

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

In the matter of an application for
mandates in the nature of writ of
Certiorari and Prohibition under
Article 140 of the Constitution.

I.D Lanka Limited,
Melfort Estate,
Kotalawela,
Kaduvela.

Petitioner

C.A Application No. 1041/2005(Writ) Vs

1. S.A.C.S.W. Jayatillake,
Director General of Customs and
Excise,
Department of Sri Lanka Customs,
Customs House, Bristol Street,
Colombo 1.
And two others

Respondents

BEFORE : **S.SRISKANDARAJAH, J (P/CA).**

COUNSEL : Faiz Musthapha, PC, with M.Wickremasinghe,
for the Petitioner.

Y.J.W.Wijetilake, PC, ASG
for the 1st to 3rd Respondents.

Argued on : 13.07.2010.

Decided on : 11.01.2012

S.Sriskandarajah, J.

The Petitioner is a public limited liability company engaged in the business of bottling and selling wholesale alcoholic beverages and in the business of wholesale trade of foreign liquor. The Petitioner Company is licensed under the Excise Ordinance to carry on the aforesaid trades and it is liable to pay excise duty under and in terms of Excise (Special Provisions) Act No.13 of 1989 as amended. For the purpose of this Act the mode of ascertaining the value of an excisable article is provided under Section 7(1) of the Excise (Special Provisions) Act No. 13 of 1989 as amended by Excise (Special Provisions) (Amendment) Act No. 40 of 1990 and Excise (Special Provisions) (Amendment) Act No 8 of 1994.

Section 7(1) provides:

7. (1) Where under this Act, excise duty is levied on any excisable article, not being an excisable article imported into Sri Lanka, with reference to value, such value shall be deemed to be"

(a) the normal price thereof, that is to say, the price at which such excisable articles are ordinarily sold by an assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration of sale :

(b) the nearest ascertainable equivalent price of such excisable articles determined in such manner as may be prescribed, where the normal price of such excisable articles is not ascertainable for the reason that such excisable articles are not sold or for another reason,

(c) the declared value of such excisable article for the purposes; of the turnover tax determined in such manner as may be prescribed where, in relation to any excisable article, turnover tax is to be levied under the

Turnover Tax Act, No. 69 of 1981.

(2).....

Under this section the excise duty is levied with reference to the value under Section 7, if a value cannot be ascertained under Section 7(1)(a) only the value of that article could be ascertained either by invoking the provisions of Section 7(1) (b) or 7(1) (c). In this case the excisable articles are removed from the Petitioner's Company to its subsidiary namely I.D.E. (Pvt) Ltd from there it was sold to the wholesale buyers. Subsidiary Companies are defined as related parties under Section 7. It defines 'related person' means a person who is so associated with the assess that they have a direct interest in the business of each other and includes a holding company, a subsidiary company, a relative and distributor of the assess or any sub-distributor of such distributor. Therefore the price of the Petitioners product for the purpose of excise duty should be the price at which I.D.E (Pvt) Ltd make sales to the wholesale dealers.

The Petitioner instead of calculating the value of his excisable articles under the above provisions calculated the value relying on Section 7(c) namely: the declared value of such excisable article for the purposes; of the turnover tax. The Petitioner admitted in his pleadings that the turnover tax was determined after an inquiry and for the purpose of turnover tax 86% of the wholesale price was determined as a justifiable transfer price. It shows that the wholesale price of the Petitioner's excisable article is ascertainable and the Department of Inland Revenue for the purpose of Turnover Tax had determined that 86% of the wholesale price is justifiable as transfer price.

The rationale behind Section 7 of the Excise (Special Provisions) Act is that an excise duty has to be paid on the value of an excisable articles on the normal price at which such excisable articles are ordinarily sold by an assess to a buyer in the course of wholesale trade.

The Petitioner had been paying from 1996 IV quarter to 1999 IV quarter based on the calculation of the 86% of the wholesale price as the value of its excisable article. This error was brought to the notice of the Petitioner and similar companies by a circular issued by the Department of Customs on 23.02.2000 marked P6(i). Paragraph (1) of the circular states as follows:

- (1) Excise duty should be paid on the basis of the item of product. Examination of the methods of payment of excise duty adopted by the firms, has revealed that some firms have interpreted the wholesale price differently and sale or issue their products to their distributing agents at low prices in order to avoid the due payment of excise duty. Such firms are required in terms of the Excise Duty Act No. 13 of 1989 and of the Amendment Acts thereto – particularly Section 7(1) and a(ii) thereof – to pay excise duty on the basis of wholesale price at which they sell their products through marketing outlets, distributing stalls or agencies and all those firms which had not followed the said procedure are required to take steps to reckon the outstanding excise duty accordingly and to pay same together with penalties.”

The Petitioner paid excise duty for the period of 2000 & 2001 based on the wholesale price of the excisable article without any protest or challenging the said circular. As the Petitioner had not paid the short fall of the duties from 1996 IV quarter to 1999 IV quarter as per the said circular, he was advised by letter dated 25.03.2002 (P28) to pay excise duty before 30.04.2002.

In this regard the Petitioner was given several opportunities to discuss this issue with the authorities and the 1st Respondent has stated in his affidavit that he had advised the Petitioner under Section 9(2) of Act No 13 of 1989 as amended regarding the value determined as excise duty and penalty as specified in P-35.

The Petitioner without challenging the circular marked P6 (i) complied with the requirements of the circular and paid the excise duty for the years of 2000 & 2001 on the value calculated on the wholesale price. In these instants the Petitioner had not relied on the value calculated for the purpose of turn over tax. Hence the Petitioner cannot claim that the payment of the excise duty for the period 1996 to 1999 has been duly made as the value calculated was on the basis of transfer price which price had been determined by the Ddepartment of Inland Revenue for the purpose of computing the turnover tax.

The learned Additional Solicitor General who is appearing for the Respondent brought to the notice of court that the sum sought to be recovered specified in the document marked P35 is correct but there is a typographical error in the document. The first column first item should be read as 1999 instead of 1996 and the first column last item should be read as 2002 instead of 2003.

In the above circumstances the Petitioners challenge to the Excise Duty and penalty claimed by document marked P35 has no basis and hence this court dismisses the Petitioners application without costs.

President of the Court of Appeal