S.C. (S.D.) No. 01/2021, S.C. (S.D.) No. 02/2021 and S.C. (S.D.) No. 03/2021

"Inland Revenue (Amendment) Bill"

BEFORE	:	Priyantha Jayawardena, P.C.	Judge of the Supreme Court
		L.T.B. Dehideniya	Judge of the Supreme Court
		A. L. S. Gooneratne	Judge of the Supreme Court

S.C. (S.D.) No. 01/2021

Petitioner : Raja Nihal Hettiarachchi

Counsel : K. Kanag-Ishwaran, P.C., with N.R. Sivendran, Shivan Kanag-Ishwaran, Lakshman Jeyakumar, Aslesha Weerasekara and N.S. Nishendiran

S.C. (S.D.) No. 02/2021

Petitioner : Bar Association of Sri Lanka

Counsel : K. Kanag-Ishwaran, P.C., with N.R. Sivendran, Shivan Kanag-Ishwaran, Lakshman Jeyakumar, Aslesha Weerasekara and N.S. Nishendiran

S.C. (S.D.) No. 03/2021

Petitioner : Pathberiya Appuhamillage Nadeeka Suranjana

Counsel : Faiz Mustapha, P.C., with Faisza Markar, Keerthi Thillekaratne, Lanknath Pieris and Thusitha Nanayakkara

Respondent : The Attorney-General

Counsel : Farzana Jameel, P.C., Additional Solicitor-General with N. Wigneshwaran, Senior State Counsel for the Attorney-General

Court assembled for hearings at 10.00 a.m. on the 5th of April, 2021 and at 10.30 a.m. on the 7th of April, 2021.

A Bill titled "Inland Revenue (Amendment)" was published in the Government Gazette of 18th March, 2021 and placed on the Order Paper of Parliament on 26th March, 2021.

The aforementioned petitioners have, by forwarding to this court the petitions on 31st of March, 2021 and 1st of April, 2021, invoked the jurisdiction of this court in terms of Article 121(1) of the Constitution to determine whether Clauses 40 and 47 of the Bill are inconsistent with Article 4(c) read with Article 3 and Articles 11, 12(1), 14(1)(a) and 14(1)(g) of the Constitution.

The Attorney-General was noticed in terms of Article 134(1) of the Constitution. The Additional Solicitor-General, and the other two learned President's Counsel for the petitioners, assisted court in considering the constitutionality of the Bill and the Clauses therein.

The Clauses contained in the Bill seeks;

i. to give effect to the proposals contained in the Budget presented to the Parliament on the 17th of November, 2020 by the Minister of Finance, which was approved by the Parliament, and
ii. to give clarity to certain sections of the Inland Revenue Act No. 24 of 2017 (hereinafter referred to as "the principal enactment").

Clause 40

Clause 40 of the Bill seeks to amend section 126(5) of the principal enactment.

Section 126(5) of the principal enactment states as follows;

> "Where a return or part of a return was **prepared for reward by** some other person, including by an approved accountant, other than a full-time employee of the taxpayer, that other person shall also sign the return." [Emphasis added]

Further, Clause 40 of the Bill states as follows;

> "Section 126 of the principal enactment is hereby amended in subsection (5) of that section, by the substitution for the words **"prepared for reward by",** of the words **"prepared, filled or assisted to prepare or fill for a payment by".**
>
> [Emphasis added]

Learned President's Counsel for the petitioners submitted that the principal enactment and the other Clauses of the Bill have used the words *"any other person"*. However, Clause 40 of the Bill has used the words *"some other person"*. It was submitted that such inconsistency could lead to ambiguity, and thus the said Clause is arbitrary and in violation of Article 12(1) of the Constitution.

It was further submitted that Clause 40 of the Bill which amends section 126(5) of the principal enactment excludes *"a full-time employee of the taxpayer"* from the application of the said Clause. Such exclusion and/or classification is arbitrary, capricious, and in violation of Article 12(1) of the Constitution.

Furthermore, it was submitted that Clause 40 of the Bill will have serious implications for employees of persons and companies providing tax consultancy services, including Attorneys-at-Law providing consultancy services on tax matters. Thus, it was submitted that the said Clause violates the freedom to engage in any lawful occupation or profession enshrined in Article 14(1)(g) of the Constitution.

For the reasons stated above, the learned President's Counsel for the petitioners submitted that Clause 40 of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution.

Clause 47

Clause 47 of the Bill seeks to add a new section 190A to the principal enactment.

Clause 47 states as follows;

> "The following new section is hereby inserted immediately after section 190 of the principal enactment, and shall have effect as section 190A of that enactment: -
>
> **Section 190A.**
>
> "Any **auditor**, **tax practitioner**, **tax advisor** or approved accountant **other than a full-time employee of the taxpayer** who-
>
> (a) prepares, fills or certifies or assists in preparing, filling or certifying the tax returns, accounts, records, **appeals and objections** or any other document or information to furnish to the Commissioner-General; and
>
> (b) intentionally disregards or fails to take reasonable care in discharging the professional duty, or fraudulently prepares and certifies such document or information or deliberately misinterprets any provision of this Act or any other Act administered by the Commissioner-General, or any regulation, rule or order made thereunder,
>
> commits an offence under this Act, and on conviction after summary trial before a Magistrate, be liable to a fine not exceeding one million rupees or to imprisonment of either description for a term not exceeding six months or for **a prohibition order preventing him from practicing in such capacity**.". [Emphasis added]

Learned President's Counsel for the petitioners submitted that some of the words used in Clause 47 of the Bill are vague and indefinite. It was further submitted that the term "*approved accountant*" has been defined in section 195(1) of the principal enactment. However, the terms "*auditor*", "*tax practitioner*" and "*tax advisor*" have not been defined in the principal enactment. Hence, it was submitted that the use of such words that are not defined would lead to ambiguity and may result in discrimination in the interpretation of such words and in the application of the said section. Therefore, including such words in the said Clause violates the equal protection of the law enshrined in Article 12(1) of the Constitution.

Further, it was submitted that the words *"other than a full-time employee of the taxpayer"* in Clause 47 of the Bill excludes the applicability of the said Clause to full-time employees of the taxpayers. Such classification is arbitrary, capricious, and in violation of Article 12(1) of the Constitution, as a classification can only be applied in relation to the imposition of taxes or giving of concessions to persons and objects of the State.

Moreover, it was submitted that Clause 47 of the Bill is applicable to the preparation of tax appeals and objections, and the restrictions placed on such matters by the said Clause would in effect deter the freedom of expression enshrined in Article 14(1)(a) of the Constitution.

Further, it was submitted that the words *"prohibition order preventing him from practicing in such capacity"* in Clause 47 of the Bill, permanently disbars a person from engaging in a lawful occupation or profession of his choice. Such a punishment is disproportionate and cruel, and therefore violates Article 11 of the Constitution.

Moreover, even Attorneys-at-Law are engaged in providing consultancy services on tax matters. However, the jurisdiction of disciplinary control of Attorneys-at-Law, is exclusively vested with the Supreme Court in terms of the Rules promulgated by the Supreme Court under Article 136(1)(g) of the Constitution. Therefore, the vesting of the said jurisdiction on the Magistrate's Court by Clause 47 of the Bill is an erosion of the judicial power of the Supreme Court, and therefore it was submitted that the said Clause violates Article 4(c) read with Article 3 of the Constitution.

Therefore, the learned President's Counsel for the petitioners submitted that Clause 47 of the Bill is inconsistent with Article 4(c) read with Article 3, and Articles 11, 12(1), 14(1) (a) and 14(1)(g) of the Constitution.

When the court assembled for further hearing of the petitions on the 7th of April, 2021, the Additional Solicitor General who appeared for the Attorney-General, following the *cursus curiae* set out in ***S.C. (S.D.) No. 06/2002*** and ***S.C. (S.D.) No. 01/2020 to S.C. (S.D.) No. 39/2020***, submitted to court that the Cabinet of Ministers have approved amendments to Clauses 40 and 47 of the Bill. Copies of the said proposed amendments were handed over to the learned President's Counsel for the petitioners and to court.

Said proposed amended Clauses 40 and 47 of the Bill are reproduced below;

Clause 40-

> "Where a return or a part of return was prepared for a payment by any person, including by an approved accountant, such person shall certify separately specifying the extent to which he was involved in the preparation of such return and specify the documents examined by him and the information relied upon by him. Such certification shall be submitted along with the return and the said certification shall be deemed to be part and parcel of the said return."

Clause 47-

> "Any person who fraudulently;
>
> (a) prepares any document or information, or
> (b) certifies a document
>
> to be furnished to the Commissioner General of Inland Revenue, commits an offence under this Act, and on conviction after summary trial before a Magistrate, be liable to a fine not exceeding One Million Rupees or to imprisonment of either description for a term not exceeding six months."

Learned President's Counsel for the petitioners submitted to court that the abovementioned proposed new Clauses 40 and 47 of the Bill would address the aforementioned objections raised on behalf of the petitioners, and are consistent with the Constitution.

Thereafter, the remaining Clauses of the Bill were examined by court with the assistance of the Additional Solicitor-General and the other two learned President's Counsel who appeared for the petitioners.

Principles applicable to the Bill

It is an established principle that, in fiscal legislation, the Legislature has the greatest freedom of classification in imposing liability and granting concessions, and such classification in imposing liability or granting concessions have not been held to be inconsistent with Article 12(1) of the Constitution.

In ***S.C (S.D.) No. 02/2005***, which considered the Value Added Tax (Amendment) Bill, this court observed;

> *"This Court has consistently held that in revenue matters in making classifications for granting of concessions and imposing liabilities, there is a wide discretion. These measures are taken not only to raise resources necessary for the State but also to direct economic activities properly, for the general welfare of the society.*
>
> *On this premises, it has been held that revenue measures sought to be introduced by any Bill would not generally be considered as inconsistent with Article 12 of the Constitution* ***unless they are manifestly unreasonable or discriminatory.****"* [Emphasis added]

Further, the former Constitutional Court in relation to the Finance Amendment Act of 1978 (Decisions of the Constitutional Court of Sri Lanka (Volume VI) 1978) observed;

> *"In taxation matters even more than in other fields it is well established that the legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the 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 that it cannot be justified on the basis of any valid classification."*

A similar observation was made in ***S.C. (S.D.) No. 03/1980***, in relation to the Inland Revenue (Amendment) Bill, which is reproduced below;

> *"[...] 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."*

Further, in ***P.M.Ashwathanarayana Setty v State of Karnataka* (1989 Supp (1) SCC 696)** the Supreme Court of India observed;

> *"Though other legislative measures dealing with economic regulations are not outside article 14, it is well recognised 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 ways."*

Thus, in considering the objections raised by the learned President's Counsel for the petitioners, we are of the opinion that the use of the words *"some other person"* in Clause 40 of the Bill, which is different to the words used in the principal enactment and the other Clauses of the Bill, would change the structure of the principal enactment. Moreover, the lack of uniformity between the Bill and the principal enactment would lead to ambiguity in the interpretation and enforcement of the Act.

Further, it is pertinent to note that the exclusion of *"a full-time employee of the taxpayer*" from the applicability of section 126(5) of the principal enactment, was not an amendment brought by Clause 40 of the Bill. In terms of Article 80(3) of the Constitution, once a Bill becomes law, the validity of an Act or a provision of the Act, cannot be inquired into, pronounced upon or called into question by a court or tribunal.

However, the said sub-Article 80(3) of the Constitution does not act as a bar in examining the constitutionality of a section in an Act already passed by Parliament when such a section is proposed to be amended, as such an amendment could change the entire complexion and effect of the existing section in an Act. Nevertheless, such an approach does not extend to amendments relating to typographical or grammatical errors.

It is clear from the above observations made in the aforementioned determinations, that in revenue matters, the State has a wide discretion in selecting the persons or objects to impose tax or to grant concessions, and such matters will not be inconsistent with Article 12(1) of the Constitution which provides for the equal protection of the law unless they are manifestly unreasonable or discriminatory. However, a classification shall not be made to exclude liability of persons who perform services to taxpayers. Thus, the exclusion of *"a full-time employee of the taxpayer"* from the applicability of section 126(5) of the principal enactment will not be captured within the scope of the aforesaid principle, and is therefore inconsistent with Article 12(1) of the Constitution.

However, the new proposed Clauses 40 and 47 of the Bill have removed the aforementioned inconsistencies with the Constitution.

We have examined the provisions of the Bill and are of the opinion that, upon the suggested amendment being effected, the Bill and its provisions will cease to be inconsistent with the Constitution. We accordingly determine that upon such amendment being given effect to, the provisions of the Bill will not be inconsistent with the Constitution.

In the circumstances, the Bill can be passed by a simple majority in Parliament.

Priyantha Jayawardena, P.C.,

Judge of the Supreme Court

L.T.B. Dehideniya,

Judge of the Supreme Court

A.L.S. Gooneratne,

Judge of the Supreme Court