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

In the matter of an application for mandate in the nature of writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Application No:

Writ/412/2008

Leisure World Water Parks (Private) Limited of Seethawaka, Kaluaggala, Hanwella.

Petitioner

-Vs-

1. H.D. Ravindra Shiran Jayasinghe
   Chairman,
   Seethawaka Pradeshiya Sabha,
   Hanwella.

2. Hon. P.L. Reginold Cooray Wijewarnasuriya
   Chief Minister and Minister of Finance and Planning,
   Employment, Law and Order,
   Education, Cultural Affairs,
   Housing and Construction, Local Government, Provincial Administration and Transport,
   Western Province Provincial Council
   Chief Minister's Office,
   "Sravasthi Mandiraya",
   No.32, Sir marcus Fernando Mw,
   Colombo 07.

3. Seethawaka Pradeshiya
Sabha
Hanwella

Respondent

Before: C.P. Kirtisinghe – J.
Mayadunne Corea – J.

Counsel: Nihal Fernando PC with Amith Silva and J. Saveethini for the Petitioner.
Manohara De Silva PC with Shashini Chandrasiri for the 1st to 3rd Respondents.

Argued on: 06.10.2022

Decided On: 12.12.2022

C. P. Kirtisinghe – J.

The Petitioner is seeking for a mandate in the nature of a writ of Certiorari quashing the certificate issued by the 1st Respondent marked P16 and for a mandate in the nature of a writ of Certiorari quashing the approval of the 2nd Respondent and the notification marked P11b published in the government Gazette.

P16 is a certificate issued by the 1st Respondent certifying the fact that the sum of Rs. 17,885,000.00 is due to the 3rd Respondent Pradeshiya Sabha from the Petitioner under the Entertainment Tax Ordinance No. 12 of 1946. P11b is a Gazette notification published by the 2nd Respondent under section 2 (2) of the Entertainment Tax Ordinance No. 12 of 1946, authorizing the 3rd Respondent Pradeshiya Sabha to impose an entertainment tax within the Pradeshiya Sabha area.

The facts of the case can be summarized as follows;

The Petitioner is engaged in the business of operating a water park known as 'Leisure World'. The Petitioner sells tickets to the public to participate in the activities of the park and for the use of the amenities of the park. The tickets are sold at the entrance of the park and also near each activity. The Petitioner states

that, in or about April 2006 several officials from the 3rd Respondent Pradeshiya Sabha visited the Leisure World water park and wrongfully alleged that the Petitioner is liable to pay an entertainment tax in respect of the water park and requested the Petitioner to pay the same. Thereafter, by several letters the 3rd Respondent requested the Petitioner to pay the tax. On 20th November 2006 a resolution was passed by the 3rd Respondent to levy and entertainment tax of 25% on payments for admission of all forms of entertainment held within its limits. The resolution was approved by the Minister and was published in the Gazette. It is the case of the Petitioner that the provisions of the Entertainment Tax Ordinance No. 12 of 1946 (as amended) is not applicable to the Leisure World water park. Thereafter, the 3rd Respondent had informed the Petitioner that the Petitioner is liable to pay an entertainment tax of 25% from 1st of January 2007 and to pay the same and unless the aforesaid payment is made legal action will be taken to recover same from the Petitioner.

Thereafter the certificate marked P16 was issued by the 1st Respondent alleging that a sum of Rs.17,885,000.00 is due from the Petitioner as entertainment tax for the period from 1st January 2007 to 17th June 2008.

The Petitioner states that the aforesaid certificate marked P16 is wrongful, unlawful, illegal, arbitrary, capricious, in abuse of powers, *ex facie* totally incorrect, erroneous, disclose errors on the face of the record, in breach of the principles of natural justice, *ultra vires*, invalid and null and void for the following reasons,

1. According to the interpretation given by the Ordinance "admission" in relation to entertainment means admission as a spectator or one of an audience and the public who purchase tickets from the Petitioner are participants and are not spectators or one of an audience.
2. The activities offered at the water park are not entertainments within the meaning of the Entertainment Tax Ordinance.
3. The imposition of an entertainment tax at a uniform rate of 25% is arbitrary, capricious, extremely unreasonable and is in breach of the principles of natural justice.
4. There is no provision under the Entertainment Tax Ordinance to impose an entertainment tax with retrospective effect.
5. The purported sum of Rs. 17,885,000.00 certified by the 1st Respondent has been calculated based on hypothetical figures without taking into consideration the actual sales of tickets.
6. The Petitioner already pays 15% of its turnover as VAT and after the tax concession period will be liable to pay income tax at the rate of 35% of its

profits. In addition to this, if the Petitioner has to pay 25% of its turnover as entertainment tax this would cripple the Petitioner's business.

1st, 2nd and 3rd Respondents in their statement of objections state that this application has been filed with the purpose of evading the payment of the tax due to the 3rd Respondent by the Petitioner. They state that the 3rd Respondent is empowered by law to impose entertainment tax on the Petitioner. They state that the uniform rate of 25% is permitted by law and the Respondents are at liberty to impose the tax without specifying or categorizing the entertainment in question. They state that the activities/sports indulged at the Petitioner's Park do fall within the definition of entertainment to which Entertainment Tax Ordinance apply. They state that, the revenue overseer of the 3rd Respondent visited the Petitioner several times and collected information with regard to the number of visitors who visit the Petitioner's Park and complied a report (1R1) and the entertainment tax was computed on the findings of the report. They further state that the tax was imposed with effect from the date resolved by the 3rd Respondent.

<u>The retrospective effect of the Entertainment Tax Ordinance</u>

The Respondents state that the tax was imposed with effect from the date resolved by the 3rd Respondent. According to the contents of the document marked P16 the entertainment tax had been imposed with effect from 01.01.2007.

Section 2(2) of the Interpretation Ordinance No. 12 of 1946 (as amended) reads as follows,

(2) Every resolution under subsection (1) shall be submitted to the Minister for approval and, if so approved, shall be published in the Gazette and **shall come into the operation on the date of such publication or on such later date as may be specified in such resolution.**

According to P11b, the approval of the minister has been published in the Gazette on 29.11.2007. Therefore, the entertainment tax shall come in to operation on that date or on such latter date as maybe specified in the resolution. It cannot come in to operation on an earlier date - a date earlier than the date of that Gazette notification. **Maxwell on The Interpretation of Statutes** 12th edition by Langon at page 215 reads as follows,

"Upon the presumption that the legislature does not intend what is rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a

fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication." (*West v. Gwynne* [1911] 2 Ch. 1, *per* Kennedy L.J. *Cf*. *Smith v. Callander* [1901] A.C. 297; *Re Snowdon Colliery Co., Ltd.* (1925) 94 L.J.Ch. 305.)

The Entertainment Tax Ordinance No. 12 of 1946 does not have a retrospective effect. Instead, section 2(2) states that a resolution shall come in to operation on the date of the publication of the approval of the minister or on a latter date as maybe specified in the resolution. Therefore, the calculation of the taxes from 01.01.2007 by the 1st Respondent is erroneous, unlawful and *ultra vires* as the resolution was not in operation as at that date. Therefore, P16 is liable to be quashed on that ground alone.

Whether the Entertainment Tax Ordinance is applicable to the Petitioner's Business

The learned Counsel for the Petitioner submitted that the Entertainment Tax Ordinance was enacted in 1946 at a time when the concept of Theme Park/ Amusement Park was never envisaged. Therefore, the Entertainment Tax Ordinance as it stands today cannot encompass leisure parks which provides amusement to the public.

Citing the judgments of **Crest Gems Ltd Vs The Colombo Municipal Council 2003 (1) SLR 370** and **Vallibel Lanka (Pvt) Ltd Vs Director General of Customs and others 2008 Bar Association Law Reports page 47** the learned Counsel for the Petitioner submitted that in view of the strict application of the interpretation of Fiscal Statues, application of the Entertainment Tax Ordinance cannot be extended or implied on the business of the Petitioner. In section 16 of the Entertainment Tax Ordinance the word '**Entertainment'** has been defined as follows,

*"**entertainment** to which this ordinance applies means any dance, **game**, **sport**, cinematograph entertainment, concert, recital, circus or variety show to which persons are admitted for payment but does not include stage play, theatrical, puppetry, ballet and other performances on stage of a like nature."*

The word '**game'** has been defined in the Oxford Dictionary as follows, "an activity that you do to have fun, often one that has rules and that you can win or lose."

The word '**Sport'** has been defined in the Oxford Dictionary as follows, "activity that you do for pleasure and that needs physical effort or skill, usually done in a special area and according to fixed rules."

The document marked P3 contains a list of activities afforded to the public at the aforesaid water park. The following activities are contained in P3.

Amusement Activities

a. Swing Around
b. Log Flume
c. Crescent Swing
d. UFO
e. Happy Express
f. Super Swinger
g. Space Ship
h. Junior Coaster
i. Pirate Ship
j. Kids play area

Water related Activities

k. Wave Pool
k. Kids Activity Pool with Slides
k. Lazy River
k. Multi lane slides
k. Octopus
k. Thunder Cruise
k. Crazy Cruise
k. Free Fall

Lake Rides

s. Bumper Boats
s. Speed Boats
s. Paddle Boats

Although the concept of a Theme Park or an Amusement Park was never there in 1946 when the Entertainment Tax Ordinance was enacted, some of the activities contained in P3 come within the definition of 'Sport' or 'Game' and therefore, one cannot maintain the argument that the provisions of the Entertainment Tax Ordinance do not apply to the business of the Petitioner.

Whether a tax can be charged from the revenue generated from the participants of the activities

Section 2 (1) of the Entertainment Tax Ordinance No. 12 of 1946 reads as follows,

2(1) Every local authority shall have power, by resolution, to impose and levy a tax (hereinafter referred to as the "entertainment tax") on payments for **admission** to entertainments held in the area within the administrative limits of such authority at such rate or rates as may be specified in such resolution.

Section 16 of the Ordinance defines the word **'admission'** as follows,

"admission" in relation to an entertainment, means admission as **a spectator or one of an audience** and includes admission to any place in which the entertainment is held, and its grammatical variations and cognate expressions shall be construed accordingly"

The Oxford Dictionary defines a '**spectator'** as follows, "a person who looks on at a show, game, incident etc." It defines the word '**audience'** as follows, "the assembled listeners or spectators at an event."

It was the submission of the learned President's Counsel for the Petitioner that the public who purchase tickets from the Petitioner to take part in an activity in the Leisure Park such as a water slide are participants and they are not spectators or one of an audience within the meaning of the Entertainment tax Ordinance. On the other hand the learned President's Counsel for the Respondents submitted that a broader interpretation should be given to section 16 of the Entertainment Tax Ordinance. Relying on the words "includes admission to any place in which the entertainment is held", the learned Counsel submitted that on a plain reading of section 2 and section 16 of the Ordinance, it is abundantly clear that for entertainment tax to be levied one need not necessarily join as a spectator but any situation where a person "gains admission to any place in which entertainment is held", then the entity is liable to pay the entertainment tax.

The learned President's Counsel for the Petitioner has drawn our attention to similar statutes in other jurisdictions. In **India**, The Nagaland Amusement Tax Act No. 4 of 1965 defines the word 'admission' as follows,

"Admission includes admission as a spectator or one of an audience and **admissions for the purpose of amusement by taking part in an entertainment**"

In the **United States**; Nebraska Revised Statutes - Chapter 77-Revenue and Taxation a similar statute sets out as follows;

"Admission means the right or privilege to have access to a place or location where **amusement**, entertainment, or recreation is provided to an audience, spectators, **or the participants in the activity**. Admission includes a membership that allows access to or use of a place or location, but which membership does

not include the right to hold office, vote, or change the policies of the organization."

In the Indian legislation the words 'taking part' had been included to make the Act applicable to a participant. In the United States legislation, the words 'participant in the activity' had been included to make the Act applicable to a participant. In our Act there is no similar inclusion. If the legislature intended to make the Act applicable to a participant then similar words could have been introduced in to section 16 of the Entertainment Tax Ordinance or without including the words 'spectator' or 'one of an ordinance' it could have merely stated "admission to any place in which the entertainment is held".

In **Bennion on Statutory Interpretation** 5th Edition at page 1225, it is stated as follows,

"A statutory term is recognised by its associated words. The Latin maxim *noscitur a sociis* states this contextual principle, whereby a word or phrase is not to be construed as if it stood alone but in the light of its surroundings. While of general application and validity, the maxim has given rise to particular precepts such as the *ejusdem generis* principle and the rank principle."

At page 1226 it is stated as follows,

"This section of the Code deals with the manifestations of the principle traditionally subsumed under the rubric *noscitur a sociis* (it is recognised by its associates). A like principle states that *noscitur ex socio*, *qui non cognoscitur ex se* (what cannot be known in itself may be known from its associate). A related maxim is: *quae non valeant singula*, *juncta juvant* (what has no meaning by itself is effective when combined). Francis Bacon tells us that *copulatio verborum indicat acceptationem in eodem sensu* (the linking of words suggests treatment of them in the same sense). Two detailed applications of the principle are dealt with separately in subsequent provisions of this Code. These are the *ejusdem generis* principles and the rank principle.

A word or phrase in an enactment must always be construed in the light of the surrounding text. '... words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context'. '…"facilities" is "a chameleon-like word" which "takes its colour from its context".'

> 'English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put

back into the sentence with the meaning which you have assigned to them as separate words...'."

Therefore, the words "includes admission to any place in which the entertainment is held" cannot be taken out of the sentence and interpreted in isolation and put back into the sentence and it has to be construed in the light of the other words in the sentence and in the light of its surroundings. When the word 'admission' is construed in that manner one cannot come to the conclusion that 'a participant' can be included in to the definition 'admission'. Therefore, the provisions of the Entertainment Tax Ordinance No. 12 of 1946 cannot be made applicable to a participant in an amusement within the meaning of the Act.

The learned President's Counsel for the Petitioner submitted that a tax on a citizen or an entity has to be specifically imposed by law and cannot be assumed or implied.

In the case of **Crest Gems Ltd Vs. The Colombo Municipal Council (2003) 1 SLR 370** Shirani Thilakawardena J. (P/CA) held as follows,

"the principles adopted by the court in interpreting taxing statutes and identified four basic rules of construction in interpreting the taxing statutes. One such rule is as follows:

"A subject is only to be taxed upon clear words, not upon intendment or upon the "equity of an act...."

In the case of **Vallibel Lanka Pvt Ltd Vs. Director General of Customs and others (2008) BLR page 47** Siripavan J. (as he then was) held (with S. N. Silva PC CJ. and Amarathunga J. agreeing) as follows,

1. **It is the established rule in the interpretation of statues levying taxes and duties not to extend the provisions of the statute by implication, beyond the clear import of the 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.**
2. Thus, the intention to impose duties and/or taxes on imported goods **must be shown by clear and unambiguous words**.
3. Considerations of hardship, injustice or anomalies do not play any useful role in construing fiscal statutes. One must have regard to the strict letter of the law and cannot import provisions in the Customs Ordinance so as to supply any assumed deficiency.

The Entertainment Tax Ordinance is a taxing ordinance. Therefore, the intention to impose a tax on the participants of an amusement must be shown by clear and unambiguous language and cannot be inferred by ambiguous words. On the plain reading of section 16 of the Ordinance it is apparent that such an intention is not shown by clear and unambiguous language. Therefore, one cannot interpret the section to include a participant of an amusement within the meaning of 'admission' in section 16 of the Ordinance to enable the Act to apply in such a situation.

For the aforesaid reasons we are of the view that the certificate issued by the 1st Respondent marked P16 certifying that a sum of Rs. 17,885,000.00 is due to the 3rd Respondent Pradeshiya Sabha from the Petitioner is unlawful, *ultra vires* and contrary to the provisions of the Entertainment Tax Ordinance No. 12 of 1946 (as amended).

The Petitioner is also seeking for a mandate in the nature of a writ of Certiorari quashing the approval of the 2nd Respondent and the notification marked P11b published in the Government Gazette. By that Gazette notification the 2nd Respondent had approved the 3rd Respondent Pradeshiya Sabha to impose an Entertainment Tax of 25% on the admission charges of all the entertainments within the Pradeshiya Sabha division. That applies to all the entertainments performed within the Pradeshiya Sabha area. The question whether it is reasonable to impose an Entertainment Tax of 25% on the admission charges of a particular entertainment will depend on the nature of a particular entertainment and vary from one type of an entertainment to the other. If we issue a writ of Certiorari quashing that approval that will prevent the 3rd Respondent Pradeshiya Sabha from recovering an entertainment tax from all the other persons who performed entertainments within the Pradeshiya Sabha area who are not before this Court. Therefore, we are of the view that this Court should not issue such a mandate.

<u>Reasonableness of charging 25% of the admission charges as an Entertainment Tax</u>

The learned President's Counsel for the Petitioner submitted that it is unreasonable to charge 25% of the admission charges of the Petitioner as an Entertainment Tax. He submitted that the Petitioner already pays 15% of its turn over as Value Added Tax (VAT). After the 5year Tax concession period the Petitioner is liable to pay income tax at the rate of 35% of its profits. Therefore, it was the submission of the learned President's Counsel that if in addition to VAT and Income Tax, the Petitioner were to pay an Entertainment Tax of 25% of its turn over that would cripple the Petitioner's business. As we have come to

the conclusion that the 1st Respondent's decision contained in P16 is unlawful and *ultra vires*, it is liable to be quashed. Therefore, it will only be an academic exercise to go into the question of reasonableness. It is also unnecessary to go into the question whether the entertainment tax has been calculated on hypothetical figures without taking into consideration the actual ticket sales.

For the aforesaid reasons we issue a mandate in the nature of a writ of Certiorari quashing the certificate issued by the 1st Respondent marked P16. We refuse to issue a mandate in the nature of a writ of Certiorari quashing the approval of the 2nd Respondent and the notification marked P11b published in the Government Gazette.

We make no order for costs.

Judge of Court of Appeal

Mayadunne Corea – J.

I Agree

Judge of Court of Appeal