

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

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

CA-WRT-330/2023

Si Lanka State Trading (General Corporation Limited

100, Nawam Mawatha

Colombo 02

Petitioner

Vs.

1. V.V. Hettiarachchi

Secretary

Tax Appeals Commission

35, Lakehouse Building

2nd Floor

D.R. Wijewardena Mawatha

Colombo 10

1A) B.H.N. Jayawickrama

Secretary

Tax Appeals Commission

35, Lakehouse Building

2nd Floor

D.R. Wijewardena Mawatha

Colombo 10

2. Justice (Retired) P.W.D.C. Jayathilake

3. S.K. Weerawardena

4. G.D.C.Ekanayake

The 2nd to 4th Respondents all at
Tax Appeals Commission
35, Lakehouse Building 2nd Floor
D.R. Wijewardena Mawatha
Colombo 10

5. D.R.S. Hapuarachchi

Commissioner General of Inland Revenue
Inland Revenue Department
Sri Chittampalam A. Gardiner Mawatha
Colombo 02.

5A) W.A. Sepalika Chandrasekara

Commissioner General of Inland Revenue
Inland Revenue Department
Sri Chittampalam A. Gardiner Mawatha
Colombo 02

Respondents

Before : N. Bandula Karunarathna, P/CA, J.
B. Sasi Mahendran, J.

Counsel: Faisz Musthapha, PC with Pulasthi Rupasinghe for the Petitioners
M. Amarasinghe, SSC for the Respondents.

Argued On: 06.12.2024

Written

Submissions: 15.01.2025 (by the petitioner)

On

Judgment On: 28.01.2025

JUDGMENT

B. Sasi Mahendran, J.

The Petitioner instituted this action by petition dated 13.06.2023 seeking inter alia writs of Certiorari to quash the order/determination of the 2nd to 4th Respondents contained in the document marked P5 and to quash the decision of the Tax Appeals Commission contained in the document marked P8.

The facts of this case are as follows:

According to the Petitioner, the Petitioner is a company duly incorporated under the laws of Sri Lanka.

The Petitioner states that the Department of Inland Revenue issued the Assessment bearing No. 7332196 (period 13030), 7332197 (period 13060), 7332198 (period 13090), and 7332199 (period 13120) for the taxable period from 01.01.2013 to 31.12.2013 to the Petitioner regarding to the unpaid value added tax (VAT) by the Petitioner. The Petitioner states that being aggrieved by the said assessment, the Petitioner lodged an appeal to the Commissioner General of Inland Revenue (hereinafter referred to as the 'CGIR') by the Petition of Appeal dated 24.05.2016. The Petitioner further states that by determination dated 05.06.2018, the CGIR confirmed the said assessment. Being dissatisfied with the said determination of the CGIR, the Petitioner preferred an appeal bearing No. TAC/VAT/024/2018 to the Tax Appeals Commission (hereinafter referred to as the 'TAC') by the Petition of Appeal dated 31.10.2018.

The Petitioner states that by letter dated 25.11.2021, the TAC inter alia informed the Petitioner that the hearing of the said appeal would be on 16.12.2021 to which the

Petitioner replied by letter dated 01.12.2021 informing the Petitioner's inability to participate on the said date and requested for another date.

The Petitioner further states that by the written submission dated 04.01.2022, the Petitioner submitted to the TAC inter alia that the determination of the CGIR is time-barred and therefore, the appeal must be deemed to be allowed by operation of law and that the assessments are excessive and without lawful justification.

The Petitioner states that thereafter, two letters dated 05.04.2022 sent by the TAC informed that the next hearing date is on 28.04.2022 and that the bank guarantee needs to be renewed by the Petitioner. The Petitioner further avers that, upon receiving the said letter, the Petitioner immediately took steps to renew the said bank guarantee and sought a further date for the hearing by letter dated 26.04.2022 due to the restrictions imposed on the island by the government, but as stated by the Petitioner, the Petitioner did not receive any response to the said letter.

According to the Petitioner, when matters remained as such, on 02.01.2023, the Petitioner received a letter dated 15.12.2022 marked P4 issued by the 1st Respondent together with an order/determination dated 15.12.2022 marked as P5 which was delivered by the 2nd to 4th Respondents.

The Petitioner states that the said letter marked P4 inter alia indicated that *"Since you have not extended the Bank Guarantee, please pay all the tax due and penalty to the Department of Inland Revenue immediately."* The Petitioner contends that despite the indication in the letter marked P4, the Petitioner in fact extended the relevant bank guarantee on 05.05.2022, until 04.05.2023.

The Petitioner further states that the 2nd to 4th Respondents by the order/determination marked P5 have determined that when the said appeal bearing No. TAC/VAT/024/2018 was taken up by the TAC for hearing, the Petitioner was absent and unrepresented and

that the appeal of the Petitioner was dismissed in terms of Section 11 (1) of the Tax Appeals Rules 2012.

The Petitioner avers that though the Petitioner retained the services of M/s Wijerathne & Co., Chartered Accountants to represent itself in the said Appeal, due to the organizational restructure of the said firm, they may not have given requisite updates regarding the progression of the said Appeal to the Petitioner.

The Petitioner further avers that the petitioner by way of a motion dated 31.01.2023 and Affidavit dated 30.01.2023, made an application in terms of Section 11 (2) of the Tax Appeals Rules 2012 to inter alia relist the said appeal. The Petitioner states that however, by letter dated 20.03.2023 marked P8, the Petitioner was informed that the application *“was not allowed as there was no valid reason being submitted to the Commission for the absence”* of the Petitioner.

The main grievance of the Petitioner is that the letter marked P8 was issued without giving any hearing to the Petitioner and therefore, the documents marked P8 and P5 are arbitrary and ultra vires.

In this context, the Petitioner has invoked the writ jurisdiction of this Court seeking inter alia writs of Certiorari to quash the order/determination marked P5 and the decision of the Tax Appeals Commission marked P8.

It should be noted that according to the document marked P9, the Petitioner has invoked the jurisdiction of this Court in terms of Section 11A (1) of the Tax Appeals Commission Act No. 23 of 2011.

Our Courts have held that when an alternative and equally efficacious remedy is available to a party, the party should be required to pursue such remedy before invoking the writ jurisdiction.

Her Ladyship Shiranee Tilakawardane J. P/CA (as her Ladyship then was) in the case of Ishak v. Laxman Perera, Director of Customs and Others (2003) 3 SLR 18 at 22 held that:

"Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision.". "Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament's intention".

In Tennakoon v. Director-General of Customs and Another (2004) 1 SLR 53 at page 56, his Lordship Wijayaratne, J. held that:

"The petitioner in this application seeks to challenge the forfeiture made under section 119 of the Customs Ordinance by a writ application when in fact the Customs Ordinance itself provides for such a course of action under section 154. The petitioner is not therefore without an alternative suitable remedy. The petitioner is not entitled to seek the writ jurisdiction of this court when there is an alternative remedy available to him. In the Sarvodaya case⁽¹⁾ it was held "Ordinarily the only remedy available to the petitioner for

claiming the said goods is to institute proceedings in terms of section 154, challenging the validity of the seizures”

In Rev. Maussagolle Dharmarakkitha Thero And Another Vs. Registrar Of Lands And Others (2005) 3 SLR 11, His Lordship Sisira De Abrew J held that;

“The Petitioners had a right of appeal against the decision of the 1st Respondent contained in PS. This right has been given to them under section 3S(1) of the said Ordinance. The learned Counsel for the Petitioners contended that the Petitioners were unaware of the decision made by the 1st Respondent refusing to register the deed P4. The Commissioner of Buddhist Affairs, by his letter dated 16.06.1995 marked P7, informed the 3rd Respondent a copy of which was sent to the 1st Petitioner that transfer of property by deed No. 3062 (P4) could not be approved since the property was Sangika property. The petitioners, in their petition have admitted this position. Therefore it is safe to conclude that the 1st petitioner was aware of the decision of the Commissioner of Buddhist Affairs who is the 2nd respondent. Then it was within the knowledge of the 1st Petitioner that the 1st Respondent was going to refuse the registration of deed P4. For these reasons, I am unable to agree with the above contention of the learned Counsel for the Petitioners.

In view of the above facts, it is clear that the Petitioners have not used the right of appeal given to them under section 3S (1) of the said Ordinance. The Petitioners have, therefore, not used the alternative remedy available to them.”

In the instant case, the Petitioner has already filed an application in this Court which is still pending.

Therefore, we see no reason to allow this application while the said application is pending.

Application dismissed.

No order for costs.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

PRESIDENT OF THE COURT OF APPEAL