

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

Smithkline Becham (Pvt.) Limited
Level 34, West Tower,
World Trade Centre,
Echelon Square,
Colombo 1.

PETITIONER

C.A 110/2012 (Writ)

Vs.

1. Dr. Neville Goonewardena
Director General of Customs
Customs House,
40, Main Street,
Colombo 11.
2. L. M. Nelson
Inquiring Officer
Director of Customs
(Cargo Examination)
Cargo Examination Division,
Sri Lanka Customs
Rank Container Terminal,
Orugodawatte.
3. DHL Global Forwarding Lanka
(Private) Limited,
66, Vivekananda Hill,
Colombo 13.

3A. M. A. I. R. Fernando
Logistics Supervisor,
DHL Global Forwarding Lanka
(Private) Limited,
66, Vevekananda Hill,
Colombo 13.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Nihal Jayawardena P.C., with Sampath Wickramarachchi for Petitioner
Janak de Silva D.S.G., for 1st & 2nd Respondents
Asoka Somaratne with S. Mathew for 3rd & 4th Respondents

ARGUED ON: 02.12.2013

DECIDED ON: 04.06.2014

GOONERATNE J.

Petitioner Company has sought a Writ of Certiorari to quash order marked A3. The order at A3 was as a result of short levy of customs duty and the order is directed to impose a mitigated forfeiture of Rs. 24,733,282/-. A

Writ of Prohibition is sought to restrain the Respondents from recovering the said sum. In the same application the Petitioner Company seeks a Writ of Mandamus directing the 1st & 2nd Respondents to determine the correct amount payable in accordance with Section 18 of the Customs Ordinance. In the alternative a Mandamus directing the Respondents to determine the correct amount the 1st Respondent could legally order the Petitioner Company to pay. This court issued a stay order as per sub para (v) of the prayer to the Petitioner which order was periodically extended and now extended till date of judgment. The position of the Petitioner very briefly is that the short levy of customs duty resulted not due to any fraudulent act but was due to a oversight which originated in India, but the third party manufacturer who supplied the goods to the Indian Company which exported the same goods to the Petitioner Company.

Petitioner Company is engaged in the business of manufacturing, importing and distributing of pharmaceuticals and Iodex Balm, was one such items imported from India, and marketed and distributed as a pain reliever. The body of the petition gives a description of packages and change from glass bottle to plastic bottles. 3rd Respondent is a freight forwarding company which clear Petitioner's goods and acts on behalf of the Petitioner Company in the

clearing of imported goods. Petitioner gives details of import and the method adopted in para 13 and the levy of cess in para 14 of the petition. I would for purpose of clarity incorporate paras 15 to 20 of the petition to demonstrate now the short weight occurred and which position seems to be not challenged by the Petitioner Company for the reasons stated thereto. Further X7 document attempt to fortify the Petitioner's position.

1. The Petitioner states that the net weight of the substance so imported had to be stated in the Customs Declaration in order to calculate the cess payable and this was calculated on the basis of information found in the packing list.
2. The two types of containers were packed in the form of batches. A batch of 20g containers (packs) contained 412 of those numbers and in the case of 10g packs there were 512 such packs in a batch.
3. The Petitioner states that when the Ointment was imported in glass containers the correct number of packs in a batch was always stated in the packing list prepared by the third party manufacturer. However, after the plastic containers replaced glass, an erroneous entry relating to the packs in a 10g batch had been entered in the packing list prepared by the third party manufacturer which had gone unnoticed until the Customs detained a consignment which had arrived in the Port of Colombo and processed for Customs clearance on or about the 8th of March 2011.
4. The Petitioner states that the Customs Officials had noticed a difference in the declared net weight and the actual net weight of the substance so

imported in the consignment that was subject to a check and had questioned the officials of the Petitioner Company for explanation of the difference in the net weight.

5. The Petitioner states that it found out that the reason for the understatement of net weight was the understatement of the number of 10g packs in a batch as 412 in the packing list prepared by the third party manufacturer instead of the actual number of packs which was 512.
6. The Petitioner states that once this was detected by the Petitioner Company the responsible officials of the Company also inquired as to whether this error had occurred in the previous consignments as well. This has revealed that this had occurred in six previous consignments as well.

The Petitioner Company in this application gives the impression to court that the Petitioner is always willing to rectify the defect/lapses and pay the difference legally due to the state. The 2nd Respondent however held a customs inquiry which went on for several days and 2nd Respondent as per documents A – 2 (xi) issued a show cause notice. Our attention was drawn to document P23C (mistake in calculation re. 20 grms.). Learned President's Counsel for Petitioner referred to Section 18 and 18 (A) of the Customs Ordinance.

The 1st & 2nd Respondents inter alia urge the following:

- (a) By reference to 2R1 to 2R14 state commercial invoices and packing lists have been prepared and sent by Glaxo Smithkline Pharmaceutical Ltd. Document prepared by a related party with intent to defraud revenue.
- (b) Calculation of cess based on the net weight given in the commercial invoice and the cusdec Weight of goods most crucial item of information to be entered in the cusdec. Investigation reveal that subject consignments set out a lower net weight that the actual weight of goods imported.
- (c) No packing list produced at the time of clearance.
- (d) On 6 occasions earlier there were similar instance of under declaration of weight for the same item by the Company.
- (e) Petitioner failed to confess voluntarily information of the discrepancies, and false declaration until investigations by the customs.

When I consider the entirety of facts placed before this court, no doubt a short weight was discovered at a certain point of time which seems to have occurred previously. However the Petitioner Company was ready and willing to pay the total amount due on short levied payments along with interest and any other payment legally due. Material also suggest that the 3rd Respondent Company acted on behalf of the Petitioner Company in this entire process. The erroneous entry is admitted as a mistake by a third party manufacturer in the packing list (as in P23C -- 412 instead of 512).

This seems to be a genuine mistake for which there could be a possibility to occur, when third parties are brought into the transaction to enable the Petitioner Company to conclude the transaction. If the Respondents rely on a willful act or omission to defraud the state revenue the burden of proof on that aspect would be to prove beyond all reasonable doubts. I would draw more support to entertain the above views from the following recognized case law.

Toyota Lanka (Pvt.) Ltd. Vs. S.A.C.S.W. Jayathilaka, S.C. Appeal No. 49/2008

Hon. S.N. Silva CJ. held:

“the provision in Section 47 ‘but if such goods shall not agree with particulars in the bill of entry the same shall be forfeited’ apply to a situation in which by means of a wrongful entry goods are conveyed by stealth, to evade payment of customs duties or dues or contrary to prohibition or restrictions ... 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 underpayment or short levy of duties or dues. In such event the proper course 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”.

On the question of burden of proof the case of Shiabdeen and others vs. Attorney General 78-79 2 SLR 1 Hon Wimalachandra J. held:

“the state should have established that fact beyond reasonable doubt as in a criminal case. The reason for such a heavy burden is that the Customs Ordinance is a penal enactment which imposes severe penalties on those who violates its provisions, and that any breach of such provisions must be established beyond reasonable doubt.” In this case the learned Judge followed the same principle applied by Basnayake J. in the case of Attorney General V. Lebbe Thamby and Others 61 NLR 254.

The Customs Department does not seem to have discharged the burden of proof beyond reasonable doubt and establish intent to defraud.

I do agree with the views expressed by learned President's Counsel on the following matters. Section 47 which occupies a page in the Customs Ordinance would be too prolix to include in this judgment since all those involved in customs litigation need to be fully aware of its introduction to the statute. Its application and to apply Section 47 with the misdescription as in Section 50 does not appear to be in order.

The other two cases that need to be kept in mind is the cases of Valible Lanka (Pvt.) Ltd ... and Fonterra Brands Lanka (Pvt.) Ltd....

In Valible Lanka (Pvt.) Ltd. vs. Director General of Customs 2008 BLR at pg 47 & 48.. Sripavan J. held:

“It is the established rule in the interpretation of statutes levying taxes and duties, not to extend the provisions of the statutes by implicating beyond the clear import of the language used or to enlarge their operation in order to embrace matters not specifically pointed out. In case of doubt, the provisions are construed most strongly against the State and in favour of the citizens”.

In Fonterra Brands Lanka (Pvt.) Ltd. v. Director General of Customs and another 2008 BLR at pg. 346..

“It is a well known and well recognized rule that in a statute imposing a pecuniary burden, if there is a reasonable doubt with regard to the construction of any burdensome provision, the construction most beneficial to the subject is to be adopted”..

I have also studied with much care and enthusiasm the written submissions tendered to this court on behalf of the 3rd Respondent. I have noted the contents and submissions that the excess balm calculated at 771.318 kg. for which no cess was paid the procedure adopted was to do an inventory of the number of bottles and multiply it by the nett content of the bottles to arrive at the conclusion of excess bottles. Section 123 of the Ordinance reads thus:

It shall be lawful for the Director General to authorize the officers of customs to take samples of goods for the purpose of ascertaining the duties payable on such goods or for any other purpose relative to the customs, and such samples shall be accounted for in such manner as the Director General may direct”.

In all the above facts and circumstances of this case, we are of the view that this is a fit case to exercise the writ jurisdiction of this court. We direct the issue of a Writ of Certiorari and Mandamus as per sub paras (ii) and

(iv) of the prayer to the Petitioner. As regards sub para (iv) we direct that the mandamus should be issued as in the alternative prayer in sub para (iv).

Application allowed as above without costs.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL