

**Supreme Court, Division Bench
Honourable Justice Anil Kumar Sinha
Honourable Justice Kumar Regmi**

Judgment

Writ No. 075-WO-1388

Sub: Mandamus, Certiorari et.al.

Petitioner: Mahesh Dangol, age 24, son of Sukh Bahadur Dangol resident of Kathmandu District, Kathmandu Municipality Ward No. 2 and Authorized representative of Tergar Foundation of Nepal located at Kathmandu district, Nagarjun Municipality Ward No. 5

Vs.

Respondent: Inland Revenue Office, Kathmandu District, Kathmandu Metropolitan City, Ward No. 14, Kalanki

District Administration Office, Kathmandu District, Kathmandu Metropolitan City Ward No. 11

The summary of the facts and the order of the writ petition submitted pursuant to Article 46 and Article 133 (2) of the Constitution of Nepal and falling under the extra-ordinary jurisdiction of this court is as follows:

Fact Section

The writ petition submitted by Tergar Foundation of Nepal reads as follows: that the Tergar Foundation of Nepal is an organization registered at the District Administration Office, Kathmandu, and has received affiliation from the Social Welfare Council on 2067/11/20 (corresponding to 4 March, 2011). Likewise, being an organisation involved in religious activities, it had registered itself as a tax exempt organization and had subsequently received a permanent account number on 2067/12/7 (corresponding to 21 March, 2011). As an organization being exempted from income tax, the organization had received tax exemption from 2068/8/20 (corresponding to 6 December, 2011) till fiscal year 2073/2074 (corresponding to 2016/2017). However, the respondent office on 2075/12/17 (corresponding to 31 March, 2019) had for the fiscal year 2074/2075 levied 14,662,192 rupees and on 2076/1/9 (corresponding to 22 April, 2019) had levied 24,425,146 rupees and pursuant to Clause 2 (s), 10, 11, 99, 101 of Income Tax Act, 2058 and Rule 5 (a) of the Income Tax Regulation, 2058 had ordered the respondent to submit the above amount as tax. In the revised tax assessment notice of 2076.01/08 (corresponding to 21 April, 2019) the notice stated that where the organization pursuant to Rule 5.a (1) of the Income Tax Regulations, 2059 (2002), had failed to renew its registration within the prescribed period, the organization pursuant to Rule 5.a (5) of the said Regulations was not entitled to any tax exemption. The petitioner claims that the actions taken by the respondent by assessing the tax and bringing the organization within the ambit of tax is unlawful and requests the court to quash the decisions, orders, and correspondence through an order of certiorari. The

petitioner also states that the organization being a religious and a social organization had received tax exemption from the date of registration of the organization and had received certification and recognition accordingly and therefore, the petitioner requests the court to issue an order of mandamus directing the respondents to renew the organization as a tax exempt organization.

The petition registered by the petitioner had been endorsed by the Registrar of this court on 2073/3/18 (corresponding to 2 July, 2016) which reads as follows: with regards to the admissibility of the petition it has been noticed that while assessing the tax for the fiscal year 2074/075 by the Inland Revenue Office, Kalanki on 2073/1/8 (corresponding to 20 April, 2016), wherein a revised tax assessment pursuant to Clause 101 (1) of the Income Tax, 2058 had been made and pursuant to Paragraph No. 4 of the tax assessment, the petitioner had been directed to file an administrative appeal before the Department of Inland Revenue provided the petitioner did not concur with the decision and where the petitioner had been provided with a remedy, the petitioner rather than taking recourse of the said remedy has filed a petition pursuant to the extraordinary jurisdiction of this court and therefore, the writ petition cannot be registered and hence, the writ petition pursuant to Rule 18 (2) of the Supreme Court Regulation and Clause 128 of the National Civil Procedure Code, 2074 (2017) is hereby endorsed.

An order on 2076/3/26 (corresponding to 11 July, 2019) had been issued by this Bench which stated the following: considering the gravity of the matter raised by the petitioner and upon perusal of the petition, the court deems that the issues raised by the petitioner need to be resolved by this Bench and hence the endorsement made by the Registrar of this court on 2076/3/18 (corresponding to 3 July, 2019) is hereby overruled, Subsequent to the said order, the writ petition was registered on 2076/3/26 (corresponding to 11 July, 2019).

A show cause notice had been issued by this court on 2076/3/31 (corresponding to 16 July, 2019) which reads as follows: What has happened in this regard? Why should the order as sought by the petitioner not be issued? Provided, there are any reason and grounds for not issuing the order, the respondents are hereby directed to submit their rejoinder within 15 days excluding the period of travel through the Office of the Attorney General. It is hereby ordered to provide a copy of the writ petition and to issue a summon in the names of the respondents and to submit the case file upon submission of the rejoinder or upon the expiry of the limitation period. Furthermore, considering the request for an interim order, the Bench deems it appropriate to discuss the issue in the presence of both the Parties, wherein a hearing has been scheduled for 2076/4/17 (corresponding to 2 August, 2019) wherein the Parties are hereby ordered to be present on the said date.

The rejoinder submitted by the Chief District Officer of District Administration Office, Kathmandu on 2076/4/5 (corresponding to 21 July, 2019) reads as follows: that where the respondent the District Administration Office had failed to timely renew the organization and the tax assessment made by the tax office is illegal wherein the petitioner seeks the court to issue an order of certiorari to quash the said decision. The decision as to whether or not an organization is entitled to tax exemption does not fall within the jurisdiction of this office and pursuant to the Rules an organization shall be renewed upon submission of proof of tax clearance and therefore the writ petition filed against this office should be dismissed.

The contents of the rejoinder submitted by the Chief Tax Officer of the Inland Revenue Office, Kalanki on 2076/11/22 (corresponding to 9 August, 2019) reads as follows: that Tegar Foundation of Nepal had been affiliated with the Social Welfare Council on 2067/11/22 (corresponding to 6 March, 2011) and pursuant to Clause 2(s) 1 (a) of the Income Tax Act, 2058 had been registered as not-for-profit organization. Pursuant to Rule 6 a (1) of the Income Tax Regulations, 2059 (with amendments), the organization enjoying tax exemption need to renew its tax exemption certificate within six months from the date of expiry of the fiscal year and provided the tax exemption certificate is not renewed pursuant Rule 5 a (5) of the said Regulations, the tax exempted organization shall not be entitled to tax exemption. Pursuant to Clause 99 of the Income Tax Act, 2058, the taxpayer had filed the self-assessment of tax for the fiscal year 2074/075 on 2075/8/12 (corresponding to 28 November, 2018) and pursuant to Clause 96 had submitted the income statement pursuant to Section 96 of the same Act. While submitting the income statement, the taxpayer had claimed a 100 percent tax exemption citing that the petitioner's industry pursuant to Clause 11 (3) of the Income Tax Act, 2058 (with amendments) was established in a remote area. However, the taxpayer pursuant to Rule 5(1) of the Income Tax Regulations, 2059 (with amendments) failed to renew the tax exemption certificate for the fiscal year 2074/075. Where the taxpayer had not obtained a tax exemption certificate for the fiscal year 2074-075 and where it was not demonstrated that the industry was established in a remote area, a taxable income at Rs. 58,648,771.92 pursuant to Clause 99 of the Income Tax Act, 2058 was assessed wherein 25 percent tax was levied on the taxable income totalling the amount to Rs. 14,662,192.98 and notification pursuant to Section 101(6) of the Income Tax Act, 2058 had been served on 2074/12/17 (corresponding to 31 March, 2018) requesting the taxpayer to submit a certification of deposit of Rs. 14,662,192/98 and provided the said amount had not been deposited, the taxpayer was asked to submit the amount with the interest accrued thereon. The notification issued was received by the taxpayer on 2076/1/4 (corresponding to 17 April, 2019). Upon receiving the notification pursuant to Clause 101 (6) of the Income Tax Act, 2058, the taxpayer in response to the notification had on 2076/1/6 (corresponding to 19 April, 2019) furnished a reply stating that tax exemption certificate for the fiscal year 2074/075 could not be obtained owing to technical reasons. Where the taxpayer failed to provide a satisfactory response or evidence thereof with regards to matters relating to tax assessment, this office pursuant to a decision made on 2076/01/08 (corresponding to 21 April, 2019), and pursuant to Clause 101 of the Income Tax Act, 2058 had on 2076/1/9 (corresponding to 22 April, 2019) had carried out a revision of the tax wherein according to the revised tax and pursuant to Clause 102 of the Income Tax Act, 2058, the taxpayer was notified to deposit a total of Rs. 24,425,146 (in words twenty four million four hundred and twenty-five thousand one hundred and forty six rupees), along with interest with 7 days from the date of receipt of the letter. The notification was received by the taxpayer on 2076/01/17 (corresponding to 30 April, 2019). Where the taxpayer pursuant to Rule 5 a (1) of the Income Tax Regulations, 2059, had failed to renew the tax exemption for the fiscal year 2074/075, the taxpayer subsequent to Rule 5 a (5) of the said Regulations is not entitled to tax exemption, wherein tax assessment was made accordingly. The respondent taxpayer pursuant to Clause 115 of the Income Tax Act, 2058, has the right to file an administrative appeal but on the contrary the petitioner circumventing the said remedy has entered the writ jurisdiction and without exhausting the legal remedies prescribed by the law, the petitioner cannot enter the jurisdiction of the honourable court and the avenues of regular remedy cannot be made ineffective. Therefore, based on the aforementioned legal provisions, facts, and evidence the respondent requests the writ petition to be dismissed.

An order by this court had been issued on 1076/5/10 (corresponding to 17 August, 2019) which reads as follows: it has been noted that an order for assessment of the tax had been made pursuant to Rule 5 a of the Income Tax Rules, 2059, and the Bench also notes that an alternative remedy exists for filing an appeal before the Administrative Review and Revenue Tribunal against the said assessment order. Question regarding the application and interpretation of the provision prescribed under Clause 10 (g) of the Income Tax Act, 2058, has been raised in the petition wherein the Bench deems it reasonable to resolve the issues during the final hearing and therefore, an interim order need not be issued and the Bench directs to proceed accordingly pursuant to the rules.

On 2076/11/23 (corresponding to 6 March, 2020) the petitioner had filed a petition before this court which reads as follows: that the Tergar Foundation of Nepal is providing food, shelter, and medical treatment to approximately 280 individuals, including minor students, Buddhist religious teachers, monks and nuns. Being a religious and social organization, the organization has no independent source of income, and to carry out its regular activities the organization is dependent upon grants and assistance from various donor agencies. That the petitioner not concurring with the tax assessment levied for the fiscal year 2074-2075 had filed a writ petition requesting the court to quash the assessment wherein the writ petition is sub-judice before the court. Where the decision against the writ petition has not been finalized, the respondents have not renewed the organization wherein the Social Welfare Council has not provided approval for receiving grants and assistance from donor agencies. Consequently, approximately 280 individuals including minor students, Buddhist religious teachers, monks and nuns are being deprived from food and medical treatment wherein the organization may be subject to forced closure and therefore, the petition in order to avert the dire and precarious conditions arising therein seeks the court to issue an interim order.

An order had been set aside on 2077/3/14 (corresponding to 28 June, 2020) by this court which reads as follows: where all the parties have submitted their rejoinders and taking note of the subject matter it is deemed imperative to dispose the writ petition expeditiously and therefore, pursuant to the rules, it is hereby ordered to schedule a full hearing on 2077/3/23 (corresponding to 7 July, 2020)

Order

Pursuant to the cause-list the writ petition was presented before this court and on behalf of the petitioner the Learned Senior Advocate, Mr. Surendra Bhandari, argued that the petitioner's organization was not a profit making professional organization but rather a service-oriented non-governmental organization. That the organization had received tax exemption certificate and was exempted from tax up to fiscal year 2073/74. While filing the income statement for fiscal year 2074/75, a claim for 100 percent tax exemption was made, but on the contrary and without providing an opportunity for a fair and appropriate hearing, income tax was assessed. The statutory basis for exemption of tax to be enjoyed by this organization has not been amended. Provided, the organization is forced to bear the burden of unlawful taxation, the organization may be subject to forced closure. In case of forced closure, many students and people receiving services from the organization will be affected. Owing to the procedural errors in the renewal process, it is not justifiable to close down the organization and therefore, the petitioner requests the court to issue an order of mandamus and certiorari.

The contention of the learned Joint Government Attorney Mr. Harishankar Gynawali on behalf of the respondent's office is as follows: that the petitioner's organization was granted tax exemption for the fiscal year 2073/074. In order to obtain tax exemption for the coming fiscal year, the organization should within the period prescribed by law renew the tax exemption certificate and avail the facilities of tax exemption. Provided, this mandatory legal provision is not complied, the organization will not be eligible for tax exemption. The tax claimed was based on the self-assessment return submitted by the organization and therefore, the tax claimed cannot be deemed to be otherwise. Where an organization claiming tax exemption has been duly renewed and has acquired tax exemption, tax against such organization will not be levied by the revenue office. The organization must hold itself accountable for its own mistakes. The petitioner had the opportunity of seeking redress through an administrative review and on behalf of the organization an extension for filing a review petition was also sought and therefore, the petitioner does not have the locus-standi in entering the extra-ordinary jurisdiction of this court and since there are ample alternatives avenues available for the petitioner, the writ petition should be quashed.

It is for this Bench to decide as to whether or not an order of mandamus need to be issued to overrule the decision to levy income tax against an organization claimed by the petitioner to be registered as a tax exempt organization.

2. It is evident that the petitioner's organization pursuant to Clause 4 of the Associations Registration Act, 2034 (1977) had been duly registered at the District Administration Office, Kathmandu on 2067/8/20 (corresponding to 6 December, 2010). Upon perusal of the Articles of the organization, it is evident that the organization is not for profit-making organization and from among its objectives, the organization is a public interest social welfare organization catering towards the promotion and development of social service, religion, literature, art and science and in the promotion, development, and preservation of Buddhism. In order to fulfil its objectives, the organization pursuant to its objectives may upon acquiring approval pursuant to the prevailing laws establish, operate and manage schools, colleges, or other educational institutions. The organization's fund comprises of amounts received in lieu of entrance fees and membership fees, donations and aid received voluntarily, amounts received from the sale of movable or immovable properties or other goods and amounts received from foreign institutions, individuals, or international organizations. The organization that was registered on the basis of the objectives and funds collected therein, was registered by the Department of Inland Revenue on 2067/9/1 (corresponding to 16 December, 2010) under "Business Trade: Religious Organization: and permanent account number 304576690 was provided to the organization. Likewise, vide letter 2067/12/7 (corresponding to 21 March, 2011) letter no. 067/68, dispatch no. 3736, the Inland Revenue Office, Kathmandu Area No. 3 had for the purpose of Clause 2 (s) of the Income Tax Act, 2058, issued a certificate registering the organization as a tax exempt organization stating the objective of the organization as "Religious Work". Sub-clause (1) of Clause 2 (s) states "organization entitled to enjoy exemption" and underlines the following entities registered in the Department as organizations entitled to enjoy tax-exemption (a) social, religious, educational, or charitable organizations established with non-profit motives. It is not disputable that the petitioner's organization falls within this category.
3. The certificate provided to the organization registered as tax exemption organization on 2067/12/7 (corresponding to 21 March, 2011) under the Heading "that donations, gifts,

returns or expectations of receiving returns and other contributions that the organization will not be affiliated with” provides certain preconditions which are as follows: that tax exemption shall be not be applied only when any property is gifted to the organization or when any payment in lieu of any services is provided. Other than that any property of the organization and provided any individual receives any benefit in lieu of the property received by the organization shall not be entitled to tax exemption and furthermore, it states that provided the institution engages in activities other than that prescribed in its objectives and accrues taxable income, then exemption of tax will not be applicable to such income. An organization that has been issued with a certificate and entitled to enjoy tax exemption pursuant to Rule 3 of the Income Tax Regulations, 2059 (2002), shall submit its audited annual financial statements to the Department within 3 months from the date of expiration of the fiscal year. Earlier, procedural provision for renewal of such certificate was not provided. Rule 5 a had been included in the Income Tax (Sixth Amendment) Regulations, 2073, that came into effect on 2073/02/15 (corresponding to 28 May, 2016) which prescribed that for renewal of a certificate, the institution shall submit an application in the format prescribed by the Department before the Tax Officer within 3 months from date of expiration of the fiscal year with the audited financial statements of the previous fiscal year, tax deduction at source along with submission of tax deposit. Sub-rule (5) of 5a. states that an organization availing tax exemption facility shall not enjoy tax exemption facility without renewal of tax exemption certification and it also prescribes that provided an organization involves in activities other than its objectives and accrues taxable income then tax exemption will not be applicable to such income.

4. With the implementation of the Income Tax (Sixth Amendment) Rules, 2073 on 2063/2/15 (corresponding to 28 May, 2016), it is evident that question on the financial audited report for the fiscal year 2073/74 has not been raised in the petition or in the rejoinder. Clause 96 of the Income Tax Act, 2058 (2002) prescribes each every person to submit within 3 months of expiration of an income year an income return of that year and pursuant to Clause 81 of the said Act such income return should be maintained in the format or type as prescribed by the Department or to be certified or authenticated by audit or in other manner. However, with regards to tax exempt organization, the organization for the purpose of renewing its certificate should pursuant to Sub-Rule (2) of Rule 5 of the Income Tax Regulation, 2059 (with amendments), submit an application in the format prescribed by the Department before the Tax Officer and pursuant to Sub-Rule (3) shall along with the application submit an annual audited financial statement of the previous fiscal year and tax deduction at source with tax deposit and certificate thereby indicating that there were no provisions for filling the income statement for such organizations but rather they were required to submit a financial statement in a separate format.
5. It is evident that the applicant had submitted the financial statement for the fiscal year 2074/75 and pursuant to Schedule 6 (Computation of Income from Business) had submitted the income statement and the said record had been certified on 2075/8/12 (corresponding to 28 November, 2018). The Tax Officer verifying and certifying the form has not provided any comments as to whether or not the “Computation of Income from Business” form pursuant to Clause 7 of the Income Tax Act, 2058, need to be filled by tax-exempt organizations. The petitioner while submitting the financial statement had under Schedule A, revealed that it had received donations amounting to 68,753,096.18 rupees from various organizations and

individuals, and had shown the amount as income where in the income statement in the form titled "Computation of Income from Business " as prescribed in Schedule 5, the petitioner under the heading "Service Charge (7.2 a)" has mentioned Rs. 68,753,096.19 and in the financial statement under "net savings of this year" a total of 58,648,771.92 has been mentioned wherein in the form of Department of Inland Revenue under "Income from Business" the same amount has been mentioned. In the said form, the tax payer seeks 100 percent tax exemption from its income citing the "industry established in a remote area". Errors may have been committed by the petitioner owing to the anomalies in the form submitted. The Tax Officer has verified and certified the statement on 2075/8/12 (corresponding to 28 November, 2018) which is evident from the documents attached with the case file. Form relating to business as provided under Schedule 5 was filled online by the organization that was registered under Associations Registration Act, 2034 and had received tax exemption certificate from Department of Inland Revenue and pursuant to Rule 5 of the Income Tax Regulation 2059 (with amendments) had submitted a financial statement where under source of income the organization had stated donation received and the Tax Officer while verifying the form of the taxpayer has not been able to comment as to whether or not those forms are applicable to the petitioner's organization. During the hearing, the Joint Government Attorney on behalf of the respondents informed the Bench that it was mandatory for organizations receiving tax exemption certificate for this year to fill out the form under Schedule 5 (a) issued by the Department. He further informed that for the purpose of Sub-clause (2) of Clause 96 of the Income Tax Act, 2058, the financial statements should be submitted pursuant to the format and type prescribed by the Department and for the purpose of Sub-rule (3) of Rule 5 of the Income Tax Regulation, 2059, the audited financial statement should be interrelated and that it is for the Department of Inland Revenue to provide clarification on matters relating to the application of Schedule 5 (a). The respondents contend that for public notice Schedule 5 has been uploaded in website of the Department. Under these circumstance, it is the duty of the Tax Officer to ensure that the forms submitted by any individual are in accordance with the procedures and formats laid out by the Department. Provided, there are any errors or discrepancies, the Tax Officer should notify the individual and provide an opportunity to rectify those errors before registration and it is the duty of the Tax Officer to exercise the same powers that have been vested in a court. Clause 135 of the Income Tax Act, 2058 stipulates the following: "for the purpose of this Act, the Department shall have the powers vested in a court under the law in force in matters of summoning the presence of the concerned person, recording of statements, examining evidence and compelling production of documents." The provision has been inserted by the Legislature with great importance. The Constitution of Nepal has envisioned an independent judiciary, and that the courts and other judicial bodies shall pursuant to the Constitution, laws and recognized principles of justice exercise the rights relating to justice. It is expected that the Tax Officers while determining the tax will perform their duties impartially and without any biasness and independently like the courts. In our court proceedings, provided any document is deemed to be incomplete or does not conform with the prescribed format, the document is returned to the concerned Party with instructions to rectify the errors and these are purely procedural matter and such procedural issues will not affect the facts of the case or will not have any effect on the Parties.

6. It is indisputable that the petitioner had submitted the details online and that the same had been verified on 2075/8/12 (corresponding to 28 November, 2018) by the respondent's office.

The certificate of tax exemption received by the organization that was issued on 2067/12/7 (corresponding to 21 March, 2011) had not been revoked or neither was its objectives amended. On the basis of the financial statement submitted by the petitioner, a letter dated 2075/12/7 (corresponding to 21 March, 2019) having letter no. 2075/076 dispatch no. 1646 had been provided which reads as follows: "With regards to the above, it has been noted that the organization has not obtained a tax exemption certificate for the fiscal year 2074/075, and therefore, pursuant to Clause 99 of the Income Tax Act, 2058, the taxable income of Rs. 58,648,771.92 has been determined and pursuant to the said Act, a 25 percent income tax has been levied on the said amount totalling the amount to Rs. 14,662,192 (in words: fourteen million six hundred and six hundred and sixty-two thousand one hundred ninety-two rupees) has been imposed wherein the petitioner pursuant to Clause 101 (6) of the Income Tax Act, 2058 had been informed to submit the proof of payment of tax within 7 (seven) days from the date of receipt of this letter, or provided payment had not been made the petitioner was informed to submit the same with interest within 15 (fifteen) days." It is noted that pursuant to the prescribed legal procedures, the petitioner had to submit the financial statement; however in the form submitted pursuant to the format prescribed in Schedule 5, tax exemption of hundred percent had been mentioned. Provided, the petitioner was not entitled to hundred percent tax exemption, it was the duty of the Tax Officer to provide an opportunity to the petitioner to submit any reasons thereof but on the contrary, the content of the letter states that pursuant to the tax assessment Rs. 14,662,192 as tax had been imposed and had directed the petitioner to submit an evidence of proof of submission or had provided a timeline for submission of the same. The recital that the petitioner had not acquired income tax exemption certificate and that the certificate acquired had not been renewed are two different subject matters which cannot be disputed. On the other hand, while submitting the financial statement under Income Statement, the petitioner had submitted net saving of the year and had claimed a 100 percent tax exemption and under the bracket of tax assessment had specified 0 (zero) percent. Provided, tax was to be imposed to the petitioner, the petitioner pursuant to the principles of natural justice should have been provided with an opportunity to be heard which is the right of the petitioner. Clause 74 (2) of the Income Tax Act, 2058 states the following: "in the context of paying tax pursuant to this Act, the taxpayer shall have the following rights" and in Sub-Clause (2) (c), the Act provides the taxpayer the right to have an opportunity to furnish proofs in defence on tax related matters and this is a legal right of the taxpayer established by the Act. Sub-clause (6) of Clause 101 further complements the said right wherein the said Clause prescribes a time limit of fifteen days for the submission of proof and evidence for defence.

7. Article 126 of the Constitution of Nepal stipulates that powers relating to justice in Nepal shall be exercised by the courts and judicial bodies in accordance with the Constitution and other recognized principles of laws and Article 115 guarantees that no tax shall be levied and collected except in accordance with law. Imposing tax by coercively enforcing the law is not justifiable. One of the basic fundamental principles of natural justice is to provide an opportunity to be heard and that decisions should not be made in the absence of such hearing. Decisions made contrary to the principles of natural justice shall not have legal validity have been elucidated in Nepal Law Magazine 2067 Unit 1, Decision No. 8294, Nepal Law Magazine. 2068 Unit 7, Decision No. 8663, Nepal Law Magazine 2073 Unit 5, Decision No. 9606, Nepal Law Magazine 2074 Unit 5, Decision No. 9806 and Nepal Law Magazine 2074 Unit 7, Decision No. 9869.

8. The provisions prescribed in the Act are not ornamental. They must be implemented in alignment with their genuine significance and intent. From the letter dated 2075/12/7 (corresponding to 31 March, 2019) provided by the Inland Revenue Office, Kalanki, it is noted that assessment of tax had been made and a period of 15 days had been provided for recovery of the tax. The letter cites Sub-clause (6) of Clause 101 of the said Act however; the letter does not provide an opportunity to the petitioner to submit any clarifications. The present dispute concerns as to whether or not the errors or omissions made by the petitioner while filling the application form or during the renewal creates imposition of tax or as to whether or not owing to procedural errors the petitioner should be subjected to penalty pursuant to Clause 128 of the Income Tax Act, 2058? As to whether or not failure in the renewal of the tax exemption certificate would ipso facto revoke the registration of the organization registered on 2067/12/7 (corresponding to 21 March, 2011)? The applicant while submitting the financial description had shown the amount received as amount received from donations and therefore, would the amount shown or would the amount filled in an irrelevant Schedule be deemed to be within the purview of the definition of income from service as prescribed in Sub-clause (2) (a) of Clause 7 of the Income Tax Act, 2058? These are some of the questions that need to be answered based on the laws and grounds and pursuant to the legal provisions provided it is deemed to be an income the same should be stated and the petitioner pursuant to Sub-clause (6) of Clause 101 and Sub-clause (2) (c) of Clause 74 of the said Act must be given an opportunity to be heard and this is the spirit and intention of the Act. The tax administrator should be aware that they should not exercise their rights to accrue unfair benefits from the taxpayer and that the tax administration should also be aware that the principle of fair play or public trust is applicable to them. According to this principle provided any action is taken or is to be taken against the taxpayers, the taxpayer should be provided with information therein. Where all details relating to the tax exempt organization is obtained and where a certificate to that effect has been provided, it cannot be deemed to be appropriate of not informing the organization of the potential consequences of failure to renew or delay in the renewal and not providing an opportunity to be heard and this is the objective of this principle
9. Law relating to revenue as prescribed in Sub-clause (2) of Clause 74 and Sub-clause (6) of Clause 101 of the Income Tax Act, 2058 is not something new. Clause 33 (4) of the former Income Tax Act, 2031, provided for an opportunity to be heard and with regards to this legal provision this court in *Mohan Krishna Kharel vs. Income Tax Office, Rajbiraj* (Nepal Law Magazine 2045, Unit 8, Decision No. 3544) had propounded the following: “while providing information, mere prescription of the Clause of the Act will not fulfill the intent of the Act, the intent of the Act is to provide under which heading and under what grounds and basis were the tax assessed and provided information therein is provided, the taxpayer would be able state as to whether or not income tax is applicable or would be able to submit evidences therein”. Therefore, the court ruled that imposition of tax and collection tax are two different matters and should be viewed differently. The process of assessment of tax should be followed prior to collecting the tax. In the letter dated 2075/12/7 (corresponding to 21 March, 2019) provided to the petitioner, although Clause 101 (6) of the said Act was mentioned, the grounds and reasons for assessing the tax revision and the information therein was not provided but on the contrary, correspondence for recovery of tax was made and thereafter on 2076/1/8 (corresponding to 21 April, 2019) a decision regarding the assessment of revised tax was made. Prior to deciding the recovery of tax, the petitioner’s organization that was

exempt from taxation should have been informed the basis and reasons thereof and provided failure to renew the certificate was the grounds for converting the donation to income from business, the legal grounds for the application of Clause 7 of the said Act should have been provided to the petitioner. Therefore, pursuant to the intent of law, prior to providing an opportunity to submit any clarification a letter demanding submission of tax and that an opportunity to be heard pursuant to Clause 74 (2) (c) and 101 (6) was provided to the petitioner cannot be deemed to be proper and therefore, the letter dated 2075/12/7 (corresponding to 21 March, 2019) demanding submission of tax and the revised tax assessment decision made on 2076/1/8 (corresponding to 21 April, 2019) cannot be deemed to be in accordance with the law.

10. During the hearing, the Joint-Government Attorney on behalf of Nepal government argued that the petitioner had the legal remedy of filing an administrative appeal against the revised tax assessment and that the petitioner had even sought an extension for registration of an appeal petition and therefore, the extraordinary jurisdiction of this court cannot be applicable. Under Article 133 (2) of the Constitution of Nepal, the Article prescribes as to when and under what circumstances can this court exercise its extraordinary jurisdiction. Extraordinary jurisdiction can be exercised by this court for any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal questions involved in any dispute of public interest or concern have the extraordinary power to issue necessary and appropriate orders, provide appropriate remedies, enforce such right or settle such dispute. Questions relating to non-compliance of the principles of natural justice, and legal questions regarding the denial of the exercise of the right guaranteed by the Income Tax Act have been raised and therefore, the petitioner's right to exercise his right cannot be deemed to have been exhausted merely because the taxpayer had sought for an extension for an administrative review. Pursuant to the established legal principle, principle of estoppel is not applicable in disputes having legal questions and therefore, the Bench does not concur with the argument raised by the respondent. In a writ petition of certiorari filed by the authorized representative Acting Project Chief Anil Kumar Pokharel, on behalf of Sunsari Morang Irrigation Development Committee against Larsen and Turbo Limited (Writ No. 3029 of the Year 2059, Date of Decision 2063/09/25), the court ruled that the extraordinary jurisdiction has been recognized as judicial review or writ jurisdiction by this court and that extraordinary jurisdiction can be entertained by the court provided there is error of law apparent on the face of the record, breach of the principles of natural justice, lack of power, excess of power or abuse of power, error of procedure, error of law, fraud on law, failure to perform duty and bad faith. The respondent had argued that this court cannot entertain the extraordinary jurisdiction with respect to the petition and upon analysing the issues raised in the petition and the prevailing legal provisions the Bench concludes that it cannot concur with the arguments raised by the respondent.
11. Therefore, based on the commentaries made hereinabove, the letter dated 2075/12/7 (corresponding to 20 April, 2018) from the Inland Revenue Office, Kalanki, requesting for submission of tax from the petitioner's organization and the decision on the revised tax assessment made on 2076/1/8 (corresponding to 21 April, 2019) is deemed to be contrary to the law and is hereby quashed through an order of certiorari. An order of mandamus is hereby issued in the name of the respondent Inland Revenue Office, Kalanki directing the office to

decide as to whether or not the tax exemption certificate issued on 2067/12/7 (corresponding to 21 March, 2011) should be renewed and as to whether or not it should be exempted from any taxation and based on the audited financial statement of the disputed fiscal year, provided there are any taxation liabilities the same should be clearly specified along with the legal grounds and potential liabilities to be incurred and pursuant to the principles of natural justice and Income Tax Act, 2058, provide an opportunity to be heard and to submit evidence or reply therein and upon evaluation of the legal grounds, evidences and the replies furnished therein to reach a decision. It is hereby directed to provide a copy of this order to the respondents through the Office of the Attorney General and to upload the order in the electronic system and to remove the writ petition from the register and submit the case file to the Record Section.

Judge

Concurring with the above Opinion:

Judge

Bench Officer: Kul Prasad Dahal

Computer Type: Shanti Tamang

Year 2077 of the Month of Ashar Date 23 Day 3

(Corresponding to Year 2020 of the Month of July Date 7 Day 3)