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

In the matter of an application for a mandate in the nature of a Writ of Certiorari under Article 140 of the Constitution.

Rank Entertainment Holdings (Pvt) Limited
No.09, 15th Lane,
Galle Road,
Colombo 03.

PETITIONER

Case No.

CA Writ No: 292/2013

Vs.

1. Commissioner General of Inland Revenue
   Department of Inland Revenue,
   No. 81, Sri Chiththampalam A. Gardiner
   Mawatha, Colombo 02.

2. Mrs. B. Athukorala
   Senior Assessor - Unit 12,
   Department of Inland Revenue,
   No. 81, Sri Chiththampalam A. Gardiner
   Mawatha, Colombo 02.

3. W.D.A. Avantha Walimuni
   Assessor - Unit 12,
   Department of Inland Revenue,

No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

4. D.M. Somadasa Dissanayake
Commissioner – Inland Revenue,
Department of Inland Revenue,
No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

5. K. Dharmasena - Deputy Commissioner
Department of Inland Revenue,
No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

6. B.G. Piyadasa
Deputy Commissioner - Unit 12,
Department of Inland Revenue,
No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

7. M.D.J.M. Devapriya
Deputy Commissioner
Department of Inland Revenue,
No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

8. L.R. Perera
Deputy Commissioner - Unit 10,
Department of Inland Revenue,
No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

9. Mrs. S. Liyanage
Senior Assessor - Unit 12,
Department of Inland Revenue,
No. 81, Sri Chiththampalam A. Gardiner
Mawatha, Colombo 02.

10. Hon. Attorney General
Attorney General Department,
Colombo 12.

RESPONDENTS

Before	:	Dhammika Ganepola, J. Damith Thotawatta, J.
Counsel	:	Faisz Musthapha, P.C. with H. Withanachchi, Keerthi Tillekeratne and Bishran Iqbale for the Petitioner. Nirmalan Wigneswaran, D.S.G. for the Respondents.
Argued on	:	28.11.2024
Written Submissions tendered on	:	Petitioner : 10.02.2025 Respondents : 27.01.2025
Decided on	:	25.03.2025

Dhammika Ganepola, J.

Factual Matrix of the case

The Petitioner in the instant application is a Limited Liability Company which engages in the business of operating a casino. The Petitioner's casino does not levy a charge/participation fee from its customers for providing the facilities for card room games. It is stated that the Petitioner receives any monetary benefits only in the event it succeeds in a game of

chance against a customer. The Petitioner is not involved in the business of making a 'supply' to its customers and therefore the money received by the Petitioner in furtherance of its business activities is not in consideration of a 'supply'.

The Inland Revenue Department corresponded with the Petitioner during the years 2007/2008, suggesting that the Petitioner was liable to pay Value Added Tax [VAT]. In terms of several Notices of Assessment dated 08.11.2008 [P5], the Department purported to charge VAT as being due from the Petitioner for the years 2007 and 2008. The Petitioner appealed against said notice of assessment to the 1st Respondent, the Commissioner General of Inland Revenue by its letter dated 09.03.2009 [P6].

Thereafter, the 5th Respondent, the Deputy Commissioner acting under the authority given to him by the 1st Respondent, conducted an inquiry into the said appeal. The 5th Respondent, the Deputy Commissioner, as per the determination dated 22.03.2011[P7(a)], allowed the appeals and the respective notices of assessment for the period ending 01.04.2007 were annulled. Further said determination observed that neither copy of the Certificate of VAT Registration nor acceptable documentary evidence to prove that the Certificate of VAT Registration issued to the Petitioner was submitted.

The Petitioner stated that despite the above observations in P7(a), the 5th Respondent decided that the Petitioner was liable to pay VAT for the period commencing from 01.04.2007. It is stated that the 5th Respondent in making such observation has acted in excess of jurisdiction. Further, it is submitted that in any event, said observation is *ultra vires* the VAT Act in as much as there is no 'supply' of goods or services by the Petitioner Company.

Thereafter, the 2nd Respondent issued notices of assessment dated 13.02.2011 bearing nos.6327237 to 6327267 and 6327350 to 6327353 marked P8(i) to P8(xxxv) for the taxable periods commencing from 01.04.2007(07061) and ending on 31.03.2010(10033). The Petitioner appealed against such notices of assessment by letter dated 08.03.2011, marked P9(a).

Thereafter, the 6th Respondent issued the Tax in Default Notice P10 dated 12.08.2011 under Section 41(1) of the VAT Act. The above notice P10 refers to three periods of assessment, namely,

a. 01.09.2004 – 31.03.2006 (04093 - 06033)
b. 01.04.2006 – 31.03.2007 – (06061 - 07033)
c. **01.04.2007 – 31.03.2010 – (07061 - 10033) [the period for which the Petitioner appealed against by letter P9(a) and forms the subject matter of the instant application**.]

The Petitioner objected to the above Tax Default Notice P10 by letter dated 08.09.2011 marked P12. The 4th Respondent, by his determination dated 20.03.2013 (P16), rejected the appeal and confirmed the assessment thereto. The reasons for the determination were given by letter dated 20.03.2013 marked P19.

Thereafter, the Petitioner preferred an appeal to the Tax Appeal Commission by letter dated 10.06.2013 (P20) against the above determination P16. Said appeal was rejected on the ground that the Petitioner had not provided a bank guarantee in terms of Section 7 of the Tax Appeals Commission by its letter dated 30.07.2013 marked P21.

The Petitioner states that the above assessments are totally *ultra vires* the VAT Act and made without jurisdiction. Accordingly, the Petitioner seeks *inter alia* Writs of Certiorari to quash the determination P16 and P19 and to quash the Notices of Assessment marked P8(i) to P8(xxxv).

The Petitioner's liability to pay VAT based on the 'supply of services'

The Petitioner's main argument is that the Petitioner is not liable to pay VAT as its business of running a Casino is not making a "supply of services" to its customers.

As per Section 2(1)(a) of the VAT Act, Value Added Tax shall be charged 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 or carrying out, of a taxable activity by such person in Sri Lanka.

Nevertheless, the Petitioner contended that its business, Casino, does not levy a charge or participation fee from customers for providing facilities for card room games but it derives monetary benefit only in the event it

succeeds in a game of chance against a customer. Therefore, the monies received by the Petitioner from its business activities cannot be considered as a "supply of service" as per the Act. In this instance, it is important to consider what a "supply of service" means.

Section 83 of the VAT Act defines "supply of services" as "any supply which is not a supply of goods which includes any loss incurred in taxable activity for which an indemnity is due".

Moreover, the Petitioner states that the gaming activities of a Casino do not involve any "supply of goods or services" as the VAT cannot be practically ascertained by reference to the value of such goods or services. However, such an assessment should be considered in light of the definition of the 'taxable activity' which is provided in the Act.

"Taxable activity" is defined in Section 83 of the Act *inter alia* as 'any activity carried on as a business, trade, profession or vocation other than in the course of employment or every adventure or concern in the nature of trade'. It is settled law that a "taxable activity" is to be given a broad interpretation given the existence of the loose and unrestrictive phrase "every adventure or concern in the nature of trade". This has been clearly stipulated in the case of ***Malwatte Valley Plantations Plc Vs. Commissioner General of Inland Revenue 2021 2 SLR 45*** as follows:

> *"It is important to note that the definition of a taxable activity in the VAT Act includes not only any activity carried on as a business or trade but also "every adventure or concern in the nature of trade." Hence, it need not be a trade alone, as any act in the nature of a trade is also captured under the definition. This gives the term 'taxable activity' a very broad definition; one under which the sale of trees by the Appellant falls quite comfortably."*

In fact, the activities of the Casino are such that it would formulate a continuous flow of revenue from the transactions carried out in the course of its activities. Such revenue would constitute an indemnification of a loss incurred in carrying out a taxable activity. This same interpretation has been adopted in ***People's Leasing and Finance Plc Vs. The Commissioner General of Inland Revenue, Case No.Ca/Tax/0021/2019,Tax Appeals Commission No. TAC/VAT/011/2016*** as follows:

> *"The situation is different where the company has received income on a continuous basis from the transactions carried out in the course of the business of trading in securities (i.e., sale or purchase of shares in the share market, which goes beyond the activity of a simple acquisition or sale of shares). Such transactions would be a supply of services provided for consideration as part of continuous commercial activities of such company."*

In addition, the Petitioner has admitted that the Petitioner merely provides the surrounding environment to facilitate the activities of a Casino. I am of the view that such a facilitation could be considered as a supply of services as defined in Section 83 of the VAT Act because in the absence of such facilitation, the wagering activities affiliated with a Casino could not reasonably exist.

Furthermore, the Department of Inland Revenue has relied on (R4) Section 5 of the Act, which stipulates the mechanism for calculating the value of a taxable supply of services for business activities such as the Petitioner's business. Said Section 5(4) of the Act is reproduced as follows:

> *5(4) Where a supply of services is made under any lottery or any taxable activity of entering into or negotiating a waging contract or any business of like nature, the value of such supply shall be the total amount of money receivable in respect of such supply less the consideration of the prizes or winnings awarded in such lottery, wagering contract, or any business of like nature as the case may be*.

The aforesaid statute shows that the legislature intended to include the services provided by the business in the nature of the Petitioner's venture under the purview of the VAT Act.

Having pointed out the provisions of Section 5(4) of the VAT Act, the Respondents have contended that businesses in the nature of "wagering contracts" have been explicitly identified as constituting a supply of service within the VAT Act. The activities of a Casino would quite comfortably fall within the definition of a business in the nature of a wagering contract. The inclusion of the term "wagering contract" in Section 5(4) of the VAT Act is too much of a coincidence to be overlooked.

Although the Petitioner has argued that the aforesaid section merely sets out the mechanism for calculating the value of supply of a service, this Court cannot completely disregard the Respondents' contention and must interpret the statute as a whole.

Therefore, I am of the view that we are to take the whole statute together and construe it all together, giving the words their ordinary signification. In *S v. Looij [1975] (4) SA 703*, it was held that:

> *"To determine the purpose of the legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of all others. To treat a single provision as decisive…might obviously result in a wholly wrong conclusion'*.

Accordingly, in the circumstances, I hold that the business run by the Petitioner is a "supply of services" to its customers as per the VAT Act and that the Petitioner Company is liable to pay VAT as per the Act.

Registration of the Petitioner under the VAT Act

The Petitioner argues that the Petitioner is not liable to pay VAT at the material time of assessment for the reason that the Petitioner was not registered under the VAT Act, which is a pre-condition to the imposition of liability under the VAT Act.

The material period for payment of VAT in the instant application is, from 01.04.2007 to 31.03.2010. The Petitioner states that the failure to register the Petitioner Company as a VAT payer in terms of Section 14 and issue of a Certificate under Section 15 of the Act is mandatory. Non-compliance with such requirement renders the imposition of VAT void. The Petitioner states that there is no evidence to support the registration of the Petitioner Company as a VAT payer.

However, the 1st Respondent submits that the Petitioner had been assigned the Taxpayer Identification Number [TIN] 114383430 by letter dated 21.12.2005 (R1). The said letter had been addressed to the Petitioner Company. Further, the letter dated 22.05.2007 [P4(a)] issued by the Department of Inland Revenue informing that an assessment will be issued to the Petitioner for the years of Assessment 2004/2005 and 2005/2006 produced with the Petition also referred to the above TIN.

The Respondents state that the Petitioner did not respond to the said P4(a) within a reasonable time. Accordingly, steps were taken to register the Petitioner under the VAT Act on 14.06.2007, and VAT TIN 114383430 7000 (where 7000 is the VAT code assigned to the existing TIN of the Petitioner) was assigned and the VAT registration certificate was issued. In support of the above, the Taxpayer Information sheet for VAT marked R2, which was effective from 01.08.2004, was submitted.

The Petitioner in response to the P4(a) by its letter dated 26.06.2007 (R3) i.e. after the registration on 14.06.2007, has objected to the imposition of VAT on Petitioner's Casino. However, the issue in respect of non-registration of VAT or not receiving the VAT certificate has not been challenged therein. The Petitioner was informed of its liability to pay VAT by letter dated 26.07.2007 (R4) by the Department of Inland Revenue.

Section 2 of the VAT Act imposes the duty to pay VAT upon a registered person. In terms of Section 21(1) of the VAT Act, a registered person is liable to furnish returns of his supplies to the Commissioner-General. The above-mentioned conduct of the Petitioner itself indicates that the Petitioner has acted as a registered VAT payer, as outlined in the Act. If the Petitioner was not a registered person, there would be no reason for the Petitioner to pay VAT or submit the required returns as specified in the Act. The very same reasons suggest a reasonable conclusion that the Petitioner received the certificate of registration.

If the Petitioner had genuine concern about the fact that there was an issue with registration status and the receipt of the registration certificate, the Petitioner should have promptly raised this issue at the earliest opportunity by challenging the decision of the Department of Inland Revenue to treat the Petitioner as a registered VAT payer. This proactive approach could have fostered a more efficient resolution of the matter. However, it is observed that the Petitioner has raised the issue of non-registration only in 2009 by its letter of appeal P6 against the Notices of Assessment. The Petitioner has not raised the non-registration issue even in the communications marked R3, R7, R10 and P4(b). It appears that the Petitioner has not even prayed for the Petitioner to not be considered a registered VAT payer in the instant application. The Petitioner argued that there is no need to challenge the registration, as there is currently no registration in effect. However, I am of the view that,

since the Department of Inland Revenue has treated him as a registered VAT payer, the Petitioner should have pursued the appropriate relief.

It was submitted that the Petitioner has paid the VAT for September 2004 (R12), and submitted nil returns from August 2004 to March 2012 (R13), which is admitted by the Petitioner. Although the Petitioner states that such payments were made under protest, no sufficient materials have been placed before the Court to support the said stance. Further, it is stated that the Petitioner has submitted VAT returns for the period of June 2010 to September and March 2011 to March 2012(R27(a)-R27(V)).

Hence, based on the above-attended circumstances, I am of the view that the Petitioner is now estopped from denying such registration under the VAT Act. Accordingly, the Petitioner's argument that the Petitioner is not liable to pay VAT at the material time of assessment for the reason of non-registration under the VAT Act cannot be sustained.

Lack of Uberrima Fides

It is also important to note that the Petitioner has failed to disclose the above-mentioned payment of VAT and the submission of returns [as reflected in documents marked R12, R13 and R27(a) -R27(V)] at the earliest stage of the application until the Respondents disclosed the same subsequently. *In* ***Sarath Hulangamuwa v. Siriwardene [1986] 1 SLR 275 at 282, Siva Selliah J.*** *held as follows:*

> *"A Petitioner who seeks relief by Writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised. In the instant case, the fact that the petitioner had a residence at Dehiwala is a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this court should exercise its discretion to quash the order complained of as unjust and discriminatory. On this ground too the application must be dismissed for lack of uberrima fides."*

In *Namunukula Plantations v Minister of Lands and Others 2012 1SLR 366* Marsoof J. held that,

"A person who approaches the Court to grant of discretionary relief, to which category an application for certiorari would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any hearing on the adjudication of the issues raised. He owes a duty of utmost good faith (uberrima fides) to the Court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge of which he could have known by exercising diligence expected of a person of ordinary prudence".

Conclusion

In the circumstances and for the foregoing reasons, I hold that the Petitioner has failed to satisfy this Court of any legal ground which warrants this Court to exercise its writ jurisdiction. Accordingly, I refuse to grant any of the reliefs prayed for in the prayer to the Petition. I order no cost.

Application is dismissed.

Judge of the Court of Appeal

Damith Thotawatta, J.

I agree.

Judge of the Court of Appeal