

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

A BILL TITLED, "NATION BUILDING TAX (AMENDMENT)"

In the matter of an application under and in terms of Article 121 read with Article 120 and Article 83 of the Constitution to determine whether the above Bill is inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka

BEFORE

K. Sripavan	-	Chief Justice
Anil Gooneratne,	-	Judge of the Supreme Court
Prasanna S. Jayawardena, P.C.	-	Judge of the Supreme Court

S.C.(S.D.) No.34/2016

<b>Petitioner</b>	P. Liyanaarachchi, Attorney-at-Law, "Saketha", Midellawita Road, Galahitiyawa, Ganemulla.
<b>Counsel</b>	Dharshana Weraduwege
<b>Respondent</b>	Hon. Attorney General, Attorney-General's Department, Colombo12.
<b>Counsel</b>	Mrs. Farzana Jameel P.C., Additional Solicitor General with Yuresha de Silva, Senior State Counsel

Court assembled for hearing on 20<sup>th</sup> September 2016.

The Bill titled "Nation Building Tax (Amendment)" which seeks to amend certain provisions of the Nation Building Tax Act No. 9 of 2009 was challenged by the Petitioner as to its constitutionality.

The Petitioner alleges that Clauses 1, 2(2)(a)(iii), 2(2)(b), 4(2)(b) and 5 violate Articles 03,04,12(1), 13(6), 27(1), 27(2)(a),111(c) of the Constitution. The main argument of the Petitioner is that the aforesaid Clauses, purporting to have retrospective operation violate Articles 03, 04 and 12(1) of the Constitution.

Article 75 of the Constitution empowers the Parliament to make laws including laws having retrospective effect. Thus, it is well recognized that the power to legislate includes the power to legislate prospectively as well as retrospectively. This Court expressing its view in respect of a Special Determination on the Bill titled "Code of Criminal Procedure (Special Provisions)" S.C. S.D. 16/2012 and S.C. S.D. 17/2012 noted as follows with regard to the enactment of retrospective legislation.

*"Retrospective legislation would in most instances validate or invalidate the rights of parties and therefore the mere fact that in this instance Clause 8 validates the acts referred to therein with retrospective effect does not necessarily mean that it constitutes a usurpation of judicial power by the legislature".*

Further, in relation to the **Inland Revenue (Amendment) Bill** S.C.S.D. 3/1980, this Court made the following observations:-

*".....This is however, fiscal legislation and it is a matter for the legislature to decide what consideration 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.**" (emphasis added)*

Thus, once the legislature decides to give retrospective operation to the Nation Building Tax (Amendment) Bill with effect from 1<sup>st</sup> January 2016, the Court should not substitute its own opinion for the opinion of the legislature. As Warrington L.J. in **Short Vs. Poole Corp (1926) C.H. Division 60(91)** stated that *"with the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."* Accordingly, the power to tax retrospectively is an incident of sovereignty and is co-extensive with the subjects to which the sovereignty extends. It is unlimited in its range acknowledging in its very nature no limits so that

security against its abuse, if any, is to be found only in the responsibility of the legislature which imposes the tax on the people who are to pay it.

Learned Counsel for the Petitioner submitted that Clause 4(2)(b) of the Bill introduces Nations Building Tax in addition to the existing tax on telecommunication levy. In the case of *Ananthakrishnan Vs. Madras* AIR (1952) 395 at 408 the Court observed as follows :-

*“The Law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the legislature and that it knows no limitations except what are prescribed by the Constitution. The laws fixing taxes cannot be questioned on the ground that the tax is heavy and oppressive ....”*

Thus, it is well established in taxing matters, the legislature has the greatest freedom in selecting persons or objects it will tax and such steps taken by the legislature is not open to attack on the basis that the legislature taxes some persons or objects and not others. Once the legislature decides the limit within which the law applies, the law cannot operate unequally within the limit so decided by the legislature.

This Court in S.C. Special Determination No. 17/1997 (Bill to Amend the Inland Revenue Act No. 28 of 1979) referred to the approach that should be followed by Court with regard to taxing Statutes as follows:-

*“The principles that govern the approach of the court to taxing statute, where the basis of classification is challenged, were lucidly set out by Hedge J. in the following terms:*

*It is not in dispute that taxation laws must also pass the test of article 14. That has been laid down by this court in Moopil Nair v. State of Kerala (1961 3 SCR 77). But as observed by this court in East India Tobacco Co. vs. State of Andhar Pradesh (1963 1 SCR 404, 409), in deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and*

*that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of article 14. It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.*

*Mr. Goonewardena cited the decision of the Supreme Court of India, Kerala Hotel Restaurant Association vs. State of Kerala and others, 1990 S.C. cases (Tax 309) where Verma J. stated "The extent to which the revenue is required from a particular source is a matter of fiscal policy and if the legislature chooses to be satisfied with the raising of that amount alone which can be recovered from the affluent, it cannot be faulted for not dragging the impecunious also in the tax net. Even otherwise the play in the joints permitted to the legislature for making classification in a taxing provision is greater....." In the course of his judgment Verma J. cited the following passage from the judgment of Venkarachaliah J. in the case of P.M. Ashwathanarayana Setty vs. State of Karnataka (1989) Supp (1) SCC 696) : "Though other legislative measures dealing with economic regulations are not outside article 14, it is well recognized that the State enjoys the widest latitude where measures of economic regulations are concerned. These measures for fiscal and economic regulations involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable way."*

The Court therefore does not see any violation of the provisions of the Constitution by imposing Nation Building Tax in addition to the telecommunication levy.

Counsel further argued that the validation Clause, namely, Clause 5, violates Articles 3, 4, 12(1) and 27(1) of the Constitution. The legal effect of the said Clause is to validate certain taxes calculated and collected by the Commissioner-General of Inland Revenue and the Director General of Customs under Sections 4 and 5 respectively of the principal enactment from persons to whom the Act applies and further to provide that such provisions shall not affect any decision or order made by any Court or any proceedings pending before any Court in respect of any such tax collected.

This Court while expressing its determination on the "Powers of Attorney (Amendment) Bill – S.C. (S.D.) 8/2013 quoted with approval the following passage from M.M. Seervai in constitutional Law of India" 4<sup>th</sup> Edition, Vol 3 – page 2311.

Citing the Supreme Court judgment of India in ***Mahal Chand Sethia Vs. W.B. (cr. App 75 of 1969)*** Seervai states:

*"An Amending Act simpliciter will cure the defect in the statute only prospectively. But as a legislature has the competence to pass a measure with retrospective effect, it can pass an Amending Act to have effect from a date which is past. Usually legislatures pass Acts styled Amending and Validating Acts, the object being not only to amend the law from a past date but to protect actions already taken which would otherwise be invalid as done without legislative sanction. There is nothing in our Constitution which creates a fetter on legislature's jurisdiction to amend laws with retrospective effect and validate transactions effected in the past."*

Accordingly, the Bill which seeks to give effect to validate certain taxes collected from persons to whom this Act applies with effect from 1<sup>st</sup> January 2016 is not inconsistent with the provisions of the Constitution.

In the circumstances set out above, we determine that neither the Bill as a whole nor any of its provisions thereof is inconsistent with the Constitution.



**K.SRIPAVAN**  
**CHIEF JUSTICE**



**ANIL GOONERATNE**  
**JUDGE OF THE SUPREME COURT**



**PRASANNA S. JAYAWARDENE, P.C.**  
**JUDGE OF THE SUPREME COURT**