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

In the matter of an application for orders in the nature of Writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. **Hariharan Selvanathan**
   C/O No. 83, George R. De Silva Mawatha,
   Colombo – 13.

2. **Manoharan Selvanathan**
   C/O No. 83, George R. De Silva Mawatha,
   Colombo – 13.

3. **Nataraja Ramaiah**
   No. 17, Stubbs Place, Off Dickman's Road,
   Colombo – 04.

C. A, (Writ) Application No. 52/2008

4. **Suresh Kumar Shah**
   No. 125/11, Kirula Road,
   Colombo – 05.

5. **Don Chandima Rajakaruna Gunawardana**
   No. 61, Janadhipathi Mawatha,
   Colombo – 01.

6. **Lional Cuthbert Read De Cabraal Wijetunge**
   No. 01, Charles Avenue,
   Colombo – 03.

7. **Palehenalage Chandana Priyankara Tissera**
   No. 55, Swarnadisi Place,
   Nawala.

8. **Soren Ask Nielsen**
   C/O No. 61, Janadhipathi Mawatha,
   Colombo – 01.

9. **Jesper Bjorn Madsen**
   C/O No. 61, Janadhipathi Mawatha,
   Colombo – 01.

10. **Ceylon Brewery PLC**
    No. 61, Janadhipathi Mawatha,
    Colombo – 01.

Petitioners

Vs.

1. **Mr. S. A. C. S. W. Jayatilleke**
   Director-General, Customs and Excise Duty
   Excise Duty Division,
   Department of Sri Lanka Customs,
   Customs House,
   Bristol Street,
   P. O. Box 518,
   Colombo – 01.

1st Respondent

2. **D. M. W. Menike**
   Assistant Director of Excise Duty
   Customs Department

Bristol Paradise Building,

Bristol Street,

Colombo – 01

2nd Respondent

CA 52/ 08.

Counsel: K. Kaneg Iswaran P.C. with

Avindra Rodrigo and Manoj De Silva

instructed by, F.J.and G. De Saram for the Petitioners.

F. Jammel, D.S.G. for the Respondents.

Argued: 9-09-2011, 28-10-2011, 16-11-2011, 16-12-2011.

Written Submissions: 06-03-2012.

Judgment: 18-06-2012.

Before: Rohini Marasinghe J.

The administrative body involved in this application is the Department of Customs. The 1 to 9 petitioners are the directors of the 10th petitioner

company. The Statute under consideration in this application is namely, the Excise (Special Provisions) Act, No: 13 of 1989.

Subsection 1 of section 5 reads as follows;

"The excise duty levied under section 3 on any article shall

(a) in any case where such excisable article has been produced or manufactured in Sri-Lanka, be paid by the producer or manufacturer of that excisable article, in the prescribed manner, after its removal from the factory or other place in which such excisable article was produced or manufactured and such duty shall be paid within one calendar month from the date of each quarter in the year in which such removal takes place.."

Section 5(2) of the Act provides that "Where the excise duty payable on any excisable article is not paid in accordance with the provisions of subsection (1) such excise duty shall be deemed to be in default".

The Section 7 relates to the mode of ascertaining the value of the excisable article in order to calculate the duty that is payable on the excisable article.

The Section 9(1) provides; " Where any excise duty has not been levied or paid on any excisable article .....excise officer may ..... require him to show cause why he should not pay the amount so specified in the notice.". This is called the "Section 9 Notice".

The Section 9(2) states; that "The Director –General shall, after considering the representations, if any, made by the person on whom notice is served under subsection (1) determine the amount of excise duty due from such person, not being an amount in excess of the amount specified in the notice, and notify him accordingly, and thereupon such person shall pay the amount so determined." This is called the "Determination under section 9(2)."

The section 10 refers to Appeals that may be made to the Director General. If any person is aggrieved by the determination made against him under section 9, that person may lodge an appeal within 30 days after the service of the notice of such determination.

Notwithstanding the appeal, the defaulter shall pay the duty payable on such determination unless the Director General directs otherwise.

Subsection 2 of Section 10 specifies the manner of filing an appeal. The appeal should be by way of a petition in writing addressed to the Director General and should state precisely the grounds of such appeal.

Subsections 5 and 6 of section 10 refer to the manner of dealing with such an appeal and the manner of arriving at the decision after determining the appeal.

Section 6 of subsection 10 refers to the right of appeal to the Court of Appeal against the decision of the Director General made under subsection 5 of section 10.

According to section 11 if there was no valid appeal within the time specified in the Act against the determination of the Director General in respect of the excise duty, or where the amount of such excise duty had been determined on appeal, then such amount so specified is considered as final and conclusive as the amount due on such excisable article.

Section 12 (1) of the Act provides for the manner in recovering the amount due by instituting an action in the Magistrate's Court.

The facts of this application to this court are briefly as follows;

The 10th Petitioner (hereinafter referred to as petitioner company) namely, The Ceylon Brewery PLC was in the business of *inter alia* being a producer, manufacturer, exporter, importer, seller, marketer, distributor and dealer of beer products until September 2001 when it ceased its commercial operations. The 1st to 7th petitioners were the directors of the 10th petitioner Company.

The petitioner company was informed by the excise officer that excise duty had not been paid on the excisable article as specified under said the Act. The notice specified the amount that was chargeable as excise duty from the petitioner company for the relevant period. The notice further specified the period within which the person chargeable with such duty should show cause against paying that amount specified in the notice.

It is not in dispute that the petitioner company was served with such notice which is marked as P8. It is also not in dispute that the petitioner company was served with a 'section 9 notice' for the second time which is marked as

P16 (a). It is also not in dispute that the petitioner company had not filed an appeal under section 10 of the Act against the said notices. It is also not in dispute that the petitioner had not paid the amount specified in the said notices.

The petitioner company contends that the show cause letter in respect of the notice marked as P8 was sent on 4-4-2000 presently marked as P 10. The Respondents admit the receipt of the said show cause letter marked as P 10. The question raised by the petitioner company was that the respondents failed to make a determination under section 9 (2) after the show cause letter was sent which was marked as P 10. However it is not in dispute that the petitioner company was in receipt of the letter sent by the respondent dated 20- 11- 2011, which is marked as P 14 (a). The annexure to the P 14 (a) showed the amount chargeable as excise duty, arrears and penalty due from the petitioner company. The said annexure was marked as P 14 (c). The respondents contend that the document and the annexure marked as P 14 (a) and P 14 (c) were in fact the determination under section 9 (2).

The respondents further submit that the document marked as P 21 was in fact the determination made under section 9 (2), in respect of the second section 9 notice sent on 16-9-2002.

The petitioner had filed this action seeking *inter alia* a writ of prohibition to prohibit the respondents from taking any steps to prosecute the petitioners in the Magistrate's Court in the case bearing No: M.C.Fort S/65898/07/B., and for a writ of certiorari to quash the decision contained in the document marked as P 39.

The P 39 is filed under section 12 (1) of the Act.

The contention of the learned President's Counsel for the petitioner company on this issue was that, the document marked as p 39 was ultra *vires* the Statue in question. The reason for such as the learned President Counsel submits was that the respondents erred in law when action was instituted in the Magistrate's Court for the recovery of the excise duty without first exercising the conditions precedent to the exercise of power under section 12(1). The conditions precedent mentioned by the learned President's Counsel were that the petitioner company had filed an appeal against the decision contained in the document marked as P 30 (a) and the annexure to P 30 (a) which is marked as P30 (b) and the respondent had failed to hear the appeal in the manner provided in section 10 of the Act. In such circumstances the conditions precedent to the exercise of the power allowed under section 12 had not been complied with by the respondent, and as such

the Counsel submits that the decision to institute action was ultra vires the Act and should be vitiated.

The respondents are empowered to exercise its powers under section 12 of the Act to recover the amount of excise duty from the defaulter by instituting proceedings before the Magistrate's Court. The exercise of the Power allowed under section 12 depends on establishing that;

1. A determination under section 9 in respect of the chargeable excise duty had been made and notified to the person concerned. (Section 9 notice)

and

2. No valid appeal had been lodged within the time specified, and the manner provided in section 10 (1)

or

3. The amount had been determined on appeal and had not been paid by the defaulter.

The Excise (Special Provisions) Act No. 13 of 1989 provides for two types of notices. One notice is served under section 9 of the Act. The other notice

is served under section 12(1) of the Act. The former notice is called the 'section 9 notice'. The manner of dealing with 'section 9 notice' is provided in sections 10 of the Act. The manner in dealing with the notice served under section 12 is dealt under that section.

The section 9 notice: provides in summary, that where the excise duty on any excisable article had not been paid the excise officer may specify the amount chargeable as excise duty for the relevant period. The notice contains the amount chargeable as excise duty and specifies the date within which such person mentioned on the notice should show cause against that notice. If a show cause letter is received the Director General is required to make his determination either by affirming the amount already mentioned in the notice or vary the amount as the case may be. Under section 9 (2) the Director- General is not required to hold any inquiry. The show cause under this act is usually by way of a letter. And the Director-General is not required to follow any rules or procedure. The decision is contained in mere arithmetical figures, and the Director-General is not required to give any reasons for that determination. The Director-General of course is bound to act honestly, and fairly, and as long as he does so the court should not interfere with the correctness of such determination

If any person is dissatisfied with that determination made under section 9 such person should appeal against that decision in accordance with the manner provided in section 10 and its subsections. The parties are entitled to place their respective cases before the Director–General. The party can appear in person or through any authorized person. Such party can call witnesses on his behalf. A section 10 inquiry takes the form of an inquiry that commonly takes place before any administrative body. After the conclusion of such an inquiry, the Director-General is entitled to come to his decision.

The extent to which the courts of law are entitled to interfere with the decisions of the executive branches of the government both on jurisdictional fact and non jurisdictional fact was expressed by Lord Denning in **Smith v Inner London Education Authority [1978] 1 ALL E.R. p 411** as follows;

" If it is clear that, if the education authority or the Secretary of State have exceeded their powers or misused them, the courts can say 'Stop', Likewise, if they have misdirected themselves in fact or in law. I go further, if they have exercised their discretion wrongly, or for no good reason, then too the courts can interfere. But, short of those grounds, I know of no principle on which the courts can interfere." (p 415)

In **Secretary of State for Education and Science v Tameside MBC [1977] A.C.** p.**1014** the judgments in both the Court of Appeal and the House of Lords made similar suggestions, in particular by Lord Wilberforce and Lord Scarman.

Lord Wilberforce;

"If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of the judgment however bona fide it may be, becomes capable of challenge. (p 1047)

And Lord Scarman:

"..... misunderstanding or ignorance of an established and relevant fact" was within the scope of judicial review. (p 1030)

Despite this general restriction of judicial review on questions of fact or law, if it is clear that on a disputed fact the authority had been mistaken or misdirected and that disputed fact was a material fact for the decision of the authority, then in such instance the court may adjourn the hearing and refer

the decision to be reconsidered and if necessary direct the authority to call for further evidence. The reason is that the decision of the authority should not only be reasonable, it should also be justified and be in accordance with the evidence.

But, the decision in **Reg v Secretary of State for the Home Department, Ex parte Zamir [1980] A.C. 930** appears to have departed from this precedent. This case which is referred to as case of Zamir dealt with an application relating to an 'illegal entrant'. The immigration officer had to make a decision whether the applicant was an 'illegal entrant'. The Lords in that case held that the function of the court was only to see whether there were reasonable grounds for the decision of the immigration officer. The House of Lords in the case of **Reg v Home Secretary, ex p Khawaja [1984] 1** A.C. p. 74, overruled the decision held in the case of Zamir and Lord Wilberforce addressed the issue on the following terms;

"The sole question is as to the nature of this review. How, far can, or should, the court find the facts for itself, how far should it accept, or consider itself bound to accept, or entitled to accept, the findings of the administrative authorities? On principle one would expect that, on the one hand, the court, exercising the powers of review, would not act as a court of appeal or attempt to try or retry the issue. On the other hand, since the critical conclusion of fact is one reached by an administrative authority (as opposed to a judicial

body) the court would think it proper to review it in order to see whether it was properly reached, not only as a matter of procedure, but also in substance and law." (p. 101)

In summary, this principle would have operated in this case, if there was a valid appeal under the manner provided in section 10 (1) and if there was a determination on that appeal under section 10 (4). And, if any person was aggrieved by that determination of the Director –General upon any appeal made to him under section 10 (1) he may appeal from that decision to the Court of Appeal. But the facts narrated by me in this case show that there was no valid appeal under section 10(1) for determination under section 10(4).

The appeal before the Court of Appeal is conducted in the manner provided by the Criminal Procedure Code Chapter XXVIII.

The Final Notice: By this notice the person is informed that he had committed an offence under this Act. This notice purports to give him a final chance to regularize the payments and nothing more. The literal meaning of the word itself is self evident of that fact. In the said final notice a period is given for the person informing him that criminal action would be

taken against him, if the duty so specified in the notice is not paid within the period so specified in the said notice, and not for any other purpose. (P30(a))

After the said period had lapsed and the amount still remains unpaid the Director- General proceeds to recover the duty by filing action in the Magistrate's Court.

The proceedings at the Magistrates Court begin by filing of the certificate. (P 39) It is similar to a charge sheet before a Magistrate's Court. This certificate is issued under section 12 (1) of the Act No: 13 of 1989. Upon receipt of the certificate the Magistrate will commence the proceedings before it.

In this case the Counsel for the petitioner company had sought to have the decision made by the Director-General quashed mainly for the purpose that the appeal filed by the petitioner company upon the Final notice had not been determined by the Director-General under section 10.

The final Notice is not a determination that fall within section 9(2) of the Act. Therefore, no appeal can be filed against that final notice.

In this case the petitioner company had been granted a stay order to stay the proceedings filed before the Magistrate's Court. The stay order had been given by this court on 12-02-2005.

The petitioner company had challenged the decision of the Director-General to institute action against the Directors of the petitioner company. The objections are reinforced in the written submissions as follows.

".... The 1st to 9th Petitioners-Directors are not the producers or manufacturers of the excisable articles of the Petitioner Company, and are not liable for the payment of excise duty nor can they be deemed to be in "default" of the payment thereof."

The doctrine of vicarious liability for offences described as "quasi-criminal" offenses are where certain acts are forbidden by law under a penalty. **(Channell J. in Parks, Gunston and Tee v Ward [1902] 2 K.B. 1 at p 11)** And, Aitkin J. defined as offences wherein 'the legislature prohibit an act or enforce a duty in such words as to make the prohibition or duty absolute. **(Mousell Bros. v. L N W. Rly. Co. [1917] K.B. at p. 845)** are found in offenses arising out of statutes which is under consideration, The Food Act, The Exchange Control Act and many other wide range of similar statutes. In

most of the statutes the burden of proving the guilty mind or *mens rea* is always on the prosecution. But in some statutes for instance, in the Food Act 26 of 1980, the Exchange Control Act 24 of 1953, and the Excise Special Provisions Act 13 of 1989, the burden of exculpating one's self from criminal liability is placed on the defendant. In these statutes there is found a provision which enacts that where an offence under the Act is committed by a body corporate, every person who at the time of the commission of the offence was the Director, Secretary, or other similar officer of that body shall be deemed to be guilty unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence. (Section 25) This section ordained that where a body corporate has been found to be an offender under the Act, then Directors, Secretary, or other similar officers of the body corporate, including persons who are purporting to act in those capacities are deemed to be guilty, unless they prove that the offence was committed without their knowledge or that they exercised requisite standard of care to prevent the commission of that offence. The burden has been placed on the defendant which is a reversal of the fundamental rule in criminal law that the burden of proving the guilt of the defendant is in the prosecution. **(London Property Investments Ltd. v. A.G. [1953] 1 All E.R. 436, at 441.)** This rule is seen

in many other statutes and two of them in addition to this statute are Exchange Control Act 24 of 1953 and Food Act 26 of 1980.

Another distinctive feature of corporate liability is the doctrine of *alter rego*. That means the only acts and mental states that will be imputed to the company are those of persons who are in control of the company. This usually includes directors and mangers and whoever has a controlling voice in the company. It will be found in cases where the defendant is being the managing director of the company or being any other person holding a similar position, has delegated the management of his company to a officer who then becomes his *alter ego.* The knowledge or lack of requisite care of that officer is attributable to the company, when a company may be convicted of offences based upon" knowingly" or " negligently" (lack of due care) allowing the offence to be committed. **(Conlon v Muldowney [1909] Ir. R. 498, Lord O Brien C.J.)** The standard of care in relation to directors of companies is to be found in the Companies Act 20 of 2007 in section 189. But under the statute that is being contemplated in these proceedings, the directors are not being charged as *alter rego* of the company. The directors are charged because the company has committed an offence. And the persons who could be charged in that event are prescribed in the Act itself. And under section 25 the directors may be entitled to use the defense that

they had reasonable grounds to believe that a competent person was charged with keeping the books of account. And further that such officer purposely and knowingly permitted the default. Then the burden shall shift to the officer to disprove his complicity. It is important to note that under section 25 the prosecution should first establish that the company has committed the offences specified in that section. All that has to be established before the Magistrate under these proceedings is that the petitioner company is guilty of the offences so specified in the attachment filed before the court. The company having no muscles could not act except through human beings. In order to be more specific and to avoid any confusion as to who should be charged under these statutes, the statute itself provided for such an event. In these proceedings the directors are charged because the section 25 provides that they are liable if the offence is committed by the company. This is not without precedent. In the Official Secret Act in England there is a similar provision that;

"Where the person guilty of an offence .... is a company or a corporation, every director and officer of the company or corporation shall be guilty of the like offence unless he proves that the act or omission constituting the offence took place without his knowledge or consent."

This is a provision of the Official Secret Act 1920 section 8 (5). This of course may be justified in such an important piece of legislation as the Official Secret Act. But this section has been incorporated in England in some statutory offences and one such is the Dangerous Drugs and Poisons Act 1923 s 2 (2c).

Finally, crimes for which a corporation can be convicted are crimes which are punishable only by fine and if the offence is not one which is punishable by a fine, a corporation cannot be convicted.

Therefore, for the foregoing reasons I am of the view that the proceedings before the Magistrate's Court had been duly filed.

I regret to mention that I am unable to agree with the submissions of the learned President's Counsel on the points argued in this case.

The petition is dismissed.

Rohini Marasinghe J.

Judge of the Court of Appeal.