

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.

Multiform Chemicals (Pvt) Ltd
659, Elvitigala Mawatha,
Colombo 05.

Petitioner

CA (Writ) Application No: 201/2013

Vs.

1. The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
2. Mrs. J.A.R. Perera,
Assessor,
LTU Audit Unit 08,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
3. Senior Assessor,
Unit 08,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
4. Mrs. H.M.D. Munasinghe,
Deputy Commissioner,
VAT (Special Audit) Branch,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

5. Justice (Retd) Hector S. Yapa,
Chairman,
Tax Appeals Commission,
No. 49/14, Galle Road,
Colombo 03.
- 5A Justice Chandra Jayathilake,
Chairman,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
6. Mr. Jolly Somasundaram,
Member,
Tax Appeals Commission,
No. 49/14, Galle Road,
Colombo 03.
7. Mr. P.A. Pematilaka,
Member,
Tax Appeals Commission,
No. 49/14, Galle Road,
Colombo 03.
8. Mrs. Swarna Liyanage,
Secretary,
Tax Appeals Commission,
No. 49/14, Galle Road,
Colombo 03.
- 8A Ms. V.V. Hettiarachchi,
Secretary,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
9. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
10. Justice Sunil Rajapaksha,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,

- Colombo 10.
11. Justice S.de L.Tennakoon,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
 12. Mr. I.M. Abeyratne,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
 13. Mr. Saman Wickremaarachchi,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
 14. Ms. G.D.C. Ekanayake,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
 15. Mr. B.J. Jayaratne,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.
 16. Mr. G.K.D. Amarawardena,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.

17. Justice S.K. Weerawardena,
Member,
Tax Appeals Commission,
Lake House Building, 2nd Floor,
D.R. Wijewardena Mawatha,
Colombo 10.

Respondents

Before: **R. Gurusinghe J.**

&

M.C.B.S. Morais J.

Counsel: Riad Ameen with Rushitha Rodrigo instructed by Paul Ratnayake
Associates for the Petitioner.

Chaya Sri Nammuni, DSG for the Respondent.

Written Submissions: By the Petitioner – on 02.08.2019, 15.02.2016

By the 1st- 4th Respondents – on 13.05.2019

Argued on: 04.03.2025

Decided On: 29.05.2025

JUDGMENT

M.C.B.S. Morais J.

This is an application in the matter of writ of certiorari and prohibition in terms of Article 140 of the constitution of Democratic Socialist Republic of Sri Lanka.

Multiform Chemicals (hereinafter sometimes will be referred to as the Petitioner) is challenging the decisions made by the Respondents. Accordingly, the Petitioner prays for the following reliefs.

“a. to issue notice on the Respondents;

b. to call for and examine the record maintained by the Respondents;

c. to issue a Writ of certiorari quashing the decision of the 2nd Respondent contained in the letter dated 04.01.2006 marked "P3";

d. to issue a Writ of certiorari quashing the Notices of Assessment dated 11.03.2006 issued by the 3rd Respondent marked – “P 4(a)” and “ P 4(b)”

e. to issue a Writ of certiorari quashing the determination dated 09.04.2008 of the 4th Respondent Deputy Commissioner marked "P8(b)";

f. to issue a Writ of certiorari quashing the reasons dated 07.05.2008 for the said determination of the 4th Respondent Deputy Commissioner marked "P9(c)"

g. to issue a Writ of certiorari quashing the aforesaid determination dated 28.02.2013 of the Tax Appeal Commission marked "P13(b)";

h. to issue writ of prohibition restraining the 1st to 4th Respondents from taking any steps to recover the taxes and/or penalty referred to in the Notices of Assessments marked "P4(a)" and "P4(b)";

i. to issue an interim order, until the final hearing and determination of this Application, restraining the 1 to 4th Respondents from taking steps to recover the taxes and/or penalty referred to in the Notices of Assessments marked "P4(a)" and "P4(b)";

j. to grant costs; and

k. to grant such other and further relief as to Your Lordships Court shall seem fit and meet.”

The Petitioner is a limited liability company incorporated under the Companies Act. The Petitioner is engaging in a business of importing and sale of industrial chemicals and the business of an

indenting agent for industrial chemicals, by receiving orders from third party importers for transmission to foreign principal/supplier. The Petitioner states that the process of placing orders under the said business took place as such that the Petitioner did not have any authority from the foreign principal to accept the orders placed by the said third party importers and the Petitioner only transmitted the said orders to the said foreign principal. The Petitioner further states that for the services obtained by the foreign principal the Petitioner has received a remuneration by way of commission on orders accepted and executed by the said foreign principal.

It is the first contention of the Petitioner that the aforesaid services supplied by the Petitioner to the foreign principal was zero-rated in terms of section 7(1)(b)(vii) and section 7(1)(c) of the Value Added Tax Act (hereinafter sometimes will be referred to as the VAT Act), as the commission was received in foreign currency through bank in Sri Lanka and the said services supplied by the Petitioner are utilized outside Sri Lanka. The Petitioner further states that no payments have been incurred from any third-party importer in respect of the aforesaid services supplied by the Petitioner.

Further, the Petitioner states that the Petitioner has sold a car and a motorcycle, used by the office staff, as well as a fax machine and a photocopier, for the amount of Rs. 3,842,000. Additionally, a payment of Rs. 299,005 has been received by the Petitioner as insurance indemnity for damages incurred to the Petitioner's vehicle. The Petitioner contends that the Petitioner is not involved in the business of selling cars, motorcycles, fax machines, or photocopiers and the insurance indemnity received by the Petitioner neither constitute a 'taxable activity' of the Petitioner nor in the course of 'carrying out taxable activity' under section 2 of the VAT Act. Accordingly, the Petitioner has made the VAT returns for the taxable period of November 2002 to December 2003, However, the payment has been rejected by the 2nd Respondent by the letter dated 4th of January 2006 made in terms of section 29 and section 33 of the VAT Act No 14 of 2002.

Accordingly, it is the contention of the Petitioner that section 29 of the VAT Act does not permit communication to refer more than one taxable period, and it requires separate communication to be made for each taxable period. Thereafter, the Petitioner received a notice of assessment dated 11th of March 2006, relating to the taxable period November 2002 and December 2003. It is the

contention of the Petitioner that the said Notice of assessment for the taxable period of December 2003 is ultra vires as it is time-barred in terms of section 33 of the VAT Act, further it also includes several other taxable periods within the aforesaid taxable period of December 2003. Accordingly, the Petitioner has appealed the aforesaid notice of Assessment on 27th of March 2006, which was acknowledged by the 2nd Respondent. The Petitioner states that the evidence was adduced and the appeal was heard by the 4th Respondent. The determination of the said appeal was received by the Petitioner on the 10th of April 2008.

Being dissatisfied with the said order, the Petitioner preferred an appeal dated 21st of May 2008 to the Board of Review against the determination by the 4th Respondent. The appeal was heard by the board of review, and both parties have submitted their written submissions. However, the board of review ceased to function, therefore, the aforesaid appeal was heard by the tax appeals commission, and the determination was delivered on 28th of February 2013.

Being aggrieved by the said determinations, the Petitioner has now made a writ application to quash the determinations made by the Respondents.

The Respondents state that the determination dated 28th of February 2013 of the Tax Appeals Commission is based on the following issues.

- a. *“Should the Appellant Company be taxed at the concessionary 0% rate as stipulated in Section 7 (1) (C) of the VAT Act?*
- b. *Should the sale of Capital assets be liable for VAT at the rate of 20%?*
- c. *Are amounts received under a contract of insurance liable for VAT?”*

For a company to be treated as zero-rated tax in term of Section 7 (1) (C) of the VAT Act, the service provided should be outside Sri Lanka. It is the contention of the Respondent that the Petitioner serves as an agent to foreign manufacturers who are outside Sri Lanka, who are the principal for the goods of 3rd party buyers. The payment is received by the Petitioner in foreign currency through a local bank. However, it is the Respondent's view that these goods are consumed in Sri Lanka within the manufacturing process of the said buyer. Therefore, the Respondents claim

that the Petitioner cannot be entitled to a 0% concessionary rate under section 7 (1)(c) of the VAT Act, as the requirement that the services used and consumed outside Sri Lanka is not met.

Further, it is the view of the Respondent that the sale of the capital assets of the Petitioner falls within the scope of section 2(1)(b)(ii), thereby subjecting it to a 20% tax rate. Further, the Petitioner, being a registered company in Sri Lanka, carrying on a taxable activity, in the performance of acts in transferring the ownership of the goods exclusively to the new buyer, performs the necessary actions to come within what is defined as ‘supply of goods’. Therefore, the Respondent contends that the Petitioner performs a taxable activity which makes him liable for a payment under the VAT Act.

The next contention of the Respondent is that the amount received under a contract of insurance for the damage caused to the capital asset of the car is considered a taxable activity. The Petitioner has received the insurance indemnity under the insurance policy on the capital assets while carrying out a taxable activity. Therefore, it is the view of the Respondents that the claim made by the Petitioner regarding a loss incurred on the damage to the car is a supply of service as envisaged under section 83 of the VAT Act.

According to section 7 (1)(c) of the VAT Act, there are three requirements that need to be fulfilled for a service to be qualified under zero rated concession.

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

The first or the second requirement is not contended by either party. The third requirement ensures that the service provided shall be utilized or consumed outside Sri Lanka. It is the Respondents view that the services provided by the Petitioner in the present matter are utilized and consumed within Sri Lanka, as the goods are transferred by the foreign principal to the third party, which shall be consumed in Sri Lanka. However, it must be noted that the Petitioner is neither a party to

the contract between the third party and the foreign principal nor has the Petitioner received any payment from the third party. Therefore, it is apparent that the Petitioner has acted within the capacity of a commissioned agent to the foreign principal.

Had the Petitioner approached this Court through an appeal application, the Court might have considered the position mentioned above, likely in favor of the Appellant. However, since the Petitioner has instead filed a writ application, it is important to note certain specific aspects related to the issuance of writs. Unlike appeals, which involve a review of decisions made by lower courts, writ applications are extraordinary remedies that the Court grants only under special circumstances. Therefore, the Court must carefully examine whether the conditions for issuing a writ are met before granting relief in this case.

In the case of ***Pradeshiya Sabawa, Hingurakgoda, and others Vs. Karunaratne and others (2006) 2 Sri L R 419***, Andrew Somawansa, J.(P/CA) has established the grounds on which a writ of certiorari can be granted.

“The grounds of issue of writs of certiorari are :

(a) acting in excess of jurisdiction or ultra vires;

(b) breach of a mandatory provision or rule;

(c) breach of rules of natural justice;

(d) error of law on the face of the record;”

It is the contention of the Petitioner that the Respondents have acted ultra vires, by considering irrelevant factors and by failing to consider relevant matters in making the determination. However, when exercising the discretionary remedy of this court under Writ Jurisdiction, the Petitioner’s conduct, and circumstances of the case needs to be noted.

In ***Bisomenike Vs. C. R. de Alwis (1982) ISLR 368***, Sharvananda, J, observed that;

"A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. The exercise of this discretion by Court is

governed by certain well accepted principles. The Court is bound to issue it at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, submitting to jurisdiction, laches, undue delay or waiver The proposition that the Application for Writ must be sought as soon as injury is caused is merely an Application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chance of his success in Writ Application dwindles and the Court may reject a Writ Application on the ground of unexplained delay. An Application for a Writ of Certiorari should be filled within a reasonable time"

In the present matter the Petitioner is seeking the writ of certiorari and prohibition by an application filed in the Court of Appeal in 2013, to claim from this court a discretionary relief in respect of an alleged order made on the 11th of March 2006 against the letter of assessment by the 2nd Respondent, the determination dated 9th of April 2008 by the 4th Respondent, and against the determination dated 28th of February 2013 by the Tax Appeal Commission respectively. However, it is apparent that there is a significant delay in exercising the discretionary remedy of this court, which is best known to the Petitioner. Further, the Petitioner has failed to exercise the remedy to appeal against the determination of the commission under section 11A of the Tax Appeals Commission Act No. 23 of 2011.

"11A (1) Either the person who preferred an appeal to the Commission under paragraph (a) of subsection (1) of section 7 of this Act (hereinafter in this Act referred to as the "appellant") or the Commissioner-General may make an application requiring the Commission to state a case on a question of law for the opinion of the Court of Appeal. Such application shall not be entertained unless it is made in writing and delivered to the secretary to the Commission, together with a fee of one thousand and five hundred rupees, within one month from the date on which the decision of the Commission was notified in writing to the Commissioner-General or the appellant, as the case may be....."

Therefore, it is evident that the Petitioner has failed to avail himself of the statutory remedy provided under Section 11A by appealing against the determination of the Tax Appeal Commission in the matter of the law for the reasons best known to him. The Petitioner now seeks to quash determinations made from the year 2006 onwards, exercising a discretionary remedy from this court, 7 years after the date that the determination was entered.

When considering the facts of this case, it is evident that the Petitioner has approached this court after significant laches, and the Petitioner has also failed to exercise the direct statutory remedy available. Moreover, the Petitioner has failed to provide any reason to justify his action in terms of the delay and failure to exercise the statutory remedy. Therefore, I am of the view that the discretionary remedy of this court, provided under Article 140 of the Constitution, need not be invoked.

Therefore, this application is dismissed.

No cost ordered.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal