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

In the matter of an application in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for Mandates in the nature of Writs of *Certiorari, Prohibition & Mandamus*.

Court of Appeal Case No.

CA/WRT/454/19

Dr. D. M. S. Dissanayake
Medical Officer,
Base Hospital,
Kuliyapitiya.

Petitioner

1. Hon. Mangala Samaraweera,
Minister of Finance.

1A. Hon. Mahinda Rajapaksa,
Minister of Finance.
(1A Added Respondent)

1B. Hon. Basil Rajapaksa,
Minister of Finance.
(1B Added Respondent)

2. Dr. R. H. S. Samaratunga,
Secretary to the Treasury &
Secretary to the Ministry of Finance.

2A. S. R. Attygalle,
Secretary to the Treasury &
Secretary to the Ministry of Finance.
(2A Added Respondent)

3. K.A. Vimalenthirarajah,
Director General,
Department of Fiscal Policy,
1st to 3rd Respondents are from the
Ministry of Finance and Planning,

General Treasury,
The Secretariat,
Colombo 01.

4. P.S.M.Charles,
Director General of Customs.

4A). Major General G. V. Ravipriya (Retd.,)
Director General of Customs,
(4A Added Respondent)

5. I. A. M. Arthanayake,
Additional Director General of Customs
(Corporate).

6. Sunil Jayarathna,
Additional Director General of Customs
(Revenue & Services),
4th to 6th Respondents are from:
Customs Department,
Customs House,
40, Main Street,
Colombo 11.

7. Sri Lanka Ports Authority
19, Chaithya Road,
Colombo 01.

8. Hon. Sagala Ratnayake,
Minister of Ports & Shipping and Southern Development,
Ministry of Ports & Shipping and Southern Development,
19, Chaithya Road,
Colombo 01.

8A). Hon. Johnston Fernando,
Minister of Ports & Shipping,
Ministry of Ports & Shipping,
19, Chaithya Road,
Colombo 01.
(8A Added Respondent)

8B). Hon. Rohitha Abeygunawardena
Minister of Ports & Shipping,
Ministry of Ports & Shipping,

19, Chaithya Road,
Colombo 01.

(8B Added Respondent)
Colombo 01.

9. The Government Printer,
Department of Government Printing,
118, Dr. Danister De Silva Mawatha,
Colombo 08.

Respondents

Before: **M. T. MOHAMMED LAFFAR, J.**

Counsel: K. Deekiriwewa with Dr. M.K. Herath, Dr. K. De Silva and J. G. Arachchige for the Petitioner.

S. Dharmawardene, ASG and A. Gajadeera, SC for the Respondents.

Argued on: 02.02.2022

Decided on: 25.07.2022

MOHAMMED LAFFAR, J.

The Petitioner by his Petition dated 14.10.2019 is seeking, *inter alia*, the following reliefs:

i. A mandate in the nature of Writ of Certiorari quashing the impugned antedated *ultra vires* Gazetted Regulation bearing No. 2118/24 dated 09-04-2019 marked as X6.

ii. A mandate in the nature of Writ of Prohibition against the 1st and 6th Respondents prohibiting the implementation or the putting it into operation of such an Order which had been published in the Gazette by antedating bearing No. 21118/24 dated 09-04-2019 marked as X6 which is absolutely and incurably bad in law in terms of the law of the land.

iii. A mandate in the nature of Writ of Mandamus to the 4th Respondent directing her to accept and pass the bill (Cusdec) correctly framed by the Petitioner under section 47 of the Customs Ordinance in respect of a Double Cab vehicle imported by the Petitioner who is the consignee without demanding the Petitioner to pay luxury tax based on an antedated gazetted notification at the time of submission of entries (Cusdec) to the Director General of Customs for the purpose of computation of applicable levies.

iv. A mandate in the nature of Writ of Mandamus to the 1st Respondent directing him to delete or remove Double Cabs (Utility Land Vehicles) whether patrol or diesel from being a vehicle that gets subjected to the luxury tax in terms of the schedule which describe the type of vehicles that gets subjected to the luxury tax.

v. A mandate in the nature of a Writ of Mandamus compelling the 1st and 4th Respondents to perform their public duty by accepting the grave error committed by them or their subordinates or employees and/servants and in consultation with the Minister concerned of the Sri-Lanka Ports Authority and Sri-Lanka Ports Authority, in the public interest to make good the loss by refunding a considerable portion of the total demurrages charged especially the penal occupational charges after deducting the Sri-Lanka Ports Authority landing, handling and basic occupational charges.

vi. A mandate in the nature of Writ of Mandamus compelling the 1st to 6th Respondents to perform their public duty by refunding the "Luxury tax amount" that they have demanded, charged and collected based on the impugned ultra vires antedated Gazetted Regulation at a stage when such a demand was not warranted by law.

At the argument of this application, the learned Counsel for the Petitioner informed Court that he would not pursue the relief as set out in paragraph "g" of the prayers to the Petition which is reiterated in the forgoing paragraph No. iv.

<u>FACTUAL MATRIX:</u>

The Petitioner imported a motor vehicle (a diesel double cab with a cylinder capacity of 2800 cc) on a concessionary permit. The letter of credit was opened on 04-05-2019. The Bill of Lading (X10B) and the Delivery Order (X10C) pertaining to the said vehicle are dated 29-06-2019 and 23-07-2019 respectively. As per the CUSDEC (X10D) the vehicle arrived on 07-07-2019. In terms of the impugned Gazette bearing No. 2118/24 dated 09-04-2019 (X6 or 2R3) the assessment of the luxury tax on the said vehicle was made on 13-08-2019 (X10E), and thereafter, the Petitioner had paid the luxury tax amounting to Rs. 2,969,860/= on 27-08-2019 and got the vehicle released from the Customs Department.

The contention of the learned Counsel for the Petitioner was that though the 1st Respondent (Minister of Finance) had affixed his signature on the draft regulation of X6 on 09-04-2019, the impugned Gazette containing the regulations made by the Minister has been published only on 02-08-2019. As such, the said double cab that was arrived on 07-07-2019 is not subject to the luxury tax which has been imposed by X6. Hence, the learned Counsel for the Petitioner submits that the decision made by the Sri-Lanka Customs imposing luxury tax on the said vehicle is *ultra vires*.

The Respondents in their objections moved for a dismissal of the Petitioner's application on the basis *inter-alia* that;

a. In terms of the Gazette bearing No. 2113/11 dated 05-03-2019 marked 2R1, the Petitioner is liable to pay luxury tax to the vehicle in suit.
b. Since the Petitioner has already paid the luxury tax amounting to Rs. 2,969,860/= on 27-08-2019 and got his vehicle released, he is estopped from challenging the said tax in this application.
c. As the Petitioner failed to exhaust the alternative remedies provided in law, he is not entitled to invoke the Writ jurisdiction of this Court.

The luxury tax has been imposed on the said vehicle In terms of the Gazette marked as X6. Even though, X6 has been signed by the 1st Respondent on 09-04-2019, as per the letter issued by the Department of Government Printing marked as X9, the same was published on 02-08-2019. Under section 51 (2) of the Finance Act No. 35 of 2018, the regulations made by the Minister will come into operation on the date of publication of the Gazette or on a future date as stipulated in the same, which reads thus;

> *"Section 51 (1) The Minister may make regulations in respect of all matters which are required to be prescribed or for which regulations are authorized to be made under this Act.*
>
> *(2) Every regulation made by the Minister under subsection (1) shall be published in the Gazette and shall come into operation on the date of its publication or on such later date as may be specified therein."*

In these respects, it is apparent that, the vehicle in dispute has arrived before the publication of the Gazette marked X6. It is pertinent to be noted that the Petitioner had submitted the CUSDEC to the Department of Customs before the publication of the impugned Gazette marked X6. In these circumstances, it appears to this Court that the Petitioner is not subjected to the regulations stipulated in X6.

Be that as it may. I shall now turn to the contention of the learned Additional Solicitor General who is appearing for the Respondents stating that the liability of the Petitioner for the luxury tax is based

on the principal Regulations stipulated in the Gazette bearing No. 2113/11 dated 05-03-2019 marked 2V1.

The provisions on the imposition of luxury tax on motor vehicles have been introduced by the Finance Act, No. 35 of 2018. Under section 19 of the said Act, the luxury tax is imposed on **every specified motor vehicle** as prescribed by the regulations. The term 'specified motor vehicle' is defined in the Act as follows;

> *"Section 23: 'specified motor vehicle' means any assembled or unassembled diesel motor vehicle of which the cylinder capacity exceeds 2,300 CC or a petrol motor vehicle of which the cylinder capacity exceeds 1,800 CC or an electric vehicle of which motor power of the engine exceeds 200 Kw, but shall not include a dual-purpose petrol motor vehicle the cylinder capacity of which does not exceed 2,200 CC, dual purpose electric motor vehicle, a van, a single cab or a wagon."*

According to the above interpretation, any assembled or unassembled diesel motor vehicle of which carries the cylinder capacity that exceeds 2300cc is categorized as a specified vehicle. The only exception to the chargeability of luxury tax under the Act is applicable to the vehicles excluded in the above interpretation and the vehicles defined under section 22 of the Act. Admittedly, the vehicle imported by the Petitioner is a brand-new Diesel Double Cab with a cylinder capacity of 2800cc, and therefore, the same falls within the category of specified diesel motor vehicle in terms of the above definition. In these circumstances, it is the view of this Court that the vehicle in dispute is subjected to luxury tax.

The Regulations of Gazette marked 2V1 has been in force with effect from 06-03-2019. The Regulation 3 of the Gazette marked 2V1 reads that the luxury tax on motor vehicles payable in terms of section 19 of the Finance Act, No. 35 of 2018 (as amended), on any specified motor vehicles. The schedule of 2V1 sets out the luxury tax free threshold, and accordingly, for diesel motor vehicles the luxury tax free threshold is mentioned as Rs. 3.5 Mn and the applicable tax rate is 120%. It appears to this Court that at the time of preparing the Bill

of Lading (X10B), the Delivery Order (X10C) and the CUSDEC (X10D), the operative Regulations were 2R1 and not the impugned X6 or 2R3. The imposition of the luxury tax on the vehicle in dispute under the principal Regulation 2R1 has been in operation for the period commencing from 06-03-2019 to 02-08-2019. In these respects, it is the considered view of this Court that the Petitioner is liable to pay the luxury tax in terms of the regulations marked 2V1.

Professor Wade in Administrative Law (Tenth Edition), at page 31, emphasizes that,

> *"Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. If it is not within the powers given by the Act, it has no legal leg to stand on. The situation is then as if nothing has happened, and the unlawful act or decision may be replaced by a lawful one.*

In the case of **Edirisooriya and Others v. National Salaries and Cadre Commission and Others [2011] 2 Sri LR 221,** it was observed that,

> *"The Central principle of Administrative Law, - ultra vires - simply means acting beyond one's power or authority."*

The Court of Appeal, in **Gunaratne v. Chandrananda de Silva [1998] 3 Sri LR 265** held that,

Per Gunawardena, J.

"it is an inflexible and deep rooted principle of law that no act or decision which is void at its inception can ever be ratified . . . further statutory power must be exercised only by the body or officer in whom it has been reposed or confided unless sub delegation of the power is authorized by express words or necessary implication . . . further one cannot act or decide on his own account when in fact one is devoid of power to so act or decide and seek to validate that act or decision thereafter under the colour of the concept of ratification."

In the instant application, the 1st Respondent has made the Regulations (2R1 and 2R3/X6) within the purview of the provisions of the Finance Act, No. 35 of 2018 (as amended), and therefore, I

decline to accept the submission of the learned Counsel for the Petitioner that the said Regulations are *ultra-vires.* It appears to this Court that the Respondents have acted within the scope of the provisions of the existing laws and regulations.

Besides, the learned Additional Solicitor General submits that, as the Petitioner failed to exhaust the alternative remedies provided in law, he is not entitled to invoke the Writ jurisdiction of this Court.

The Prerogative Writs are discretionary remedies, and therefore, the Petitioner is not entitled to seek the Writ jurisdiction of this Court when there is an alternative remedy available to him.

In **Linus Silva Vs. the University Council of the Vidyodaya University (64 NLR 104**) it was observed that;

> *"The remedy by way of certiorari is not available where an alternative remedy is open to the petitioner is subject to the limitation that the alternative remedy must be an adequate remedy."*

The Court of Appeal in **Tennakoon Vs. Director-General of Customs (2004-1SLR-53)** held that;

> *"The petitioner has an alternate remedy, as the Customs Ordinance itself provides for such a course of action under section 154. In the cir-cumstances the petitioner is not entitled to invoke writ jurisdiction."*

In **Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura and Another [1996] 2 SLR 70,** the Court of Appeal decided that;

> *"There is a presumption that official and legal Acts are regularly and correctly performed. It is not open to the Petitioner to file a convenient and self-serving affidavit for the first time before the Court of Appeal and thereby seek to contradict either a quasi-judicial act or judicial act. If a litigant wishes to contradict the record he must file necessary papers before the Court of first instance, initiate an inquiry before the Court and thereafter raise the matter before the Appellate Court so that the Appellate Court*

would be in a position on the material to make an adjudication on the issues with the benefit of the Order of that Court."

It is to be noted that Section 154 and 164 of the Customs Ordinance provides an alternative remedy for a person aggrieved by any seizure, forfeiture or detention of goods. However, the Petitioner failed to exhaust such remedy provided in law before invoking the Writ jurisdiction of this Court.

The alternative remedy is, always, not a bar to invoke the Writ jurisdiction of this Court. If the Court is of the view that, the alternative remedy is inadequate, where there has been a violation of the principle of natural justice, where the impugned order is without jurisdiction and there are errors on the face of the record, the Petitioner is permitted to invoke the Writ jurisdiction before exhausting the alternative remedies provided in law.

In the case of **Somasunderam Vanniasingham Vs. Forbes and others (1993-2SLR-362)** the Supreme Court observed that;

"A party to an arbitration 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. This is so even though he had the right to repudiate the award under section 20 (1) of the Industrial Disputes Act. A settlement order should not itself be hastily regarded as a satisfactory alternative remedy to the Court's discretionary powers of review. There is no rule requiring the exhaustion of administrative remedies."

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"As I have said there is no rule requiring alternative administrative remedies to be first exhausted without which access to review is denied. A Court is expected to satisfy itself that any administrative relief provided for by statute is a satisfactory substitute to review before withholding relief by way of review."

In this regard, I refer to the observation made by the Supreme Court of India in **Whirlpool Corporation v Registrar of Trademarks, Mumbai, (1998) 8 SCC 1.** It was that

> *"Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."*

In the case of **Harbanslal Sahnia v Indian Oil Corpn. Ltd, (2003) 2 SCC 107**, the Supreme Court of India held that;

> *"In an appropriate case, in spite of the availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is a failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."*

It is pertinent to be noted that, the Petitioner has not exhausted the alternative remedy provided in law and failed to state in his application any reasons for not to avail of those provisions of law.

I shall now deal with the paramount preliminary objection raised by the learned Additional Solicitor General stating that the Petitioner is estopped from challenging the luxury tax on the footing that he has already paid the same to the Customs Department.

Admittedly, the Petitioner has already paid the luxury tax amounting to Rs. 2,969,860/= on 27-08-2019 and got his vehicle released, and

thereafter, on 14-10-2019, instituted the instant application challenging the said tax.

A Petitioner who is seeking relief in an application for the issue of a Writ is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief. (Vide: **Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura and Another [1996] 2 SLR 70.**

Clive Lewis in Judicial Remedies in Public Law (4th ed.) at para. 9-17, emphasizes that:

> *"The claimant should challenge the decision which brings about the legal situation of which complaint is made. There are occasions when a claimant does not challenge that decision but waits until some consequential or ancillary decision is taken and then challenges that later decision on the ground that the earlier decision is unlawful. If the substance of the dispute relates to the lawfulness of that earlier decision and if it is that earlier decision which is, in reality, determinative of the legal position and the later decision does not, in fact, produce any change in the legal position, then the courts may rule that the time-limit runs from that earlier decision."*

The Supreme Court of India in the Case of **the Registrar of Delhi University vs Ashok Kumar Chopra, on 9 October, 1967-ILR 1968 Delhi 364**, observed that;

> *"Where there is an inherent duty of one person to inform the other person of accurate facts and circumstances but remains silent, his failure to discharge this duty will work as estoppels against him."*

It is not merely a positive or active declaration that can be the basis for a plea of estoppel but also an act or omission can constitute such

basis. An estoppel may arise from silence as well as words. However, to constitute an "estoppel by silence" or "acquiescence", it must appear that the party to be estopped must be sound in equity and good conscience to speak and that party claiming estoppel relied upon such silence or acquiescence and was misled thereby to change his position to his prejudice. In some circumstances, silence or inaction can constitute a representation for the purpose of an estoppel. This is where there is a legal duty to make a disclosure or take steps, the omission of which is relied upon as creating the estoppel.

In this application, it is pertinent to note that the Petitioner, without any objections or protest had paid the luxury tax imposed by the Department of Customs and got his vehicle released. Moreover, the Petitioner decided to waive off his right to appeal provided in law as well. As such, it appears that the Petitioner's own conduct by way of acquiescence in the proceedings operate as an estoppel.

I do agree with the contention of the learned Counsel for the Petitioner that a waiver must be an intentional act of surrender of rights with knowledge of what those rights are, as enunciated by the Supreme Court in **Abeywickrema Vs. Pathirana (1986-1SLR-120).** Admittedly, the Petitioner in this application had not objected or protested against the imposition of luxury tax before the Department of Customs and opted not to prefer an appeal in terms of the provisions of the Customs Ordinance, which amounts to an intentional act of surrender of his rights with knowledge.

One should keep in mind the consequences that would flow if the impugned Gazette marked X6 is quashed as prayed for. This Court is mindful of the fact that since 02-08-2019 the Regulations X6 have been in force, and accordingly a large number of vehicles have already been imposed with luxury tax in accordance with the same. As I have already decided that the Petitioner is liable to pay luxury tax not by X6 but upon 2V1. Furthermore, the persons those who have paid luxury tax in terms of X6 have not come before Court. In these circumstances, if the X6 is quashed by way of Writ that would bring disastrous consequences. In this regard, I refer to the

observation made by the Court of Appeal in **Pradeshiya Sabawa-Hingurakgoda Vs. Karunaratne (2006-2SLR-410**), which reads thus;

> *"A Court before issuing a Writ of Mandamus, is entitled to take into consideration the consequences which the issue of the writ will entail."*

For the foregoing reasons, I am of the view that the Petitioner in this application is not entitled to the reliefs as prayed for in the prayers to the application. Thus, the application is dismissed. The parties should bear their own costs as to this application.

Application dismissed.

JUDGE OF THE COURT OF APPEAL