IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for the issue of Writ of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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FONTERRA BANDS LANKA (PVT) LTD.
(formerly known as New Zealand Milk Lanka Ltd), of No. 100, Delgoda Road, Biyagama.

C.A. (Writ) Application No.663/2010

PETITIONER

Vs

1. The Commissioner GeneraL Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

2. Mr. S.H.P.C.S. Perera, Assessor Unit 6B, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

3. Ms. R.K.C. Chitralatha, Senior Assessor, Unit 6B, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

4. Mr. J.M. Jayawardena,
Commissioner Appeals,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

RESPONDENTS

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BEFORE : Deepali Wijesundera J.

COUNSEL : K. Kanag Isvaran PC for the Petitioner.

Priyantha Nawana DSG for the Respondents.

ARGUED ON : 18th March, 2014

DECIDED ON : 18th July, 2014

Deepali Wijesundera J.

The petitioner is a duly incorporated company in Sri Lanka engaged in importing manufacturing and selling milk powder and milk products. The respondents are the Commissioner General and Assessors of the Department of Inland Revenue.

The petitioner is challenging the purported assessment of taxable income for the year of assessment 2004/2005 and the determination made pursuant to that the *Inland Revenue Act No. 38 of 2000.*

The petitioner has filed this application for writs of Certiorari to quash letters marked as **P4** dated 25/03/200, Assessment made on 28/03/2008 notice dated 11/06/2008 marked as **P6**, determination dated 01/07/2010 marked as **P13**, reasons for the said determination dated 14/07/2010 marked as **P15**. Petitioner has also prayed for a writ of Prohibition to restrain the respondents from implementing the assessment dated 28/03/2008 and the notice marked **P6**.

The petitioner before the 30th of November 2005 in terms of Sec. 98 of the Act had submitted its Tax Returns for the assessment year 2004/2005 to the respondents this is marked as **P2** and the receipt issued to the petitioner is marked as **P3**. The petitioner has received a letter dated 25/03/2008 from the 2nd respondent stating that the Income Tax Return for the year 2004/2005 has not been accepted in terms of *sec. 134(3) of Act No. 38 of 2000* and said letter is an intimation. This is marked as **P4**. The learned Presidents' Counsel for the petitioner stated that any assessment of the income tax payable by the petitioner for the year of assessment ending 31/03/2005 could be made only before expiry of three years which is 31/03/2008, and the notice and rejection, both had to be communicated to the petitioner prior to this date. The petitioner's argument was that a letter was sent three day prior to the expiry of the said three years and that it is only a letter of intimation and the petitioner was never sent a notice requiring the petitioner to pay in terms of the law.

By letter dated 25/04/2008 **(P5)** the petitioner has set out reasons for disagreeing with the said question and explained the petitioner's position. Thereafter the 3rd respondent has sent a notice of assessment dated 11/06/2008 **(P6)** under Se. 134(1) of the said Act and the petitioner states that **P6** was sent seventy days after the three years period, the time limit set out in Sec. 134(1). The petitioner has appealed

against this notice to the 1st respondent under Sec. 136 of the said Act saying the said notice is time barred **(P7).** At the inquiry the respondents have stated the said notice was sent prior to the expiry of the given three years and that the date on which it was sent is 25/03/2008 which the petitioner states is the letter of intimation and is not a notice sent within the given time under Sec. 134(1) and that it is a patent violation of the mandatory provisions of *Section 134(3) of the Act No. 38 of 2000.* The determination of the inquiry held by the 4th respondent is marked as **P13**. The petitioner has communicated his dissatisfaction to the 1st respondent acting under 134(1) **(P14)** for which the 4th respondent acting for 1st respondent has given the reasons for the said determination **(P15).** The petitioner states by not giving reason for the rejection of this income tax return and not sending the notice within the stipulated time period were rejected by the 4th respondent and that it is a misapplication of the law and the respondents are in gross violation of the statutory provisions and that the respondents have acted ultra vires. The petitioner has also appealed to the Board of Review **(P16).**

The learned Presidents' Counsel for the petitioner cited Samarakoon Chief Justice's judgment in **Kanagaratna Vs. Rajasunderam (1981) 1SLR 492** and the also Bandaranayake Judge's judgment in **Somasunderam Vanniasingham Vs. Forbes and Another (1993) 2SLR 362.**

The argument of the respondents were that the law does not require to the notice of assessment to be dispatched within three years, that it only requires the rejection of the tax return and the assessment to be done within the time limit prescribed. They also stated that the petitioner's appeal against the quantum of the assessment is an admission of the fact that the assessment is valid in law. The respondents further stated that the assessment was made before the 31st of March 2008 and the petitioner was duly informed and that the notice of assessment was dispatched on 11/06/2008 and an appeal was lodged by the petitioner on 01/08/2008. Respondents stated if the petitioner intended to take up an objection to the act of assessment on the basis that it was out of time and thus ultra vires, the petitioner ought to have applied for judicial review at that time in 2008 instead of appealing against the assessment and belated if taking up the issue of time bar in these proceedings. Respondents stated that the petitioner has not suffered any injustice. The assessment made on 28/03/2008 is marked as **1R3** and the notice as **1R2.** The respondents stated since the petitioner's appeal is pending before the Board of Review the petitioner has not established a legal basis for the application of writ jurisdiction in this court.

In short the main submission of the respondent was that since the *Inland Revenue Act No. 38 of 2000* has internal remedy for challenging

the decision of the Commissioner General of Inland Revenue the petitioner is precluded from seeking a remedy in a writ application by passing the remedy provided within the four corners of the said Act.

This court has to decide whether the petitioner is entitled to relief by way of a writ. The issue relating to time bar the respondents stated under Sec. 134(3) proviso the time bar does not apply in the instant case.

Sec 134(3) reads thus;

(3) Where a person has furnished a return of income, the Assessor may in making an assessment on such person under subsection (1) or under subsection (2), either....

(a) accept the return made by such person; or

(b) if he does not accept the return made by that person estimate the amount of the assessable income , of such person and assess him accordingly:

Provided that where an Assessor does not accept a return made by any person for any year of assessment and make an assessment or additional assessment on such person for that year of assessment, he shall communicate to such person in writing, his reasons for not accepting the return.

In the instant case the petitioner has made a self-assessment **(P3)** the respondents by **(P4)** has informed the petitioner that the amounts stated is not acceptable. The petitioner's argument was that **P4** is not a refusal of the self-assessment but a letter of intimation but **P4** was sent to the petitioner by the respondents after his assessment was sent, the petitioner has made a reply to **P4** by **P5** and has also appealed to the 1st respondent against the notice sent.

Sec. 136(1) which deals an appeals to the Commissioner General states;

> ***136 (1). Any person who is aggrieved by the amount of an assessment made under this Act or by the amount of any valuation for the purpose of this Act may, within a period of thirty days after the date of the notice of assessment, appeal to the Commissioner-General against such assessment or valuation:***

The petitioner being dissatisfied with the determination of the Commissioner General has made an appeal to the Board of Review under Sec. 138(1).

The petitioner after receiving **P4** and **P6** had appeal to the 1st respondent and only after the 1st respondent's determination was given has made this application stating the assessment is time barred under Sec. 134(5).

The proviso to Sec. 134(5);

Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person, of any arrears relating to the profits from employment of that person for that year of assessment;

Provided further that, where in the opinion of the Assessor, any fraud, evasion or willful default has been committed by, or on behalf of, any person, in relation to any income tax, payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment.

Therefore the petitioner can not say that **P4** is not a refusal or an amendment but a letter of intimation P4 at the beginning itself states *"I refer to the Income Tax return furnished for the above year of assessment and the Subsequent Audit carried out by the officers of*

Inland Revenue from the documents and records submitted to the Department and hereby inform you that the Revenue Tax return has not been accepted due to the following reasons". After stating the reason on page 3 the amendments are stated. The petitioner after replying to this and appealing to the 1st respondent has come to this counsel seeking for a writ for which the petitioner is not entitled to under the said Act.

In Kanagaratna Vs. Rajasunderam it has been held "the availability of an alternative remedy does not prevent a court from issuing a writ of Prohibition in cases of excess or absence of jurisdiction which is not applicable to the instant case. The law is very clear in this case and one can not say there is an excess or an absence of jurisdiction.

In **Somasunderam Vanniasingham Vs. Forbes and Another** it is stated "A party to an arbitrator award under the Industrial Disputes Act is not required to exhaust other available remedies before he could challenge illegalities and errors on the face of the record by an application for a writ of Certiorari."

There is no illegality or error on the fact of the record in the instant case. Both these judgments can not be applied to the instant application. Here the law is clearly stated and the petitioner accepting **P4** has appealed to the 1st respondent and after the 1st respondent's determination has taken a belated defense of time barr the petitioner should have applied for judicial review at that time instead of appealing against the assessment without belated if taking up the issue of the time bar of the assessment.

The petitioner's appeal is presently pending before the Board of Review and the petitioner did not establish a legal basis for the invocation of writ jurisdiction of this court.

For the afore stated reasons I refuse the application of the petitioners with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL.