

**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.

Flintec Transducers (Private) Limited  
P. O. Box 24, KEPZ Phase I, Spur Rd. 2, Katunayake.

**Petitioner**

**Case No. CA (Writ) 194/2013**

**Vs.**

1. The Commissioner General of Inland Revenue  
Department of Inland Revenue,  
Sir Chittampalam A. Gardiner Mw.,  
Colombo 02.
2. Mr. S. C. Athukorala  
Senior Assessor,  
Unit 4,  
Department of Inland Revenue,  
Sir Chittampalam A. Gardiner Mw.,  
Colombo 02.
3. Mrs. R. K. C. Chithralatha  
Senior Assessor,  
LTU (6B),  
Department of Inland Revenue,  
Sir Chittampalam A. Gardiner Mw.,  
Colombo 02.
4. Mr. Newton Perera  
Deputy Commissioner,  
LTUAudit – Unit 8,  
Department of Inland Revenue,  
Sir Chittampalam A. Gardiner Mw.,  
Colombo 02.

5. Justice Hector Yapa  
Chairman,  
Tax Appeals Commission,  
No. 49/14, Galle Road, Colombo 03.
6. Mr. Jolly Somasundaram  
Member,  
Tax Appeals Commission,  
No. 49/14, Galle Road, Colombo 03.
- 6A. Mr. M. N. Junaid  
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.
- 7A. Mr. S. Swarnajothi  
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. Mrs. J. Dheemantha Ranasinghe  
Secretary,  
Tax Appeals Commission,  
No. 49/14, Galle Road, Colombo 03.
9. Hon. Attorney General  
Attorney General's Department,  
Colombo 12.

**Respondents**

**Before:** Janak De Silva J.

N. Bandula Karunarathna J.

**Counsel:**

Riad Ameen with Pratheepa Balendran for the Petitioner

Manohara Jayasinghe SSC for the Respondents

**Argued On:** 27.06.2019

**Written Submissions Filed On:**

Petitioner on 22.01.2016 and 26.11.2019

Respondents on 20.03.2017 and 23.09.2019

**Decided On:** 26.05.2020

**Janak De Silva J.**

The Petitioner is engaged in the business of manufacture and sale of load cells and accessories for electronic scale. The Petitioner is a registered person in terms of section 14 of the Value Added Tax No. 14 of 2002 as amended (VAT Act) for the purposes of the VAT Act.

The Petitioner submitted monthly Value Added Tax (VAT) returns for the periods of September, October and December 2006 [P2 (a) to P2 (c)]. By letter dated 16.01.2009 [P3 (a)] the 2<sup>nd</sup> Respondent rejected the tax returns under section 29 of the VAT. The reasons given were that disposal of a building, motor vehicle and machinery owned by the Petitioner was liable for VAT.

Thereafter three notices of assessments [P4 (a) to P4 (c)] dated 04.06.2009 was sent to the Petitioner. The Petitioner appealed against the said assessments to the 1<sup>st</sup> Respondent by letter dated 02.07.2009 as provided for in section 34 of the VAT Act [P5]. This appeal was heard by the 4<sup>th</sup> Respondent who by his determination dated 16.06.2011 [P10] confirmed the assessments.

Aggrieved by this determination, the Petitioner conveyed his dissatisfaction to the 4<sup>th</sup> Respondent who by letter dated 05.07.2011 [P12] conveyed the reasons for his determination. The Petitioner then preferred an appeal to the Tax Appeals Commission (TAC) which was dismissed on 24.01.2013.

The Petitioner has inter alia sought the following relief from Court:

- (a) Writ of Certiorari quashing the decision of the 2<sup>nd</sup> Respondent contained in the letter dated 16.01.2009 [P3 (a)],
- (b) Writ of Certiorari quashing the notices of assessment issued by the 3<sup>rd</sup> Respondent [P4 (a) to (c)],
- (c) Writ of Certiorari quashing the determination dated 16.06.2011 of the 4<sup>th</sup> Respondent Commissioner marked P10,
- (d) Writ of Certiorari quashing the reasons dated 05.07.2011 for the said determination of the 4<sup>th</sup> Respondent Commissioner [P12],
- (e) Writ of Certiorari quashing the determination dated 24.01.2013 of the TAC [P16],
- (f) Writ of Prohibition restraining the 1<sup>st</sup> to 4<sup>th</sup> Respondents from taking any steps to recover the taxes and/or penalty referred to in the notices of assessments [P4 (a) to (c)].

On 27.06.2019 parties agreed to dispose the matter by way of written submissions. Parties were given the opportunity of filing further written submissions which was done.

Parties agree that the issue to be determined is whether disposal of a building, a motor vehicle and machinery constitutes a supply made *"in the course of carrying on, or carrying out of a taxable activity"* of the Petitioner within the meaning of section 2(1)(a) of the VAT Act.

The submission of the Petitioner is as follows:

- (I) Firstly, the scope of the word "taxable activity" in sections 2(1) (a) and 83 of the VAT Act are addressed.

- (II) Secondly, the scope of the words "in the course of carrying on, or carrying out" in section 2(1) (a) of the VAT Act is addressed.
- (III) Thirdly, it is submitted that documents R1 and R2 and submissions based thereon are irrelevant to this application.
- (IV) Fourthly, it is submitted that the writ application is the only remedy.

### ***Taxable Activity***

Section 2(1) of the VAT Act reads:

"2(1) Subject to the provisions of this Act, a tax, to be known as the Value Added Tax (hereinafter referred to as "the tax") shall be charged -

(a) at the time of supply, on every taxable supply of goods or services, made in a taxable period, by a registered person in the course of the carrying on, carrying out, of a taxable activity by such person in Sri Lanka;

(b) on the importation of goods into Sri Lanka, by any person,

and on the value of such goods or services supplied or the goods imported..."

The learned counsel for the Petitioner contends that disposal of a building, motor vehicles and machinery cannot be liable for VAT if such disposal does not constitute a taxable activity and submits that the disposal of a building, motor vehicles and machinery by the Petitioner is not taxable activity within the meaning of section 83 of the VAT Act.

The Petitioner relies on extracts from *Grainger & Son v. Gough* (3 TC 462 at 472), *Lionel Simmons Properties Ltd. (In Liquidation) and Others v. Commissioners of Inland Revenue* (53 TC 461 at 491-2) and *Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison* (36 TC 207) which discusses the interpretation of the words "trade", "business" and "adventure in the nature of trade". All these words appear as part of the definition of "taxable activity" in section 83 of the VAT Act.

However, I am not inclined to accept the position that for the disposal of a building, motor vehicles and machinery by the Petitioner to be liable for VAT, it must fulfill the requirements in the definition of the word "taxable activity" in section 83 of the VAT Act.

The taxable activity which the Petitioner carries on is manufacture and sale of load cells and accessories for electronic scale. In order for the disposal of a building, motor vehicles and machinery to be subject to VAT, there is no need for those acts i.e. disposal of a building, motor vehicles and machinery to be a taxable activity by itself within the meaning the word "taxable activity" in section 83 of the VAT Act. It suffices that the disposal of a building, motor vehicles and machinery was made by the Petitioner *"in the course of carrying on, or carrying out of a taxable activity"*.

***In the course of carrying on, or carrying out***

Manufacture and sale of load cells and accessories for electronic scale is the taxable activity of the Petitioner. The learned counsel for the Petitioner submits that although the Petitioner also owns capital assets such as buildings, motor vehicles and machinery which are capital assets used in the business, disposal of such capital assets are not liable to VAT as that is not supplies made by the Petitioner *"in the course of the carrying on, carrying out, of a taxable activity."*

The learned counsel for the Petitioner sought to draw an analogy with section 2(2) of the Finance Act 1972 of the United Kingdom which reads:

"Tax on the supplies of goods and services shall be charged only where: -

- (a) the supply is a taxable supply; and
- (b) the goods or services are services by a taxable person *in the course of a business carried on by him*" (Emphasis added by the Petitioner)

He then pointed out that section 2(2) of the Finance Act 1972 of the United Kingdom was amended in 1977 by the introduction of the words "or furtherance" and that the amended section 2(2) of the Finance Act 1972 of the United Kingdom now reads:

"Tax shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or *furtherance* of any business carried on by him" (Emphasis added by the Petitioner)

The learned counsel for the Petitioner drew the attention of Court to the decision in *Roderick W.K. Stirling v. Commissioner of Customs and Excise* [(1986) 2 CMLR 117] where it was observed (at page 121-122):

"In our opinion, the 1977 Act when it added the words 'or furtherance of' any business to section 2(2) of the Finance Act 1972 did not intend, in defiance of the Sixth Directive, to extend the ambit of value added tax to supplies made by a taxable person who was not acting as such and was not carrying out an economic activity in terms of Article 4. *In our opinion the purpose of the 1977 Act in adding the words 'or furtherance' was to ensure that all business activities were caught by the section, for example, fringe activities carried on separately from a main business; or transactions related in some way to the main business but which are different in character from the general run of business, as where a retailer sells a delivery van*" (Emphasis added by the Petitioner).

The learned Counsel for the Petitioner therefore submitted that "fringe activities carried on separately from a main business" such as where a retailer sells a delivery van became subject to VAT in UK only because of the words "*or furtherance of*".

He further submitted that the words *in the course of a business carried on by him* in section 2(2) of the Finance Act 1972 of the United Kingdom are similar to the wording *in the course of the carrying on, carrying out, of a taxable activity* in section 2(1)(a) of the VAT Act and contended that Court should adopt the approach taken in *Roderick W.K. Stirling v. Commissioner of Customs and Excise* (supra).

However, in my view the technique followed by the drafters of the English Act and the VAT Act may not be the same. For example, the goods and services tax are imposed by the Finance Act 1972 of the United Kingdom by reference to *business* whereas in Sri Lanka the VAT is imposed by the VAT Act by reference to *taxable activity*. In section 83 of the VAT Act, the definition of "taxable activity" is not limited to "business" but includes "trade" and "adventure in the nature of trade". Hence it is unsafe to draw the analogy proposed by the learned counsel for the Petitioner.

In *Croos Raja Chandra v. Commissioner of Inland Revenue* (76 N.L.R. 102 at 104) Weeramantry J. held that no doubt the words "in the course of" may in certain contexts be given a somewhat liberal interpretation so as to gather in matters not literally occurring "in the course of" the object or proceeding to which the words relate. In my view, VAT liability may arise in terms of the VAT Act, where there is some visible connection existing between the taxable activity and the supply of goods and services.

I am unable to agree with the contention of the learned counsel for the Petitioner that the sale by the Petitioner of its capital assets such as buildings, motor vehicles and machinery are not part of its business and therefore not liable to VAT as that is not supplies made by the Petitioner "*in the course of the carrying on, carrying out, of a taxable activity*".

As the TAC correctly held, the sale of capital assets is taking place within the framework of the *business* of the Petitioner. The capital assets used are an integral part of the *business* of the Petitioner. This fact is admitted by none other than the representative of the Petitioner in P6 where it is stated that *I do not think that there is a dispute about the fact that these items are capital assets used in the business of the Appellant Company*. This was reiterated by the representative of the Petitioner to the TAC in P14.



Therefore, in my view the TAC correctly concluded that the capital assets used are an integral part of the *business* of the Petitioner and the sale of such capital assets are taxable supplies which are taking place within the business itself and cannot be separated or isolated from the *business* of the Petitioner. Thus, they were supplies made by the Petitioner "*in the course of the carrying on, carrying out, of a taxable activity*".

The Court need not address the other two issues raised by the Petitioner in view of the conclusions set out above.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal

**N. Bandula Karunarathna J.**

I agree.

Judge of the Court of Appeal