

In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

Case No: CA / WRIT / 31/2019

In the matter of an Application for Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hayleys Consumer Products Ltd,
No. 400, Deans Road,
Colombo 10.

Petitioner

VS.

Director General of Customs
Sri Lanka Customs
No. 40, Main Street,
Colombo 11

Respondent

Before: M. T. Mohammed Laffar, J.
S. U. B. Karalliyadde, J.

Counsel: Thishya Weragoda with Kasun Illangatillake and Mahela Liyanage for
the Petitioner
Manohara Jayasinghe SSC for the Respondent

Written submissions tendered on: 15.11.2021 by the Petitioner
01.12.2021 by the Respondent

Argued on: 13.10.2021.

Decided on: 26.01.2022.

S.U.B. Karalliyadde, J.

The Petitioner is a Company duly incorporated under the Companies Act, No. 7 of 2007 and the Respondent is the Director General of Sri Lanka Customs. The Petitioner is engaged in importation and distribution of 'Pringles' brand Potato chips in Sri Lanka. For the purpose of clearing the Potato chips, from the Customs, Petitioner used the Harmonized Code (HS Code) 2005.20.00. The World Customs Organization (the WCO), have developed and introduced a multipurpose international product nomenclature system known as 'Harmonized Commodity Description and Coding System' or simply 'HS' recognizing that all Customs and Border agencies around the world must classify the identical good in the identical manner for the purposes of levying import and export tariffs. The Harmonized System is governed by the International Convention on the Harmonized Commodity Description and Coding System.

In February 2014, Post Clearance Audit Directorate of the Sri Lanka Customs (the PCAD) initiated a post-clearance audit trial regarding the 'Pringles' Potato chips imported by the Petitioner into the country under HS Code 2005.20.00 and by letter dated 05.02.2015 marked as A 3 requested the Petitioner to submit documentation relating to the product literature specially denoting the composition of all products imported under the HS Code 2005.20.00. By letter dated 13.02.2015 marked as A 4 Petitioner submitted the requested information by the PCAD. The learned Counsel for the Petitioner submitted to the Court that since the PCAD did not communicate any determination and/or change in respect of the HS Code under which the Potato chips

were imported, the Petitioner continued to import the good under the same HS Code believing genuinely that HS Code 2005.20.00 is the correct HS Code. The learned SSC appearing for the Respondent submitted to Court that in pursuant to the post-clearance audit, a Customs Inquiry had been conducted by the PCAD under the reference No. PCAD/HQO/070/2017 and at the Inquiry it was found that the appropriate HS Code for the product is HS 1905.90.20. He has further submitted to Court that the Commodity Classification Division of the Customs (the CCD) which is the Division that is entrusted with giving rulings on classification matters also confirmed that the correct HS Code for the product should be 1905.90.20. It is important to note that the Custom duties payable for the goods imported into Sri Lanka under HS Code 1905.90.20 are higher than the Custom duties payable for the goods imported under the HS Code 2005.20.00. In pursuant to the Customs Inquiry, the Respondent decided to charge Rs. 54 576 752.76 as short-paid levies from the Petitioner for 17 consignments imported into Sri Lanka. The argument of the learned Counsel for the Petitioner is that the decisions of the Respondent to categorise the 'Pringles' Potato chips under HS Code 1905.90.20 and to charge Rs. 54 576 752.67 as short levies are *ultra vires* the powers conferred on the Respondent and those decisions were unreasonable, irrational, illogical and contrary to the principles of natural justice and therefore, the Petitioner has a legitimate expectation of directing the Respondent through Court to refer the dispute to the WCO for determination of the correct HS Code. By this Writ Application, the Petitioner is seeking the reliefs, *inter alia*, to issue writs of Certiorari to quash the letter dated 23.01.2018 marked as A6 of the Respondent informing the Petitioner to pay the short-paid levies with immediate effect and the reminders dated 19.11.2018 and 28.02.2019 (marked as A8 and A11 respectively) to pay the same and a writ of Mandamus directing the Respondent to seek opinion of the WCO regarding the appropriate HS Code.

The main issue to be decided in this Application is whether the correct HS Code for the 'Pringle' Potato chips imported by the Petitioner should be 2005.20.00 or 1905.90.20.

The learned SSC submitted to Court that for the determination of HS Codes, specialized knowledge on classification is required and it is the exclusive domain of the technocrats who have expertise in that area. The position of the learned SSC therefore, is that this Court cannot assume the function of the CCD, which consists of experts on classification and make a decision contrary to the decision of the CCD. Nevertheless, he admits that the Court is not deprived from examining the reasonableness and the legality of the determination of the CCD. I totally agree with the said submission and the admission of the learned SSC. I, therefore, will consider whether the decisions of the Respondent that the appropriate HS Code is 2005.20.00 and that the Petitioner should pay the amount mentioned in the letter marked as A-6 as short-paid levies are reasonable, rational and legal.

The argument of the learned Counsel for the Petitioner that the appropriate HS Code should be 2005.20.00 is based on the following grounds;

(a) ex-facie the primary ingredient contained in "Pringles" Potato chips is potatoes as every variety of "Pringles" Potato chips contain more than 50% potatoes as evidenced by the documents submitted to the PCAD marked as A4.

(b) several Potato chips products have been imported into Sri Lanka categorised under the said HS Code No. 2005.20.00 including "Mister Potato Crisps", "LAY'S Potato Chips" and "LIGO Potato Chips" and the said Potato chip brands have been imported subsequently to the PCAD inquiry being instituted against the Petitioner as evident by the document marked as A10a and A10b.

(c) "Pringles" Potato chips are permitted to be imported into several other countries, including India, Bangladesh, Maldives, Thailand, Indonesia, Vietnam, Canada, Belgium, China, Austria, Argentina, Bolivia under the said HS Code No. 2005.20.00. as evident from the document marked as A10c.

According to the National Imports Tariff Guide issued by Sri Lanka Customs (marked as A9) HS Code 2005.20.00 comes under HS Heading 20.05. The products covered

under that HS Heading are 'Other vegetable prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of Heading 20.06' (Heading 20.06 deals with 'Vegetables, fruit, nuts, fruit-peel and other parts of plants, preserved by sugar'). The description of the product which comes under HS Code 2005.20.00 is 'Potatoes'.

HS Code 1905.90.20 which the Customs has decided as the correct HS Code comes under Chapter 19 of the National Imports Tariff Guide and the products covered under that Chapter are 'Preparations of vegetables, fruit, nuts or other parts of plants'. The relevant 'HS Heading' for HS Code 1905.90.20 is 19.05 and the products included into that Heading are 'Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products'. The product description given under HS Code 1905.90.20 is 'Other, in retail packaging of 1kg or less'. Therefore, it is evident that the HS Code 2005.20.00 deals with products manufactured using Potato based preparations while HS 1905.90.20 does not deal with any product manufactured using any form of Potatoes.

The learned SSC submitted to Court that the CCD had confirmed the decision dated 23.01.2018 of the Inquiring Officer who had conducted the Customs Inquiry that the appropriate HS Code should be 1905.90.20. The classification opinion of the CCD is marked as R2. According to the facts stated in R2, to decide the correct HS Code, the CCD has considered certain HS Headings [20.05(4) and 19.05(A) (15)] and Folios (IV-2005-1, IV-2005-2 and IV-1905-1 to 3). In paragraph 22 of the statement of objections, it is stated that the 'Chapter Notes', 'Heading Notes' and 'Subheading Notes' of Nomenclature of the WCO confirms the decision of the Inquiring Officer. The allegation of the learned Counsel for the Petitioner is that at the Customs Inquiry those Headings, Folios and Notes were not made available to the Petitioner or not even drawn the attention of the Petitioner. None of those HS Headings, Folios and Notes are

tendered even to the Court for its consideration. Hence, the Court is not in a position to decide as to whether the reasons mentioned in R2 for classification of ‘Pringle’ Potato chips under HS 1905.90.20 were reasonable/rational/legal. In *South Bucks District Council v Porter*¹ Lord Brown remarked that,

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law . . . The reasons need only refer to the main issues in the dispute, not to every material consideration . . . A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

The proceedings of the Customs Inquiry are tendered to Court marked as R5. The allegation of the learned Counsel for the Petitioner is that the Petitioner was not given an opportunity to present its facts at the Inquiry and therefore, the Inquiry was not conducted in a fair and reasonable manner. The learned Counsel for the Respondent denied that allegation. The Court is not in a position to look into that allegation of the Petitioner for the reason that page No. 106, which is the 1st page of the proceedings dated 23.01.2018 of the Customs Inquiry is missing from R5. It has been stated at page 107 in A5 that a letter dated 02.08.2017 was received by the Inquiring Officer from the CCD denoting that the ‘Pringles’ brand Potato chips should be accepted within the HS Code 1905.90.20 and that letter is annexed as P1 to the Inquiry proceedings. The position of the Petitioner is that such a letter was not produced at the Inquiry nor the attention of the Petitioner drawn to such a letter. The Court can observe that, that letter

¹ [2004] UKHL 33.

is not even annexed to the Inquiry proceedings tendered to Court marked as R5. Under the said circumstances, I am of the view that the Respondent has failed to satisfy the Court that the Customs Inquiry had been conducted fairly and reasonably adhering to the principles of natural justice. Furthermore, the Court can observe that no reasons have been given in R5 for the classification of the product under HS Code 1905.90.20 and therefore, the decision taken at the Customs Inquiry is arbitrary and unreasonable. In *Karunadasa v. Unique Gem Stones Ltd and Others*², it was held that “Natural Justice means that a party is entitled to a reasoned consideration of his case; and whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision may be condemned as arbitrary and unreasonable.”

Lord Wrenbury in *Roberts v. Hopwoods*³, emphasises that “A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so. He must in the exercise of his discretion do not what he likes but what he ought. In other words, **he must, by the use of his reason, ascertain and follow the course which reason directs.** He must act reasonably.”⁴

Considering all the above stated facts and circumstances, I hold that the decision of the Respondent to classify the ‘Pringles’ Potato chips imported by the Petitioner within HS Code 1905.90.20 is unreasonable, irrational, illegal and arbitrary. Therefore, I hold that the letters marked as A6, A8 and A11 compels the Petitioner to pay short-paid levies are unreasonable, illegal and irrational.

The learned SSC submitted to the Court that a writ of Mandamus cannot seek against an entity and argued that since, the Respondent in the instant Application is named in

² (1997) 1 SLR 256.

³ (1925) AC 578.

⁴ H. W. R Wade and C. F Forsyth, *Administrative Law*. (11th edn, Oxford University Press, 2004) p 294.

his official capacity, the Court cannot issue a writ of Mandamus. The Rule 5 of the Court of Appeal (Appellate Procedure) Rules-1990⁵ provides thus;

“5. (1) This rule shall apply to applications under Articles 140 and 141 of the Constitution, in which a public officer has been made a respondent in his official capacity, (whether on account of an act or omission in such official capacity, or to obtain relief against him in such capacity, or otherwise).

(2) A public officer may be made a respondent to any such application by reference to his official designation only (and not by name), and it shall accordingly be sufficient to describe such public officer in the caption by reference to his official designation or the office held by him, omitting reference to his name. If a respondent cannot be sufficiently identified in the manner, it shall be sufficient if his name is disclosed in the averments in the petition.”

Therefore, when considering the said Rule, it is clear that the above stated submission of the learned SSC is without merits.

According to the facts revealed before the Court it is clear that the Petitioner had imported ‘Pringles’ brand Potato chips for about two to three years under HS Code 2005.20.00 before the dispute about the correct HS Code arose. As mentioned hereinbefore, there is no expert opinion acceptable to the Court about the correct HS Code for the ‘Pringles’ Potato chips imported by the Petitioner. Therefore, as argued by the learned SSC, if the appropriate HS Code for the product is 1905.90.20 and if the Petitioner is allowed to continue the importation under that HS Code 2005.20.00, a huge revenue loss could be caused to the Customs and ultimately to the country. It is important to mention at this stage that it is the duty of the importer to divulge the correct HS Code. The Respondent is disputing the HS Code disclosed by the Petitioner in the instant Application. The Petitioner seeks to issue a writ of Mandamus directing the Respondent to seek the opinion of the WCO regarding the appropriate HS Code. The

⁵ Court of Appeal (Appellate Procedure) Rules-1990.

learned Counsel for the Petitioner argued that the Petitioner had a legitimate expectation that the Respondent would seek an opinion from the WCO in Brussels. The learned SSC argued that there is no statutory provision, Rule or practice to seek clarifications on HS Codes from the WCO provided that the matters that has international ramifications could be submitted for determination of the WCO since it's a costly process. The learned Counsel for the Petitioner has failed to refer any statutory provision, Rule, or practice of referring the disputes in this nature to the WCO. In the case of *T & J Pharma Imports (Pvt) Limited vs. P.S.M. Charles D.G. of Customs and others*⁶, Obeyesekera, J. (as then he was) observed thus; 'I must say that this Court does not have the expertise to engage in the classification of a good imported to the country, nor would it attempt to do so in the exercise of its writ jurisdiction. That expertise lies with Sri Lanka Customs, and its Nomenclature Committee, as well as with the World Customs Organization. In instances where Courts lack such expertise, Courts would defer to the view of such expert bodies.' Therefore, the Court has recognised that the expertise in classification of goods lies with the Nomenclature Committee as well as the WCO. Under the above stated circumstances, I hold that the Petitioner has failed to establish that it had a legitimate expectation that the Respondent would seek an opinion from the WCO.

Considering the above stated facts and circumstances, I hold that the Petitioner is entitled to a writ of Mandamus not to the extent that is prayed for in prayer (d) to the amended Petition dated 11.06.2019 but to the extent that the matter should be referred to the Nomenclature Committee of the Respondent to determine the appropriate HS Code.

Therefore, I issue a writ of Certiorari as prayed for in prayer (c) to the amended Petition quashing the contents of the letters marked as A6, A8 and A11 and a writ of Mandamus

⁶ Writ Application No. 210/2018.

directing the Respondent to refer the matter to the Nomenclature Committee of the Respondent for determination of the appropriate HS Code. No costs ordered.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR J.

I agree.

JUDGE OF THE COURT OF APPEAL