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

Sonic Steel Industries (Private) Limited
No. 34, Abdul Jabbar Mawatha,
Colombo 12.

PETITIONER

C.A 166/2009 (Writ)

Vs.

1. Prof. G. L. Peiris
   Hon. Minister of Export Development & International Trade,
   Ministry of Export Development & International Trade,
   Rakshana Mandiraya,
   21, Vauxhall Street, Colombo 12.

And 06 others

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: K. Deekiriwewa for the Petitioner
F. Jameel D.S.G., for Respondents

ARGUED ON: 31.05.2013

DECIDED ON: 10.10.2013

GOONERATNE J.

The Petitioner company has sought a Writs of Certiorari, Prohibition and Mandamus. The prayer relating to Mandamus had been prepared in very wide terms, and the issue really pertains to payment of cess. According to the Petitioner without there being statutorily authority, cess, had been collected, and the prayer pertaining to Mandamus contains alternative relief. Certiorari is sought to quash Gazette Notification 'X4' & 'X5' (dated 31.01.2009 & 6.11.2008 respectively). The learned Deputy Solicitor General who appeared for the Respondent at the very outset informed this court that prayer 'f' & 'g' relating to the Writ of Prohibition is very vague. This court observes that very many relief prayed for by the Petitioner company, contained in the petition is prolix and the remedy sought pertains to orders made in the years 2008 & 2009.

Petitioner company as pleaded is engaged in the importation of steel and iron rods/coils. According to the submissions of learned counsel for the Petitioner and the material contained in the petition the grievance of the Petitioner mainly seems to be that money collected under cess order need to be remitted directly to the Export Development Fund established under the Export

Development Board Act No. 40 of 1979. However it had not happened in that manner but amount on cess diverted to the treasury violating statutory provisions and constitutional provisions. Petitioner argues that cess money should accrue to the export development Board Cess Fund and not to Government revenue, as proceeds had to be utilized to meet the costs of Export Development.

The counsel for the Petitioner emphasis on Section 14 of the above Act. Section 14 reads thus:

> 14 (1) There shall be charged, levied and paid a cess at such rates as may be determined by the Minister from time to time, with the concurrence of the Minister in charge of the subject of Finance, by Order published in the Gazette, on such imports and exports specified in the Order.
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> (2) The amount of cess imposed under this section may be varied or rescinded by a like Order.
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> (3) 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 therein, and shall be brought before Parliament for approval within four months of the date of its publication. Any such Order which is not so approved shall be deemed to be revoked as from the date of its disapproval, but without prejudice to the validity of anything previously done thereunder.
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> (4) This section shall have effect as though it formed part of the Customs Ordinance, and the provisions of that Ordinance shall apply accordingly.
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> (5) The proceeds of the cess recovered under this section shall be paid monthly by the Principal Collector of Customs to the credit of the Fund.
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> (6) The cess imposed under this section shall be in addition to any import duty or export duty or any other cess levied under any other written law.

Petitioner argues that Section 14(1) of the Act where the power to impose cess conferred on the Minister is to be done only on certain specified items, in order to raise funds for Export Development only. Further it has to be credited to the fund. Petitioner blames the 6th Respondent and state there is a total deviation from the above statutory scheme and imposed a totally unwarranted amount on the Petitioner. Petitioner describes this as a manifest error. I would also for purpose of clarity incorporate paragraphs 7 & 8 of the petition since the Petitioner relies on same to a great extent. It reads as follows:

Further the Customs Department by misconstruing the Order and also by deviating from the statutory provisions had collected certain unwarranted 'cess' amount and germane to that collection had collected unwarranted VAT amount and unwarranted Nation Building Tax 'NBT' amount also and as such Commissioner General of Inland Revenue is named as the 7th respondent in this case.

Petitioner states that the petitioner is one of the leading and largest importers of steel and iron roads and coils into the Country. Further it states that it is involved in retail as well as wholesale business of steel and iron rods and coils and as such is a major player in this commodity market. It is also pertinent to state that until the publication of the impugned Gazetted Order bearing Gazette No. 1586/26 dated 30.01.2009 the items namely steel and iron rods and coils imported under the HS heading 72.07, 72.08, 72.09, 72.10, 72.11, 72.12, 72.13, 72.14, 72.15, 72.16, 72.17, 72.18, 72.19, 72.20, 72.21, 72.22, 72.24, 72.25, 72.26, 72.28, and 72.29 were not subjected to a 'Cess' levy. A copy of the immediately

preceding Gazetted Order bearing Gazette No. 1574/7 dated 06.11.2008 marked as "X5" is annexed and pleaded as part and parcel of this petition.

Petitioner further argues that the Minister's order has not made, to charge or levy a cess only on a unit rate. In other words there is no order to charge, levy and pay cess on the basis of the unit rate. In order to follow the argument of the Petitioner the following from the pleadings are noted.

> The Hon. Minister's 'Order' very clearly stipulates that "a Cess shall be charged, levied and paid on all goods enumerated in Column III of the Schedule I hereto at rates specified in the corresponding entry in Column IV in the same Schedule hereto on the aggregate of a sum equivalent to their value for customs duty purposes at the time of importation and a sum equivalent to ten per centum of such value, provided however, that;"
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> Therefore it is abundantly clear that whenever there is an ad valorem rate (indicates a percentage) specified in any item enumerated in Column III then the cess can be computed according to the Order and could and has to be paid or levied according to the Order.
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> But as in the case of Palm oil (HS Heading 15.11 or HS code 1511.90.20) wherein only an unit rate of Rs. 6/- per k.g is given in the Column IV or as in the case of steel rods and coils (HS Heading 72.13 or HS code 7213.91) wherein only an unit rate of Rs. 10/- per k.g is given in the Column IV Cess cannot be computed on the basis of the aggregate of a sum equivalent to their value for customs duty purposes at the time of importation and a sum

equivalent to ten per centum of such value as this basis or the method of computation cannot co-exist with an unit rate and its alien to the application of unit rate.

In other words on the one hand there is no "Order" to pay or levy on the unit rate and on the other hand there is no ad valorem rate specified in Column IV corresponding to the manner or the basis of computation stipulated in 'Order' itself.

The Petitioner complains mainly on the statutory aspect i.e order made not to collect funds for the fund created under Section 13(1) of the enabling Act but to generate funds to the Treasury which is not a prescribed purpose of the Act. The impugned order violates Article 76(3) of the Constitution. In those circumstances the Petitioner states that the total cess amount imposed on the Petitioner company should be released to the Petitioner

The Respondents in their objections have specifically pleaded the following as matters of law by way of preliminary objections.

(a) The Petitioner is guilty of lashes in regard to the Gazette Notification dated 06.11.2008 marked X5 with the petition;

(b) In any event, the Order contained in X5 was rescinded by the Order contained in Gazette Notification dated 30.01.2009 marked X4 and thus this application is futile.

(c) The matter put in issue by the Petitioner, involves fiscal policy of the State and is not amenable to judicial review.

(d) The Petitioner has no locus standi to have and maintain this application.

(e) In any event the act of remitting the money collected as Cess to the Consolidated Fund, is in accordance with the law.

We have perused the objections of the Respondents and the affidavit of the 1st Respondent Minister as well as of the 4th Respondent. The Minister concerned emphasis the government policy to remit the amounts collected on cess payments with the Treasury, and refer to two circulars in this regard. As such the grievance of the Petitioner is nullified by Government policy adopted in circulars of 12th July 2005 & 24th of April 2007 (6R1 & 6R2). As such it is not a policy in breach of any law, and monies were deposited periodically in the Treasury. It is no secret that the Director General of Customs collected cess as required by Gazette Notification No. 1586/26 of 30.01.2009. We don't think there was a breach of law in the manner pleaded by the Petitioner, but simply an arrangement within the Government, which does not give rise to any illegality.

It is the fiscal policy of the Government and a Court of Law should not disturb such a policy in the interest of Justice. Such a fiscal policy of the state would not be amenable to the writ jurisdiction of this court. Further Parliament

has full control over public finance. Even otherwise the fiscal policy need not be disturbed, by a writ application.

On the other hand it appears to this court that exercise of power on the documents sought to be quashed by certiorari would be futile in the circumstances of this case. As pleaded by the Respondent's order X5 was rescinded by order X4 and as such the application of the petitioner is futile The Writ of Certiorari and Mandamus has been refused by the Court of Appeal on numerous occasions. A writ will not issue where it would be vexatious or futile. (1958) 61 NLR 491, 496. Both X4 & X5 were issued more than 5 years ago. Certiorari will not be issued to quash a particular exercise of power if it be futile to do because it is no more operational or it has had its effect (pg. 988 – Principle of Administration Law 3rd Edition by Sunil F. Cooray.

In all the above circumstances of this case we are not inclined to grant the relief prayed for by the Petitioner. As such this application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL