SUPREME COURT

D.M.S. Fernando and Another
Vs.
Mohideen Ismail

S.C. Appeal No. 22 of 1981 — C.A. Appeal No. 1390 of 1979

Inland Revenue Act Section 96C (3)(d) — Requirement of Statement of reasons in writing — Such requirement whether Mandatory or Directory — Failure to state reasons — consequence.

The Respondent-Petitioner is a taxpayer who furnished a return for 1975/76. In the return he declared that his income was Rs.88,915/-. However the Assessor had information that he had done business with B.C.C. and that he had earned a gross sum of Rs.961,415/-. After many interviews with the Assessor the taxpayer was warned that his return would be rejected and an assessment based on an estimate by the Assessor would be issued. The Assessor issued an assessment on 29.4.79 drastically reducing the amount claimed as expenses. The taxpayer appealed against this assessment to the Assessor.

In the meantime the Taxpayer applied to the Court of Appeal for a Writ to quash the assessment on the grounds that the Assessor had not given his reasons in writing for rejecting the return. The Court of Appeal granted the writ but the appellants appealed against the order.

Held (Sharvananda J & Wimalaratne J. dissenting) The notice of assessment was null and void because the Assessor failed to obey a mandatory order to give his reasons in writing to the taxpayer for rejection of the return in terms of section 90C (3) (d.) of the Inland Revenue Act. It is essential that an Assessor who rejects a return should state his reasons and communicate them. His reasons must be communicated at or about the time he sends his assessment on an estimated income. Any later communication would defeat the remedial action intended by the amendment.

APPEAL from judgment of the Court of Appeal.

Before: Samarakoon, Q.C., C.J.,
Weeraratne, J.,
Sharvananda, J.,
Wanasundera, J., and
Wimalaratne, J.

Counsel: G.P.S. de Silva, Additional Solicitor-General with K.C. Kamalasabayason, State Counsel for Respondent-Petitioners.
C. Sivaprakasam with M. Devasagayam for Petitioner-Respondent.

Argued on: 27th, 28th and 29 January, 1982.

Cur. adv. vult.

Decided on: 2.4.82

SAMARAKOON, C.J.

The Appellants in this case are both officers of the Inland Revenue Department of Sri Lanka. The first Appellant is an Assessor attached to the Colombo North Regional Office of the Department and the second Appellant is the Commissioner-General of Inland Revenue and the Head of the Department. They have appealed against an Order of the Court of Appeal which issued a Writ of Certiorari quashing an Assessment of Tax made in respect of the Respondent for the year of Assessment 1975/76. The Respondent was a shareholder of two businesses called "Lanka Copra Stores" and "Welcome Traders", and also the owner of immovable property of considerable value in the City of Colombo and Kuliyapitiya. As such he was a Tax Payer assigned to the Colombo North Regional Office of the Inland Revenue Department. He was allotted file No. 70/6039-24/2.

In his affidavit filed in the Court of Appeal the Respondent has stated in paragraph 6 thereof that in or about August 1976 he furnished a return of income and wealth for the year of Assessment 1975/76 to the Assessor Colombo North Regional Office "in the prescribed form issued to him by the Assessor". This return has been filed of record marked A and a Statement of Accounts being his Auditor's computation of income and wealth has been filed also marked A. These facts are admitted in the affidavit filed by the first Appellant. In this Statement of Accounts the Respondent disclosed a taxable income of Rs. 88,915/- and taxable wealth at Rs.215,599.93. Admittedly this statement did not disclose his total statutory income. At an interview the Respondent and his Auditors had with the Assessor then dealing with the file (not the 1st Appellant) in the year 1977, the Assessor disclosed material in his possession which indicated that he had derived considerably more income from dealings with the British Ceylon Corporation Ltd. Realising, no doubt, that the fat was in the fire, the Respondent sent a second Statement of Account (Document C) disclosing an additional income of Rs. 961,415.80 thereby boosting the taxable wealth. The 1st Appellant states in her affidavit that at the interviews the Respondent and his Auditors had with the officials of the Inland Revenue Department in June 1978 and October 1978, the Respondent was informed that "his return and statements will not be accepted" and that "after investigating into the Return and the subsequent Statements" "an assessment was made on 30th March 1979 of the Wealth and Income for the Year of Assessment 1975/76" (Document D). The total assessable income was fixed at Rs.786,480/- and the Taxable Wealth was fixed at Rs.816,099.00. The total tax and penalty payable was fixed at Rs.669,860.00. This Notice of Assessment has been sent by Registered Post on 20th April, 1979. By an appeal dated 26-4-1979 the Respondent appealed to the Commissioner of Inland Revenue against this assessment. (Document 1R2). That appeal is now pending. In addition he has filed this application for a Writ of Certiorari to quash the Notice of Assessment dated 30th March, 1979.

It was contended by the Respondent before the Court of Appeal that the Notice of Assessment was "illegal, null and void and made without jurisdiction and ultra vires" the first and second Appellants. How the second Appellant comes into the picture at this stage is difficult to comprehend as he acts in this case only in appeal. The contention before us was that the assessor had failed "to communicate

(to the Respondent) in writing the reasons for not accepting the return". It was argued that his obligation being mandatory the issue of the Notice of Assessment was without jurisdiction and null and void. Reference was made to the provisions of Section 96C (3) (d) of the Inland Revenue (Amendment) Law No. 30 of 1978 which requires the assessor to give reasons for not accepting the return. This is an amendment to the provisions Chapter XIA made by Inland Revenue (Amendment) Law No. 72 of 1972 which introduced a new concept of "Self Assessment of Profits and Income, Net Wealth and Taxable Gifts and the Payment of Tax chargeable thereon". That Chapter dealt only with Payment of Tax and the Assessment of Tax, if quarterly tax has been underpaid. It did not provide for assessment of statutory income and assessable income for payment of tax. The "return" referred to therein is probably a reference to the return required to be sent at the time of payment of quarterly instalment of tax provided in Section 96(B)(4) of Law No.30 of 1978. However the Assessor did not purport to act under the provisions of Section 96(C)(3) which empowered him to call for additional tax only after making an assessment of tax. I do not therefore see any need to consider this aspect of the case. Furthermore the appeal was argued before us on the basis that this was a case of non acceptance of an Annual Return in terms of Section 93(2) as amended by Law No. 30 of 1978, Section 93 Act No. 4 of 1963 as amended by Law No. 17 of 1972 and Law No. 30 of 1978 now reads as follows in Chapter XI under the Heading "Assessment" –

> "93(1) Every person who is, in the opinion of an Assessor, chargeable for any year of assessment commencing on or before April 1, 1971, with income tax, wealth tax or gifts tax shall be assessed by him as soon as may be after the expiration of the time specified in the notice requiring him to furnish a return of income, wealth or gifts under section 82."; and
>
> "(1A) For any year of assessment commencing on or after April 1, 1972, an Assessor may, notwithstanding anything to the contrary in subsection (1), assess any person at any time, whether or not such time is before the commencement of the year of assessment to which the assessment relates, if he is of the opinion that such person is about to leave Sri Lanka, or that for any other reason it is expedient to do so."

"(2) Where a person has furnished a return of income, wealth, or gifts, the Assessor may

(a) either accept the return and make an assessment accordingly; or

(b) if he does not accept the return, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly and communicate to such person in writing the reasons for not accepting the return."

The Additional Solicitor-General who appeared for the Appellants argued that this section does not apply to all returns. He stated that the return furnished with Document A was a false return and therefore no reason need be given as section 93(2) does not apply to false returns. He pointed to the fact that Statement of Account C itself gave the lie to the Statement of Account A. He further stated that the reason for "rejection" (that was the word he used) was patent from the Document C which constituted an admission of falsity by the Respondent. He argued that this was a case of deliberate suppression of income and wealth. The false he stated was sought to be made to appear true. "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 section requires those reasons to be stated and not the conclusion which he arrived at, though he may if he so chooses give his conclusions too. Furthermore the section requires reasons for non-acceptance of a return which is an act of the Assessor. It is his thinking that has to be disclosed to the Assessee. No doubt there may be cases where the reasons for non-acceptance may be obvious but one must bear in mind the fact that the legislature has made no exception to the general rule and the duty cast on the Assessor must be carried out even though the Assessee himself accepts the obvious. In the present case such a situation does not arise because the Assessor in making the assessment accepted the figures of assessable income and taxable wealth set out in accounts A and C. He only rejected the claim for expenses and made his own assessment of expenses. The Assessor was then required to give reasons for such action. To satisfy the provisions of the section reasons must relate to assessable income, taxable wealth and taxable gifts, whichever is not accepted. It is not a mere 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. I therefore reject the argument of the Additional Solicitor-General.

At this stage it would be convenient to deal with the opinion of Perera J. that "the amending law clearly contemplated that the notice communicating the reasons for not accepting of a return should be an exercise before the actual assessment of income, wealth or gifts is made for the purpose of sending the Statutory Notice of Assessment referred to in Section 95." I have quoted him verbatim because it appears to me that he considered this communication to be a condition precedent to making an estimate of assessable income. Perera J. was of the view that the intent of the provision was to give the Assessee an opportunity to meet the Assessor so as to convince him, if possible, that his non-acceptance was erroneous. Section 93(2) is an empowering section. It empowers the Assessor to do one of two things. He may accept the return in which event he makes the assessment accordingly. Or else he may not accept the return. In such an event he is obliged to do two things-

1. Estimate the assessable income, taxable income or taxable gifts *and assess him accordingly* (the underlining is mine).

and 2. He must communicate to the Assessee in writing the reason for not accepting the return.

To my mind these are all part of one exercise. There is nothing in the provision which indicates that the estimation of assessable income, wealth and gifts must be postponed for some time long after the non-acceptance. Even if one transposes the words "and communicate to such persons in writing the reasons for not accepting the return" to the first line of the section after the word "return" and before the word "estimate" it will not make it a condition precedent. One has still to read more words into it to have the effect of postponing the rest of the exercise to some time later. This would be doing violence to the section. The section imposes a duty but does not impose a time limit within which it should be done. To my mind the section merely states that if the Assessor does not accept a return he may assess on an estimate. His exercise is not complete till he has also communicated his reasons for not accepting the return. In

effect he also justifies his act of assessing on an estimate. The plain meaning of the section is clear. Perera J. has read into it a condition and an additional duty which is against the accepted canons of construction of statutes. Perera J. has referred to a statement of the legal effect of the amendment to section 93 contained in the Bill to amend the Revenue Act. No 4 of 1963 presented by the Minister in Parliament on 7th June 1978 and published in the Gazette of 30th June 1978. In reference to section 93 it states as follows:-

> "Clause 34: Amends section 93 of the principal enactment and the legal effect of this Clause will be to impose a duty on an Assessor who rejects a return furnished by any person to state his reasons for rejecting the return.

If the intention of Parliament is to be considered, as Perera J. has sought to do, this statement in Clause 34 alone suffices to indicate beyond doubt that Parliament intended to impose one duty only and that is a duty on the Assessor to communicate reasons. I cannot therefore uphold the finding that this section imposed a condition precedent and a duty on the Assessor to hear submissions of the Assessee before making an estimate of assessable income, taxable wealth and gifts. The assessment so made in terms of section 93(2) must be followed by a Notice of Assessment in terms of section 95. That is the first time that the Assessee is apprised of the estimated income and taxable wealth and he must then know the reasons for non-acceptance of his return. It appears to me therefore that the duty to communicate reasons can be discharged by sending the reasons simultaneously with the Notice of Assessment.

The next question to be considered is whether the duty imposed on the Assessor to communicate reasons is a mandatory one which renders the Notice of Assessment null and void. The statute itself contains no sanction for a failure to communicate reasons. If it had the matter would be easy of decision. But the matter does not rest there. One has to make further inquiry. "If it appears that Parliament intended disobedience to render the Act invalid, the provision in question is described as 'mandatory', 'absolute', 'imperative' or 'obligatory'; if on the other hand compliance was not intended to govern the validity of what is done, the provision is said to be 'directory' " (Halsbury's Laws of England, Ed.3 Vol.36 page 434 s.656). Absolute provisions must be obeyed absolutely whereas directory

provisions may be fulfilled substantially. Vide *Woodward vs. Sarsons* (1875) (L.R. 10 CP 733 at 746). No universal rule can be laid down for determining whether a provision is mandatory or directory. "It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed — per Lord Campbell in *Liverpool Borough Bank vs. Turner* (1860)(2 De G F & J 502 at 508) *Vita Food Products vs. Unus Shipping Co.* [1939] A.C. 277 at 293. Each Statute must be considered separately and in determining whether a particular provision of it is mandatory or directory one must have regard "to the general scheme and to the other sections of the Statute". *The Queen vs. Justices of the County of London and London County Council* [1893] 2 Q.B. 476 at 479. It is also stated that considerations of convenience and justice must be considered. *Pope vs. Clarke* [1953] 2 All E.R. 704 at 705. Then again it is said that to discover the intention of the Legislature it is necessary to consider — (1) The Law as it stood before the Statute was passed. (2) The mischief if any under the old law which the Statute sought to remedy and (3) The remedy itself. (Maxwell on Interpretation of Statutes 12th Edition page 160). These are all guidelines for determining whether Parliament intended that the failure to observe any provision of a Statute should render an act in question null and void. They are by no means easy of application and opinions are bound to differ. Indeed some cases there may be where the dividing line between mandatory and directory is very thin. But the decision has to be made. I will therefore examine the Statute bearing in mind these guidelines.

As I mentioned earlier the law in regard to Taxation now has provisions for self assessment by the Assessee and provisions for assessment by the Assessor upon a return made by the Assessee. The former does not concern us in deciding this appeal though it may be necessary to refer to some of the provisions of Chapter XIA. It is the latter that requires examination. Income Tax laws were first introduced by the Income Tax Ordinance No.2 of 1932 (Chapter 242). Subsequently a Wealth Tax and a Gift Tax was imposed and these were consolidated in the Inland Revenue Act No.4 of 1963. All persons chargeable with tax were bound to furnish a return to the Commissioner within a stipulated period (section 81) if he has not already been required to do so by the Assessor in terms of section 82. By virtue of powers vested in him by section 93 the

Assessor proceeds to assess that person. Where a person has furnished a return the Assessor may if he accepts the return make an assessment accordingly (section 93(2)(a)). Or if he does not accept the return, he may make an estimate of the assessable income, taxable wealth or taxable gifts and assess him accordingly. (Section 93(2)(b)). In either case he must, if he is to recover Tax, send a Notice of Assessment to the Assessee (section 95). There is also provision for additional assessment (section 94). Prior to the Act of 1963 the assessment was sent by the Assessor to the Assistant Commissioner and he after approval sent the Notice of Assessment to the Assessee (section 70, section 71 Chapter 242). After 1963 the Assessor was given power to send the Notice of Assessment without first having his assessment vetted by an Assistant Commissioner. If the Assessee was aggrieved by the amount of assessment he could appeal to the Commissioner within 30 days of the Notice of Appeal and the Commissioner decided such appeal (section 97). If the Assessee was dissatisfied with the Commissioner's determination he had a right of appeal to the Board of Review (section 99). The onus of proving that the assessment was excessive or erroneous was on the Assessee (section 101(3)). There is also a provision for appeal to the Supreme Court on a case stated by the Board (section 102). Then came the amendment by Inland Revenue (Amendment) Law No.17 of 1972 which was mainly concerned with self assessments. This was concerned only with quarterly taxes, the recovery of taxes and the assessment of quarterly tax in case of non-payment or under payment. As stated earlier the provisions of this law do not concern this appeal. One significant fact is that the Assessor was not bound to and gave no reasons for non-acceptance of a return nor was he called upon to justify his estimated assessment. In this state of the Law came the amendment by the Inland Revenue (Amendment) Law No. 30 of 1978 which *inter alia* required the Assessor to communicate his reasons for not accepting the return. This is a duty cast on the Assessor. Whereas earlier he had no duty to justify his non-acceptance of a return now he was required to do so.

The problem here is one of construction of the Statute with the object of discovering the intention of Parliament. "This problem of construction has arisen before in a number of cases. It was dealt with by Winn J. in his judgment in the Divisional Court in *Brayhead (Ascot), Ltd. vs Berkshire County Council. [1964]* 1 All E.R. 149 "The learned Judge (if I may use a colloquialism) 'broke down' and analysed the relevant provisions there in question and considered in

relation to each whether it was mandatory in the sense that a failure to comply nullified the resultant document, or whether the failure to comply was merely a failure to comply with a procedural matter. I would adopt the same approach" per Stamp L.J. in *Howard vs. Secretary of State* [1974] 1 All E.R. 644 at 649. I myself will adopt the same mode of analysis. In *Brayhead (Ascot) Ltd vs. Berkshire County Council* (1964) 1 All E.R. 149 (supra), the Court was called on to construe certain provisions of the Town and Country Planning Act 1947 and the Development Order 1980 made by the Minister under the provisions of section 14 of the Act of 1947. By a document dated February 18, 1957, and headed "Notice of Consent" the Council informed the Company that the Council in pursuance of their powers under the Town and Country Planning Act 1947 thereby permitted the erection of factory premises to be carried out on the named site in accordance with the application that had been made and plans submitted with it subject to compliance with a specified condition, viz., that "use of the premises be limited to Clause 3 of the Town and Country Planning (uses classes) Order 1950 (Light Industry)." No reason was stated in the document for the imposition of the condition. Sometime later the Windsor Rural District Council acting on behalf of the Berkshire Council served three enforcement notices on the Company alleging that the use of the factory premises had not been limited to the uses set out in Clause 3 of the Order of 1950 which was a breach of condition stipulated in the "Notice of Consent". The Company contended that the condition in the "Notice of Consent" was rendered null and void by reason of the absence of reasons for imposing the condition. Paragraph 9 of Article 5 of the Development Order of 1950 reads thus in its relevant portion —

> "Every such notice shall be in writing and (a) in the case of an application for planning ..... where the local planning authority decides to grant such permission ..... subject to conditions or to refuse it, they shall state their reasons in writing, and send with the decision a notification in the terms (for substantially in the terms) set out in Part 2 of Sch. 2 hereto .....

In his reasoning Winn J. stated as follows:

> "As a matter of construction it seems clear that art.5 (9)(a) requires (A) that the notice of decision be in writing; (B) the reasons be stated in writing; (C) that the notice be accompanied

by a notification in the prescribed form; these requirements can be satisfied by a single document or by three physically separate documents. Should requirement (A) not be complied with, disputes might well arise as to the calculation of the time limit for appeal to the Minister fixed by s.16(1) of the Act of 1947; should requirement (C) not be satisfied an applicant might be left in ignorance of his rights. Each of those requirements is, therefore, essential to the statutory purposes. The interposition of requirement (B) militates strongly against any view that it can be regarded as merely directory; all three requirements appear to be mandatory."

Nevertheless he held non-compliance with the duty to give reasons did not render the Notice null in law. As far as I can gather his reasons for this decision are threefold:-

1. The Company "could undoubtedly demand as of right a statement of reasons and by threat or effect of an order of mandamus secure them ....."
2. The "extreme result is not required for the effective achievement of the purposes of the Statute nor intended as a matter of construction by Parliament".
3. "Even if the Notice be null the enforcement powers under section 23(1) of the Act of 1947" could in this case still be "effectively excercised on the ground that permission was *de facto* granted only subject to a condition, albeit that condition was not notified in the prescribed manner to the applicant."

Let us "break down" the provisions of section 93(2) of (Amendment) Act No.30 of 1978, in the same way.

1. There is first a decision made not to accept a return. This is indeed an important decision which could entail serious consequences for the assessee.
2. There is next the requirement of making an estimate. This must necessarily be done, otherwise no tax could be collected and the State would suffer. There is no doubt that this is a mandatory provision. For the imposition of tax this is a *sine qua non*. Without it an imposition of a tax will be illegal.
3. The third is a requirement to communicate reasons for the non-acceptance of the return. This is a duty coupled to the

power of making an estimate and taxing thereon. It is a direction of Parliament contained in its legislation requiring obedience of a kind. I have no doubt that this provision is a mandatory one.

The next question to consider is whether the failure to observe the stipulation renders the Notice of Assessment null and void. No doubt the requirement can be enforced by a Writ of Mandamus or an effective threat of it. But that is a matter of choice for the Assessee. It cannot by any kind of reasoning be said that at the time Parliament passed the amending act it had in mind the enforcement of duties imposed by it by means of a Writ of Mandamus. I do not think such a procedure even engaged the mind of the Legislature. On the other hand it is quite clear that when it imposed a duty on state employees it expected obedience from them. Furthermore one has to consider this amendment in the light of the law as it then existed. The Assessor was then not bound to disclose any reasons either on the file or by communication to the Assessee. All was left to the good sense of the Assessor and his sense of justice and fairness. The Assessee could only appeal against the quantum of assessment and the onus of proof lay on the Assessee. He could only speculate on the reasons for such assessment for the purposes of his appeal. The picture is now different. A duty is now imposed on the Assessor not only to give reasons for non-acceptance of a return but also to communicate them to the Assessee.

The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly unfair assessments which many Assessors had been making as " a protective measure". An unfortunate practice had developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a return till the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment. The law, I think, enabled the department to make recoveries pending any appeal on such assessments. The overall effect of this unhappy practice was to pressurise the tax payer to such an extent that he was placed virtually at the mercy of the tax authorities. The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come

to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the Assessee. The provision for the giving of reasons and the written communication of the reasons, contained in the amendment is to ensure that in fact the new procedure would be followed. More particularly the communication of the reason at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not give him latitude to chop and change thereafter. It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them. His reasons must be communicated at or about the time he sends his assessment on an estimated income. Any later communication would defeat the remedial action intended by the amendment.

Such an important and far reaching change cannot be lightly treated. I have no doubt that by this change the Legislature intended the natural consequences that attach to the disobedience of a mandatory provision. To hold otherwise would result in the proliferation of applications for Writs of Mandamus. I cannot for a moment accept the contention that the legislature intended this provision to be a source of litigation of that kind. I therefore hold that the Notice of Assessment dated 20th April, 1979, is null and void.

There was another matter that was raised incidentally. It was contended by the Deputy Solicitor-General that the Respondent was not entitled to maintain this application for Writ because an alternative remedy by way of appeal was available to him under the Inland Revenue Act. Those provisions confine him to an appeal against the quantum of assessment. The Commissioner has not been given power to order the Assessor to communicate reasons. He may, or may not, do so as an administrative act. The Assessor may, or may not, obey. The Assessee is powerless to enforce the execution of such administrative acts. 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. An application for Writ of Certiorari is the proper remedy.

For the reasons hereinbefore given I dismiss the appeal with costs here and in the Court of Appeal.

WANASUNDERA, J. — I agree.

WEERARATNE J.

I have had the advantage of reading the order proposed by the Chief Justice, and whilst I am in agreement with the conclusion reached by him on the grounds stated in his order, I desire to outline my reasons.

As stated by learned Counsel appearing before us, this case raises the important question in income tax Law as to the rights of a taxpayer whose return of income, wealth or gifts has not been accepted by the assessor, to know the reasons which have induced the Assessor to reject the taxpayer's return. Although the present appeal is concerned with an assessment made in respect of the income and taxable wealth of the respondent for the year of Assessment 1975/76, and is governed by the provisions of Section 93(2) of the Inland Revenue Act No. 4 of 1963, which Act has now been superseded by the Inland Revenue Act No. 28 of 1979, the question raised before us in appeal continues to be of interest and importance to both the taxpayer and the Department of Inland Revenue by reason of the fact that the provisions of Section 93(2) of Act No. 4 of 1963 have been re-enacted in similar terms in Section 115(3) of the Act No. 28 of 1979.

Section 93(2) of the Inland Revenue Act No. 4 of 1963 reads as follows:

"(2) Where a person has furnished a return of income, wealth or gifts, the Assessor may either-

(a) accept the return and make an assessment accordingly; or
(b) if he does not accept the return, estimate the amount of the assessable income taxable wealth or taxable gifts of such person and assess him accordingly."

Section 93(2) as amended by the Amending Act No 30 of 1978 is as follows:-

"Where a person has furnished a return of income, wealth or gifts, the Assessor may —

(a) either accept the return and make an assessment accordingly;

(b) if he does not accept the return, estimate the amount of the assessable income taxable wealth or taxable gifts of such person and assess him accordingly, *and communicate to such person in writing the reasons for not accepting the return.*"

It was contended before us on appeal for the Assessor and the Commissioner General of Inland Revenue that the requirement to communicate to the assessee in writing the reasons for not accepting a return did not apply to all returns. The learned Additional Solicitor General submitted that no statutory obligation was cast upon the Assessor to inform the assessee of his reasons where the taxpayer had submitted a false return. He urged that the duty cast by Section 93(2) (b) to state reasons was confined only to instances where the return was not accepted for reasons other than the falsity of the return. In the present case, inasmuch as the assessee's return was not accepted as being a false return, he contended that the Assessor was lawfully entitled not to accept the return without stating his reasons and to proceed to assess the assessable income, taxable wealth or taxable gifts of such person. The contention on the other side was that the duty to state reasons existed in every instance where an Assessor decides not to accept a return made to him, that such duty is mandatory, and that the failure to state reasons, rendered the notice of assessment made by he Assessor ultra vires and liable to be quashed in writ proceedings.

I am unable to agree with the contention advanced for the State. The language of Section 93(2)(b) is plain, admitting of only the meaning, that where an Assessor decides to reject a return made to him and to make his own estimate of the assessable income, taxable wealth or taxable gifts of the taxpayer, he must make known to the assessee the reasons why the assessee's return has not commended itself to him. The legislature must be taken to have meant and intended that which it has plainly expressed, and whatever it has in clear terms enacted, cannot be restricted by judicial interpretation unless such course is rendered necessary upon a reading of the statute as a whole. An analysis of the scheme of Section 93 would indeed be helpful. Section 93(1) and 93(1)(A) contemplate, inter alia, assessments being made by the Assessor without his first having received the return made by the assessee. In such instances, the Assessor proceeds to issue a notice of assessment based on his own

estimate, arrived upon whatever material may be available to him. Section 93(2), however, stands on a different footing. This sub-section relates to cases where a taxpayer has furnished a return.

When such a return is received, the Assessor can either accept it and make an assessment accordingly, or reject the return and then proceed to make his own assessment. The legislature has considered it fair and reasonable that when the taxpayer has complied with his obligation of making a return to the Department of Inland Revenue, that he should then be entitled to be informed of reasons when the Assessor decides not to accept the return and rejects the same. If the Assessor decides to reject a return on the ground that it is a false return, then the matter becomes all the more serious from the point of view of the assessee, and quite apart from exempting the Assessor from the requirement to state reasons, makes it all the more obligatory on him to do so and thus make known to the taxpayer why his return does not find favour. When the legislature requires the Department to make known to the subject why the statutory return furnished by the subject is being rejected and the Department's own assessment substituted, it becomes the duty of this Court to enforce observance of such requirement.

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 fulfill 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.

The reasons set out above, coupled with the further fact that the requirement to state reasons was brought into the Section by the amendment of 1978, (Inland Revenue Amendment Law No 30 of 1978) compel me to conclude that the requirement to state reasons is a mandatory provision and is not merely directory. It seems to me that such a construction fulfills the legislative purpose underlining this Section. Failure to comply therefore renders the impugned act of the Assessor liable to be quashed by certiorari. I therefore concur in the order proposed by my Lord the Chief Justice.

SHARVANANDA J.

I have read the judgment of Hon'ble the Chief Justice. I regret my inability to agree with it.

The Petitioner-Respondent filed an application for a mandate in the nature of Writ of Certiorari and/or Prohibition to quash the assessment of tax made by the 1st Respondent-Petitioner for the Year of Assessment 1975/76 on the Petitioner-Respondent under the provisions of the Inland Revenue Act, No.4 of 1963, as amended by Inland Revenue (Amendment) Laws, Nos.17 of 1972 and 30 of 1978.

The Petitioner-Respondent (tax-payer) is a partner of the firm called 'Lanka Copra Stores'. By his final return dated 11th August 1976, he furnished return 'A' of his income and wealth for the Year of Assessment 1975/76. In the last paragraph of the return, he made the declaration: "I declare that the above particulars are in every respect fully and truly stated according to the best of my knowledge and belief". In his return he stated that his total statutory income for 1975/76 was Rs. 89,034/-, which included an income of Rs. 35,172/- for the period 1.4.74 to 31.3.75 on account of Lanka Copra Stores,and that his net wealth was Rs. 369,099/-.

Subsequent to the furnishing of the aforesaid return dated 4th August 1976, the Petitioner-Respondent and his Auditors were interviewed on several dates by the Assessor in charge of the Respondent's file. At the interviews, it was realised that the Petitioner-Respondent had not disclosed and accounted in his return part of the sale proceeds of copra received by his firm from the British Ceylon Corporation Ltd. After being confronted with certain tell-tale material from the British Ceylon Corporation Ltd, the Petitioner-Respondent furnished the statement 'C' dated 10th August 1977, wherein he acknowledged that he had been paid a sum of Rs. 1,270,234/59 by the British Ceylon Corporation Ltd. on account of "difference in prices for copra purchases by it". From this sum the Petitioner-Respondent apportioned Rs. 96,415/80 as representing the amount of his income relating to the year ended 31st March 1975 from that source. Out of this gross income of Rs. 961,415/80, he sought to deduct a sum of Rs. 404,500/- on account of "*estimated expenses incurred by me out of the moneys received from the B.C.C Ltd. and unaccounted in my books*". In 'C' he disclosed that his

additional net income was Rs. 248,359/- after credit being given for his alleged expenditure. This sum was not reflected in the return. This letter 'C' ex facie, amounted to an acknowledgment on the part of the Petitioner-Respondent that he had grossly under-stated his income in his annual return 'A' and that the return was incorrect, if not false. In the light of 'C' the Petitioner-Respondent could not conceivably have expected his return 'A' to be accepted by the Assessor — the letter militated against the acceptance of his return 'A'.

The Petitioner-Respondent was served with notice of assessment 'D' dated 30th March 1979, assessing his total statutory income in a sum of Rs. 786,480/-. On this basis, his gross income tax was computed to be Rs. 558,145/-. After the sum of Rs. 27,042/- being income tax paid on self-assessment was set off, the income tax payable by him was stated to be Rs. 531,103/-. He was also notified that the penalty payable by him was Rs. 132,776/-. According to the notice, the income tax and penalty payable by him aggregated to Rs. 663,879/-. Further, his net wealth was assessed at Rs. 916,099/- and the total wealth tax payable by him was computed to be Rs. 5,190/-. After a sum of Rs. 1,125/- was set off as wealth tax paid on self assessment, the Petitioner-Respondent was called upon to pay as wealth tax and penalty a sum of Rs. 5,981/-.

According to the Respondent-Petitioners, the Petitioner-Respondent was served with letter dated 4th April 1979 marked 1R1, informing him of the reasons for the Assessor rejecting his return. 1R1 stated, inter alia: "The books of account for the years 1975/76 were far from satisfactory. The reasons for rejecting the return and accounts have already been intimated to you. In particular, the amount of price difference paid by the B.C.C. Ltd. In respect of copra delivered were not brought into account". The Petitioner-Respondent, however, has denied the receipt of this letter.

The assessment of the Petitioner-Respondent's income and wealth by the Assessor was based on the date furnished in the letter 'C' and return 'A'. The Petitioner-Respondent's claim for estimated expenses alleged to have been incurred by him out of the moneys received from B.C.C. Ltd. and admittedly unaccounted in his books was quite understandably not accepted. The basis of assessment was elucidated by the Additional Solicitor-General as follows:

Basis of Assessment
A.M. Ismail - Year of Assessment 75/76

1. **Price difference received from B.C.C. (as per document C)**	961,415	
Less amount brought into the books	215,008	
Amount not disclosed	746,407	
Less - Expenses claimed - Rs.498,048 Expenses allowed	48,961	(estimate)
2. **Income from Trade**		
As per return - Lanka Copra Stores	35,172	
Additional as above	697,446	
	732,618	
Welcome Traders - as per return	51,612	
Amount assessed	784,230	
3. **Wealth**		
Net wealth as per return	316,099	
Accretion to capital arising from non-disclosed income of Rs. 697,446	600,000	(estimate)
Amount assessed	916,099	

The Petitioner-Respondent thereupon appealed to the 2nd Respondent-Petitioner on 26th April 1979 against the assessment made on him and also, by his petition dated 7th May 1979, moved the Court of Appeal for the issue of a mandate in the nature of a Writ of Certiorari and/or Prohibition quashing the assessment conveyed in the said notice of assessment 'D' dated 30th March 1979 and declaring the said assessment null and void and without jurisdiction and ultra vires, on the ground that the said notice contravened the provision of sections 93(2)/94/96(c)(3) of the Inland Revenue Act as amended by the Inland Revenue (Amendment) Laws, Nos. 17 of 1972 and 30 of 1978. His contention was that the failure of the Assessor to comply with the mandatory provisions of section 93(2)/94/96(c)(3) of he Inland Revenue Act as amended which imposed

a duty on the Assessor to communicate his reasons in writing for not accepting his return rendered the said assessment 'D' invalid and ultra vires.

By judgment dated 29.1.81, a Divisional Bench of the Court of Appeal held that the relevant provisions of the Amendment Law, No. 30 of 1978, were mandatory and that the non observance of same deprived the Assessor of jurisdiction to issue the notice of assessment 'D' and that hence the Petitioner was entitled to an order quashing the assessment dated 30th March 1979. The Petitioner's application for writ was thus allowed with costs. Against the said order, the Respondents-Petitioners have preferred this appeal to this Court.

At the hearing of the appeal, it was contended that the sections which applied to the matter in issue in this case were the amended section 93(2)(b), 94 proviso (c) and 96(c)(3) proviso (d). But since the question in controversy is basically the same, whichever of the three sections is considered, it was finally accepted by the parties that the amended section 93(2)(B) of the Inland Revenue Act as amended by Law No. 30 of 1978 is the one applicable to the facts of this case. Hence it is not necessary to consider the other sections or the impact of self-assessment on the question in issue.

The original section 93(2) of the Inland Revenue Act, No. 4 of 1963, reads as follows:

"Where a person has furnished a return of income, wealth or gift, the Assessor may either–

(a) accept the return and make an assessment accordingly;
(b) if he does not accept the return, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly."

Section 34 of the Inland Revenue (Amendment) Law, No. 30 of 1978 provided:

"Section 93 of the principal enactment is hereby amended by the repeal of sub-section (2) of that section and the substitution therefor of the following new sub-section:

'(2) Where a person has furnished a return of income, wealth or gifts, the Assessor may-

(a) either accept the return and make an assessment accordingly; or

(b) *if he does not accept the return, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly and communicate to such person in writing* the reasons for not accepting the return."

Under the original section 93(2), the Assessor was not obliged to give his reasons for not accepting the return made by the taxpayer. By the amendment effected by the Amendment Law, No. 30 of 1978, the Assessor was required, if he did not accept the return of the taxpayer, to estimate the amount of his assessable income, etc. and assess him accordingly and communicate to such person in writing the reasons for not accepting his return. An obligation has now been cast on the Assessor to communicate to the taxpayer in writing the reasons for not accepting the return made by him. The object of this Amendment appears to be to make a taxpayer who has, according to him, made a correct return and is therefore reasonably entitled to expect his return to be accepted, aware, if the Assessor does not accept his return, of the reasons for the non-acceptance of his return so as to enable him to demonstrate the untenability of the said reasons at the hearing of any appeal that may be preferred by him against the assessment. The return referred to is the return required by section 82 of the Inland Revenue Act. Under the Amendment, what the taxpayer should be informed of are only the reasons in writing for non-acceptance of his return, but not the ground or basis of the estimate of the assessable income made by the Assessor. If the Assessor accepts the return made by the taxpayer, the Assessor has no alternative but to make the assessment accordingly. But if he does not accept the return, or where the taxpayer has not furnished a return, then it is competent for the Assessor to estimate the amount of the assessable income, etc. of the taxpayer and assess him accordingly.

In the present case, the Assessor has admittedly not accepted the return 'A' dated 11.8.76 made by the Petitioner-Respondent for the year of assessment 1975/76. Since the Assessor did not accept the return, he, in the exercise of his powers under section 93(2)(b) of

the Inland Revenue Act as amended by Inland Revenue Law, No. 30 of 1978, was entitled to estimate the income, etc. and make the assessment embodied in the notice of assessment 'D' dated 30th March 1979. According to the Respondents-Petitioners, the reasons for the non-acceptance of the Petitioner-Respondent's return were communicated to the Petitioner-Respondent by letter 1R1 dated 4th March 1979. The Petitioner-Respondent has denied the receipt of the letter 1R1. He has stated in his affidavit dated 31st October 1979 that a photostat of 1R1 was sent to him by the Deputy Commissioner of Inland Revenue under cover of his letter dated 22nd June 1979 only after this application was made to the Court of Appeal. The Respondents-Petitioners have however not furnished satisfactory proof of the posting of the letter 1R1 to the Petitioner-Respondent and hence I proceed on the basis that the Assessor has failed to communicate to the Petitioner-Respondent in writing the reasons for not accepting his return and has thus failed to comply with the statutory requirement of section 93(2)(b) of the Inland Revenue (Amendment) Law, No. 30 of 1978. The important question raised in this appeal is: what is the effect of such non-compliance or omission? It has been held by the majority of the Judges of the Court of Appeal (viz. Victor Perera J. with whom Ranasinghe J. agreed) that the communication of reasons must precede the assessment of income and is a condition precedent to such assessment. On the other hand, Abdul Cader J. did not agree with the above view of the majority, but held that, as the Assessor had failed to communicate the reasons, he had failed to perform a mandatory duty cast on him and the assessment was hence void.

No statutory provisions are intended by Parliament to be disregarded, but where the consequences of not complying with them in every particular are not prescribed, the Courts must judicially determine them. In doing so, they must necessarily consider the importance of the literal observance of the provisions in question to the object Parliament intended to achieve. If it is essential, it is mandatory, and any deviation from the prescribed course is fatal and renders invalid the act done. The difference between a mandatory and directory statute is one of effect only. Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required or is a mere matter of form. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied

nullification for disobedience. It is the duty of Courts of Justice to try to get the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.". - per Lord Campbell in *Liverpool Borrough Bank v. Turner* (1861) 30 L.J. CH. 379 at 380. The fact that a statutory provision is mandatory in form need not necessarily indicate that any violation of it would imply nullification. If the Legislature intended to exact strict and literal compliance with its terms as a condition precedent to the validity of the act or proceeding to which the statute relates, the provisions of the Act are mandatory. Generally speaking, a condition laid by the Legislature is mandatory and cannot be dispensed with. Acts done without complying with the condition are invalid. Should it be determined that the Legislature intended to give mere instructions and directions as to the mode of the performance of the act in question, the statute is considered directory only and precise compliance with the directions of the statute is not essential to give validity to the act done. In the ultimate analysis, the intention of the Legislature as manisfested in the statute is the controlling factor in determining the imperative or directive character of the statutory provision. In *Howard v. Bodington* ((1877) 2 P.D. 203 AT 211), Lord Penzance said:

> "I believe, as far as any rule is concerned, you cannot safely go further than that. In each case you must look to the subject matter; consider the importance of the provision that has been disregarded and the relation of the provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect, decide whether the matter is what is called imperative or directory."

"When Parliament enjoins something to be done as a step towards some transaction of legal significance, it is frequently questionable what effect failure to comply with the statutory injunction has on the validity of the subsequent transaction. In some of the older authorities, it seems to have been envisaged that there were only two possible outcomes-either the transaction was void, or it was valid. Mandatory provisions have, therefore, frequently been classified as either 'imperative' (when failure to comply renders all subsequent proceedings void) or 'directory' (when the subsequent proceedings are valid, although the person's failure to carry out the action enjoined by Parliament may sometimes be punishable). (see Maxwell on Interpretation of Statutes (11th Ed) 362-373; Craes on Statute Law

(6th Ed) 249-251; *Howard v. Bodington* (1877) 2 P.D. 203 at 210, 211 - per Lord Penzance). This terminology has, however, not been consistently used. Moreover, it is now clear that there are not only two possible consequences of non-compliance with a statutory or other legal stipulation, but three – the subsequent transactions may be neither void nor valid, but voidable."– per Sir Jocelyn Simon P. in *F v. F* [1970] 1 All E.R. 200 at 204.

Parliament's intention is as evinced by the words used. The decisive question is, what is the intention expressed by the words used? We should give the words the literal interpretation, heedless of what Parliament intended.

The jural act authorised by the amended section 93 (2) of the Inland Revenue Act is the assessment of the tax-payer's income by the Assessor. If he accepts the return of the taxpayer, he is bound to make an assessment according to the said return. But if he does not accept the taxpayer's return, then he has to take the next step of estimating the amount of his assessable income, etc. and assess the taxpayer accordingly. This exercise is not dependent on the taxpayer being informed, in advance, of the non-acceptance of his return and of the reasons for such non-acceptance. There is no requirement of having to give any such prior notice so as to enable representations to be made against the non-acceptance of the return. In construing the corresponding provisions of the Income Tax Ordinance, i.e. section 64(2) which are identical with the amended section 93(2) of the Inland Revenue Act, Viscount Simon, in delivering the judgment of the Privy Council in *Gamini Bus Co. Ltd. v. Commissioner of Income Tax* (54 N.L.R. 97 at 98), observed:

> "The Assessor did not accept the returns made by the appellant-Company and estimated the amount of assessable income of the appellant-Company in each of the four years at substantially larger sums. He was, of course, entitled to do this according to the best of his judgment and it was not necessary for him to give his reasons for rejecting the appellant's returns for arriving at his own estimates."

The Amendment Law, No.30 of 1978, has now provided for the coummunication to such person in writing the reasons for not accepting the tax-payer's return. But, the significant thing is that the notification

is to be only after the Assesssor has made his assessment according to the best of his judgment. According to the scheme of the section, the communication of the reasons for not accepting the tax-payer's return is a procedural step following on, and not preceding, the Assessor's exercise of his power of assessment; it is not a step related to or essential to the act of assessment. Reasons for not accepting the return need not set out the basis of the estimated assessable income from which the assessment stems. The Amendment does not postulate any notice of the estimate on which the assessment is founded. Since the subsequent communication of reasons for non-acceptance of the return does not form part of the process of assessment and is not essential to the act of assessment, which is the object of the provision, compliance with that term is, in my view, a matter of form rather than of substance and cannot vitiate the assessment. The provision is directory only: "There is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory, in the sense that they were not meant to be a condition precedent to a grant, or whatever it may be, but a condition subsequent; a condition as to which the responsible persons may be blamable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done." – per Lord Blackburn in *Justices of Middlesex v. The Queen* [1884] 9 A.C. 757 at 778.

In my view, failure to comply with the direction as to communication of reasons, unless it results in injury or prejudice to the substantial rights of the taxpayer, will not affect the validity of the assessment. Disregard by the Assessor of the direction to him to communicate in the end, after his assessment, the reasons for not accepting the taxpayer's return does not, ipso facto, render void or nullify the antecedent assessment made under section 93(2)(b). It only makes the assessment voidable if the tax-payer is substantially prejudiced by such disobedience. The tax-payer, however, has the right to call for the reasons at any time.

In the instant case, the Petitioner-Respondent cannot complain of any prejudice by the failure, as on his own showing the return 'A' sent by him was not a true return and could not be accepted for manifest reasons. He could not conceivably have expected his return 'A' to be accepted. By no stretch of imagination can it be said that the Petitioner-Respondent has suffered any prejudice by the Assessor's

omission to inform him in writing the reasons for not accepting his return. Hence the assessment in notice 'D' cannot be avoided. Its efficacy is not affected by the Assessor's aforesaid neglect to communicate in writing the reasons for not accepting his return.

No doubt, the non-complaince may often be inconvenient for a tax-payer; he may find it necessary to specify in his notice of appeal to the Commissioner of Inland Revenue the grounds why the Assessor was not justified in not accepting his return. Section 97 requires an aggrieved taxpayer to appeal to the Commissioner against such assessment setting out the grounds of such appeal within a period of 30 days of the date of the notice of assessment. The requirement that a notice of appeal should specify the grounds of appeal is directory only, and failure to comply with that requirement does not bar an appeal — vide *Howard v. Secretary of State for Environment* [1974] 1 All E.R. 664. However, the taxpayer can undoubtedly demand, as of right, a statement of reasons and by threat or effect of an order of mandamus to secure them; further, it would be strange if the Commissioner does not adjourn the hearing of the appeal until the reasons have been delivered to enable the appellant to criticise or controvert the Assessor's reasons for rejecting his return.

In the case of *Brayhead Ltd v. Berkshire County Council* ([1964] 1 All E.R. 149), a Queen's Bench Division consisting of Lord Parker CJ, Winn and Fenton Atkinson J. had to consider the effect of a breach of statutory duty to give reasons for the decision. The appellants were granted planning permission by the respondents for the erection of a factory, subject to the condition that the premises should be limited to light industrial use. In breach of Article 5(9)(a) of the Town and Country Planning General Development Order (1950) which provided as follows:

> "Every such notice shall be in writing, and (a) in the case of an application for planning permission ..... where the local planning authority decides to grant that permission ..... subject to conditions or to refuse it, *they shall state their reasons in writing* and send with the decision a notification in the terms (or substantially in the terms) set out in paragraph 2 of Schedule 2 hereto."

The notice of decision notifying this permission did not state any reason for the imposition of the condition. An enforcement notice

under section 23 of the Town and Country Planning Act (1947) was served on the appellants alleging that they had contravened the conditions. The appellants appealed to the Minister to quash the notice, but the Minister dismissed the appeal. The appellants contended that the enforcement notice was invalid because it was based on a breach of condition that had not existed as a valid conditon because of the omission of reasons from the notice of planning permission. On appeal, the Queen's Bench Division upheld the Minister's decision and held that, although the requirement of Article 5(9)(a) of the Order of 1950 that the reasons for imposing a condition should be stated in writing was mandatory, it did not follow that non-compliance thereof rendered void the notice of the planning authority's decision. It is relevant to note that section 16 of the Act of 1947 provided for an appeal to the Minister against the conditional grant or refusal of planning permission.

In the case of *Howard v. Secretary of State* ([1947] 1 All E.R. 644), the Court of Appeal approved the above decision in *Brayhead Ltd v. Berkshire C.C.* ([1964] 1. All E.R. 149). In the course of his judgment, Roskill LJ., when dealing with the contention that a failure to indicate the grounds of appeal and/or the facts on which the appeal was based, in breach of the statute which provided that "An appeal shall be made by notice in writing to the Minister which *shall indicate the grounds of appeal* and state the facts on which it is based", nullified the notice of appeal that was sent, observed at page 649:

> "The crucial question is - is that notice of appeal invalidated because the other provisions of the section were not complied with? Like Lord Denning MR. and Stamp LJ., I would accept that those provisions cannot be construed as other than mandatory; but the fact that they are mandatory does not itself cause a failure to comply with them to invalidate the notice. This problem of construction had arisen before in a number of cases. It was dealt with by Winn J. in his judgment in the Divisional Court in *Brayhead Ltd v. Berkshire County* Council ([1964] 1 All E.R. 153)."

In *London and Clydeside Estates v. Aberdeen* ([1979] 1 All E.R. 876), the House of Lords had to consider the effect of a planning certificate which failed to conform to the requirement of Article 3(3) of the Town and Country Planning (Scotland) Order (1959), which provides as follows:

"If a local planning authority issues a certificate otherwise than for the class or classes of development specified in the application made to them ..... they shall in that certificate include a statement in writing of their reasons for so doing and of the rights of appeal to the Secretary of State given by section 6 of this order."

The certificate in question did not include a statement of the appellant's right of appeal to the Secretary of State as required by the above order. It was held that the certificate was invalid because the requirement of the aforesaid Article 3(3) to include a statement in writing of the rights of appeal to the Secretary of State was mandatory and the failure to include this information was fatal to the certificate as "Where Parliament prescribes that an authority with compulsory powers should inform the subject of his right to question those powers, prima facie the requirement must be treated as mandatory". - per Lord Hailsham. That the certificate should 'include' a written notification of the rights of appeal was held to be an integral part of the requirement. The House referred to the judgment of Winn J. in *Brayhead Ltd v. Berkshire C.C* ([1964] 1 All E.R. 149) and distinguished it. Lord Keith relevantly observed at page 893: "As is shown by *Brayhead Ltd v. Berkshire C.C*, something may turn on the importance of the provisions in relation to the statutory purpose which the provision is directed to achieve and whether any opportunity exists of later putting right the failure". He endorsed the principle enunciated by Winn J. that "while the requirement of a statutory provision may be mandatory in the sense that compliance with it could be enforced by mandamus, non-compliance did not render the condition void because that result was not required for the effective achievement of the purpose of the statute under which the requirement was imposed and not intended by Parliament on a proper construction of that statute".

In *Rex v. Liverpool C.C ex-parte Liverpool Taxi Fleet Operators' Association* ([1975] 1. All E.R 379), the Queen's Bench Division had to consider the following section:

"A body (a Committee of Local Authority) may by resolution exclude the public from a meeting ..... whenever publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted, or *for other special reasons*

stated in the resolution and arising from the nature of the business out of the proceedings; and *where such a resolution is passed,* this Act shall not require the meeting to be open to the public during proceedings to which the resolution applies."

Under the section it was permissible for the Committee to resolve to exclude the public for special reasons stated in the resolution and arising from the nature of the business. The Court held that the requirement of the section that the reasons for excluding the public should be stated in the resolution was directory and not mandatory, and the fact that the reason had not been stated in the resolution would not have the effect of invalidating the resolution automatically, and, in those circumstances, the resolution would be set aside only if it could be shown that someone had suffered significant injury in consequence of the irregularity. In the course of his judgment with which the others agreed, Lord Widgery, Chief Justice, said at page 384:

"One must distinguish between statutory provisions which are clearly imperative or mandatory and those which are merely directory. In my opinion, the requirement that the reason shall be stated in the resolution is a purely directory requirement. The effect of that is that the resolution does not automatically become a nullity by reason of the failure to state the reasons within its terms. It stands, unless and until set aside by this Court, and would not be set aside by this Court unless there were good reasons for setting it aside on the footing that someone had suffered significant injury as a consequence of the irregularity."

Mr. Sivapragasam, Counsel for the Petitioner-Respondent, submitted that the intention of Parliament in providing, by the amendment to section 93(2)(b) of the Inland Revenue Act, for the communication by the Assessor to the taxpayer in writing the reasons for not accepting his return was to give him an opportunity to persuade the Assessor that the latter was not justified in rejecting his return prior to the Assessor taking the next meaningful step of estimating the amount of the taxpayer's assessable income and that this object should be given effect. There is good sense in having such object in view; such object seeks to give statutory recognition to the rule of 'audi alteram partem'. But what the Court is concerned is with what a statute has said rather than with what it was meant to say. The meaning and intention of a statute must be collected from the

actual expression used by the Legislature. The sequence of steps to be taken by the Assessor as regulated by the amended section 93(2)(b) militates against the submission of Counsel. Acceptance of the submission of Counsel which found favour with the majority of the Court of Appeal would involve re-writing that section by juxtaposition of words and supplying omissions. However sensible the course suggested by Counsel, a Court cannot depart from the language of the state in order to give effect to the supposed intention of the Legislature. If the language of the statutory provision fails to achieve Parliament's apparent purpose, the Court cannot take upon itself the task of judicial legislation by reading words into the statute or supplying omissions.

For the reasons set out above, I set aside the judgment of the Court of Appeal and allow the appeal with costs in both Courts and dismiss the application of the Petitioner-Respondent.

WIMALARATNE J:

The facts are set out in the Judgments of My Lord the Chief Justice and Sharvananda J. It is unnecessary for me to repeat them except to emphasise that in his subsequent statement 'C' dated 10.8.77 in which, for the first time he disclosed an additional income of Rs.961,415.80 from a new source, the assessee also claimed as a deduction an estimated expenditure, *unaccounted in his books*, of a sum of Rs.404,500/- including a payment of Rs.190,000/- to a working partner.

Where the Assessor does not accept a return he is now obliged, by virtue of section 93(2)(b) of the amending Act No.30 of 1978, to do two things, namely (1) to estimate the assessable income etc. and assess him accordingly; and (2) to communicate to the assessee in writing the reasons for not accepting the return. The Chief Justice takes the view that they are all part of one exercise and that the assessor's exercise is not complete till he communicates the reasons to the assessee. But the Chief Justice is unable to uphold the view of the Court of Appeal that this section imposes a condition precedent and a duty on the assessor to hear submissions of the assessee before making an estimate of assessable income etc. The duty to communicate reasons can, in his opinion, be discharged by sending the reasons simultaneously with the notice of assessment.

Dealing with the question as to whether the duty to communicate reasons is mandatory, failure to perform which renders the notice of assessment null and void, the Chief Justice, after a consideration of various guidelines, including the rules in *Heydon's Case*, concludes that it is a direction of Parliament contained in its legislation requiring obedience of a kind: he has no doubt it is a mandatory one, and that failure to observe the stipulation as to communicating reasons renders the notice of assessment null and void. Whilst agreeing that the duty can be enforced by Mandamus or by an effective threat of it, he is unable to accept the contention that the legislature intended the provision to be a source of litigation. Therefore the failure to communicate the reasons for non-acceptance of the return simultaneously with the notice of assessment rendered the notice of assessment null and void.

According to Sharvananda J. the exercise of estimating the amount of assessable income etc. and of assessing the taxpayer accordingly, is not dependant on the taxpayer being informed, in advance, of the non acceptance of his return and of the reasons for such non acceptance. But he disagrees with the Chief Justice as to the effect of non-compliance, for in his view disregard by the assessor to communicate reasons does not ipso facto render void or nullify the antecedent assessment made under section 93(2)(b). It only makes the assessment voidable if the taxpayer has been susbstantially prejudiced by such disobedience.

I am in respectful agreement with the view taken by both learned Judges that the communication of reasons for not accepting a return is not a condition precedent to the making of a subsequent estimate and an assessment. The context in which the words "and communicate to such person in writing the reasons for not accepting the return" occur, in section 93(2)(b), leaves no room for doubt as to how that section ought to be interpreted. The Court of Appeal was therefore in error when it imposed on the assessor a condition precedent of communicating reasons before taking the steps of estimating and assessing.

From here we get on to the next question. There could be no doubt that reasons for non acceptance have to be communicated by the assessor at some stage. My Lord the Chief Justice takes the view that it should be sent simultaneously with the notice of assessment;

does the non compliance of that duty, however, render the notice of assessment null and void? One of the grounds for awarding Certiorari is lack of jurisdiction; and jurisdiction may be lacking if the authority exercising jurisdiction has disregarded an essential preliminary requirement. The Chief Justice is of the view that the failure to communicate reasons amounts to a failure to comply with a mandatory provision and therefore to a disregard of an essential preliminary requirement.

What, then, is the test to determine whether a statutory provision is mandatory, and what is the test to determine whether disregard of such a provision has the effect of nullifying a decision taken in disregard of such statutory provisions? Under the heading "disregard of procedural and formal requirements", *S.A. de Smith* suggests the following test:-

> "When Parliament prescribes the manner or form in which a duty is to be performed, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The Courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act'. *Judicial Review of Administrative Action* (4th Ed) 142.

He continues "Although nullification is the natural and usual consequence of disobedience (Maxwell on the Interpretation of Statutes 11th Ed. 364) breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, ..." at p. 143. In a footnote (72) the author points out that in the 12th edition of Maxwell, the sentence "nullification is

the natural and usual consequence of disobedience" is not reproduced, possibly because it was thought to be over emphatic.

Also relevant to a correct approach to the question are the following observations of Winn J. in the case of *Brayhead Ltd. Vs. Berkshire C.C [1964] 1 All E.R. 149.* referred to in the judgments of the Chief Justice and Sharvananda J.: "while a statutory provision may be mandatory in the sense that compliance with it could be enforced by Mandamus, non compliance did not render the condition void because that result was not required for the effective achievement of the purpose of the statute under which the requirement was imposed and not intended by Parliament on a proper construction of the statute". at p. 153

These tests, of de Smith and of Winn J., are based on sound reason and afford a solution to the question we are called upon to decide. I would seek a solution by asking myself the question: is it necessary for the purpose of achieving the objects of the amendment to declare as null and void the notice of assessment because of non compliance by the Assessor with the requirement to communicate to the assessee the reasons for not accepting the return furnished by the assessee? My answer to that question is "NO". What then is the purpose that the amendment seeks to achieve?The purpose the amendment seeks to achieve is to enable the taxpayer to know the reason or reasons as to why his return has not been accepted. Why is it that he should know the reason? It is because up to the date of the amendment he did not have a clue as to why his return was not accepted, and at the stage of appeal he was faced with various difficulties in discharging the burden of proving that the assessor's valuation or assessment was excessive, or arbitrary. Take the simple case of a taxpayer who in his return has valued his house at Rs. 100,000/-. The assessor does not accept his valuation but takes the next step of estimating and assessing it at Rs. 200,000/-. In his reasons for not accepting the return the assessor may, for example, rely on the market price of property in the vicinity for not accepting the assessee's valuation of Rs. 100,000/- made in his return. 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. I am fortified

in my view by an observation of the Chief Justice that "the assessor must now take a firm decision on tenable facts and on reasonable grounds that he will be called upon to justify them in appeal and, that the assessee is now in a better position to deal with the assessor's estimate". I am in entire agreement with that observation.

The extreme result of nullifying the notice of assessment is not necessary for the effective achievement of the purpose Parliament had in mind when it imposed a duty on the assessor to communicate the reasons for not accepting a return. Although the stipulation to communicate reasons is mandatory in the sense that it could ultimately be enforced by Mandamus, I repeat the words of Winn J. that non compliance with that duty does not render the notice of assessment void, because that result is not required for the effective achievement of the purpose of the statute. In my opinion, the assessor would be complying with his statutory duty if he communicates the written reasons either simultaneously with the notice of assessment or within a reasonable time thereafter so as to enable the assessee to utilise the communication at the hearing of his appeal by the Commissioner.

The test suggested by de Smith that breach of procedural or formal rules ought to be treated as a mere irregularity, if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced appears to have commended itself to Sharvananda J. I am in entire agreement that on an application of that test as well, the assessee in the present case is not a person who has suffered any prejudice at all by the failure of the Assessor to communicate the reasons for not accepting his return simultaneously with the notice of assessment.

For these reasons I am in agreement with Sharvananda J. that the application ought to have been refused by the Court of Appeal and that the present appeal ought to be allowed, with costs.

Appeal dismissed.