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* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 71/2019

Stassen Exports (Pvt) Ltd,
No. 833, Sirimavo Bandaranaike Mawatha,
Colombo 14.

PETITIONER

Vs.

1. The Commissioner General of Inland Revenue,
   Department of Inland Revenue,
   Colombo 2.

2. H.M.G. Rajakaruna,
   Deputy Commissioner,
   Unit 6B (LTU),
   Department of Inland Revenue,
   Colombo 2.

3. M. D. Asitha G Munasinghe,
   Assistant Commissioner,
   Unit 6A (LTU),
   Department of Inland Revenue,
   Colombo 2.

4. Mrs. J.D. Ranasinghe,
   Deputy Commissioner,
   Unit 6A,
   Department of Inland Revenue,
   Colombo 2.

5. Mr. Sarath Abevratne,
   Commissioner,
   Unit 6A,
   Department of Inland Revenue,
   Colombo 2.

6. Mrs. Daya Munasinghe,
   Deputy Commissioner General,
   Department of Inland Revenue,
   Colombo 2.

7. Mr. Jude Devapriya,
   Commissioner,
   Unit 6B,
   Department of Inland Revenue,
   Colombo 2.

8. Mr. W.A.D.D. Wanigasundara,
   Deputy Commissioner,
   Unit 6B.,
   Department of Inland Revenue,
   Colombo 2.

9. Mr. Darmadasa Rangalla,
   Commissioner,
   Department of Inland Revenue,
   Colombo 2.

9A. Mrs. Sepalika Chandrasekera,
   Commissioner,
   Department of Inland Revenue,
   Colombo 2.

10. Ms. Gayani Balasuriya,
Deputy Commissioner,
Department of Inland Revenue,
Colombo 2.

11. Mr. Nadun Guruge,
Deputy Commissioner General
(Direct Tax Administration),
Department of Inland Revenue,
Colombo 2.

12. Mr. Rohitha Gamage,
Commissioner,
Unit 6B,
Department of Inland Revenue.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Nihal Fernando PC with Harshula Senevirathne, instructed by K. Upendra Gunasekara for the Petitioner.

Manohara Jayasinghe, DSG with M. Fernando SC for the Respondents.

Written submissions tendered on:

11.03.2020 and 14.07.2023 by the Petitioner

10.01.2023 and 02.08.2023 by the Respondents

Argued on: 15.06.2023

Decided on: 12.12.2023

S.U.B. Karalliyadde, J.

The Petitioner to this Writ Application, Stassen Exports (Pvt) Ltd (the Petitioner Company) is a Company duly incorporated in terms of the Companies Act, No. 07 of 2007 and a duly registered Tax Payer, holding TIN No. 104047890. The Petitioner Company filed its Return of Income and the Final Income Tax computation respectively on 30.11.2010 and 17.06.2011 for the Year of Assessment 2009/10. After that, several discussions and/or interviews were held between the Senior Accountant, Accountant and the Financial Controller of the Petitioner Company and the 4th and 5th Respondents of the Inland Revenue Department (the IRD) regarding certain aspects of said Return of Income filed by the Petitioner Company. The Petitioner Company alleges that at the interviews held on 17.01.2014 and 30.04.2014 at the IRD attended by the Financial Controller, Senior Accountant and the Accountant of the Petitioner Company, the Commissioner of Unit 6A of the IRD (5th Respondent) intimated and/or threatened and/or exerted undue pressure or duress on the above-stated employees of the Petitioner Company to accept that a portion of the overdraft interest included in the total overdraft interest to be in relation to investment-related interest expense. The Petitioner Company further alleges that the said employees were not given any opportunity to read the subject interview notes on the said dates and the interview notes were signed by them merely to acknowledge their presence. Furthermore, the employees of the Petitioner Company had no authority to enter into any agreement with the IRD on behalf of the Petitioner Company and they did not have any letter of authorization from the Petitioner Company to enter into an agreement on behalf of the Petitioner Company. Therefore, the Petitioner Company argues that interview notes on the said two dates do not amount to an agreement entered into and between "Authorized Representatives" of the Petitioner Company and the IRD nor do not amount to "final and conclusive"

agreements. The Petitioner Company further argues that in any event in terms of Section 171 of the Inland Revenue Act, No. 10 of 2006 (as amended) (the Act), only an agreement reached during an appeal stage hearing is final and conclusive and cannot be reversed, which is not the case in the instant Application for the reason that no Assessment had been raised by the IRD contesting or challenging the Income Tax Return of the Petitioner Company for the Year of Assessment 2009/10 and accordingly, no appeal had been preferred by the Petitioner Company as there is no Assessment to appeal against.

By the letter dated 28.04.2014 marked as P6, the 3rd Respondent intimated to the Petitioner Company that for the reasons mentioned in that letter, the Return of Income furnished by the Petitioner Company for the Year of Assessment 2009/10 had not been accepted by the IRD. Replying to P6, the Petitioner Company by letter dated 27.06.2014 marked as P7, informed the IRD that the Petitioner Company is contesting the adjustment sought to be made by the 3rd Respondent to the Statutory Income or Taxable Income of the Petitioner Company as stated in P6. Consequent to the letter marked as P7, further interviews were held between the Financial Controller, Senior Accountant and the Accountant of the Petitioner Company and the IRD. Nevertheless, no Notice of Assessment or Assessment was raised by the IRD in terms of the Act, challenging or contesting the Income Tax Returns filed by the Petitioner Company for the Year of Assessment 2009/10. The Petitioner Company argues that in any event, the said Income Tax Returns cannot now be challenged or contested for the reason that the statutory period to raise an Assessment has lapsed now.

While the facts remained as such, the IRD has sent the Statement of Tax Overpaid dated 30.05.2017 marked as P9 to the Petitioner Company and the Petitioner Company by its letter dated 15.06.2017 marked as P10 objected to P9 and claimed the total amount of

Income Tax Refundable in terms of the Income Tax Return already filed by the Petitioner Company for the subject Year of assessment. By the letter dated 25.08.2017 marked as P11 addressed to the IRD, the Petitioner Company further contested the legality of P9 in the absence of a Notice of Assessment or Assessment being raised or issued within the statutorily stipulated period of prescription.

The substantive reliefs sought by the Petitioner in the Petition dated 22.02.2019 to this Writ Application are as follows;

> **Prayer (b)**: Issue a mandate in the nature of the Writ of *Certiorari* quashing the Statement of Tax Overpaid dated 30 May 2017 (P9).
>
> **Prayer (c)**: Issue a mandate in the nature of the Writ of *Certiorari* quashing the decision/determination of the 8th Respondent dated 4th April 2018 (P17).

The Respondents while admitting the fact that the interviews were held on 17.01.2014 and 30.04.2014, deny the allegations of the Petitioner Company that undue pressure was extended upon the employees of the Petitioner Company and argue that if there is any disagreement in the content of the interview notes of those two dates, the representatives of the Petitioner Company were at the liberty to state that fact and sign the interview notes accordingly. Besides, if there were such allegations against the IRD, the Petitioner Company representatives could have easily refused to sign the interview notes or complain to the Commissioner General of the IRD about the conduct of the Officers of the IRD. The Respondents strongly deny the allegation of the Petitioner Company that its representatives were forced to accept the facts and figures stated in the interview notes dated 17.01.2014 and 30.04.2014 marked as P4 and P5 and forced to place their signatures. The Respondents state that the above-stated representatives of the Petitioner Company had represented the Petitioner Company even long before and

after the interviews dated 17.01.2014 and 30.04.2014 at the IRD on many occasions regarding the tax matters of the Petitioner Company and therefore, the Respondents reasonably believed that the said Officers were representing the Petitioner Company to discuss the tax matters for the assessment year 2009/10 and, did not demand a letter of authorization from the Petitioner Company to represent it at the interviews in dispute dated 17.01.2014 and 30.04.2014. The Respondents therefore argue that the representatives of the Petitioner Company have signed the interview notes on the said dates admitting and confirming the tax liability of the Petitioner Company for the Year of Assessment 2009/10. Under the above-stated circumstances, the position of the Respondents is that the assessment for the relevant year was settled and finalized on consent on 17.01.2014 and 30.04.2014 and accordingly the letter of intimation marked as P6 was sent out upon the consensual agreement arrived at between the parties upon the interviews on those two dates.

The Respondents strongly deny the allegations of the Petitioner Company, *inter alia*, that they forced the representatives of the Petitioner Company to arrive at a settlement about the tax liability of the Petitioner Company, the representatives were not allowed to read the subject interview notes dated 17.01.2014 and 30.04.2014, the representatives on those two dates had placed their signatures on the notes merely to acknowledge their presence, the representatives had no authority to come to any agreement with the IRD on behalf of the Petitioner Company etc. The above-mentioned matters are serious matters which are connected to the reliefs sought in this Application. Since those matters are involved with the facts, the Court cannot decide on those facts on affidavit

evidence. It is trite law that when the material facts are in dispute the Courts does not exercise its Writ jurisdiction.[1]

A.S. CHOUDRI in his book on the Law of Writs and Fundamental Rights (2nd Ed.), Vol.2, (at page 449) states thus:

> "*Where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct, a writ will not issue*."

Referring to the above-stated authority, in the case of *Thajudeen Vs. Sri Lanka Tea Board and Another*[2] Ranasinghe J with Seneviratne J agreeing held:

" That the remedy by way of an application for a Writ is not a proper substitute for a remedy by way of a suit, especially where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity examining their witnesses and the Court would be better able to judge which version is correct, has been laid down in the Indian cases of Ghosh v. Damodar Valley Corporation[3]*, Porraju v. General Manager B. N. Rly*[4]*"* (at page 474).

Therefore, after considering the above-stated facts of the case and the legal literature, I hold that the Petitioner Company is not entitled to invoke Writ jurisdiction of this Court.

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[1] A.R.H. Mohideen and 10 others Vs Colombo Municipal Council and 4 others (C.A. Writ Application No: 466/2020), Rupasinghe Arachchige Dona Kusumawathie and 4 others Vs W. M. B. Weerasekara, Commissioner General of Agrarian Development and 9 others (C.A. Writ Application No: 0553/2019).
[2] (1981) 2 SLR 471.
[3] A.I.R. 1953 Cal. 581.
[4] A.I.R. 1952 Cal. 610.

The Petitioner Company also contends that according to Section 171 of the Inland Revenue Act, No. 10 of 2006 (as amended), an agreement reached only during an appeal stage hearing is final and conclusive and cannot be overturned. However, this Court is of the view that the Inland Revenue Act does not expressly prohibit the IRD from reaching settlements with the taxpayers at a stage other than the appeal stage. It is an accepted fact that in procedural law what is not forbidden is permissible in law.[5]

In *Narsingh Das v. Mangal Dubey*[6], Mr. Justice Mahmood, the celebrated Judge of the Allahabad High Court, observed: -

> *"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."*

The said view was followed by a Full Bench of the Allahabad High Court in *Raj Narain Saxena Vs. Bhim Sen & others*[7], and in *Rajendra Prasad Gupta vs Prakash Chandra Mishra & Ors*[8]. Therefore, since the Inland Revenue Act does not expressly prohibit reaching settlements before the appeal stage, the settlement reached by the IRD with the Petitioner Company does not ultra vires the provisions of the Inland Revenue Act.

Clive Lewis in Judicial Remedies in Public Law, 5th ed., South Asia Edition (2017) states (page 185):

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[5] Abeyasinghe Arachchige Asoka vs R. P. R. Rajapaksha, Commissioner General of Lands and 4 Others, C A Writ Application No. 208/2013, CA Minutes of 02.09.2016 at Page 15.
[6] ILR 5 All 163 (FB) (1882)
[7] AIR 1966 Allahabad 84 FB
[8] Civil Appeal No(s). 984 OF 2006

> *"For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects.* ***Once its illegality is established, and if the courts are prepared to grant a remedy,*** *the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as ever incapable of ever producing legal effects." (emphasis added)*

Thus, even where an act of a public authority is *ultra vires* and a nullity, for remedial purposes the illegality must be established before a court. As stated above, I hold that the Petitioner Company in the instant Application has failed to establish that the settlement reached *ultra vires* the provisions of the Inland Revenue Act.

The Petitioner Company seeks a Writ of Certiorari to quash the Statement of Tax Overpaid marked as P9 but not prayed to quash the proceedings of the settlement marked as P4 and P5 which led the IRD to send P9. Therefore, even if the Court decide to issue a Writ of Certiorari quashing P9, the decision of the IRD based on P4 and P5 remains intact.

In *Weerasooriya v. The Chairman, National Housing Development Authority and Others*[9] Sripavan J. (as he was then) held that the court will not set aside a document unless it is specifically pleaded and identified in the express language in the prayer to the petition.

The Petitioner has not prayed to quash the proceedings marked as P4 and P5 and therefore, this Court cannot quash P4 and P5. On the other hand, since the process of settlement has not been challenged by the Petitioner Company in any court, its validity

[9] C.A. Application No. 866/98, CA Minutes 08.03.2004

should be presumed. Wade and Forsyth, Administrative Law, 9th Ed., Indian Edition, page 304, states that;

> "This must be equally true even where the 'brand of invalidity' is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects."

Lord Diplock stated in *Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry*[10] that;

> "It leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction. " (emphasis added)

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a court.[11] In this instant Application, the Petitioner Company has not even sought to set aside the settlement marked on P4 and P5, hence, the validity of P4 and P5 should be presumed.

Furthermore, in prayer (c) it has been prayed for a Writ of Certiorari to quash the document dated 04.04.2018 marked as P17. Even though the Petitioner Company seek a Writ of Certiorari to quash P17 on the basis that it contains a decision/determination of the 8th Respondent, the Court is of the view that no decision/determination has been intimated to the Petitioner Company by P17. By that letter, the IRD has only informed

[10] (1975) AC 295 at 366.
[11] id.

the Petitioner Company that its tax liability for the year of assessment 2009/10 was settled and finalized upon an agreement between the Petitioner Company and the IRD. Therefore, I hold that the relief sought in prayer (c) is futile.

It has been repeatedly held by this Court that writs would not be issued where it would be vexatious or futile. In *PS. Bus Co. Ltd. v Members and Secretary of the Ceylon Transport Board* [12] Sinnetamby. J stated that the prerogative writs are not issued as a matter of course and it is 'in the discretion of Court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ, for instance, will not issue where it would be vexatious or futile.

In *Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Ltd.*[13], this court held that being futile in its result to issue a writ of mandamus is a ground to refuse the writ.

In *Samastha Lanka Nidahas Grama Niladhari Sangamaya Vs Dissanayake*[14] Saleem Marsoof J. held that *"it is trite law that no court will issue a mandate in the nature of a writ of certiorari or mandamus where to do so would be vexatious or futile."*

Marsoof, PC. J (P/CA) in the case of *Ratnasiri and others Vs Ellawala and others*[15] held that; *"This court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of 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."*

[12] 61 NLR 491
[13] 2005 (1) Sri LR 89.
[14] [2013] BLR 68.
[15] (2004) SLR 180.

In the case of *Siddeek Vs Jacolyn Seneviratne*[16] Soza J. observed that, *"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 issue where the end result will be futility, frustration, injustice and illegality."*

In *Ratnasiri and others Vs Ellawala and others*[17] what was sought to be quashed was the decision said to have been made by the Transfer Board, to whom the power of transfer has been delegated by the Public Service Commission. However, the Public Service Commission had approved and adopted the decision of the Transfer Board and no relief has been sought against that decision. Justice Saleem Marsoof, P.C., P/CA (as he then was) held that it would be futile to grant the reliefs prayed for since it would still leave intact the decision of the Transfer Board.

Considering all the above-stated facts and circumstances, I hold that there are no merits in this Writ Application to grant the reliefs sought by the Petitioner Company and that should be dismissed. Accordingly, I dismiss the Application. The Petitioner Company will pay Rs. 100 000/- to the IRD as costs of this Application.

Application dismissed with costs.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL

[16] [1984] 1 Sri LR 83.
[17] [2004] 2 Sri LR 180 at 208.