

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

N. Vaitilingam & Company Limited
No. 70, K. Cyril C. Perera Mawatha,
Colombo 01300.

PETITIONER

C.A 1007/2007 (Writ)

Vs.

1. M. Warusavitharana
The Commissioner of Provincial Revenue
Western Provincial Council
No. 76 1/1, Duminda Building
Galle Road, Colombo 00400
- 1A. L.P Thilakarathna
The Commissioner of Provincial Revenue
Western Provincial Council
No. 76 1/1, Duminda Building
Galle Road, Colombo 00400
- 1AA. U. P. G. Ududeniya
The Commissioner of Provincial Revenue
Department of Revenue
Western Provincial Council
No. 660, Galle Road,
Colombo 00300
- 1B. G. A. N. Jayantha
The Commissioner of Provincial Revenue
Department of Revenue
Western Provincial Council
No. 660, Galle Road,
Colombo 0030.

2. The Western Provincial Council
Independence Square,
Colombo 00700.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
H. N. J. Perera J.

COUNSEL: M. A. Sumanthiran with Javad Mansoor for the Petitioner
Janak de Silva D.S.G., for the Respondents

ARGUED ON: 05.04.2013

DECIDED ON: 07.08.2013

GOONEATNE J.

The Petitioner N. Vaitilingam & Company Limited, as pleaded in the petition carries on the business of manufacture and distribution of 'river' brand galvanized roofing sheets etc. and also engage in the sale of imported and locally purchased items of hardware. In paragraph 4 of the petition it is pleaded that Petitioner Company pays value added tax to the Inland Revenue Department on manufactured items and are liable to pay Turn Over Tax to the Western Provincial Council on the sale of imported and locally purchased hardware items. In

paragraph 7 of the petition, position of the Petitioner in this application is stated as follows:

- (i) Due to an oversight the Petitioner paid the 1st Respondent turnover tax for the quarter commencing 30th June 2002, 30th September 2002, 31st December 2002, 31st March 2003, 30th June 2003, 30th September 2003, 31st December 2003, 31st March 2004, 30th June 2004, 30th September 2004, 31st December 2004, 31st March 2005, 30th June 2005 and ending 30th September 2005;
- (ii) Due to an oversight the Petitioner paid turnover tax of 1% in respect of the turnover attributable to the sale of manufactured (i) galvanized roofing sheets and (ii) zinc aluminium/colour coated roofing sheets;
- (iii) In the circumstances, the Petitioner by an oversight included turnover arising from manufacturing to its turnover from the sale of other imported and locally purchased goods;
- (iv) Due to the aforesaid error, the Petitioner paid the Commissioner of Revenue of the Western Provincial Council an aggregate sum of Rupees Eighteen Million Four Hundred and Eighty Nine Thousand and Three Hundred and Four (Rs. 18,489,304.00) – as certified by the Petitioner's Auditors (Chartered Accountants) – for the quarters set out above.

Petitioner urge that the sum paid by the Petitioner to the Commissioner of Revenue of the Western Provincial Council was not legally due to the said Commissioner. Thereafter the Petitioner having realized the erroneously making

such payment, made representation to the authorities concerned by P4 (letter personally given to Mr. Tudor, Senior Assessor). In the petition it is more or less pleaded that the Senior Assessor Mr. Tudor agreed to the position of the Petitioner Company i.e Petitioner Company is a manufacturer (as in paragraph 4(ii)) and accepted that the refund for the preceding 3 years commencing 2003 January to September 2005 would be allowed. The said Senior Assessor assured the Petitioner that a balance sum to be refunded in a sum of rupees Sixteen Million Three Hundred and Three Thousand Five Hundred and Fifty. Balance due to be set off against the Turnover Tax payable from the quarter ended 31.3.2006. As such approval for same would be obtained.

However in this application Petitioner Company emphasize that the only basis of refusal to refund or set off the above taxes by the Respondents is on the basis that there is no right to make a refund of the over paid taxes, in law.

Petitioner argues that in terms of Section 101 of the Financial Statute of the Western Province, provides for the refund of payments made as Turnover Tax. By P14 & P35 the position of the Respondents are stated. The main relief sought are a Writ of Certiorari to quash the order of the 1st Respondent in document P35, and a Writ of Mandamus to refund the amounts stated above or to set off the same against Petitioner's Turnover Tax liability commencing from

the quarter ended on 31st December 2005 as in sub paragraph (iii) of the prayer to the petition. There has been lot of correspondence between the parties, but the Respondents seems to have denied all attempts of the Petitioner Company to get relief in terms of the prayer to the petition.

In the submission made to this court the Petitioner Company very emphatically state that the Company is involved in two principal activities. i.e.

(a) Manufacturer and Distributor

(b) Purchase for sale both imported and local hardware items.

As regards items manufactured, value added tax be paid to the Inland Revenue Department, but not liable to pay Turnover tax. On the sale of imported/local items liable to pay Turnover Tax to the Western Provincial Council. This is an aspect stressed and argued in this court by learned Counsel for Petitioner. On the above basis this court has been invited to consider the 13th Amendment to the Constitution and the Provincial Council list of same which refer to Turnover Tax on wholesale/retail sales within the Province. In explaining further Section 3(1) of the Financial Statute of the Western Province Act No. 6 of 1990 is mentioned and the Petitioner states Turnover Tax cannot be charged or recovered from a manufacturer. Petitioner is a manufacturer. The Petitioner is a manufacturer regarding the items as in paragraph 4(i) of the petition. It is noted

that paragraphs 4(i) and 4(ii) refer to the business activities of the Petitioner Company both as manufacturer and wholesale/retail dealer.

The Respondents in this application have filed two sets of objections (objection dated 12.7.2008 and Amended objections of 29.6.2011). However the Petitioner has in the counter affidavit of October 2011 objected to the amended objections after the close of pleadings and state that it should not be admitted. Whatever it may be, the counter affidavit of Petitioner has answered the amended counter objections of the Respondents. In the objections it is pleaded inter alia that the statements in the relevant Department file do not reflect the statements of the Senior Assessor Mr. Tudor, and that the said Mr. Tudor expired on 25.1.2007. It is further pleaded that the said Mr. Tudor did not have the authority to make representations or give any assurance in favour of the Petitioner Company.

In the amended objections of the Respondents it is pleaded inter alia that the Respondents are unaware that value added tax had been paid to the Inland Revenue Department. Further it is pleaded that Petitioner had identified his business as General Hardware Merchants and Importers. As such Petitioner is estopped from identifying itself as a 'manufacturer'. (vide R1 – R4). Another point raised in the objections is that turnover of the Petitioner consists of turnover of

the head office and the factories. Petitioner had paid turnover of the head office and not from the factories and the Audit Financial Statements of the Petitioner marked R42 to R45 the turnover of the Head Office of the Petitioner is not identified as a manufacturing turnover. As a matter of law the Respondents pleads in the Amended Objections:

- (a) The Petitioner is guilty of unmeritorious conduct in that it has unilaterally set-off the amount it is claiming as over payment for the years 2002/03, 2003/04 and 2004/05 in these proceedings from the actual amount of turnover tax it has to pay for the period commencing from the quarter ending on 31.12.2005 up to 31.03.2009. Such a course of action is not available to the Petitioner in law or in fact since set-off cannot be set up against the State/an arm of the State/a State agency and/or the issue is sub-judice as it forms the subject matter of this application.
- (b) This application is misconceived in law,
- (c) There has been undue delay on the part of the Petitioner in making this application.
- (d) The purported representations attributed to Senior Assessor Mr. H.D.A.J. Tudor is ultra vires, in as much, he did not have the authority, statutory or otherwise, to make the purported representations;
- (e) This Court does not have the have jurisdiction to grant the relief claimed.

We have perused all the pleadings filed in this application and heard oral submissions of learned counsel on either side. The material placed before

this court no doubt indicate that the Petitioner was engaged in the business of manufacturer within the meaning of Section 59 of the Turnover Tax Act No. 69 of 1981 and the Provincial Council Turnover Tax Act No. 25 of 1999, and also in the wholesale and retail business. Nor can this court reject the position of the Petitioner as regard the method of payment of taxes. i.e value added tax payable on manufactured items to the Inland Revenue Department and liable to pay Turnover Tax to the Provincial Council on wholesale/retail sales of imported and local items. The crux of the matter is whether the Plaintiff Company is entitled to the refund of over paid taxes or to set off the overpaid taxes in the manner pleaded and urged on behalf of the Plaintiff Company.

It cannot be said that the Financial Statute of the Western Provincial Council No. 6 of 1990 makes no provision to refund payments. Section 101 (2) to Section 101(4) reads thus:

- (2) If it is proved to the satisfaction of the Commissioner by claim duly made in writing within three years after the end of a quarter that any person has paid turnover tax in excess of the amount with which he was properly chargeable for that quarter, such person shall be entitled to have refunded the amount so paid in excess.
- (3) Provided that nothing in this section shall operate to extend or reduce any time limit for appeal or repayment specified in any other section or to

validate any objection or appeal which is otherwise invalid or to authorize the revision of any matter which has become final and conclusive.

- (4) Where it is proved to the satisfaction of the Commissioner by claim made in writing that any person has paid any sum referred to in subsection (1) of section 12 which is in excess of the sum which he should have paid if such sum were calculated in accordance with the provisions of subsection (2) of that section, such person shall be entitled to have refunded the amount so paid in excess, if such claim is made within three years of the end of the quarter in which the sum referred to in the aforesaid subsection (1) was paid.

The above sections contemplate a refund of Turnover Tax paid in excess. Therefore on a legal basis I would agree that a refund of tax could be made. Petitioner's point seems to be that excess was paid owing to an incorrect understanding of the term 'business' in Section 106 of the said Statute. Section 3(2) of the Act excludes sales by a manufacturer and as such not chargeable with Turnover Tax. Petitioner Company state it paid an excess of turnover tax by including turnover from its manufacturing activity on which value added tax was duly paid. In support of payment to the Inland Revenue Department document P6 had been produced. P6 not denied by Respondent (paragraph 8 of Petition of the Petitioner admitted by Respondent in their objections). However the vital paragraph 7 of the petition of the Petitioner denied by the Respondents. Position

of the Respondents is that turnover of the Petitioner consists of the turnover of the Head Office and the factories, and as such Petitioner had paid turnover tax of the head office and that of the factories not calculated. In this regard Respondents have produced R42 to R45 to prove the above point. Respondent reply supported by R42 to R45 had been explained by the Petitioner in paragraph 11 of the counter affidavit of Mr. Edmond, Financial Manager of Petitioner Company.

It is stated therein that these inaccuracies had been brought to the notice of the Respondent and subsequently rectified. It is very unfortunate that court is not in a position to go into that aspect since it remains an important disputed facts. Nor can this court decide Writ Application on a balance of probability. The Respondents have given the Petitioner enough opportunities to place their case, but it appear to dispute the position of the Petitioners, as stated above. Another area of disputed facts are again pleaded by the Petitioner in their own petition in paragraph 8(iii), with reference to letter P10 pertaining to under payment of Rs. 44,417/00 by the Petitioner. Petitioner rejects P10 but court cannot be so well equipped to rule on this aspect in a review procedure.

Petitioner complains of excess payments. The Respondents deny paragraph 7 of the petition where the Petitioner seek to explain their mistake. In the pleadings of the Petitioner under payments, as above is stated (P10) and Petitioner rejects such position. Having also considered the role of Mr. Tudor the Senior Assessor, it is unfortunate that a record of what transpired in those discussion are only made available by the Petitioner. Respondents reject any assurances given by Mr. Tudor, as stated by the Respondents he had no right to do so. It is possible to argue that there was some expectation which could be relied upon by the Petitioner. However this court cannot conclude whether expectation or assurance given by Mr. Tudor amounts to a legitimate expectation, in the absence of proper official records being placed before court.

This court observes that vital facts relied upon by the Petitioner Company are disputed i.e excess payment of tax though specifically not denied by Respondents, but at least by implication Respondents reject Petitioner's contention. Further when inaccuracies and errors are almost admitted by the Petitioner relief cannot be granted. This court is reluctant to grant the discretionary remedy available by way of writ jurisdiction.

I would refer to the following case law:

Thajudeen Vs. Sri Lanka Tea Board & Another 181(2) SLR 471..

Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a writ will not issue.

Mandamus is pre-eminently a discretionary remedy. It is an extraordinary, residuary and supplementary remedy to be granted only when there is no other means of obtaining justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the court will decline to exercise its discretion in his favour if a specific alternative remedy like a regular action equally convenient, beneficial and effective is available.

Public Interest Law Foundation Vs. Central Environment Authority 2001(3) SLR

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The Petitioner sought a Writ of Certiorari to quash the decision of the Central Environmental Authority (C.E.A) approving the construction of the Southern Expressway” on the basis that (i) there was a failure to analyse or consider reasonable and environmentally friendly alternatives. (ii) the Environmental Impact Assessment Report (EIA) does not provide proper intelligible and adequate reasons for the rejection of alternatives to the Project.

Held:

- (i) By a grant of certiorari the Court does not and cannot impose its own decisions. It simply quashes the original decision.
- (ii) The Court is ill equipped to form an opinion on environmental matters they being best left to people who have specialized knowledge and skills in such affairs. Courts may decline to exercise review because it is felt that the manner is not justifiable.

- (iii) Judicial review is concerned not with the decision but with the decision making process.

Per Gunawardena, J.

“It is worth observing that the review procedure is not well suited to the determination of disputed facts...”

- (iv) Court is not in a position to choose between competing schemes.
- (v) Decision making is an important aspect of the work entrusted to the CEA. Any person endowed with decision making powers will appreciate that discretion is an aid to the exercise of these powers. The C.E.A too is left free to make a choice among possible courses of action.

The letters P14 and P35 attempts to convey the decision of the Respondents. Having taken both documents (subject to the view expressed on a legal basis) in the context of the problem in hand, this court does not wish to interfere more particularly as regards document P35. Whether payments made by the Petitioner is an excess payment of tax or whether tax due are underpaid as claimed by the Respondents in letter P10 remains disputed facts.

As regards the Writ of Mandamus, we refer to the following authority.

In P. K. Banerjee Vs. L. T. Symond AIR (1947) Cal 307...

Whether the facts show the existence of any or all prerequisites to the granting of the writ is a question of law in each case to be decided not in any rigid or technical view of the question but according to a sound and reasonable interpretation. The court will not grant a Mandamus to

enforce a right, not of a legal but of a purely equitable nature however extreme the inconvenience to which the applicant might be put.

A Mandamus will not be granted to correct an erroneous decision as to fact 2 CLW 14; 10 Times 65; 12 Law Rec 176. The grant of Mandamus is a matter for the discretion of the court. It is not a writ of right and is not issued as a matter of course. 1 CLW 306.

In all the above circumstances we are not inclined to interfere with the decision of the Respondents. As such this court is not in a position to grant relief to the Petitioner Company.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J.

I agree,

JUDGE OF THE COURT OF APPEAL