

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

In the matter of an application for mandates in
the nature of Writs of Certiorari, mandamus,
and Prohibition in terms of Article 140 of the
Constitution.

CA-WRIT 346-23

Sajin De Vas Gunawardena
No. 12/6 Hill Lane,
Pelawatte
Battaramulla.

Petitioner

V.

1. The Commissioner General of Inland Revenue
Department of Inland Revenue
Sir Chiththampalam A. Gardiner Mawatha
Colombo 02.
2. T.M. S.M. Tennakoon
Commissioner
Department of Inland Revenue
Colombo 02.
3. G.P.Mahinda Kumara
Commissioner
Department of Inland Revenue
Colombo 02.
4. W.K.K.Jayaratne

Commissioner
Department of Inland Revenue
Colombo 02.

5. The Chief Magistrate
Chief Magistrate's Court (No. 09)
Colombo 12.

6. The Registrar
Chief Magistrate's Court (No. 09)
Colombo 12.

Respondents

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

Counsel: Farzana Jameel PC with Suren Gnanaraj, Ruchindra Fernando and
Shahanie Mackie for the Petitioner
M. Gunatilleke, ASG, PC with Mihiri de Alwis, SSC and M. Kannangara,
SC For the Respondents

Argued On: 27.03.2024

Written 01.07.2024 (by the Petitioner)

Submissions: 02.07.2024 (by the Respondents)

On

Judgment On: 11.07.2024

B. Sasi Mahendran, J

The Petitioner instituted this action praying for the main reliefs as prayed in the petition dated 23.06.2023.

- b. Issue a Writ of Certiorari quashing the impugned decision made by the 2nd Respondent dated 11th February 2019 marked 'P10'.
- c. Issue a Writ of Certiorari quashing the Notice of the Determination dated 12th February 2019 marked 'P9',
- d. Issue a Writ of Certiorari quashing the Notices of Assessment dated 18th January 2017 marked 'P6', 'P7' and 'P8'
- e. Call for and quash by way a Writ of Certiorari, the 1st Respondent's decision to reject the Petitioner's Returns of Income for the years of Assessment 2010/2011, 2011/2012 and 2013, and the decision to assess the Petitioner's income for the said years of Assessment,
- f. Issue a Writ of Certiorari quashing the assessment made by the 1st Respondent in respect of the Petitioner's assessable income for the years of Assessment 2010/2011, 2011/2012 and 2012/2013,
- g. Call for and quash by way of a Writ of Certiorari the decision of the 1st Respondent to issue a Certificate of tax in default, against the Petitioner, in the Chief Magistrate's Court of Colombo, for the Years of Assessment 2010/2011, 2011/2012 and 2012/2013.

According to the petition, on or about 14. 06. 2023, while the Petitioner was overseas, he has come to know through the local newspapers, that the 1st Respondent has instituted proceedings against the Petitioner by way of a purported Certificate of Tax in Default in the Chief Magistrate's Court of Colombo in terms of Section 179 (1) of the Inland Revenue Act No. 10 of 2006 as amended. According to the Petitioner, the particular action by the Respondent is ultra vires, since, before the due conclusion and proper determination of the Petitioner's appeal, they have instituted this action in the Magistrate's Court.

The facts of this case are as follows:

According to the document marked as R1, the Petitioner has made a request to the Inland Revenue Department (IRD) to open an income tax file in his name as he was receiving a remuneration of Rs. 900,000 from the Cosmos Telecommunication Ltd. acting in the capacity as a Director for the accounting period of 2009/2010.

Based on the request, the Petitioner was allocated the Tax File No. 7/6931/1/1. According to paragraph 14 of the petition, the Petitioner admitted the fact that he has failed to submit the returns for the years of assessment 2010/2011, 2011/2012, 2012/2013 within time. According to the Respondent, the tax return for the year of assessment 2010/2011 was delayed by 13 months, the tax return for the year of assessment 2011/2012 was delayed by 1 month and 16 days and the tax return for the year of assessment 2012/2013 was delayed by 5 months and 23 days.

In terms of Section 106 of the said Act, every person who is chargeable with income tax shall on or before the 30th November immediately succeeding the end of that year of assessment shall furnish to an assessor a return of his income.

Thereafter, by the letter dated 27.02.2015 which was marked as R3, the Respondent requested the Petitioner to submit the following details.

1. "Declarations of assets and liabilities as at 31.03.2012, 31.03.2013 and 31.03.2014.
2. Receipts and payments accounts for the above assessment years
3. Details of the movable and immovable properties that purchased or sold by you during the period of 01.04.2011 – 31.03.2014.
4. Account numbers and details of all type Accounts/Deposits that you have maintained in Banks/Financial Institutions during the period of 01.04.2011 – 31.03.2014.
5. 1. Audited accounts of the companies that you were a director or a shareholder (other than Public Listed Companies) for the assessment years 2011/2012, 2012/2013, 2013/2014.
2. Extracts of the director current accounts of the above companies.
6. Names, number of shares and percentage of shares holding owned by you in Public Listed Companies during the period of 01.04.2011 – 31.03.2014."

These documents were not indicated in the Petitioner's petition. We are mindful that, at any stage, the Petitioner has not diverged the assessor that the said Cosmos Group of Companies do not belong to him. According to the Respondent, the said returns submitted by the Petitioner were rejected by the assessor and by the letter dated 30.12.2016, the Respondents have informed the Petitioner of the following reason for such rejection.

“Income declared by you for the year of assessment 2010/2011 is not sufficient to meet the expenses made during the year. Difference between receipts and payments is treated as undeclared taxable income.”

The 2nd Respondent has mentioned that there is an undeclared additional income which has not been disclosed by the Petitioner. The 2nd Respondent has formed the opinion that the Petitioner has invested in the director’s current accounts during those years. This position was strengthened by the document marked as R12 where the Petitioner has sent a letter to the Commissioner on 08.01.2019.

“1. The drawings and withdrawals made from the respective companies where I functioned as a Consultant was not for my personal consumption but as a cash flow managements of the respective companies. Accordingly, when one company was in need of working capital etc. funds were withdrawn from another company and deposited. In this manner the total amounts withdrawn has been deposited to the respective companies and there is documentary evidence available to prove same.”

Thereafter, the 2nd Respondent has issued the notice of assessment indicating the tax payable and the penalty in terms of Section 164 of the IRA. All three notices of assessment were sent on 18.01.2017. In terms of Section 165 of the said Act, the Petitioner is entitled to appeal against the notice of assessment issued by the assessor. Accordingly, the Petitioner has submitted an appeal on 13. 02. 2017 against the notices of assessment issued by the 2nd Respondent which were marked as R7(a), (b) and (c). In the said appeal, he has stated that the estimate made by the Assistant Commissioner is grossly perverse and unfair as the assessor had arrived at the additional liable income mainly considering amounts declared as withdrawn in director’s current account. But the Petitioner has not indicated that he has no dealing with the director’s current account. According to the petition in paragraph 32 to 35, one Prasad Dimuthu Kumara, the accountant of several Cosmos Companies, has appeared in the particular inquiry before the Assistant Commissioner as the authorized representative of the Petitioner and has explained with regard to the cash receipts and payments details. But he has not denied that particular accounts were not used by the Petitioner. We note that, in the written submission filed by the Petitioner dated 03.06.2024 in paragraph 16, the Commissioner General has written to the Director of Criminal Investigation Department asking whether they have any information regarding the Petitioner which was done according to Section 106 (20) of the IRA. It shows that before the Commissioner made the determination, he has gathered information of the Petitioner. According to the Petitioner, he has received a letter on

12.02.2019 (P9) which contained the determination of the appeal, determined on 11.02.2019 according to Section 165 (13) of the IRA. These documents are marked as P9 and P10 which have been challenged by the Petitioner. We are of the view that P9 is a communication to the Petitioner regarding the determination, there is no decision in the particular document to be challenged by the Petitioner.

We are mindful that the Petitioner's appeal does not contain any reference to the tax that was paid. According to the Petitioner, the determination made by the 1st Respondent which is marked as P10, is said to be ultra vires and that the Commissioner has not followed the principles of natural justice. In response, the Respondent has indicated that there were interviews held with the accountant and details and information were asked by the Respondent. Especially in R8(d), the Commissioner has requested the details from the Petitioner on 01.05.2018.

"Therefore, you are kindly requested to submit the following documents on or before 15.05.2018 in order to settle the above appeal.

1. Declaration of assets and liabilities and receipts and payments accounts for the year of assessment 2010/2011

2. Details breakup of payments for the following Companies as per receipts and payments accounts of years of assessments 2011/2012, 2012/2013.

2011/2012 2012/2013

Cosmos Aviation Services (Pvt) Ltd 34,200,192 6,537,000

Cosmos Technology (Pvt) Ltd 42,854,017 15,213,000

Cosmos Leisure (Pvt) Ltd 14,349,000 51,215,000

Cosmos Security (Pvt) Ltd 4,089,094 -

Cosmos Plantation (Pvt) Ltd 18,235,604 18,140,020

Cosmos Printing (Pvt) ltd - 4,780,000"

It shows that the 1st Respondent has considered all the details before making the determination which is marked as P10.

Also, in the document marked as R4, where the Petitioner himself has indicated that under the column of receivable current account with related parties mentioned Cosmos Technology, Cosmos Leisure, Cosmos Plantation and under column liability payable Cosmos Aviation Service, Cosmos Printing and Cosmos Security.

It is clear that the Petitioner himself has admitted the fact that he has a direct involvement with the particular current accounts.

According to the determination made by the Respondent marked as P10, he has confirmed the assessment issued for the years 2010/2011, 2011/2012, 2012/2013.

When we consider the entire documents, the assessor has considered all the documents placed before him, to reach at the determination. Also, the Commissioner General has acted in accordance with the provisions of the said Act.

In the instant application, the main ground urged by the Petitioner is that the assessments made by the 2nd Respondent in P6, P7 and P8 are ultra vires and ex facie erroneous.

What is Ultra Vires was discussed in **De, Smith's Judicial Review, Eighth Edition, page 210,**

The Ultra vires doctrine

“In essence, the doctrine of ultra vires permits the courts to quash decisions made by bodies exercising public functions which they have no power to make. Acting ultra vires and acting without jurisdiction have essentially the same meaning, although in general the term "vires" has been employed when considering administrative decisions and delegated legislation, and "jurisdiction" when considering judicial decisions, or those having a judicial flavour.”

According to the document marked as R6, the 2nd Respondent has indicated the reason for not accepting the returns for the said years of assessment. According to him, he has come to the conclusion, based on the document filed by the Petitioner marked as R4. According to R4, the Petitioner has declared the companies where he has received money and where he has paid the money. On that footing, 2nd Respondent has come to the conclusion that, the amounts invested in the director's current accounts by the Petitioner during those years are considered as undeclared taxable income. Nevertheless, the onus of disproving the undeclared income is on the Petitioner which he has failed to do.

According to the R17, where the 1st Respondent gave reasons for the determination are stated as follows:

“In the absence of required details and information from the appellant, there is no any other alternative other than the estimation of undeclared income based on the information that he has already collected. Accordingly, the Commissioner has clearly given his reasons in arriving to the undeclared income for above years of assessment. If his calculations are not acceptable, it is the duty of appellant to prove that the calculations are incorrect.

.....

The Commissioner is not in a position to provide the information regarding all affairs of the taxpayer including types or character of the income sources. Since the Commissioner has explained the method of calculating the undeclared income in his letter of information, now it is the Appellant’s duty to prove that there is no any undeclared income as calculated by the Assistant Commissioner. Without providing sufficient details and information to prove his position, it is not acceptable the reason given by the Appellant.”

When we consider both the decisions, it is clear that both Respondents have acted according to the law and evidence placed before them.

Grounds for issuing certiorari are mentioned by **M.P. Jain and S.N. Jain** in **Principles of Administrative Law, 6th Enlarged Edition, Volume 2, Page 2180.**

The grounds for the issue of certiorari have been succinctly stated by the Supreme Court in *Syed Yakoob v. K.S. Radhakrishnan*. Prohibition and Certiorari are issuable on the following grounds:

- i. When the concerned authority is acting or has acted under a law which is invalid, ultra vires or unconstitutional;
- ii. jurisdictional error;
- iii. error of law apparent on the face of the record;
- iv. findings of fact not supported by evidence;
- v. failure of natural justice.

We hold that the Petitioner has failed to establish that the particular orders made by the Respondents do not fall under any of the grounds mentioned above.

In addition, the Petitioner in his submission has mentioned that, the determination made by the 1st Respondent is not final. According to the Petitioner, by letter dated 30.08.2019, the Respondent has informed the Petitioner that the matter has been referred to the Commission for consideration. According to the Petitioner's written submission in paragraph 133, this amounts to an acknowledgement and admission by the CGIR of the non-conclusion of the appeal. On the other hand, the Respondent stated that the particular appeal has been duly determined and there is no provision to reopen.

We are mindful of the P9 dated 12.02.2019 where it has stated that if the Petitioner is aggrieved by this determination, they have a right of appeal to the Tax Appeals Commission in terms of Section 7 of the Tax Appeals Commission Act No. 23 of 2011. On that wording, it is clear that the appeal is concluded.

One of the objections taken by the Respondent is that Petitioner had an alternative remedy to converse this decision. The Petitioner counters that there is no alternative remedy by relying on two judgments in his submission. The Petitioner's grievance is that the assessor's assessment is wrong.

I reproduce the judgments cited in the Petitioner's submission. Accordingly,

In A.M. Ismail v. Commissioner of Inland Revenue, (1981) 2 SLR 78, at page 111, it was held that:

"It has power to review or annual an assessment if it is proved that an assessee was not liable to pay the tax charged."

Mrs. D.M. S. Fernando and Another v. A. M. Ismail, (1982) IV SLTC 184, held that

"Those provisions confine him to an appeal against the quantum of assessment."

According to the above said judgments, there is an effective alternative remedy available to the Petitioner to converse the matter before the TAC. But the Petitioner has failed to appeal to the Tax Appeals Commission.

When we consider the documents in entirety, the Petitioner has failed to satisfy this court that P6, P7 and P8 are amenable for writ of Certiorari.

Therefore, for the above said reasons we dismiss this application with costs.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL