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 and Mandamus*.

Court of Appeal Case No.

CA/WRT/0014/2020

1. WTL AUTOMOBILES (PVT) LIMITED,
   310, Negombo Road Welisara,
   Ragama.

2. Indika Sampath Merenchige,
   Director,
   WTL Automobiles(Pvt) Ltd,
   No:25, St. Nikolas Road,
   Wattala.

Petitioners

Vs.

1. Nadun Guruge,
   Commissioner General of Inland Revenue.

1A. Mr. D. R. S. Hapuarachchi
   Acting Commissioner General of Inland Revenue. Department of Inland Revenue,
   Mawatha,
   Headquarters Building, P.O. Box 515, Sir Chittampalam A. Gardiner,
   Colombo 02.

2. S. D. Champa Malkanthi,
   Commissioner,
   Legacy work (Corporate) Unit,
   Department of Inland Revenue,
   2nd Floor,
   Scout Headquarters Building,
   Sir Chittampalam A Gardiner Mawatha,
   Colombo 02.

3. K. J. K. W. Ediriweera,

Assistant Commissioner,
Legacy Default Tax (Corporate) Unit
Department of Inland Revenue,
2nd Floor,
Scout Headquarters Building,
Sir Chithmpalam A Gardiner Mawatha,
Colombo 02.

4. A. K. Lokubalasooriya,
Assessor, Economic Service Charge (ESC)
Unit Department of Inland Revenue,
Headquarters Building, P.O. Box 515, Sir
Chittampalam A Gardiner Mawatha,
Colombo 02.

5. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

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

Counsel: K. Deekiriwewa with Dr. M. K. Herath, Dr. Kanchana De Silva and Jagath Gajaweerachchi for Petitioners.

S. Balapatabendi, A.S.G with Chaya Sri Nammunni D.S.G for the Respondents.

Supported on: 16-06-2022

Decided on: 29-08-2022

MOHAMMED LAFFAR, J.

The Petitioners have invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking, *inter alia*, the following main reliefs;

a. A mandate in the nature of a Writ of Certiorari to quash the impugned assessment dated 22-04-2019 marked as X5 issued by the 4th Respondent which is manifestly *ultra-vires* the rule-making authority.
b. A mandate in the nature of a Writ of Certiorari to quash the impugned Tax in default notice dated 28-08-2019 marked as X6, sent by the 2nd Respondent which is also manifestly *ultra-vires*.
c. A mandate in the nature of a Writ of Prohibition, prohibiting or restraining the 1st to 4th Respondents from implementing/enforcing and proceeding with the said void *ultra-vires* assessment notice dated 22-04-2019 marked as X5 or try to take steps for a fresh assessment for the year of assessment 2016/2017.
d. A mandate in the nature of a Writ of Prohibition, prohibiting or restraining the 1st to 4th Respondents from implementing/enforcing and proceeding with the said void *ultra-vires* Tax in default notice marked as X6.
e. A mandate in the nature of a Writ of Prohibition prohibiting or restraining the 1st to 4th Respondents from exceeding or misusing their jurisdiction conferred upon them by Economic Service Charge (Amendment) Act No. 7 of 2017.
f. A mandate in the nature of a Writ of Mandamus directing the Respondents to release/return the cheque bearing No. 440464 which was dated 05-01-2020 and had been given from the Bank of Ceylon-Welisara Branch Current Account bearing No. 0070738355 to the 2nd Respondent on 19-12-2019 or if they have encashed the aforesaid cheque, release/return the money which the 1st Respondent has realized from the aforesaid cheque from the 1st Petitioner with accrued interest or such interest as may be determined by the Court.

When the matter was taken up for support on 16-06-2020, the learned Counsel for the Petitioners informed Court that the Petitioners are not pursuing the interim reliefs as prayed for in the prayers to the Petition. The Respondents in their objections moved for a dismissal of the Petition on the grounds set out therein.

We heard the learned Counsel for the Petitioner in support of this Application. We heard the learned Additional Solicitor General who is appearing for the Respondents as well.

In terms of the provisions of the Economic Service Charge Act, No. 13 of 2006 (as amended), the Petitioners had forwarded a "Nil return" dated 20-04-2017 for the year of assessment 2016/2017 to the Department of Inland Revenue **(X3)** on the basis that, under the provisions of the said Act, Economic Service Charge (ESC) was not chargeable from the Petitioners for the said period. The assessor refused to accept the said "Nil return" and made an assessment of

Rs. 13,072,012 for the year 2016/17 **(X5).** Since the Petitioners failed to pay the ESC as stipulated in X5, the 2nd Respondent had issued a notice dated 28-08-2019 **(X6)** to the Petitioners stating that the Petitioners had defaulted in paying the ESC for the said period. Thereupon, the Petitioners had submitted a cheque dated 05-10-2020 marked as **X6C** to the Department of Inland Revenue for the amount due as ESC. Subsequently, before realising the said cheque, the Petitioners instituted the instant application before this Court on 20-01-2020.

In this scenario, the learned Counsel for the Petitioners submits that in terms of the Economic Service Charge (Amendment) Act, No. 7 of 2017, a liability to pay only accrues only with effect from 01-04-2017, and therefore, the Petitioners are not liable to pay ESC for the year of assessment 2016/17. As such, the Petitioners state that the assessment notice marked **X5** and the Tax in default notice marked **X6** are *ultra-vires*, unlawful and arbitrary.

When the matter was taken up for support, the learned Additional Solicitor General who is appearing for the Respondent raised a preliminary objection as to the maintainability of this application, which reads thus;

> "The Petitioners who had furnished a cheque to the value of Rs. 13,072,012/- in response to an assessment issued by the Department of Inland Revenue for the said amount under the Economic Service Charge Act No. 13 of 2006 (as amended) for the year of assessment 2016/17, cannot now deny its liability by way of this application, thereby approbating and reprobating its position."

In response to the foregoing preliminary objection, in paragraph 21 of the petition, the Petitioners state that the 2nd and 3rd Respondents had threatened to freeze the bank accounts if the demanded amount is not secured, and therefore, they had submitted the cheque marked X6C. It is to be noted that there is no material before Court to substantiate the contention of the Petitioners in this respect.

The Court is mindful of the fact that, consequent to several interviews held by the Officers of the Department of the Inland Revenue with the Petitioners, the Petitioners, having accepted the assessment of ESC **(X5)** had drawn the cheque marked **X6C,** and thereafter, superstitiously, before realising the cheque, instituted these proceedings. In these respects, it is transpired that;

1. The Petitioners had unequivocally admitted the ESC liability for the year 2016/17, and thereby, waived off their right.
2. Having issued the cheque (X6C) to the Respondents, the Petitioners have invoked the Writ jurisdiction of this Court, thereby, dishonestly preventing the Respondents from depositing the said cheque in the bank. The

Petitioners have not invoked the jurisdiction of this Court with clean hands.

The general proposition of law is that a person can waive his right, and once he does so, he cannot claim it later. A waiver is a question of fact. A waiver may be expressed or may be implied by conduct. The basic condition, however, is that it must be "an intentional act with knowledge". The Supreme Court, in **Abeywickrema Vs. Pathirana**[1] observed that *"a waiver must be an intentional act of surrender of rights with knowledge of what those rights are".*

In this application, the Petitioners had submitted a "Nil return" in respect of ESC for the year of assessment 2016/17 to the Department of Inland Revenue on the footing that the Petitioners are not liable to pay ESC for the said period. The Officers of the Department of Inland Revenue declined to accept the "said Nil return" and issued the assessment notice marked as X5 wherein the ESC payable for the period in dispute is stipulated as a sum of Rs. 13,072,012/-. There were several discussions taken place between the Petitioners and the Officers of the Department of Inland Revenue with regard to this matter. Ultimately, having accepted the liability as mentioned in X5, unconditionally, the Petitioners had paid the said amount to the Department of Inland Revenue by a cheque marked X6C. In this matrix, it is abundantly clear that the Petitioners had intentionally surrendered their right, which amounts to a waiver. Moreover, admittedly, the Petitioners opted not to prefer an appeal to the 1st Respondent and thereafter to the Tax Appeal Commission, which amounts to an intentional act of surrender of their rights with knowledge. In these respects, I am of the view that the Petitioners in this Application cannot proceed with this matter as they have already waived their right.

Furthermore, it is settled law that a party seeking prerogative relief should come to Court with clean hands. The expression is derived from one of Equities maxims: 'He who comes to Equity must come with clean hands.'

'Clean hands' is the legal principle that only a party that has done nothing wrong can come to a Court with a lawsuit against the other person. If the party bringing the suit has acted in an unfair, illegal, dishonest, or otherwise immoral way in regards to the subject matter at issue then they have violated an equitable principle and have "unclean hands." Someone who violates equitable norms cannot then seek equitable relief or claim a defence based on the law of equity.

In this regard, the Kerala High Court in **Pottakalathil Ramakrishnan v. Thahsildar, Tirur and Ors.**[2] , the Divisional Bench addressed the effects of approaching the Court with unclean hands, while addressing the issue, observed that "*any person approaching a superior court must come with a pair of clean*

[1] 1986 (1) SLR-120

[2] WA No. 1513 of 2020.

hands. It neither should suppress any material fact, but nor take recourse to the legal proceedings over and over again which amounts to abuse of the process of law."

In **Perera Vs. National Housing Development Authority**[3] the Court of Appeal observed that;

> *"It is also relevant to note that the petitioner has submitted to this Court a privileged document which he is not entitled to have in his possession. He has not explained the circumstances under which he came to possess this document. Writ being a discretionary remedy the conduct of the applicant is also very relevant. The conduct of the applicant may disentitle him to the remedy."*

In the case of **Alphonso Appuhamy Vs. Hettiarachchi**[4] it was held that;

"When an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with uberima fides."

In this Application, the Petitioners, having accepted the ESC for the said period (X5), unconditionally paid the amount due to the Department of Inland Revenue by way of a cheque (X6C). Thereupon the Petitioners, before the said cheque was realised, surreptitiously, instituted these proceedings, thereby, deceiving the Respondents. The conduct of the Petitioners is *mala-fide* and illegal as per the law relating to the Bills of exchange. In these respects, it appears to this Court that the Petitioners in this Application have not come before Court with clean hands and therefore, they are not entitled to seek prerogative remedies from this Court.

Besides, in accordance with section 11 of the Economic Service Charge Act, No. 13 of 2006, the provisions of the Inland Revenue Act are applicable pertaining to the appeals, which reads thus;

> *"The provisions of Chapter XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX and XXXI of the Inland Revenue Act, relating respectively to appeals other than the provisions in sections 166,167,168, and 169, Finality of Assessments and Penalty for Incorrect Returns, Tax in Default and Sums Added thereto, Recovery of Tax, Miscellaneous Matters, Repayment, Penalties and Offences, Administration and General matters shall mutatis mutandis, apply respectively to Appeals, Finality of Assessments and Penalty for Incorrect Returns, Service Charge in Default and Sums Added*

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3. 2002 (3) SLR-50
4 77 NLR 131

Thereto, Recovery of Service Charge, Miscellaneous Matters, Repayment, Penalties and Offences, Administration and General matters under this Act."

Section 139 of the Inland Revenue Act, No. 14 of 2017 (as amended) provides an encyclopedic opportunity for a taxpayer to prefer an appeal to the Commissioner-General when he is dissatisfied with an assessment of tax, which reads thus;

"(1) A taxpayer who is dissatisfied with an assessment or other decision may request the Commissioner-General to review the decision.

(2) A request for review shall be made to the Commissioner-General in writing not later than thirty days after the taxpayer was notified of the decision, and shall specify in detail the grounds upon which it is made.

(3) Where the request is an objection against an assessment that has been made in the absence of a return required to be made, the notice of request relating to the objection shall be sent together with a return duly made.

(4) The receipt of every request shall be acknowledged within thirty days of its receipt and were so acknowledged, the date of the letter of acknowledgment shall for the purpose of this section, be deemed to be the date of receipt of such request.

(5) The Commissioner-General shall consider the taxpayer's request and notify the taxpayer in writing of the Commissioner-General's decision and the reasons for the decision. Taxpayer's request shall be considered by a tax official other than the tax official who made the assessment or other decision.

(6) The Commissioner-General shall give effect to the decision referred to in subsection (5) by confirming an existing assessment or making an amended assessment (including for a nil amount) or an additional assessment in accordance with this Act or taking such other necessary action to give effect to that decision.

(7) Where the Commissioner-General hears the evidence of a taxpayer or of any other person in respect of the request, a record of such evidence shall be maintained or caused to be maintained.

(8) Notwithstanding the provisions of subsection (2), the taxpayer may make a request for administrative review upon satisfying the Commissioner-General that owing to absence from Sri Lanka, sickness, or other reasonable cause the taxpayer was prevented from making the request within thirty days of the event described in subsection (2), and that there has been no unreasonable delay on the taxpayer's part."

Moreover, in terms of Section 140 (1) of the Inland Revenue Act, a person aggrieved by the decision of administrative review under Section 139 of the said

Act, may appeal against the decision to the Tax Appeals Commission, and thereafter, may appeal to the Court of Appeal against the decision of the Tax Appeal Commission. In these respects, it is abundantly clear, that the legislature has provided adequate alternative remedies to a taxpayer who is dissatisfied with the assessment of tax. However, the Petitioner in the instant Application has not availed himself of these provisions of law.

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**[5] 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**[6] 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 circumstances, the petitioner is not entitled to invoke writ jurisdiction."*

In **Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura and Another**[7], 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 the 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 Sections 139 (1), 140 (1) and 144 (1) of the Inland Revenue Act No. 14 of 2017 provide alternative remedies for a person aggrieved by the assessment of tax. However, the Petitioners 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

[5] 64 NLR 104.
[6] 2004 (1) SLR 53.
[7] 1996 (2) SLR 70.

remedies provided in law. In the case of **Somasunderam Vanniasingham Vs. Forbes and others**[8] 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."*

Per Bandaranayake J.

"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,**[9] where it was held 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,**[10] 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 in the instant Application 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 as well. In

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[8] 1993 (2) SLR 362.
[9] (1998) 8 CC 1.
[10] (2003) 2SCC 107.

these, circumstances, it is the view of this Court that the application is liable to be dismissed *in-limine.*

Be that as it may, the contention of the Petitioners was that, in terms of the Economic Service Charge (Amendment) Act, No. 7 of 2017, the Petitioners are not liable to pay ESC for the year of assessment 2016/17, for the reason that the said amendment came into force from 01-04-2017. The Contention of the Respondents was that, in terms of the said Amendment Act, the Petitioners are liable to pay ESC for the period in dispute.

It is to be noted that, though the (Amendment) Act, No. 7 of 2017 has been certified on 17-05-2017, it has come into force from 1-4-2016, which reads thus;

> *"This Act may be cited as the Economic Service Charge (Amendment) Act No. 7 of 2017 and* ***shall be deemed to have come into operation on April 1, 2016,*** *unless the dates on which certain provisions shall come into operation are specified in such sections."*

By section 2 (1) (a), ESC liability is imposed on every person or partnership in respect of every part of the relevant turnover of such person or partnership, which reads thus;

> *"(1) An Economic Service Charge (hereinafter referred to as the "service charge") shall, subject to the provisions of this Act, be charged from every person and every partnership for every quarter of every year of assessment-*
>
> *(a) commencing on or after April 1, 2006 (hereinafter in this Act referred to as "a relevant quarter") in respect of every part of the relevant turnover of such person or partnership for that relevant quarter; and…"*

The Petitioner seeks to claim in reliance on section 2 (1) (b) (iii) that as an importer of motor vehicles, it only becomes liable to pay ESC on or after 1st April 2017 and that it is not liable to pay ESC for the year of assessment, 2016/17. The above contention of the Petitioners is contrary to the provisions of the (Amendment) Act No. 7 of 2017.

Having scrutinized the provisions of the Principal Enactment and the (Amendment) Act No. 7 of 2017, it is abundantly clear that the ESC liability of the Petitioner is as follows;

- On or after 1st April 2016 on every part of the liable turnover, (making it liable to pay ESC for the year of assessment 2016/17); and in addition,
- From 1st April 2017 on all imports of motor vehicles, based on the CIF value certified by the DG customs.

In a nutshell, in terms of the provisions of the Amendment Act, No. 07 of 2017, it is apparent that the Petitioner becomes liable to pay ESC on or after 1st April

2016 under section 2 (1) (a) for the said period in dispute, and from 1st April 2017 both under section 2 (1) (a) and (b) of the ESC Act.

In these respects, it is the view of this Court that the instant Application is devoid of merits. Thus, the notices on the Respondents are refused and the application is dismissed. The parties should bear their costs as to this Application.

Application dismissed.

JUDGE OF THE COURT OF APPEAL