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ADMINISTRATIVE LAW AND TAXPAYER'S RIGHTS*

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Introduction

The emergence of the Welfare State has inevitably brought about a radical expansion of the ambit of governmental activity. At the turn of the century, when the political and economic philosophy of *laissez faire* was very much in vogue, functions of a stringently limited nature were attributed to the State. The established view at that time was that the State had only one basic responsibility to discharge. This consisted of the maintenance of order and tranquillity within the community. This objective had two aspects - external and internal. In the former sphere the armed forces were available to the State to prevent external aggression. In the latter sphere, it was the police which served as the instrument of the preservation of peace among different sections of society.

Once the State fulfilled its fundamental purpose of maintaining law and order, it was left to each individual to decide how his own life and activities were to be organised in such a manner as to achieve optimal satisfaction. The role of the State, in keeping with the conceptual underpinnings of *laissez faire*, was essentially non-interventionist. The State existed for no other purpose than to create the conditions which enabled individuals and groups within the community to lead their own lives and to attain the objectives which they had set themselves. Anything more, if attempted by the State, was unacceptable because it was characterised as an unwarranted erosion of the substance of individual liberty.

The world has changed a great deal since then. Global problems relating to poverty, in the sense of deprivation of resources indispensable for a minimum of dignity in human life, grotesque disparities with regard to the distribution of income and wealth, recognition of the need for basic facilities pertaining to education, health and recreational activity, and the explicitly acknowledged need to provide special protection for vulnerable groups such as labour, women and depressed communities have engendered a new climate of opinion powerfully conducive to expansion of the frontiers of State initiatives.

This has meant significantly enhanced intensity and continuity of State involvement in the lives and legitimate activities of individuals in almost all areas. The apparatus of the State has become progressively complex. Ministries, governmental departments and State corporations have proliferated in order to facilitate the performance of the diverse role which has been ascribed to the State.

The pursuit of these objectives, intended to confer extensive benefits upon large segments of the community, has entailed, as a necessary condition, the availability of substantial resources to the State. This is the wherewithal which the State needs to fulfil its mandate. The primary mechanism by which the State gains access to the resources it requires for this purpose, is taxation. The greater the measure of State involvement

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and participation which are considered appropriate, the ampler is the volume of revenue which the State must have at its disposal.

Inevitably, then, the individual must accept liability to pay taxes to the State. The criteria and parameters of liability to pay tax will, of course, be governed by the imperatives of legislative policy.

However, the increasing incidence of tax liability as a commonplace phenomenon of modern life makes it crucial to design and enforce safeguards for the individual - in circumstances where he is pitted against the might of the State. It is against the backdrop of these developments that I consider today the task of identifying the impact of principles of administrative law upon the rights of taxpayers. The applicable law and practice, if it is to be a viable instrument of social policy, must achieve a perceptive balance between fiscal effectiveness, on the one hand, and administrative justice and fairplay, on the other.

My purpose in the present lecture is to endeavour to show how the contemporary law, which has undergone dramatic transformation during the last decade or two, arrives at this equilibrium. There surely cannot be a more fitting theme to expound and analyse in a lecture delivered to honour the memory of the late Mr Ambalavanar. It can truly be said that no Shri Lankan strove as sincerely and indefatigably as he did to revamp the diverse facets of tax law among as wide a section of the Shri Lankan community as possible. For all that he achieved in these fields, and for the vigour and vitality which he consistently imparted to the subject that he adopted as his life's work, he deserves a place of signal honour, not only in our own country but internationally, and I deem it a proud privilege to be afforded the opportunity of paying tribute to a professional of the stature of the late Mr Ambalavanar this evening.

II. The Aspect of Lawfulness

The bulwark of the protection which the citizen enjoys, derives from the assurance that whatever action is resorted to by the tax authorities much at all times be taken within the confines of the law. The underlying legal concept here is that of jurisdiction or *vires*. The tax authorities are invested with powers which are conferred upon them by legislation. In all that they do to raise revenue for the State they are under a compelling obligation scrupulously to ensure that they do not transgress the limits of the powers which they lawfully posses. It is in this sense that there is pervasive truth and validity in the assertion by a celebrated English judge, Farwell L.J. in *Dyson* v *Attorney General* that "The courts are the only defence of the liberty of the subject against departmental aggression".

This is not rhetoric but demonstrable reality because, in the ultimate analysis, it is to the courts that the citizen must turn in order to enforce the inherent limitations on public power and the accountability of those who exercise It. The cornerstone of the British tradition in public law is that all governmental authority has necessarily to be exercised under legal control. This is the pith and substance of the rule of law applied to the day to day functioning of administrative agencies. The seminal notion is that no

government functionary, no matter how exalted the position he holds, is above the law. His official actions must always be such as to bear judicial scrutiny and to be capable of justification within the framework of legal norms.

The primary objective aimed at by these principles, applicable as they are in all their rigour to the tax authorities, is the avoidance of administrative action which is arbitrary or capricious in character. This presupposes that any citizen who complains of injustice at the hands of an administrative tribunal or official should have access to an effective remedy.

The remedy is one which he can seek in the courts by way of an injunction, an action for compensation, an action for a declaratory judgment or the invocation of a prerogative writ. These are remedies which, barring exceptional circumstances, are capable of being sought against the administration or any officer purporting to act on its behalf, including the tax authorities of the State.

The core of the protective principle, which a citizen is entitled to call in aid in a contest with a revenue authority in situations where they have acted against him beyond the pale of the law, is buttressed by the central doctrine of *ultra vires*. This doctrine receives expression in two contexts, substantive and procedural. The substantive limb of the doctrine has the effect that the Department of Inland Revenue and its officers, in any action which they take against the citizen, must limit themselves to the purview of authority which is allotted to them by empowering legislation. The procedural aspect requires that, even though they have acted within the frontiers of properly conferred authority, their action is nevertheless open to challenge if they have failed to act in conformity with the standards relating to natural justice and procedural fairness which are compulsorily required by the law.

There are several situations in which action by the revenue authorities can be successfully impugned on the basis of the *vires* principle. For instance, it may be possible to show that the tribunal lacks competence to adjudicate in respect of the parties, the subject matter or the locality in question. Similarly, where there is proof that the tribunal or other institution is improperly constituted, or where the commencement of proceedings has taken place in a manner not contenanced by the law, the proceedings can be vitiated at the instance of the taxpayer on the footing of lack or excess of legal authority.

'Moreover, if the tribunal, although invested with jurisdiction *ab initio*, entertains matters or makes an order beyond its competence, the tribunal's order may be effectively assailed.

However, the most important application of the *vires* principle to taxpayers in Shri Lanka undoubtedly finds its setting in section 115 (3) of the Inland Revenue Act which deals with the courses of action available to an assessor in circumstances where a person has furnished a return of income or gifts. In terms of the statutory provision, the assessor may either accept the return and make an assessment or, if he does not accept the return, estimate the amount of the assessable income or taxable gifts of such person and assess him accordingly and communicate to such person in writing the reasons for not accepting the return.

In a *cursus curiae* it has been held by our courts that the assessor does not comply adequately with this statutory requirement by merely stating his conclusion that the return is unworthy of credence and is therefore being rejected.

The assessor is legally compellable to go further and to divulge to the taxpayer the reasons why the assessor considers himself unable to accept the return furnished by the taxpayer. In the leading case of *D.M.J.Fernando and J.A.R. Felix* v *Ameer Mohideen Ismail* decided by the Supreme Court ten years ago, Samarakoon, C.J., observed emphatically: "To satisfy the provisions of the section reasons must relate to assessable income, and taxable gifts, whichever is not accepted. It is not a more conclusion for non-acceptance of the total return. I am of opinion that the assessor is bound to give reasons for non-acceptance of a return without exception." Samarakoon C.J. was satisfied that the bald assertion by the assessor that the return was false, would not do. His Lordship commented: "Falsity is a conclusion arrived at by the assessor. It is a conclusion arrived at by a process of reasoning based on data available to the assessor". The essence of this landmark ruling was that the reason, indicative of the assessor's process of reasoning, should be disclosed to the taxpayer.

The established law in Shri Lanka, then, is that a mandatory duty to communicate these reasons to the taxpayer devolves on the assessor. This is manifestly a sound construction of the governing statute law. Plainly, the taxpayer would be greatly prejudiced in relation to the departmental appellate procedure if reasons are withheld from him.

As Weeraratne J. observed in *D.M.S. Fernando's* case, "It is also relevant to note that the assessee is granted by section 97 the right to appeal to the Commissioner against the amount of the assessment made on him. Section 97(2)(a) requires every appeal to be preferred by a petition in writing, addressed to the Commissioner and to set out the grounds of appeal. An assessee who has made a return which has been rejected and is confronted with a notice of assessment made by the assessor, will be at a disadvantage and unable to fulfil the statutory requirement of stating the grounds for his appeal unless he is made aware of why his own estimate of his income, as appearing in his return, has been rejected."

To a comparable effect is the reflection of Wimalaratne J in the same case: "When the assessor's reason is communicated to the assessee, the assessee will be in a better position to satisfy the Commissioner at the stage of appeal that the assessor's reasons are faulty and ought not to be acted upon. That, in my view, is the purpose Parliament sought to achieve by requiring the assessor to furnish reasons."

The thrust of the reasoning contained in these judgments is that the duty to communicate reasons to the taxpayer necessarily attaches to the statutory power of the assessor to reject the return furnished by the taxpayer and to issue a fresh assessment. Failure on the part of the assessor to adhere to this compulsory requirement imposed by statute has the necessary consequence that the assessor acts *ultra vires* the governing legislation, so that the action purported to be taken by him has no validity in law. This

is a clear illustration of the manner in which the doctrine of *vires*, in its application to tax law, can be availed of as a potent vehicle for protection of the rights of the taxpayer.

111. The Postulate of Equality of Treatment

There is, indisputably, an overriding public interest with regard to equitable and even-handed administration of the tax laws. It is an integral part of statutory policy in this field that no tax payer should have just cause to believe that the tax laws are administered in such a manner as to discriminate unfairly among groups of taxpayers, some of whom are permitted to enjoy unwarranted advantages. In Shri Lanka, where the constitutional laws of the Republic embody a Bill of Rights, this principle is reinforced by added sanctity, in so far as the postulate of equality is entrenched in the paramount law of the country. The Constitution of the Democratic Socialist Republic of Shri Lanka contains explicit provision that "All persons are equal before the law and are entitled to the equal protection of the law".

Nevertheless, the principle is established in English and Commonwealth law that, in general, one taxpayer has no sufficient interest in asking the Court to investigate the affairs of another taxpayer or to complain that the latter has been underassessed or overassessed (*Inland Revenue Commissioner* v *National Federation of Self-Employed and Small Business Ltd*, per Lord Wilberforce). This principle applies equally to groups of taxpayers. An aggregate of individuals, each of whom does not have an interest, cannot of itself have an interest.

This premise is fortified by a variety of considerations.

(i) Assessments are individual and are purely a matter between the taxpayer and the revenue authorities.

(ii) Assessments are confidential. In this respect the position of taxpayers is quite different from that of ratepayers, since the rating list is a public document.

(iii) There is no common fund in which all taxpayers have an interest.

(iv) The duties of the revenue authorities are owed to the Republic of Shri Lanka rather than to individuals.

(v) A taxpayer who contends that another taxpayer enjoys an improper benefit or concession does not derive a tangible benefit from the success of his application.

These factors operate cumulatively to provide powerful support for the proposition that, in general, one taxpayer lacks *locus standi* or the legal entitlement to intervene in matters connected with the assessment of taxes due from another taxpayer.

However, the generality of this principle needs to be qualified emphatically by reference to a limitation which is certainly defensible from the standpoint of public policy. This limitation has nowhere been expressed more cogently than in the language of Lord Diplock in the *National Federation of Self-Employed and Small Businesses* case: "It would in my view be a grave *lacuna* in our system of public law if a pressure group, or

even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped". Given the fundamental rights dimension of Shri Lankan law, the basis of the qualification suggested by Lord Diplock has considerably greater force.

It remains true, however, that there are definable limits within which the principle relating to equality of treatment lends itself to legitimate invocation in the context of tax litigation. The reality and importance of these limits emerge clearly from the judgement of the Supreme Court of Shri Lanka in *C.W. Mackie & Co. Ltd.* v *Hugh Molagoda.*

This was a case in which the petitioner complained that a tax in respect of sales of rubber had been collected from him, although no action had been taken by the Inland Revenue authorities to secure the tax from others who were equally liable in terms of the applicable law. The Court held that there was an inalienable obligation devolving by statute on the revenue authorities to collect the tax from whomsoever was liable in accordance with the criteria stipulated in the statute law and that the tax authorities had no discretion, by means of an administrative arrangement, to exempt some persons who were liable, from duty to pay tax. Had they purported to do so, they were acting in flagrant violation of the law, and this dereliction of duty could not conceivably be called in aid as the basis of a contention that comparable latitude, itself in conflict with the law, be extended to other taxpayers as well. As Sharvananda C.J. vividly put it, "The inequality complained of by the petitioner in this case is only an inequality in the matter of illegal treatment. The Constitution only guarantees equal protection of the law, and not equal violation of the law. One illegality does not justify another illegality".

The case of *C.W.Mackie & Co. Ltd.* graphically illustrates the norms within which the revenue authorities may lawfully exercise discretion in the discharge of their duties. These are *indicia* which the law regards as inflexible and inelastic, and if the rule of law is to be upheld in its integrity, then these principles must not succumb to the shifting sands of expediency. Open-ended discretion which is not capable of reference to some clear principle is, at bottom, destructive of the clarity and objectivity that are essential conditions for the application of equitable standards in the administration of laws governing taxation.

This principle has been accorded unrelenting support in English judgments of high authority. A noteworthy example is provided by the speeches in the House of Lords in *Vestey* v *Inland Revenue Commissioners.* This was a case which involved an elaborate contrivance by the settlors of a discretionary trust to place the income derived from certain properties out of reach of the revenue laws of the United Kingdom. The revenue authorities, by resorting to a self-asserted administrative discretion, attempted to levy tax on various beneficiaries who had not been unequivocally designated as taxpayers by the applicable legislation. The House of Lords had no hesitation in striking down this action by the revenue authorities as inexcusable "overkill' for which there was no vestige of constitutional justification. Lord Wilberforce declared: "No method for levying the tax in such cases has been prescribed by Parliament, and this gap cannot be filled by administrative discretion". The principle involved was held to have particular constitu-

tional importance, in so far as it pertained to the right not to be taxed in the absence of specific legislative warrant.

But this is not to suggest, by implication, that the use of administrative discretion on the part of revenue authorities in declining to collect in whole or in part the taxes due from an individual or group, must be characterised in all circumstances as contravening the law. This is too absolute a proposition. The need to curtail its scope in appropriate circumstances is made clear by the decision arrived at by the House of Lords in the *National Federation of Self-Employed and Small Business Ltd.* case.

Application for judicial review was made by an association of taxpayers who resented the fact that the Inland Revenue had agreed to waive large arrears of income tax from some 6000 workers in the newspaper printing industry who for some years had collected pay under false names and defrauded the revenue. The applicants complained that the Inland Revenue had failed in their duty to administer the tax laws fairly as between different classes of taxpayers and that they had been unduly influenced by the fact that the printing workers might cause serious disruption by striking if their demand was refused.

In the circumstances of the case the House of Lords declined to hand down any ruling against the Revenue authorities. In this case the Inland Revenue, after discussions with the employers and the unions, introduced a special arrangement to ensure that,in the future, the tax would either be deducted at source or properly assessed, and made it clear that if the arrangement was generally accepted, investigations into tax lost in previous years would not be carried out.

It was this administrative arrangement, leading to tax evasions in previous years being impliedly acquiesced in by the revenue authorities, which the House of Lords was inclined to uphold as not involving a violation of the law in the special circumstances of the case.

The House of Lords emphatically rejected the contention that the action taken by the revenue authorities was *ultra vires* or unlawful. The ruling by the Law Lords, in favour of the Inland Revenue, was predicated on the premise that the latter acted in the bona fide exercise of the wide managerial discretion conferred on them by statute. Lord Diplock asserted that, since judicial review is available only as a remedy for the conduct of a public officer or authority which is *ultra vires* or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which was assailed only as being unfair or unwise, judicial intervention was inappropriate in the particular circumstances of this case.

A comparable decision recognising some measure of latitude available to revenue authorities in respect of the exercise of an administrative discretion regarding the collection of taxes, was arrived at by the Queen's Bench Division of England in *Regina* v *Inspector of Taxes, Reading, ex parte Fulford-Dobson.* This was a case where the taxpayer entered into an agreement whereby he would work and reside in Germany, and within a few days the taxpayer's wife gifted to him a farm which she intended to sell

shortly. The sole purpose of this gift was to take advantage of substantial relief in respect of capital gains tax on a disposal of property made after the taxpayer ceased to be ordinarily resident in the United Kingdom. In this case the revenue inspector disallowed the concessions claimed by the taxpayer and assessed him for the full amount of tax.

He took this action in reliance on a qualification incorporated in a booklet entitled "Extra-Statutory Concessions" which the revenue authorities had published. The qualification was to the effect that the concessions set out in the booklet would not be applied when there was an attempt to use them for tax avoidance purposes. The Court held that the extra-statutory concessions, including the qualification they contained, could legitimately be used by the revenue authorities as the basis of assessment of liability of taxpayers.

This conclusion was supported by McNeil J. on the basis that, since the extra-statutory concessions had been published in a booklet, there was nothing secretive about the concessions which were demonstrably capable of being applied evenly and that the concessions were offered by the tax authorities within the scope of their lawful authority in so far as their provisions fell "within the concept of good management and of administrative common sense".

Before leaving the subject of equal treatment in respect of formulation and application of tax laws - a constitutional requirement in countries like India and Shri Lanka - there is a point which needs to be made emphatically. In deciding whether a tax law is discriminatory or not, it is of practical importance to bear in mind the crucial distinction between "discrimination" and "classification". A tax law does not become vulnerable simply because it purports to tax some persons or objects and not others. According to settled principle, it is only when, within the range of its selection, the law operates unequally, and that policy cannot be justified as the basis of any valid classification, that it would be held to violate the equality postulate embodied in the Constitution. As the Supreme Court of India has aptly observed, "It is well settled that a statute 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 acts reasonably". (*per* Hegde J. in *B.A. Dutta* v *Lawrence I.T.R.*

IV. Consistency and Uniformity

The importance of these values is specifically acknowledged by the legal system of Shri Lanka. The whole basis of the doctrine of binding precedent or *stare decisis* is that like cases should be decided alike. This is because well settled expectations need to be fulfilled, and there must be certainty and predictability in the application of the law. Lawsuits must not assume the appearance of a lottery.

It would seem, however, that a departure from this principle has become established in respect of assessment of tax liability. This is clear from the ruling by the Judicial Committee of the Privy Council in *The Trustees of the Abdul Gaffoor Trust* v *Commissioner of Income Tax.*

This is one of the best known cases with regard to taxation of trust properties in Shri Lanka. The Board of Review constituted under the Income Tax Ordinance had held in respect of the assessment for the year 1949-50 that the trust was of a public character established solely for charitable purposes.

During the next year, however, the tax authorities wished to impose a levy on the trust income because they believed that the provisions of the trust instrument conferred significant potential benefits on the lineal descendants of the settlor in such a manner as to erode the exclusively public character which is an essential ingredient of a charitable trust.

The question that arose for decision was whether the tax authorities, having made a clear decision in one year, were estopped in law from changing their minds and giving effect to a contrary decision in subsequent years. Were they bound by their own previous decision or were they at liberty to examine the matter afresh, untrammelled by the policy to which they had previously committed themselves?

In the *Abdul Gaffoor* case their Lordships of the Privy Council entertained no doubt on this point. No doctrine analogous to that of binding precedent was applicable to tax authorities. Their Lordships asserted without ambiguity that a question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another year. This was so, notwithstanding that there might appear to be a similarity or identity in the questions of law on which the issue of liability is dependent.

This conclusion was supported by the following reasoning: the subject-matter of the proceedings is limited to one issue only, namely the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it. Although the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning on the consideration of statutes or on the general law, and the adjudicating tribunal will have to form its view on these questions, Lord Radcliffe unhesitatingly characterised the whole range of these questions as "collateral or incidental to what is the only issue that is truly submitted to determination".

The result of this approach, now irreversibly established in our law, is that the taxpayer who has secured from the revenue authorities a favourable ruling in respect of his assessment for one year, has no assurance that the Revenue can be compelled to adhere to that decision in succeeding years. This matter is not treated as *res judicata*, and the tax authorities are free to disregard their previous ruling with impunity. Clearly, this entails a significant element of jeopardy to a taxpayer who is prevented from planning his business affairs in reliance upon a pre-existing course of dealing by the Revenue.

V. Entitlement to Natural Justice

It is established law that all administrative tribunals and agencies having the power to make determinations prejudicial to the rights of individuals, are subject to a mandatory duty to comply with the rules of natural justice. The tax authorities are, unquestionably,

governed by the operation of these rules which have been described as crystallizing the basic elements of equity and fair dealing.

The first rule of natural justice is that no one should be a judge in his own cause. In other words, there must be complete objectivity and impartiality in reaching a decision. The officer or tribunal determining the rights and liabilities of the taxpayer must not bring to bear upon his task a mind clouded with prejudice or prejudgment. This is one of the rudiments of a fair decision.

The second but equally important, rule of natural justice is encapsulated in the phrase *audi alteram partem* - that each side must be afforded the opportunity of an adequate hearing. There are several instances in which the courts of Shri Lanka have granted relief to taxpayers on the ground of contravention of these hallowed principles.

In *Nadesan* v *C.I.R.* Tambiah J. observed: "It is a clear principle of law that a person should be heard before an order is made against him". This was a case where the Board of Review constituted under the Inland Revenue Act had failed to provide the taxpayer with an opportunity to lead evidence by way of reputation of the assessment prepared by the assessor. This was considered a ground on which the taxpayer was entitled to judicial review.

The mere availability of an opportunity to make submissions or representations represents insufficient compliance with the rules of natural justice. The taxpayer must be given adequate information with regard to the basis on which the assessment has been prepared, for it is only then that he can effectively present his arguments in rebuttal.

New Portman Ltd. v *Jayawardena, Assessor*, is an illustrative case in this regard. Here the assessee's complaint was that his return of income had been rejected by the assessor on the basis of "information" allegedly at the disposal of the assessor. This information was of a secret or clandestine character, at no time communicated to the taxpayer. The Supreme Court had no hesitation in holding that these were circumstances in which the taxpayer had been denied the benefit of the rules of natural justice.

The sacrosanct quality of the principle *audi alteram partem* is unequivocally recognised by the departmental appellate procedure which is catered for by the tax laws in force in Shri Lanka. Section 117 (6) of the Inland Revenue Act provides that "where no agreement is reached between the appellant and the assessor, the Commissioner-General shall, subject to the provisions of section 120, fix a time and place for the hearing of the appeal". In contrast with the appellate procedure stipulated by the Inland Revenue Act No. 4 of 1963, the present legislation refreshingly requires that the taxpayer should be heard in proceedings in which he lodges an appeal against the assessment by the assessor to the Commissioner-General of Inland Revenue.

There is an anomalous feature of the current practice which calls for comment. This concerns the role of the assessor at the hearing before the Commissioner-General. Although the law does not concede to the assessor any formal entitlement to be present at the hearing and to make submissions in support of this own assessment, the contemporary practice appears to have acquiesced not only in the presence of the assessor at

the hearing of the appeal but in the attribution to the assessor of an adversarial role, *qua* prosecutor, adducing evidence, examining and cross-examining witnesses including the appellant, and making submissions. The question is whether this practice is in conformity with sound policy objectives of the law.

Mr. Stanley Fernando, the depth and range of whose knowledge of the tax laws of the Republic have immeasurably enhanced the quality of the courses of instruction on the subject in the Faculty of Law of the University of Colombo, has argued with great cogency that this practice is not sanctioned by the applicable law. In particular, he has relied on the following considerations:

(a) The appeal is made to the Commissioner-General who is under no obligation to refer the matter back to the assessor.

(b) The appellate procedure contemplated before the Commissioner-General by the legislation does not assume the complexion of an adversarial contest in which the assessee is the accused and the assessor functions as the prosecutor, nor can the proceedings be conceived of properly as a *lis inter partes* between the assessor and the assessee.

The emphatic view expressed by Mr Stanley Fernando that it would be more in conformity with the law for the Commissioner-General at his discretion to obtain the assistance of the assessor by summoning him as a witness and leading his evidence under the powers vested in the Commissioner-General of Inland Revenue in terms of section 117 (8) of the Act, is certainly worthy of serious consideration.

VI. The Fallibility of Human Judgement: Opportunity for the Rectification of Error

The governing legislation makes provision for a diversity of appellate procedures, which commence at the departmental level and continue through determination at the level of the Commissioner-General of Inland Revenue to inquiry by the Board of Review, a statutory body consisting of lay persons who are invested with the duty of examining the decisions made at the different echelons of the administrative hierarchy. Provision is also made for appeal to the apex tribunals of the judiciary - the Court of Appeal and the Supreme Court.

However, there is a decisive limitation with regard to the scope of appeals, in that the appellate jurisdiction of the higher courts can be invoked solely on questions of law.

A vital dichotomy is made here between questions of fact and questions of law. In the former area the departmental revenue authorities and the Board of Review would appear to be supreme. Their determinations are immune from challenge before the established courts of the Republic. By contrast, where adjudication of questions of law is concerned, it is natural and fitting that the courts, in their role as supreme interpreters of the enacted law, should have the last word.

In view of the significance of the practical consequences which flow from the distinction between questions of fact and questions of law-access of the taxpayer to the

courts being restricted to the latter domain - it is of much more than theoretical interest to examine the criteria to which the law has recourse in order to determine whether a particular issue is properly classifiable as a question o fact or as a question of law.

Changing attitudes and values are discernible in the development of the law. During the early stages of evolution the tendency was for the courts to ascribe an exceedingly wide and elastic meaning to the phrase "conclusions of fact" and to exclude the entire range of these issues from the purview of judicial determination.

This approach, however, underwent substantial modification in due course. The intricate and sophisticated analysis characteristic of more recent case law distinguishes scrupulously between the primary findings of fact and those inferences or conclusions of fact which could be drawn from them. These inferences or "secondary facts" as they are sometimes called, often impinge upon questions of law. This is so, in the sense that if, on the primary facts found, no person properly instructed on the relevant law, could have come to the conclusion reached by the departmental authorities, then the courts have power to intervene on the hypothesis that there has been an error in point of law. These are cases in which the conclusion arrived at by the departmental authorities is flawed on one or more of three grounds:

(a) they have misunderstood the statutory language;

(b) they have made a finding which is altogether unsupported by the evidence adduced;

(c) their conclusion is inconsistent with the evidence and contradictory of it.

In each of these contexts the blemish derives from an error of law and is therefore capable of rectification by resorting to the appellate jurisdiction of the courts.

This analysis of the criteria which serve to demarcate the boundary between questions of fact and questions of law forms the foundation of the celebrated speech by Lord Radcliffe in the House of Lords in the case of *Edwards (Inspector of Taxes)* v *Bairstow* which is regarded today as the leading authority on the subject.

The substantial question for decision in this case was whether a particular transaction could properly be classified as a trade so as to render the profits derived from it to liability for tax. The House of Lords, while not disputing the premise that the finding that the transaction was not an adventure in the nature of trade was an inference of fact, nevertheless held that it ought to be set aside because it was apparent that the tax authorities had acted without any evidence or on a view of the facts which could not reasonably be entertained. Similarly, in *Ransom* v *Higgs*, the House of Lords vitiated a finding by the revenue authorities that a particular transaction constituted "trading", in the sense relevant to the tax laws, on the ground that this view involved a manifest absurdity - that the taxpayer had traded with himself.

The established law, the gist of which is that unreasonable inferences from the facts as ascertained by the tax authorities, are themselves classifiable as questions of law so as to attract the appellate jurisdiction of the courts, allows ample scope for judicial activism

directed towards the protection of the taxpayer in areas where judicial intervention had been excluded previously. This development, which would certainly have met with Mr Ambalavanar's enthusiastic approval, has been made possible by the significant reduction of the area of factual adjudication in regard to which the judgement of the revenue authorities reigns supreme without intervention by the courts.

VII. The Protection of the Taxpayer through Revisionary Jurisdiction

The appellate jurisdiction of the higher courts does not provide a complete remedy in cases of infringement of the rights of taxpayers, since the right of appeal can be exercised only in circumstances where it has been conferred in explicit terms by statute. Where a case of contravention of a taxpayer's rights falls outside the ambit of appellate jurisdiction with which the Court is invested, a gap is discoverable in the law. The principal mode by which this *lacuna* is made good, is the exercise of revisionary jurisdiction.

The invocation of this jurisdiction by the Court of Appeal is specifically recognized by the Constitution of Shri Lanka which declares that "The Court of Appeal may in the exercise of its revisionary jurisdiction affirm, reverse, correct or modify any order, judgment, decree or sentence according to law, or it may give direction to such Court of First Instance, Tribunal or other Institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit".

These are settings in which the tax laws of Shri Lanka do not confer a right of appeal as a vehicle for securing redress in the event of denial or breach of an accrued right. This is exemplified by the provisions of the Inland Revenue Act No. 28 of 1979 which refrain from conferring a right of appeal against an order of a Magistrate in recovery proceedings.

In order to prevent a travesty of justice, the courts of Shri Lanka have been prepared to grant revision orders against magistrates in tax recovery proceedings. For example, where the magistrate purported to sentence a company director to a term of imprisonment for non-payment of tax assessed on the company on the ground that the director is a "defaulter" in the sense envisaged by the statute, Gratiaen J. was prepared to quash the order of the magistrate on the ground that the principal officer of a company is not a "defaulter" in this context. (*M.E. de Silva* v *C.I.T.*)

Similar relief has been granted in cases where the magistrate had sentenced a defaulter to imprisonment, even though special circumstances of exoneration envisaged by the legislature had been adequately demonstrated. Special circumstances in this sense include proof that default in payment was attributable to causes in respect of which the defaulter lacked control or that bona fides on his part had been established or that, at the time of institution of proceedings for recovery, the defaulter did not have the means to render satisfaction.

Puswella v *C.I.T.* is a case where H.N.G. Fernando J quashed the order made by a magistrate,since his Lordship was satisfied that special circumstances established by the taxpayer had not been taken into consideration by the magistrate.

A controversy existed at one time in our law as to whether taxes assessed on a person who dies subsequently could, in default payment, be recovered by proceedings in the Magistrate's Court against the administrator of the deceased. In *Hamza* v *C.I.R.* the question was answered in the affirmative. However, this view was rejected in *I.D. Ramalin* v *C.I.R.* where the ruling was that an executor who had not been duly charged with tax could not be regarded as a "defaulter" against whom recovery proceedings were capable of being instituted in the Magistrate's Court. This view has now been upheld by the Supreme Court in *Mohamed Raphic Mohamed Hamza* v *C.I.R.*

These are cases where revisionary jurisdiction was effectively invoked with regard to the interpretation of a statutory provision.

VIII. Appellate Jurisdiction as a Limitation of the Scope of Judicial Review

In principle there is no reason why judicial review, which in English usage derives from prerogative, should be regarded as being in any way curtailed by the conferment of a right of appeal on the aggrieved taxpayer. There is, however, the countervailing consideration that judicial review, precisely because it is a form of prerogative remedy, is available not on the basis of strict entitlement but as a matter of discretion exercised by the court. It is settled law that discretionary bars (such as delay, acquiescence, and the imputability of fault to the party seeking relief) militate against availability of prerogative relief invoked through judicial review.

The present law finds exposition by the Queen's Bench Division in *R* v *I.R.C., ex parte Opman International.* Woolf J. there acted on the principle that, although the fact that there is an alternative procedure available does not mean that an application for judicial review should in no circumstances be made, judicial review is, essentially, a procedure of last resort and a residual procedure which ought to be resorted to only in those cases where the alternative procedure does not satisfactorily achieve a just solution of the taxpayer's claim.

This restriction on the ambit of judicial review is plausibly explicable on the footing that the availability of an alternative procedure which is adequate and effective in all respects could well be looked upon as a circumstance in the light of which the court would probably decline judicial review in the exercise of its discretion.

However, a fundamental caution needs to be administered as to the legitimacy of the limiting criteria. Despite the existence of a right of appeal, judicial review will be regarded as the appropriate remedy in circumstances where the *vires* or lawful authority of the assessor is sought to be impugned. Referring to a case of this kind, Samarakoon C.J. had this comment to make: "The present objection goes to the very root of the matter and is independent of quantum. It concerns the very exercise of power, and is a fit matter for writ jurisdiction." *D.M.S. Fernando* v *Ameer Mohideen Ismail)*

IX. The Doctrine of Unreasonableness and Taxpayers' Rights

Unreasonableness, as a ground of judicial review of administrative decisions, is a comprehensive term which embraces a wide variety of defects including misdirection,

improper purpose, disregard of relevant considerations and advertence to immaterial factors. In the leading case of *Associated Provincial Picture House Ltd.* v *Wednesbury Corporation* decided in 1948, Lord Greene M.R., referred to the rubric of unreasonableness as "a general description of the things that must not be done". The essence of the doctrine of Wednesbury unreasonableness, which derives its name from this case, is contained in Lord Greene's observation that "There may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority". The hallmark of the *Wednesbury* connotation of unreasonableness is that the tribunal or officer exercising the discretion, although acting within the four corners of the legislative grant of discretion, has arrived at a decision which is repugnant to all reason.

The gist of the *Wednesbury* principle is that the decision assailed must be not only wrong, but unreasonably wrong, so wrong that no reasonable person could sensibly reach it. This excludes from the ambit of review differences of opinion of the kind which may well exist among reasonable persons. The crucial distinction in regard to containing the Wednesbury formula is that between a mistaken and an unreasonable exercise of judgment. Although an element of *mala fides* is not indispensable, the decision impeached must contain some quality of perversity, arbitrariness or absurdity which removes it from the class of a merely erroneous exercise of discretion.

It is conceivable that the *Wednesbury* principle governs the rights of taxpayers in restricted categories of situations. The House of Lords has considered *Wednesbury* unreasonableness in the setting of a representation by the Inland Revenue regarding discontinuance of an inquiry in consideration of waiver of certain tax benefits claimed by the taxpayer. In *Rex* v *Inland Revenue Commissioners, ex Preston,* in response to a statement by an official of the Inland Revenue that he did not intend to proceed with his investigation if the taxpayer abandons certain claims for interest relief and capital loss, the latter withdrew the claim and paid capital gains tax on a transaction which the official had been examining. However, as a sequel to the receipt of new information relating to the transaction, the Inland Revenue Commissioner, having concluded that the taxpayer had received from the transaction a benefit which was liable to taxation, issued the taxpayer with a request for further particulars and in due course gave him formal notification initiating the statutory procedure for cancellation of a tax advantage. By the time this development took place, a statutory time bar prevented the taxpayer from making good his claim for relief in respect of capital gains tax on the sale price of the shares in question. He argued accordingly, that the correspondence containing the conditional offer by the Revenue as to termination of the pending investigation constituted a binding legal agreement which estopped the Revenue from raising inquiries on any matters covered by the correspondence.

In the House of Lords, Lord Templeman, making the leading speech, acknowledged explicitly that *Wednesbury* unreasonableness could be legitimately invoked in respect of the rights of taxpayers. Lord Templeman declared that conduct equivalent to a breach of contract or breach of representation could, *per se,* be indicative of unreasonableness in the degree postulated by the *Wednesbury* test. Subject to the qualification that relief may be withheld in an appropriate case in the exercise of judicial discretion, Lord Templeman commented: "I consider that the taxpayer is entitled to

relief by way of judicial review for 'unfairness' amounting to abuse of power if the Commissioners (Inland Revenue) had been guilty of conduct equivalent to a breach of contract or breach of representation on their part".

The premise of Lord Templeman's speech in *Preston's* case made necessary a careful examination of the circumstances surrounding the correspondence with a view to ascertaining whether the terms of the undertaking by the Revenue authorities demonstrated inconsistency with their subsequent action. It was only because of the ambiguous and evasive nature of some of the taxpayer's statements in regard to the transaction which was the subject of scrutiny at that time that an estoppel operating against the Revenue was excluded. The tenor of Lord Templeman's speech suggests that, but for this lack of frankness regarding a matter as to which the Revenue was entitled to expect candour, the inhibitory effect of the representation made on behalf of the Revenue might well have been decisive.

Conclusion

I have attempted to highlight, in the course of this lecture, some of the fundamental principles of administrative law which regulate the relationship between the taxpayer and the Revenue authorities. These principles are concerned with the accomplishment of a task which savours of some element of "social engineering". The purpose of the rules is to achieve a pragmatic balance between efficiency of the mechanisms directed towards tax collection and the upholding of equity and fairness for the taxpayer. A range of remedies is available to the taxpayer both within the administrative hierarchy of the Inland Revenue Department and by having recourse to the jurisdiction of the courts, whether by resorting to appeal or review. Each of these remedies is pervaded by certain basic principles. One of these is the doctrine of jurisdiction. The consistent emphasis of modern administrative law is on the premise that all action taken by the Revenue authorities against the taxpayer must be strictly within the ambit of power conferred by law on the Revenue. The judicial trends which were surveyed in the course of this lecture offer ample indication of the creativity of the courts in devising new methods for attaining the ends of justice and procedural propriety by giving an extended application to principles founded upon *vires* or jurisdiction. Equally, relatively novel applications of the *Wednesbury* doctrine of unreasonableness have opened fascinating vistas for controlling administrative discretion exercised by the tax authorities in keeping with a principle which has reliable antecedents in English and Commonwealth law. The outlook for the future is, therefore, singularly promising.

There is good reason for the expectation that the courts of Shri Lanka will respond imaginatively to the challenge and develop appropriate remedies to cater for new problems which are constantly developing between the taxpayer and the State.