

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

In the matter of an Application for Writs
of Certiorari and Mandamus in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

C.A (Writ) Application No. 13/2013

Dr. V.S.D. Rodrigo
No. 49, Thempala,
Raddolugama.

PETITIONER

Vs.

1. The Commissioner General,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 12.
2. Mr. M. Jayasekera,
The Deputy Commissioner,
Department of Inland Revenue,
Ratnapura.
- 2A. Mr. K.D.M. Rathnakumara,
The Commissioner,
Department of Inland Revenue,
Ratnapura.

- 2B. Mr. J.M.S.S. Rathnawardhana,
The Commissioner,
Department of Inland Revenue,
Ratnapura.
3. Mr. K.G.U.C. Kumburugedara,
Senior Assessor,
Department of Inland Revenue,
Ratnapura.
- 3A. Mr. W.A. Premarathna,
Senior Deputy Commissioner,
Department of Inland Revenue,
Ratnapura.
4. Mr. M. D. Anandasiri,
Assessor,
Department of Inland Revenue,
Ratnapura.
- 4A. Mr. K.G.U.C. Kumburugedera,
Assistant Commissioner,
Department of Inland Revenue,
Ratnapura.
5. National Gem and Jewellery Authority,
No.25, Galle Face Terrace,
Colombo 3.
6. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Riad Ameen with Ranil Samarasooriya and Ms. Pratheepa Balendiran for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General for the 1st – 4th and 6th Respondents

Yajish Tennekoon for the 5th Respondent

Argued on: 6th June 2018

Written Submissions: Tendered on behalf of the Petitioner on 8th July 2018

Tendered on behalf of the 1st – 4th and 6th Respondents on 25th July 2018

Decided on: 12th December 2018

Arjuna Obeyesekere, J.

The Petitioner has filed this application seeking *inter alia* the following relief:

- (a) A Writ of Certiorari to quash the decision contained in the letter marked 'P5'¹;
- (b) A Writ of Certiorari to quash the decision contained in the Notice of Assessment marked 'P6'²;

¹ 'P5' is a letter dated 6th December 2007 sent by the 3rd Respondent giving reasons for the rejection of the Income Tax Returns of the Petitioner for the year of assessment 2005/06.

- (c) A Writ of Certiorari to quash the decision contained in the Notice of Tax Default marked 'P13'³;
- (d) A Writ of Mandamus compelling the 1st – 4th Respondents to refund to the Petitioner a sum of Rs. 900,448.

The issue that arises for the consideration of this Court in this application is whether the Petitioner was the exporter of the gems in three transactions referred to in the petition and if so, whether the Petitioner is entitled to claim an exemption from income tax on the profits and income that he received from the said transactions.

The adjudication of this application requires this Court to examine the provisions of two statutes. The first is the National Gem and Jewellery Authority Act No. 50 of 1993 (NGJA Act) which sets out the provisions relating to the export of gems. The second is the Inland Revenue Act No. 38 of 2000, as amended (the IR Act) which sets out the exemptions granted from the payment of income tax on the income derived from the export of gems. This Court would set down the applicable provisions of the aforementioned laws, prior to embarking on an examination of the facts relevant to this application.

² 'P6' is the Notice of Assessment dated 14th December 2007 issued to the Petitioner, under the hand of the 4th Respondent, requesting the Petitioner to pay a sum of Rs. 983,502 as balance income tax.

³ 'P13' is the Notice of Taxes in Default dated 27th March 2008 issued to the Petitioner by the Department of Inland Revenue.

The National Gem and Jewellery Authority has been established in terms of Section 2(1) of the NGJA Act and has been entrusted with the task of the development, regulation and promotion of the gem and jewellery industry in Sri Lanka.

'Gem industry' is defined in Section 55 of the NGJA Act to mean:

"any trade or business of all or any of the following classes or descriptions:

- (a) mining for gems or gemming;
- (b) importing gems into or **exporting** gems from Sri Lanka;
- (c) selling, purchasing or supplying gems;
- (d) valuing gems;
- (e) cutting, polishing, engraving or carving gems;
- (f) heat treatment of gems and any other method of enhancing the value of gems;
- (g) examination and certification of gems and assaying of precious metal;
- (h) lapidary training."

In terms of Section 15 (1) of the NGJA Act, "Notwithstanding anything to the contrary in any other written law, the Authority shall be the sole authority responsible for the issue of licenses to carry on the gem industry whether such industry is, or is proposed to be, carried on in or over any State or private land."

Section 15(2) of the NGJA Act specifies that, "no person shall carry on the gem industry except under the authority of a license issued by the Authority."

Section 16 of the NGJA Act specifies further that, "no person shall export any gems from Sri Lanka except with the approval of the Authority." The words, 'export any gems' has been defined in Section 55 of the NGJA Act as follows:

"the carrying or taking out of Sri Lanka or causing to be carried out or taken out of Sri Lanka any gem, whether by sea or air, except gems worn on any person or carried or taken out of Sri Lanka by such person subject to the limits imposed by the Controller of Exchange"

Thus, it is clear to this Court that the cumulative effect of the above provisions is that all exports of gems from Sri Lanka must be carried out only with the approval and under a license issued by the National Gem and Jewellery Authority.

Exemptions from the payment of income tax have been set out in Sections 8 – 22 of the IR Act. Section 15(i) of the Principle Act⁴ deals with exemptions relating to gems and reads as follows:

⁴ Act No. 38 of 2000.

"There shall be exempt from income tax, the profits and income within the meaning of paragraph (a) of section 3 arising to any person from the **sale of gold, gems or jewellery.**"

Thus, in terms of Section 15(i), the profits and income earned by a person from the sale of gems is exempted from the income tax payable by such person in terms of Section 3(a) of the IR Act. This Court observes that the purpose of the sale, i.e. whether it was for export or otherwise, was irrelevant as far as claiming the exemption was concerned.

The above Section 15(i) was repealed by Section 9(1) of the Inland Revenue (Amendment) Act No. 8 of 2005, and substituted with the following:

"There shall be exempt from income tax, the profits and income within the meaning of paragraph (a) of section 3 arising to any person from –

- (i) the sale of gold, gems or jewellery, for any year of assessment commencing **prior** to April 1, 2005;
- (ii) **export** of gold, gems or jewellery, for any year of assessment commencing on or after April 1, 2005;".

Thus, with the amendment introduced to the IR Act in 2005, the exemption from income tax hitherto granted on the profits and income from the **sale** of gems in

terms of the Principle Act was withdrawn. The exemption was instead offered only to the profits and income of a person who carried out the export of gems, after 1st April 2005. Thus, if an exemption from income tax was to be sought, the person claiming such exemption must be the exporter of the gems.

This Court would now proceed to consider the facts relevant to this application.

The Petitioner is a Consultant Surgeon by profession attached to Government Service and is a tax payer. The Petitioner states that in March 2005, while serving in Ratnapura, he had entered into a transaction with a person named Olan Phengkit for the sale of one lot of 'yellow kewangu gems' at a total price of Rs. 920,000. The sale appears to have been done through the 5th Respondent National Gem and Jewellery Authority. The Petitioner has annexed to the petition, marked 'P1', an invoice issued by the National Gem and Jewellery Authority as proof of the abovementioned transaction. This Court has examined 'P1' and observes that the Petitioner has been described as the seller of the gems, while Phengkit has been described as the buyer as well as the exporter. The mode of delivery is given as, 'to be taken personally by Mr. Olan Phengkit'.

The Petitioner states that he declared the income from the said transaction in the income tax returns submitted by him to the Department of Inland Revenue, for the year 2004/2005. As the said transaction was a sale, in terms of Section 15(i) of the IR Act, the income derived from the said sale was eligible to be exempted from the calculation of the total taxable income of the Petitioner. The Petitioner states that the Department of Inland Revenue has recognized that the Petitioner

is entitled to be exempted from the payment of income tax in respect of the income from the said transaction. There is no dispute between the parties in relation to this transaction.

As stated earlier, Section 15(i) of the IR Act was repealed by Section 9 of the Inland Revenue (Amendment) Act No. 8 of 2005 and substituted with a new Section 15(i). The substituted provision was to apply with effect from 1st April 2005. After this amendment came into effect and during the year of assessment 1st April 2005 – 31st March 2006, the Petitioner had entered into three transactions, which the Petitioner claims are transactions for the export of gems. The Petitioner has produced with the petition, four documents pertaining to each of the said three transactions, marked as 'P2a' - 'P2d', 'P3a' - 'P3d' and 'P4a' - 'P4d'. This Court observes that the four documents of each transaction are identical and hence, will only examine documents relating to one transaction.

The document marked 'P2a' has been issued by the National Gem and Jewellery Authority on 5th July 2005. It is titled, 'Sale Agreement' and refers to one Naruthep Anampong as the buyer. The Petitioner has been referred to as the seller. Both the Petitioner and the said Anampong has signed as seller and buyer, respectively. The total price for the sale of one lot of 'ottu' is given as Rs. 926,000. This Court observes that this document does not refer to any export of the goods referred to therein.

The next document marked 'P2b' is a 'Declaration of Sale of Gems' by Anampong who is referred to and has signed as the buyer. 'P2b' reads as follows:

"I do hereby declare that the Geuda gems weighing 927 cts forwarded herewith for export were sold as agreed by sale agreement to the value of Rs. 926,000 by Mr. V.S.D.Rodrigo"

This Court observes that in terms of 'P2b', the gems have been forwarded for export by Anampong, which makes him the exporter, as opposed to the Petitioner.

The third document marked 'P2c' is referred to as a 'geuda trade account withdrawal form'. According to the Petitioner, every buyer of gems was required to maintain an account with the National Gem and Jewellery Authority and payment for all transactions had to be effected through this account. This Court has examined 'P2c' and observes that a sum of USD 10000 in travellers cheques have been remitted to account No. TG722 which is in the name of 'A.Naruthep', who in turn has authorized Bank of Ceylon 'to debit my trade in geuda account' with a sum of Rs. 988,458⁵.

The fourth document marked 'P2d' is an invoice issued by the National Gem and Jewellery Authority. 'P2d' refers to Naruthep Anampong as the exporter as well as the buyer and specifies the mode of delivery as, 'to be taken personally by Naruthep Anampong. The National Gem and Jewellery Authority has affixed a seal on 'P2d', which reads as follows:

⁵ The commission payable to the National Gem and Jewellery Authority and other miscellaneous payments have been added to the sale price of Rs. 926,000 and the aggregate is Rs. 988,458.

"I certify that the articles mentioned in this invoice were sold by Mr. V.S.D.Rodrigo as per declaration made by exporter and sale agreement available in this office."

This Court observes that 'P2d' has been signed by Anampong as buyer and exporter.

The Petitioner states that he declared the income he received from the above export transactions in his income tax returns submitted for the year 2005/2006 and claimed an exemption from income tax.

By a letter dated 6th December 2007 issued in terms of Section 134(3) of the IR Act⁶ and annexed to the petition marked 'P5', the Department of Inland Revenue had informed the Petitioner as follows:

"බඳ තිදහස් ආදායම ලෙස මැණික් අපනයනයෙන් ලැබූ ඉදෑබ ලාභය රු. 2,442,635/- ක් තුළ වාරේතා කර විය තහවුරු කිරීමට ඉදිටිපත් කර ඇත්තේ මැණික් හා ස්වර්ණාගරන අධිකාරීයෙන් නිකුත් කළ අංක. ආරපිට/වල් 2005/186⁷, ආරපිට/වල් 2005/138⁸ සහ ආරපිට/වල් 2005/96⁹ දරන ඉන්වොයිකියක් ය. ඉන්වොයික් අනුව SURASAKPHITTHA YAPHITHAK සහ NARUTHEP ANAMPONG යන අපනයනකරුවන්ට තුළ ලංකාව තුළ

⁶ In terms of Section 134(1) of the IR Act, where any person, who in the opinion of an Assessor is liable to any income tax for any year of assessment has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, the Assessor may assess the amount which in the judgment of the Assessor ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith the amount so assessed. Section 134(3) of the IR Act specifies that where the assessor does not accept the return of income furnished by a person, the Assessor may in making an assessment on such person under section 134 (1) estimate the amount of the assessable income of such person and assess him accordingly.

⁷ This invoice has been annexed to the petition, marked 'P4d'.

⁸ This invoice has been annexed to the petition, marked 'P3d'.

⁹ This invoice has been annexed to the petition, marked 'P2d'.

මැතික් විකුණා ඇති බැවත් , 2005 අංක 08 දුරණ දේශීය ආදායම (සංගෝධන) පහතේ 9(1)(ii) වගක්තිය පරිදි එම බදු හිඳහන කිවෙන්නේ අපනයනය කරන තැනැත්තාට මස ඔබට නොවම.”

Thus, it was the position of the Department of Inland Revenue that the Petitioner was only a seller of gems and was not entitled to the exemptions granted to exporters of gems.

The Department of Inland Revenue had thereafter issued a Notice of Assessment dated 14th December 2007, annexed to the petition marked 'P6', requiring the Petitioner to pay a sum of Rs. 983,502, which is the balance income tax and penalty payable on the aggregate value of the aforementioned three transactions.

Being dissatisfied with the said assessment, the Petitioner had filed an appeal dated 22nd December 2007¹⁰ with the Commissioner General of Inland Revenue against the said Notice of Assessment. He had annexed a letter dated 12th December 2007¹¹ issued by the National Gem and Jewellery Authority in relation to the aforementioned four transactions, which reads as follows:

“අද්දේශීලගම, තැමපොල නො.49 හි පදි.ව, ව.එස්.ඩී. රෝඩ්ගේ මහතා පහත සඳහන් ගෙවූ ඇත්තා අපනයනයන් අප ආයතනය මගින් සිදුකර ඇති බැවි මෙයින් සහතික කරම.”

The hearing of the appeal had taken place on 22nd February 2008 before the 2nd Respondent. The Petitioner states that at the hearing, the 3rd Respondent

¹⁰ Annexed to the petition, marked 'P7'. The right of appeal is provided for in Section 136(1) of the IR Act.

¹¹ Annexed to the petition, marked 'P9'.

informed him that the officers of the National Gem and Jewellery Authority had confirmed that the aforementioned transactions executed in 2005 are not exempted from the payment of income tax. The Petitioner claims that he believed what the 3rd Respondent stated as they were all public officers, and that he withdrew the appeal. This Court observes that the 3rd Respondent had denied the above allegation made by the Petitioner and has annexed to the Statement of Objections the Notes of Interview of the appeal hearing, marked '1R1(a)', which has been signed by the Petitioner too. The relevant portions of '1R1(a)' are reproduced below:

"දෙශීර රෝඩිගේ මයා ව, 2005 අංක 08 දුරණ දේශීය ආදායම (සංගේධිත) පනතේ 9 (1) (ii) යටතේ බඳු නිදහස හිමි නොවන බැවි පැහැදිලි කර දුනිම්.

එහු මැණික් අපනයනය කර ඇත. අපනයනකරවෙකුට විකුණා ඇත. එහුට මුදල් ලබා ඇත්තේ දේශීය මුදලිනි. එය එහු පිළිගති. අනියාවනය ඉල්ලා ඇස්කර ගැනීමට එකඟ වෙයි. දෙශීර රෝඩිගේ මහතා විශේෂඝ ගල්ස වෛද්‍යවරයෙකි.

එහු අනුරූපාපුර මහ රෝහලට ස්ථාන මාරු කර ඇත.

දෙශීර රෝඩිගේ මහතා රත්නපුර මහ රෝහලේ සේවය කොට ඇත්තේ තාවකාලිකව බැවි පවතායි.

එමිය රත්නපුර පුද්ගලික වෛද්‍ය වෘතිය සාර්ථක නොව බවත් දක්වා සිට.

වෛද්‍ය රෝඩිගේ මහතා, කලින් මැණික් ව්‍යාපාර බද්දෙන් නිදහස් වූ තිසා 2005/06 වර්ෂයේදී එම නිදහස ඇති බැවි සිතා මැණික් ව්‍යාපාරයේ යෙදී ඇත. නමත් 2005/06 සිට මැණික් ව්‍යාපාරය බද්දව යටත් වේ. එය එහු නොදුත් බැවි දක්වා සිට. මේ තත්ත්වය සැලකිල්ලට ගෙන ද්‍රීඩනය සම්පූර්ණයෙන් ඉවත් කිරීමට එකඟ වය."

Even though the Petitioner withdrew the appeal, by a letter dated 15th April 2008 written to the 2nd Respondent¹², the Petitioner claimed that the National Gem and Jewellery Authority had informed him that the Ratnapura Office of the Department of Inland Revenue had not contacted the National Gem and Jewellery Authority, as claimed by the 3rd Respondent and that the National Gem and Jewellery Authority is in a position to confirm that the Petitioner is in fact the exporter of the said gems. The Petitioner had thereafter written several written letters to the Department of Inland Revenue and the Tax Ombudsman and finally, filed this application in 2013, seeking the aforementioned relief.

It appears that the above explanation as to why the Petitioner withdrew the appeal and the correspondence that took place thereafter until this application was filed has been offered by the Petitioner to demonstrate that he did pursue the statutory remedy available to any person dissatisfied with a Notice of Assessment and to explain the long lapse of time that has taken place since the issuing of the Notice of Assessment.

The main issue in this application is whether the Petitioner is the exporter of the gems in the aforementioned three transactions. In terms of the NGJA Act, an exporter of gems must obtain a license as well as the approval of the National Gem and Jewellery Authority. Neither the Petitioner nor the National Gem and Jewellery Authority have produced any license or authority issued to the Petitioner by the National Gem and Jewellery Authority, permitting the Petitioner to export the gems referred to in the said transactions.

¹² This letter has been annexed to the petition, marked 'P10'.

Under normal circumstances, a person in Sri Lanka engaging in the export of a good would enter into some form of correspondence with the foreign buyer relating to the export, and agree on the terms of the transaction, including the price, method of payment, mode of conveyance etc. The Petitioner has not disclosed to this Court the person to whom he was exporting the goods nor has he produced with his petition any documents evidencing a transaction where the Petitioner is the exporter. The documents 'P2a' - 'P2d' only demonstrate that the Petitioner was the seller of the gems and that Anampong was the buyer as well as the exporter of the gems.

An export would necessarily result in the submission of a declaration to Sri Lanka Customs by the exporter, especially where a license is required from the National Gem and Jewellery Authority to effect an export. The Petitioner has not produced to this Court a customs declaration showing that he was the exporter of the gems.

It is in this background that this Court would once again consider the documents submitted by the Petitioner in support of his position that he was the exporter of the gems in question. None of the four documents relating to each transaction – i.e. 'P2a' - 'P2d', 'P3a' - 'P3d' and 'P4a' - 'P4d' – refers to the Petitioner as being the exporter. 'P2a' is a 'sale agreement' between the Petitioner and the buyer, 'P2b' is a declaration by the buyer in his capacity as the exporter, 'P2c' is a remittance made by the buyer to an account maintained by the buyer with the National Gem and Jewellery Authority and 'P2d' is an invoice issued by the National Gem and Jewellery Authority to Anampong in his capacity as the

exporter, permitting him to personally carry the goods. All these documents refer to the Petitioner as being the seller of the gems to the buyer who in turn has exported the goods. The person who has been described as the exporter in the said documents is not the Petitioner but the buyer who purchased the gems from the Petitioner. It appears that the approval for the export of the gems has been given by the National Gem and Jewellery Authority to the buyer and not to the Petitioner.

The learned Counsel for the Petitioner referred this Court to the definition of 'export any gems' in the NGJA Act and the definition of 'export' in the Imports and Exports Control Act No. 1 of 1969, as amended¹³ and submitted that the Petitioner has caused these gems to be carried out or taken out of Sri Lanka and therefore, the Petitioner should be recognized as the exporter. The Petitioner has however not submitted any documents in support of this position that he caused the gems to be taken out of Sri Lanka and the documents that have been submitted (i.e. 'P2a' - 'P2d', 'P3a' - 'P3d' and 'P4a' - 'P4d') does not support the said submission of the learned Counsel for the Petitioner.

In these circumstances, this Court cannot accept the position of the Petitioner that he was the exporter of the gems or that he caused the gems to be carried out or taken out of Sri Lanka. This Court is therefore of the view that the decision to reject the income tax returns of the Petitioner for the reasons set out in 'P5' and requesting the Petitioner to pay a sum of Rs. 983,502 is in accordance with the

¹³ Export has been defined as follows: "with its grammatical variations and cognate expressions, when used in relation to any goods, means the carrying and taking out of Sri Lanka, or causing to be carried or taken out of Sri Lanka, whether by sea or by air of such goods".

law and is neither illegal nor irrational. Hence, 'P5' is not liable to be quashed by a Writ of Certiorari. The notice of assessment marked 'P6' and the notice of default marked 'P13' have been issued in consequence of 'P5' and are in accordance with the provisions of the IR Act. In view of this finding, the Petitioner is not entitled to the Writ of Mandamus prayed for.

The learned Deputy Solicitor General has taken up an objection that the Petitioner is guilty of laches in that this application has been filed in 2013 seeking to quash decisions made in 2007. The Respondents have also taken up the objection that the Petitioner had an alternative statutory remedy, which the Petitioner has exhausted and that the Petitioner cannot invoke the Writ jurisdiction of this Court. In view of the finding of this Court that the Petitioner is not the exporter and is therefore not entitled to an exemption from income tax, the necessity to consider the said objections does not arise, suffice to say that a person who has availed himself of a statutory remedy should not be permitted to have a second bite at the cherry by seeking to quash the Notice of Assessment by a Writ of Certiorari.

For the reasons set out in this judgment, this Court does not see any legal basis to grant the Writs of Certiorari and Mandamus prayed for by the Petitioner. Accordingly, this application is dismissed, without costs.

Judge of the Court of Appeal