

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

CA.WRIT NO.787/2008

01. Lion Brewery (Ceylon) PLC,
No.61, Janadhipathy Mawatha,
Colombo 13.
02. Harihaan Selvanathan,
C/O.No.83, George R. De Silva
Mawatha
Colombo 13
And 09 others.

PETITIONERS

Vs.

01. Mr.S.A.C.W. Jayathilake,
Director General of Excise,
Excise Duty Division,
Department of Sri Lanka Customs,
Customs House, Bristol Street,
Colombo 01.
02. E.M.D.B. Ekanayake,
Director-Excise Duty,
Excise Duty Division,
Department of Sri Lanka Customs,
Customs House, Bristol Street,
Colombo 01.

RESPONDENTS

BEFORE : S. SRISKANDARAJAH, J (P/CA)

COUNSEL : K.Kanag Iswaran PC, with Avindra Radrigo
for the Petitioner.

Farzana Jameel DSG with Suren Gnanaraj SC
for the Respondents,

Argued on : 28.01.2013, 25.03.2013, 29.05.2013, 27.06.2013 & 03.07.2013

Decided on : 07.08.2013

S.Sriskandarajah,J

The Petitioner is a public limited company. The 1st Respondent is the Director General of Excise who is in charge of the administration of the Excise (Special Provisions) Act No.13 of 1989. The Minister of Finance, acting under Section 3 of the Excise (Special Provisions) Act, by order dated 5th November 1998, published in the Government Gazette bearing No.1052/15 specified 10% as the rate applicable for excise duty in respect of beer made from malt. By this notification, beer made from malt became an excisable article in terms of Section 3(1) of the said Act. In the given circumstances the 1st Petitioner became liable to pay 10% excise duty on the beer produced by it. In terms of Section 14 of the said Act, after the expiration of the period of 2 months from the date on which any article became an excisable article in terms of an order made under Section 3, no person shall engage in the production of any such excisable article unless such person is registered for the purposes of the Act with the 1st Respondent. The 1st Petitioner made an application for registration with the 1st Respondent and obtained a registration in terms of Section 14 of the said Act. By the said registration the 1st Petitioner is obliged to inform the 1st Respondent the number of excisable articles produced or manufactured during the prescribed period, the number of excisable articles removed from the place of production, and excise duty paid on such excisable articles.

The issue in this application is in relation to duty payable to the period 1998 4th quarter to 2002, 1st quarter to the beer manufactured by the 1st Petitioner and was sold to the wholesale distributors located Island-wide. It is the contention of the 1st Petitioner that the wholesale distributors, in turn, sold it to the retailers at a price stipulated by the 1st Petitioner. The

retailers, in turn, sold it to consumers at a price stipulated by the 1st Petitioner. It is the contention of the Petitioner that the beer sold as aforesaid, was an excisable article in terms of the Excise Duty (Special Provisions) Act No.13 of 1989, and the 1st Petitioner paid in full the duty payable in terms of the Act on the beer sold by the 1st Petitioner during the period 1998 4th quarter to 2002 1st quarter. The 1st Petitioner further contended that at all times material to this application, the 1st Petitioner had paid excise duty as calculated on the ex-factory price as being the normal price within the meaning of Section 7(1)(a) of the Act.

The Director General of Excise, by a letter dated 7th October 1999, requested the 1st Petitioner to calculate the excise duty on wholesale price, and the Director General of Excise observed that the 1st Petitioner has so far not computed the excise duty on the correct wholesale price for the period 1998 4th quarter to 2002 1st quarter, and requested the 1st Petitioner to calculate the excise duty and to make payment of arrears of duty and penalty computed on the correct wholesale price. The 1st Petitioner contended that the 11th Petitioner who represented the 1st Petitioner, explained and demonstrated to the officials of the Director General of Excise, the distinction between the ex-factory price and the wholesale price set out in their letter dated 12th November 1998(P6) and the ex-factory price was the normal price applied by the 1st Petitioner in selling beer to its distributors in wholesale trade. The Director-General, by letter dated 17th January 2000, informed the 1st Petitioner that the 1st Petitioner has failed to calculate the excise duty on wholesale price and requested the 1st Petitioner to pay arrears of excise duty and the penalty thereto for quarters 1998 1st quarter to 1999 4th quarter. The Director-General Customs and Excise thereafter, by letter dated 16th February 2000, informed the petitioner that the relevant returns have not been duly prepared by the 1st Petitioner and that there is a discrepancy between the return furnished by the 1st Petitioner and the records available with the Respondent and, according to the rectified calculations, a sum of Rs.10,765,648.89 as arrears and Rs.2,271,780.95 as penalty is payable. With the said letter a notice under Section 9(1) was also annexed, informing the 1st Petitioner in respect of the periods of November 1998 to December 1999, the 1st Petitioner had paid excise duty in part and furnished incorrect returns, and even had acted in breach of Regulation/Order No.1 of 1991 and in contravention of Section 4/Section 5/Section 14 of the said Act, and the said notice has given a sum of Rs.10,765,648.89 was due from the 1st Petitioner as excise duty and Rs.2,769,780.95 as penalty for the period November

1998 to December 1999 and requested the 1st Petitioner to show cause on or before 29th February 2000 why it could not be prosecuted and/or the Certification of Registration granted to it, should not be cancelled or suspended or why it should not be otherwise dealt with. It is the contention of the Petitioner, by letter dated 4th April 2000, the 1st Petitioner showed cause as to why further action should not be taken against it and explained the basis upon which the 1st Petitioner calculated the excise duty and demonstrated why it is not liable to pay the amounts set out in the said notice. The 1st Petitioner, in the said show cause letter, has taken up the position that in terms of the Act, the basis to be used for the calculation of the excise duty is the normal price which is defined in the Act as the price at which such excisable articles are ordinarily sold. He further submitted, the Act does not refer to a wholesale price. As such, the wholesale price should carry the ordinary English meaning of the word which would be the price at which the goods are sold to the buyer during the course of wholesale trade, and the 1st Petitioner contended that it has acted strictly in accordance with the Act, and it denied any liability to pay any arrears or penalty in terms of the Act.

The dispute on the payment of Excise duty for the period commencing from the fourth quarter of 1998 to the fourth quarter of 1999 is in relation to an under payment of duty where the Petitioner calculated the Excise duty based on the price of the article at Ex factory price. The Petitioner claims that this is the price at which the articles are ordinarily sold by it to the buyer in the course of whole sale trade for delivery at the time of removal. The Petitioner contended that the beer manufactured by the Petitioner was sold to the wholesale distributors located island wide at the price fixed by the Petitioner named as 'Ex factory price' which is lower than the price fixed by the Petitioner when distributors located island wide sells beer to the retailers, this price the Petitioner named it as 'wholesale price' and the Petitioner has fixed the 'retail price, which is even higher than the whole sale price and the Ex factory price . It is the contention of the Petitioner that the normal price stipulated in Section 7i.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 is the price mentioned by the Petitioner as Ex factory price whereas the 1st Respondent contended that the normal price referred to in Section 7 is the wholesale price fixed by the Petitioner where the beer is sold in wholesale trade to the retailers. The Petitioners disputed this basis and insisted that their basis to be accepted. In

relation to the identification of the normal price of the beer sold by the Petitioner as specified in Section 7 several round of discussions took place between the Petitioners and Respondents. In the discussions in addition to the method of calculation of Excise Duty the necessity for the payment of excise duty with regarded to the complimentary and promotional issue of beer were also discussed.

In the meantime the Excise duty on beer was removed with effect from 23.03.2002 by order published in Gazette No.1228/14 dated 22.03.2002 and the Inland Revenue (Special Provisions) Act No 10 of 2003 came in to force on 17.03.2003 by this Act the 1st Petitioner claimed amnesty. But when the said Act was revised by Inland Revenue (Regulation of Amnesty) Act No10 of 2004 on 20.10.2004 the 1st Petitioner was reminded of the failure to calculate excise duty in accordance with the provisions of the Excise (Special Provisions) Act and the 1st Petitioner was noticed of the amounts due on complimentary beer by notice dated 22.05.2008 (P29). Where it has been stated during the period Fourth Quarter of 1998 to the Fourth Quarter of 1999 the 1st Petitioner Company had failed to pay a sum of Rs.10,765,648.89 with a 100% penalty totalling to 21,531,297.78. The said notice also notified a sum of Rs.16,292,840.17 for the 4th Quarter 2000 to 1st Quarter 2002 for the issue of complimentary beer and penalty of the same amount totalling to Rs.32585680.34. The Petitioner's quarry on the said notice were replied and a determination under Section 9 was made and was communicated to the Petitioner by letter dated 04.06.2008 (P31).

The Petitioner has neither complied with the determination nor filed an appeal against the determination, the 1st Petitioner sought further clarification, and the 1st Respondent informed the 1st petitioner by letter dated 31/07/2008, the details annexing the calculation sheet. The contention of the Respondent is that the 1st Petitioner has failed to appeal against the determination made by the 1st Respondent and had persisted in finding ignorance despite the numerous correspondence between the parties and the discussions held. In view of Section 10 of the Excise Provisions Act, any person may, if he is dissatisfied with any determination made in respect of him under Section 9, could appeal against the said determination to the Director-General within 30 days after the service of notice of such determination on him, but the said section provides that 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 such appeal. In this instant case, the Petitioner has failed to file an appeal as provided by this section, but has continuously sought clarification on the determination made by the 1st Respondent, the said clarifications cannot be considered as an appeal under Section 10, as Section 10 provides that if an appeal is filed, notwithstanding the appeal, the person who appeals, has to pay the excise duty determined, but as the excise duty determined was not paid, it cannot be construed that the subsequent communication made by the 1st petitioner can be considered as an appeal against the said determination. Section 11 of the said Act also provides that where no authorized appeal has been lodged within the time specified in the Act against the determination of the Director-General in respect of the excise duty, the amount determined by the Director-General shall be final and conclusive for all purposes of this Act as regards to the amount of the excise duty payable.

The first issue is in relation to the normal price of the Excisable article manufactured by the 1st Petitioner under Section 7 has to be determined by the Director General. He has the power to call for documents ,Books of Accounts and evidence to determine the normal price of an excisable article to determine excise duty payable. The Director General has determined that the price mentioned as wholesale price by the Petitioner is the normal price stipulated in Section 7 and the Excise duty has to be calculated on this price. The Petitioner contended that the Ex factory price is the normal price stipulated in Section 7 as it sells the beer at this price at the time of removal to the wholesale distributors.

It is an admitted fact that the Petitioner as the manufacturer does not sell beer to retailers on wholesale for the retailers to sell it to the consumers. But the Petitioner sells beer at a price (Ex factory price) to the wholesale distributors located island -wide, their function is to sell it to the retailers at a price (Wholesale Price). Retailers in turn sell it to the consumers at a price(Retail Price). The definition of the normal price is as follows:

“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.”

“related person” means a person who is so associated with the assessee that they have a direct interest in the business of each other and includes a holding company, a subsidiary company, a relative and distributor of the assessee or any sub-distributor of such distributor.”

In the instant case the Petitioner the manufacturer sells beer to the wholesale distributors located island-wide. This distributors of assessee has a direct interest of the business of each other, therefore the distributors located island wide could be considered as related persons. As such the ex factory price at which the Petitioner sells it to the wholesale distributors located island-wide cannot be considered as normal price. When an Excisable article is sold through a related person the normal price could be determined as per Section 7(1)(a)(ii) of the said Act. Accordingly the normal price of the beer of the Petitioner is the price at which the Excisable article is sold by the wholesale distributors located island-wide (related persons) to retailers this price is the price described by the Petitioner as ‘wholesale price’. Hence the decision of the Director General that the normal price is the price described by the Petitioner as the Wholesale price and not the Ex-factory price is reasonable and in accordance with the provisions of the Act . In view of the above the determination of the Director General that the Petitioner should pay the short fall of Excise Duty with penalty during the relevant period cannot be quashed by a writ of certiorari.

The next issue is whether the complimentary beer attracts excise duty. The excise duty is exemption to the articles described in Section 3B and Section 3C of the said Act. They are articles of every description, imported or cleared from customs bond for the official use of the President; and articles of every description purchased or procured from a custom Duty Free Shop as provided in Section 3B and the article that are exemption for the payment of excise duty by the order published by the minister under Section 3C of the said Act. Complimentary beer does not fall under any of the above category. Therefore complimentary beer attracts excise duty.

The certificate of Excise Duty in default and penalty includes the short fall of the Excise Duty and penalty and the Duty on the distribution of the complimentary beer and penalty. As there is no illegality, irrationality or procedural irregularity in arriving at the findings appears in the certificate of excise duty marked as P4. it cannot be quashed by a writ of certiorari.

The Petitioner in this application has sought a writ of prohibition prohibiting the 1st and 2nd Respondents from taking any step or action to prosecute the Magistrate's Court Kaduwela Case No 11303 against the 1st to the 11th Respondents.

Section 5 of the said Act provides that excise duty shall be paid by the producer or manufacturer of an excisable article, in the prescribed manner after its removal from the factory, within one calendar month from the last date of each quarter in the year in which such removal takes place. If the Excise duty is not paid as prescribed the Director General could take action to recover the duty as provided under Section 11B or Section 12 of the said Act. At the same time as the non-payment of excise duty is an offence under Section 24 of the said Act, prosecution could be instituted against the defaulter in the Magistrate Court to punish the defaulter. If the offence is committed by bodies of persons provisions Section 25 of the said Act would apply.

In the instant case the Director General had decided to recover the excise duty in default. Section 11A of the said Act provides that any excise duty in default shall be a charge upon all the assets of the defaulter. Section 11B(2) provides for the procedure to recover the Excise duty by seizure and sale of movable property. Section 11B(3) provides If the Director General is of opinion that recovery by the means provided in Subsection (2) is impracticable or inexpedient, he may issue a certificate to the District Court that has jurisdiction and the District Court thereupon direct a writ of execution to issue to the Fiscal authorizing and requesting him to seize and sell any of the property movable and immovable of the defaulter for the recovery of the excise duty.

Section 12 of the said Act also provide for a procedure to recover excise duty accordingly the Director General may issue a certificate containing particulars of the excise duty in default and the name and last known place of business or residence of the defaulter to a Magistrate having jurisdiction to show cause and in default of sufficient cause being shown, the excise duty in default shall be deem to be a fine imposed by a sentence of the magistrate on such defaulter.

Section 12 of Excise (Special Provisions) Act is a standalone section unlike Section 38(2) of the Employee's Provident Fund Act No.15 of 1958 as amended this Act provide for recovery of EPF contribution in terms of Section 17 and 38(1) of the said Act through the District Court. This section further provides where the Commissioner is of the opinion that recovery under Section

17 and Section 38(1) is, for whatever reason impracticable or inexpedient or where the full amount due has not been recovered by seizure and sale, then the Commissioner may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer, to the Magistrate having jurisdiction. The Magistrate after providing an opportunity to show cause and in default of sufficient cause being shown, such sum shall be deemed to be a fine imposed by a sentence of the Magistrate on such employer. It has been held by the Supreme Court that in the Employee's Provident Fund Act No. 15 of 1958 as amended the legislature very clearly has set out the scheme step by step as to how the Commissioner becomes entitled to use the procedure set out in Section 38(2) of the said Act. The Assistant Commissioner of Labour had no jurisdiction or power under the said statute to file a certificate in the Magistrate Court in terms of Section 38(2) of the EPF Act without first proceeding under Section 17 and thereafter under Section 38(1) of the said Act; *Kodagoda Arachchige Dayawathi v D.S. Edirisinghe, Commissioner General of Labour and four others, SC(F/R) No. 241/08, SC minutes 01.06.2009.*

In the instant case the certificate issued by the Director General in the Magistrate's Court Kaduwela in Case No 11303 against the 1st to the 11th Respondents is under Section 12 of the said Act. The Director General has filed a certificate against the defaulter namely the 1st Petitioner and at the same time he has named the Directors of the 1st Petitioner Company as accused and the learned Magistrate has issued summons on the 2nd to the 11th Petitioners as they are the Directors of the 1st Petitioner Company. The Director General is entitled to file a certificate in the Magistrate Court under Section 12 without resorting to Section 11B (2) or (3) to recover the excise duty in default from a defaulter that includes a body corporate. But when such certificate is filed against a body corporate (the defaulter), the directors of that company cannot be made accused in that proceedings in the first instance before the defaulter shows cause. Therefore the proceedings instituted in the said case against the 2nd to the 11th Petitioners are ultra vires the powers of the Director General of Excise as such this court issues a writ of prohibition prohibiting the 1st and 2nd Respondents from taking any step or action to prosecute the Magistrate's Court Kaduwela Case No 11303 against the 2nd to the 11th Respondents.

This is without prejudice for the Magistrate in the above case to summon the Directors of the defaulter company to show cause as to why they should not be dealt with under Section 25, in

default of sufficient cause being shown by the defaulter Company and when such sum in default is imposed as a sentence of fine by the Magistrate on defaulter Company. Section 25 deals with a situation where an offence is committed by a body Corporate the Directors of the said body corporate shall be deemed to be guilty of that offence and they are entitled to the defenses provided under the said section. Similarly when a sentence is imposed on a body corporate whether it is a fine or otherwise it deemed to be a sentence imposed on directors of that body corporate subject to the defense they are entitled under Section 25 of the said Act.

The application of the Petitioners for a writ of certiorari is refused and the Writ of prohibition in relation to the 2nd to the 11th Petitioners are allowed without costs.

President of the Court of Appeal