

**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*,
Prohibition and *Mandamus* in terms of
Article 140 of the Constitution of the
Republic of Sri Lanka.

RS Importers (Private) Limited,
No: E-3-1, Special Economic Centre,
Dambulla.

PETITIONER

CA (Writ) Application No: 253/2012 Vs.

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. Dr. R.H.S. Samaratunga,
Secretary to the Treasury and,
Secretary to the Ministry of Finance &
Mass Media,
Ministry of Finance & Mass Media,
The Secretariat,
Colombo 01.
3. S.R. Attygale,
Deputy Secretary to the Treasury,
Ministry of Finance & Mass Media,
The Secretariat,
Colombo 01.

4. K.D.N. Ranjith Asoka,
Director General,
Department of Trade and Investment
Policy,
Ministry of Finance & Mass Media,
The Secretariat,
Colombo 01.

- 4A) K.A. Vimalenthirarajah,
Director General,
Department of Trade and Investment
Policy,
Ministry of Finance & Mass Media,
The Secretariat,
Colombo 01.

5. K.A. Chulananda Perera,
Director General of Customs,
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.

- 5A) P.S.M. Charles,
Director General of Customs,
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.
(5A Added Respondent)

6. A. Senanayake,
Additional Director General of Customs,
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.

7. R. Rajendran,
Additional Director General of Customs,
(Corporate),
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.
8. D.A.I. Daranagama,
Additional Director General of Customs,
(Revenue & Services),
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.
- 8A) U. Liyanage,
Additional Director General of Customs,
(Revenue & Services),
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.
(8A Added Respondent)
9. M. Ravindrakumar,
Director of Customs,
Policy Planning & Research Directorate,
Sri Lanka Customs Headquarters,
Charmers Query,
Main Street, No. 40,
Colombo 11.
10. Jayantha Weerasekera,
Director of Customs, Declarations
Sri Lanka Customs Headquarters,

Charmers Query,
Main Street, No. 40,
Colombo 11.

11. Hon. Ravi Karunanayake,
Hon. Minister of Finance,
Ministry of Finance,
The Secretariat,
Colombo 01.

11A) Hon. Mangala Samaraweera,
Hon. Minister of Finance & Mass Media,
The Secretariat,
Colombo 01.
(11A Added Respondent)

RESPONDENTS

Before : A.L. Shiran Gooneratne J.

Counsel : K. Deekiriwewa with L.M. Deekiriwewa, Dr. Kanchana de Silva
and M.K. Herath for the Petitioner.

Dilrukshi Dias, P.C. ASG for the Respondents.

Written Submissions of the Plaintiff filed on: 12/01/2018 & 23/02/2018

Written Submissions of the Respondents filed on: 01/04/2014 & 05/11/2014

Judgment on : 08/06/2018

A.L. Shiran Gooneratne J.

The Petitioner has invoked the jurisdiction of this court, inter alia, to seek a mandate in the nature of writ of Certiorari to quash Gazette No. 1770/26, dated

10th August 2012, marked X2, published in terms of the Special Commodity Levy Act No. 48 of 2007, (sometimes herein after referred to as “the Act”) on the basis that the said Gazette Notification is ultra vires.

All connected applications to this Petition were taken up together as the Petitioners are all similarly circumstanced. Their grievance and cause for complaint are similar and the relief sought from this Court are identical.

The Petitioner, a commodity importer, was subject to levies on clearance of imports in terms of Section 2(4) of the Act. The Act conferred power on the Minister to determine the composite levy to be paid through Gazette Notifications. The Petitioner submits that at the time of submitting the Bill of Entry (CUSDEC), for clearance of his imports, the applicable levy should have been calculated under Gazette Notification No. 1766/35, dated 13/07/2012, marked X4, and not under the impugned Gazette Notification dated 10/08/2012, marked X2. The impugned Gazette Notification marked X2, was published subsequent to Gazette Notification No. 1766/35, dated 13/07/2012, marked X4.

Section 2 and Section 7 of the Act, which are directly relevant to this discussion, are re-produced below in whole and in part, respectively;

Section 2. (1) From and after the date of the coming into operation of this Act, there shall be imposed a levy to be called the “Special Commodity Levy” on certain commodity items which shall from time to time be specified by the Minister by Order published in the Gazette.

(2) The period of validity of every such Order and the rate of the Special Commodity Levy to be imposed in respect of each such specified item, either on ad valorem or specific basis, shall also be specified in the Order.

(3) Every Order made under subsection (1) which is valid for a period of over thirty days, may be amend or varied by adding thereto or removing there from any item or by revising the rates specified therein.

(4) No Order made under subsection (3) may be amend or varied until the expiration of thirty days from the date of the making thereof.

(5) The Special Commodity Levy so imposed shall be a composite levy and during the period any Order published in terms of subsection (1) is in force, no other tax, duty, levy or cess or any other charge imposed in terms of any of the laws specified in the Schedule to this Act, shall be applicable in respect of the commodity items specified in any such Order.

Section 7. Every Order made by the Minister in terms of section 2 and section 5, shall –

(i) be in operation immediately upon the Minister affixing his signature thereto;

(ii) -----

In terms of Section 7 (1) of the Act, every order made in terms of Section 2 and Section 5, becomes operative upon the Minister placing his signature thereto.

Section 2(2) mandates the Minister to specify a period of validity in the said order. The Petitioner argues that in terms of Section 7(1) of the Act, the Minister is restricted to impose a later date as the operative date of the order made in terms of Section 2(2) of the Act and therefore, submits that the operative date of the Act is the date when the Minister affix his signature and the Minister is thereafter not empowered to specify a later date as the operative date.

It is observed that Section 2 (2) of the Act imposes a period of validity to be specified in such order. Section 7(1) of the Act refers to an order made in terms of Section 2(2) of the Act to be in operation immediately after the Minister affix his signature thereto. It is also observed that the word “shall” appear in both Sections 2(2) and Section 7(1), of the Act.

In this background, I will now turn to the main relief prayed for in paragraph (d) to the prayer, where the Petitioner is seeking to compel “the 5th to 10th Respondents to apply the commodity levy order dated 13/07/2012, from the date of making the order, that is from the date the Minister placed his signature on such order, irrespective of the later date, that is 14/07/2012, stipulated by the Minister in the said order -----”

The Petitioner has made reference to Gazette Notification No. 1766/35, dated 13/07/2012, marked X4. The said Gazette Notification was followed by the impugned Gazette Notification No. 1770/26, dated 10th August 2012, marked X2.

In terms of Section 7(1) of the Act, every order made by the Minister in terms of Section 2 and Section 5 shall be in operation upon the Minister placing his signature. The making of the said order would be the date of commencement of the period of validity in terms of Section 2 (4) of the Act. Accordingly, in terms of Section 2(3), the order dated 13/08/2012, made by the impugned Gazette Notification marked X2, dated 10/08/2012, has a validity period of 04 months from the said date as opposed to the order dated 14/07/2012, marked X4, which has a validity period of 03 months.

In terms of Section 2(2) of the Act, the Minister is empowered to specify a time period on the date of making the order. Therefore, Section 2(2) of the Act, can be clearly distinguished from Section 7(1) of the Act, where the Minister affix his signature in the said order, and the operation of the order would commence immediately thereon. Accordingly, the period of validity envisaged in terms of Section 2(4), of the Act would relate to the date of making the order and as such has no relevance to the date of operation of the order. Therefore it is clear that the date of making the said order contemplated by Section 2(4) of the Act would be the commencement of the period of validity and not the operative date of the order as contemplated by Section 7(1) of the Act, which empowers the Minister to specify a later date as the operative date of the order.

Accordingly, the powers exercised by the Minister is clearly within the confines of the Act, and could be distinguished from the decision in *Wasana*

Trading Lanka (Pvt) Ltd. Vs. Director General of Customs and others, which was relied on by the Petitioner, where the relevant Ministers power to set aside a subsequent operative date was curtailed in that instance, by the operation of a successive Act.

The Respondents submit that the validity period from the making of the order as contemplated in terms of Sections 2(3) and 2(4) of the Act, are not mandatory, but are directory through the use of the word “may” instead of “shall”, in the said Sections. The Respondents have drawn attention of Court to several decided cases in support of the above contention.

The Respondents submit that the Court should consider the intention of the legislature by considering all provisions of the Act concurrently. Whilst referring to the preamble of the Act, and in particular Section 5 of the Act, the Respondents submit that the intention of the legislature has been to give the Minister the prerogative of determining the rate of the levy and the period of validity in consideration of the economic conditions of the country.

In the case of *Howard Vs. Bodington (1877) 2 P.D. 203*, Lord Penzance said,

“I believe that as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and

upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.”

Lord Campbell L.C. in the case of *Liverpool Borough Bank Vs. Turner (1860) 2 De G.F. & J. 502*, held that;

“No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislator by carefully attending to the whole scope of the statute to be considered.”

In terms of Section 5 of the Act, the Minister is empowered to waive the special commodity levy, taking into consideration the prevailing economic considerations, for a period of time, specified in such order. Such discretion given to the Minister is strongly suggestive of a situation, where the Minister is empowered to look into divergent considerations which impact economic realities faced by the country. when implementing taxes, duties levies or any other charge on specified commodity items as contemplated in the preamble to the Act.

Therefore, it is my view that the Special Commodity Levy Act, provides for a wider construction of Sections 2(1) and 2(3), to enable the Minister to take account of the existing economic exigencies of the country within the intent of the Act, and not be restricted in any manner. The said contention resonates with good administration, where the Minister is empowered to impose the special commodity

levy on certain commodity items from time to time within the confines of the Act, by an order published in the Gazette. In relation to the period of validity, Sections 2(1) and 2(3) of the Act, use the word “may”, in reference to the 30 day period. In the circumstances, the Court cannot interpret the word “may” provided in Sections, 2(1) and 2(3) of the Act, in isolation or to give a restrictive interpretation. Accordingly I hold, that the discretion used by the Minister in terms of the said provisions have been exercised within his power and the spirit of the enactment.

The Petitioner also challenge the impugned Gazette marked X2, to be in violation of the provisions of the Electronic Transactions Act. The formulation of this argument is baseless and has no merit.

Therefore for the reasons stated above, the Petition is dismissed without costs.

Parties in C.A. (Writ) 241/2012, C.A. (Writ) 242/2012, C.A. (Writ) 243/2012, C.A. (Writ) 244/2012, C.A. (Writ) 245/2012, C.A. (Writ) 246/2012, C.A. (Writ) 247/2012, C.A. (Writ) 248/2012, C.A. (Writ) 249/2012, C.A. (Writ) 250/2012, C.A. (Writ) 251/2012, C.A. (Writ) 254/2012, C.A. (Writ) 255/2012, C.A. (Writ) 256/2012, C.A. (Writ) 263/2012 have agreed to abide by the Judgment delivered in this case. Therefore all applications connected stands dismissed.

JUDGE OF THE COURT OF APPEAL