

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

An Application for Revision under
Section 753 of the Civil Procedure Code

CA Revision No: 2189/2002

D.C. Colombo Case No. 66695/Tax

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A Gardiner Mawatha,
Colombo 2.

Complainant

Vs.

Tourinns of Ceylon Ltd.,
No. 33, Yahala House,
Staples Street, Colombo 2.

Respondent

And now between

Tourinns of Ceylon Ltd.,
No. 33, Yahala House,
Staples Street, Colombo 2.

Respondent-Petitioner

- Vs -

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A Gardiner Mawatha,
Colombo 2.

Complainant-Respondent

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

Counsel: Ms. Bhagya Herath for the Respondent - Petitioner

Ms. Maithri Amarasinghe Jayathilake, State Counsel for
the Complainant - Respondent

Written Submissions: Tendered on behalf of the Respondent - Petitioner on
30th April 2008, 12th January 2012 and 6th July 2017

Tendered on behalf of the Complainant - Respondent
on 3rd June 2008 and 11th January 2012

Decided on: 28th June 2019

Arjuna Obeyesekere, J

When this matter was taken up on 10th May 2019, the learned Counsel for the Parties moved that this Court pronounce judgment on the written submissions that had already been tendered on their behalf. The learned Counsel also informed this Court that the parties are agreeable to be bound by the judgment that would be delivered in this application in CA (Revision) Application No. 2188/2002.

The Respondent – Petitioner (the Petitioner) has filed this application, seeking *inter alia* to revise and set aside the Order made by the Additional District Judge of Colombo on 14th November 2002 in District Court of Colombo Case No. 66695/Tax. A copy of the said Order has been annexed to the petition marked 'P6'.

As this application deals with the power of the Commissioner General of Inland Revenue to recover taxes in default under the provisions of the Turnover Tax Act No. 69 of 1981, as amended (the Act), it would be appropriate at this stage to examine the powers vested in the Commissioner General of Inland Revenue under the provisions of the Act to recover such taxes in default.

In terms of the Act, there shall be charged from *inter alia* every person who carries on any business in Sri Lanka,¹ a tax in respect of the turnover made by that person from its business, at such rate as the Minister may fix by Order published in the Gazette. This tax is known as the 'Turnover Tax'.

Section 10 of the Act, which specifies the time at which the turnover tax must be paid and the consequences that flow from non-payment, reads as follows:

"The turnover tax in respect of any quarter shall be paid not later than the fifteenth day of the month following the end of that quarter. Any tax not so paid shall be deemed to be in default and the person by whom such tax is payable or where any tax is payable by more than one person, or by a partnership then each of such persons and each partner in the partnership shall be deemed to be a defaulter for the purposes of this Act."

Section 12(1) specifies the manner in which turnover tax must be paid in respect of imported goods, and reads as follows:

¹ Turnover tax was payable during the period commencing from 13th November 1981 to 31st December 1981 and for every quarter commencing on or after 1st January 1982 but prior to the date on which the Goods and Services Tax Act, No. 34 of 1995 came into operation.

“Notwithstanding anything in this Act, there shall be charged from every person who imports, prior to the date on which the Goods and Services Tax Act, No. 34 of 1996 comes into operation, any article manufactured outside Sri Lanka (not being an excepted article within the meaning of section 8), turnover tax in respect of his turnover, whether his turnover for any quarter is less than the amount specified in section 3 or not, at the rates specified by the Minister under section 7 and shall be collected by the Principal Collector of Customs.”

The procedure to issue an assessment in respect of tax in default, the right of the tax payer to appeal against such assessment to the Commissioner General of Inland Revenue, and against such decision of the Commissioner General of Inland Revenue to the Board of Review and the right of the tax payer to have a Case Stated to this Court are set out in Sections 13 - 19 of the Act.

Chapter XII of the Act contains provisions for the recovery of taxes which are in default. In terms of Section 31, “any turnover tax in default shall be a first charge (on) all the assets of the defaulter.” Section 32 specifies that “where any turnover tax is in default, the Commissioner-General shall, before proceeding to recover such tax, issue notice in writing to the defaulter stating- a) the particulars of such tax; and b) that action is being contemplated to recover such tax.”

Section 33 of the Act contains provisions for the recovery of the tax in default by the sale and seizure of assets belonging to the person liable for the payment of the turnover tax – i.e. the defaulter.

Section 34(1) of the Act provides for the filing of action "where the Commissioner-General is of the opinion that recovery of turnover tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale." Section 34(1) proceeds to state that the Commissioner General may "issue a certificate containing particulars of such tax and the name and last known place of business or residence of the defaulter to a Magistrate having jurisdiction in the division in which such place is situate" and that "the Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the tax should not be taken against him". In default of sufficient cause being shown, the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter.

Thus, it was within the power of the Commissioner General of Inland Revenue to file action to recover the sum in default and there is no dispute between the parties that the Commissioner General of Inland Revenue in fact had such power.

Section 35(1) of the Act reads as follows:

"Where the turnover tax payable by any person is in default and it appears to the Commissioner-General to be probable that any person-

(a) owes or is about to pay money to the defaulter or his agent; or

(b) holds money for or on account of the defaulter or his agent; or

(c) holds money on account of some other person for payment to the defaulter or his agent; or

(d) has authority from some other person to pay money to the defaulter or his agent,

the Commissioner-General may give to such person notice in writing (a copy of which shall be sent by post to the defaulter) requiring him to pay any such moneys not exceeding the amount of the tax in default to the officer named in such notice. The notice shall apply to all such moneys which are in his hands or due from him at the date of receipt of such notice, or come into his hands or become due from him or are about to be paid by him at any time within a period of three months after the date of such notice.”

Section 35(3) of the Act sets out the obligation on the part of the person receiving such notice, and reads as follows:

“Where any person to whom a notice has been given under subsection (1) is unable to comply therewith owing to the fact that moneys in question do not come into his hands or become due from him within the period referred to in subsection (1), he shall within fourteen days of the expiration thereof give notice in writing to the Commissioner-General apprising him of the facts.”

Having laid out the applicable provisions of the Act, this Court would briefly examine the facts of this application.

The Petitioner is a company registered under the provisions of the Companies Act No. 12 of 1987. This being an application filed in 2002, the Petitioner has not filed proof that it has been re-registered as required by Section 487 of the Companies Act No. 7 of 2007. The Respondent however has not challenged the legal status of the Petitioner to continue with this application.

The Petitioner states that the Commissioner General of Inland Revenue instituted the abovementioned action against the Petitioner for the recovery of turnover tax in default by filing a certificate dated 31st August 2001 under the provisions of the Act. The said Certificate of Tax in default has been annexed to the petition marked 'P2'. By 'P2', the Commissioner General of Inland Revenue had sought to recover a sum of Rs. 1,281,019 being the turnover tax due for the 3rd quarter of 1995, 1996 and 1997, together with the penalty.

The Petitioner states that it appeared before the District Judge of Colombo on notice and that the learned District Judge afforded the Petitioner an opportunity of showing cause as to why further proceedings for the recovery of taxes should not be taken. The Petitioner had accordingly done so by filing an affidavit of one of its Directors, Mrs. Indranee Peiris, which has been annexed to the petition marked 'P3'. The annexures to the said affidavit had been marked 'X1' – 'X10'.

This Court has examined 'P3' and it does not appear that the Petitioner is challenging its liability to make the said payment. In fact, as noted earlier, recovery proceedings are filed only after the issuance of an assessment for the unpaid tax and the appeal process provided for in the Act has been completed. This Court observes that the explanation offered by the Petitioner by way of

'P3' is as follows. Mrs. Peiris states that in terms of a notice published by the Divisional Secretary of Kolonnawa under Section 38 of the Land Acquisition Act, a land situated in Wellampitiya in extent of 22 acres belonging to her late husband, Mr. H.C.Peiris had been vested in the State. Mrs. Peiris states further that the Cabinet of Ministers had determined in 1991 that her husband should be paid a sum of Rs. 132 million as compensation. Although an initial payment had been made, no steps had been taken thereafter to make any further payment.

Mrs. Peiris had stated further that the Department of Inland Revenue had sent the following letter dated 11th July 1995 marked 'X6' to the Divisional Secretary, Colombo:

" TAXES IN ARREARS RS. 6,554,192/-
TOURINNS OF CEYLON LTD.

Mr. H.C. Peiris has brought to my notice that compensation is receivable by him in respect of commercial land acquired by the Government. Acquisition Order has been gazetted in the Gazette No. 745/3 of 14/12/92. Copy of the relevant Gazette Notification is sent herewith. As Mr. Peiris has agreed with me that the tax outstanding could be collected from the compensation payable, I would be thankful if arrangements are made to remit the amount of tax outstanding to the Department of Inland Revenue.

Please note not to release any monies without referring the matter to the Commissioner General of Inland Revenue. A copy of the letter received from Mr. H.C. Peiris is attached herewith and further a notice under

Section 131 of the Inland Revenue Act to collect this money as default taxes is also enclosed herewith.”

There are two matters that this Court must observe at this stage. The first is that ‘X6’ is only a covering letter and that the Certificate itself, which is said to have been annexed to ‘X6’ but has not been produced with ‘P3’ has been issued under Section 131 of the Inland Revenue Act. The second matter is that the defaulter of turnover tax was the Petitioner in this application, whereas compensation was due and payable to a Director of the Petitioner. However, what is clear from ‘X6’ is that the Commissioner General of Inland Revenue had written the said letter upon being provided the relevant information by Mr. H.C. Peiris.

Mrs. Peiris states that by a notice dated 12th January 1999 marked ‘X7’, the Commissioner General of Inland Revenue had informed the Divisional Secretary Colombo as follows:

“1983/84, 92/93 වර්ෂය සඳහා බදු වශයෙන් ටුවර් ඉන් ඔෆ් සිලෝන් ලිමටඩ් විසින් ගෙවිය යුතු රැපියල් හැට එක් ලක්ෂ පනස්හතරදහස් එකසිය අනුදෙක - රු. 6,154,192/- ක මුදලක් නොගෙවා පැහැර හැර ඇති බැවින් ඔබ ”

This Court must observe that ‘X7’ relates to the payment of income tax for the aforementioned period whereas the Certificate marked ‘P2’ relates to turnover tax in default.

Mrs. Peiris states further that her husband who was the Chairman of the Petitioner, had filed CA (Writ) Application No. 1225/2000 seeking *inter alia* a Writ of Mandamus to proceed with the inquiry under Section 9 of the said Act

to determine the exact quantum of compensation that was due to him, and that this Court, by its judgment delivered on 9th May 2002 had granted the relief prayed for in the said application. She had stated further that as a result of the said judgment, there should be a substantial increase in the quantum of compensation payable. In view of this, Mrs. Peiris had informed the Department of Inland Revenue by letters dated 7th June 2000 and 6th December 2000 marked as 'X8' and 'X9' respectively, that the tax in default could be recovered from the compensation payable to her.

The crux of the defence presented by the Petitioner to the District Court therefore was that since the Department of Inland Revenue had already taken steps by way of 'X6' and 'X7' to secure the sums of money due to it, on account of unpaid Turnover Tax, the Commissioner General of Inland Revenue is estopped from taking steps to recover the same sum of money through a recovery action filed in the District Court.

The learned District Judge, having considered the above arguments of the Petitioner and the material presented by the Petitioner in support of the said arguments, rejected the said defence and held by his Order marked 'P6' that the Petitioner is liable to make the said payment to the Department of Inland Revenue. Dissatisfied with the said Order 'P6', the Petitioner filed this application seeking to revise and set aside the said Order.

This Court has examined the Order of the learned District Judge and observes that the learned District Judge had overruled the objections of the Petitioner on the following grounds:

- (a) The two letters relied on by the Petitioner, namely 'X6' and 'X7' do not relate to turnover tax;
- (b) In any event, the validity period of such notices is 3 months, and by the time the Certificate 'P2' was filed, the said letters 'X7' and 'X8' had expired; and
- (c) The provisions of Section 150(2)(c) of the Inland Revenue Act No. 38 of 2000, which the Petitioner claimed was applicable, do not apply.

It is the position of the Petitioner that the learned District Judge erred in respect of each of the above three positions. This Court would therefore consider each of the above matters.

'X7' had been issued on 12th January 1999, under Section 131 of the Inland Revenue Act, No. 28 of 1979. Section 131 is identical to the provisions contained in Section 35 of the Turnover Tax Act and can only be resorted to, to recover income tax that is in default. 'X7' could not have been issued in respect of turnover taxes in default. 'X7' specifically sets out that the amount sought to be recovered relates to the taxes in default for the years 1983/84, and 1992/93. These periods are prior to the period for which turnover tax in default is sought to be recovered by 'P2'. This Court is therefore in agreement with the learned District Judge that the Commissioner General of Inland Revenue had not sought to secure the payment of turnover tax by way 'X7'.

'X6' has been issued in 1995 in respect of "taxes in arrears". While it is correct that 'X6' does not specify what the taxes in arrears are, this Court observes that at the time 'X6' was issued, the turnover tax in default could only have

been for the 3rd quarter of 1995. Thus, even if 'X6' contained a component of turnover tax in default, it did not contain the entirety of the tax in default specified in the Certificate 'P2'. What is significant however is that notice had been given under Section 131 of the Inland Revenue Act, No. 28 of 1979 and not under Section 35 of the Turnover Tax Act. The fact that no reference has been made in 'X6' to Section 35 of the Act is clear evidence that 'X6' did not relate to turnover tax in default.

The second ground on which the learned District Court Judge had rejected the explanation given by the Petitioner was that in any event, a notice issued under Section 35 of the Turnover Act or Section 131 of the Inland Revenue Act is valid only for a period of 3 months.²

This Court is in agreement with the position of the learned District Judge that a notice issued under Section 35 (1) of the Act is valid only for a period of 3 months from the date of issue. It is in fact logical to specify a time period as the Commissioner General of Inland Revenue is not expected to go into deep slumber after issuing a notice under Section 35(1). If the taxes in default which are sought to be recovered is not forthcoming, then the Commissioner General of Inland Revenue may pursue other modes of recovery specified in the Act. Thus, this Court is of the view that by the time the Certificate 'P2' was filed in 2001, the notices 'X6' and 'X7' had lapsed and there was no legal impediment to the filing of 'P2'.

² Vide: Section 35(1), which specifies that: "The notice shall apply to all such moneys which are in his hands or due from him at the date of receipt of such notice, or come into his hands or become due from him or are about to be paid by him at any time within a period of three months after the date of such notice."

The Petitioner argues that in terms of Section 35(3) of the Act³ if the person to whom a notice has been given under Section 35(1) of the Act⁴ is unable to comply therewith owing to the fact that moneys in question do not come in to such persons hands or become due from him within the period referred to in Section 35(1) of the Act, he shall within fourteen days of the expiration thereof, give notice in writing to the Commissioner General of Inland Revenue apprising him of the facts. The Petitioner argues that no such notice has been given and therefore Certificate 'P2' could not have been issued. While this Court is of the view that the failure on the part of the recipient of a notice under Section 35(1) to acknowledge the said notice attracts the consequences set out in Section 35(4) of the Act, the said argument of the Petitioner cannot be sustained in view of the finding of this Court that the validity period of 'X6' and 'X7' is only 3 months.

The liability of the Petitioner to pay turnover taxes in default is in terms of the Act. It is independent of any compensation that the Petitioner or its Directors should get from the State. The provisions of the Act make it clear that the Commissioner General of Inland Revenue has been conferred with a choice of methods by which he can recover the turnover taxes in default. It is the view of this Court that the Commissioner General of Inland Revenue can exercise any one or more of such methods, either singularly or collectively, in order to secure payment of the tax in default as long as such a course of action ensures the expeditious recovery of the taxes in default, provided of course that the Commissioner General of Inland Revenue shall not be entitled to recover more than what is actually in default. If one method is not successful, the

³ Corresponding Section in the Inland Revenue Act is Section 131(3).

⁴ Corresponding Section in the Inland Revenue Act is Section 131(1).

Commissioner General is entitled in terms of the law to pursue another mode of recovery specified in Chapter XII of the Act.

The final submission of the learned Counsel for the Petitioner is that Section 150(2)(c) of the Inland Revenue Act No. 38 of 2000 would prevent the Commissioner General of Inland Revenue from proceeding against the Petitioner. This Court is in agreement with the learned District Judge that the provisions of the said Act has no application where Turnover Tax is sought to be recovered, and that in any event, the said Act applies only with regard to income derived on or after 1st April 2000. Furthermore, the facts of this case does not attract the provisions of Section 150(2)(c).

The learned State Counsel has drawn the attention of this Court to the fact that the power of revision vested in this Court can only be exercised where the Petitioner had established exceptional circumstances and has cited the following passage from the judgment of this Court in **Dharmaratne and Another vs Palm Paradise Cabanas Limited and Others**⁵ where it was held as follows:

“Existence of exceptional circumstances is the process by which the Court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such selection process is not there, revisionary jurisdiction of this Court will become a gateway of every litigant to make a second appeal in the garb of a revision application, or to make an appeal in situations where the legislature has not given a right of appeal.”

⁵ (2003) 3 Sri LR 24; Amaratunga, J.

This Court is in agreement with the learned State Counsel that quite apart from the fact that the Petitioner has failed to show that the Order 'P6' is bad in law, that in any event, the Petitioner has not pleaded any exceptional circumstances, which would entitle it to the relief sought from this Court.

In the above circumstances, this Court is of the view that the Order of the learned District Judge is correct in law. This Court does not see any legal basis on which the said Order can be set aside. This application is accordingly dismissed. This Court makes no order with regard to costs.

As has been agreed upon by all the learned Counsel, this Order must apply to CA Revision Application No. 2188/2002 as well. Hence, the said CA Revision Application No. 2188/2002 must also stand dismissed without costs.

JUDGE OF THE COURT OF APPEAL

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

I agree.

PRESIDENT OF THE COURT OF APPEAL