

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

**In the matter of an application for
mandate in the nature of Writ of
Mandamus under and in terms of Article
140 of the Constitution of The
Democratic Socialist Republic of Sri
Lanka**

609 Manufacturers (Pvt) Ltd,
11/7, Dharmapala Mawatha,
Beddagana,
Pitakotte.

Petitioners

CA/WRIT/242/2015

Vs,

1. L.K.G.Gunawardena,
The Commissioner General Of
Excise,
Head Office,
Department of Excise,
34,W.A.D. Ramanayake Mawatha
Colombo-02.
2. Hon. Ravi Karunanayake
The Minister of Finance,
Ministry of Finance,
The Secretariat,
Colombo-01
3. Dr.R.H.S.Samaratunga
Secretary of the Ministry of
Finance,
Ministry of Finance,
The Secretariat,
Colombo-01

Respondents

**Before : Vijith K. Malalgoda PC. J (P/CA) &
S. Thurairaja PC. J**

**Counsel : Nihal Jayawardene PC with Malik Hannan for the Petitioners
Ms. Farzana Jameel PC, Addl.S.G with Sumathi Dharmawardane, DSG for the
1st, 2nd and 3rd Respondent**

Argued on : 04.10.2016

Written Submission on: 22.11.2016, 23.11.2016

Order on : 15.12.2016

Order

S.Thurairaja PC J

The Petitioner has filed this Application with the ultimate object of obtaining from this Court mandates in the nature of a *writ of Certiorari and Mandamus* directing the 2nd Respondent to quash and rescind the Excise Notification No. 937 and re-validate the Excise Notification No. 878

The facts relevant to this Application are as follows. The Petitioner is a manufacturer and exports air freshener and detergent using local raw materials (cinnamon oil, citronella oil and pine oil) with the aid of rectified spirits as a solvent base of the raw materials.

For the above said purpose the Petitioner had been granted specific approval by the Minister of Finance to obtain the required quantity of rectified spirits enabling the manufacturing process of the article which the Petitioner exports. The Commissioner General of Excise by the direction of the Deputy Secretary to the Treasury was authorized to release the excisable-rectified spirits once the exporter (Petitioner) tenders a bank guarantee sufficient to cover the excise duty in respect of the rectified spirit required for the manufacturing of the article exported.

The Petitioner in the petition had categorically stated that, the required procedure prescribed in Gazette Notification 878 published in Gazette Notification No. 1386/31 dated 1st April, 2005 was adhered to by the Petitioner. However, it is further stated that, the predecessor of the 1st Respondent had requested the Petitioner to pay the excise duty in cash at the point of delivery for obtaining the rectified spirit for the manufacturing purpose of the exported article.

In order to resolve the arisen issue, the Petitioner had resorted to administrative measures by way of representation made to the Department of Excise and the Attorney General's Department in April 2011 where the Attorney General had advised the then Commissioner General of Excise to permit the Petitioner to have the benefit of the Excise Notification No. 878 where it was viewed as been a more fair and acceptable regulation by contrast to the subsequently enacted Excise Notification No. 937 which was unfair and discriminatory.

In order to succeed in an excise duty concession, it is vital to define a "rectified spirit", although a clear definition is not provided under the Excise Ordinance.

"A rectified spirit", is a highly concentrated ethanol which has been purified by means of repeated distillation, a process that is called rectification and is unfit for human consumption. This rectified spirit is an excisable commodity and was obtained by the Petitioner for the manufacture process of its exported article (air freshener). The Petitioner claims that due to the use of this rectified spirit in the manufacturing process, the Petitioner's export article is "liquor."

Clause 3 (2) of the Memorandum of Association of the Petitioner company provides the objects for which the company was established and permission was obtained from the Sri Lanka Export Development Board to export air freshener. However, the Petitioner obtained the original license under Excise Notification No. 386 which covers the manufacture, bottling and sale of "**medicinal preparations containing alcohol**" and is not in relation to liquor but solely for the preparation of medicinal products. Further, as per the Excise Ordinance *Liquor* includes, "**spirits of wine, spirit, wine, toddy, beer and all liquid consisting of or containing alcohol; also any substance which the Minister may declare to be liquor for the purposes of this Ordinance**" (emphasis added). Therefore, the Petitioner has deviated from the scope for which the original license was granted, for air freshener is not medicinal nor is it liquor simply because it requires rectified spirit/alcohol for the manufacturing purpose.

The Petitioner company however, is of the view that it has been subjected to an illegal exercise of administrative discretion when it was required to adhere to the Excise Notification No. 937 instead of the Excise Notification No. 878

In fact the true question is, whether the Minister and/or the Commissioner General of Excise had exercised the vested discretion in an illegal manner which would entail unreasonableness, a principle better known as the "*Wednesbury unreasonableness*."

Lord Greene M.R. in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223** stated, at page 229, "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in **Short v Poole Corporation (1926) Ch 66, 90, 91** gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

As Lord Scarman explained in R v Secretary of State for the Environment ex p. Nottinghamshire CC (1986) AC 240 at 249 according to the Wednesbury case, the Court will intervene to quash the decision reached by an authority, where it concerns a circumstance in which the said authority had exercised its discretion illegally.

Therefore, a ground for judicial review concerns unreasonableness, where the statutory power vested in an authority has been abused.

Excise Notification No. 878 issued purportedly under Section 25 of the Excise Ordinance by the Commissioner General of Excise stated that, “the **export of liquor** in respect of licenses issued by him under Section 12 of the Excise Ordinance, shall be permitted by the payment of excise duty or on furnishing a bond or bank guarantee for export if such article on a duty free basis and such bond or guarantee shall be acceptable to the Commissioner General of Excise.” (Emphasis added)

The Petitioner therefore, is not an exporter of liquor but rather an exporter of air freshener. Simply due to the fact that the said export article contains liquor as an ingredient of manufacture does not necessarily make the article liquor. Thus, the Petitioner cannot seek to quash and rescind the Excise Notification No. 937 and re-validate the Excise Notification No. 878, when in fact the Petitioner does not come within the purview of the latter Notification.

Excise Notification No. 937 was issued by the Minister under Section 22 of the Excise Ordinance which stated that, “export of undenatured, potable and bottled liquor meant for sales.” The statutory definition of “**denatured**” means “**effectually and permanently rendered unfit for human consumption.**” Therefore, it is common sense to state that, “undenatured” to mean fit for human consumption. Thus, it is preposterous to state that, the Petitioner’s export article (air freshener) is liquor and is fit for human consumption when it is obviously contrary.

Due to this reason, there has been no abuse of discretionary power vested in the Minister and the Commissioner General of Excise to give rise to judicial intervention as the Petitioner lacks *locus standi* to quash and impugned the Notification No. 937 by a *Writ of Certiorari*, when the Petitioner falls outside the scope of both Excise Notification Nos. 878 and 937

However, an issue lies whether there is legitimate expectation. Legitimate expectation arises to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. It is based on the principles of natural justice and fairness, and seeks to prevent authorities from abusing power.

In the case of R (Majed) v London Borough of Camden (2010) J.P.L. 621 the Court of Appeal held that a local planning authority’s statement of community involvement gave rise to a legitimate expectation that the consultation set out in it (which was additional to the statutory minimum under the relevant procedural order) would be carried out. The Court

held that legitimate expectation came into play when there was a promise or a practice to do more than that which was required by statute and that the statement of community involvement issued by the local authority was a paradigm example of such a promise and a practice.

However, if the Petitioner did not expect any form of concession then there exists no expectation that can be protected by the doctrine of legitimate expectation and further, cannot expect compliance by an authority as observed in the case of **R v Secretary of State for National Heritage ex p. J Paul Getty Trust (1997) EU LR 407**

For a legitimate expectation to arise, it must be founded in law. It cannot arise out of an extension or favour given by a person who is in the first place had no authority to grant the same. In **G.M. Nimalsiri v Col P.B.J. Fernando and others** (SCFR 256/2010 – SC minute 12.09.2015), justice Priyantha Jayawardene with justices Ekanayake and Wanasundera agreeing, held that an administrative error cannot be legitimate expectation. ‘in order to succeed in an application for legitimate expectation, the expectation must be legitimate. Mistakes, decisions based on erroneous factual data or illegality cannot be the basis for a legitimate expectation. A similar view was expressed in **Vasana V Incorporated Council of Legal Education and others (2004) 1 SLR 154**

In **Ceylon Agro-Industries Limited V Director General of Customs and others** (CA 622/2009, CAM 14.02.2011) held that representation made outside or in excess of powers cannot be the basis of any expectation. Thus when the making of a representation is outside the power of the maker, in law, nothing flows from it. There can be no claim.

In **Tokyo Cement V Director General of Customs and others** 2005 [BLR] 24, the Supreme Court held inter alia that:

- (a) A representation not permitted by law is *ultra vires*,
- (b) A legitimate expectation has to be taken in the sense of an expectation that will be protected by law,
- (c) The position with regard to the effect of a representation made by public authorities as to the manner in which the terms of the power reposed in such authority which the provisions of a statute will be applied will be as follows-
 - i. A statement formally published by an appropriate authority being a statement within the terms of the power reposed in such authority- which would be *intra vires*, may safely be regarded as binding.
 - ii. When the representation is of is of less formal nature it would be binding only if it is made pursuant to a more detailed inquiry at which the person subsequently relying on the representation has made a full disclosure as to the transaction. In respect of taxation, a representation to forego revenue will be considered as

binding only if an informed decision to that effect is taken at the appropriate level of the decision making process.

But in the present application, the Petitioner relied upon the authorization obtained initially by letter dated 24th February, 1995 from the Deputy Secretary to the Treasury to the Commissioner General of Excise which stated that, "I shall be glad if you would implement the agreed procedure." Although, such authorization was rather personal than legal in nature.

However, it can be observed that the Petitioner was in reliance on the undertaking made, for in the letter dated 10th June 2010 from the Petitioner to the Commissioner General of Excise, the Petitioner had specifically stated that, "We enjoy the benefits of the said Treasury decision made pertaining to our exports and having acted accordingly, earned approximately US\$ 65 million regularly up to now." The Petitioner goes onto state that, "Therefore, as partners in earning foreign exchange for the development of the Motherland, we request you to kindly consider the above facts and permit us to continue following the directive of the Treasury dated 24.02.1995 to export to the international market." Thus, further establishing that the Petitioner was relying upon the concession awarded in the year 1995.

A doubt has been created whether the decision reached by the Deputy Secretary to the Treasury in the year 1995 is a policy and if so, non-compliance would result unfairness. A policy is a principle of action adopted or proposed by a relevant authoritative body such as by the Government. **"Inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly or contrary to the citizen's legitimate expectation."** [Administrative Law by Wade & Forsyth, 9th edition] (Emphasis added) Such was observed in the case of **Attorney General of Hong Kong v Ng Yuen Shiu (1983) 2 AC 629** and in **R v Home Secretary ex p. Ruddock (1988) 1 WLR 1482**

The decision of the Deputy Secretary to the Treasury is merely a personal arrangement and lacks authority in a legal sense to become a policy. Thus, neither the Minister nor the Commissioner General of Excise is bound by the decision reached by the Deputy Secretary to the Treasury.

However, if the decision was in fact reached within the realms of the discretion of the authority then compliance would be necessary provided it would not conflict with the duties of the authority as it was stated in **Attorney General of Hong Kong v Ng Yuen Shiu (1983) 2 AC 629**

In the case of **Ceylon Agro- Industries Limited v Director General of Customs and Others** (ibid) it was held that, "representations made outside or in excess of powers cannot be the basis of any expectation. Thus, when the making of a representation is outside the power of the maker, in law, nothing flows from it. There can be no claim." Accordingly, a policy

cannot lie where the decision was in excess of the power conferred and in turn a legitimate expectation cannot stand. Further, a *Writ of Mandamus* will not lie where the authority has not acted *ultra vires* by rather on personal grounds.

Thus, the decision per se to allow the Petitioner to benefit under the Excise Notification No. 878 itself was incorrect because the mere use of spirit as a raw material does not mean that the final product (air freshener) is a spirit/liquor. The Petitioner from the inception lacked the scope to enjoy the benefits of such excise duty concession and the Petitioner was aware of such as the Petitioner requested the continuance of the "arrangement" to be entitled to an excise duty concession.

The Preamble of the Excise Ordinance states that, "***An Ordinance to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs.***"

"Liquor" includes "***spirits of wine, spirit, wine, toddy, beer and all liquid consisting of or containing alcohol; also any substance which the Minister may declare to be liquor for the purposes of this Ordinance.***" There exists no contemplation that air freshener will be considered as liquor which is an excisable article. (Emphasis added)

Moreover, the petition made by the Petitioner does not provide that the Petitioner suffered in the hands of unreasonableness due to the failure on the part of the Respondents to uphold the decision made by the Deputy Secretary to the Treasury. Hence, highlighting that there was no legitimate expectation created to begin with. Therefore, in the given circumstances I do not see any legal basis for this Court to issue *Writs of Certiorari and Mandamus* prayed by the Petitioner. Accordingly, the Application is dismissed without cost.

Application disallowed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree,

PRESIDENT OF THE COURT OF APPEAL