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

In the matter of an Appeal under Section 10 of the Excise (Special Provision) Act No.13 of 1989.

Asian Paints (Lanka) Limited,
81, Koralawella Road,
Moratuwa.

Petitioner

C.A.(Writ) Application No.807/2008

Vs.

1. Mr. Sarath Jayathillake,
   Director General of Customs and
   Excise, (Special Provisions) Division,
   Sri LankaCustoms,
   Bristol Street,
   Colombo 01.
2. Mr. E.M.D.B. Ekanayake,
   Director of Excise Duty,
   Bristol Paradise Bilding,
   Bristol Street,
   Colombo 1.

Respondents

Before:	S. Sriskandarajah, J. P (C/A)
Counsel:	Y.N.P.De.Silva
	for the Appellant.
	Milinda Gunatilake SSC
	for the Respondent.
Argued on:	15.02.2011
Written submissions on:	14.03.2011 (Appellant)
	28.04.2011 (Respondent)
Decided on:	25.08.2011

S.Sriskandarajah J.

This appeal is under section 10 of the Excise (Special Provisions) Act No.13 of 1989. The Appellant is a body corporate incorporated in Sri Lanka under the Companies Act. The Appellant carries on the business of manufacturing and sale of paint and allied products and it is liable to pay excise duty under the Excise (Special Provisions) Act No.13 of 1989 on the sale of certain products which are manufactured by it. The Appellant is also liable to pay Value Added Tax (VAT) in terms of Value Added Tax Act No.14 of 2002 on the sale of its products. The Petitioner submitted that on or about 21st February 2007, the Director-General of Customs and Excise informed the Appellant by a letter, inter alia, that:

(1) Excise Duty was payable on locally manufactured paint in terms of Gazette Notification No.1471/23 dated 16th November 2006.

(2) Upon the dispatch of goods from the factory, excise duty should be computed on the VAT inclusive of wholesale price at the rate of 5% in terms of Section 5(1)(a) of the Act.

The Appellant submitted that after several discussions he received a letter around 29th October 2007 informing the Appellant that it had computed the excise duty erroneously by the non-inclusion of the Value Added Tax component in the wholesale price. The Appellant's position is that it has filled the return for the 1st quarter of 2007 and 2nd quarter of 2007, and the said returns include Turnover, Excise duty, Excise duty paid and Social Responsibility Levy paid. The Appellant further stated that on or about the 14th May 2008, the Appellant received a notice titled Final Notice: "Failure to pay Excise duty" from the 1st Respondent the Director-General of Customs and Excise. The Petitioner in this appeal challenges the decision contained in the Final Notice and has sought that an order be made that the amount of excise duty payable under the Excise (Special Provisions) Act No.13 of 1989 be computed on an authorization which does not include Value Added Tax which is payable in terms of Value Added Tax No.14 of 2002.

The Respondents raised a legal objection that this appeal cannot be maintained as the appellant has not paid the excise duty notwithstanding the appeal. The Respondent contended that in terms of Section 10(1), as amended, any person may, if he is dissatisfied with any determination made in this respect under Section 9, appeal against such determination to the Director-General within 30 days after the service of notice of such determination on him. Such person shall, notwithstanding the appeal, pay the excise duty payable on such determination unless the Director-General orders that the payment of excise duty or any part thereof be held over pending the determination of the appeal.

The Respondent submitted that it is a mandatory pre-condition for an Assessee invoking the appeal process to either:

(a) make payment of the excise duty payable on the basis of the determination,

or

(b) obtain an order from the Director-General that such sum be held over pending the appeal.

The Respondents submitted that it is common ground that the appellant has not paid the duty and no hold over has been granted, and in view of the above, the Respondents submitted that the Appellant cannot have and maintain this application. Where there is a mandatory requirement of law for the tax to be paid, there was no basis for the appeal to be heard in the absence of such a payment being made. The learned Senior State Counsel on behalf of the Respondents submitted that in the absence of a hold over pending the appeal the Director General has no statutory power to waive the requirement of the payment of excise duty in entertaining an appeal. He relied on judgment delivered in C.W. *Mackie & Co. Ltd. Vs. Hugh Molagoda (S.C. Application No.85/85) decided on 18th of November 1985*, where the court held: "The Commissioner General being a statutory body exercising statutory powers under statutory restrictions and conditions cannot arrogate to himself a power which the law has not endowed him with."

It is the submission of the Appellant that the Director-General of Excise has accepted the appeal filed by the Appellant on the 16th of June 2008, and that by his letter dated 4th September 2008 acknowledged that an appeal has been duly filed and that he is proceeding to make a determination accordingly. The Appellant further submitted that the appeal provision and the recovery provision which are contained in the Act are distinct provisions. The requirement that the excise duty should be paid notwithstanding the appeal relates to the recovery procedure and ensures that the Appellant cannot stultify the recovery process by the mere filing of the appeal. In these circumstances the Appellant submitted that the non-payment of the duty does not relate to the substance of the appeal itself. The Respondents further submit that the Director-General has the power to hold over the tax pending the determination of the appeal in terms of Section 10(1) of the Act. Even though the Director-General has not

formally granted a hold over, he has accepted unequivocally the appeal filed by the Appellant under Section 10(1) of the Act, and he has not taken any steps for the recovery of the excise duty payable either. In these circumstances it could be construed that the Director-General has granted a hold over. The Counsel for the Appellant also submitted that the *C.W.E. Mackie & Co., Limited Vs. Hugh Molagoda* case referred to by the Respondents is inapplicable as that case relates to a situation where the Commissioner-General of Inland Revenue patently did not have authority to make administrative arrangements not to recover any turn over tax from rubber dealers notwithstanding specific relevant regulation which has been made imposing such a tax. It was held in that case the Commissioner General, by making such administrative arrangements, was usurping a power which he did not in law possess. In the instant case the Director-General is specifically empowered in terms of section 10(1) of the Act to hold over the excise duty pending the determination of such an appeal.

The Director-General, in any event, has the power to order a hold over, but in this case he has not specifically made an order for hold over, but he has entertained the appeal and has proceeded to hear the appeal and give a determination. The non-payment of the excise duty in the above circumstances will not invalidate the Director-General's decision to accept the appeal and determine the same. If the Director-General was of the opinion that the circumstance of this case does not warrant a hold over, and the payment of tax is a pre-condition of entertaining the appeal, he should have rejected the appeal without considering the same. In view of these I agree with the submissions made by the Appellant that the mere fact that the tax was not paid will not invalidate the appeal that was considered by the Director-General. In these circumstances I over-rule the objection raised by the learned Senior State Counsel and proceed to consider the merits of the appeal.

The Appellant in this appeal has urged that the Respondents have erred in law in failing to compute the value upon which excise duty is calculated in accordance with

Section 7(1) of the Excise (Special Provisions) Act. The Appellant's position is that in computing excise duty, the Respondents have included the Value Added Tax as part of the value of the excisable article, and in doing so have erred in law. The Respondents' position is that under Section 7(1)(a) excise duties levied on any excisable article, not being an excisable article imported into Sri Lanka, with reference to value, such value shall be deemed; (a) The normal price thereof, i.e., 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. The Respondents contended that the normal price of an article is the price at which such excisable articles are ordinarily sold by the Assessee to a buyer in the course of a wholesale trade, and in view of this, the value of the excisable article is the wholesale price inclusive of VAT. In other words, the buyer who purchased the excisable article from the Appellant pays VAT as part of the purchase price of such article. The Respondents relied on the judgment delivered in *Trans Asia Hotel Limited Vs. Commissioner-General of Inland Revenue and another, 3 SLR, Sri Lanka Law Reports 2002 [2002] 3 SLR, page 365,* the Court held:,

> According to section 5 of the Turnover Tax Act "turn over" means that total amount received or receivable from two sources, namely,
>
> 1. Transactions entered into in respect of that business, or
> 2. For services performed in carrying on that business and includes what is set out therein.
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> .....
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> "It seems to me that when the petitioner sells food and beverages (vide 13A-C) it enters into a transaction of sale with the petitioner's customers. If the petitioner in that transaction receives money, that money received from the transaction entered into in respect of that business can, without doubt, be classified as the turn over. It is irrelevant what components go to constitute the total which the customer was called upon to pay the petitioner. If the petitioner did not send its returns of Turn

Over Tax in respect of the total turn-over received from the transactions entered into in respect of its hotel business of supplying food and beverages to the customers, then the petitioner was acting in violation of section 5. The Turn Over Tax is on what is received or receivable. There is no statutory duty cast on the petitioner to collect government tax. The petitioner was not an agent of government for the collection of the government tax. It must also be mentioned that the Turn Over Tax is payable by the petitioner on the Turn Over of the petitioner in respect of its hotel business. The petitioner is not empowered to recover it from the customer which, according to the Act, is the responsibility of the petitioner to pay. Transferring the Turn Over Tax to the customer is totally illegal. The argument that there was tax on tax must therefore fail."

The above case clearly lays down the principle on which the Turnover Tax is calculated it states that the Turn Over Tax is payable by the petitioner on the Turn Over of the petitioner in respect of its hotel business. The Turn Over Tax is on what is received or receivable. There is no statutory duty cast on the petitioner to collect government tax. The petitioner was not an agent of government for the collection of the government tax. But on the other hand VAT which is imposed in terms of the VAT Act is merely a collection of tax which is made by the supplier for and on behalf of the government of Sri Lanka and the quantum of the VAT is required to be shown separately in terms of Section 20(2)(c) of the VAT Act and it is remitted to the Government at the end of each month. The burden of the payment of VAT falls only on the consumer. The basic principle of the VAT system is that, it is intended to tax only the final consumer as the VAT is a tax on consumption. The Contention of the Respondent that the buyer who purchased the excisable article from the Appellant pays VAT as part of the purchase price of such article is untenable the buyer purchase the article at the price stipulated and in addition pays VAT as a consumer.

Section 7(1)(a) of the Excise Duty (Special Provisions) Act provides:

"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 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 the delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration of the sale.

As I observed above the VAT component is not included in the sale price the supplier of goods is the one who charges VAT, collect and accounts to the revenue and it is indicated separately from the sale price. The sale price is the price at which the articles are sold to a buyer. Therefore the normal price referred to in Section 7(1)(a) of the Excise Duty (Special Provisions) Act is the price of the article sold to a buyer excluding of VAT. In view of the above I set aside the decision; that the excise duty should be computed by the inclusion of the Value Added Tax component in the wholesale price, contained in the documents marked P4 dated 29th October 2007 and the Final Notice marked P10 dated 14th May 2008.

The appeal is allowed without costs.

President of the Court of Appeal