

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

*In the matter of an application for Orders in the  
nature of Writs of Certiorari, Mandamus and  
Prohibition under Article 140 of the Constitution  
of the Democratic Socialist Republic of Sri  
Lanka.*

CA/WRIT/156/2022

Jayaratne V.I.P. Services (Private) Limited  
No. 2B, Elvitigala Mawatha,  
Colombo 8.

**Petitioner**

Vs.

1. Major General (Retd.) G. Vijitha  
Ravipriya  
Director General of Sri Lanka Customs,  
Sri Lanka Customs,  
No. 40, Main Street, Colombo 11.
2. Gamini Jayawardena  
Deputy Director,  
Sri Lanka Customs,  
'The Secretariat', Colombo 11.
3. Dr. M. K. C. Senanayake  
Director General, Department of Fiscal  
Policy,  
'The Secretariat', Colombo 01.
4. K. M. Mahinda Siriwardana  
Secretary to the Treasury,  
Ministry of Finance,  
'The Secretariat', Colombo 01.
5. Hon. Ranil Wickramasinghe  
Minister of Finance  
Ministry of Finance,  
'The Secretariat', Colombo 01.

**Respondents**

**Before** : Sobhitha Rajakaruna J.  
Dhammika Ganepola J.

**Counsel** : Dappula De Livera PC with Prasanna de Silva and Dimitra Abeysekara  
and Amasha De Alwis for the Petitioner.

Zuhri Zain, DSG with Shiloma David, SC for the Respondents.

**Argued on** : 01.11.2022

**Written Submissions:** Petitioner -06.12.2022

Respondents-08.12.2022

**Decided on** : 12.01.2023

**Sobhitha Rajakaruna J.**

The Petitioner in the instant Application claims that the Petitioner is entitled to invoke the writ jurisdiction of this Court in order to get the importation documents relating to the vehicle imported by the Petitioner in 2017 released. The Petitioner seeks such relief based on the assessed excise duty already paid by the Petitioner for the importation of the said vehicle and without any increased excise duty. According to the Petitioner the said vehicle which is a Mercedes Benz Elegance Hearse ('Hearse') was a used vehicle with an engine capacity of 2,685 cc and the Petitioner has purchased the said Hearse for the purpose of importing the same to Sri Lanka under HS Code No. 87.03.23.40.

The Department of Imports and Exports Control issued a license on 26.07.2017 ('P3') for the importation of the said Hearse and a Letter of Credit has been opened on 17.08.2017. The Petitioner's contention is that, at the time of opening of the aforesaid Letter of Credit, the excise duty levied for the importation of motor vehicles including Hearses was governed by the provisions of the Gazette Extraordinary No. 1992/29 dated 10.11.2016 ('P5') and accordingly, the excise duty payable, inter alia, for Hearses imported by Registered Funeral Undertakers at the rate of 50% of the value with the approval of the

Ministry of Finance as set out in item 4 of Schedule II thereof. The Petitioner, based on the tax regime applicable at the time of opening the aforesaid Letter of Credit claims that the Petitioner had a legitimate expectation that the excise duty payable on the importation of the said Hearse would be a sum of Rs.1.8 Million. The said Hearse was shipped on board in the United Kingdom on 29.10.2017 and arrived in Sri Lanka on 16.11.2017.

After opening the Letter of Credit, the Petitioner has applied to the Department of Fiscal Policy for a duty rebate to be granted as applicable for the import of a used Hearse and the said Department accordingly, granted approval for concessionary excise duty in terms of the said item 4 of Schedule II of the Gazette Notification 'P5' by way of the document dated 22.11.2017 ('P7'). Consequently, Sri Lanka Customs ('Customs') issued a Notice of Assessment dated 27.11.2017 ('P9') assessing the excise duty payable for the importation of the said Hearse at Rs.1,806,401.00. The Petitioner settled the said amount on 29.11.2017.

The Petitioner's complaint is that even after the payment of the excise duty pertaining to the importation of the said Hearse, the 2<sup>nd</sup> Respondent arbitrarily prevented the release of the vehicle on account of a budget revision. Apparently, the said Gazette Notification, marked 'P5' under which the excise duty for the said Hearse was calculated, has been rescinded by the Gazette Extraordinary No. 2044/32 dated 09.11.2017 ('P10') and thereby, the computation of excise duty has been revised. In the meantime, another Gazette Notification ('P11') has been published on 28.11.2017 to grant certain reliefs by way of revising and staying the applicability of the Gazette Notification 'P10' to several classes of vehicles where Letters of Credit have been opened prior to 09.11.2017. Additionally, the Government Gazette Extraordinary No. 2117/48 dated 04.04.2019 ('P14') was also issued revising and staying the applicability of 'P10'.

However, the subject vehicle has not been taken into the category of vehicles described in 'P11' & 'P14'. Accordingly, the Petitioner was informed to pay an additional excise duty amounting to a sum of Rs.6,300,000.00 in order to get the Hearse released.

The Petitioner asserts that it was not served with a revised Notice of Assessment for the enhanced excise duty and the enhanced assessment was only an internal note on the reverse of the letter dated 19.02.2018 ('P12(d)(1)') sent by the Petitioner to the Director General of Customs. In a subsequent development, the Hearse has been released to the

Petitioner upon submission of a Bank Guarantee for the value of Rs.6,300,000.00. However, the Customs retained the Petitioner's import documents such as Letter of Credit, Import Control License etc., which are essential for the registration of the said vehicle.

The Petitioner pleads that the Petitioner has been unfairly and unjustly excluded from the reliefs granted by the Gazette Notifications, marked 'P11' & 'P14', and the Petitioner was gravely prejudice by such Gazette Notifications. The Petitioner made several representations to the Ministry of Finance and to Sri Lanka Customs and such communications between the Petitioner and the relevant authorities are annexed to the Petition marked as 'P15a' to 'P15c' and 'P16' to 'P23'. The stand taken by the Respondents in those communications is that the date of importation shall be the date of delivery and no duty relief can be accommodated in respect of the Hearse within the existing legal provisions.

***The effect of Section 3 of Act No. 1 of 2006***

The Respondents heavily rely on the provisions of Section 3 of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006. The said Section 3;

'Notwithstanding anything to the contrary contained in any of the laws specified in Part II of the Schedule hereto, for the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, shall be the date of delivery to the Director-General of Customs, of the bill of entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged.'

If this matter is dealt only with a narrow interpretation of the said Section, the Petitioner may be levied charges based on the provisions of the Gazette Notification, marked 'P10', as it has been issued on 09.11.2017, prior to the delivery of the subject vehicle. It is a standard norm that the orders or regulations promulgated under certain Statues should not be violative of any other law prescribed by an Act of Parliament unless the Legislature itself has made provisions to that effect. The Petitioner argues that granting concessions to several other importers by the orders prescribed in the Gazette Notifications, marked 'P11' and 'P14' itself amounts to a violation of the provisions of the said Act No. 1 of 2006. The

ground for such argument is that the Gazette Notification 'P11' by which certain concessions have been granted specifies the date of applicability for the imposition of excise duty as being based on the time of the opening of the Letter of Credit. An excise duty thereof will be calculated as per the rescinded Gazette Notification, marked 'P5' and not on the date of submission of the bill of entry. Similarly, the Gazette Notification, marked 'P14', specifies the applicability of 'special duty' being the 'rate of excise duty applicable at the time of opening of the respective Letters of Credit' and not on the date of the submission of the bill of entry. Thus, a reasonable question arises as to whether the subsequent Gazette Notifications 'P11' and 'P14' are lawful. However, this Court is not invited to consider such question in the instant Application.

***Petitioner's legitimate expectation***

Another foremost claim is that the Petitioner had a legitimate expectation that the prejudice caused to the Petitioner would have been rectified by way of a subsequent Gazette Notification as several persons who imported certain other categories of vehicles during the same time have been accorded with concessions to overcome the effect of 'P10'. In response to the arguments formulated by the Petitioner on its legitimate expectation, the Respondents referring to the judgement in ***Ranasinghe Bandara vs. Director District Land Reform Commission and others, CA/Writ/233/2017 decided on 17.06.2019*** asserts that there cannot be any legitimate expectation created by an ultra vires representation. Anyhow, the Petitioner cited several judgements in order to establish the fact that when there is a change in policy an opportunity should be accorded for a reasonable remedy for the parties whose legitimate expectation was frustrated.

In ***Dayaratne and others vs. Minister of Health and Indigenous Medicine and others (1999) 1 Sri. L.R. 393***;

*"...When a change of policy is likely to frustrate the legitimate expectation of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against unequal treatment, arbitrarily, invidiously, irrationally or otherwise unreasonably dealt out by the executive."*

*“...But it is also well-established that it is a misuse of power for (a public body) to act unfairly or unjustly towards the private citizen when there is no overriding public interest to warrant it”*

*“...there is a substantive requirement that there must be an overriding public interest if a change of policy were to set at nought an individual's prior expectation”*

The Supreme Court in ***Ratnakumara and others vs. Postgraduate Institute of Medicine SC Appeal 16/2014, SC minutes 30.03.2016*** (this case has been referred to even in ***Dr. Chanaka Harsha Talpahewa vs. Mr. Prasad Kariyawasam, Secretary to the Ministry of Foreign Affairs and others, SC/FR Application No. 378/2017 decided on 21.06.2022***) considered the immediate change of a regulation without giving adequate prior notice as follows;

*“...any person who commences an act under a particular “Regulation” has an expectation to finish the same under the same terms and conditions stated in the said Regulations. Thus, it gives rise to a legitimate expectation for such persons to complete their actions under the same terms and conditions.”*

### ***Reasonable criteria***

Other than the assertions on the legitimate expectation, the salient feature that needs to be taken into consideration is assessing the Notice of Assessment (‘P9’) based on the provisions of ‘P5’ by Customs despite the fact that the Hearse arrived in Sri Lanka after issuing the Gazette Notification ‘P10’. The contention of the learned Deputy Solicitor General who appears for the Respondents is that the duty rebate sought by the Petitioner has been considered based on the Gazette Notification, marked ‘P5’ and anyhow, it has been done inadvertently without referring to the revised excise duty reflected in the Gazette Notification ‘P10’. It is stated that the said Notice of Assessment (‘P9’) has been issued under the excise duties described in ‘P5’ owing to a failure on the part of the Customs to update the particular computerized system to include the new excise duty rates during the time the Customs issued the said Notice of Assessment to the Petitioner.

Now I need to examine whether the Respondents have adopted a reasonable criteria after committing a purported error or mistake in respect of the said Notice of Assessment upon which the total amount therein has been paid by the Petitioner and also whether the claims

on legitimate expectation of the Petitioner outweigh the provisions of Section 3 of the said Act No. 1 of 2006.

It is important to note that the Customs has accepted the payment of Rs.1,806,401.00 on 29.11.2017 from the Petitioner and nowhere in the subsequent communications the relevant officials have categorically informed the Petitioner that they had made a mistake or an error in calculating the excise duty based on a wrong Gazette Notification. Instead, the relevant authorities continuously responded to the Petitioner's requests for relief stating that the rate of excise duty applicable on the Hearse was the rate prevailed at the time of submission of bill of entry and those are the rates described in the Gazette Notification 'P10' and not in 'P5' upon which the Notice of Assessment ('P9') has been made. All the requests made by the Petitioner for a concession similar to what was given to certain categories in 'P11' and 'P14' were turned down by officials on the basis that such relief cannot be afforded within the existing legal regime in reference to the importation of the Hearse.

In terms of the said Section 3 of the Act No. 1 of 2006, the date of importation or exportation for the purpose of levying any tax or duty shall be the date of delivery of the bill of entry relating to the relevant goods. There is no issue in the instant Application on the date of the bill of entry as the Petitioner has clearly declared in Custom - Goods Declaration, marked 'P8', that the vessel has arrived at the Port of Colombo on 16.11.2017. Thus, what needs consideration at this stage is whether overcharging the Petitioner is rational at a time where the transactions have been completed by settling the tax/duty upon the Notice of Assessment 'P9'.

If there is an obvious error in calculating charges, I am of the view that the relevant authorities can adopt a suitable criteria to rectify such error/mistake. It needs to be inquired as to whether any evidence has been tendered to Court by the Respondents to show that there was a mistake. Only in oral and written submissions made on behalf of Respondents, it was admitted that the issuance of the Notice of Assessment based on 'P5' was a mistake. Even the endorsement made by the Deputy Director of Customs ('DDC') reflected in 'P12(d)(1)' does not refer to any mistake/error, but it illustrates only the fact that the computerized system has not been modified after issuing 'P10'. The said DDC has stated therein;

*“However, the system has not been modified to collect taxes based on ‘Engine Capacity’ for Hearses. This new tax system came into effect after 2018 budget.”*

Having observed that the computerized system has not been updated with the new tax regime, the said DDC without any further clarification has arrived at the following conclusion;

*“According to new X1D Gazette Rupees 8,005,000.00 should have been paid for this Hearse but as per ‘4000-XH1’ code only 1,789,094.00 has been recovered for this Cusdec”*

It appears that the DDC has completely ignored the fact that the computer system had not been updated for period of 11 days starting from 09.11.2017 (the date of ‘P10’) up to the date of the Notice of Assessment (‘P9’) i.e., 27.11.2017. Do the Respondents expect this Court to believe that the Customs has not updated their computer system after publishing ‘P10’ for 11 days and if so, what was the criteria and procedure adopted by the Customs for the goods imported during that period? Hasn’t the Customs cleared any goods other than the Hearse imported during the said period? Anyhow there is no evidence before Court as to how long exactly the said system was functioning without the revised data being updated. Moreover, the Petitioner speaks not about 11 days but about a period of 3 weeks within which the said system has not been updated. To my mind, it is impossible to justify even a single day without an updated computerized system at the Customs which is vital for the process of levying tax/duty in respect of imported goods.

It is observed that none of the communications addressed to the Petitioner by the relevant officials stipulate that the Customs has made a mistake and there had been a necessity to rectify such error. Certain provisions are available in the Interpretation Ordinance also to amend, vary, rescind or to revoke orders by the authority who made the same orders. If a public officer or a public institution makes a mistake, procedures are in place which enable them to rectify such mistakes according to law. Not issuing a revised Notice of Assessment up to date itself emphasizes that the Customs has not followed any reasonable criteria in order to overcome any purported repercussions of not updating the computerized system.

### ***‘Rights’ of the Petitioner***

In light of the above, it is important to examine whether the rights of the Petitioner can be undermined by clinging only to the provisions of the said Section 3 of the Act No. 1 of 2006 when the subsequent Gazette Notifications ‘P11’ and ‘P14’ are silent on the class or

category of vehicles such as the Hearse. The Petitioner contends that despite the fact that all excise duty assessed by the Customs have been paid, the import documentation in relation to the Hearse have been retained by the Customs unfairly and unjustly. The Petitioner further pleads that the failure to include the category of vehicle imported by the Petitioner in the Gazette Notifications marked 'P11' and 'P14' which granted relief only to a certain category of persons caused grave prejudice and unfairness to the Petitioner.

It needs to be stressed that the Petitioner should not get any undue advantage due to any reasonable mistake of the Customs. But I cannot avoid any contrary conclusion if the rights of the Petitioner are affected due to the irrational conduct of the Respondents. For the reasons set out above and also based on the circumstances of this case, it can be assumed ex-facie that the Petitioner's rights have been affected due to the conduct of the Customs and the Department of Fiscal Policy as discussed above. This prompts me to be wide-awake upon the contention of the Petitioner that there is no provision in law for the Customs to release an imported motor vehicle on a bank guarantee with a condition of retaining all relevant documents which prevents the Petitioner from registering the Hearse with the Department of Motor Traffic.

By looking at the issues from a different angle, the Customs cannot, in terms of the principles of Rule of Law, accord preferential treatment or special privileges to the Petitioner by delaying the issuance of a revised notice of assessment or not following a reasonable criterion to rectify promptly any error made by them. Since 2017 the Customs has been failed to follow a reasonable and non-discriminatory criterion to recover any additional duty/taxes, if any, from the Petitioner. An act of merely responding to the letters of the Petitioner stating that an additional tax/duty should be recovered based on the date of the bill of entry cannot be regarded as an appropriate criterion.

If a scheme or criterion adopted to recover additional duty/taxes are prima facie unreasonable and irrational or discriminatory because they are not based on a criteria having a rational relation to the object sought to be achieved, then the party whose rights were affected due to such scheme or criteria will be entitled to discretionary remedy of this Review Court. Sisira De Abrew J. in *Sri Lanka Telecom Ltd. vs. Human Rights Commission of Sri Lanka and others*, SC Appeal No. 215/12 decided on 01.03.2017 considering several legal literature, held that if a recommendation of a Public Body affects the right of an

individual, Superior Courts, in the exercise of their writ jurisdiction, have the power to quash such a recommendation by issuing a writ of Certiorari.

***Conclusion***

Judicial control over public power has been expanded through judicial activism. The process of considering 'Rights' as an independent ground of review has been recognized by our Courts since the Supreme Court made pronouncements in the judgement of *Perera vs. Prof. Daya Edirisinghe and others (1995) 1 Sri. L.R. 148*. Even if this Court disregards the submissions of the parties on legitimate expectation, my above findings in reference to the Petitioner whose rights have been affected, are sufficient for the purpose of full and proper adjudication of the instant Application. Thus, I do not make any determination on the reliefs prayed for based on the alleged legitimate expectation. Anyhow, I am mindful of the statement of Lord Woolf MR in *R vs. North and East Devon Health Authority, ex p. Coughlan (2000) 3 All E.R. 850 (at p.872)*, where he has stated that "Once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the changing policy." It is true that the governments are free to change policy, however, in certain circumstances the Review Courts have tended to uphold the expectation generated by the old policy.

In the circumstances, I proceed to issue writs as prayed for in paragraphs (b), (e)(i) and (f) of the prayer of the amended Petition dated 08.08.2022 of the Petitioner.

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**