

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

In the matter of an application for mandates in the nature of writ of certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**BHARTI AIRTEL LANKA (PVT) LTD.**

No.598, Elvitigala Mawatha,  
Colombo 5.

**PETITIONER**

Vs.

C.A. (Writ) Application No.51/2010

**1. THE DIRECTOR GENERAL OF  
CUSTOMS**

Sri Lanka Customs  
Customs House, Bristol Street,  
Colombo 1.

**2. MR. G.B. GNANARAJ**

Superintendent of Customs  
Post Clearance and Audit Branch  
(PCAB)  
Sri Lanka Customs  
Customs House, Bristol Street,  
Colombo 1.

**3. MR. P.K.A. SENARATH**

Superintendent of Customs  
Post Clearance and Audit Branch  
(PCAB)  
Sri Lanka Customs  
Customs House, Bristol Street,  
Colombo 1.

**4. MR. VIPULA SENANAYAKE**

Assistant Director of Customs

Investor Facilitation Centre (INFAC),  
Sri Lanka Customs  
Customs House, Bristol Street,  
Colombo 1.

5. **MR. S.L.E. MOHOTTI**  
Superintendent of Customs  
(CBCU Unit), Sri Lanka Customs  
Customs House  
Bristol Street,  
Colombo 1.

6. **THE HON. ATTORNEY GENERAL**  
Attorney General's Department  
Colombo 12.

#### RESPONDENTS

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**  
COUNSEL : Faiz Musthapa PC with Riad Ameen,  
for the Petitioner  
Anusha Samaranayake,  
for Respondents

Argued on : 01.03.2013 & 30.04.2013

Decided on : 11. 07.2013

#### *S.Sriskandarajah, J*

The Petitioner is a company incorporated under the Company Law of Sri Lanka, and the Petitioner was issued a cellular mobile licence under the Sri Lanka Tele-communication Act No.25 of 1991, as amended. The Petitioner submitted that it had entered into an agreement with the Board of Investment of Sri Lanka under Section 17 of the Board of Investment Sri Lanka Law No.4 of 1978, as amended and, in terms of the said agreement, the Petitioner is entitled to import project related capital items approved by the Board of Investment, free of Customs duty. The Petitioner further submitted that the subject matter of this application relates to the importation of microwave links. The microwave links are essential for the

Petitioner's territorial network expansion and, to meet its network, commitments pursuant to the licence. The Petitioner submitted that the said microwave links were declared by the importers of other telecommunication operators under the H.S. Code 8529.90.00. As such, the microwave links imported by the Petitioner were also declared under H.S. Code 8529.90.00 in the Customs declaration form. It was the position of the Petitioner that the said Customs declarations were accepted after examining the goods and were delivered on previous occasions. But in or about March 2009, the Customs Officers processing the Customs declaration forms expressed the opinion that microwave links imported by the Petitioner should be classified under H.S. Code 8517.61.10, and the Excise Duty could be paid thereon. In view of the opinion expressed by the Customs Officers, the Petitioner submitted that two consignments of microwave links imported by the Petitioner were declared under H.S. Code 8517.61.10 in the Customs declaration form and Excise duty was paid there on.

It is the position of the Petitioner that the H.S. Code 8517.61.10 is applicable to base stations having transmission apparatus incorporating recipient apparatus, but the microwave links imported by the Petitioner cannot be used for transmission and recipients of signatures between the two telecommunication Boards without a microwave antenna. The Petitioner submitted that the microwave links are imported by the Petitioner without a microwave antenna and are manufactured separately in another country and imported by the Petitioner in a separate consignment. It is the contention of the Petitioner that the microwave links imported by the Petitioner do not constitute a base station but, instead, the said microwave links and the microwave antenna together are eventually connected to a base station. The description of the H.S. Code for "transmission apparatus incorporating recipient apparatus" falls within H.S. Code 8517.61.10 which attracts an Excise duty. As the Petitioner was exempted from Customs duty, as it is a BOI approved company, the 15% Customs Duty is not leviable if the apparatus imported falls within the description given above. It is the contention of the Petitioner that the transmission apparatus imported by the Petitioner does not incorporate a recipient apparatus; it will fall within the category of "other". That could be categorized under the H.S. Code 8517.62.90, the goods falling under this category is not subject to Excise duty.

When one peruses the general rules for the interpretation of the harmonized system rules, "any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken in to include a reference to that article complete or finished or (falling to be conclusive as complete or finished by virtue of these rules) presented unassembled or disassembled."

As claimed by the Petitioner, the microwave links imported by the Petitioner do not contain a microwave antenna. In the absence of a microwave antenna, the said product cannot be termed as a transmission apparatus incorporating recipient apparatus, but even if one considers the general rule of interpretation mentioned above, and if the Petitioner has imported the microwave link and the microwave antenna in a disassembled or unassembled manner, it could be interpreted that the said items will fall under an article incomplete or unfinished transmission apparatus incorporating recipient apparatus falling under H.S. Code 8517.67.10, but in the Petitioner's case, the Petitioner had not made any attempt to import microwave antenna, either along with microwave links that was imported by the Petitioner or separately in a different consignment to fit to the microwave link. In these circumstances one cannot interpret the microwave links imported by the Petitioner will fall under the transmission apparatus incorporating recipient apparatus and, therefore, it has to be categorized under "other" and, therefore, the Petitioner in his opinion has rightly declared that the H.S. Code is that of 8517.62.90.

In view of the conflict on declaration, the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent belongs to the Port Clearance Audit Branch, had commenced investigation with regard to the correct classification of the microwave links imported by the Petitioner and the liability to pay Excise duty thereon. The Petitioner was summoned for an inquiry by the 2<sup>nd</sup> Respondent. The Petitioner submitted, but the 5<sup>th</sup> Respondent also summoned the Petitioner's employees for another inquiry and statements of the employees were recorded by the 5<sup>th</sup> Respondent. In view of the conflicting inquiries between the 2<sup>nd</sup> and 5<sup>th</sup>, the 5<sup>th</sup> Respondent purposely detained and thereafter seized the said microwave links referred to in Customs declaration bearing No.48319 by letter dated 23<sup>rd</sup> December 2009. This decision was made by the 5<sup>th</sup> Respondent despite the

fact the 4<sup>th</sup> Respondent had made an order to release the goods by obtaining a pay order to satisfy the difference between the Excise duty payable between the two classifications.

The Petitioner in this application has sought a Writ of Certiorari to quash the decision of the 5<sup>th</sup> Respondent contained in the said letter dated 22<sup>nd</sup> December 2009 marked P14(a) and P14(b). Justice Tennekon in *Attorney General v Wimaladharma* 78 NLR 327 at 333 observed;

“It does not mean that any goods may be seized by officers of customs according to whim and fancy... It only means that an officer of customs bona fide acting as such may seize any goods which he has reason to suspect are forfeited or liable to forfeiture... To use the words adopted by the legislature itself ... though in another context the officer of customs seizing goods under Section 125 must have “probable cause” for such seizure.”

It has also been held in *Toyota Lanka (Pvt)Ltd v Director General of Customs SC Appeal No.49/2008 SC minutes 20.03.2009* the Supreme Court held:

“I am further of the view and hold that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an under payment or short lavy of duties or dues. In such case event the proper couse would be a requirement for payment of the amount due prior to delivery of goods or the recovery of the amounts due in terms of section 18.”

It has been held in the above case that if there is a disputed classification of goods and the said declaration is made not by stealth to evade payment of duties, the proper cause is to request for payment of the amount due prior to delivery of goods. As there is no allegation that the Petitioner in the same consignment or in a different consignment had imported antennas to allege that the Petitioner had imported unassembled or disassembled goods. In the instant case the Petitioner had imported goods according to his classification it would fall under HS Code 8517.62.90 if Customs Department claims that it should fall under a different HS Code it has to be determined after an inquiry, in such a case the difference of Customs duty or the Excise duty should have been obtained as security and items imported could be released to the Petitioner.

As the inquiry has still not been completed, after giving an opportunity to the Petitioner, the Customs Department could arrive at an appropriate finding in relation to the description under which the Petitioner's goods could be declared but, the Respondents have no right to seize the goods. In these circumstances, the issue of seizure notice is *ultra vires*. Therefore, this Court quashes the notice of seizure and directs the Respondents to hold an inquiry and determine the description of the goods imported by the Petitioner. The application for writ of certiorari is allowed as prayed for in prayer (c) of the Petition without cost.

President of the Court of Appeal