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

Kishani Industries (Pvt) Ltd.,
No. 152,
Seeduwa Road,
Udugampola.
Petitioner

CA CASE NO: CA/WRIT/359/2015

Vs.

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Colombo 2.
And 4 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray for the Petitioner.
Suranga Wimalasena, S.S.C., for the Respondents.

Decided on: 03.12.2019

Mahinda Samayawardhena, J.

The Petitioner filed this application against the Commissioner General of Inland Revenue (hereinafter "the Respondent") to compel the latter by way of writ of mandamus to pay to the Petitioner a refund of Rs.4,405,943/30, or, in the alternative, any sum to which the Petitioner is entitled, as a refund of the amount paid in excess, in terms of section 200 of the Inland Revenue Act, No.10 of 2006.

The Petitioner's case relates to the refunds in respect of five years of assessments, namely, 2006/2007, 2007/2008, 2008/2009, 2009/2010 and 2010/2011.

The basis of the Petitioner's claim is that the Ministry of Health withheld 5% of all payments made to the Petitioner for supply of surgical gauze and remitted the same to the Department of Inland Revenue in terms of section 153 of the Inland Revenue Act and the amounts so remitted (withholding tax) during each such year of assessment mentioned above are in excess of the amount of the income tax payable by the Petitioner for the particular year of assessment, and hence the Petitioner is entitled in law to have the excess amounts refunded by the 1st Respondent in terms of section 200 of the Inland Revenue Act.

The Respondent filed objections to this application.

The Respondent does not dispute that withholding tax deducted and remitted to the Department of Inland Revenue during each of the aforesaid years of assessment is in excess of the amount

payable as income tax by the Petitioner for the particular year of assessment—vide *inter alia* P19, P20, P24.

As seen from P19, the position of the Respondent is that the Respondent is a tax defaulter since 1997 under various Statutes, and the tax in default by the Petitioner is much greater than the refund the Petitioner claims, and, therefore, the Respondent is entitled to set off the tax in default against excess payments made by the Petitioner.

The counter submission of the Petitioner is that the income tax is charged and payable as provided in the Inland Revenue Act for a year of assessment, and the taxpayer's income tax liability is ascertained for a particular year of assessment without regard to another year of assessment, and if there is an excess payment in a particular year of assessment, the Respondent is under a statutory duty under section 200 of the Inland Revenue Act to refund it to the taxpayer, and the Respondent is not empowered to recover from the said excess any amount alleged to be in default by the taxpayer for any other year of assessment.

After brief oral submissions, both parties were allowed to file written submissions. The written submission of the Petitioner was filed first, followed by that of the Respondent.

At the outset I must state that (a) the system of justice which prevails in our country is adversarial, as opposed to inquisitorial, and therefore it is the duty of the Judge to decide the case on how the competing parties present the dispute

before him; (b) taxing statutes shall be strictly construed and the subject shall not be taxed without clear words for that purpose.

With that in mind, let me consider the standpoint taken by the learned Senior State Counsel (SSC) in his written submission.

The pivotal argument of the learned SSC is (as I have already stated) that the Petitioner is a tax defaulter under various statutes from 1997, and he has admitted this in correspondence with the Respondent; and the cheques given in settlement of taxes in default have been returned, which have not been disclosed to Court.

I think those matters, even if true, are beside the point. The matter put in issue in this application is not whether the Petitioner is a tax defaulter, but whether the Respondent can set off tax in default in a particular year of assessment against the refund due in respect of another year of assessment.

This question has not been answered by the learned SSC, and, therefore, the Court, in this case, has no alternative other than to accept the version of the Petitioner.

Instead, the learned SSC, in his written submission, relies on technical objections in defeating the application of the Petitioner.

The learned SSC states that facts are in dispute and therefore writ does not lie. The amount to be paid as excess payments may be in issue, and therefore granting the main relief stated in paragraph (b)(i) of the prayer to the petition may not be possible,

but the alternative relief stated in paragraph (b)(ii) of the prayer to the petition can be granted.

The learned SSC has adverted to the delay on the part of the Petitioner in coming to Court. This cannot be a good ground as seen from P24 whereby a letter sent by the Respondent to the Petitioner reveals the issue was still a live issue even by 09.02.2015. The last letter attached to P24, sent by the Petitioner to the Respondent, is dated 09.07.2015. This application has been filed on 16.09.2015.

The learned SSC emphasises that a tax defaulter cannot come before a Court seeking a discretionary relief such as writ, claiming a refund where the tax in default is much greater than the refund.

As I have already stated, in construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law. There is no equity in a taxing provision and such provision cannot be decided on conjectures and inferences.

In the Supreme Court case of *Vallibal Lanka (Pvt) Limited v. Director General of Customs*[1], Sripavan J. (later C.J.) held:

> *It is the established rule in the interpretation of statutes levying taxes and duties, not to extend the provisions of the statute by implication, beyond the clear import of the*

[1] [2008] 1 Sri LR 219 at 223

> *language used or to enlarge their operation in order to embrace matters not specifically pointed out. In case of doubt, the provisions are construed most strongly against the state and in favour of the citizen.*

If the Respondent thinks that the Petitioner has defaulted payment of taxes, he must follow the law to recover them.

If the learned SSC endorses the view of the Respondent that the Respondent can set off default tax against the refund due, irrespective of the year of assessment, he shall inform the Court under which provision of the Law the Respondent is empowered to do so. The learned SSC has not shown such a provision to this Court.

Another argument of the learned counsel for the Petitioner is that the alleged taxes in default are, in any event, time barred and therefore unrecoverable.

The learned SSC does not say that they are not time barred. His position is that, notwithstanding time bar, they are recoverable in terms of section 2 of the Default Taxes (Special Provisions) Act, No.16 of 2010, and he quoted the following portion of the said section in support.

> *Notwithstanding anything in any other written law to the contrary, the provisions of this Act shall apply to the recovery, discharge or write-off of taxes charged and levied on or before December 31, 2009 under any of the laws specified in the Schedule to this Act and which*

> *<u>continue to be in default</u> under any such laws, for a period of over two years or more, or where applicable, after the appellate procedures specified in any such laws for the recovery of any such tax (in this Act referred to as "tax in default") have been exhausted: (emphasis mine)*

It is the submission of the learned counsel for the Petitioner that section 2 of the Default Taxes (Special Provisions) Act has not repealed section 200 of the Inland Revenue Act, and, in any event, that section is applicable to taxes that "continue to be in default", and tax liabilities extinguished by operation of law by being time barred are not taxes that "continue to be in default", and therefore do not fall within section 2 of the Default Taxes (Special Provisions) Act. I am inclined to accept that argument. Any doubt in the taxing statutes shall be resolved in favour of the taxpayer.

For the aforesaid reasons, I grant the petitioner the alternative relief, as prayed for in paragraph (b)(ii) of the prayer to the petition dated 14.09.2015. No costs.

Judge of the Court of Appeal