

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

CA (WRIT) 560/2007

Ultra Tech Ceylinco (Pvt.) Limited
NO.81/11/1,
New Nuge Road,
Peliyagoda, Kelaniaya

Petitioner

Vs.

1. Sarath Jayathillake
The Director General, Sri Lanka Customs,
Customs House,, Bristol Street, Colombo 01.

2. K. Yohanathan alias Yoganathan
Superintendent of Customs
Sri Lanka Customs, 2nd Floor, Hemas Building
Bristol Street, Colombo 01.

3. P. Saman de Silva
Superintendent of Customs
Customs BOI Coordinating Unit [CBCU]
Sri Lanka Customs, 2nd Floor Hemas Building,
Bristol Street, Colombo 01.

4. S underal ingam
Superintendent of Customs
Customs BOI Coordinating Unit [CBCU]
Sri Lanka Customs, 2nd Floor, Hemas Building
Bristol Street, Colombo 01.

5. Kulenthiran
Assistant Director of Customs
Sri Lanka Customs, Customs House,
Bristol Street, Colombo 01.

Respondents

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

In the matter of an application for Writs of
Certiorari under and in terms of Article 140 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.

C.A. (Writ) Application No. 560/2007

<u>BEFORE</u>	: Deepali Wijesundera J.
<u>COUNSEL</u>	: D.S.Wijesinghe P C with Ms.Kaushalya Molligoda and Isuru Somadasa and G. Wickramasurendra for the Petitioner. : D.S.G. Arjuna Obeysekara for the Respondents.
<u>ARGUED ON</u>	: 20 th January, 2014.
<u>DECIDED ON</u>	: 28 th March, 2014.

Deepali Wijesundera J.

The petitioner who is a Limited Liability Company has filed this application against the 1st to 5th respondents seeking several writs against them prayed for in paragraph 52 of the petition. When this case was taken up for argument the petitioner restricted their prayer to paragraph 52 prayer (b) which is for a writ of certiorari to quash the decision of the 1st to 4th respondents to conduct the inquiry bearing no. CBCU/2006/19 against the petitioners.

The petitioner company is engaged in packing and sale in the local market ordinary Portland cement imported from several countries including India, Indonesia, Spain and The UAE (**P1 and P2**). Ultra Tech Cement Limited (UTCL) India is the principal supplier of bulk cement to the petitioner which is 80% of the supply. The petitioner company has paid customs Import Duty, Social Responsibility Levy, Port and Airport Levy and Value added Tax on the total value of the imports. The petitioner has declared dividends for the financial years 2003, 2004 and 2005 in a sum of Rs. 216 Million and the said dividends have been remitted to UTCL India.

In 2005 an investigation has been launched against cement importers in respect of under invoicing cement imports. The port clearance audit branch of the customs together with the Revenue Task Force carried out random inquiries and investigations into goods cleared by importers. The petitioner's import documents were also examined by the 2nd and 3rd respondents and their team of officers under the said random investigation. The examination of petitioner's documents have revealed that the petitioner had submitted false value declaration forms and cleared large consignments of cement without payment of the appropriate customs duties and levies. An investigation was launched into the imports of the petitioner and steps were taken under Sec. 9 of the Customs Ordinance. The petitioner was requested to forward documents set out in letter date 16/10/2006 addressed to petitioner (**marked as P6**). On receipt of the petitioner's documents 2nd, 3rd and 4th respondents have examined the said documents and it has transpired that the petitioner had submitted false value declaration forms and remitted a large sum of money by way of dividends to UTCL India. The directors of the petitioner company were summoned (**P8**) for an inquiry and the inquiry was held on seven days. The evidence of the 2nd respondent was recorded and he was under cross examination by the petitioner's counsel when this application was filed by the petitioner company.

The petitioner argued that an inquiry under Sec. 8 of the Customs Ordinance cannot be conducted since the alleged violation relates to valuation and the procedure set out in section 51A of the Customs Ordinance must be followed.

The petitioner also submitted that the dividends cannot be considered when deciding on the transaction price of the imports of bulk cement to Sri Lanka. The petitioner submitted the purported inquiry is completely misconceived in law and that there is no requirement under the provisions of schedule "E" of the Customs Ordinance.

The argument of the respondents was that the petitioner having participated at the inquiry on several dates is estopped from now claiming that the holding of an inquiry is ultra vires. They also submitted that holding of an inquiry will be beneficial to the petitioner.

The respondents stated that in terms of the Customs Ordinance as amended by Act No. 2 of 2003 the value of any part of the proceeds of any subsequent resale, disposal or use of imported goods that accrues directly or indirectly to the seller including dividends shall be added to the transaction value for the purpose of determining the

customs duties payable on the said goods and that this is a mandatory provision of law and cannot be evaded by importers whatever may be their internal arrangement.

The respondents submitted that the transaction value declared by the petitioner is false in terms of schedule E of the Customs Ordinance as amended and that the customs is entitled to call for documents and examine in order to ascertain if the relationship influence the price hence the need for the customs inquiry. The respondents submitted that the petitioner's application is premature since there has not been any determination made against the petitioner.

UTCL India is the principal supplier of bulk cement to the petitioner making the transaction a "related party transaction" as provided in schedule E of the Customs Ordinance. The petitioner has however not disclosed in the value declaration form which is a mandatory requirement under Sec. 51A. The petitioner has declared dividends in a sum of Rs. 216 Million for 2003, 2004 and 2005 the bulk of which has been remitted to UTCL of India. The issue therefore is whether the principal supplied cement at a lower price, thereby paying a lower amount as customs duty and thereafter recovered the actual cost of the cement through dividends on which customs duty has been paid

thereby defrauding the revenue due to the state. The basic rule of valuation is set out in Article 1 of the schedule "E".

The petitioner has suppressed facts from the customs by making false declarations in the value Declaration forms submitted to customs and thereby defrauding the country of revenue.

It is common ground between the parties that what is now being conducted is a post clearance investigation and therefore what is applicable is Sec. 51A(2).

Sec. 51A (2) reads as follows:

If an officer of customs is satisfied as a result of an examination or investigation, or an audit carried out under section 128A, at any time prior to or after the clearance of the goods that the value declared by the importer or his agent under an Article of Schedule E under which the value was initially accepted, is not appropriate the officer of customs may amend the value in accordance with the appropriate Article of Schedule E.

The petitioner having participated in the Sec. 8 inquiry for seven days is estopped from now saying the holding of the inquiry is ultra vires. There has not been any determination made against the petitioner by the 1st to 4th respondents for this court to issue a writ of certiorari as prayed for in prayer (b) of the petition.

For the afore stated reasons the application of the petitioner is dismissed with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL.