

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

CA (Writ) Application No: 108/2019

Hitibandara Attapattu Mudiyanse
Ananda Parakrama Kumara Algama,
No. 37, Colombo Road,
Malpitiya, Boyagane,
Presently of No. 184/38, Prestige Park,
Radawana Road, Yakkala.

PETITIONER

Vs.

1. Nadun Guruge,
Acting Commissioner General of Inland
Revenue.
2. Mallika Samarasekera,
Former Commissioner General of
Inland Revenue.
3. Commissioner General of Inland Revenue,
Department of Inland Revenue.
4. K.D.A.P. Koralearachchi,
Former Deputy Commissioner,
VAT/GST Branch.
5. K. Dharmasena,
Former Commissioner (Zone III),
Inland Revenue.

6. Leela Ramanayake

7. Ivon Dissanayake

8. P. Rohini

9. Pushpa Rajapaksha,

6th – 9th Respondents are Members of
the Committee for Granting of Tax
Exemption for Small and Medium Scale
Enterprises

10. Commissioner,
Recoveries, Clearance and Legal
Division.

1st – 10th Respondents at
Department of Inland Revenue,
Sir Chittampalam A.Gardiner Mawatha,
Colombo 2.

11. Secretary,
Ministry of Finance, Colombo 1.

12. Hon. Mangala Samaraweera,
Minister of Finance,
Ministry of Finance, Colombo 1.

13. Kalyani Dhahanayake,
Former Chairman of the Committee for
Granting of Tax Exemption for Small
and Medium Scale Enterprises,
C/o. Department of Inland Revenue,
Secretariat,
Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

14. T.M. Bandara,
Commissioner of Inland Revenue,
Regional Office, Kurunegala.

15. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Yasantha Kodagoda, P.C., J / President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: D.H. Siriwardena for the Petitioner

Yuresha Fernando, Senior State Counsel for the
Respondent

Supported on: 1st July 2019

Written Submissions: Tendered on behalf of the Petitioner and the
Respondents on 31st July 2019

Decided on: 2nd December 2019

Arjuna Obeyesekere, J

The Petitioner states that he was a building contractor and was engaged in the construction of irrigation canals, roads, buildings etc. He states further that his business was registered with the Department of Inland Revenue (the Revenue) for the payment of Value Added Tax (VAT). The Petitioner admits that he had delayed the filing of the VAT returns and that as a result, the Revenue had disallowed the claims he had made for VAT refunds. The Revenue had served the Petitioner a Certificate of Tax in default dated 16th September 2009 in

terms of Section 43(1) of the Value Added Tax Act No. 14 of 2002, as amended, in a sum of Rs. 11,137,283. On an appeal filed by the Petitioner, the penalty on the sum due had been waived and the sum in default had been reduced to Rs. 6,405,616. The Revenue has filed Case No. 71585 against the Petitioner in the District Court of Colombo in the year 2009 seeking to recover the aforesaid sum of Rs. 6,405,616.

The Petitioner states that he faced many difficulties while carrying out several projects in 2009 in the district of Mannar, and that he was discriminated at the hands of a particular Public servant on the basis of his ethnicity. As a result, the payments due to the Petitioner for work which had already been carried out had been delayed, which the Petitioner claims affected his cash flow and ultimately disrupted the smooth functioning of his business. The Petitioner states that he was compelled to sell two motor vehicles belonging to him and obtain an overdraft facility from the Bank of Ceylon to tide over his financial problems.

In the above circumstances, the Petitioner had made an application to the Revenue in terms of Section 21 of the Value Added Tax (Amendment) Act No. 9 of 2011. Section 21 reads as follows:

"Any person or partnership supplying any goods or services having an annual turnover of a sum not exceeding rupees one hundred million who has defaulted in the payment of taxes payable by him under this Act in respect of any taxable period ending on or before December 31, 2010, due to the existence generally of any conflict environment or due to any

financial constraints of such person or partnership, shall be exempt from the payment of such charge as is in default under this Act:

Provided that, the Commissioner-General of Inland Revenue shall on a request made to him in that behalf, issue to such person or partnership a Certificate of Exemption in respect of the sum as in default:

Provided further, the person or partnership to whom the Certificate of Exemption is issued, shall simultaneously forward to the Commissioner-General of Inland Revenue a written assurance to the effect that such person or partnership shall be responsible for the payment of all sums which may become payable by him under this Act, in respect of any future taxable period commencing on or after January 1, 2011."

This Court has examined the said application dated 9th September 2011 annexed to the petition marked 'P9a' submitted by the Petitioner to the Revenue and observes that even though the Petitioner had explained therein the financial difficulties faced by him, no documents had been annexed to the said application in support of the facts contained therein. By a letter dated 11th June 2012, annexed to the petition marked 'P14', the 2nd Respondent, who was the Commissioner General of Inland Revenue at that time, had informed the Petitioner that an exemption cannot be granted in terms of the aforementioned provision of the Act, as the Petitioner has failed to substantiate the financial difficulties faced by him.¹ The Petitioner had appealed to the Commissioner General of Inland Revenue against the said decision by letter dated 27th June 2002, but his appeals had been rejected by

¹ The reasons given is is 'මුද්‍රා දුර්වලතා සහායකර නොමැත'.

the 2nd Respondent by her letters dated 2nd August 2012 and 4th June 2013, annexed to the petition marked 'P16' and 'P17', respectively.

Dissatisfied by the said decision, the Petitioner has filed this application on **14th March 2019** seeking to quash the said decisions contained in 'P16' and 'P17', as well as a Writ of Mandamus compelling the Revenue to grant an exemption to the Petitioner in terms of the provisions of the above Act.

At the time this matter was supported, the learned Senior State Counsel for the Respondents raised a preliminary objection that the Petitioner is guilty of inordinate delay in invoking the jurisdiction of this Court. The said objection relates to the maintainability of this application and hence, this Court is of the view that it should consider the said objection at the outset.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay, and where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Mandamus. While this Court expects parties to seek relief from Court as soon as it may reasonably be possible, a delay, if any should be due to reasons beyond the control of the party seeking relief. A party cannot 'sit' on his entitlement to seek relief and thereafter belatedly make an application to Court seeking relief, the granting of which is at the discretion of Court.

In Biso Menika v. Cyril de Alwis² Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

"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. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disintitiled himself to the discretionary relief by reason of his own conduct, like 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 chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay..... An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed."

Sharvananda J. went on to consider if an application for a writ should be dismissed on account of delay where the act complained of is an illegality, and held as follows:

"When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject

²1982 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction."

In **Seneviratne v. Tissa Dias Bandaranayake and another**³, the Supreme Court, adverting to the question of long delay, held as follows:

"If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus subveniunt,⁴ and for other reasons refuses to assist those who sleep over their rights and are not vigilant."

In **Issadeen v. The Commissioner of National Housing and others**⁵ Bandaranayake J, dealing with a belated application for a Writ of Certiorari held as follows:

"It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding 'a good and valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated

³ 1999 (2) Sri LR 341 at 351.

⁴ For the laws assist the watchful, (but) not the slothful.

⁵ 2003 2 SLR 10 at page 15.

applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy”.

The above judgments clearly illustrate four important matters, although not necessarily in a particular order. The first is that an application for a Writ must be filed without delay. The second is that where there is, on the face of the application, a delay, such delay must be explained to the satisfaction of Court. The third is that delay can be ignored, if the act complained of is manifestly illegal, such as a decision of a statutory authority made in excess of jurisdiction. The fourth is the nature of the acts that have taken place during the time period between the impugned decision or act and the filing of the application. These factors are relevant when determining whether an application should be dismissed on account of the Petitioner being guilty of delay.

This Court will now consider the facts of this application, keeping in mind the above dicta.

As observed earlier, while 'P14' was issued on 11th June 2012 and 'P16' and 'P17' have been issued on 2nd August 2012 and 4th June 2013 respectively, this application had been filed only on 19th March 2019. Thus, there is considerable delay in invoking the jurisdiction of this Court as this application has been filed almost six years after the appeal had been rejected. This Court has examined the petition and observes that the Petitioner has not offered any explanation for the delay in filing of this application. Furthermore, the Petitioner is not alleging that the decision of the Commissioner General of Inland Revenue is illegal, or *ultra vires* the powers of the Commissioner General of Inland

Revenue, and that delay should therefore not be considered. In the above circumstances, this Court is in agreement with the submission of the learned Senior State Counsel that the Petitioner is guilty of delay and that this application is liable to be dismissed in *limine* on the ground of laches. The necessity for this Court to consider the grievance of the Petitioner, namely that the decision of the 2nd Respondent is unreasonable, therefore does not arise, suffice it to state that in the absence of material in support of the Petitioner's appeal to the Commissioner General, it cannot be said that the rejection of the Petitioner's appeal by the Commissioner General is unreasonable.

In the above circumstances, this Court does not see any legal basis to issue notice of this application on the Respondents. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

**Yasantha Kodagoda, P.C., J/
President of the Court of Appeal**

I agree

President of the Court of Appeal