

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

K. Balasubramaniam,  
No. 24,  
New Chetty Street,  
Colombo 13.  
Petitioner

**CASE NO: CA/WRIT/175/2016**

Vs.

1. Chulananda Perera,  
Director General of Customs,  
Customs House,  
No. 40,  
Main Street,  
Colombo 11.
2. D.R. Luxman,  
Deputy Director of Customs,  
Customs House,  
No. 40,  
Main Street,  
Colombo 11.
3. A.M.A.S. Amarasinghe,  
Assistant Preventive Officer,  
No. 40,  
Main Street,  
Colombo 11.

4. The Attorney General,  
The Attorney General's  
Department,  
Hulftsdrop,  
Colombo 12.  
Respondents

Before: Mahinda Samayawardhena, J.  
Counsel: Nagananda Kodituwakku for the Petitioner.  
Milinda Gunathilake, Senior D.S.G., for the  
Respondents.

Decided on: 16.01.2019

Samayawardhena, J.

The petitioner imported a consignment of Ayurvedic products including "*Thalsukiri*" (Palm Sugar) in March 2016. Admittedly, he did not misdescribe the goods in terms of quantity, description, value etc. in the Cusdec<sup>1</sup> and Commercial Invoices presented for the Customs for the purpose of clearing the goods.<sup>2</sup> Nevertheless, he was imposed a penalty (as opposed to a payment of a levy) in a sum of Rs.2.5 million under section 47 of the Customs Ordinance, No. 17 of 1869, as amended, because, according to the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the petitioner, in order

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<sup>1</sup> Cusdec stands for Customs Declaration/Bill of Entry

<sup>2</sup> Vide paragraph 13 of the Statement of objections of the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

to avoid payment of cess (tax) imposed on commodities under HS Code<sup>3</sup> 17029090, which is the correct HS Code for “*Thalsukiri*”, fraudulently declared an incorrect HS Code, i.e. 17022000, in the Cusdec. The petitioner filed this application seeking to quash the said order of the 2<sup>nd</sup> respondent marked P4 by way of certiorari and to compel the 1<sup>st</sup> and/or the 2<sup>nd</sup> respondent to refund the said amount so recovered.

It is noteworthy that notwithstanding the impugned order sought to be quashed was admittedly made by the 2<sup>nd</sup> respondent, only the 1<sup>st</sup> and 3<sup>rd</sup> respondents filed objections to the application of the petitioner.

The petitioner was without legal assistance when the said penalty was imposed. Just five days after the said penalty was paid<sup>4</sup>, he, through an Attorney-at-Law, tendered an Appeal marked P6 under section 2 of the Customs Ordinance to the 1<sup>st</sup> respondent—The Director General of Customs—to revise the said order stating *inter alia* that he was not given a fair hearing and there is no specified Commodity Classification for *Thalsukiri* and therefore there is a confusion about the correct HS Code for the said commodity.

This appeal has not reached a finality, as according to the respondents, the petitioner was not co-operative.<sup>5</sup> Conversely, the petitioner states that as the Director General of Customs referred the appeal to the very same officers whom the petitioner

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<sup>3</sup> HS Code stands for Harmonized Commodity Description and Coding System.

<sup>4</sup> Vide P5.

<sup>5</sup> Vide R3, R4.

complained to have abused their authority to deny him a fair hearing, he came before this Court seeking relief.

It is common ground that there is no specified Commodity Classification for *Thalsukiri*. Therefore (as the petitioner has informed the Director General of Customs by P6) the importers including the petitioner had imported *Thalsukiri* under “*Other*” category of which the HS Code is 17029090. However, after the Government introduced cess on the commodities falling into that HS Code (17029090) from 2013, they have successfully<sup>6</sup> started importing *Thalsukiri* (Palm Sugar) under the category “*Maple Sugar and Maple Syrup*” of which the HS Code is 17022000, until the petitioner was, for the first time in March 2016, accused of for committing a fraud by declaring an incorrect Commodity Classification Code for *Thalsukiri* in the Cusdec.<sup>7</sup>

On what basis do the respondents state that the correct HS Code for *Thalsukiri* is 17029090? That is on the basis that the petitioner has, one time before the introduction of cess, imported *Thalsukiri* under that HS Code as seen from Cusdec marked R17, and he also admitted in his statement R12 that the correct HS Code for *Thalsukiri* is 17029090. That, in my view, cannot be the yardstick to decide the correct HS Code for *Thalsukiri*.

The contention of the learned Senior Deputy Solicitor General for the respondents that the correct HS Code for *Thalsukiri* is 17029090 was proved to be unacceptable by P8 tendered by the

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<sup>6</sup> The fact that it was successfully done is corroborated by paragraphs 22(viii), 22(xv) of the statement of objections of the 1st respondent, R19, paragraph 30 of the written submissions of the respondents dated 10.07.2018.

<sup>7</sup> As seen from R1 and R2, after imposing the penalty on the petitioner, the respondents have charged another importer with the same offence.

petitioner with his counter affidavit. According to P8—Classification Ruling obtained by the petitioner after filing this application from the Deputy Director of Customs for the Director General of Customs—the correct HS Code for *Thalsukiri* is 17029029 and not 17029090. As seen from P9, the petitioner has thereafter imported a consignment of *Thalsukiri* under that HS Code (i.e. 17029029) under Cusdec No.13800.<sup>8</sup>

However, the respondents are not prepared to accept that the correct HS Code for *Thalsukiri* is 17029029<sup>9</sup> although they admit that Nomenclature Committee is the correct place to refer to when there is a question of Commodity Classification<sup>10</sup>, and P8 Classification Ruling on *Thalsukiri* has been given by the Nomenclature Committee.<sup>11</sup> That means, at the moment there are three HS Codes for *Thalsukiri*: (a) HS 17029090—according to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents<sup>12</sup>, and also according to the petitioner at one point of time<sup>13</sup>; (b) HS 17022000—according to the petitioner from 2004<sup>14</sup>; and (c) HS 17029029—according to the Deputy Director of Customs for the Director General of Customs.<sup>15</sup> It is therefore clear that the correct HS Code for *Thalsukiri* is yet to be decided. Hence the impugned order made

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<sup>8</sup> P9 has been tendered with the written submissions of the petitioner dated 10.10.2018 with a copy to the Hon. Attorney General as seen from the Registered Postal Article Receipt attached therewith.

<sup>9</sup> Vide paragraphs 40, 41 of the written submissions of the respondents dated 10.07.2018 and paragraphs 27-29 of the further written submissions of the respondents dated 12.10.2018.

<sup>10</sup> Vide paragraph 23 of the written submissions of the respondents dated 10.07.2018.

<sup>11</sup> Vide paragraph 27 of the further written submissions of the respondents dated 12.10.2018.

<sup>12</sup> Vide P4.

<sup>13</sup> Vide R17.

<sup>14</sup> Vide R19.

<sup>15</sup> Vide P8.

on the premise that the correct HS Code for *Thalsukiri* is HS 17029090 is erroneous on the face of the record.

In the cases cited by the learned Senior DSG for the respondents in his written submissions, there was no issue regarding the correct HS Code as in this case. Hence those cases are distinguishable.

In that backdrop, the principal submission made by the learned Senior DSG for the respondents on the footing that “*this is not a commodity classification dispute but a dispute regarding the declaration of a wrong HS Code*” is unsustainable as there is no certainty about the correct HS Code. No sooner had the petitioner obtained legal assistance than he put the Commodity Classification in issue.<sup>16</sup>

The argument that the petitioner before the cess was introduced once imported *Thalsukiri* under HS Code 17029090 and therefore that is the correct HS Code is baseless.

Let me now deal with the broader question of denial of a fair trial. In response to what the petitioner states that he was denied by the 3<sup>rd</sup> respondent to have legal representation at the inquiry<sup>17</sup>, the 3<sup>rd</sup> respondent admits that the petitioner met him and requested that he be permitted to have legal representation to defend his case, but thereafter without legal representation gave P3 stating that he was prepared to pay the penalty.<sup>18</sup> It is

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<sup>16</sup> Vide P6 and P7.

<sup>17</sup> Vide paragraphs 14 and 15 of the petition.

<sup>18</sup> Vide paragraph 14 of the statement of objections of the 3<sup>rd</sup> respondent and the corresponding paragraph of the affidavit.

unbelievable, in my view, that the petitioner gave P3 voluntarily without any inducement or promise.

In the unique facts and circumstances of this case, I am inclined to accept the submission of the learned counsel for the petitioner that the petitioner was not given a fair hearing before the impugned order was made by the 2<sup>nd</sup> respondent. In fact, it is the position of the petitioner that he was never produced before the 2<sup>nd</sup> respondent by whom the impugned order was made against him,<sup>19</sup> which has not been denied by the respondents up to now. That probably may be the reason why the 2<sup>nd</sup> respondent decided not to file objections to the petitioner's application. If a fair hearing has been denied, that is a good ground to quash the impugned order by certiorari. (*Multipurpose Co-operative Society, Madawachchiya v. Kirimudiyanse* [2011] 1 Sri LR 135)

For the aforesaid reasons, I quash the order contained in P4 by way of writ of certiorari and compel the 1<sup>st</sup> respondent by way of mandamus to refund the sum of Rs. 2.5 million recovered from the petitioner. The 1<sup>st</sup> respondent shall pay a sum of Rs.25,000/= as costs of the action to the petitioner.

Judge of the Court of Appeal

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<sup>19</sup> Vide Appeal made to the 1<sup>st</sup> respondent marked P6.