

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

In the matter of an application for a
Writ of Certiorari under Article 140
of the constitution of the Democratic
Socialist Republic of Sri Lanka.

E.A.P.Network (Private) Ltd.,
676, Gall Road, Colombo 3.

Petitioner.

C.A. Writ Application
No.18/2009

1. Director General of Customs
Sri Lanka Customs, Colombo 1.
2. K.A.Dharmasena
Inquiry Officer,
Asst. Director of Customs,
Sri Lanka Customs Colombo -1.
3. The Board of Investment of
Sri Lanka, Level 26
West Tower, World Trade Centre,
Echelon Square, Colombo -1.

Respondents.

BEFORE : Deepali Wijesundera J., and
M.M.A. Gaffoor J.,

COUNSEL : Uditha Egalahewa Pe with
R.Ammen for the Petitioner
Neil Unambuwa DSG for the
Respondents.

ARGUED ON : 27.01.2016

DECIDED ON : 02.11.2015

M.M.A. Gaffoor J.

The petitioner is company incorporated under the laws of Sri Lanka having engaged in the management and operation of television stations under a license issued to it by the Ministry of Media and Communication in conjunction with the frequencies obtained from the Telecommunication Regulator Commission.

The main issue in this application is whether the licenses fee for the telecast of the TV programs recorded in tapes imported by the petitioner is liable for custom duty.

It is an admitted fact that the tapes in question were imported by the petitioner through the carrier company DHL . At the inquiry the accountant of the petitioner Company Mr. B.U.A. Mendis admitted that the tax invoice P 14 b was issued to the petitioner Company to reimburse the Customs duty and other levies paid by DHL on Petitioners behalf. On the other hand, the condition no I of the Air Waybill is that the DHL may perform any of the activities mentioned in that condition on shipper behalf. Sub paragraph (1) of condition I is that: complete any document, amend any product or service code and pay any duties or taxes required under any law or regulation. It is clear that the carrier company is only acting on petitioners behalf as an agent. The importation of the goods was done by the petitioner. The agent cannot be held responsible for the offence of the principal because he is acting on the instructions of the principal. As per condition 12 of the Air Waybill all information provided by the shipper or his representative is presumed to be correct and the carrier is indemnified against losses incurred on incorrect information.

Section 52 of the Customs ordinance imposes the forfeiture on a false declaration. The section reads:

52 where it shall appear to the officers of the custom that the value declared in respect of any goods according to section 51 is a false declaration, the goods in respect of which such declaration has been made shall be forfeited together with the package in which they are contained. Where such goods are not recoverable, the person making such false declaration shall forfeit either treble the value of such goods or be liable to a penalty of one hundred thousand rupees , at the election of the Collector of customs.

The petitioner argues that this section applies only to the person who is “ making such a false declaration” and it is the currier company that has made the false declaration and not the Petitioner Company. Even though the penal statues need strict interpretation, as I pointed out earlier, the currier company acted on Petitioners behalf and on the presumption that he was provided with the accurate information. The tax invoice P 14 b confirms that the petitioner has to reimburse the amount paid by the currier. By giving false declaration, it is not the currier that was benefitted but it was the petitioner. In these circumstance, though the declaration was made by the currier, it was made on behalf the petitioner on the information provided by the Petitioner.

Therefore it is the petitioner who has provided the declaration in the instant case.

The next issue is whether the declaration is a false declaration. Section 51 of the Customs Ordinance provides for the declaration of the value of the articles imported. The section read thus;

51 In all cases when the duties imposed upon the importation of articles are charged according to the value thereof, the respective value of each such article shall be stated in the entry together with the description and quantity of the same, and duly affirmed by a declaration made by the importer or his agent on a form of such size and colour as may be specified by the Director - General by notification published in the Gazette , and such value shall be determined in accordance with the provisions of schedule E, and duties shall be paid on a value so determined.

Article 8 (1) c of the schedule E of the Customs (Amendment) Act no. 02 of 2003 is the relevant section for the instant case. The article reads;

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods.

(a) the following to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods:-

(i) commissions and brokerage except buying commission

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question

(iii) the cost of packing whether for labour or materials

(b) the value apportioned as appropriate of the following goods and services when supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value

has not been included in the price actually paid or payable.

(i) materials components parts and similar items incorporated in the imported goods:

(ii) tools dies, moulds and similar items used in the production of the imported goods:

(iii) materials consumed in the production of the imported goods :

(iv) engineering development art work and design work and plans and sketches undertaken elsewhere than in Sri Lanka and necessary for the production of the imported goods.

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued to the extent that such royalties and fees are not included in the price actually paid or payable:

Indian Supreme Court in the case of M/s Associated Cement Companies Ltd. V. Commissioner of Customs (A.I.R. 2001 Supreme Court 1. 862 at page 871) referring to a technical advice held that “ it is true that the appellants had wanted was technical advice or information technology. Payment was to be made for this intangible asset. But the moment the information or advice is put on a media, whether paper or diskettes or any other thing, that what is supplied becomes chattel. It is in respect of the drawings, designs etc. which are received that the payment is made to the foreign collaborators. It is these papers or diskettes etc. containing technological advice which are paid for and used. The foreign collaborators part with them in lieu of money, it is, therefore, sold by them as chattel for the use by Indian importer. The drawings, designs, manuals etc. so received are goods on which customs duty could be levied”

In the same case at page 876 Court referred to the case of Advent Systems Limited V. UNISYS Coporation 925 F 2d 670 (3rd Cir 1991) where it has been held that computer software was a “good”.

In the case of BC Computres Ltd. V. U.S.Wickramasinghe and others C.A. Application No.674/07 (Writ) C.A.Minutes 29.01.2013 Sriskandarajah,J. cited the Supreme Court

judgment in the case of S.C. Appeal 43 of 2004 S.C. Minutes 27.04.2006 where it has been held;

1. *All tangible goods, wares and merchandise imported in to Sri Lanka are subject to Customs duty;*

- 11 *Discus, magnetic tapes and CDs containing software imported in to Sri Lanka constitute wares or merchandise;*

- 111 *The focus of the Customs investigation is on software imported as part of the tangible carrier media, such as discs, tapes and CDs;*

- 1V *In ascertaining the value of such goods, the value of such tangible component thereof, is taken in to account in conformity with the express provisions laid down in 2.8.2 of the Schedule (e) of the Customs Ordinances regarding intellectual property. (The said Schedule has now been repealed by Customs (Amendment) Act No. 2 of 2003 and;*

- V *It must be noted that the said taxation is tangible unit and not intangible component, per se, and the relevant item is taken as a whole for the purpose of valuation.*

Sriskandarajah J. further held that “the transacted value between the parties are clearly borne out by their licence agreement”

In the instant case the questioned tapes contain television programs which are to be telecasted in Sri Lanka. These television programs become "goods" or "articles" and attract the custom duty.

As per article 8(1)c of the Customs (Amendment) Act, the licence fee or the loyalty fee has to be included in to the value of goods. The Petitioner Company has agreed with the owners of the television programs to pay a licence fee for telecasting the programs so imported. In fact the audit of the custom has found that the Petitioner has paid a licence fee to the owners. The law provides that the licence fee shall be added to the price of the goods.

These TV Programs imported to Sri Lanka for the purpose of telecasting them in the Petitioners TV channel. The Petitioners do not sell the TV program directly to the general public, but they earn money by telecasting these programs to the public. Therefore, though it is not a direct sale, it amounts to a sale.

The Petitioner knowingly that they are paying a licence fee, they misdirected the customs through their agent, the carrier company, by declaring that the value of the goods imported is only the value of the carrier media. It is a false declaration.

The Petitioner is guilty of making a false declaration to customs on the importation of the tapes containing television programs. The prerogative writ being a discretionary remedy, the petitioner should come to Court with clean hands.

Biso Menika vs. Cyril de Alwis and others [1982] 1 Sri L R 368

A person who applies for the extra-ordinary remedy of Writ must come with clean hands and must not suppress any relevant facts from Court. He must refrain from making any misleading or incorrect statements to Court.

In Halsbury Laws of England – Vol. II, 3rd Ed. page 71, para 128 it is stated “on an application for relief the utmost good faith is required and if the applicant in his affidavit suppress the material facts the Court will refuse an Order without going into the merits.”

In the instant case the Appellant's hands were not clean from the beginning. He has given a false declaration to the Customs to defraud the custom duty. It is worse than non disclosure of material facts. The Court cannot grant a discretionary remedy in such a situation.

Under these circumstances, we dismiss the application subject to costs fixed at Rs.100000/=.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera,J.

I agree.

JUDGE OF THE COURT OF APPEAL