

**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 Writs of Certiorari, and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wasana Trading Lanka (Private) Limited,
No.310, Negombo Road, Welisara,
Ragama.

Petitioners

C.A.Writ Application No. 689/08

Vs

1. Sudharma Karunaratne,
Director General, Customs Department,
Times Building, Bristol Street, Colombo 1.
And six (06) Others.

Respondents

<u>BEFORE</u>	:	S. SRISKANDARAJAH, J.
<u>COUNSEL</u>	:	K.Deekiriwewa with L.N.Deekiriwewa and Mrs. M.K.Herath for the Petitioner. F.Jameel DSG for the Respondents.
<u>Argued on</u>	:	09.09.2010
<u>Written Submissions on</u>	:	19.10.2010 Petitioner 22.11.2010 Respondent
<u>Decided on</u>	:	18.01.2011

S.Sriskandarajah J.

The Petitioner has imported 11 seater vans in the ordinary course of business which were classified under HS Code 8702.90.03 and cleared those vehicles on 21st and 24th November 2006. Sri Lanka Customs after having examined the goods and the customs entry levied respectively Rs. 612,328/- and Rs.6,369,253/- as duty and other levies excluding Excise Duty. Prior to 17.11.2006 the 11 seater vans classified under HS Code 8702.90.03 is not an excisable item as per the order made under Section 3 of the Excise (Special Provisions) Act No 3 of 1989 as amended. On 16.11.2006 Minister of Finance made order under Section 3 of the said Act declaring that the items fall under HS code 8702.90.03 are excisable items and fixed a rate of 3% as exercise duty and it will come into effect from 17.11.2006. The 1st and 2nd Respondent submitted that due to a technical error, the new excise duty rates had not been fed into the computers of the Customs Department but it was updated two weeks later. Due to this fact the Excise duty that should have been imposed on the imports of the said vehicles on the 21st and 24th of November 2006 was not imposed. Therefore the 2nd Respondent on behalf of the 1st Respondent demanded the payment of Excise duty of Rs. 627,982/- and Rs.6,522,901/- for the said two imports by his letter dated 08.12.2006 marked as X7(a) in the Petition. The Petitioner company appealed to the Deputy Minister in respect of the duty claimed by the Sri Lanka Customs and informed the 2nd Respondent by its letter dated 24.04.2007 that it will pay the said excise duty before 31.05.2007 in the event the Company does not obtain a duty waiver from the Ministry of Finance. As the Petitioner has not settled the dues the 2nd Respondent on behalf of the 1st Respondent informed the Petitioner by his letter dated 15.08.2008 marked as X7(b) in the Pe4tition to settle the dues within 14 days and if failed action will be taken to revoke the facilities in terms of the provisions of Section 144 of the Customs Ordinance. The Petitioner in this application is seeking a writ of certiorari to quash the decision communicated by the letters marked X7(a) and X7 (b). The Petitioner

has also sought a writ of prohibition prohibiting the application of the order made under Section 3 of the Excise (Special Provisions) Act No 13 of 1989 published in the Gazette on the 16th of November 2006 marked X3 in the Petition from 6.11.2003 to 11.01.2003.

The Petitioner has sought the above relief on the following basis.

1. The Minister has no jurisdiction to make an order that will come into operation on a subsequent date other than the date on which he signed the order and published the same in the gazette. In view of this the order X3 is ultra vires and it cannot be implemented.
2. The recovery of any Excise duty that has not been recovered by the Customs at the time of Importation could be recovered only by an Excise Officer in view of the provisions of the Excise (Special Provisions) Act. In any event Section 144 of the Customs Ordinance is not applicable in the given circumstances.

On the first issue the Petitioner contended that the order marked X 3 is ultra vires as there is an anomaly in the date of implementation of the order and the order came into effect. The said order was published in the Gazette on 16.11.2006 accordingly the minister has signed the said order on that day. According to Section 2 of the Protection of Government Revenue (Special Provisions) Act No 1 of 2006 the order should have come into effect on 16.11.2006 but in the order the Minister has declared that with effect from 17th November 2006 , Excise Duty on every article specified in Column III of the Schedule hereto shall be payable at the rate in the corresponding entry in Column IV. From the above that there is a contradiction with regard to the date on which the said order is going to be in force. Hence the Petitioner submitted that the order is ultra vires the rule making authority conferred on the Minister.

Section 2 of the Protection of Government Revenue (Special Provisions) Act No 1 of 2006 provides;

“Notwithstanding anything to the contrary in any law specified in Part I of the schedule hereto, an order made by the appropriate Minister under any such Law, shall come into force from the date on which the Minister has affixed his signature on such Order”.

The Excise (Special Provisions) Act, No 13 of 1989 is specified in part I of the Protection of Government Revenue (Special Provisions) Act No 1 of 2006. Therefore the order made by the Minister under the Excise (Special Provisions) Act, No 13 of 1989 shall come into force from the date on which the Minister has affixed his signature. The order signed by the Minister and published in the Government Gazette No 1471/23 dated 16.11.2006 under section 3 of the Excise (Special Provisions) Act, No 13 of 1989 in view of the above provisions has in fact come into force on 16. 11. 2006. The order of the minister is declaring a new or a different Excise duty to the Article specified in Column III of the order with effect from 17.11.2006. The Excise (Special Provisions) Act, No 13 of 1989 empowers the Minister in Section 3(4) to give a later date specified in the order for the order to come in to force. Section 3 reads as follows:

3(1) There shall be charged, levied and paid on every article manufactured or produced in Sri Lanka, or imported into Sri Lanka, an excise duty at such rate or rates as may be specified by the Minister, by Order published in the Gazette. Every such article in respect of which an Order is made under this section is hereafter referred to as "an excisable article".

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4. Every Order made by the Minister under this section shall come into force on the date of its publication in the Gazette or on such later date as may be specified in such Order and shall be brought before Parliament within a period of four months from the date of its publication in the Gazette or, if no meeting of Parliament is held within such period, at the first meeting of Parliament held after the expiry of such period, by a motion that such Order be approved.

Even though the above section empowers the Minister to give a later date specified in the order for the order to come in to force the later Act namely Protection of Government Revenue (Special Provisions) Act No 1 of 2006 takes away that power by specifically providing; notwithstanding

anything to the contrary in any law specified in Part I an order made by the appropriate Minister under any such Law, shall come into force from the date on which the Minister has affixed his signature on such order. As Excise (Special Provisions) Act, No 13 of 1989 is specified in Part I mentioned above there is no anomaly in the operative date of the order. The gazette notification marked X3 gives the date on which the Minister affixed his signature on the order namely 16th November 2006 and this is the operative date of the said order.

The Petitioners contention that the Minister has opted to exercise a part of the removed statutory power or authority leads to abuse of power and hence ultra vires the rule making authority has no merit. The Minister has exercised his power under Section 3 of the Excise (Special Provisions) Act. The Power to charge, and levy on every article manufactured or produced in Sri Lanka, or imported into Sri Lanka, an excise duty at such rate or rates as specified by the Minister, by order published in the Gazette under Section 3 is not removed or made inoperative. But what was made inoperative by the Protection of Government Revenue (Special Provisions) Act is the power to give a later date for the operation of the said order. Therefore that part of the order which can be separated from the other part of the order i.e. "with effect from 17th November 2006" will become inoperative and the rest of the order will be operative from the date on which the Minister signed the said order that appears in the gazette notification i.e. 16th November 2006.

The Petitioner challenged the recovery of the excise duty by the 1st and 2nd Respondent under Section 18(2) of the Customs Ordinance as amended. The Petitioner contended that the recovery of any Excise duty that has not been recovered by the Customs at the time of Importation could be recovered only by an Excise Officer in view of the provisions of the Excise (Special

Provisions) Act. The Counsel for the Respondent relied on Section 5(2) of the Excise (Special Provisions) Act, No 13 of 1989 as amended by Excise (Special Provisions) (Amendment) Act, No 8 of 1994 which reads as follows:

5(2) a) Notwithstanding anything in this Act, every person who imports any excisable article manufactured outside Sri Lanka (not being an exempted article within the meaning of sections 3A, 3B and 3C) shall pay to the Director-General of Customs, excise duty, in respect of such excisable article, prior to its removal from the customs warehouse or such other place at which such excisable article is stored, at the rates of excise duty determined under section 3.

The above Section imposes a liability on the importer to pay Excise duty in respect of excisable article, prior to its removal to the Director General of Customs. This section imposes a corresponding obligation on the Director General of Customs to collect the Excise duty before the removal of the goods. In this instant case the Petitioner did not pay the excise duties and the Director General of Customs has not collected the Excise duty admittedly due to an error in updating the computers in the Customs Department. But the vehicles were removed from the customs after paying the other duties and dues. The contention of the Respondents is that the power to collect excise duty on imports is vested in the Director General of Customs and hence the Director General of Customs is empowered to demand payment of any duties, dues or charges on any goods imported have been sort levied under Section 18 (2) of the Customs Ordinance. The Respondents further contended that the words 'short levied' includes even instances of unpaid duties, and not only duties have been paid in part. Thus an uncollected duty is a short fall in levy.

Section 18 of the Customs ordinance deals with situation such as short levy of any duties, dues or charges. The obligation on the Director General of Customs is to collect the Excise Duty before the removal of the goods as per Section 5(2) (a) of the Excise (Special Provisions) Act, as amended. In the instant case the vehicles were removed from the customs and the Director General of Customs is using the provisions of Section 18(2) of the Customs ordinance to collect the Excise Duty. The Excise duty is not imposed by the Customs Ordinance or by the Director General of Customs. It is imposed by

the Excise (Special Provisions) Act but this Act empowers the Director General of Customs to collect Excise Duties in relation to goods that are imported before the removal of the same from the customs. At the same time said Act imposes an obligation on the importer to pay the excise duty on his imports to the Director General of Customs. There are extensive provisions laid down in the Excise (Special Provisions) Act to recover the Excise Duties that are not paid. Section 9 of the said Act provides for the procedure that has to be followed. Firstly a show cause notice to be issued on the importer to show cause why he has not paid the amount specified in the notice and if there is any cause shown after considering his representation a determination will be made on the Excise Duty due from that person and such person shall pay that amount. Under Section 10 if that person is not satisfied with the said determination he may appeal to the Director General and his determination on appeal is final. Section 12 deals with the recovery of Excise Duty in default by issuing a certificate to the Magistrate Court having jurisdiction. Section 12A of Excise (Special Provisions) (Amendment) Act, No 8 of 1994 imposes a penalty for the defaulter of the Excise duty.

There is a statutory scheme embodied in the Excise (Special Provisions) Act to recover unpaid excise duties therefore it excludes any other procedure or remedy. When considering whether a person occupying a land acquired by the state under the Land Acquisition Act could be ejected by using the provisions of the State Lands (Recovery of Possession) Act, Justice U.de. Z.Gunawardana in *Edwin v Tillakaratne* [2001] 3 Sri.L.R 34 at 39 held:

“when the statutory scheme embodied in the relevant Act (Land Acquisition Act) itself provides a procedure for ejection or remedy, it must, in the generality of cases, be taken to exclude any other procedure or remedy. One has to follow the procedure given in the Land Acquisition Act itself to remove the petitioner.”

Firstly the Director General of Customs cannot recover or collect an unpaid Excise duty after the removal of the goods from the Customs. Secondly the Director General of Customs cannot use the provisions of Section 18(2) to recover unpaid Excise Duty in view of the provisions to collect unpaid Excise

duty in the Excise (Special Provisions) Act. Hence this Court issues a writ of Certiorari to quash the decision contained in document marked X7(a) and X7(b) without prejudice to the collection of excise duty from the Petitioner in accordance with the Excise (Special Provisions) Act as amended.

Judge of the Court of Appeal