

“Finance Bill”

BEFORE	:	Priyantha Jayawardena PC	Judge of the Supreme Court
		K. Kumuduni Wickremasinghe	Judge of the Supreme Court
		A. L. Shiran Gooneratne	Judge of the Supreme Court

S.C. (S.D.) No. 25/2021

Petitioner	:	Sunil Handunneththi
Counsel	:	Shantha Jayawardena with Niranjana Arulpragasam and Thilini Vidanagamage

S.C. (S.D.) No. 26/2021

Petitioner	:	Eran Wickramaratne
Counsel	:	Suren Fernando with Khyathi Wikramanayake and Sanjith Dias

S.C. (S.D.) No. 27/2021

Petitioner	:	Ekeshwara Kottegoda Vithana
Counsel	:	Darshana Weraduwa with Dhanushi Kalupahana

S.C. (S.D.) No. 28/2021

Petitioners	:	1. Centre for Policy Alternatives (Guarantee) Limited
		2. Dr. Paikiasothy Saravanamuttu

Counsel : M. A. Sumanthiran PC with Viran Corea, Bhavani Fonseka, S. Fernando, Luwie Ganeshkaran, Kyati Wickramanayake, Sanjith Dias and Divya Mascarange

S.C. (S.D.) No. 29/2021

Petitioner : Rathnayake Mudiyansele Ranjith Madduma Bandara

Counsel : Farman Cassim PC with B. Siriwardena, Mithun Imbulamure and Vinura Kularatne

S.C. (S.D.) No. 30/2021

Petitioner : Weligodage Saman Rathnapriya Silva

Counsel : Eraj de Silva with Daminda Wijerathne and J. Sundharamoorthy

S.C. (S.D.) No. 31/2021

Petitioner : Ashok Abeysinghe

Counsel : A. S. M. Perera PC with Anjela Josef

S.C. (S.D.) No. 32/2021

Petitioner : Nagananda Kodituwakku, appeared in person

Respondent : 1. The Attorney-General
2. Secretary-General of Parliament

Counsel : N. Wigneshwaran, Deputy Solicitor-General with Ishara
Madurasinghe, State Counsel and Shiloma David, State
Counsel

Court assembled for hearings at 10.00 a.m. on the 27th, 28th and 29th of July, 2021. With consent of the parties, all the petitions were taken up for hearing together on the 28th of July, 2021.

A Bill titled ‘Finance’ was published in the Government Gazette of the Democratic Socialist Republic of Sri Lanka on the 12th of July, 2021, and was placed on the Order Paper of Parliament on the 20th of July, 2021.

The aforementioned petitioners have invoked the jurisdiction of this court in terms of Article 121(1) of the Constitution to determine whether the Bill or any of the Clauses therein are inconsistent with the Constitution.

The Attorney-General was given notice in terms of Article 134(1) of the Constitution. The learned Deputy Solicitor-General who appeared for the Attorney-General and Secretary-General of Parliament, learned counsel for the petitioners, and the petitioner who appeared in person, assisted court in considering the constitutionality of the Bill and the Clauses therein.

The Bill seeks to introduce a tax amnesty in order to give effect to the proposals contained in the Budget Speech which was presented to Parliament by the former Minister of Finance on the 17th of November, 2021, and approved by Parliament.

The long title of the Bill states –

“An Act to enable persons to voluntarily disclose undisclosed taxable supplies, income and assets required to be disclosed under certain laws; to provide for the imposition of a tax on the taxable supplies, income and assets so disclosed; to indemnify the persons who voluntarily disclose any such taxable supply, income or asset against liability from investigation, prosecution and penalties under specified laws; to grant certain concessions to persons who had already disclosed taxable supplies, income and assets under specified laws; and for matters connected therewith and incidental thereto.”

Part I of the Bill – Imposing the Tax on Voluntary Disclosure

Part I of the Bill provides a tax amnesty to individuals and companies who voluntarily disclose taxable supply, income or asset which they were required to disclose, but had failed to disclose under the provisions of specified revenue laws. Clause 2(2) of the Bill however, excludes those under investigation, pending legal proceedings, or convicted under the provisions of specified laws, from benefitting under the scheme set out in the Bill.

Accordingly, any person who wishes to benefit from the tax amnesty scheme set out in the Bill, is first required to invest an amount equivalent to the undisclosed taxable supply, income or asset either in shares issued by a resident company, treasury bills or bonds issued by the Central Bank, any quoted debt securities issued by a resident company in Sri Lanka, or in any movable or immovable property. If such person is unable to invest immediately, the said amount may be deposited in a bank account. Clause 3(3) of the Bill further states that those who have invested or deposited such an amount prior to the commencement of the Act, are exempted from fulfilling the said requirement.

In addition to the above, Clause 4(2) of the Bill requires such persons to pay a tax on voluntary disclosure. The said tax is charged at a rate of *one percent* of the amount of taxable supplies, income or assets disclosed in the declaration form submitted to the Commissioner-General under Clause 5(1) of the Bill.

However, if such declaration is not in compliance with the provisions of the Bill, the Commissioner-General of Inland Revenue may reject the same and should notify the declarant in writing, the reasons for the rejection.

Part II of the Bill - Provisions to Write off Tax Arrears under certain laws

Part II of the Bill provides for a taxpayer who is liable to pay tax arrears or penalty or interest stipulated under the provisions of the Bill within the stipulated time frame to be written-off by the Commissioner-General.

Further, Clause 12 of the Bill writes off tax arrears of any individual whose assessable income, as calculated in terms of the said Clause, does not exceed Rs. 3 million. However, the said write offs are subject to the limitations set out in Clauses 14 and 15 of the Bill.

Moreover, such concessions on tax would not be granted to persons with tax arrears payable under the Value Added Tax Act No.14 of 2002 and would only be applicable to any individual whose assessable income in terms of the Inland Revenue Act No. 24 of 2017 prior to the 31st of March, 2020, is less than three million rupees. Further, such concessions on tax would not be granted to individuals falling within the categories set out under the proviso to Clause 12 of the Bill.

At the commencement of the hearing, learned Deputy Solicitor-General who appeared for the Attorney-General and Secretary-General of Parliament, submitted that the Ministry of Finance had agreed to amend some of the Clauses in the Bill at the committee stage and outlined the proposed amendments. Further, he moved for time till the 29th of July, 2021, to hand over the proposed amendments to court after the Legal Draftsman had prepared the same. Accordingly, the following committee stage amendments were handed over to court with copies to the counsel for the petitioners on the 29th of July, 2021;

1. **Clause 4(1)** will be amended as follows:

A person to whom this Part applies shall be liable to pay a tax to be called the “Tax on Voluntary Disclosure” to the Commissioner-General prior to making the declaration under section 5 subject to the provisions of subsection (2).

2. **Clause 5(1)** will be amended as follows:

Any person to whom this Part applies who has invested or deposited any undisclosed taxable supply, income or asset as specified in section 3 and has paid the Tax on Voluntary Disclosure as specified in section 4, shall on or prior to December 31, 2021, submit to the Commissioner-General a declaration (hereinafter in this Part referred to as the “declarant”) in relation to any undisclosed taxable supply, income or asset, substantially in the relevant Form specified in Part I or Part II of Schedule V hereto, along with the documents to prove the ownership, date of acquisition and cost or market value of the asset subject to the guidelines issued by the Commissioner-General under subsection (2).

3. **Clause 5(2)** will be substituted with the following:

For the effective implementation of the provisions of this Act, the Commissioner-General may issue necessary guidelines specifying the manner of payment and filing the declaration within one week of the date of coming into operation of this Act.

4. **Clause 5(3)** will be substituted with the following:

(a) Upon receipt of a declaration made under subsection (1), the Commissioner-General shall verify whether such declaration is in accordance with this Act.

(b) Where the declaration is in accordance with this Act the Commissioner-General shall accept the declaration in writing and inform of such acceptance to the declarant within thirty days of the date of receipt of the declaration.

(c) If the declaration is not in accordance with the provisions of this Act, the Commissioner-General shall reject the declaration and inform the declarant in writing the reasons for his rejection within thirty days of the date of receipt of such declaration.

(d) If the Commissioner-General fails to inform the declarant as specified in paragraph (b) and (c) within thirty days the declaration shall be deemed to have been accepted.

5. **Clause 5(4)** will be substituted with the following:

Any declarant whose declaration is rejected in terms of subsection (3), shall be entitled to submit a fresh declaration remedying any defects specified in the Commissioner-General's decision under subsection (3) within thirty days of the receipt of the Commissioner-General's decision.

6. **Clause 5(5)** will be amended as follows:

Any declarant who ~~intentionally~~ provides false or incorrect information in the declaration made under subsection (1) shall not be entitled to the immunity granted under section 6, notwithstanding the acknowledgement of such declaration by the Commissioner-General under subsection (3).

7. **Clause 6(1)** will be amended as follows:

(a) Under the provisions of ~~the respective~~ any law specified in Schedule I hereto, other than the Value Added Tax Act, No. 14 of 2002 ~~and~~ in relation to any year of assessment ending on or prior to March 31, 2020 in relation to the ~~taxable supply~~ income or asset disclosed in the declaration made under subsection (1) of section 5.

(b) Under the provisions of the Value Added Tax Act, No. 14 of 2002 in relation to any year of any period ending on or prior to March 31, 2020 ~~and~~ in relation to the amount of taxable supplies disclosed in the declaration made under subsection (1) of section 5, unless such tax has been collected by such declarant.

8. **Clause 7(1)** will be amended as follows:

The Commissioner-General or any officer of the Department of Inland Revenue, shall preserve and aid in preserving ~~absolute~~ official secrecy in respect of the identity of a declarant and any matter or thing contained in a declaration made under subsection (1) of section 5 of this Act.

9. **Clause 12(b)** will be amended as follows:

Where the assessable income of the relevant individual exceeds rupees three million in aggregate with the income from final withholding payments, gains and profits exempted from income tax in terms of the provisions of the Inland Revenue Act, No. 24 of 2017.

10. **Clause 13(1)** will be amended as follows:

The Commissioner-General shall write off any penalty or interest calculated in terms of the provisions of any law specified in Schedule I or IV hereto, in relation to a taxpayer, in respect of which the payment due date was December 31, 2020 or a date prior to that

date, if the taxpayer settles pays the full amount of the tax outstanding, under the provisions of the said laws, on or prior to March 31, 2022.

11. **Clause 14** will be amended as follows:

Where there is any dispute in relation to any tax arrears referred to in section 11 or 12, in respect of which a decision is pending ~~decision~~ before or has been made by the Tax Appeals Commission or any court of law, prior to February 22, 2021, before the commencement of this Act, under the provisions of any respective law specified in Schedule I or Schedule III hereto, or an assessment made in relation to a taxpayer, shall not be written off under the provisions of section 11 and 12, as the case may be.

12. **Clause 17** will be deleted in its entirety.

13. **Clause 20** will be amended to include the following:

“Final withholding payments” shall have the same meaning assigned to such payment as provided in section 88 of the Inland Revenue Act, No. 24 of 2017;”

Further, the definition of ‘return’ which was in the same Clause will be amended as follows:

“return” means a return of income or Value Added Tax return that a person is required to file with the Department of Inland Revenue in terms of the respective laws specified in Schedule I, including any certificate, declaration or any other attachment required to be furnished with the return;

Further, learned Deputy Solicitor-General informed that the typographical error in Clause 2(2)(a) in the Sinhala text would be corrected to give the same meaning in the English Text.

Thereafter, the petitioners commenced their submissions.

Legislative Competence

Learned counsel for the petitioners submitted that the Bill provides for a waiver of tax arrears. Thus, it would legalize the acts of persons who defaulted tax, either in full or in part.

Further, it was submitted that the Bill grants tax evaders a full immunity from investigation and prosecution under specified revenue laws, if they voluntarily disclose their undisclosed taxable supply, income or assets. Hence, the Bill would discourage tax compliance.

Moreover, it was submitted that the Bill would facilitate persons who have acquired wealth through illegal and anti-social activities, to bring their wealth into the country's financial system and therefore, use such money as if they were earned through legitimate means.

Thus, it was submitted that the cumulative effect of the Bill is to enact legislation to grant an amnesty to tax defaulters, and is thereby discriminatory against taxpayers who have already paid the stipulated taxes on time. Therefore, the enactment of the Bill into law to grant a tax amnesty is arbitrary, irrational, grossly unreasonable, and contrary to the rule of law. Thus, the cumulative effect of the Bill is inconsistent with Article 12(1) of the Constitution and, therefore, cannot be enacted into law by Parliament.

The counsel for the petitioners cited **S.C. Reference No.1/2004** which considered *Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003* consequent to invoking constitutional jurisdiction by the then President, in terms of Article 129(1) of the Constitution, five judges of this court observed;

"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 it grants; immunities and indemnities to persons who have contravened the laws that have been referred to and thereby defrauded public revenue causing extensive loss to the State."

However, we observed in *Inland Revenue (Regulation of Amnesty) Bill, S.C. (S.D.) No. 26/2004*, three judges of this court (including two of the judges who considered the aforementioned reference) observed that subject to certain amendments, the Bill can be passed in Parliament. Hence, the above reference has no applicability to the instant Bill. In any event, in the determination of the *Tax Amnesty Bill SC No. 2 of 1978*, five judges of this court have held that Article 15(7) of the Constitution permits to enact legislation to grant amnesties.

Without prejudice to the above, learned counsel for the petitioners further submitted that the exemptions recognized in law in enacting fiscal legislation have no application to the enactment of legislation on tax amnesties by Parliament.

Responding to the above submission, the learned Deputy Solicitor-General submitted that Sri Lanka has introduced amnesty schemes eleven (11) times since their first introduction in 1964.

Moreover, it was submitted that granting tax amnesties is a common phenomenon in the world. Countries such as Argentina (2021), Dominican Republic (2020) (2021), Colombia (2020), El Salvador (2020), Guatemala (2020), Panama (2020), the United Kingdom (2007) (2011) (2020), Honduras (2018) (2019) (2020), Malaysia (2019), Philippines (2019), Pakistan (2018), Indonesia (1964) (1984) (2008) (2016) (2017), India (2016), Australia (2014), Spain (2012), Greece (2010), Portugal (2005) (2010), Russia (2007), Belgium (2004), Germany (2004), South Africa (2003), Italy (2001) etc., have introduced various types of tax amnesties from time to time to raise additional revenue and to get tax defaulters into the tax regime. Further, Los Angeles City (2009), and the State of Louisiana (2009) too have enacted similar legislation.

He further submitted that, the Bill has been drafted to meet specific and pressing needs of the people and the Republic whilst honouring the obligations of the State under Articles 148, 155 and 157 of the Constitution. Moreover, the Bill does not prevent investigations and/or prosecution in respect of wealth acquired by illegal or anti-social activities. Thus, the Bill is not directed at converting unlawfully earned funds into legal funds or for any other similar purpose.

Accordingly, he submitted that the present Bill falls within the exclusions set out in Article 15(7) of the Constitution and thereby it does not violate any of the Articles in the Constitution.

In this context, he cited the determination in the ***Finance Bill, S.C. (S.D.) No. 28/2004*** where it was observed;

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

“..... subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public

*health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of **meeting the just requirements of the general welfare of a democratic society.***

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

The aforementioned submissions of the parties with regard to the legislative competence of the Parliament to enact legislation to grant tax amnesties are considered first.

Article 15(7) of the Constitution confers power on the legislature to enact legislation to restrict the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 for the purpose of *inter-alia* – ‘meeting the just requirements of the general welfare of a democratic society’. Time and again this court has observed that enacting such legislation is not inconsistent with the Constitution.

In the determination of the ***Tax Amnesty Bill*** (*supra*), five judges of the Supreme Court recognized the legislative competence to enact legislation to grant tax amnesties to persons who have defaulted in the payment of tax. In the said determination, the Supreme Court observed;

“The main provisions of the Act deals with persons who are commonly referred to as “tax evaders”. The provisions of the Act seek to grant such evaders an amnesty in regard to non-payment of taxes in respect of any profit and income arising or accruing on or before 31st March, 1977.

The provisions of this Bill do not apply to any person in relation to whom investigations have been commenced by the Commissioner-General or by any other officer of the Department of Inland Revenue for any alleged or suspected evasion of any tax payable under the provisions of the law for the time being relating to the imposition of income tax in respect of any profit and income arising or accruing on or before 31st March, 1977.

The provisions of this Bill will not benefit those tax evaders who have already been dealt with under the law or who have paid penalties. We have considered these

provisions in the light of the fundamental rights of equality before the law and equal protection of the law as provided in Article 12(1) of the Constitution of Sri Lanka.

In view, however, of the provisions of Article 15(7) of the Constitution and the permitted restriction of the exercise and operation of the fundamental rights in the interest of meeting the just requirements of the general welfare of a democratic society, we think that the purpose of this Bill justifies the restriction, if any, of the fundamental rights of equality.”

Further, in the ***Tax Amnesty Bill S.C. (S.D.) No. 3/89***, the court observed;

“In regard to the class of persons liable to pay income tax and surcharge on income tax for the years of assessment ending on or before 31.3.88, the Bill seeks to make special provision for certain persons who have failed to comply with their statutory obligations, including a different (and probably lower) rate of tax and relief from the penalties and prosecutions for default. Prima facie, the Bill appears to discriminate in favour of tax evaders and against the honest tax-payer, and we have to consider whether the Bill is inconsistent with Article 12(1) for that reason.

[....]

.... it confers certain advantages on the tax evader, in respect of past years, based on a rational and intelligible basis of differentiation; and with the objective of bringing a distinct category of persons, namely those resorting to tax evasion, into the fiscal net, in the future. There is no inconsistency with Article 12 (1).”

Moreover, in ***The Specified Certificates of Deposit (Tax and Other Concessions) Bill S.C. (S.D.) No. 18/90***, the court observed;

*“The Bill is similar in many respects to the Tax Amnesty Act, No.5 of 1989, which was considered by this Court in **Special Determination No.3 of 1989 (P/Parl/2)** on 6th April 1989 (Hansard of 8.4.1989, column 1154). It is not violative of article 12 to confer certain advantages and immunities on tax evaders, upon making disclosure and making substantial payment in respect of previously undisclosed profits and income, although this might be more favoured treatment than that meted out to honest taxpayers under the normal tax laws. Such difference in treatment is based*

on a rational and intelligible basis of differentiation, reasonably related to the legislative objective of bringing a distinct category of persons (tax evaders) into the fiscal net in the future. Legislation of this kind is not intended for the sole purpose of benefiting tax evaders, but is enacted in recognition of the reality that there is tax evasion, which is both extensive and difficult to check or detect; it seeks to recover some revenue in respect of past evasion; and finally, to secure full compliance in the future.”

In ***Inland Revenue (Regulation of Amnesty) Bill, S.C. (S.D.) No. 26/2004*** it was observed;

“This disclosure of undisclosed assets and the like would in our view be a valid basis for the grant of an amnesty which would not be inconsistent with the equal protection of law guaranteed by Article 12(1) of the Constitution.”

Responding to the submissions made by the learned Deputy Solicitor-General with regard to the legislative competency to enact legislation to grant tax amnesties, counsel for some of the petitioners submitted that the determinations of this court on enacting fiscal legislation have no application to the instant Bill as it provides to grant a tax amnesty. We are unable to agree with the above submissions of the counsel for the petitioners, as enactment of legislation to grant tax amnesties is a part of the government policy on fiscal matters.

In the circumstances, the learned Deputy Solicitor-General submitted that Parliament has the legislative competence to enact legislation granting tax amnesties. In this regard, it is pertinent to note that tax amnesties are introduced by governments to encourage individuals and businesses who have failed to declare taxable income or assets to disclose their wealth by offering certain benefits to such persons.

He further submitted that in the aforementioned circumstances neither the Bill nor any of the Clauses in the Bill are arbitrary, irrational or violative of any of the Articles in the Constitution.

We have considered the objection raised by some of the counsel for the petitioners with regard to the legislative competence to enact legislation to grant tax amnesties and are of the view that there is no constitutional ouster to enact legislation to grant tax amnesties by Parliament.

However, Article 15(7) or any of the Articles in the Constitution does not oust the jurisdiction of the court to consider the constitutionality of a Bill, even if on the face of the Bill it appears that the Bill comes within one of the exclusions enshrined in Article 15(7) of the Constitution.

Hence, this court is required to consider the Clauses of the Bill in terms of Article 121 read with Article 123 of the Constitution.

We are also of the view that, the Clauses of the Bill fall within the aforementioned exclusion set out in Article 15(7) and thus, the Bill is not inconsistent with Article 12(1) of the Constitution.

Proportionality

Counsel for the petitioners submitted that the Bill *inter alia* provides for the granting of full immunity from liability to pay arrears of taxes, penalties and interests or from investigations and prosecutions. Further, such an amnesty is available to any person who has not disclosed a taxable supply, income or asset which were required to be disclosed under the provisions of any law. It was also submitted that, granting of the tax amnesty is conditional upon the making of an investment or deposit as set out in Clause 3 of the Bill.

It was further submitted that the sum to be collected under the 'Tax on Voluntary Disclosure' scheme is at a nominal rate of *one percent* of the total value of the disclosed wealth which is far lower than the tax liability of the persons who have already paid taxes in terms of the applicable law. In this regard it was pointed out that;

- i. Under the Inland Revenue Act 2017, the tax rates originally varied from 4-24%, and subsequent to the amendment by Act No. 10 of 2021, the rates were between 6-18%.
- ii. Under the Inland Revenue Act 2006, the tax rates varied from 5-35% for individuals.
- iii. Under the Value Added Tax Act, post November 2016 up to January 2020, the tax rate was 15%, and post January 2020 - 8%.

Moreover, counsel for the petitioners cited the determination in *The Specified Certificate of Deposit (Tax and other Concessions) Bill (supra)* where the court observed that the seven percent of taxable income is far too low and is arbitrary.

Accordingly, it was submitted that the benefits offered to tax defaulters are disproportionate to the taxes imposed on the taxpayers who pay their taxes on time.

Responding to the aforementioned submissions, the learned Deputy Solicitor-General submitted that due to the outbreak of COVID-19 in Sri Lanka, the government revenue has dropped drastically. However, the government expenditure remains the same and, thus, the government revenue is not sufficient to cover recurrent expenditure of the country. Hence, the introduction of the new Finance Bill would help to ease the fiscal deficit, as a temporary measure at this critical time.

He further submitted that there are compelling reasons for enacting the Bill into law, such as encouraging tax evaders to disclose their wealth, raise funds that are required for the government coffers, to spur economic activity and to clear accumulated outstanding taxes which are unable to recover by the State.

Moreover, this Bill has addressed the losses suffered by certain businesses as a result of the economic impact of COVID-19 and also sets out a scheme to usher in tax evaders into the national tax administration.

It was further submitted that Sri Lanka's tax compliance rate is very low, mainly due to the weak tax administration, enforcement system, complexities in enforcement of fiscal legislation and higher tax rates. As the Bill covers both existing 'tax filers' as well as 'non tax filers', the compliance rate is expected to increase up to sixty percent.

Learned Deputy Solicitor-General further submitted that the purpose of the Bill is to give effect to certain Budget Proposals. Moreover, previous legislation required tax defaulters to pay a percentage of the taxable income. In comparison, the Bill requires tax defaulters to pay *one percent* of the total amount of the money or the income disclosed and *one percent* on the market value of the movable and immovable property on date of the declaration. Therefore, it is not possible to compare the present tax amnesty scheme with the previous scheme that offered tax amnesty.

Thereafter, he drew a distinction between the previous legislation and the present Bill. He heavily relied on the fact that the Bill intends to widen the number of taxpayers for the future and thereby it facilitates to increase the number of taxpayers. Further, it was submitted that the object of widening the tax net is a unique feature of the Bill and thereby reduces the burden on taxpayers in the long run.

Further, it was submitted that the Bill is a part of the government's efforts to implement a structured taxing system by clearing all tax arrears on or before 31st of December, 2021, and to expand the tax administration by offering incentives to persons who have failed to enter the tax regime and thereafter, getting them to comply with the tax legislation.

The issue that needs consideration by court is whether the benefits offered to tax defaulters in exchange of full disclosure of their income and assets are proportionate to the taxes imposed on the general public by the government, and whether such a scheme violates Article 12(1) of the Constitution.

In order to incentivize voluntary disclosure, tax amnesties offer either; financial or legal amnesty or a combination of both. Accordingly, if an individual or a company discloses their undisclosed income or assets, the government will grant immunity from liability to pay in full or in part of the amount of the unpaid taxes, and also may exempt them from penalties or the payment of interest as a result of defaulting payment of taxes. Further, the government may grant immunity to such individuals and companies from investigation and prosecution for tax evasion under the revenue laws.

Moreover, the primary reason for granting a tax amnesty is to raise funds for the government coffers on a short-term basis and, thereby, to increase revenue. Further, introducing a 'tax on voluntary disclosure' scheme would reduce the government's budget deficit of a given fiscal year with minimal State intervention. Furthermore, encouraging tax evaders to disclose their undisclosed income and assets would assist in getting such persons to the national tax system, and thereby increase tax collection and compliance in future fiscal years. Hence, such persons will have to pay the stipulated taxes along with the rest of the taxpayers in the future.

In the majority decision of *Parliamentary Pensions Bill, Decisions of the Constitutional Court of Sri Lanka volume 4 (1976) page 36*, it considered Article 18(1) of the 1972 Constitution of Sri Lanka (which is identical to Article 12(1) of the present Constitution) and observed;

“Classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which a classification is made. If a law is made applicable to a class of persons or things and the classification is based upon a differentia having a rational relation to the objects sought to be achieved, there can be no objection to its constitutional validity that its application is bound to affect one person or thing, or a particular class of persons.

Classification, therefore, must be based –

- (i) on a rational basis, and*
- (ii) on intelligible differentia; and*
- (iii) the differentia must bear a rational relation to the objects sought to be achieved by it; and*
- (iv) arbitrary selection cannot be justified by calling it a classification.”*

In the dissenting determination it was observed;

“..... Permissible classification must satisfy two conditions, namely, (1) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) the differentia must have a rational relation to the object sought to be achieved by the Bill in question.”

We observe that unlike in previous legislation relating to granting of tax amnesties, the present Bill contains stringent provisions to comply with all the laws that are in operation. Particularly, the Bill excludes the persons who have earned money illegally. Further, the Bill provides to secure international commitments which are arising from the conventions that Sri Lanka has ratified. Hence, in view of the stringent safeguards embodied in the Bill, it is necessary to provide substantial incentives to attract the persons who evade payment of tax, either in full or in part.

Further, though the previous tax regimes charged a percentage of the taxable income, the Bill contains provisions to charge *one percent* of the total income declared or the market value of the movable or immovable property at the time of the declaration by the persons who were evasive of paying their taxes as required by law. In this regard, imposing a higher rate of tax would deter such

persons from participating in the scheme offered by the Bill and comply with the fiscal legislation in the future.

Moreover, the Bill contains short-term and long-term fiscal policies of the government. As a short-term benefit, the Bill contains provisions to collect money for the government coffers on or before the 31st of December, 2021. As a long-term benefit, it has provisions to get tax evaders to join the tax regime in the country and to pay the prescribed taxes along with the other payments in the future.

The principle applicable to the enactment of fiscal legislation were considered by court in the following determinations;

In ***Inland Revenue (Amendment) Bill S.C. (S.D.) No. 01-03/2021*** the court observed;

“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.”

Further, in ***Value Added Tax (Amendment) Bill S.C. (S.D.) No. 02/2005***, 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]

Furthermore, the former Constitutional Court in relation to the ***Finance (Amendment) Bill 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."

Moreover, in the ***Inland Revenue (Amendment) Bill S.C. (S.D.) No. 03/1980***, the court observed;

"[...] This is, however, fiscal legislation and it is a matter for the Legislature to decide what considerations relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to. Presumably, this provision is sought to be enacted on the basis of economic consideration in respect of which the decision must largely be left to the Legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made."

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."

It is pertinent to note that, tax amnesties that are offered by governments vary in nature depending on the government's fiscal policy. Complete tax amnesties grant full immunity from liability to pay outstanding taxes, penalties or interest incurred as a result of defaulting tax. In addition, it offers granting immunity from investigation or prosecution for tax evasion under the specified

revenue laws. Semi-complete tax amnesties require the tax defaulter to pay a 'tax on voluntary disclosure' at an average rate determined by government's fiscal policy in view of writing off past tax liabilities. Restrictive tax amnesties require the tax defaulter to pay the full amount of the outstanding tax, but grants him immunity from liability to pay any penalty or interest arose as a result of tax default. It also grants immunity from investigation or prosecution for the tax evasion under revenue laws.

Further, it is a part of the government's fiscal policy to decide the type and the amount of taxes that will be implemented taking into consideration the amount of revenue that will be collected for a particular fiscal year.

The petitioner who appeared in person, submitted *inter-alia* that recently international rating agencies downgraded the sovereign rating of Sri Lanka and as such, the government is finding it difficult to raise funds in the international money market.

The Bill titled '*The Specified Certificates of Deposit (Tax and other Concessions)*' (*supra*) provided a tax amnesty for the persons who defaulted the payment of tax either in full or in part.

However, in the said determination the court observed that the benefits and immunities granted to tax evaders by the said Bill are quite disproportionate to the concessional taxes required to be paid by the defaulters in tax.

We have considered the aforementioned Bill and the instant Bill and are of the view that the different percentages of taxes are recovered from tax defaulters cannot be compared on the face of the Clauses in the said Bills. Hence, it is necessary to consider the cumulative effect of the benefits offered to tax defaulters in view of their voluntary disclosure of undisclosed income, assets and the benefits that are expected for the State by the Bill.

As stated above, one of the main objects of the Bill is to bring tax defaulters into the fiscal net. More importantly, the present situation in the country that was stated above and the need to increase the revenue for the government coffers to grant redress to the ordinary people are necessary considerations of the fiscal policy of the government that are required to be taken into consideration by court in making the determination.

In the circumstances, for the reasons stated above, the determination in the Bill titled '*The Specified Certificates of Deposit (Tax and other Concessions)*' has no application to the instant Bill.

In the circumstances, we are of the view that there is a rationale behind the objects sought to be achieved by the Bill. Further, the rationale in providing certain benefits to tax defaulters to raise funds for the government coffers at a time where the country is facing severe economic and financial hardships is justified.

Further, the classification in the instant Bill is between taxpayers and non-taxpayers or taxpayers who have paid a tax less than what is prescribed by law. We are of the view that the Bill falls within the exclusion set out in Article 15(7) of the Constitution.

Thus, taking into consideration all the facts and circumstances urged in the submissions made by the Deputy Solicitor-General, we are of the view that the benefits granted to tax defaulters in exchange of voluntary disclosure of their total wealth and paying the *one percent* tax on the total income or the market value of the movable or immovable property is proportionate. Hence, the benefits that are offered to tax defaulters are not violative of Article 12(1) of the Constitution.

Applicability of the Doctrine of 'the Constitution as a Living Organ/Document'

When considering the constitutionality of legislation that are being brought in at a time where a country is facing severe economic crisis, financial hardships and calamities or to meet the requirements of an evolving society etc, the court should not confine itself to traditional interpretations that are used to interpret the Constitution.

It is pertinent to note that, the concept of equality set out in Article 7 of the Universal Declaration of Human Rights was enshrined in Article 18(1) of the 1972 Constitution and it was once again enshrined as Article 12(1) of the 1978 Constitution. However, during the recent past the needs and circumstances of the people and the country as a whole have adversely affected due to COVID-19.

It is a fact that presently the country is facing severe economic and financial hardships which warrants immediate remedial action to grant redress to the people of this country. In such

circumstances, the court should not apply the traditional principals of interpretation of the Constitution and give a restrictive interpretation to Articles enshrined in the Constitution. The facts brought to the notice of the court by the learned Deputy Solicitor-General and the petitioner who appeared in person warrants the court to interpret the Constitution taking into consideration the harsh realities that the country is undergoing at present.

The outbreak of COVID-19 in Sri Lanka is an unprecedented event in our country. Thus, it is vital that the Constitution be interpreted as a 'living document' to meet the aforementioned situation in our country and thereby allowing the adoption of a more liberal interpretation of the Constitution when considering the present Bill.

At the core of living constitutionalism is the idea that while constitutional guarantees remain static, the application is dynamic. Living constitutionalism prevents the interpretation of the Constitution from being anchored to the specific interpretation at all times and it offers the flexibility that is required to face unprecedented events or to meet the requirements of an evolving society. As such, it would be pragmatic to apply such an approach to interpret the constitutional issues that have arisen at present.

The flexibility offered by living constitutionalism is tied to the idea that the Constitution is not a law but an amalgamation of concepts that are fundamental to the governance of society. Hence, the Constitution should be interpreted to meet unexpected situations or to meet the requirements of an evolving society while maintaining these fundamental concepts.

When taking into consideration the aforementioned circumstances we are of the view that the benefits offered to tax defaulters by the government are proportionate in view of the aforementioned stringent conditions that are imposed on them. Thus, the enactment of legislation to grant a tax amnesty and the benefits offered to tax defaulters in exchange of voluntary disclosure and payment of the aforementioned sum to be collected do not violate Article 12(1) of the Constitution.

Secrecy Clause

Learned counsel for the petitioners submitted that Clause 7(1) of the Bill seeks to provide absolute secrecy in respect of the identity of a declarant and 'any matter or thing' contained in a declaration

made under Clause 5(1) of the Bill. Further, Clause 7(2) of the Bill provides for punishment for breach of secrecy.

It was further submitted that giving a defaulter the same level of secrecy is arbitrary, irrational and discriminatory against the rights of the honest citizens of this country who comply with the revenue laws and pay their taxes on time, and thereby the said Clause violates Article 12(1) of the Constitution.

Furthermore, it was submitted that the level of secrecy sought to be granted by Clause 7 of the Bill will undermine the power of Parliament to have full control over public finance and thus, violates Articles 148 and 4(d) read with Article 3 of the Constitution.

Moreover, it was submitted that the wording in Clauses 7(1) and 7(2) of the Bill requires the said two sub-Clauses to be read independently of each other. Further, it was submitted whilst sub-Clause (1) provides absolute secrecy, sub-Clause (2) refers to 'official' secrecy and the punishment for breach of secrecy. Hence, Clause 7 of the Bill is ambiguous. Further, the word 'absolute' in Clause 7(1) of the Bill violates the Right to Information guaranteed under Article 14A of the Constitution.

Learned Deputy Solicitor-General submitted that Clause 7 of the Bill states that the provisions of the Inland Revenue Act, No. 24 of 2017 in respect of 'official secrecy' and penalties for the breach of secrecy shall apply *mutatis mutandis* to a declaration made under this Bill. Hence, the secrecy provisions under section 100 of the said Inland Revenue Act will apply with equal force to declarants under the Bill. Accordingly, the declarants under the Bill will be entitled to the same degree of confidentiality that is applicable to an ordinary taxpayer.

He further submitted that Article 14A permits to impose restrictions by law in respect of the instances set out in Article 14A(2), which includes "preventing the disclosure of information communicated in confidence. Moreover, the information furnished to the Department of Inland Revenue under the Bill falls within the said exception as the information provided under the Bill would be 'information communicated in confidence'. In addition to the above, he submitted that the said same 'secrecy' is offered to any taxpayer.

Learned Deputy Solicitor-General further submitted that the said Clause in the Bill is almost a reproduction of section 5 of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004,

which was approved by this court after anxious scrutiny. Hence, the question of considering the constitutionality of the said Clause will not arise. In this regard he cited the relevant determination in the *Inland Revenue (Regulation of Amnesty) Bill*, S.C. (S.D.) No. 26/2004.

Responding to the above submission of the learned Deputy Solicitor-General, counsel for the petitioners submitted that the existence of a law which contains a provision that is inconsistent with the Constitution is not a justification to enact similar legislation.

In this regard, counsel for the petitioners cited *In Re: Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations (Amendment) Bill* S.C. (S.D.) No. 5/1979 where the court observed;

“The Bill seeks to extend the period of operation of Law No. 16 of 1978 for the period of another year. It was therefore necessary for us to consider the provisions of the original Law, in as much as if the provisions of the original law is inconsistent with the Constitution, this Bill too would be inconsistent with the Constitution.”

[Emphasis added]

Further, in *Re: New Wine Harvest Ministries (Incorporation) Bill* S.C. (S.D.) No. 2/2003 the court observed;

“..... In exercising jurisdiction under Article 123 of the Constitution we cannot examine the validity of past legislation Nor, can we take their content as a standard of consistency with the provisions of the Constitution. Our task is to examine the provisions of the bill challenged by the Petitioner and to determine whether they are inconsistent or not with the provisions of the Constitution.”

[Emphasis added]

Moreover, it was submitted by counsel for the petitioners that Article 14A did not exist when the aforementioned determination cited by the learned Deputy Solicitor-General was made by this court. Thus, it is necessary to consider the provisions of the Bill afresh in determining its constitutionality.

We are inclined to agree with the submissions made by counsel for the petitioners in respect of the issue that the Clauses in the instant Bill are required to be considered by this court in terms of Article 121(1) read with Article 123 of the Constitution.

In this regard, this court observed the following in ***Inland Revenue (Amendment) Bill S.C. (S.D.) No. 01-03/2021***;

“..... 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.”

Thus, it is necessary to consider Clause 7 of the Bill with a view to make a determination in respect of the constitutionality of the said Clause.

Article 14A of the Constitution states;

“14A (1). Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen’s right held by: -

- a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;*
- b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;*
- c) any local authority; and*
- d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph.*

(2). No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.

(3) in this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens."

We have examined the provisions of the Bill, particularly, Clause 7 of the Bill, and are of the view that the disclosure of information by a declarant under the Bill is carried out in confidence and therefore, the legislature is entitled to enact laws to prevent such information being shared with others. Thus, enacting Clause 7 is not inconsistent with the Constitution.

However, we agree with the submissions made by counsel for the petitioners, that sub-Clauses 7(1) and 7(2) give two different and distinct meanings. The rules of interpretation are required to give a meaning to each and every word in a Statute and it is presumed that the legislature does not waste words in enacting legislation.

Further, where a word is used more than once in an Act, principles of interpretation require such a word to be given the same meaning wherever it appears in the Act, unless there are compelling reasons to give different interpretations to the same word. Similarly, when different words are used in an Act, such words are required to be given different and distinct meanings.

Thus, we are of the view that the words 'absolute' and 'official' gives two different meanings which leads to ambiguity and thereby, may lead to arbitrary enforcement of the said Clause. Hence, Clause 7 as presently constituted, violates Article 12(1) of the Constitution.

However, learned Deputy Solicitor-General submitted that the word 'absolute' in Clause 7(1) of the Bill will be substituted with the word 'official' to harmonise the said Clause with Clause 7(2) of the Bill at the Committee stage. Hence, the said sub-Clause will read as follows;

of the identity of a declarant and any matter or thing contained in a declaration made under subsection (1) of section 5 of this Act."

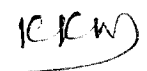
Therefore, we are of the view that if the said amendment is effected at the committee stage, the aforementioned inconsistency with Article 12(1) of the Constitution will cease.

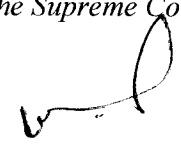
Further, as stated above, learned Deputy Solicitor-General informed court and the counsel for the petitioners that Clause 17 of the Bill would be deleted at the committee stage. Hence, determining the constitutionality of the said Clause does not arise. A similar view was expressed in the determination of *'Equal Opportunity Act' S.C. (S.D.) No. 14/99*.

We have examined all the provisions of the Bill and determined upon the suggested amendments being effected, neither the Bill nor any of the Clauses in the Bill are inconsistent with the Constitution. In the circumstances, the Bill can be passed by a simple majority in Parliament.

We wish to place on record our deep appreciation of the assistance given by the learned Deputy Solicitor-General, counsel for the petitioners and the petitioner who appeared in person in the consideration of the Bill.


Priyantha Jayawardena PC,
Judge of the Supreme Court


K. Kumudini. Wickremasinghe,
Judge of the Supreme Court


A.L. Shiran Gooneratne,
Judge of the Supreme Court