 of the Bill**), the confirmation of the Secretary to the Treasury, *that such categories of institutions are dependent on Government funding to meet their tax liabilities*.

   Having ironically ***verified from the persons concerned*, themselves of the accuracy of the tax defaulted by such persons**, **thereby admitted by such persons of default of tax**, Assessors are empowered to write off **such admitted defaulted taxes** of any person, ***as per delegation of the Commissioner General's powers – vide Clause 14.***

   There are no specified guidelines and/or criteria, whatsoever, to justify such write-off of public revenue, causing loss to the State, i.e. the public !

   The "Default Tax Recovery Unit" to be established under Clause 5, is required to prepare a report of the **'Taxes in Default'** in terms of Clause 2, *but the "Default Tax Recovery Unit"* ***questionably and intriguingly has nothing, whatsoever, to do with the write-off of taxes in default*** *under Clause 6 !*

   The estimated volume or total sum of taxes in default, *some of which are to be arbitrarily written-off,* presumably with penalties is admittedly not disclosed, and not available; and as per Clause 6, a further 6 Months time has been sought to have the same compiled by the "Default Tax Recovery Unit".

   Thus the Parliament has not been made known the total sum of taxes in default i.e. arrears of over 2 years as at 31.12.2007, some of which ***is arbitrarily proposed to be written-off*** *and quantum of which sum also is not made known to Parliament now or in the future !.*

   In the case of public Corporations and GOBU's, ought not the relevant Officials be held responsible and accountable, if there had been mismanagement and/or misappropriation of public funds, which has resulted in the default of taxes i.e. public revenue of the State ?

8. **Clause 14** - empowers the Commissioner General to delegate any of the functions or powers conferred on him by the Bill, to other Officers, **even to any Assessor** appointed or deemed to have been appointed under Inland Revenue Act No. 10 of 2006.

   Therefore, any of the Officers referred to in Clause 14 of the Bill, including any Assessor, *could write-off taxes of any person*, under such delegated power *devoid of guidelines and/or criteria.*

   Given the scandalous manner in which colossal fraudulent VAT refunds had been made by Assessors, Deputy Commissioners and Commissioners of the Inland Revenue Department, causing colossal losses to the State, ie. the public, **can such *carte blanche* ability and power to arbitrarily write-off taxes be given?**

9. **Clause 5** - establishes a Unit called the **'Default Tax Recovery Unit'** *under the purview of the Commissioner General,* with a Deputy Commissioner General appointed to be in charge.

10. **Clause 6** - (**shall**) mandates the Commissioner General, within 6 months of the appointment of the '**Advisory Committee**' referred to in **Clause 3**, to cause the **'Default Tax Recovery Unit'** to prepare and finalise a report, identifying **'taxes in default'** of **defaulters**, who would be **all persons, whose 'taxes are in default'**, in terms of Clause 2, read with the definition of a **defaulter** as per **Clause16**.

    Shockingly and intriguingly, having prepared and finalised such report on **'taxes in default'** of all defaulters, the **'Default Tax Recovery Unit'** ***has no role, whatsoever, to play in writing-off of taxes of any person, as per the Bill.***

    The one and only task of 'Default Tax Recovery Unit' is to prepare and finalise the above report as per **Clause 6**. ***That is all !!*****!**

11. **Clause 3** - provides for the appointment of an '**Advisory Committee'** by the Minister of Finance, consisting of 5 Members, one of whom shall be a retired Judge of the Supreme Court or Court of Appeal or High Court, to be the Chairman, and 4 other Members, who have knowledge, experience and shown capacity in taxation law, accountancy and auditing, business management or finance. **The 'Advisory Committee'** could regulate procedure in regard to meetings and transaction of business.

    The constituent of Members of **The** '**Advisory Committee'** could result in serious issues of 'conflicts of interests'; **whilst they would be deemed to be 'public servants',** coming under the purview of the **Public Service Commission.**

    The Bill does not provide for any **secrecy**, nor are the Members of **'The Advisory Committee' subject to the provisions of the Bribery Act.**

12. **Clause 4 (1)** – stipulates the only **functions** of the **'Advisory Committee'** to be -

    a) to **respond to communications** received from the Commissioner General under **Clause 7 regarding the write-off of any "tax in default"**, and

    b) **to advise on any matter** referred to it for **advice** by the Commissioner General or the Minister, as the case may be.

    The **'Advisory Committee**', as per **Clause 4 (2)** has the power **to summon any person** ***to give any information or produce any document,*** with regard to a matter before it.

    The above raises the issue of **privacy, secrecy and privilege,** including 'conflicts of interests', in view of the constituent Members of the **'Advisory Committee'.**

    Members of the **'Advisory Committee'** are not bound by the **strict secrecy provisions** in Section 209 of the Inland Revenue Act No. 10 of 2006, and Section 178 of Inland Revenue Act No. 38 of 2000 and Section 158 of Inland Revenue Act No. 28 of 1979.

    Neither a Minister, nor even Parliament, can have access to tax information of persons, except the Bribery Commission and Courts, as provided for in law.

13. **Clause 7 (2)** - requires the Commissioner General, **3 months prior to taking necessary steps to write-off any "tax in default" under Clause 7 (1),** to inform the **'Advisory Committee'** of such fact and the '**Advisory Committee'** is entitled to make any comments thereon within 3 months. In the event, if the Committee makes any comment, the Commissioner General has to respond thereto immediately. ***That is all !***

    The **Advisory Committee's approval and/or sanction is not necessary for a write-off of taxes of an admitted tax defaulter**, who is any person, whose tax is in default in terms of **Clause 2,** read with the definition of a "Defaulter" as per **Clause 16**.

    Clause 14 provides for delegation to those other Officers, stipulated in **Clause 14,** including **any Assessor,** appointed or deemed to have been appointed, the powers of the Commissioner General under the Bill, ***including the write-off of any taxes of any person.***

    What happens, *when and if*, an Assessor simply writes-off taxes of a defaulter i.e. any person (*vide* Clause 16), and does not report to the Commissioner General and/or the 'Advisory Committee' ?

    Inherently, there is a *carte blanche* arbitrary power and ability for an Assessor to write-off taxes, i.e. public revenue, acting in collusion with any tax defaulter, *with absolutely no check and balance for any prohibition therefor* !

    In terms of Section 176 of Inland Revenue Act No. 10 of 2006 **Tax is to be the first charge,** and in terms of Section 205 **tax is payable notwithstanding any prosecution or conviction for an offence under the Inland Revenue Act No. 10 of 2006** (*Identical provisions existed in Sections 146 and 174 of Act No. 38 of 2000 and Sections 127 and 154 of the Inland Revenue Act No. 28 of 1979*)

14. **Clause 8** - provides for the Commissioner General, notwithstanding secrecy contained in the law, to publish **that information *(?)*** in the *Gazette* within 30 days of such **write-off, of an admitted defaulter's tax.**

    What happens, if such information is not gazetted ? How does one ensure the *Gazetting* of such information to notify the public, that their property, i.e. public revenue, had been written-off ?

    As stated above, especially when the delegated power to **write-off of admitted defaulted taxes** is exercised by all the Officers of the Inland Revenue Department, **including Assessors.**

    Given the experience the public have had with the scandalous and collossal VAT refunds, what follows, if such information is not *gazetted*, after write-off of such public revenue, **i.e. taxes admitted as defaulted** by any person, whose taxes are in default, as per **Clause 2,** read with definition of a **defaulter** in **Clause 16 ?**

    Gazetting of write-offs, *after the event may never happen.* For example, in 1994/95, the Ministry of Finance had to compile large Volumes of Gazette Notifications of Customs Duty Exemptions, which had been liberally given, purportedly 'in the public interest' by the previous regime, under Section 19A of the Customs Ordinance, where *Gazettes* had to be tabled in Parliament *as soon as possible*, **but had not been done** ! The following extracts are cited from the Statement (*vide "**A**"* attached) made to Parliament by the then Minister.

"GRANT OF DUTY WAIVERS"

"I have tabled in the House today two sets of gazette extraordinary notifications - Nos. 828/1 of 18th July, 1994, 830/7 of 3rd August, 1994 and 842/6 of 26th, October, 1994.

The first refers to all the import duty waivers granted by the former Minister of Finance, Hon. D.B. Wijetunga, under Section 19A of the Customs Ordinance, during the year 1991. The second contains the import duty waiver granted by the same Hon. Minister during the year 1992 and the third contains the Duty Waivers granted by the same Hon. Minister during the first quarter of the year 1993.

Judging by the extraordinary size of these gazette notifications, the 1991 duty waivers running to 474 pages and 1992 duty waivers running to 488 pages, and the 1993 first quarter running into 117 pages, the Hon. Members will get an idea of the extent to which the legitimate income of the Government from import duties have been frittered away by the last regime during the two years 1991 and 1992 and during the first quarter of year 1993.

These ad hoc duty waivers have made a mockery of our tax system. .....

The loss suffered by the county through this habit of granting duty waivers has been estimated at about Rs. 5 billion during each of the last 5 to 6 years. Also, most duty waivers result in the waiver of the related turnover tax applicable on the imported goods. The loss of revenue to the country on this account amounts to around Rs.3000 million. Hence, the total annual loss of revenue is around Rs.8000 million, which is over 6 percent of total government revenue - a staggering loss. .....

..... Although I present the 1991, 1992 and the 1993 first quarter exemptions today, the value of 1993 and 1994 ones are yet to be gazetted. "

One Member of Parliament had imported as recollected nearly 300 Buses 'duty free' and 'dumped' them on the Transport Board Depots, at retail prices comparable with those of the Local Agents, and had recovered payment through Central Finance, who had been later 'bailed out' of the consequent financial crisis, by Late President D.B. Wijetunga, by Treasury Funds being released therefor, as purported to be purchasers by the State !

Under Section 19A of the Customs Ordinance, Parliament has the right to revoke such Order made even by a Minister, and if so revoked, the Customs Duty payable on such exempted goods has to be paid by the importer ! In this instance, the write-offs are by Assessors !

In any case, '**public notice**' by *Gazette* is inadequate, and ought be by publication in the media as provided for in Section 529 (4) of the Companies Act No. 7 of 2007, which relates to the private sector, **whereas the instant case concerns public funds** ! In any case, ought not the public or at least Parliament, be so notified **prior** to such write-offs ?

Full control of public finance is solely vested in Parliament in terms of Chapter XVII of the Constitution. The Appropriation Act provides for the Parliamentary control over public finance, stipulating the powers of the Minister and Parliament, for variation of public revenues and expenditures. **The estimated volume or total sum of 'taxes in default' and penalties sought to be written-off has not been disclosed to Parliament, *as it ought to have been*.**

15. **Clause 9(1) –** provides for the Commissioner General, where "**tax in default"** is not written-off under **Clause 7,** to issue Notice to a **defaulter**, setting out details of the amount of "**tax in default"** and requesting that the same be settled within 60 days, notwithstanding -

    a) any agreement that may have been entered into with the **defaulter;** or

    b) commencement of proceedings for recovery, other than where proceedings for recovery have been filed in Court.

Clause 9(2) – a **defaulter** who is so Noticed, prior to expiry of 60 days could,

    a) request the Commissioner General that the defaulter be permitted to settle the "**tax in default"** in instalments; or

    b) raise objections in regard to the payment of the **"tax in default"** referred to in the above Notice.

Clause 9(3) – empowers the Commissioner General to agree to payment of the **"tax in default"** ***within a period not exceeding 3 years,*** and inform the **'Advisory Committee'** of the details of the agreement entered into with the **defaulter**.

There is no reference for the recovery of any penalty, for installment payments of 'taxes in default' !

There is no reference, whatsoever, to the recovery of (1) **Penalties** and (2) **Taxes held over or deferred as at 31.12.2007**, ***defaulted for over 2 years as per Clause 2*** !

Clause 9(4) – empowers the Commissioner General to make a decision within 60 days of objections made under **Clause 9(2) (b),** and where the "**tax in default"** is re-determined to discharge the excess of the "**tax in default**" over the amount so re-determined. ***(This, however, does not require communication to the 'Advisory Committee' !)***

Provisions of Clause 9(3) should apply for the re-determined tax liability. This is not stipulated?

In terms of delegation of the Commissioner General's powers under **Clause 14,** as referred to above, the foregoing could be carried out by the other Officers, referred to in **Clause 14,** including **any Assessor**.

16. **Clause 10 –** where a **defaulter**, who is Noticed under **Clause 9 (1)** -

    a) fails to respond to the Notice within the 60 days; or

    b) having entered into an agreement with the Commissioner General to pay the **"tax in default"** in instalments, and fails to pay any installments for over 30 days,

the Commissioner General shall issue Notice of **Default** on the **defaulter,** and the amount due as "**tax in default"** is to be recovered by an action instituted in the **Commercial High Court, under Act No. 10 of 1996**.

There is 'lacuna' on the right to so institute action for recovery, if the **defaulter** raises objections under **Clause 9 (2) (b),** and fails to reach an agreement on re-determination of the tax liability under **Clause 9 (4),** particularly given the stipulation in **Clause 2,** that the provisions of this Bill shall apply, *notwithstanding anything to the contrary in any other law,* which would include Inland Revenue Act No. 10 of 2006 and the previous Acts.

In terms of delegation of the Commissioner General's powers under **Clause 14,** as referred to above, the foregoing could be carried out by the other Officers, referred to in **Clause 14,** including **any Assessor.**

In view of volume of work in the 2 Commercial High Courts, a separate Commercial High Court for recovery of **'taxes in default'** may have to be established, since **'taxes in default'** are statutory dues to the State, and hence ought not the recovery process be through the island-wide Magistrate's Courts, as in the instance of E.P.F. defaults, and the prevalent provisions of the Inland Revenue Acts ? ***(VAT, GST, Turnover Tax, Debits Tax are taxes collected on behalf of the State)***

Section 178 of Inland Revenue Act No. 10 of 2006 empowers the Commissioner General to recover 'taxes in default' by seizure and sale of property, *including seizing funds in Bank Accounts*; whilst Section 179 provides for recovery of 'taxes in default' before a Magistrate, where seizure and sale is impracticable or inexpedient. *The identical provisions existed in the previous Acts, i.e. Sections 148 and 149 of the Inland Revenue Act No. 38 of 2000 and Sections 129 and 130 of the Inland Revenue Act No. 28 of 1979.*

Section 174 of Inland Revenue Act No. 10 of 2006 provides for punishment for Tax in Default by prosecution of the Directors, Partners, Principal Officers, etc. before a Magistrate's Court.

By enacting provisions of **Clause 10,** read together with **Clause 17,** the aforesaid procedures for recovery of **'taxes in default'** in the Inland Revenue Act No. 10 of 2006 **are questionably being subjugated and/or suppressed**, in the context of stipulation in **Clause 2**, that the provisions of this Bill shall apply, *notwithstanding anything to the contrary in any other law,* which would include Inland Revenue Act No. 10 of 2006 *and the previous Acts*.

Hence such endeavour, *renders nugatory* the speedier process of recovery of 'taxes in default', stipulated in the 'Title' and 'Preamble' of the Bill !

Thus, if recovery proceedings are in the Magistrate's Courts, then the necessity for provisions **Clauses 10** and **17** would not arise.

In certain countries tax defaulters, including direct tax defaulters, defrauding on payments due to the State are punished with jail sentences ! Hence, how could those who collect indirect taxes on behalf of the State, such as VAT, GST, Turnover Tax, Debits Tax be permitted to misappropriate such public property in violation of Article 28 of the Constitution, and the provisions of the Offences Against Public Property Act No. 12 of 1982, which attract 300% fines and 20 year jail sentences ?

Ought not this be compared with the sentencing to jail of very poor persons for non-payment of small fines imposed in Magistrate's Courts for minor offences, whereas would not tax payers being the elitist segment of society, deserve more stringent punishment for offences of misappropriating public property ?

17. **Clause 11 –** empowers the Commissioner General to require **any person** to furnish information for the purpose of recovery of **"tax in default".**

18. **Clause 12** – makes it the duty of the Commissioner General to ensure that aggregate of any taxes, **not including any penalty thereon or any tax held over or deferred**, ***which is in default*** under any law specified in the Schedule to the Bill as at the end of any calendar year, over that of the immediately preceding year, **shall not exceed 3% of the total taxes collected under the said laws in the immediately preceding year.**

Monetary values, as well as volumes of taxes increasing, makes such '3% parameter' meaningless, whereas, **what would be relevant would be to restrict the ageing of the 'taxes in default' ?**

For example, Hatton National Bank has reported at page 191 (*vide* ***"B"*** *attached)* of its Annual Report 2008, that Tax Assessments against the Bank, amounting to over Rs. 3,466.8 Mn., **are outstanding on Appeals made by the Bank** in respect of VAT, PAYE and Income Tax for several years, from as far back as 2002 *viz* : ***Would these be entitled to be written-off in terms of the Bill*** ?

Year	Tax	Assessment Nos.	Amount Rs. Mn.
2002	VAT	8340174, 8340175, 8340176, 8340177 & 8340178	111.9
2003	VAT	8290566, 8290567, 8290568, 8290569, 8290570, 8290571, 8290572, 8290573, 8290574, 8290575, 8290576 & 8290577	324.4
2003 & 2004	VAT	VATFS/06/0312/06, VATFS/U6/0401/01, VATFS/J6/0402/02, VATFS/U6/0403/03, VATFS/U6/0404/04 & VATFS/U6/0405/05	247
2004	VAT	8325523, 8325524, 8325525, 8325526, 8325527, 8325528, 8325533 & 8325534	74.6
2005	VAT	8334997, 8334998, 8334999, 8335000, 8335001, 8335002, 8335003, 8335006, 8335007 & 8335008	142.9
2006	VAT	8341405, 8341406 & 8341407	36.2
2003, 2004 & 2005	PAYE	8018210, 8202714 & 8364152	407
2003/04	Income tax	8036192 & 8398969	641.1
2005/06	Income tax	8412214 & 8734153	542.6
2006/07	Income tax	8534869 & 8728091	939.1
		Total	**3,466.8**

19. **Clause 13(1) –** stipulates that where the aggregate taxes, **not including any penalty thereon or any tax held over or deferred**, ***which is in default*** under any law specified in the Schedule to the Bill, in default, as referred to above exceeds the stipulated 3% as referred to in **Clause 12**, then the Commissioner General shall submit a report to the Minister **within 4 months** of the end of that year, giving reasons for such excess and making recommendations for remedial action to be taken.

    Clause 13(2) – in the event, the Minister accepts the above reasons, he shall request the Commissioner General to take steps to give effect to the recommendations.

    Clause 13(3) – where the **Minister does not accept such report** as being adequate to warrant such excess, he shall require the Commissioner General to comply with the requirement imposed by **Clause 3(1)** within 6 months ! **(Whereas compliance ought be with stipulation in Clause 12.)**

    Clause 13(4) – where the Commissioner General fails to comply with the requirement of **Clause 13(2)** within the time stipulated therein, the Minister shall take action against the Commissioner General as deemed appropriate ! **(Whereas compliance period of 6 months is stipulated in Clause in 13(3) !)**

Non – enforcement of provisions of the Inland Revenue laws already in force

20. In the Judgment delivered on 21.7.2008 by Your Lordships' Court in SC (FR) Application No. 209/2007, there were several findings of fraudulent dealings in the privatisation of Lanka Marine Services Ltd. (LMSL) to John Keells Holdings PLC (JKH), and Your Lordships' Court *inter-alia* annulled the BOI approval, which had been wrongfully and unlawfully obtained by and/or granted to JKH for LMSL, *based upon which BOI approval, profits of LMSL had been exempted from income tax*.

    Notwithstanding, the findings in the Judgment of Your Lordships' Court of fraudulent collusion, and *the retrospective annulment* of the BOI approval, the Officers of the Commissioner General, *feigning prescription* under Section 163 of the Inland Revenue Act No. 10 of 2006 did not issue Assessments to recover taxes for all the years, *whereas* in terms of the *proviso* cited below to Section 163 (5) (b) of the Inland Revenue Act No. 10 of 2006, (*so also in proviso to Section 134 (5)(b) of the Inland Revenue Act No. 38 of 2000 and in proviso to Section 115 (5)(b) of the Inland Revenue Act No. 28 of 1979*) the Assessor was lawfully mandated to make Assessments retrospectively for all the years.

    Vide – Proviso to Section 163 (5)(b) of Inland Revenue Act No. 10 of 2006 (Identical provisions existed in the previous Acts, as cited above)

    "Provided further that, where in the opinion of the Assessor, any fraud, evasion or wilful default has been committed by or on behalf of, any person in relation to any income tax payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment."

    Consequently, it was only upon a Motion being filed on 10.12.2008 *(vide "C" attached)*, that the Officers of the Commissioner General issued Assessments for the recovery of cognizable taxes for all the years, and informed Your Lordships' Court, through the Addl. Solicitor General.

21. Court of Appeal Writ Application No. 1661/2003, *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 *vide* - Document "X5" to the Petition.**

Such 'inordinate delay' and 'stalling' of the settlement in CA Writ Application No. 1661/2003 is as a consequence of the Officers of the Commissioner General, *having been and are continuing to be 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, on the following lines, ***in the context of disclosure in June 2005 that the relevant provisions of the Inland Revenue Laws had not been duly and properly enforced, as morefully set out in the Settlement Motion forming part of Document "X5" to the Petition*** :

a) Commissioner General and his agents and/or assigns to open new Income Tax Files in respect of approximately 13,482 Declarents, who have submitted Declarations, without having Income Tax Files, and to grant the said Declarents Income Tax Amnesty, after verification of the correctness of the Declarations, in terms of the law up to 31st March 2002, and to thereafter enforce the correct assessment and collection of Income Taxes for the subsequent Years of Assessment commencing from the Year of Assessment 2002/03 under and in terms of the Inland Revenue Act No. 38 of 2000, as amended,

b) Commissioner General and his agents and/or assigns to grant an Income Tax Amnesty, wherever it is due, in terms of the law up to 31st March 2002 to approximately 38,303 Declarents, who already had Income Tax Files, after verification of the correctness of the Declarations, and to thereafter enforce the correct assessment and collection of Income Taxes for the subsequent Years of Assessment commencing from the Year of Assessment 2002/03, under and in terms of the Inland Revenue Act No. 38 of 2000, as amended,

c) Commissioner General and his agents and/or assigns to enforce and/or cause the enforcement of the collection all other indirect taxes, such as GST, VAT and Turnover Tax, in respect of all the aforesaid Declarents as may be applicable under the respective laws, and where necessary causing action to be taken under and in terms of the Offences Against Public Property Act No. 12 of 1982, as amended, inasmuch as the Supreme Court had pronounced that such revenue had been collected on behalf of the State from the general public by companies and persons under the said Statutes and thus tantamount to the misappropriation of public funds

d) Commissioner General and his agents and/or assigns to communicate, in terms of **Section 178 (4) (b) of the Inland Revenue Act No. 38 of 2000 / Section 209 (4) (b) of the Inland Revenue Act No. 10 of 2006** to the Commissioners of Revenue of the respective Provincial Councils of matters which relate to turnover of any wholesale or retail trade or business carried on by any person or partnership within such respective Provincial Councils to enable such Commissioners of the respective Provincial Councils to ascertain such turnovers for purpose of collecting the correct turnover tax, in respect of the Declarents, who carried on wholesale or retail trading activities.

Vide - Section 209 (4)(b) of Inland Revenue Act No. 10 of 2006 (Identical provisions existed in the previous Act as cited above)

"Notwithstanding anything contained in this section, any officer of the Department of Inland Revenue may communicate any matter which comes to his knowledge in the performance of his duties under this Act or under any other written law administered by the Commissioner – General, to-

the Commissioner of Revenue of any Provincial Council, being a matter which relates to the turnover for any period commencing on or after January 1, 1991, of any wholesale or retail trade or business carried on by any person or partnership within the Province for which such Provincial Council is established, to such an extent as the Commissioner – General may deem necessary to enable such Commissioner to ascertain such turnover;"

e) Commissioner General and his agents and/or assigns to communicate in terms of **Inland Revenue Act No. 28 of 1979 Section 158 (10) / Inland Revenue Act No. 38 of 2000 Section 178 (10) / Inland Revenue Act No. 10 of 2006 Section 209 (10),** to the Controller of Exchange, as had been already called for by the Controller of Exchange, information disclosed in Declarations which contain disclosure of foreign income and/or foreign borrowings and/or foreign debts and/or foreign assets, to be investigated and dealt with by the Controller of Exchange in terms of respective laws administered and enforced by him,

f) Commissioner General and his agents and/or assigns to communicate in terms of **Inland Revenue Act No. 28 of 1979 Section 158 (10) / Inland Revenue Act No. 38 of 2000 Section 178 (10) / Inland Revenue Act No. 10 of 2006 Section 209 (10)** to the Director General of Customs, where it appears that any person has committed an offence under the Customs Ordinance,

Vide - Section 209 (10) of Inland Revenue Act No. 10 of 2006 (Similar provisions existed in the previous Acts as cited above)

"Notwithstanding anything contained in the preceding provisions of this section, where it appears to the Commissioner- General from any matter which comes to his knowledge in the performance of his duties under this Act, that any person has committed an offence under the Exchange Control Act or the Customs Ordinance, he may Communicate or deliver to the Controller of Exchange or the Director – General of Customs, as the case may be, any information relating to the commission of the offence or any articles, books of account or the documents necessary or useful for the purpose of proving the commission of such offence."

g) Commissioner General and his agents and/or assigns to report in terms of **Inland Revenue Act No. 28 of 1979 Section 158 (5) (iv) / Inland Revenue Act No. 38 of 2000 Section 178 (5) (d) / Inland Revenue Act No. 10 of 2006 Section 209 (5) (d)** to the Attorney General to be forwarded to the Bribery Commission for investigation, any case where the Commissioner General and/or his agents and/or assigns suspect/s from information available to him and/or them, that any person is guilty of bribery, as per the Declarations made to the Commissioner General under Inland Revenue (Special Provisions) Act No. 10 of 2003 and Inland Revenue (Special Provisions) (Amendment) Act No. 31 of 2003, and now deemed to be Declarations made under and in terms of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004 or otherwise.

x) by those Declarents who had declared themselves to be public servants or those who are disclosed to be public servants, as it appears from the informations in the declarations, who have held such office within the last 10-years prior to the date of coming into effect of Inland Revenue (Special Provisions) Act No. 10 of 2003, coming under the purview of the Bribery Act, amended by Act No. 20 of 1994, and

y) by those Declarents who had declared themselves to be persons or those who are disclosed to be public servants, as it appears from the informations in the declarations, who have held such office within the last 10-years prior to the date of coming into effect of Inland Revenue (Special Provisions) Act No. 10 of 2003 coming under the purview of the Declaration of Assets and Liabilities Law No. 1 of 1975, amended by Act No. 74 of 1988

inasmuch as the aforesaid persons and/or their said Declarations had been specifically denied any immunity, whatsoever, under the Inland Revenue (Special Provisions) Act No. 10 of 2003, as amended by Inland Revenue (Special Provisions) Act No. 31 of 2003, and no legitimacy or legitimate entitlement, right or expectation or legal protection, whatsoever, could flow from a fraud, and in this instance, the perpetration of a fraud on the State defrauding public revenue as had been held by the Supreme Court.

Vide - Section 209 (5)(d) of the Inland revenue Act No. 10 of 2006 (Similar provisions existed in the previous Acts, as cited above)

"Notwithstanding anything contained in the preceding provisions of this section, the Commissioner – General shall-

report to the Attorney – General for investigation any case where he suspects from information available to him, that any person is guilty of bribery."

22. The above CA Writ Application No. 1661/2003 was instituted in the face of the Inland Revenue (Special Provisions) Act No. 10 of 2003 *(i.e. the fraudulent Tax Amnesty of 2003)*, which was subsequently repealed, saving only the 'Income Tax Amnesty', by Inland Revenue (Regulations of Amnesty) Act No. 10 of 2004.

Upon discovery in June 2005, that the provisions of the Inland Revenue (Regulations of Amnesty) Act No. 10 of 2004, which became law in October 2004 had not been given effect to and enforced by the Commissioner General / his Officers, the prayers in this CA Writ Application No. 1661/2003 were amended of consent; and thereafter, the Hon. Attorney General, ***from as far back as July 2006***, had been finalising the above Terms of Settlement and endeavouring to enter the same. However, the Commissioner General / his Officers have been questionably 'stalling' to confirm, and recently 'feigning' to the Hon. Attorney General, ***that they 'lack competence' to duly perform some of the above statutory provisions***.

In such circumstances, Application has been made to the Court of Appeal to consider referring to Your Lordships' Court, the above matter for determination, in terms of Article 126(3) of the Constitution, for infringement of Fundamental Rights enshrined in Chapter III of the Constitution*, and the matter is now fixed for Hearing*.

23. The Opinion pronounced by a Full Bench of Your Lordships' Court in March 2004, *inter-alia*, declared that the Inland Revenue Act No. 10 of 2003 had been antithetic to the 'rule of law', violative of fundamental rights, and had **defrauded public revenue causing extensive loss to the State**.

Thereafter the said law having been repealed, except for the 'Income Tax Amnesty', by Inland Revenue (Regulations of Amnesty) Act No. 10 of 2004, **the Commissioner General / his Officers were statutorily bound to have taken prompt and effective action, to protect public revenue, being managed and collected by them, as per Statute, and as further obligated as a fundamental duty under Article 128 of the Constitution, and in terms of the oath / affirmation they have taken in entering upon such public office**.

24. *On the other hand*, **the subsequent tax collection and revenue administration had been castigated**, and the Officers concerned had been faulted by the Auditor General in a Special Report submitted in June 2006 to Parliament, in terms of Article 154(6) of the Constitution. Some of the 'extracts' from the Executive Summary of the said Report are cited below:

- **Even though the Tax Revenue represents about 90 per cent of the overall Government Revenue, a sound and efficient management had not been maintained for the management of the Tax Revenue.**
- **Even though the contribution of the Value Added Tax represented about 42 per cent of the Government Tax Revenue, its management is replete with serious deficiencies.**
- **The institutions dealing with the Tax Revenue had not maintained an adequate tax management co-ordination with their supervisory institutions that is, the General Treasury and the Ministry of Finance.**
- **The responsibilities devolving on the Secretary to the relevant Ministry in terms of the provisions in the Constitution, and on the Secretary to the Treasury and the respective Heads of Departments as the Accounting Officers through the Financial Regulations had not been discharged properly.**
- **Apart from that, a huge responsibility and a duty are devolved on him in terms of Financial Regulations as the Secretary to the relevant Ministry who is the Chief Accounting Officer and as the Secretary to the Treasury whose foremost responsibility is the maintenance of the financial control and administration of the Government.**
- **Therefore, the responsibility of the Treasury for the overall management of the public finance including the management of Tax Revenue is a responsibility which cannot be evaded.**
- **Questionable responses made instead of taking the immediate steps necessary to be taken even after serious lapses are brought to the notice of the institutions concerned by audit, pose problems.**
- **Had the higher management acted with understanding and adequate professional competence, specially with regard to the estimation, collection and refund of Tax Revenue and the determination of the quantum of tax, the possibility of the loss from taxes remaining without being collected in accordance with regulations, of such an erroneous amount of revenue could have been minimised."**

Even in the face of such damning findings, *warranted action having not been taken,* <u>ironically</u> it is now sought by the "Default Taxes (Special Provisions) Bill" to <u>write-off taxes in default as at 31.12.2007</u>, *with further time of 6 months being required to compile a report thereon !*

25. Having filed this instant Petition, consequent to a communication had with the Secretary to the Treasury, **submissions made to the Presidential VAT Commission** on the foregoing **'lapses'** on the part of the Commissioner General / his Officers, were forwarded to the Secretary to the Treasury (*vide* ***"D"*** *attached)*

Inconsistencies of the Clauses of the Bill with the Constitution

26. A 7-Member Bench of Your Lordships' Court in the Determination made 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 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)*

27. 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)*

28. 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*)

29. In the Opinion in SC Reference No. 1/2004 pronounced by Full Bench of Your Lordships' Court, on the Inland Revenue Act No. 10 of 2003, amended by Act No. 31 of 2003, Your Lordships' Court, *inter-alia*, pronounced as follows:

> **"Hence, the indemnities from liability and immunities thus granted would not only erode the equal protection of the law guaranteed by Article 12(1) of the Constitution, but also be antithetic to the Rule of Law being the underlying basis of our Constitution"**
>
> **"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 thereby defrauded public revenue causing extensive loss to the State"** *(This was reiterated in the Determination in SC (SD) No. 26 / 2004)*

30. In the Determination in SC (SD) No. 26/2004 on the "Inland Revenue (Regulation of Amnesty) Bill" Your Lordships' Court, *inter-alia*, determined as follows:

> **"The effect of the aforesaid provisions is the creation of two segments of tax payers and persons within the country. One being the law abiding honest person who has diligently complied with laws relating to revenue, public finance and fiscal control and submitted the requisite declarations and returns and paid what is due. The other would be the person who has been evading tax for several years and who has not complied with the salutary requirements of laws relating to revenue, public finance and fiscal control and who would now benefit through the immunity granted by the Inland Revenue (Special Provisions) Act No. 10 of 2003. Section 3 referred to above, grants 'full immunity from liability to pay tax under any law specified in the schedule hereto' and the immunity would be enjoyed from liability from any investigation or prosecution for any offence under any law specified in the schedule to the Act. Thus the Act has made clear provisions to create two categories and through such classification has favoured one category by allowing them to enjoy full immunity not only from liability to pay tax, but also from any investigation or prosecution."** *(This was reiterated from the Opinion in SC Reference No. 1/2004)*
>
> **"Proviso to clause 4(2) empowers the Minister to appoint any person or persons from within the Authority administering any law referred to in the schedule to Act No. 10 of 2003, in order to expedite the collection or recovery of taxes, levies or penalties. Such persons would be Public Officers in terms of the Constitution. We are of the view that the power that is sought to be vested in the Minister to appoint any Public Officers to discharge a particular function would be inconsistent with the provisions of Chapter IX of the Constitution relevant to he Public Service, as included in the 17th Amendment.**
>
> **Prior to the 17th Amendment to the Constitution, the Public Service came within the overall control of Cabinet Ministers in terms of Article 55 of the Constitution. The 17th Amendment brought about radical departure from this state and the authority of the Cabinet Ministers is restricted to Heads of Departments.**
>
> **Therefore we are of the opinion that the contents of the proviso to clause 4(2) of the Bill would be inconsistent with Article 55 of the Constitution, as amended by the 17th Amendment to the Constitution.**
>
> **Clause 6 of the Bill empowers the Minister to issue general or special directions for the proper administration and implementation of the provisions of the Act and where necessary to issue guidelines to ensure the same. This clause too would attract the same objection referred to above.**

The Addl. Solicitor General submitted that similar provisions are not contained in the Inland Revenue Act or any of the Revenue Statutes that are in operation. 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"

Clause 2 - Clause 2 is inconsistent with Article 12(1) of the Constitution, in that, it **arbitrarily segregates** *those whose taxes are in default for a period of over 2 years as at 31.12.2007 to be granted and/or conferred undue advantage, benefit and privilege of write-off of such taxes in default*, whilst arbitrarily excluding and discriminating against *those whose taxes are in default for a period less than 2 years as at 31.12.2007*, thereby *denying them from being granted such advantage, benefit and privilege*, and thus eroding and infringing upon the equal protection of the law guaranteed to all persons, as enshrined in the Constitution.

Furthermore, Clause 2 does not include penalties and taxes held over or deferred, which is also an arbitrary discrimination and *antithetic to the rule of law* which is the underlying basis of the Constitution.

Clause 3 - As morefully dealt with as cited above in the Determination in SC (SD) No. 26/2004 on the "Inland Revenue (Regulation of Amnesty) Bill", the appointment of an Advisory Committee by the Minister in terms of Clause 3 is inconsistent with Article 55 of the Constitution, as amended by the 17th Amendment.

Clause 4 - As morefully dealt with as cited above in the Determination in SC (SD) No. 26/2004 on the "Inland Revenue (Regulation of Amnesty) Bill", the functioning of an Advisory Committee appointed by the Minister as per Clause 4 is inconsistent with Article 55 of the Constitution, as amended by the 17th Amendment.

The Members of such Advisory Committee would have access to confidential informations pertaining to individual tax payers *regardless of their conflict of interests, and without being bound by oath of secrecy, whilst they also do not come under the purview and ambit of the Bribery Act,* as amended, whereas even the Minister or Cabinet of Ministers or the Parliament do not have access to the confidential tax information of tax payers.

Clause 5 - As morefully dealt with as cited above in the Determination in SC (SD) No. 26/2004 on the "Inland Revenue (Regulation of Amnesty) Bill", the establishment of a 'Default Tax Recovery Unit' in terms of Clause 5 is inconsistent with Article 55 of the Constitution, as amended by the 17th Amendment.

Clause 6 - The preparation of a Report by the 'Default Tax Recovery Unit' in terms of Clause 6, ***segregating*** *those whose taxes are in default for a period of over 2 years as at 31.12.2007 to be granted and/or conferred undue advantage, benefit and privilege of write-off of such taxes in default,* whilst arbitrarily excluding and discriminating against *those whose tax are in default for a period less than 2 years as at 31.12.2007,* thereby *denying them from being granted such advantage, benefit and privilege,* and thus eroding and infringing upon the equal protection of the law guaranteed to all persons, as enshrined in the Constitution, is violative of the equal protection before the law guaranteed to all persons under Article 12(1) of the Constitution.

Furthermore, **'taxes in default'** having not been specifically defined in the Bill to include penalties and taxes held over or deferred, is also an arbitrary discrimination and *antithetic to the rule of law,* which is the underlying basis of the Constitution

Clause 7 - Clause 7 is inconsistent with Article 12(1) of the Constitution, in that, it arbitrarily grants and/or confers to those *whose taxes are in default for a period of over 2 years as at 31.12.2007, undue advantage, benefit and privilege of write-off of such taxes in default,* whilst arbitrarily excluding and discriminating against *those whose tax are in default for a period less than 2 years as at 31.12.2007, denying them from being granted such advantage, benefit and privilege,* and thus eroding and infringing upon the equal protection of the law guaranteed to all persons, as enshrined in the Constitution.

It grants special benefit or favour or privilege to certain persons, who had defaulted taxes for periods of over 2 years as at 31.12.2007, whilst **discriminating** against other persons who have been honest tax payers, which is *antithetic to the rule of law* being the underlying basis of the Constitution; *and also thereby defrauds public revenue causing extensive loss to the State.*

'Taxes in default' having not been specifically defined in the Bill to include penalties and taxes held over or deferred, is also an arbitrary discrimination *and antithetic to the rule of law,* which is the underlying basis of the Constitution.

The arbitrary write-off of taxes in default i.e. public revenue of the State, in the manner set out is **unconscionable**. In SC (SD) No. 22/2003 cited above it was determined that the **'Court will strike down unconscionable law *prescribing a procedure other than the ordinary procedure'***.

In terms of Chapter XVII of the Constitution, the full control over public finance is vested in Parliament. As per Article 149 of the Constitution such taxes in default would be public funds, forming part of the Consolidated Fund.

The non-collection i.e. the write-off / appropriation of such funds to the defaulters of such taxes, in the context of Articles 150(1), 150(2) and 152 of the Constitution,

would require approval by Parliament by way of a Resolution, *with the total sum of such taxes to be written-off being disclosed in such Resolution.*

Furthermore, Clause 7 arbitrarily exonerates public officers of institutions referred to in Clause 6, *who could have been responsible for the mismanagement and/or misappropriation of public funds*, which has resulted in the non-payment of taxes due to the State. *This is antithetic to the 'rule of law'*, which is the underlying basis of the Constitution.

Taxes in default which is public property, coming within the meaning of 'public property' of the Offences Against Public Property Act No. 12 of 1982, cannot be entrusted *to be written-off* to the Commissioner General / his Officers, including Assessors, *without the exercise of the judicial power of the people for the recovery of such public property, and hence Clause 7 is inconsistent with Article 4 of the Constitution.*

Such taxes in default being surreptitiously written-off is a denial of the constitutional right of a citizen to seek access to the judiciary in terms of Article 105 of the Constitution, *to enforce the rights of the people which are being violated*.

Clause 8 - In view of inconsistency with the Constitution of Clause 7, Clause 8 cannot exist.

Clause 9 - Clause 9 is inconsistent with Article 12(1) of the Constitution, in that, it arbitrarily grants and/or confers to those whose taxes are in default for a period of over 2 years as at 31.12.2007, *undue advantage, benefit and privilege* of re-scheduling of taxes to be paid in instalments, without any penalties being prescribed by this *special procedure*, whilst arbitrarily excluding and discriminating against *those whose tax are in default for a period less than 2 years as at 31.12.2007, denying them from being granted such advantage, benefit and privilege* of the *special procedure* and subjecting them to regular procedure, and thus eroding and infringing upon the equal protection of the law guaranteed to all persons, as enshrined in the Constitution.

Furthermore, Clause 9 does not include penalties and taxes held over or deferred, which is also an arbitrary discrimination and *antithetic to the rule of law*, which is the underlying basis of the Constitution.

'Taxes in default' having not been specifically defined in the Bill to include penalties and taxes held over or deferred, is also an arbitrary discrimination and *antithetic to the rule of law*, which is the underlying basis of the Constitution.

Clause 10 - Clause 10 is inconsistent with Article 12(1) of the Constitution, in that, it arbitrarily grants and/or confers to *those whose taxes are in default for a period of over 2 years as at 31.12.2007, undue advantage, benefit and privilege* of being prosecuted for recovery in civil proceedings in the Commercial High Court, whilst arbitrarily excluding and discriminating against *those whose tax are in default for a period less than 2 years as at 31.12.2007, denying them from being granted such advantage, benefit and privilege of the special procedure* and subjecting them to a more severe, harsher and rigorous procedure of seizure of immovable or movable property, and criminal prosecution in the Magistrate's Court.

Furthermore, Clause 10 does not include penalties and taxes held over or deferred, which is also an arbitrary discrimination and *antithetic to the rule of law*, which is the underlying basis of the Constitution.

'Taxes in default' having not been specifically defined in the Bill to include penalties and taxes held over or deferred, is also an arbitrary discrimination and *antithetic to the rule of law*, which is the underlying basis of the Constitution.

Clause 13 - As morefully dealt with as cited above in the Determination in SC (SD) No. 26/2004 on the "Inland Revenue (Regulation of Amnesty) Bill", Clause 13 seeks to vest in the Minister a discretionary power without adequate guidelines. It is therefore inconsistent with Article 12(1) of the Constitution and the provisions of Chapter IX of the Constitution, as amended by the 17th Amendment.

Clause 14 - The delegation of powers of the Commissioner General in terms of Clause 14 to other Officers of the Department, including to any Assessor, which delegated power includes the exercise of power under Clause 7, which is inconsistent with the Constitution, and *hence such delegation of unconstitutional power itself is inconsistent with the Constitution*.

Clause 16 - Whilst Clause 16 defines "defaulter" however 'Taxes in default' referred to therein having not been specifically defined to include penalties and taxes held over or deferred, is also an arbitrary discrimination and *antithetic to the rule of law*, which is the underlying basis of the Constitution, and *makes the entirety of the Bill arbitrary and discriminatory*.

Clause 17 - Clause 17 is inconsistent with Article 12(1) of the Constitution, *since those whose taxes are in default for a period of more than 2 years are* being *given to undue benefit* of being subjected *to civil prosecution*, whilst others *whose taxes are in default for a period less than 2 years as at 31.12.2007* are being discriminated they being subjected to *more stringent and harsher provisions* under the regular law of seizure of immovables and movables, and criminal prosecution in the Magistrate's Courts.

'Taxes in default' having not been specifically defined in the Bill to include penalties and taxes held over or deferred, is also an arbitrary discrimination and *antithetic to the rule of law*, which is the underlying basis of the Constitution.

Conclusion

It is very respectfully submitted that the foregoing analysis of the Clauses of the Bill, clearly and explicitly disclose, that several of the Clauses of the Bill are inconsistent with the Constitution, and are antithetic to the '*rule of law*', in terms of previous Determinations of Your Lordships' Court, *warranting the entirety of the Bill to be struck down by Your Lordships' Court*.

The unconstitutional provisions of the Bill, detrimental to public good, causing undue loss to the State, have been deceptively and misleadingly 'hidden' by the wordings in the 'Title' and 'Preamble' of the Bill; *akin to garbing a hungry wolf in the clothing of a harmless sheep !.*

It is very respectfully further submitted that whilst ***questionably:***

(a) **being recklessly negligent in enforcing the Inland Revenue Laws already in force**, as disclosed by the facts set out above, and **as had been exposed by the Special Report in June 2006 to Parliament by the Auditor General**, and

(b) '**stalling**' and '**evading**' **to enforce the mandated statutory provisions of the existing Inland Revenue Laws,** *as amply demonstrated* in CA Writ Application No. 1661/2003 referred to above, and

(c) **failing and neglecting to take *corrective action* for the due and proper enforcement of revenue administration and tax collection,** to protect public revenue,

'incredibly' and **'mysteriously'**, "Default Taxes (Special Provisions) Bill" has been attempted ***'to be rushed through Parliament during the Sinhala and Tamil New Year holiday season',*** **to arbitrarily write-off taxes in default**, without a proper definition thereof, and ***sans any guidelines and/or criteria***, and *without even having compiled a report on the extent of such* ***'taxes in default'*** *to be so written-off*, **for Parliament to have been informed**, prior to approval of such write-off, in terms of Chapter XVII of the Constitution.

In the foregoing premises it is very respectfully submitted that the entirety of the "Default Taxes (Special Provisions) Bill", ought be struck down by Your Lordships' Court.

Intervenient -Petitioner

29th April 2009