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

In the matter of an application for writs of Certiorari and prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/Writ/19/2013

Sojitz Kelanitissa (Private) Limited
No. 28, New Kelani Bridge Road,
Wellampitiya.

PETITIONER

Vs.

1. The Commissioner General of Inland Revenue
   Department of Inland Revenue,
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

2. Mrs. Wasana Siriwardena
   Assessor

Unit 7 (LTU)
Department of Inland Revenue,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

3. Mrs. T.G.D.S. Jayawardena
   Senior Assessor
   LTU (7B)
   Department of Inland Revenue,
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

4. Mr. Keertthi Peiris
   Senior Assessor
   LTU (7B)
   Department of Inland Revenue,
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

5. Mr. U.L Udaya Kumara Perera
   Assessor
   LTU (7A)
   Department of Inland Revenue,
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

6. Mr. D.M. Somadasa Dissanayake
   Commissioner
   Taxpayer Service Unit
   Department of Inland Revenue,
   Sir Chiththampalam A. Gardiner Mawatha,

Colombo 02.

7. Justice (Retd) Hector S. Yapa
   Chairman
   Tax Appeals Commission
   No. 49/14, Galle Road, Colombo 03

7A. Justice (Retd) Nissanka Udalagama
   Chairman
   Tax Appeals Commission
   No. 49/14, Galle Road, Colombo 03

7B. Justice (Retd) Chandra Jayathilake
   Chairman
   Tax Appeals Commission
   Lake House building
   No. 65, AC6
   Colombo 01

8. Mr. Jolly Somasundaram
   Member
   Tax Appeals Commission
   No. 49/14, Galle Road, Colombo 03

8A. Mr. M.N Junaid
   Member
   Tax Appeals Commission
   No. 49/14, Galle Road, Colombo 03

8B. Justice Sunil Rajapaksha
   Member

Tax Appeals Commission
Lake House Building
No. 65, AC6
Colombo 01

9. Mr. P.A. Prematilaka
Member
Tax Appeals Commission
No. 49/14, Galle Road, Colombo 03

9A. Mr. S. Swarnajothi
Member
Tax Appeals Commission
No. 49/14, Galle Road, Colombo 03

9B. Justice S. de L. Tennakoon
Member
Tax Appeals Commission
Lake House building
No. 65, AC6
Colombo 01

10. Mrs. Swarna Liyanage
Secretary
Tax Appeals Commission
No. 49/14, Galle Road, Colombo 03

10A. Mrs. J. Dheemantha Ranasinghe
Secretary
Tax Appeals Commission
No. 49/14, Galle Road, Colombo 03

10B. V.V Hettiarachchi
Secretary
Tax Appeals Commission
Lake House building
No. 65, AC6
Colombo 01

11. Hon. Attorney General
Attorney General's Department
Colombo 12

12. Mr. I. M Abeyratne
Member
Tax Appeals Commission
Lake House building
No. 65, AC6
Colombo 01

13. Mr. Saman Wickramarachchi
Member
Tax Appeals Commission
Lake House building
No. 65, AC6
Colombo 01

14. Ms. G.D.C. Ekanayake
Member
Tax Appeals Commission
Lake House building
No. 65, AC6
Colombo 01

15. Mr. B.J. Jayaratne
    Member
    Tax Appeals Commission
    Lake House building
    No. 65, AC6
    Colombo 01

16. Mr. G.K.D. Amarawardena
    Member
    Tax Appeals Commission
    Lake House building
    No. 65, AC6
    Colombo 01

17. Justice S.K. Weerawardena
    Member
    Tax Appeals Commission
    Lake House building
    No. 65, AC6
    Colombo 01

RESPONDENTS

Before:	C.P Kirtisinghe, J Mayadunne Corea, J
Counsel:	Faisz Musthapha. P.C. with Riad Ameen and R. Rodrigo for the Petitioner Milinda Gunatilleke A.S.G. with Manohara Jayasinghe D.S.G for the Respondents
Written submissions:	For the Petitioner on 24/05/2023 For the Respondents on 29/05/2023
Argued on:	14/12/2022, 13/01/2023, 30/01/2023,
Decided on:	18/09/2023

Mayadunne Corea J,

The facts of the case are briefly as follows. The Petitioner is a limited liability company duly incorporated under the laws of Sri Lanka. It is a subsidiary of AES Corporation USA, serving as an independent power producer on the island. The Petitioner states that it supplies power to the Ceylon Electricity Board (CEB) under a Power Purchase Agreement (PPA) and is registered for VAT for such supply and pays VAT on the sums paid by the CEB to the Petitioner for the said service.

The Petitioner states that pursuant to the Implementation Agreement and an order dated 10.08.2000 under Section 10(1) of the Insurance Corporation Act No. 2 of 1961, the Petitioner was permitted to procure insurance from foreign insurers and it procured insurance cover in respect of property

damage and business interruption. The Petitioner states that the Petitioner's power plant in Kelanitissa was damaged by fire in March 2004 and consequently the Petitioner claimed and received an insurance indemnity of USD 35,271,126 from foreign insurers. The Petitioner contends that the insurance indemnity received by the Petitioner for the said damage is not subject to VAT as it does not fall under section 83 of the VAT Act.

The Petitioner further states that in terms of the (PPA) entered with the CEB to supply power, it was incumbent on the CEB to make timely payments within 30 days of receipt of an invoice, and in the event of a delay, the Petitioner was entitled to charge compound interest. The Petitioner has invoiced CEB in respect of interest for the taxable periods of February 2004, March 2004, April 2004, May 2004, June 2004, August 2004, October 2004, and November 2004. The Petitioner states that this interest received on delayed payments is also not subject to VAT. The Commissioner General of Inland Revenue (CGIR) carried out a VAT Audit and informed the Petitioner that the interest payment by the CEB and the indemnity payments by the insurer for the loss caused by the fire was liable for VAT. Aggrieved by the said decision, the Petitioner appealed to the Tax Appeals Commission (TAC) which upheld the position of the Commissioner General. Hence this writ application.

Summary of the sequence of events

To understand the issue before this Court, it is pertinent to consider the sequence of events that occurred.

- On 22.03.2004 Petitioner's power plant is damaged by a fire.
- The Petitioner submits his original VAT returns for the period of March to December 2004 (R2A to R2H) (the Petitioner has marked the same in P5A to P5H).
- It is observed that in the returns, the Petitioner has failed to disclose the indemnity for the loss nor the invoices for the interest of delayed payments of the CEB. In the said return, the Petitioner has failed to insert any figures of payment under 'zero-rated supplies - cage C' and 'Exempted supplies - cage D'.
- The Petitioner invoices the CEB (para 7 of the Petitioner's written submissions).

- VAT audit commenced (para 14 of the petition).
- Subsequent to the Petitioner's auditors holding an interview with the Assessor, the Petitioner submits that the insurance indemnity due is to be zero-rated (P13 dated 22.03.2006).
- The Respondents reply that the insurance indemnity is liable for tax by P14(a) 08.05.2006
- The Respondents also inform the Petitioner that the interest payment by the CEB is liable for VAT by P14 (b) dated 08.05.2006.
- Respondent rejects the returns of the Petitioner for the taxable period 01.01.2003 to 31.12.2004 by letter dated 16.06.2006 (P16), subsequent to a VAT audit.
- Respondent thereafter issues a Notice of Assessment for the taxable period 2004 December P17.
- Petitioner appeals to CGIR against the said assessment by letter dated 11.09.2006 P18 (a).
- CGIR decision of the said appeal dated 05.09.2008 (P25).
- Reasons for the said determination are given by CGIR on P26(b) date 30.09.2008.
- As per para 22 of the petition thereafter the VAT audit recommenced for the period 1.1.2004 to 31.03.2006.
- The Respondents informed the Petitioner of willfully not disclosing their indemnity by their letter dated 16.06.2008 (P33).
- The Petitioner appeals to the Board of Review against the determination of the CGIR dated 05.09.2008 pertaining to the taxable period December 2004 P7(a) 18.10.2008.
- Petitioner submits amended VAT returns 1.1.2004 to 30.11.2004 (R3(a) to R3(g)).
- On 27.11.2008 the Respondents rejected the amended returns (P23(a) to P35(b)).
- On 25.05.2009 the Respondents have issued notices of assessment 28.02.2004 to 31.11.2004 (P36(a) to P36(h)).
- It is observed that these assessments have been made subsequent to the audit and subsequent to the rejection of the amended VAT returns which have been submitted in the year 2008 for the taxable period of 1.1.2004 to 31.11.2004.
- It is also observed that in the said Notices of Assessments, the month of December is not covered. However, this Court observes that the returns of the month of December which

have been rejected have been appealed to the Board of Review and the said Board of Review decision which confirms the assessment has not been challenged (P31).

- This Court also observes that as per P32, the Petitioner has also sought a case stated to be preferred to the Court of Appeal for its opinion against the Board of Review decision. However, as per P21 G of the petition, there have been no cases submitted to the Court of Appeal as the Board of Review has been replaced by the TAC.
- It appears that the Board of Review decision has not been canvased by the Petitioner thereafter. Hence pertaining to the taxable period of December, there is an unchallenged Board of Review decision.

Grounds of challenge

The Petitioner challenges the said TAC decision in this application on the grounds that the said decision is arbitrary, capricious, ultra vires the VAT Act, and without jurisdiction. Thus, making the said order illegal.

Respondent's objections

While denying the Petitioner's claim, the Respondents have raised several objections to the maintainability of this application. They argued that the Petitioner is guilty of willfully and fraudulently failing to make true and full disclosures of material facts to determine the amount of tax payable and also submitted that the Petitioner has failed to disclose or substantiate the grounds they have urged and submitted that the acts of the 1st Respondent and the determination impugned is lawful and intra vires of the provisions of the VAT Act.

Assessments

Both parties were not at a variance of the grounds in dispute, namely, whether the insurance indemnity and the late payment of the interest payment by the CEB were subject to VAT payment as per the assessment.

While the Petitioner argues that the said payments should be zero-rated, and exempted, the Respondents submit otherwise. The Petitioner also argues that the assessment is time-barred and the Petitioner has not been given a proper hearing before the TAC.

Both parties were not at variance on the grounds that the Petitioner was a VAT-payable entity and that they were supplying electricity to the CEB. While the power purchase agreement between the CEB and the Petitioner was in operation, the Petitioner's premises were gutted by a fire causing significant damage which was indemnified by the insurer. It is also observed that the indemnity covered the loss that occurred to the business and the premises.

This Court will now consider the grounds urged.

Insurance indemnity.

As per the Value Added Tax Act No. 14 of 2002 (as amended), liability arises under section 2 (1). Accordingly, section 2 (1) (a) reads as follows,

Subject to the provisions of this Act, a tax, to be known, as the Value Added Tax (hereinafter referred to as "the tax") shall be charged –

(a) At the time of supply, on every taxable supply of goods or service, made in a taxable period, by a registered person in the course of the carrying on, or carrying out, of a taxable activity by such person in Sri Lanka;

It is pertinent to note that the Petitioner was engaged in supplying electricity to the CEB which is a taxable activity. It is not disputed that while engaged in the said activity, a fire broke out and the Petitioner's supply was disrupted. Parties are not at variance that subsequently, the Petitioner's loss was indemnified by the insurer. The contention was whether the indemnity received, amounts to a taxable supply. At this stage, it is pertinent to understand whether the supply of services that is under reference, becomes a taxable activity. To have a better understanding, this Court will now

refer to the interpretation of "supply of services" under section 83 of the VAT Act. The said Act interprets the supply of services as follows,

"Supply of service" *means any supply which is not a supply of goods but includes any loss incurred in a taxable activity for which an indemnity is due"*

Both parties are not at variance and it is clear as per the above interpretation that the "insurance indemnity due" is taxable as it was due for disruption of a taxable activity, that is the supply of electricity. However, the Petitioner contends that the insurance indemnity should be zero-rated under section 7 (1) (c) of the VAT Act. This Court also wishes to note that for section 7 (1) (c) to be invoked, the service has to be taxable. Both the Counsels were not at variance that the insurance indemnity due is liable for tax.

However, the Petitioner's argument is based on section 7 (1) (c) of the VAT Act and it is their contention that though it is liable, the amount needs to be zero-rated by operation of law namely under section 7 (1) (c). The said section reads as follows;

Section 7 (1) (c) A supply of -

> *(c) any other services, being a service not referred in paragraph (b), provided by any person in Sri Lanka to another person outside of Sri Lanka to be consumed or utilized outside of Sri Lanka shall be zero rated provided that the payment for such services in full has been received in foreign currency from outside Sri Lanka through a bank in Sri Lanka*

As per section 83 by operation of law, the loss incurred in a taxable activity for which an indemnity is due is caught up as a supply of services. It is observed that the Petitioner incurred a loss in generating power when his power plant caught fire. The petitioner was engaged in the taxable activity of generating and supplying power. The Respondent argued that as per the insurance contract at the relevant time, the indemnity was due to the Petitioner. It is not disputed that the Petitioner was paid by the insurer in foreign currency from outside of Sri Lanka. As submitted by the Petitioner, he has been paid USD 14,755,970 in respect of property damage and USD

20,515,156 in respect of business interruption. The Petitioner contends that the said indemnity amounting to the sum of USD 35,271,126 was paid in several installments from June 2004 to August 2006.

The Petitioner's contention is that though the loss to the Petitioner occurred in Sri Lanka, to come within the meaning of "supply of services" in the said chain of events, the insurer had to decide whether an indemnity was due or not. His contention is that the decision to indemnify or not was taken by the insurer in a country that is not Sri Lanka. Hence the argument that though an indemnity was due, the supply of services as per the definition of the Act had not taken place until the decision was taken to indemnify. The Petitioner's contention is that said supply of services comes to a conclusion when the decision to indemnify is taken.

It is pertinent to note that the Petitioner's contention cannot be accepted as the insurer taking a mere decision is not when the indemnity becomes due. The parties to the insurance contract have come to an agreement to indemnify the loss when the loss occurs. For that, the insured has paid a premium. Accordingly, in our view, the moment the event that triggers the loss occurs the indemnity becomes due as per the agreement. If we are to subscribe to the Petitioner's contention there will be a number of practical difficulties. For example, if the insured makes a decision not to indemnify then as per the contract there will be litigation. In such an event indemnity would not be due till the court case is concluded and a decision taken. Then the question of time bar will be attracted.

Another ground why we can't accept the Petitioner's argument is that if the indemnity is due only when the insurer makes a decision to indemnify, the resulting position would be that till then there is no indemnity which would be contrary to the entire insurance agreement.

In response to the above argument of the Petitioner, the Respondent argued that section 7 (1) (c) has no application to the present case before us.

Applicability of section 7 (1) (c)

The Petitioner contends that under section 7 (1) (c), for the services to be zero-rated it has to be consumed or utilized outside Sri Lanka. Hence the argument that the services were consumed and

utilized outside of Sri Lanka therefore the services have to be zero-rated. They argued that the utilization and consumption of the loss occurred when the decision to indemnify was made in the Head Office of the insurer in the USA. Thus, the argument that section 7 (1) (c) should be applied. It is also pertinent to note that no evidence was submitted to demonstrate whether the insurer acted through an agent in Sri Lanka.

It was the Respondent's contention that for the Petitioner's argument on indemnity to take effect, the loss has to be consumed or utilized outside Sri Lanka, but when the determination was made to indemnify and payments were made in Sri Lanka, it amounts to the loss being consumed or utilized in the country.

It was further argued that for the said proposition of the Petitioner to be good, the Petitioner had to export the loss. Hence, they argued, what matters in this interpretation is whether there was a suffering of a loss to which an indemnity was due to a recipient who was subject to paying VAT.

It is also observed that in this instance, the insurer is not a VAT-registered entity. Accordingly, as per the Petitioner's argument based on the interpretation section of the Act if it is the insurer who provides the services to the insured for the loss suffered, then the insurer being a non-VAT registered person will not qualify for payment. However, the legislature in its wisdom has decided to include the "indemnity due" to the loss of a "taxable activity" to be a supply of services. Thus, subjecting it to the charging section namely section 2 of the VAT Act. In our view, for the section to be given a purposive interpretation, in this instance, the words "supply of services" cannot be given the meaning as contended by the petitioners to fall in line with section 7 (1) (c).

Further, it was the contention of the Respondent that if the Petitioner's contention of the application of section 7 (1) (c) is to take effect, the Petitioner in his returns should have declared the indemnity due as it was within his knowledge at the time of sending the returns, but has failed to do so. The Respondent also argued that the fire had occurred in Sri Lanka and the payments had been received in Sri Lanka.

On careful analysis, we are of the view that the supply of services, as per the interpretation means the "loss incurred in a taxable activity for which an indemnity is due". This Court has already dealt with the question of when the "indemnity is due". Accordingly, in our view, it is only when the insurer pays the insured, that the insurance contract comes to an end and the service is consumed

and utilized. Hence, we are not inclined to concede to the contention of the Petitioner that the chain of "supply" concludes with the decision to indemnify and not with the payment. In our view, the said contention of the Petitioner seems to have been brought up for the purpose of attracting section 7 (1) (c). However, as stated above we wish to disagree with the said submission of the Petitioner. It is not disputed that the payments were received in Sri Lanka. Accordingly, we hold that in this instance, once the insurer makes the payment to indemnify the loss only then loss is consumed or utilized. Hence in our view, the loss has been consumed within Sri Lanka. Thus, we are not inclined to accept the argument of the Petitioner that section 7 (1) (c) is attracted in this instance. In our view, in this case, section 7 (1) (c) has no application as the necessary grounds required to invoke the said section does not exist.

It is also pertinent to note that the legislature in its wisdom has decided to make the "indemnity due" liable for VAT by operation of law. Hence it is considered a supply of services for the purpose of bringing it under section 2 of the Act.

Interest Payment by the CEB

It is the position of the Petitioner that the interest payment by the CEB is exempted from VAT. It was argued that as per the terms of clauses 8.7, 8.9.1, and 8.9.2 of the PPA of the Ceylon Electricity Board, they are entitled to charge a compound interest if the CEB fails to make timely payments within the permitted time period after receiving the invoice (in pursuant to the provisions of the PPA) hence the argument that the Petitioner was giving credit to the CEB. As per the submissions of the Counsel for the Petitioner, the failure to honour the bill within the time period stipulated in the PPA, by the CEB is considered as giving credit to the CEB. They further argued that this was the reason why an interest component was added to the sum due from the due date till the full payment of the said bill. The Petitioners have taken great pains to address this Court as to the definition of credit. This Court has considered the said submissions. The Petitioner argued that when the Petitioner granted credit to the CEB it falls within item (b) (x) (g) of Schedule 1 – Part II of the VAT Act. The said provision reads as follows;

Schedule 1

(b) The supply of –

(x) The following financial services

(a) the operation of any current, deposit or savings account;

(b) the exchange of currency;

(c) the issue, payment, collection, or transfer of ownership of any note, order for payment, cheque or letter of credit;

(d) the issue, allotment, transfer of ownership, drawing, acceptance, or endorsement of any debt security, being any interest in or right to be paid money owing by any person;

(e) The issue, allotment, or transfer of ownership of any equity, security, debt security or participatory security;

(f) the underwriting or sub-writing the issue of any equity security, debt security or participatory security;

(g) the provision of any loan, advance, or credit;

(h) the provision –

(a) of the facility of installment of credit finance in a hire purchase conditional sale or credit sale agreement for which facility a separate charge is made and disclosed to the person to whom the supply is made;

(b) of goods under any hire purchase agreement or conditional sale agreement, which have been used in Sri Lanka for a period not less than twelve months as they ate of the agreement;

(i) the life insurance, 'Agrahara' insurance, and crop and livestock insurance;

(j) The transfer of a non-performing loan of a licensed commercial bank by way of transfer of such loans to any other person in terms of a re-structuring scheme or other scheme of such bank as approved by the Central Bank of Sri Lanka with the concurrence of the Minister

Hence the argument that the provisions of any loan, advance, and credit are not subject to VAT and are exempted.

This Court observes that parties are not at variance on the fact that the Petitioner is a registered VAT payer. The question that is posed is whether the interest paid by CEB for late payments under the PPA is exempt from VAT or is it subject to VAT as the Respondents contend.

This Court has given consideration to the said provision. This Court has also observed that the Petitioner is not a lender who supplies financial services. It is not the contention of the Petitioner that they are carrying on a business of lending, especially granting of loans, advances, or credit. Hence, we do agree with the learned ASG's submission that the Petitioner is not supplying a service that is subjected to financial VAT. Carefully considering the relevant provisions of the power purchase agreement between the Petitioner and the CEB, we observe that as per the spirit of the said agreement, the CEB is liable to pay for the electricity supply to the Petitioner by the due date. However, if the said payment has not been honored on the agreed time frame, both parties to the contract have created a mechanism to maintain an uninterrupted power supply notwithstanding the nonpayment of the invoice, and the subsequent financial loss otherwise has to be incurred by the supplier and the disruption of services that can follow. Further, as a deterrent and as a compelling factor to honour the payment on time, and to prevent the disruption of services due to financial loss an interest component has been added for the delayed period.

The Respondent in response further submitted that the interest payment is actually a penalty. But they strongly argued that this interest cannot be caught up under the provisions the Petitioner relied upon as there had been no transfer of monies from the Petitioner to the CEB as a loan or an advance to receive interest. We are more inclined to agree with the Respondent's submission that reading the provision of the PPA in its true spirit, the interest mentioned thereon is not earned from supplying electricity for credit but is imposed as a deterrent or a penalty for delayed payments. Hence, it is our considered view that the interest for late payments will not qualify for exemptions. The Petitioner has taken great pain to submit a plethora of decided cases as to the meaning of

credit. We have considered the same but we do not consider it relevant to the circumstances of this case.

It was also submitted to the Court, and it is pertinent to note that the Petitioner has failed to declare both the indemnity that was due and paid, as well as the interest payments for late payments by the Petitioner in their original returns until the Respondent found both items subsequent to an audit.

The Court will now venture into the next ground urged by the Petitioner, namely whether the assessments are time-barred.

Are the assessments time-barred as per the provisions of the VAT Act?

The Petitioner submits that the assessments marked 35A to 35H are time-barred. To understand this objection, the Court will now consider the relevant section in the VAT Act. Section 33 of the VAT Act deals with the time period during which an assessment has to be made. The said provision states that an assessment has to be made within three years from the last date of the taxable period. However, there is an exception to the norm provided under section 33 (2) in the event the taxpayer willfully and fraudulently fails to make full disclosure.

The said section reads as follows;

Section 33

(1) Where any registered person has furnished a return under subsection (1) of section 21, in respect of a taxable period or has been assessed for tax in respect of any period, it shall not be lawful for the Assessor where an assessment -

(a) *has not been made, to make an assessment; or*

(b) *has been made. to make an additional assessment. after the expiration of three years from the end of the taxable period in respect of which the return is furnished, or the assessment was made. as the case may be.*

(2) Notwithstanding the provisions of subsection (I) where the Assessor is of the opinion that person has wilfully or fraudulently failed to make a full and true disclosure of all .the material

facts necessary to determine the amount of tax payable by him for any taxable period, it shall be lawful for the Assessor where an assessment —

(a) *has not been made, to make an assessment; or*

(b) *has been made to make an additional assessment,*

within a period of five years from the end of the taxable period to which the assessments relates.

For the purpose of this Chapter, any notice of assessment may refer to one or more taxable periods.

It is the contention of the Petitioner that the notice of assessment which is the bone of contention, has been issued very much after the time period permitted under the VAT Act. The Petitioner further contends that the notice of assessments for the taxable periods is dated as stated below.

Assessment Number	Taxable Period Ending On (and the code for the taxable period)	The date on which the 3-year time bar becomes effective	The date of Notice of Assessment
8799530	28.02.2004 (04032)	28.02.2007	26.05.2009
8799531	31.03.2004 (04033)	31.03.2007	26.05.2009
8799532	30.04.2004 (04061)	30.04.2007	26.05.2009
8799533	31.05.2004 (04062)	31.05.2007	26.05.2009
8799534	30.06.2004 (04063)	30.06.2007	26.05.2009
8799536	31.08.2004 (04092)	31.08.2007	26.05.2009
8799538	31.10.2004 (04121)	31.10.2007	26.05.2009
8799539	31.11.2004 (04122)	31.11.2007	26.05.2009

Accordingly, they argue that the notice of assessments as stipulated above is beyond the 3-year period. Hence, the argument that they are time-barred.

The tax returns sent by the Petitioner were rejected and subsequently, an audit took place thereafter it was revealed that the Petitioner had failed to disclose the insurance indemnity received and the interest payment received for late payments by the CEB. The learned ASG also contended that the Petitioner has even failed to disclose them as items that have to be treated as zero-rated. This

Court observes that this argument is substantiated by the Petitioner's own conduct when subsequent to an audit, it sent an amended return disclosing the same. Hence, they argued the Petitioner is guilty of willfully or fraudulently failing to make full and true disclosure of all material facts necessary to determine the amount of tax payable, and accordingly, they argued that what is relevant in this instance is Section 33 (2) of the VAT Act, whereby it empowers the Assessor to make an assessment. Irrespective of the time limit stipulated under Section 33 (1). The contention of the Petitioner is the notice of the assessments marked 31-A to 36-H bears the date of issue as 26.05.2009. Therefore, they argue even if it is to be construed that what is applicable is section 33 (2) still the assessment is time-barred.

In this instance, the Petitioner's whole contention is based on the Notice of Assessment, however, it is pertinent to note that a notice of assessment and the assessment are two different things. For a notice of assessment to be made, an assessment has to be made prior to that. What attracts the time bar is the assessment and not the notice of assessment. This has been decided in a plethora of cases commencing from ***Honig and Other (Administrators of Emmanuel Honig) v. Sarsfiled (H. M. Inspector of Taxes) Ch. Div (1985) STE 31 (CA)/(CA) (1986) STC 246, Commissioner of Income Tax v. Chettinad Corporation, 55 NLR 556 and the Stafford Motors Case [Ca Tax 17/2017],*** where it has been clearly held that in calculating the time bar what is relevant is the making of the assessment and not the notice of assessment.

This Court has taken great pain to distinguish the grounds for making assessments and the notice of assessment in ***Unilever Sri Lanka Limited v. Commissioner-General of Inland Revenue CA/Tax /0004/2013 decided on 04.11.2022*** and the Court has deliberated on what attracts the time bar on, whether it is the assessments or the notice of assessments. If one is to consider the date of the notice of assessment yet as per the Petitioner's own submission, it appears that in applying Section 33 (2), assessments for the period of 31.05.2004 – 31.11.2004 are not time-barred. However, as held in the above cases what is relevant is not the notice of assessment but the day of the making of the assessment. For the notice of assessment to have the date 26.05.2009 the assessment has to be made prior to that. Therefore, this Court is not inclined to accept the Petitioner's contention that the time bar should attract to the date of the notice of assessment. This

Court also finds that there is no evidence before us as to when the assessment was made pertaining to notice of assessments 36-A to 36-H. While the Respondents submit that the assessments were made within the time, the Petitioners argue against it. Thus, making the date of making the assessment a disputed factor. This matter will be discussed elsewhere in this judgment.

However, this Court has gone through all the material submitted to the Court and interestingly we find that subsequent to the returns being rejected, an audit has taken place. In the said audit, it has been found that the Petitioner has failed to disclose the insurance indemnity obtained and the receipt of interest of late payment from the CEB, which caused the returns to be rejected, and for the Respondents to consider that the Petitioner has failed to make full and true disclosure of all the facts. It is not disputed that this has been conveyed to the Petitioner subsequently.

Petitioner argues that for Section 33 (2) to operate, there should be a willful nondisclosure. Pertaining to this, the Petitioner has cited a number of authorities. We find as per the said section 33(2) it is not only the Petitioner's willful act but even a fraudulent act is sufficient. As argued by the Respondents it is not disputed that the Petitioner has failed to disclose in his original returns, the receipt of indemnity or the late payment interest by the CEB. Subsequent to the audit, the Petitioner has submitted amended returns which for the first time discloses the insurance indemnity and the late payments, and has requested to accept the amended returns. However, this has occurred subsequent to the audit. If this conduct is not a fraudulent act the petitioner should have explained this subsequent conduct of requesting to accept the amended returns to the court which the Petitioner has failed to do.

The Petitioner also argued that even if the said amounts received as indemnity and late payment interest are subjected to VAT the late payment interest received should be exempted.

The assessor subsequent to the audit by letter P35 had indicated to the Appellants that the original returns submitted without disclosing the indemnity due and the late payment interest amounts to the appellants' failure to make a full and true disclosure. The Petitioner's contention while denying the said allegation is that there was a considerable time period that had lapsed and several communications had been exchanged between the parties before the sending of P35 and therefore it was argued that the sending P35 is an afterthought by the Respondent to activate the application of section 33(2) of the VAT Act.

It appears to this Court that there had been a lapse of time and there had been several communications exchanged between the parties before P35 was dispatched. However, we have also taken into consideration the explanation given by the respondents that in the first return, the Appellant had failed to disclose the two items namely the income derived from the interest payment by the CEB for late payments and the insurance indemnity that was due. We have also taken into consideration the fact that the said two items had been detected only after an audit was conducted. Accordingly, considering the submissions of both the learned counsel, this Court is not inclined to accept the Petitioner's contention that the Respondent's letter marked P35A, whereby it was stated that there is a failure to make full and true disclosure is only a cover to trigger section 33(2) of the VAT Act. In the said letter it has been clearly stated that the nondisclosure of insurance receipts was only detected following an audit conducted by the CGIR. In fact, the said letter even stated that the interest paid for delay charges was also detected only at the said audit.

Futility

The Respondent took up several objections pertaining to this application. This would be an appropriate stage to consider the objections. It is not disputed that prior to the creation of the Tax Appeal Commission pursuant to Act No.13 of 2011 an aggrieved taxpayer had the right to appeal to the Tax Board of Review. Hence, a taxpayer who is aggrieved by the Commissioner General has the right to appeal to the Board of Review. It was argued that once the determination of the Commissioner General had been made the Petitioner had appealed to the Board of Review and the Board of Review had given its determination P31. We do find the determination of the Board marked P31 is dated 08.07.2010 and is only pertaining to one month.

This appeal has been preferred against the appeal decision of the Commissioner General dated 05.09.2008. The point in dispute in the said appeal was whether the interest received for the delay of charges received from the CEB for the supply of electricity was subject to the VAT as per the assessment. After a long analysis, the Board of Review considered that the assessment made by the Assessor in such line was correct and the assessment was confirmed.

The learned ASG contended that this decision had not been challenged at the appropriate time. It was also argued that the said Board of Review decision had not been challenged even in this writ

application. Thus, making the said decision still valid in law and still enforceable. It is their contention that therefore, the Inland Revenue Department's right to recover taxes as per the said assessment is still alive. It was further contended that the Petitioner is estopped from challenging the subsequent decision in this application, as he has failed to canvass the Board of Review decision. Hence, it was contended that even if a writ is granted to quash the determination of the TAC the said Board of Review decision remains and this application becomes futile. The Respondents rely on ***Distilleries Companies Sri Lanka v. Commissioner of Labour CA writ C 56 of 2018 decided on 21st of March 2022***. This Court also has held in ***Ratnasiri and others Vs Ellawala and others (2004) 2 SLR 180 as follows;***

"This Court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of a right. Court has a discretion in regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ… will not issue where it would be vexatious or futile."

Also, in ***Siddeek V. Jacolyn Seneviratne and Three Others (1984) 1 SLR 83 it*** **was held, "*The Court will have regard to the special circumstances of the case before it before issuing a writ of certiorari. The writ of certiorari clearly will not be issued where the end result will be futility, frustration, injustice, and illegality".***

Thus, a writ will not be issued if the result ends in futility, frustration, injustice, and illegality. The Petitioner has failed to answer this objection to the satisfaction of this Court.

The Respondents raised the objection that the Petitioner cannot review the Tax Appeal Commission's decisions by way of a writ application and the proper remedy would have been an application for the Tax Appeals Commission to have a case stated before the Court of Appeal. It is not disputed that the Petitioner has failed to challenge the decision of the TAC (P48) by way of a case stated in the Court of Appeal. This Court is mindful that the application before this court is a writ application and not an appeal.

The Respondents argued that the Petitioner is impugning the decisions of the TAC on the basis that the said decision is ultra vires its powers in coming to said the decision, especially by upholding that the insurance indemnity should not be zero-rated. The Petitioner has challenged the

TAC decision on a general basis stating that the decision is ultra vires without jurisdiction and a nullity and challenged it only on the grounds urged above.

The Respondents argued that the decision impugned is squarely intra vires. This Court observes that there is no challenge made pertaining to the proper procedure or the conduct of the TAC other than challenging the procedure on the grounds of not giving a fair hearing.

Fair hearing

This Court will now consider the allegation of not having a fair hearing. This Court in **The Commissioner General of Inland Revenue v. Fonterra Brands Lanka (Pvt) Ltd CA/TAX/24/2017 decided on 13.05.2020** determined that *"**The rules of natural justice are not engraved in stone. The exact scope of the requirements of fairness depends on the circumstances of each case such as the character of the decision-making body, the types of decisions to be made and the statutory framework which guides the decision-making body**."*

Having this in mind, this Court observes that the Petitioner has been afforded the opportunity to be represented before the TAC and also has been heard. They have had the opportunity to file written submissions. The Petitioner does not challenge the decision on the grounds that the TAC has failed to consider the written submissions of the Petitioner. Hence, we are not inclined to subscribe to the Petitioner's objection of not having a fair hearing.

The Petitioner alleges that the TAC has considered material not presented before it thus making the determination bad in law. This court will consider the said ground elsewhere in this judgment.

There is no allegation substantiated with evidence, to demonstrate that TAC has acted against the principles of natural justice. In considering the decision of the TAC we find that the TAC has addressed the alleged issues before it.

TAC determination

The appellant referred the appeal to the Tax Appeals Commission against the determination made on 15.07.2011 by the CGIR. The taxable periods involved in the appeal as per the tax determination

are February 2004, March 2004, April 2004, May 2004, June 2004, August 2004, October 2004, and November 2004. There were 3 questions that were considered by the TAC namely,

- Whether the 8 assessments made were time-barred,
- Whether the total proceeds of the insurance claim received amounting to USD 35,271,126 could be taxed under 2004/2005 at the rate of 15% or the total loss for which the said compensation payment was received, should be considered as zero-rated supply, and,
- Whether the delay charges collected at Rs. 50,893,989 could be assessed as a taxable supply or is it to be considered exempt from VAT.

The TAC has given due consideration pertaining to the time bar raised on the assessments. The decision of the TAC states as follows; *'the representative of the Appellant in his written submission dated 18.03.2012 has stated the date of all notices of assessment as 26.05.2009 and the date of their receipt by the Appellant on 29.06.2009. However, the representative of the Appellant has not furnished any documentary proof to support those dates mentioned in the written submissions, which are quite different from the dates as stated by the respondent.*

The date of signing the eight notices of assessment was 22.12.2008 and the date of serving those notices of assessments was 19.01.2009, as submitted by the Respondent. On this basis, all eight assessments have been made within a period of 5 years from the end of the respective tax period, for the purpose of the section 33 of the VAT Act"

This Court observes that the TAC has considered the said grounds in its order and has come to the conclusion while giving reasons as to how it arrived at the said decision. It is the contention of the Petitioner that no material has been submitted to the TAC by the CGIR regarding the dates pertaining to the assessment. Accordingly, they argued that the said dates were not known to them and that there was no material place before the TAC, for the TAC to come to such a conclusion. The learned ASG In response denied this allegation. This court observes that to ascertain the exact dates of the assessments neither party has submitted the said assessments before this Court.

It is also pertinent to note that this Court does not have the benefit of seeing the documents submitted to the TAC other than the decision, as the complete proceedings before the TAC are not before this Court. It was incumbent on the Petitioner to submit the proceedings if they were disputing or challenging the decision of the TAC on the basis that the decision of the TAC was made without adequate material before it or has considered matters which was not before it. In our view, the Petitioner has failed to do this. In the absence of such and in view of the response by the Respondents whether the TAC has come to the decision pertaining to the time bar with the material before it or not, becomes a disputed fact. Especially in view of the fact that the Petitioner has failed to submit the full proceedings before the TAC. The writ court will be reluctant to act on disputed facts.

In view of the interpretation given to the "supply of services" and the words "indemnity due", the TAC has observed that the Petitioner has failed to disclose the indemnity due in their returns. The TAC has also observed that the Petitioner has failed to disclose the delay charges due from the CEB which they received during the assessment year 2004/2005. The Petitioner has failed to declare it, especially under the ground of the VAT returns which should be considered zero-rated. As stated elsewhere in this judgment, this has been discovered only subsequent to an audit, the TAC has also commented on the fact that subsequent to the audit the Petitioner had sent 8 amended VAT returns and had requested the CGIR to amend all 8 VAT returns. This happened on 30.10.2008. That is after a lapse of a considerable period of time after the end of the taxable period.

In the said amendments the Petitioner has requested that the CGIR amend all 8 of the VAT returns which were submitted only in 2008, and on its own volition had contended to treat the undisclosed delay charges as "exempt supplies", and the undisclosed insurance receipts in the original returns to be treated as "zero-rated supplies". By this act of the Petitioner, it is clear that the Petitioner has requested the earlier VAT returns to be amended nearly after 4 and a half years. It is pertinent to note that this action too had taken place subsequent to the findings of the audit. It is also pertinent to observe that the TAC has taken cognizance of this and taken cognizance of the fact that the Petitioner in its original returns has violated the declarations the Petitioner has made, whereby it

stated '***I declare that the particulars in this returns are true and correct***'. The TAC has also given its consideration to the fact that the said amended returns have been submitted well after the lapse of the time period allowed for the Assessor to make amended assessments under Section 33 (1). Accordingly, the TAC had given its reasons for holding that the assessments are not time-barred and, in our view, the act of the Petitioner clearly demonstrated his willful nondisclosure. Further, as submitted by the learned ASG the sequence of events explains the Respondent taking time to identify the willful nondisclosure which came to light only after the audit.

As per the determination, this conduct of the Petitioner in the eyes of the TAC has clearly justified the Assessor's opinion that the Appellant had failed to willfully disclose all the material facts necessary to determine the tax. Thus, the TAC has quite correctly held that Section 33 (2) applies in this instance. It is also pertinent to note that the Petitioner has failed to demonstrate to this Court their reasons for the nondisclosure of the above-argued two items in the original returns submitted.

The TAC has also given its reasons for arriving at the conclusion that the insurance indemnity is subjected to Tax. Especially with reference to section 83 of the VAT Act. The TAC has given its consideration to the fulfillment of the necessary ingredients especially as to when the supply of services is completed and where it was consumed or utilized. The TAC has also considered the arguments brought forward pertaining to the late payments received for the electricity services supplied by the appellant to the CEB. The TAC has given its reasons as to why it is not inclined to follow the reasons given by the Petitioner and has given its reasons as to why the supply cannot be zero-rated taking the cover under section 83.

Throughout the TAC proceedings that were submitted to this court, we find that the Petitioner has been given a hearing and has been allowed to file its written submission which the Petitioner has filed. It is pertinent to observe that once an appeal is referred to the TAC, it is incumbent on the appellant to prepare its written submissions and be ready for the prosecution of the appeal within the time period stipulated in the Act. We observe that the TAC has heard the appeal within the time and delivered its order within the time period after affording a fair hearing to the Petitioner.

Conclusion

As mentioned earlier in this judgment, we find the Petitioner's submissions pertain to an appeal rather than attacking the procedure and the process to obtain the relief in a writ application.

After hearing the lengthy submissions of both parties and after considering all the documents presented to the Court, this Court is of the view that the Petitioner has failed to establish any ground to avail itself of the remedy afforded by the writ jurisdiction. The Petitioner has failed to demonstrate to this Court that the decision of the TAC is ultra vires without jurisdiction and a nullity.

Accordingly, for the reasons stated above, we find the Petitioner has failed to challenge the impugned decisions to the satisfaction of this Court. We see no reason to interfere with the decision of the TAC. Therefore, we are not inclined to grant the relief prayed by the Petitioner. We dismiss this application without cost.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal