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VAT controversy moves from law to policy

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LEGAL WATCH

By Nayana

Readers will recall that this newspaper has already highlighted the controversy that developed after it was found that one of the two amendments to the VAT Bill referred to in the determination of the Supreme Court was not given effect to, when the Bill was passed by Parliament.

This concerned Clause 20(6) of the Bill which stated that "...Where a [VAT] registered person makes a taxable supply and the recipient of such supply is not a registered person, such supplier shall issue an invoice giving the total consideration of such supply including the tax charged".

This was objected to on the grounds that the average consumer would not be shown the actual invoice price and the tax component separately, although recipients of supplies who were themselves VAT registered persons would be entitled to a such a breakdown. No such distinction was made in the case of the earlier Goods and Services Tax (GST) which was disclosed separately on all bills, irrespective of whether or not the recipients were themselves GST registered persons.

Counsel for the Consumer Protection Society which had petitioned against certain clauses in the Bill had argued that this distinction violated the right to equality before the law and equal protection of the law guaranteed under Article 12(1) of the Constitution.

The Supreme Court in its determination summed up the argument against this clause thus: "Learned Counsel for the Petitioner pointed out that this provision would entail the nondisclosure of the actual tax component which was to be paid by the consumer, who would now be prevented from knowing what tax he in fact paid; which of course he has a right to know. It would also open the door to an unscrupulous supplier unconscionably and arbitrarily increasing his profits for goods and services and blaming such increases on the undisclosed value added tax, which in turn would result in an increase in the cost of living, thus nullifying the actual purpose of the Bill".

The Court went on to say: "Although no question of unconstitutionality was involved here, [Additional Solicitor-General] Mr. Marsoof for the Attorney-General agreed that this provision needs amendment...."

Marsoof in fact tendered a suggested amendment which is recorded in the determination of the Supreme Court as follows: "20(6) Notwithstanding the provisions of subsection 2, where a registered person makes a taxable supply and the recipient of such supply is not a registered person, such supplier shall issue an invoice giving the consideration of such supply and the tax charged..."

When the Act as passed by Parliament was finally published, it was found to contain the old section 20(6), not the amended one. A letter written by the Consumer Protection Society to Minister of Finance K. N. Choksy drawing attention to the omission was met with a reply that in as much as the Supreme Court had stated that no unconstitutionality was involved, the amendment was not mandatory.

The Minister in his letter stated that "It was therefore agreed to between the Honourable Attorney General and myself that the Parliament was not bound to make the amendment suggested to clause 20(6) by the Additional Solicitor General, in as much as it was not part of the Court's determination".

Both in his letter and in a reply given to a question raised by a Member of the Opposition in Parliament, the Minister emphasized that the decision not to amend Clause 20(6) was a policy decision that Parliament was entitled to take as the Court had held that there was no question of inconsistency with the Constitution.

This column predicted that this might be the Minister's response when we dealt with the developing controversy three weeks ago, when we said: "on the other hand, it is also possible that a calculated decision was taken, based on the fact that the Supreme Court had stated that 'no question of unconstitutionality was involved here'."

Meanwhile the Consumer Protection Society is not satisfied with the Minister's explanation and has sent a counter-reply to his letter. The Society does not accept the Minister's contention that the suggested amendment "was not part of the Court's determination". It has pointed out that its own Counsel refrained from arguing the matter further precisely because of the amendment tendered by the Attorney-General's representative. The Society has quoted from the Supreme Court determination to illustrate that the Court too considered the matter as settled:

Learned Counsel for the Petitioner stated that the above amendment suggested by learned Additional Solicitor-General was in all respects satisfactory and that he was in agreement therewith."

In fact a brief survey of some other countries which have VAT or GST systems indicates that legislative policy has differed from country to country regarding separate disclosure of the tax component in the customer's bill. For instance, in Canada VAT is disclosed separately, whereas in Britain it is not. In Australia, while a trader can optionally disclose the GST component separately, he is also required by law to display the composite price of the goods or services on the principle that the public must know the full price they will have to pay. In certain Third World countries which have introduced VAT, the requirements again differ from country to country.

However, as far as this writer could ascertain, all countries where separate disclosure is not mandatory have a single rate of VAT or GST which applies across the board except for those items that are exempt such as basic foods and most educational and health care services. Under the Sri Lankan VAT Act there are two different bands of VAT, at 10 and 20 per cent respectively (and many basic foodstuffs are not exempt).

In Sri Lanka the previous practice under GST was separate disclosure of price and tax component. The Supreme Court in its determination, as quoted above, clearly indicated that it saw separate disclosure as being necessary to prevent abuse and also as being part of the public's "right to known. What disturbs many observers is that, even against this background, the Minister did not feel it necessary to explain to the public why government "policy" requires non-disclosure.

Meanwhile this column has an access to information policy and next Sunday we hope to give readers the full list of items that are exempt from VAT and those that are taxed at 10 per cent as set out respectively in the First and Second Schedules of the VAT Act No. 14 of 2002 as passed by Parliament. Goods and services not expressly mentioned in either of these Schedules are taxed at 20 per cent.