

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

In the matter of an application for  
writs of Certiorari and prohibition  
and mandamus under Article 140 of  
the Constitution.

Ceylon Agro –Industries Limited  
346,  
Negombo Road  
Seeduwa.

Petitioner.

CA Writ No. 622/2008

Vs.

1. Director General of Customs  
Sri Lanka Customs  
Times Building  
Colombo-01.

2. Saman de Silva  
Superintendent of Customs  
Sri Lanka Customs, CBCU  
Branch  
Hemas Building  
Colombo-01.
  
3. The Board of Investment of Sri  
Lanka  
West Tower  
World Trade Centre  
Colombo-01.

Respondents.

**BEFORE:** Hon. Sathya Hettige P.C. President of the Court of Appeal  
Hon. Anil Goonaratne J, Judge of the Court of Appeal

**COUNSEL:** M. A. Sumanthiran for the petitioner.  
Jank De Silva SSC with Nuwan Peiris SC  
For Respondents.

**ARGUED ON:** 25/08/2009 , 19/01/2010 & 16/02/2010

**DECIDED ON:** 14/02/2011

## SATHY HETTIGE P.C (P/CA)

The petitioner is a company named Ceylon Agro - Industries Limited incorporated under the Laws of Sri Lanka and is engaged in the business of importing RBD Palm Olien - a raw material not available in the Sri Lanka local market for production of "Noodles" for which the petitioner was entitled to import free from customs import duty and also engaged in the business of importing Palm Olien bottling , branding and supplying to the retail market as cooking oil for which the petitioner does not seek exemption.

The petitioner entered into an agreement with the 3<sup>rd</sup> respondent in or about 30<sup>th</sup> July 1993 which is marked P 1 to this application and two other supplementary agreements dated 25<sup>th</sup> June 2003 and 14<sup>th</sup> July 2006 marked P 2 and P 3 respectively to this application pursuant to which the petitioner lawfully conducted its business and by importing raw materials for the manufacture of its products namely Noodles. The petitioner uses the Palm Olien in the manufacturing process.

The petitioner states that the above agreements were entered into in terms of the power granted to the 3<sup>rd</sup> respondent under section 17 (1) of the Greater Colombo Economic Commission Law No. 4 of 1978 as amended.

Section 17 (1) reads as follows:

***"The Commission shall have the power to enter into agreements with any enterprise in or outside the Area of Authority and to grant exemptions from any Law referred to in Schedule B hereto , or, to modify or vary the application of any such laws , to such enterprises in accordance with such Regulations as may be made by the Minister."***

The petitioner says that amongst the benefits the petitioner was granted by the 3<sup>rd</sup> respondent under the agreement P 1 and other supplementary agreements marked P 2 and P3 was the exemption of the laws in Schedule B of the Greater Colombo Economic Commission Law including the Customs Ordinance. The petitioner says that oil Palm is not commercially available in

Si Lanka and it is not produced in Sri Lanka and therefore the petitioner is permitted to import duty free such raw materials until such time the said raw materials are available in the local market. In particular the 3<sup>rd</sup> respondent has permitted the petitioner company the benefit/ concession and privilege of importing project related materials and raw materials approved by the BOI free of customs duty. The petitioner has been importing the raw material namely the RDB Palm Olien from the inception as per the agreement.

The respondents in their statement of objections have stated though the petitioner claims that agreement P 1 is the most relevant to the present application, it has been entered into on 30/07/1993 whereas the relevant regulations were passed subsequently on 16/08/1993 and as such P 1 is null and void. Respondents also state that a board paper dated 13/07/1995 was presented to the Board of the BOI and decided not to extend any further duty free facility granted to the Noodle plant operated by the petitioner company since the other projects manufacturing noodles are not eligible for any duty free import facility.

It is also stated by the respondents that the petitioner thereafter from 1996 to 15/08/2001 imported such items on payment of customs duties. It was submitted by the respondents that the petitioner obtained a fraudulent letter marked P 3 when the Board had already taken a decision on 25/07/1995 not to extend the duty free facility granted to the noodle plant operated by the petitioner company .

As far as the present application is concerned the relevant material facts are that a consignment of Palm Olien belonging to petitioners was detained by the Customs Officers under section 145 of the Customs Ordinance. It was the contention of the petitioner that the petitioner imported the Palm Olien to be used as raw material for the Noodle plant on the two letters marked P 3 and P 4 which gave them the right to import on a duty free basis.

The letter marked P 3 is written by one Mr. Kulasekare, an Executive Director of BOI addressed to the petitioner informing him that the Board approval has been granted to the petitioner company to import certain items as raw materials to be used for food processing on duty free basis.

The letter marked P 4 is written by one Mrs Rajapaksha Acting Executive Director of BOI dated 11/08/2001 informing the petitioner by referring to P 3, that as per the Agreement dated 30/07/1993 the company is permitted to import project related material on duty free for the approved project. The respondents state that however the petitioner has failed to make the Mr. Kulasekare or Mrs Rajapaksha parties to this application to explain the position.

The petitioner says that on or about 25/06/2008 the petitioner submitted the relevant documentation including the CUSDEC marked P 5 to the 3<sup>rd</sup> respondent for approval regarding the importation of six (6) containers of RBD Palm Olien . It was submitted by the petitioner further that having obtained the approval of the 3<sup>rd</sup> respondent the petitioner forwarded the CUSDEC (P 5) to the Sri Lanka Customs for clearance of the goods from the Port of Colombo.

However, the petitioner complains that the said consignment of six containers was detained by the 2<sup>nd</sup> respondent of Sri Lanka Customs without assigning any reasons. It was submitted by the petitioner that no explanation was given in writing as to why the consignment was detained without releasing even after the 1<sup>st</sup> respondent has directed the release of the consignment. The petitioner complains that the action of the Sri Lanka Customs was arbitrary and completely contrary to law.

The petitioner by this application dated 30/07/2008 seeks the following reliefs in the nature of Writs of Certiorari quashing any purported forfeiture /Prohibition and a Writ of Mandamus .The petitioner also sought an Interim relief from court directing the immediate release of the consignment of RDB Palm Olien to the petitioner subject to such security as

the court may deem reasonable. On 08/10/2008 this court refused the application for Interim relief.

The petitioner thereafter filed a Leave to Appeal to the Supreme Court which allowed the petitioner to submit a bank Guarantee and release the goods

The learned counsel for the petitioner heavily relied on the document ( Agreement ) marked P 1 and submitted that agreement is a validly executed document entered in to with the 3<sup>rd</sup> respondent which has never been canvassed . Clause 10(x) thereof provides that the petitioner is permitted to import inter alia , project related materials required for the business of the petitioner company without payment of any customs duty.

Clause 10 ( xi) of P 1 provides as follows:

***“ The Enterprise shall ensure the procurement of raw materials such as but not limiting to soya Bean and maize from the local market. The duty free importation of such raw materials will be permitted only if the local supply is not sufficient or is not available in time until such time the Enterprise could obtain such raw materials from the local market and subject to the condition that the enterprise shall take steps to develop local supply sources as stated in the said applications.”***

The petitioner contends that in terms of the above clause the petitioner is permitted and entitled to import project related raw materials such as soya beans and maize, duty free and the petitioner has a legitimate expectation that it is entitled to do so and it can continue to act upon the approvals given to it by the 3<sup>rd</sup> respondent . The petitioner further states that the granting or refusing duty concessions is a matter purely within the purview of the 3<sup>rd</sup> respondent.

It was the contention of the respondents when obtaining the documents marked P 3 and P 4 on which the petitioner relies on the petitioner may have misrepresented the facts to the officers in the BOI. It was contended by the learned counsel for the respondents that a Board Paper dated

13/07/1995 was presented to the Board of the Board of Investment of Sri Lanka which based on the contents contained therein decided on 25 /07/1995 not to extend any further duty free facility granted to the Noodle plant operated by the petitioner since other projects manufacturing noodles are not eligible for any duty free import facility. It was further submitted that the petitioner had from 1996 to 2001 imported such items by paying customs duties.

Respondents submitted that petitioner company had fraudulently used the said letter dated 25/08/2001 marked P 3 imported duty free items referred to in P 3 for manufacture of Noodles from time to time thereby defrauding the Government revenue until the date of detection.

It was brought to the notice of court by referring to the statement given by Mr. Kulasekare Executive Director of BOI to the Customs on 18.09.2008 that there was no Board decision to grant duty free facilities to the petitioner and if he was aware of the Board decision dated 25/07/1995 he wouldn't have issued the letter marked P 3 Copy of Mr. Kulasekare's statement to the Customs was marked R 5.

It was submitted by the respondents that on 6<sup>th</sup> February 1993 the BOI also granted approval to the petitioner including processing of food products into the project subject to the condition that exemption from duty at point of importation in respect of plant, machinery and equipment, raw materials and other project related goods will depend upon facilities that are available to other manufacturers of similar category.

It appears that after the withdrawal of the duty free facilities granted to the petitioner by R 3 and R 4, no other Board decision had been taken by the Board to grant duty free facilities for the import of raw materials to manufacture Noodles to Ceylon Agro Industries Ltd. The question arises as to who has the power under the BOI Act No. 4 of 1978 to take such decisions.

Section 17 of the Act provides that

***“ The board shall have the power to enter into agreements with any enterprise in or outside the Area of Authority and to grant exemptions from any law referred to in Schedule B hereto or to modify or vary the application of any such laws to such enterprises in accordance with such Regulations as may be made by the Minister”.***

It appears that Customs Ordinance is referred to in the Schedule B and any waiver of Customs duty must be in terms of the Agreement entered into by the Board under the above section. There is no evidence or any other supportive material placed before this court by the petitioner that the Board has granted approval or any waiver to import Palm Olien to the petitioner after the Board withdrew the duty free facility in 1995 by R3 . It is only the Board of the BOI can grant exemptions and not an official of the BOI without Board approval. Mr. Janak de Silva SSC invited the court's attention to section 15 (1) of the Board Of Investment Act which provides as follows:

***“The Board may delegate to the head of any department the exercise the exercise or discharge of any power or function vested in or assigned to the Board other than the powers conferred on the Board under section 17 of the Law.”***

In terms of the above provisions , it can be seen , that any delegation of powers given to the Board under section 17 thereof cannot be delegated It is only the Board can exercise such powers. The powers granted by the statute to a particular tribunal or any other authority cannot be usurped by any other officers without the powers being expressly delegated.

It is to be noted that the unauthorized and erroneous assurances given by the officials of the organization or authority should not be relied upon by the petitioner. Such assurances of officials are not binding on the Authority.

Craig on **Administrative Law** ( 3<sup>rd</sup> edition pg 652) states as follows:

*"...there are reasons which have been given as to why a representation which is ultra vires , in the sense that it is outside the power of the public body or the officer who made it , should not be binding on that body. There is the fear that if estoppels were allowed to apply it would threaten the whole ultra vires doctrine, by enabling the public bodies to extend their powers by making a representation outside their lawful authority, which would then be binding upon them through the medium of estoppel."*

It was submitted by the learned Senior State Counsel that the petitioner cannot rely on the two letters issued by two officers of the BOI since the ultra vires representation cannot form the basis for legitimate expectation.

As such I do not think that the writers of documents marked P3 and P4 the petitioner relies on did possess any power to issue such letters. I also note that there is a duty cast upon such officials also to examine carefully and satisfy themselves that there is in fact a decision taken by the Public Body in terms of the law before the officials act on misrepresentations made to them and issuing such letters to the public.

I have carefully considered the contention of the petitioner that the petitioner had a legitimate expectation to continue with his importation of project related materials and I am of the view that no legitimate expectation can arise as the petitioner was fully aware of the decision taken by the Board in 1995 and 2001 withdrawing the duty free facility.

In the circumstances and for the reasons set out above I am of the view that the petitioner is not entitled to the reliefs sought. I also direct the respondents to proceed with the Customs Inquiry in accordance with the

law and conclude the Inquiry expeditiously with sufficient notice being given to the petitioner.

Accordingly, I refuse and dismiss the application with costs.

**PRESIDENT OF THE COURT OF APPEAL**

Anil Goonaratne J,

I agree.

**JUDGE OF THE COURT OF APPEAL.**