

**SUDATH DE SILVA**

**Vs.**

**DEPUTY COMMISSIONER OF PROVINCIAL REVENUE, SOUTHERN PROVINCE**

COURT OF APPEAL  
GOONERATNE, J.  
SAMAYAWARDHENA, J.  
CA/PHC/153/2011  
SP/HCCA/MA/WRIT/3/2010  
MC/MATARA/26330  
JUNE 28, 2019

**Provincial Council's power to levy Turnover Tax on sale of National Lotteries—Item 36. 1 and 36. 2 of the Provincial Council List—Items falling under the Reserved List—Fiscal Charter of the Southern Provincial Council, section 3(1) — Scope of Provincial Statutes—Ultra vires decisions—Delay as a ground for dismissal**

The appellant invoked the writ jurisdiction of the Provincial High Court of Matara seeking to quash by a writ of certiorari the Certificate of Tax in Default issued by the Commissioner of Provincial Revenue of the Southern Province to recover Turnover Tax allegedly defaulted on by the appellant for the period stated therein on the sale of lotteries of the National Lotteries Board, on the ground that the Southern Provincial Council did not have authority to levy Turnover Tax on the sale of lotteries of the National Lotteries Board. The High Court dismissed the application in limine on the ground of delay. The petitioner appealed to the Court of Appeal.

**Held:**

1. Delay shall not result in automatic dismissal of cases where no time limit to institute an action has been prescribed. In any event, if a party seeking to quash an administrative or judicial decision does so on the basis that the tribunal acted without jurisdiction, and the court is satisfied that the complaint is well-founded, the court shall not dismiss the application on delay.

2. In terms of item 36. 2 of the Provincial Council List of the Ninth Schedule to the Constitution, Provincial Councils cannot levy taxes

on national lotteries and lotteries organised by the Government of Sri Lanka.

3. Items (f), (I) and (n) under Finance in the Reserved List of the Constitution are: lotteries organised by the Government of Sri Lanka or a Provincial Council; taxes on income, capital and wealth of individuals, companies and corporations; Turnover Taxes and stamp duties. Except to the extent specified in the Provincial Council List, these are subjects that come under the central government. Provincial Councils have no power to make statutes on them.

4. The argument of the Commissioner of Provincial Revenue that the Turnover Tax on the income of selling national lotteries was imposed in terms of section 3 of the Fiscal Charter of the Southern Provincial Council, which allows the Provincial Council to levy Turnover Tax on the income of selling any commodity, which includes a national lottery, cannot be accepted, as the Provincial Statutes are subject to the limitations contained in the Constitution.

5. A Provincial Council can make statutes with respect to any matter set out in the Provincial Council List, and it has no power to make statutes on any matter set out in the Reserved List, and if it does the latter, it can be challenged as being ultra vires.

6. The Commissioner of Provincial Revenue has acted ultra vires by issuing the Certificate of Tax in Default to recover Turnover Tax on the income of selling National Lotteries, which the appellant did as an Agent of the National Lotteries Board.

**Cases referred to:**

1. Rajakaruna v. R. J. De Mel, Minister of Finance [1985] 1 Sri LR 391

2. Biso Menika v. Cyril De Alwis [1982] 1 Sri LR 368

APPEAL from the Judgment of the High Court of Matara.

Rohan Sahabandu, P. C., for the Appellant.

Thilanka Peiris, S. S. C., for the Respondent.

*cur. adv. vult.*

July 25, 2019

**SAMAYAWARDHENA, J.**

The Commissioner of Provincial Revenue of the Southern Province (respondent) filed the Certificate of Tax in Default marked X1 in the Magistrate's Court of Matara to recover Turnover Tax allegedly defaulted by the appellant for the period stated therein on the sale of lotteries of the National Lotteries Board. The learned Magistrate by order dated 26. 11. 2007 ordered it to be recovered as a fine. The appellant did not appeal against the said order but on 23. 04. 2008 filed an application in the High Court of Matara seeking to quash the said Certificate of Tax in Default by a writ of certiorari on the basis that no Turnover Tax could be levied on the sale of the lotteries of the National Lotteries Board. The High Court without going into this important question of law, which goes to the jurisdiction of the authority to issue such Certificate, summarily dismissed the application of the appellant on the ground of delay in filing the application.

Let me pause for a while to emphasise, as I always do, that disposing of cases on technical grounds although easy and speedy does not auger well for the administration of justice system as the core matter in issue is left untouched and the grievance of the aggrieved party is not addressed. Litigants want cases to be disposed of on merits and not on technical grounds. When cases are disposed of on technical grounds, the system suffers. Cases shall be decided, not merely concluded.

The learned High Court Judge has calculated the delay from the date of the Certificate of Tax in Default and not from the date of the order of the learned Magistrate.

The delay shall not result in automatic dismissal of cases where no time limit to institute an action has been prescribed. (*Rajakaruna v. R. J. De Mel, Minister of Finance*)

In the Supreme Court Case of *Biso Menika v. Cyril De Alwis*,<sup>2</sup> Justice Sharvananda (later Chief Justice) stated at page 379:

*An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell*

*laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extralegal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.*

In the instant case, the appellant has taken up the same objection that the Southern Provincial Council did not have authority to levy Turnover Tax on National Lotteries in the Magistrate's Court. But the learned Magistrate has rejected it stating that the Magistrate's Court is not the forum to challenge the Certificate on that ground. It is after this order that the appellant has gone before the High Court challenging the Certificate of Tax in Default by way of writ of certiorari. Hence the delay in my view has satisfactorily been explained.

Be that as it may, if a party seeking to quash an administrative or judicial decision does so on the basis that the tribunal which made the impugned decision did so without jurisdiction, and the Court is satisfied that the complaint is well-founded, the Court shall not dismiss the application on delay.

In that regard Justice Sharvananda in the above-mentioned case stated thus at 379- 380:

*When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loath to allow the mischief of the Order to continue and reject the application simply on the ground of delay. unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting a/together without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically.*

*"Recent practice clearly indicates that where the proceedings were a nullity an award of Certiorari will not readily be denied"- de Smith-Judicial Review- 4th Ed. page 426.*

*In this connection Professor Wade in his "Administrative Law" 4th Ed. at page 561 states: "the discretion to withhold remedy against unlawful action may make inroads upon the rule of Law*

*and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right, but the fact that a person aggrieved is entitled to Certiorari ex debito justitiae does not alter the fact that a Court has power to exercise the discretion against him, as it may in the case of any discretionary remedy.”*

*Unlike in English Law or in our Law there is no statutory time limit within which a petition for the issue of a Writ must be filed. But a rule of practice has grown which insists upon such petition being made without undue delay. When no time limit is specified for seeking such remedy, the Court has ample power to condone delays, where denial of Writ to the petitioner is likely to cause great injustice. The Court may therefore in its discretion entertain the application in spite of the fact that a petitioner comes to Court late, especially where the Order challenged is a nullity for absolute want of jurisdiction in the authority making the order.*

The appellant has been appointed as the Marketing Agent of the National Lotteries Board for the Matara Electorate by P1. He was required to purchase Lottery tickets from the District Marketing Agent of the National Lotteries Board of Matara and sell them to other sellers on a commission basis on the conditions stated therein. The Turnover Tax which is the subject matter of this appeal has been levied “on income of selling lotteries” by the appellant.

It is the contention of the learned President’s Counsel for the appellant that the Provincial Council cannot impose Turnover Tax on the income of selling lotteries of the National Lotteries Board as the appellant does so as the agent of the National Lotteries Board notwithstanding he gets a commission by so selling.

Article 154G(1) of the Constitution introduced by the Thirteenth Amendment reads as follows:

*Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as “the Provincial Council List”).*

Item 36. 2 of the Provincial Council List reads as follows:

*Betting taxes, and taxes on prize competitions and lotteries, other than National Lotteries and lotteries organized by the Government of Sri Lanka.*

According to item 36. 2, Provincial Councils cannot levy taxes on National Lotteries and lotteries organised by the Government of Sri Lanka.

Article 154G(7) of the Constitution introduced by the Thirteenth Amendment reads as follows:

*A Provincial Council shall have no power to make statutes on any matter set out in List II of the Ninth Schedule (hereinafter referred to as “the Reserved List”).*

Under “*Finance in relation to national revenue, monetary policy and external resources, customs*” of the Reserved List, the following items are found:

*(f) Lotteries organized by the Government of Sri Lanka or a Provincial Council*

*(I) Taxes on income, capital and wealth of individuals, companies and corporations*

*(n) Turnover taxes and stamp duties, except to the extent specified in List I*

According to (f) above, it is seen that Provincial Councils shall have no power to make statutes on lotteries organised by the Government of Sri Lanka.

Section 96 of the Fiscal Charter of the Southern Provincial Council, No. 7 of 1990, which deals with the subject of imposing Taxes on Lotteries states that taxes can be imposed on Lotteries except National Lotteries or lotteries organised by the Government of Sri Lanka.

This has been enacted in consonance with item 36. 2 of the Provincial Council List quoted above.

According to (I) above, imposing taxes on the income of individuals is ruled out.

But this is exactly what the Provincial Council endeavours to do in this instance.

According to (n) above, enacting statutes on Turnover Taxes by Provincial Councils is not permitted except to the extent specified in the Provincial Council List.

The sole argument of the learned Senior State Counsel for the respondent is that the Turnover Tax in question on the income of selling National Lotteries was imposed in terms of section 3 of the Fiscal Charter of the Southern Provincial Council, which allows the Provincial Council to levy Turnover Tax on the income of selling any commodity, which includes a National Lottery. Learned Senior State Counsel says that this is not Lottery Tax but Turnover Tax imposed on the income of selling lotteries.

A conspicuous feature of the submission of the learned Senior State Counsel is not to place much emphasis on the Thirteenth Amendment to the Constitution, in particular, the Provincial Council List and the Reserved List, but to rely heavily on the Fiscal Charter of the Southern Provincial Council, in particular, section 3(1) thereof. What the learned Senior State Counsel fails to realise is that Provincial Statutes are not *sui generis*. They shall always be subject to the limitations contained in the Thirteenth Amendment to the Constitution, which established Provincial Councils.

As I have already stated, Provincial Councils can make statutes with respect to any matter set out in the Provincial Council List, and they have no power to make statutes on any matter set out in the Reserved List, and if they do the latter, such statutes can be challenged as being *ultra vires*.

Section 3(1) of the Fiscal Charter is a general provision to levy Turnover Taxes on the turnover of businesses.

Section 3(1) of the Fiscal Charter is based on item 36. 1 of the Provincial List which reads as follows:

*Turnover taxes on wholesale and retail sales within such limits and subject to such exemptions as may be prescribed by law made by Parliament.*

Item 36. 1 of the Provincial Council List is self-explanatory. It is subject to exemptions as may be prescribed by law made by Parliament. The Supreme Law made by Parliament is the Constitution.

When the Constitution retains the subject of Lotteries organised by the Government with the Central Government, having it included in the Reserved List; and also item 36. 2 of the Provincial Council List enacts that Provincial Council can impose taxes on lotteries other than National Lotteries and lotteries organised by the Government; and also in terms of item (I) under “Finance” in the Reserved List, taxes on income of individuals cannot be levied by a Provincial Council, I do not think that

the Southern Provincial Council is empowered to levy Turnover Tax on the income of selling National Lotteries solely depending on the general section 3(1) of the Fiscal Charter of the Provincial Council which allows levying Turnover Tax on businesses.

On a parity of reasoning, according to sections 8 and 9 of the Fiscal Charter of the Southern Provincial Council, once the Provincial Minister exempts any commodity for the purpose of the Fiscal Charter, Turnover Tax on the income of selling such commodity cannot be charged.

For the aforesaid reasons, I hold that the respondent Commissioner of Provincial Revenue, being an officer of the Southern Provincial Council, has acted ultra vires in issuing the Certificate of Tax in Default to recover Turnover Tax on the income of selling National Lotteries, which the appellant did as an agent of the National Lotteries Board. The Provincial Councils have no authority to levy taxes on National Lotteries and lotteries organised by the Government of Sri Lanka.

I leave the question whether Provincial Councils can levy taxes on Lotteries organized by the Provincial Council to be decided in a future case as it did not come up for decision in the instant case. (From the document marked X filed with the written submissions of the respondent it is seen that levying Turnover Tax by the Provincial Councils has been suspended with effect from 01. 01. 2011 but that poses no impediment to recover the tax in default relevant to the period before the said date.)

Hence I quash the Certificate of Tax in Default marked X1 by way of writ of certiorari.

The Judgment of the High Court is set aside and the appeal is allowed. The appellant is entitled to costs both here and in the Court below.

**GOONERATNE, J.** - *l agree.*

*Appeal allowed.*

*Judgment by: Mahinda Samayawardhena, J.*

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