IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Republic of Sri Lanka

CA Writ Application No. 87/2012

Dialog Axiata PLC
475, Union Place
Colombo 2

Petitioner

Vs.

1. The Director General of Customs
   Customs House
   No.40 Main Street
   Colombo11

2. M.Ravindra Kumar
   Deputy Director of Customs
   Customs House
   No.40 Main Street
   Colombo11

Respondents

BEFORE : **K.T. CHITRASIRI, J. &**

L.T.B. DEHIDENIYA, J.

COUNSEL : Sanjeewa Jayawardena P.C. with Suren De Silva for the Petitioner

F.Jameel Snr. D.S.G. for the Respondents

ARGUED ON : 03.03.2015, 17.03.2015 and 21.07.2015

WRITTEN SUBMISSIONS FILED ON : 15.05.2015 by the Petitioner

: 11.05.2015 by the Respondents

DECIDED ON : 02.09.2015

K.T.CHITRASIRI, J.

Petitioner Company amongst its other businesses also engaged in the business of importing High Speed Down Link Packet Access (HSBPA) Universal Serial Bus (USB) Stick Modem. (hereinafter referred to as the USB Modem) It is a Multi Media Wireless Terminal, imported from Huawei Technologies Company Limited in China. This USB Modem is used as a data receiving and transmitting device when connected to a personal computer or to a laptop. It could be used as a data storage device as well.

Petitioner company received its first such consignment from China in or about 10th February 2009. When it was cleared from the Customs in Sri Lanka the Petitioner Company had used the HS Code 8517.62.90 for the purpose of clearing the same from Customs. Accordingly, the custom duties had been paid having applied the said HS Code 8517.62.90. It is evident by the documents marked P5, P6, P7, P8, P9 and P10 (CUSDEC). The aforesaid five (05) consignments of goods had been arrived and cleared during the period February 2009 to November 2009.

During a post clearance check that took place in the month of November 2009, Customs Officials had realized that there had been an

incorrect entry of the classification of the HS Code. They were of the opinion that the applicable HS Code was HS 8517.62.10, as the USB Modem that was subjected to importation could be used as a transmission apparatus as well. As a result, the Air Cargo consignment of the Petitioner that had been cleared under HS Code 8517.62.90 in the CUSDEC marked as P11 was detained by the Air Cargo Division of the Sri Lanka Customs.

The officers of the Air Cargo Division suggested the classification HS 8517.62.10 as the correct HS code but it was disputed by the Petitioner Company. If the goods are classified under HS 8517.62.10, it was also a requirement to have an Import Control License under the Sri Lanka Telecommunications Act No. 25 of 1991. Accordingly, the Petitioner Company obtained that license too from the Telecommunications Regulatory Commission for the two Air Cargo consignments that was detained by the Customs.

Thereafter the matter was referred to the "D" Branch of the Sri Lanka Customs seeking for clarification. They classified the goods under HS 8517.12.10. By the "D" Branch, as it was the practice; the matter was referred to the Nomenclature Committee as well for its opinion. Nomenclature Committee too decided that the correct classification code should have been HS 8517.62.10.

Subsequently, Sri Lanka Customs decided to hold an inquiry under Section 8 (1) of the Customs Ordinance since the Petitioner Company has disputed the decision to have the goods classified under HS 8517.62.10. The said inquiry commenced on the 18th March 2010 and it was conducted by S.

Rajendran, Deputy Director of Customs. The second date of the inquiry was 6th May 2010 and it was taken up for inquiry for the third time on the 12th November 2010 on which date witness S.Luckman commenced his evidence reading his statement recorded on 24.02.2010. Fourth date of inquiry was the 13th January 2011 and the 5th date of inquiry was held on the 14th March 2011. After a lapse of more than 11 months, the 6th date of inquiry was held and it was on the 16th February 2012. Thereafter, for the seventh time the inquiry was re-commenced on the 29th February 2012.

When the inquiry was commenced on the 16th February 2012 there had been a change of the Inquiring Officer. M. Ravindra Kumar, Deputy Director of Customs [2nd respondent] succeeded as the Inquiring Officer in place of Rejendran. On the 29th of February 2012, the said Inquiring Officer Ravindra Kumar having taken up the matter for the second time made an order, making a demand in terms of Section 18 (2) and Section 47 of the Customs Ordinance from the Petitioner Company to pay the deficiency calculated as a result of the alleged misclassification.

Being aggrieved by the aforesaid decision of the Sri Lanka Customs, the Petitioner Company came to this Court seeking to have a mandate in the nature of a Writ of Certiorari quashing the aforesaid Order of the 2nd Respondent made on the 29th February 2012. The Petitioner Company also sought to have Writs of Prohibition against the Respondents restraining them from enforcing the aforesaid Order made on the 29th February 2012.

The grounds on which the aforesaid mandate was sought are found in Paragraphs 35, 36 and 37 in the Petition filed in this Court. One of the

matters urged by the petitioner company in those 3 paragraphs is that it is *ultra vires* for the Inquiring Officer to make a demand for a short levy under Section 18(2) of the said Ordinance. Having stated so, the Petitioner has contended that the impugned decision becomes *ultra vires* since it was made in breach of the principles of natural justice. The Petitioner Company has reiterated that the Order that is being impugned had been made without affording the Petitioner an opportunity to defend itself or being heard before making the impugned Order namely, demanding the petitioner company to pay a short levy in terms of Section 18(2) and Section 47 of the Customs Ordinance.

Section 18 (2) of the Customs Ordinance provides to recover short levies while Section 47 of the Customs Ordinance empowers the Director General to forfeit the goods in question. The manner in which forfeiture of goods could be made has been comprehensively discussed in the case of **Toyota Lanka Private Limited and Another vs. Jayatillake and Others.** [2009 (1) SLR at Page 276] In that decision it was held 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 levy of duties or dues. In that decision, it was further held that the proper course in such an event would be a requirement for payment of the amount due prior to the delivery of goods or recovery of the dues under Section 18 of the Customs Ordinance.

The aforesaid decision in Toyota Lanka Private Limited was pronounced on the 30th June 2008. Therefore, by the time the dispute in this case has arisen, the Customs authorities were well aware of the law that should have been applied in this instance. Despite having such knowledge

of the law, customs authorities have decided to hold an inquiry under Section 8 of the Customs Ordinance though the purpose of such an inquiry was to recover a short levy under Section 18 of the Customs Ordinance. The said inquiry was commenced on the 18th of March 2009. It is important to note that the Petitioner Company was not informed on that inquiry date whether it was to make an order under Section 18 or to deal with under Section 47 of the Customs Ordinance.

However, the inquiry proper had been commenced on the 12th November 2010 after receiving the decision of the Nomenclature Committee on the question of the applicable HS Code. Thereafter, witness S.Luckman gave evidence on behalf of the Department of Customs by reading his statement recorded during the investigation. On the previous day, namely on the 13th of January 2011, S. Rajendra having adjourned the inquiry for the first of February 2011, requested everyone who were present on that date to be present on the next date. On that subsequent date, the inquiry had been again postponed due to an objection been taken on behalf of the petitioner to an answer given by the witness. At that point of time too, the prosecution had made a request to permit them to lead further evidence of the witness Luckman.

Accordingly, it is seen that the inquiry had been postponed for the next date with the view of continuing with the evidence of the witness who gave evidence on the 13th January 2011. Both the prosecution and the defence were then looking forward to see the recalling of the witness who gave evidence on the previous day. However, on the 16th February 2012, the new Inquiring Officer had decided not to call that witness for further evidence. The said witness had not even being cross-examined by then.

Indeed the petitioner had been prevented from cross examining the witness due to the Order made by the 2nd respondent on 29.02.2012. At this stage, it is pertinent to note that had the inquiry was taken up on the 14th of March 2011, before the former Inquiring Officer namely S. Rajendra then the manner in which the inquiry was proceeded may have taken a different line.

Thereafter, the 2nd respondent Ravindra Kumar adjourned the inquiry for the 16th February 2012. On that date, without proceeding with the matter in the way that it was conducted by the previous inquirer, the new inquiring officer has called upon the prosecuting officer whether he has anything further to add or to explain in relation to the issue of classification. The defence Counsel appearing on behalf of the petitioner too was given the opportunity to explain as to the issue in respect of the classification code. Both parties have made short submissions in respect of the classification code. Thereafter the inquiry was re-fixed for the 29th of February 2012 and on that date the inquiring officer made his observations and decided to make a demand from the Petitioner Company to pay the deficiency arising due to the alleged misclassification of the HS Code.

Upon considering the above circumstances, it is clear that the Petitioner Company was not given an opportunity to call their witnesses or at least to cross examine the last witness who was giving evidence. Looking at the entirety of the proceedings, it is seen that the inquiry had commenced with the intention of having a full pledged inquiry by calling witnesses from both sides. However, the inquiring officer who was appointed for the second time had thought it fit to deliver the order without giving an opportunity for the Petitioner Company even to explain their position. The

Petitioner Company was not given an opportunity to make submissions even on the report submitted by the Nomenclature Committee upon which decision that the inquiring officer has come to his findings.

Foregoing circumstances show that the 2nd respondent inquiring officer has abruptly brought the inquiry to a halt and has decided the issue finally. Such circumstances show that the Inquiring Officer had failed to given an opportunity for the Petitioner Company to present its case before he arrived at the final decision. Such attitude of the inquiring officer clearly amounts to violation of the rule *audi alteram partem.*

The said rule of *audi alteram partem* is one of the basic concepts of the principle of natural justice. The expression *audi alteram partem* implies that a person must be given an opportunity to defend himself. To ensure that these rights are respected, the deciding authority must give the opportunity to prepare and present evidence and also to respond to arguments presented by the opposing party. When conducting an investigation in relation to a complaint, it is important that the person being complained against is advised of the allegations as possible and given him/her the opportunity to reply to the allegations. This principle is *sine qua non* of every civilized society. It includes the right to present the case and evidence and that important right seems to have not been afforded to the petitioner in this instance.

In the celebrated case of ***Cooper v. Wandsworth Board of Works*** *[(1863) 143 ER 414]*, the aforesaid rule was thus stated:

> *"Even God did not pass a sentence upon Adam, before he was called upon to make his defence."*

Since then, this principle of *audi alteram partem* has been developed and was highly recognized by judicial forums and has been extended it to cover administrative decisions as well. As there is large number of authorities in this connection, I will refer only to two decisions as those two decisions have been pronounced in connection with the inquiries held under Section 8 of the Customs Ordinance.

In **Geeganage V. Director General of Customs**, [2001 (3) SLR 179] it was thus held by Upali Gunawardena J.

> *"I should further note that the amount of time that a party has been given to reply to the case, if any, against him is a significant factor. Even if details of the opposing case are provided there is undoubtedly a need for the petitioner to have been given a proper opportunity to respond to the show cause notice against him and to prepare a case. The 2nd respondent should have conducted himself with more humanity, if not with anything else. The requirements of a fair hearing are not, of course, rigid or fixed but will vary with the circumstances of the case. In this case before me there were substantial differences (on the evidence) on issues of fact because the petitioner challenged the prosecution case, almost, in its entirety. The differences on vital issues could not be resolved without an adequate opportunity being given to the petitioner to respond to the prosecution case by means of either oral or written submissions. The petitioner's counsel in his written submissions had impressed on me that the petitioner was given less than 24 hours to file, submissions in writing. The 2nd respondent ought not have treated the application for reasonable time to file written submissions, on behalf the petitioner, so lightly and so flippantly. In fact, the petitioner was given less than six daylight hours to file submissions. One somehow, gets an uneasy - feeling that it was done in that way to make it impossible for the petitioner to accomplish the task. The 2nd respondent (inquirer) had made the direction on 17. 07. 1996 around 5 P M. that the written submissions of the petitioner*

be filed by 12 noon on the very next day on which latter day itself the order of the 2nd respondent had been delivered imposing the oppressive penalty.

And it is as clear as clear can be that the 2nd respondent had expected the petitioner's counsel to conjure up submissions in consequence of which the apparent opportunity given to file submissions became, a. veritable sham. The situation that arose in this case is somewhat reminiscent of what happened in R. v. Thames Magistrates' court ex P. Polemis. ***[1974 (2) All ER 1219]*** *The facts are: the captain of a ship received summons to the Magistrate's court on the day that his ship was due to sail. He was charged with discharging oil into the Thames. An adjournment was refused by the court and he was found guilty and fined. The conviction was quashed because the defendant had not been allowed sufficient time to respond. The principle involved in both cases, broadly speaking, is identical. In the case before me, as in the case above - mentioned, the suspect had not been given a reasonable opportunity to prepare the defence. Lord Widgery asserted in the Polemics case, cited above, that in such circumstances requirements of justice would not have satisfied the test of being manifestly seen to be done, whatever the jurisdiction. It is to be observed that when the petitioner failed to submit written submissions, the 2nd respondent promptly delivered the order finding the petitioner guilty which makes me wonder whether the 2nd respondent was not predisposed in favour of the prosecution, if, in fact, he had not pre judged the case.*

I cannot think of a more befitting quotation with which to crown or conclude what I had said in this order on the aspect of bias and more particularly of a party's right to respond to the case against him than an excerpt from Lord Denning's Hamlyn Lectures which were said to be made somewhere in 1949. To quote: " I know of nothing which is so essential to a right decision as to have the benefit of arguments which put forward all that can be said on each side..... every tribunal should give a reasoned decision, just as the ordinary courts

do. Herein lies the whole difference between a judicial decision and an arbitrary one....."

As Lord Musthill observed in the Doody case to which I referred in my judgment in CA861/98 the "standards of fairness are not immutable". The demands of fairness will be determined by the context of the decision. In the circumstances, in the unusually short period of time that was given to the petitioner to prepare and make submissions in writing, my own view is that no worthwhile representations could have been made on his behalf unless, perhaps, the counsel was gifted with exceptionally great mental ability which species is a rarity. Almost all the points considered in this judgment had not been raised by the counsel. But, what I have done is not without precedent.

J. L. Jowell (Professor of Public Law in the University of London) had said that where Lord Denning could be faulted was in taking points of law or fact as the basis of his judgment when these had not been argued and when an opportunity was not given to controvert the points involved. But the points I have considered in this judgment are all matters borne out by the record and are incontrovertible facts or immutable principles which are so well known, such as that in a case of this sort charge has to be proved beyond a reasonable doubt.

The procedure adopted by the 2nd respondent is contrary to natural justice. Under the judicial review procedure, the court is not concerned with the merits of the case, whether the decision was right or wrong, but whether it was lawful or unlawful. In the words of Lord Brightman: "judicial review is concerned not with the decision, but with the decision - making - process" - Chief Constable of the North Wales, Police v. Evans. ***[1982 (1) WR 1155 at 1173]"***

In the case of **Anton Clement Thomas Dawson and another V. Neville Gunwardena** [CA Writ application 77/2012 C A Minutes dated 16.03.2012] Sri Skandaraja J.held as follows:

> *"It appears that the inquiry is to ascertain what are the charges that could be framed in the given circumstances. So it is left to the Customs Officials to ascertain facts either from any witness or from suspects to frame a charge and* ***thereafter to explain the charge to the suspect and to give him an opportunity to call for evidence.*** *But at the end of leading evidence if the Customs find, that there cannot be charge framed, the inquiry will come to an end at that point."*
> (emphasis added)

Having discussed the importance of the rule *audi alteram partem*, I will now advert to one other issue that was raised by the learned DSG. It is the issue as to the nature of the inquiry held by the 2nd respondent. Learned DSG strenuously submitted that the inquiry held by the 2nd respondent is inquisitorial and not adversarial in nature. Accordingly, she contended that the duty cast upon the inquiring officer in this instance was to ascertain and determine whether the statements made to customs are true or not since there are no two sides disputing a matter. Therefore, her contention was that it is not necessary to follow strictly, the rule of *audi alteram partem* in this instance since the inquiry held by the 2nd respondent is inquisitorial in nature.

In support of her contention she has relied upon the decision in **Rican Lanka (Pvt) Limited V. Director General of Customs and others**. [CA Writ 440/2008 C A minutes dated 18.06.2012] In that decision it was held

that an inquiry under Section 8, adopting inquisitorial process is being conducted merely to ascertain whether or not any customs offence has been committed. She, in support of her contention has referred to the decision in **Dias V. DGC** [2001 (3) SLR 281] as well.

In the case of Rican Lanka (Pvt) Limited V. Director General of Customs, (supra) it was held thus:

> *"It has to be noted that the inquiry held in this respect was under Section 8 of the Customs Ordinance and the said inquiry is an inquisitorial process, whereby the inquiring officer, with the assistance of the Prosecuting Officer, called for witnesses and evidence which led to ascertain whether there is any Customs offence committed by the Inquiring Officer to charge anyone who committed or concerns with any Customs offence.*

In the case of Dias V. Director General of Customs, (supra) J.A.N. De Silva P/CA (as he was then) held that the notice of seizure issued is not a final determination. The scheme of the Customs Ordinance recognizes and gives an opportunity to the person whose goods are seized to vindicate himself at a subsequent inquiry.

In all those decisions referred to by the learned DSG, it had been held that it is the inquisitorial system that is being adopted at the inquiries held in terms of Section 8 of the Customs Ordinance. However, at the same time, it must be noted that the inquiries referred to in those cases had been held to ascertain whether there was any offence being disclosed under the Customs Ordinance and not to determine the issue finally. In the event the inquiring officer decides that an offence under the Customs Ordinance is disclosed then an inquiry proper is to be commenced and the person who is alleged to

have committed the offence will be given an opportunity for him to present his/her case at a subsequent inquiry.

Circumstances of this case are different to the facts of those cases referred to by the learned DSG. In this instance, no further opportunity was given for the petitioner company to present its case since an order to pay the short-levy had already been imposed on the petitioner company. As mentioned hereinbefore, the 2nd respondent having declined to record further evidence of the witness who was giving evidence previously, has made order directing the petitioner company to pay a short levy calculated in accordance with the HS Code 8517.62.10. That decision of the 2nd respondent made on the 29.02.2012 has become final and conclusive.

Against such a backdrop, it is clear that the inquiry held in this instance was quite different to the inquiries referred to in the decisions cited by the learned DSG. In short, the persons involved in the cases referred to by the leaned DSG had the opportunity of presenting their cases at a subsequent stage whereas in this instance the petitioner company had no such chance since the impugned order has become the final order made at the inquiry held by the 2nd respondent.

At this stage, it is also pertinent to note that the right of a party to be heard cannot be taken away merely because the process of the inquiry is by way of inquisitorial system. Irrespective of the fact that the process of the inquiry under Section 8 is inquisitorial or adversarial, right to present the case of the person, who is subjected to the inquiry should be ensured.

As mentioned before, the petitioner company was not given the opportunity to explain its position or at least to show cause as to its liability. Hence, it is clear that the 2nd respondent has violated the rule of *audi alteram partem* in this instance. In the circumstances, the impugned order made by the 2nd respondent becomes *void*. Accordingly, a mandate in the nature of a writ of certiorari is issued quashing the order dated 29.02.2012 of the 2nd respondent. As a result, the petitioner is entitled to have the remaining reliefs prayed for in the petition dated 26.03.2012 as well. There will be no costs.

Application allowed.

JUDGE OF THE COURT OF APPEAL

L.T.B.DEHIDENIYA, J

I agree.

JUDGE OF THE COURT OF APPEAL