

**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 Democratic Socialist Republic of Sri Lanka

**CA (Writ) Application No: 69/2016**

Deepak Kumar Krishnakumar Vasanthi,

carrying on a partnership business under the name, style and firm of Lal & Sons No. 5, Kotalawala Place, Colombo 4.

**PETITIONER**

Vs.

1. Hon. Ravi Karunanayake,  
Minister of Finance.

1A. Hon. Mangala Samaraweera,  
Ministry of Finance & Mass Media,  
The Secretariat, Colombo 1.

2. Dr. R.H.S. Samaratunga,  
Secretary to the Treasury and  
Secretary to the Ministry of Finance,

3. S.R. Attygale,  
Deputy Secretary to the Treasury,

2<sup>nd</sup> and 3<sup>rd</sup> Respondents at

Ministry of Finance & Planning  
The Secretariat, Colombo 1.

4. K.A. Chulananda Perera,  
Director General of Customs.

4A. P.S.M. Charles,  
Director General of Customs,

4<sup>th</sup> and 4A Respondents at  
Sri Lanka Customs Headquarters,  
Charmers Quay,  
No.40, Main Street, Colombo 11.

5. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

#### RESPONDENTS

**Before:** Arjuna Obeyesekere, J

**Counsel:** K. Deekiriwewa with L.M. Deekiriwewa, Dr (Ms) M.K.Herath and Dr. Kanchana De Silva for the Petitioner

Milinda Gunatilake, Senior Deputy Solicitor General for the Respondents

**Argued on:** 1<sup>st</sup> September 2018

**Written Submissions:** Tendered on behalf of the Petitioner on 28<sup>th</sup> January 2019 and 24<sup>th</sup> May 2019.

Tendered on behalf of the Respondents on 30<sup>th</sup> April 2019

**Decided on:** 07<sup>th</sup> November 2019

**Arjuna Obeyesekere, J**

The Petitioner filed this application on 3<sup>rd</sup> March 2016. By an amended Petition dated 2<sup>nd</sup> May 2016, the Petitioner has sought *inter alia* the following relief:

- a) A Writ of Certiorari to quash the Order made by the Minister of Finance annexed to the petition marked 'X2', whereby a surcharge of Rs. 20 was imposed on a kilogram of B' Onions, in terms of Section 10A of the Customs Ordinance;
- b) A Writ of Prohibition prohibiting and/or restraining the Director General of Customs, the 4<sup>th</sup> Respondent from implementing and/or enforcing the Order 'X2';
- c) A Writ of Mandamus compelling the 4<sup>th</sup> Respondent to release or refund the amount of money that Sri Lanka Customs has collected during the period 22<sup>nd</sup> September 2015 – 8<sup>th</sup> October 2015, in terms of the Order 'X2'

The issue that arises for the determination of this Court in this application is whether the Minister of Finance acted *ultra vires* the powers conferred on him in terms of Section 10A(1) of the Customs Ordinance when he imposed a surcharge on B' Onions while an Order made under the Special Commodity Levy Act No. 48 of 2007 (the SCL Act) subsisted in respect of B' Onions.

Section 10 is the principal section in the Customs Ordinance that provides for the imposition and levying of Customs duties.<sup>1</sup> In addition to the duties that may be collected in terms of Section 10, the Government, from time to time has imposed other taxes, levies and charges under different laws, on goods imported into the Country. Thus, depending on the item that has been imported, an importer becomes liable for the payment of customs duties, excise duty, Port and Airport levy, Value Added Tax, cess etc. The SCL Act was introduced in 2007 to simplify the tax structure on imported goods. This is reflected in the preamble to the SCL Act which provides that it is an “Act to provide for the imposition of a composite levy on certain specified commodity items in lieu of the amount chargeable on such commodity items as a tax, duty, levy, cess or any other charge in order to overcome the complexities associated with the application and administration of multiple taxes on such specified commodity items ...”

Section 2 of the SCL Act reads as follows:

- (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,*

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<sup>1</sup>Section 10 of the Customs Ordinance: “The several duties of customs, as the same are respectively inserted, described, and set forth in figures in the table of duties (Schedule A) shall be levied and paid upon all goods, wares, and merchandise imported into or exported from Sri Lanka”.

*either on ad valorem or specific basis, shall also be specified in this Order.*

- (3) *Every Order made under subsection (1) which is valid for a period of over thirty days, may be amended or varied by adding thereto or removing therefrom any item or by reversing the rates specified therein.*
- (4) *No Order made under subsection (3) may be amended 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,**<sup>2</sup> shall be applicable in respect of the commodity items specified in any such Order."*

The Petitioner states that an Order in terms of Section 2(1) of the SCL Act was published in Extraordinary Gazette No. 1931/7 dated 7<sup>th</sup> September 2015, annexed to the petition marked 'X3', whereby a composite levy was imposed on B' Onions for a period of 6 months from 8<sup>th</sup> September 2015, subject to the provisions of Section 2(3) of the Act. According to the Schedule contained in the said Order 'X3', the Special Commodity Levy for B' Onions was Rs. 10.00 per kilogram. As per the dates stipulated in 'X3', the composite levy imposed in

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<sup>2</sup> The Schedule to the Special Commodity Levy Act consists of the following Acts: The Finance Act, No. 11 of 2002 (Part 1); The Value Added Tax Act, No. 14 of 2002; The Finance Act, No. 5 of 2005 Part 1); **The Customs Ordinance**; The Sri Lanka Export Development Act, No. 40 of 1979; The Excise (Special Provisions) Act, No. 13 of 1989.

terms of the said Order was meant to be in force until 8<sup>th</sup> March 2016, unless it was amended or varied in terms of Section 2(3).

While the Order 'X3' was in force, the 1<sup>st</sup> Respondent, the Minister of Finance had published an Order under Section 10A of the Customs Ordinance, in Extraordinary Gazette No. 1933/15 dated 22<sup>nd</sup> September 2015.

Section 10A(1) of the Customs Ordinance, which was introduced by the Customs (Amendment) Act No. 83 of 1988, reads as follows:

*"In addition to any duties leviable under this Ordinance, the Minister may, with the approval of the Cabinet of Ministers, by Order published in the Gazette, levy a surcharge on the customs duty payable on such imported goods as are specified in such Order, at such rates and for such periods as are specified in such Order, if he deems it expedient in the interest of the national economy to do so."*

The said Order, annexed to the petition marked 'X2' reads as follows:

*" By virtue of the powers vested in me under Section 10A of the Customs Ordinance (Chapter 235) as amended by Act No. 83 of 1988, I, Ravi Karunanayake, Finance Minister of the Democratic Socialist Republic of Sri Lanka with the approval of the Cabinet of Ministers, do by this order impose in respect of the commodity item specified in Column 1 of the Schedule hereto a Surcharge in the interest of the national economy, at the rates specified in the corresponding entries in Column II of that Schedule from 22<sup>nd</sup> September, 2015 till 08<sup>th</sup> October, 2015."*

Thus, it is clear that the surcharge imposed by 'X2' under Section 10A(1) of the Customs Ordinance was made while a composite levy existed for B'Onions, by virtue of 'X3' made under the SCL Act.

The Petitioner is an importer of commodities including B' Onions, and had imported and cleared two consignments of B' Onions during the period that the Order 'X2' was in force – i.e. on 22<sup>nd</sup> September 2015 and 8<sup>th</sup> October 2015 – as evidenced by the Customs Declarations annexed to the petition marked 'X8A' and 'X8B'. It is not in dispute that the Petitioner paid the Special Commodity Levy in terms of 'X3' and the surcharge in terms of 'X2'.

The complaint of the learned Counsel for the Petitioner to this Court is that the said Order 'X2' is *ultra vires* and contrary to the provisions of the SCL Act, for the following reasons:

- a) No other tax can be imposed on any good under the Customs Ordinance while an Order made under Section 2(1) of the SCL Act subsists;
- b) The Order 'X2' was made whilst the Order 'X3' under the SCL Act was still in force and 'X2' is therefore contrary to the provisions of Section 2(5) of the SCL Act;
- c) The approval of the Cabinet of Ministers has not been sought prior to the making of the Order 'X2', even though Section 10A(1) requires the Minister to obtain the approval of the Cabinet of Ministers prior to the making of such Order.

Elaborating further, the learned Counsel for the Petitioner submitted that the provisions of Section 2(5) of the SCL Act makes it clear that the Special Commodity Levy must be charged '*in lieu of*' any tax, duty, levy or cess or any other charge imposed by the laws specified in the Schedule to the Act and that the Director General of Customs is *estopped* from collecting any other tax, duty, levy or cess or any other charge imposed by the laws specified in the Schedule including the Customs Ordinance, while an Order made under Section 2(1) of the SCL Act is in force. It is therefore the contention of the learned Counsel for the Petitioner that the Respondents have contravened the provisions of Section 2(5) which explicitly states that "***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.***"

The learned Counsel for the Petitioner submitted further that the procedure laid down in Section 10A(2) of the Customs Ordinance to obtain approval of Parliament for the Order 'X2' has not been followed by the Respondents.

Provisions with regard to the tabling before Parliament an Order made under Section 10A(1), and obtaining the approval of Parliament for such Order are set out in Section 10A(2) of the Customs Ordinance, which reads as follows:

*"Every Order made by the Minister under subsection (1) shall come into force on the date of such Order. Every such Order shall be published in the Gazette and shall, as soon as may be after its publication in the Gazette be tabled in Parliament, Parliament may by resolution revoke any Order*



*made by the Minister under this section within sixty days of the publication of such Order in the Gazette, and in the computation of such period of sixty days no account shall be taken of any period during which Parliament stands prorogued or dissolved. Where any such Order is revoked any sum paid in pursuance of such order shall be refunded."*

It is the contention of the learned Counsel for the Petitioner that the said Order 'X2' was presented to the Cabinet of Ministers only on 2<sup>nd</sup> December 2015, and was approved by Parliament only on 27<sup>th</sup> January 2016. The Petitioner therefore states that the Order 'X2' has not been published with the prior approval of the Cabinet of Ministers nor has it been approved by Parliament within 60 days of its publication and therefore, the Petitioner is entitled to the refund of the sums of money paid in terms of 'X2', in respect of the two consignments imported by the Petitioner.

The learned Senior Deputy Solicitor General appearing for the Respondents submitted that the 1<sup>st</sup> Respondent did not act illegally when he imposed a surcharge in terms of Section 10A(1) while an Order under Section 2(5) existed. He presented the justification for 'X2' under three grounds.

His first ground is based on the premise that apart from the provisions of Section 10 which provides for the imposition of Customs duties, the Customs Ordinance does not provide for the imposition of any other tax, duty, levy, cess or any other charge. He therefore submitted that a surcharge is not a **duty** imposed under the Customs Ordinance but is something that is imposed **in addition** to Customs duty, and hence a surcharge does not come within Section 2(5).

This Court must observe that for the same reason – i.e. the Customs Ordinance not providing for the imposition of *any other charge* other than Customs duty in terms of Section 10 – the words, '*any other charge*' in Section 2(5) of the SCL Act cannot be a reference to a provision in the Customs Ordinance, and therefore a surcharge cannot be categorized as a charge. This Court is in agreement with the said submission and is of the view that a surcharge is neither a duty nor a charge, and therefore a surcharge under Section 10A is not included in the Special Commodity Levy, and is not prohibited by Section 2(5).

The second ground advanced by the learned Senior Deputy Solicitor General was that in any event, given its nature and the purpose for which it is enacted, the surcharge in terms of Section 10A(1) is not a 'charge' and therefore does not fall within the scope of Section 2(5) of the Special Commodity Levy Act and thus cannot be said to be in violation of Section 2(5).

Elaborating in this regard, he submitted that the SCL Act has been enacted to '*overcome the complexities associated with the application and administration of multiple taxes*', or in other words, to simplify the collection of revenue by combining multiple taxes into a composite levy. On the contrary, a surcharge under Section 10A is effected when the Minister is of the view that it is expedient in the interest of the national economy to do so. He therefore submitted that the purpose of 'X2' and the objective it seeks to achieve is different to that of 'X3', and that the objective sought to be achieved by Section 10A is outside the objective sought to be achieved by the imposition of a composite levy through the SCL Act.

In support of his argument that the Order 'X2' has been issued by the Minister of Finance in the interest of the national economy, the learned Senior Deputy Solicitor General drew the attention of this Court to the memorandum dated 21<sup>st</sup> September 2015 submitted by the Director General of Trade and Investment Policy to the 1<sup>st</sup> Respondent, marked 'R1', which reads as follows:

“ ආනයනික බොම්බයි එනු සඳහා අධිකාරයක් පැනවීම

01. 2007 අංක 48 දරන විශේෂ වෙළඳ භාණ්ඩ බදු පනත යටතේ ආනයනික බොම්බයි එනු කි.ග්‍රෑමයට රු.10 ක්ව පැවති බද්ද 2015.09.07 දින සිට එම අනුප්‍රමාණයෙන්ම නැවතත් දිරිස කරන ලදී (පිටු අංක 01 හා 02). 2007 අංක 48 දරන විශේෂ වෙළඳ භාණ්ඩ බදු පනතේ විධි විධාන පරිදි යම් භාණ්ඩයක් මත බදු පනවා දින 30 ක් යන තුරු එය සංශෝධනය කිරීමට නීතිමය වශයෙන් හැකියාවක් නොමැත.
02. එහෙත් දේශීය බොම්බයි එනු අස්වැන්න ලැබෙමින් පැවතීම සැලකිල්ලට ගෙන, බොම්බයි එනු සඳහා පනවා ඇති රු. 10 ක විශේෂ වෙළඳ භාණ්ඩ බද්ද දේශීය වගාකරුවන් ආරක්ෂා කිරීමට ප්‍රමාණවත් නොවීම සලකා බලා කඩිනම් ක්‍රියාමාර්ගයක් ගත යුතුව ඇත. මේ පිළිබඳව කෘෂිකර්ම අමාත්‍යාංශයේ ලේකම්ද දුරකථනයෙන් දන්වා සිටි අතර, බදු මුදල බොම්බයි එනු කි.ග්‍රෑමයකට රු. 20/- කින් වැඩි කරන ලෙස අද දින ඉල්ලා සිටින ලදී. ඒ අනුව ආනයනික බොම්බයි එනු කි. ග්‍රෑමයකට රු. 20/- ක අධිකාරයක් රේගු ආඥා පනත යටතේ පැනවීම සුදුසු බවට නිරීක්ෂණය කරමි.
03. මේ අයුරින්ම විශේෂ වෙළඳ භාණ්ඩ බද්ද වෙනස් කළ නොහැකි අවස්ථාවකදී ඒ වෙනුවට අධිකාරයක් 2010 වර්ෂයේදී ද අර්භාපල් ආනයනයට නීතිපති උපදෙස් මත ක්‍රියාත්මක කරමින් පනවා ඇති බවට පුර්වාදර්ශයක් තිබේ (පිටුව 03 හා 04).

04. ඒ අනුව මෙම පුර්වාදර්ශය ක්‍රියාත්මක කරමින් දේශීය බොම්බයි එනු ගොවියාට සාධාරණ මිලක් ලබා ගැනීමට සහ ජාතික අවශ්‍යතාවය සලකා රේගු ආඥා පනත 10 (අ) වගන්තියේ නීතිමය විධිවිධාන පරිදි, ආනයනික බොම්බයි එනු කි.ග්‍රෑමයකට රු. 20/- ක අධිකාරයක් පැනවීමට සකස් කරන ලද ගැසට් නිවේදනය මුදල් අමාත්‍යතුමාගේ අත්සන සඳහා නිර්දේශ කර කාරුණිකව ඉදිරිපත් කරමි.”

The approval of the 1<sup>st</sup> Respondent to the said recommendation appears on 'R1' itself, and steps have been taken on the very next date to publish the Order 'X2', thereby demonstrating that urgent action was required to avert the crisis referred to in the said Memorandum.

The 1<sup>st</sup> Respondent, by way of a Cabinet Memorandum dated 2<sup>nd</sup> December 2015, marked 'R1', has apprised the above factual circumstances that prompted him to publish 'X2', and obtained the approval of the Cabinet of Ministers for the imposition of the said surcharge.<sup>3</sup>

The material placed by the Respondents clearly establish that 'X2' was published by the Minister in the interest of the national economy, and more specifically for the purpose of enabling the Sri Lankan producers of B'Onions to have a fair price in the local market. In the absence of this position being contradicted by the Petitioner, this Court is of the view that the Minister acted within the powers conferred on him in terms of Section 10A(1) of the Customs Ordinance and the said order cannot therefore be considered as being *ultra vires* the powers conferred on the Minister by Section 10A(1).

<sup>3</sup> The Cabinet Memorandum annexed to the Statement of Objections reads as follows: "In accordance with the provisions of the Special Commodity Levy Act, No. 48 of 2007, a levy imposed on any commodity could not be amended until a period of 30 days from the date of imposition. In consideration of receiving the harvest of local Big Onions to the market, the special commodity levy of Rs. 10 per Kg imposed on Big Onions was not adequate to safeguard the local growers. Having taken this situation into account, this Gazette Notification No. 1933.15 of 22.09.2015 was issued to levy a surcharge of Rs. 20 per kilogram on B' Onions from 22.09.2015 to 08.10.2015 under the Section 10 of the Customs Ordinance, as a swift action."

The final ground relied upon by the learned Senior Deputy Solicitor General was that the necessity to revise the Special Composite Levy either upwards or downwards may arise at any time, and that the Government must be able to react in order to protect the national economy. He submitted that according to Section 2(3) of the SCL Act, a composite levy imposed on a specified commodity can only be amended after thirty days. During these thirty days, the Act does not provide for a mechanism for making any amendments to the said Composite levy. An exception to this is contained in Section 5 of the Act which reads as follows:

- (1) *Notwithstanding the provisions of section 2, the Minister may, where he is of the opinion that in view of the prevailing economic considerations that it is expedient so to do, by Order published in the Gazette waive for a period of time to be specified in such Order, the Special Commodity Levy chargeable under section 2 in respect of any specified item.*
  
- (2) *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.*

It is the contention of the learned Senior Deputy Solicitor General that Section 5 provides for a reduction of the taxes via a waiver of the Composite levy, where *prevailing economic considerations* require such a course of action, but

that the SCL Act does not contain a provision to increase the Special Commodity Levy, if the interest of the national economy requires an increase in price. He submitted that the necessity to include such a provision in the SCL Act did not arise as Section 10A of the Customs Ordinance already provided such a mechanism.

This Court is of the view that the legislature could not have only contemplated a situation where the interest of the national economy would require a waiver of the Composite levy, without contemplating a situation where the interest of the national economy would require an increase. This Court is therefore in agreement with the submission of the learned Senior Deputy Solicitor General that such a situation was intentionally not contemplated by the SCL Act, since a mechanism to impose a surcharge already existed by virtue of Section 10A of the Customs Ordinance.

This Court is therefore in agreement with the submission of the learned Senior Deputy Solicitor General that the imposition of a surcharge of Rs. 20 per kilogram of B' Onions in terms of Section 10A while an Order in terms of Section 2(1) subsists, is not a violation of the provisions of Section 2(5). Any other interpretation of Section 2(5) would not allow for a pressing issue affecting the national economy of the country to be addressed during those thirty days during which the Composite Levy is in force.

It is common ground that the Order 'X2' was tabled in Parliament on 26<sup>th</sup> January 2016, as stated in the Order Paper of Parliament, marked 'X7' and that it was subsequently approved by Parliament on 27<sup>th</sup> January 2016. This is borne out by the letter dated 28<sup>th</sup> January 2016 marked 'R2' issued on behalf

of the Secretary General of Parliament. This Court therefore observes that by the time this application was filed on 3<sup>rd</sup> March 2016, the Cabinet of Ministers had granted its approval for 'X2', and 'X2' had been approved by Parliament. It is in this background that the learned Senior Deputy Solicitor General took up the position that the Petitioner is guilty of laches in that there is considerable delay in invoking the jurisdiction of this Court, and that this application must be dismissed *in limine*.

The necessity for this Court to consider the said submission arises in view of the aforementioned submission of the learned Counsel for the Petitioner that there have been irregularities in the procedure followed by the Respondents.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay, and where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Mandamus.

In Biso Menika v. Cyril de Alwis<sup>4</sup> Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

*"A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by*

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<sup>4</sup>[1982] 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19<sup>th</sup> June 2019].



*the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver..... The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay..... An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed.” (emphasis added)*

In Seneviratne v. Tissa Dias Bandaranayake and another<sup>5</sup>, the Supreme Court, advertent to the question of long delay, held as follows:

*“If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus subveniunt,<sup>6</sup> and for other reasons refuses to assist those who sleep over their rights and are not vigilant.”*

In Issadeen v. The Commissioner of National Housing and others<sup>7</sup> Bandaranayake J, dealing with a belated application for a Writ of Certiorari held as follows:

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<sup>5</sup> [1999] 2 Sri LR 341 at 351.

<sup>6</sup> For the law assists the watchful, (but) not the slothful.

<sup>7</sup> [2003] 2 Sri LR 10 at pages 15 and 16.



*“It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding ‘a good and valid reason’ for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy”.*

Sharvananda, J<sup>8</sup> in Biso Menike’s case went on to consider if an application for a writ should be dismissed on account of delay where the act complained of is an illegality, and held as follows:

*“When the Court has examined the record and is satisfied the Order complained of is **manifestly erroneous or without jurisdiction** the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, **unless there are very extraordinary reasons to justify such rejection**. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction.”* (emphasis added)

The following passage from Lindsey Petroleum Co., Vs. Hurd was also referred to in Bisomenike’s case:<sup>9</sup>

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<sup>8</sup> Supra; page 379.

<sup>9</sup> (1874) L.R., 5 P.C 221 at 239.

*“Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy.”<sup>10</sup>*

The above judgments clearly illustrate four important matters, although not necessarily in a particular order. The first is that an application for a Writ must be filed without delay. The second is that where there is, on the face of the application, a delay, such delay must be explained to the satisfaction of Court. The third is that delay can be ignored, if the act complained of is manifestly illegal. The fourth is the nature of the acts that have taken place during the commission of the act complained of and the filing of action.

This Court will now consider the relevant dates in this application, in order to see whether the submission of the Respondents has any merit.

The Order 'X2' was published on 22<sup>nd</sup> September 2015 and was in force until 8<sup>th</sup> October 2015. The Petitioner imported his first consignment of B' Onions on 22<sup>nd</sup> September 2015 and the second consignment on 8<sup>th</sup> October 2015. Thus, when the Petitioner submitted his Customs Declarations marked 'X8' and the surcharge in terms of 'X2' was imposed on the said goods on 22<sup>nd</sup> September 2015, the Petitioner became aware of the said surcharge. The Petitioner has not offered any explanation in his petition as to why he did not immediately challenge 'X2'. The Petitioner thereafter, without any complaint, paid the surcharge for the second consignment on 8<sup>th</sup> October 2015, as borne out by 'X8A'. Once again, the Petitioner has not offered any explanation as to

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<sup>10</sup> Supra; page 378.

why he did not think it fit to challenge the imposition of the surcharge at that time, or soon thereafter.

The delay in invoking the jurisdiction of this Court becomes even more significant when one considers that during the period 8<sup>th</sup> October 2015 and 3<sup>rd</sup> March 2016, the approval of the Cabinet of Ministers had been obtained,<sup>11</sup> and the Order has been approved by Parliament,<sup>12</sup> thereby validating 'X2'.

The Petitioner has failed to challenge the validity of the said Order 'X2' when it was operative, or prior to it being approved by the Cabinet of Ministers and Parliament, and filed this application only on 3<sup>rd</sup> March 2016. This Court is of the view that any person who is aggrieved by any decision of a public authority must invoke the jurisdiction of this Court at his earliest, and in any event, without inordinate delay. In this application, the Petitioner has invoked the jurisdiction of this Court 5 ½ months after 'X2' came into force, 5 months after he paid in terms of 'X2', and 5 months after the impugned Order ceased to have effect. The Petitioner has failed to offer any explanation for such delay.

This Court is therefore satisfied that there is considerable delay in filing this application. The Order 'X2' is not manifestly illegal, and has been approved by the Cabinet of Ministers and Parliament, at least a month prior to the filing of this application. In the said circumstances, this Court is in agreement with the submission of the learned Senior Deputy Solicitor General that the Petitioner is guilty of laches, and is not entitled to any relief from this Court.

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<sup>11</sup> The Cabinet Memorandum is dated 02<sup>nd</sup> December 2015.

<sup>12</sup> 27<sup>th</sup> January 2016.

For the sake of completeness however, this Court would like to consider the two complaints of the Petitioner that the procedure laid down in Section 10A has not been complied with.

The learned Counsel for the Petitioner submitted that Section 10A requires the Minister to obtain the approval of the Cabinet of Ministers prior to the publication of the Order. This Court, having examined Section 10A(1), and being mindful that the said Order is made only where the Minister deems it expedient in the interest of the national economy, and considering the urgent situation that prevailed when 'X2' was published, is of the view that the approval of the Cabinet of Ministers is not a condition precedent to the publication of an Order under that section. The legislature could not have intended it to be so, as the whole purpose of Section 10A was to provide a mechanism to address a matter of national interest. Even if it was, by the time the Petitioner invoked the jurisdiction of this Court, the Cabinet of Ministers had approved the said Order. Hence, the delay in invoking the jurisdiction of this Court would in any event have disentitled the Petitioner to any relief.

The next complaint of the learned Counsel for the Petitioner is that Section 10A(2) requires the approval of Parliament to be obtained within 60 days of its publication. This Court must state that there is merit in this argument, and that the Respondents appear to be in breach of this requirement. However, the fact of the matter is that in terms of Article 148 of the Constitution<sup>13</sup>, it is Parliament that has full control over public finance, and 'X2' has been approved by Parliament, prior to the filing of this application. While this Court

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<sup>13</sup> Article 148 reads as follows: 'Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law'.

has the power to strike down 'X2' inspite of Parliamentary approval, this Court is of the view that this is not a fit case where the discretion of this Court should be exercised in favour of the Petitioner, for two reasons.

The first reason of course is the delay in invoking the jurisdiction of this Court. The second reason is the submission of the learned Senior Deputy Solicitor General that the Petitioner is a commercial importer of commodities and that no evidence has been placed before this Court that he suffered any loss as a result of the imposition of the surcharge or that he was prejudiced in any manner. This Court observes that the Petitioner has not taken up the position that the surcharge was not passed over to the consumer nor has he taken up the position that he has been prejudiced in any manner by the imposition of the surcharge.

In view of the finding of this Court that 'X2' is not liable to be quashed, the necessity for this Court to:

- (a) consider the Writ of Prohibition sought by the Petitioner does not arise, suffice it to say that 'X2' ceased to be in force after 8<sup>th</sup> October 2015, and therefore, the question of restraining the Respondents from implementing 'X2' any further, does not arise;
- (b) consider the Writ of Mandamus sought does not arise, suffice it to say that the only situation in which funds collected by way of a surcharge imposed by Section 10A of the Customs Ordinance can be refunded is where the order is revoked by Parliament, whereas in the present application, the Parliament has approved the Order 'X2'.

In the above circumstances, this Court is of the view that the Petitioner is not entitled to the relief prayed for. This Court accordingly dismisses this application. No order is made with regard to costs.

**Judge of the Court of Appeal**