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

In the matter of an Application in the nature of Writ of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Waruna Pearl Industries (Pvt) Ltd.
No.50/6, Sir James Pieris Mawatha,
Colombo 02.

Petitioner

Case No: CA(Writ) 185/2008

Vs.

1. Officer in Charge
   Commercial Crimes Investigation,
   Unit-1, Criminal Investigations
   Department (CID),
   Colombo 01.

2. Commissioner General of Inland
   Revenue
   Department of Inland Revenue,
   Sir Chittampalam A. Gardiner
   Mawatha,
   Colombo 02.

Respondents

Before: Janak De Silva J.

Counsel:

Rasika Dissanayake for the Petitioner

Nayomi Kahawita SSC for the Respondents

Written Submissions tendered on:

Petitioner on 21.03.2018

Respondents on 29.03.2018

Argued on: 31.01.2019

Decided on: 28.06.2019

Janak De Silva J.

The Petitioner initially filed this application against some Respondents and sought several reliefs. However, an amended petition was filed on 01.02.2017 and the present Respondents were made parties and the following relief sought:

(a) A writ of Certiorari quashing the decision of the Officer-in-charge, Commercial Crimes Investigations Unit – 1, of the Criminal Investigations Department to file investigative reports in case no. B1449/06 in the Magistrate's Court, Fort;

(b) A writ of Prohibition preventing the Officer-in-Charge, Commercial Crimes Investigations Unit – 1, of the Criminal Investigations Department from taking any further steps in case no. B1449/06 in the Magistrate's Court, Fort.

The Petitioner is a Board of Investment (BOI) company and claims to be involved in the business of manufacturing garments primarily for exports. It is a registered person for the purposes of the Value Added Tax Act No. 10 of 2002 as amended (VAT Act). The Inland Revenue Department had in 2006 after a detailed investigation issued three assessments by which the Petitioner was required to pay a sum of Rs. 58 million as Value Added Tax (VAT).

Somewhere in 2008 the 1st Respondent had recorded the statement of the Managing Director of the Petitioner, one N.M.H. Anver over the submission of false documents in claiming the refund of VAT and thereafter arrested and produced him before the Magistrate's Court of Fort along with a B Report which disclosed offences punishable under sections 386, 392, 401, 403, 454 and 459 of the Penal Code arising from the preparation of false documents and using them as well as inducing another person to pay the Petitioner on the basis of such documents.

The Petitioner in this application is seeking to impugn the said proceedings on the following grounds:

(a) The Criminal Investigations Department (CID) has no jurisdiction to investigate the matter as in terms of the VAT Act it is the 2nd Respondent who has the power to make assessments and recover any overpaid VAT,

(b) Only the 2nd Respondent can initiate any criminal prosecution as sections 65, 66 and 67 of the VAT Act sets out the instances which attract criminal liability,

(c) Section 43 of the VAT Act makes provision for the Criminal Procedure Code (Code) to be made applicable to the VAT Act and as such the Code does not have general application to the VAT Act.

The common law grounds heads of judicial review are illegality, irrationality and procedural impropriety [*Council of Civil Service Union v. Minister for the Civil Service* (1985) AC 374(HL)]. There Lord Diplock went on to state:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the

question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

The Petitioner is seeking to impugn the proceedings before the learned Magistrate only on the grounds of illegality as it is claimed that the CID does not have the power to investigate the alleged offences. I shall now consider this position.

Section 5 of the Code reads:

"All offences -

(a) under the Penal Code,

(b) under any other law unless otherwise specially provided for in that law or any other law,

shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this Code."

This clearly makes the Code applicable to any offence under the VAT Act unless otherwise specially provided for in the VAT Act or any other law.

It is in this context that this Court must examine section 43 of the VAT Act in order to ascertain whether it has the effect of limiting the application of the Code to the VAT Act as contended by the learned counsel for the Petitioner.

Section 43 of the VAT Act enables the Commissioner General of Inland Revenue to initiate proceedings before a Magistrate to recover tax in default and sets out the procedure to be followed and to be applied by Court in such an application and in particular section 291 of the Code. It does not have the effect of excluding the other provisions of the Code for any offences committed in relation to VAT.

In this context it is apposite to refer to the decision of the Supreme Court of Canada in *Knox Contracting Limited v. Canada* [(1990) 2 SCR 338] where it was held:

> "The Act, which depends on the integrity of the tax payer, imposes a public duty and a breach of that fundamentally important public duty should constitute a criminal offence. The fact that the Act is concerned with taxation does not prevent the penal provisions from also being characterised as criminal law"

The proceedings initiated by the CID is not aimed at recovering any overpayment to the Petitioner. It is designed to ensure that the criminal law of this country will be applied to any act which is an offence in terms of the Penal Code. The mere fact that the VAT Act provides for recovery proceedings to recover any overpayment does not take the alleged acts of the Managing Director of the Petitioner, N.M.H. Anver outside the provisions of the Penal Code or the Code.

It is further to be noted that the alleged offences committed by the Managing Director of the Petitioner, N.M.H. Anver falls outside the list of offences set out in sections 65 to 67 of the VAT Act and the officers of the Inland Revenue Department do not have the powers of investigation given to Police officers by the Code.

Section 109 of the Code is the starting point for any investigation in terms of the Code and sub-sections (1) and 5(a) allows a police officer to make or authorise an investigation if he has reason to suspect the commission of an offence.

On 13.09.2006 R.M. Karunaratne, Executive Director of the BOI had written to the DIG of the CID (R1a) by which it was informed that the Petitioner is a BOI approved project for the manufacture of garments for exports but that although the Petitioner claimed that it has exported garments it had not imported any goods and that inquiries made by the BOI showed that the factory of the Petitioner was closed. However, the Petitioner had claimed and received VAT refunds for the years 2004, 2005 and 2006. Upon being requested by the BOI to submit documentary evidence the Petitioner did so but the documents submitted were suspicious.

The B reports filed by the CID shows that several of the traders who are said to have supplied goods to the Petitioner had stated that they did not do so and that the invoices produced by the Petitioner to claim VAT refunds purportedly given by them are forged.

These facts are sufficient to suspect the commission of an offence and as such there is nothing illegal in the CID commencing an investigation and reporting facts to the Magistrate's Court.

For all the foregoing reasons, I dismiss the application of the Petitioner with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal