

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

CA/WRIT/171/2022

Ace Healthcare (Pvt) Ltd,
No. 72/A,
Illimba Road,
Kandana, Horana.

Petitioner

Vs.

1. Major General (Retired) Vijitha
Ravipriya
Director General of Customs,
Customs House,
Colombo 11.
2. D. A. S. Chandrasiri
Director of Customs
Sri Lanka Customs,
Central Verification Terminal,
Orugodawatte.
3. W. T. Krishantha
Appraiser,
Sri Lanka Customs,

Central Verification Terminal,
Orugodawatte.

4. Udara Kulasuriya
Appraiser,
Sri Lanka Customs,
Central Verification Terminal,
Orugodawatte.
5. W. Saman C. Wickramasekara
Superintendent of Customs,
Sri Lanka Customs,
Customs House,
Colombo 01.
6. Board of Investment of Sri Lanka
West Tower, World Trade Centre,
Echelon Square,
Colombo 01.
7. Renuka M. Weerakone
Director General,
Board of Investment of Sri Lanka
West Tower, World Trade Centre,
Echelon Square,
Colombo 01.
8. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Nihal Jayawardena PC with A.R.P. Bandara for the Petitioner.
Sumathi Dharmawardena PC, ASG with M. Fernando SC for the Respondents.

Argued on : 09.08.2022, 18.10.2022, 07.02.2023 and 22.02.2023

Written Submissions: Petitioner - 24.03.2023

Respondents- 09.05.2023

Decided on : 30.05.2023

Sobhitha Rajakaruna J.

The Petitioner primarily seeks for a mandate in the nature of a writ of Certiorari quashing the decision of the Sri Lanka Customs to detain the consignment of goods in reference to the CUSDEC No. 12970 when the said CUSDEC was submitted for clearance on 10.03.2022. In addition to the said relief, the Petitioner is seeking, inter alia, for a mandate in the nature of a writ of Mandamus directing the Respondents to release the goods imported under the said CUSDEC No. 12970 and also for a writ of Prohibition restraining the 1st Respondent holding a customs inquiry in relation to the said importation.

The Petitioner has entered into an agreement with the Board of Investment of Sri Lanka ('BOI') and the Petitioner has been registered as a BOI company pursuant to a certification issued by BOI (6th Respondent) under and in terms of Section 17 of the Greater Colombo Economic Commission Law No. 4 of 1978 ('BOI Law'). The Agreements entered into between the Petitioner and the BOI are annexed as 'P3' to 'P5'. The Petitioner states that construction work of pharmaceutical and cosmeceutical manufacturing plants

commenced in the year 2018 and accordingly, the Petitioner has obtained approval to import related plants and machinery on duty free basis. The syrup, tablet and capsule manufacturing plants were also included in the said project. Setting up of an EU GMP¹ Cleanroom Compliant facility was supposed to be a part of the said manufacturing plant.

The Petitioner asserts that the BOI has granted approval to import equipment for a complete Cleanroom under HS Code 8479.89.90 for which CESS is not applicable and the respective consignment contained only the equipment essentials for the Cleanroom. The allegation against the Petitioner was that the Petitioner had failed to declare 14 plastic containers which do not fall within the above HS Code. Anyhow, the Petitioner's contention is that such items are storage devices to be kept in the stainless-steel cupboard and the 2nd, 3rd and 4th Respondents manifestly violating the agreements between the BOI and the Petitioner have decided that the said consignment was subjected to CESS. Referring to the letters, marked 'P23' to 'P25', the Petitioner states that the BOI has informed Sri Lanka Customs that the contents of the subject consignment imported under CUSDEC No. 12970 were part of the machinery of the manufacturing plant and it's under the classification of HS Code 8479.89.90.

The basic question which needs resolution in the instant Application is whether it is lawful for Sri Lanka Customs to inquire into the classification of the subject goods imported by the Petitioner when such goods have been already classified as HS Code 8479.89.90 by the BOI. Similarly, it needs consideration whether Sri Lanka Customs could exercise powers under Customs Ordinance in order to classify imported goods when such goods have been imported in terms of an agreement with the BOI under Section 17 of the BOI Law.

Regulations under BOI Law

The Greater Colombo Economic Commission Regulations No. 1 of 1978 have been published in Gazette Extraordinary No. 8/2 on 31.10.1978 ('Gazette'). The Regulation 2(v) of the said Gazette implies that the Section 10 of the Customs Ordinance shall not apply to any goods, wares and merchandise imported into Sri Lanka by virtue of an agreement entered into between an enterprise and BOI under Section 17 of the BOI Law.

¹ good manufacturing practice – European Medicine Agency

The said Section 10 of the Customs Ordinance deals with the duties of Customs and power of Parliament to modify the duties.

The Respondents argue that the said Regulation 2(v) of the Gazette has no application to Section 10(1A) to 10(1C) of the Customs Ordinance since the said Regulations were promulgated in the year 1978 and the said Section 10(1A) to 10(1C) were introduced by way of an amendment to the said Section 10 of the Customs Ordinance in the year 2013. Whereas the Petitioner's contention is that in view of Regulation 2(v) of the said Gazette, the Section 10 of the Customs Ordinance shall not apply to goods imported under an agreement entered into with the BOI and no CESS is applicable for the HS Code (8479.89.90) provided by BOI for the clearance of the good related to the said Cleanroom. It is stated that as stipulated in the Gazette Extraordinary No. 2202/6, marked 'P14' published (on 17.11.2020) in terms of Export Development Act No. 40 of 1979, the CESS is exempted for the goods under the above classification.

First, I must examine whether the Regulation 2(v) of the said Gazette is still in force amidst the amendment introduced to Section 10 of the Customs Ordinance by Customs (Amendment) Act No. 9 of 2013. By way of the said Amendment Act, Section 10(1A) to Section 10(1C) are added immediately after Section 10(1) of the Customs Ordinance. Hence, it is well noted that the Section 10 of the Customs Ordinance was amended only by adding further provisions and no changes were made to the text of the Section 10(1). The said Section 10(1) of the Customs Ordinance stipulates:- '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.' The proviso to that Section is spelt out in Section 10(1)(a) to Section 10(1)(c). By the said amendment made to Section 10, new provisions have been introduced to deal with a situation where there is a dispute relating to imposition or exemption of customs duty on any goods, any condition or exception to the payment of customs duty on any goods or clarification or description of the goods, imported into or exported from Sri Lanka. In such a situation, the importer or exporter of such goods as the case may be may make an application forthwith to the Director-General for determination and the Director-General shall, within ninety days from the date of receipt of such application determine any application made to him under subsection (1A).

On perusal of the provisions of the Section 10(1) of the Customs Ordinance and also the provisions added thereto by the said Amendment Act No. 9 of 2013, it implies that the power of the Customs officials to levy duties has not been undermined by Sections 10(1A) to 10(1C). The said Sections 10(1A) to 10(1C) only provide a mechanism to deal with a situation where there is a dispute relating to the imposition or exemption of customs duty as mentioned above. The said Regulation 2(v) which is a subordinate legislation stipulated in the said Gazette has not been amended by way of a further regulation or by the said Amendment Act No. 9 of 2013 or by any other written law.

It is necessary to bear in mind that the Regulations in the Gazette have been promulgated not under the provisions of the Customs Ordinance but under the BOI Law. Similarly, the Amendment Act No. 9 of 2013 is in respect of the Customs Ordinance. I am mindful of the fact that the regulatory clause promulgated by the relevant minister freezes the statutory clause enacted by Parliament to limit the operation of the provisions of the said Section 10. Perhaps, the relevant minister when promulgating those Regulations has referred only to the original Section 10 of the Customs Ordinance. However, neither the Parliament nor the relevant minister referred to in the BOI Law, has given thought to amend those Regulations in the Gazette, when enacting the said Amendment Act No. 9 of 2013. Hence, I have no option other than rejecting the proposition of the Respondents that the application of Sections 10(1A) to 10(1C) of the Customs Ordinance has an impediment for the operation of the said Regulation 2(v) of the Gazette.

'Duty' under Customs Ordinance vis-à-vis CESS

Now, I advert to examine whether CESS described in Sri Lanka Export Development Act No. 40 of 1979 ('SLED Act') should be taken into consideration as a tax or a duty distinct to 'duty' referred to in Section 10 of the Customs Ordinance when Regulation 2(v) of the said Gazette becomes operative. This is imperative since the Respondents allege that the goods imported by the Petitioner under CUSDEC No. 12970 contained items upon which the CESS should be imposed.

In terms of Section 14(1) of the said SLED Act 'there shall be charged, levied and paid a cess at such rates as may be determined by the Minister from time to time, with the concurrence of the Minister in charge of the subject of Finance, by Order published in the Gazette, on such imports and exports specified in the Order'. The Petitioner has submitted

such Order made under the said Section 14, marked as 'P14'. The International Trade Administration (Sri Lanka-Country Commercial Guide) website has stated that 'The Export Development Board (EDB) levy, often referred to as a “cess,” ranges from 10 percent to 35 percent ad valorem on a range of imports identified as “nonessential” or as competing with local industries.'

It is important to draw the attention to proviso to Section 10 of the Customs Ordinance which declares that any customs duty leviable in terms of Section 10 of Customs Ordinance shall not affect or be deemed to affect any royalty, cess or duty which is leviable or payable on the importation or exportation of such goods under any other written law.

The Section 10(1)(c);

'Express reference in the said Schedule to any customs duty leviable on any goods imported into or exported from Sri Lanka shall not affect or be deemed to affect any royalty, cess or duty, by whatsoever name called, which is leviable or payable on the importation or exportation of such goods under any written law other than this Ordinance.' (Emphasis added)

This reflects the fact that the provisions of the said Section 10 of the Customs Ordinance do not impede charging CESS separately, which is prescribed by the SLED Act which is another written law other than the Customs Ordinance.

Whether CESS is leviable for goods under Agreements in terms of Section 17 of the BOI Law

Then the question arises whether the investors who enter into agreements with the BOI under Section 17 of the said BOI Law are liable to pay CESS although they are exempted from duties in terms of Regulation 2(v) of the said Gazette. As indicated above the said Regulation 2(v) specifies that Section 10 of the Customs Ordinance would not apply to such agreements. When the said Regulations expressly provide that Section 10 of the Customs Ordinance is not applicable, the provisions in the said Section 10(1)(c) to the said Section will also become inapplicable in that regard. However, the question remains whether the levying of CESS will also be excluded with the operation of Regulation 2(v) of the Gazette.

I am of the view that the mere non application of Section 10 as a result of Regulation 2(v) would not warrant to read or understand those provisions of the said Section 10(1)(c) to

give a negative effect to the substance of the said Section 10 and its proviso. The mandate of Regulation 2(v) is only to spell out that the Section 10 shall not apply to the goods mentioned in the said Regulation and it is a provision applicable only for specific agreements signed with the BOI under the BOI Law. The Section 10 of the Customs Ordinance is not a subordinate legislation and the intention of the legislature embodied in Section 10, cannot be completely changed or discarded by misinterpreting the said Regulation 2(v). Thus, non applicability of Section 10 will not affect the due operation of Section 14(1) of the SLED Act. In other words, CESS can be levied even on an occasion when Section 10 of the Ordinance is not applicable in respect of agreements under Section 17 of the BOI Law and moreover, the CESS should be identified as a tax distinct from customs duties spelt out in the Section 10 of the Customs Ordinance.

This position is further elaborated by the provisions of Section 14(6) of the said SLED Act which stipulates that the CESS imposed under the said Section shall be in addition to any import duty or export duty or any other CESS levied under any other written law. Such independent identity of CESS will not be affected even with the provisions of Section 14(4) of the same Act.

Section 14(6) The cess imposed under this section shall be in addition to any import duty or export duty or any other cess levied under any other written law. (Emphasis added)

Section 14(4) This section shall have effect as though it formed part of the Customs Ordinance, and the provisions of that Ordinance shall apply accordingly.

In light of the above, I reject the hypothesis of the Petitioner that CESS cannot be levied in respect of goods imported by virtue of agreements under Section 17 of the BOI Law.

The scope of the authority of Sri Lanka Customs over the goods imported in terms of an agreement under Section 17 of the BOI Law.

The Petitioner's additional argument as per 'P14' is that the goods imported by the Petitioner under CUSDEC No. 12970 do not fall into the specifications which warrants CESS to be levied. It is obvious that CESS can be levied only in reference to the imports and exports specified in an order issued by the relevant minister under Section 14 of the

SLED Act. Then a pertinent question arises whether an investor who imports goods under a BOI agreement would be liable to pay CESS for any imported goods fall under a specification different to the specification prescribed & approved by the BOI. Both parties of the instant Application made contrasting submissions on the competence of Sri Lanka Customs to determine on specifications in respect of the goods imported under an agreement entered into with BOI.

In this regard, the Petitioner highly relies on the judicial precedent enunciated in *Ceylon Quartz Industries (Private) Limited vs. The Director General of Customs, S.C. Appeal No. 79/2002 decided on 04.10.2012*. At the outset, based on my earlier findings, I must emphasize that the dicta of the said Judgement can be taken in to consideration when analyzing the questions in the instant case. It is to be noted that the Respondents take a contrary view upon an alleged basis that the said judgement has been delivered after the said Amendment Act No. 9 of 2013. In the said judgement which discussed the control of customs over the goods imported under an agreement entered into under Section 17 of the BOI Law, Dr. Shirani A. Bandaranayake CJ. has stated;

“As referred to earlier BOI was introduced and established chiefly for the purpose of attracting investments within the country. With the said objective in mind various concessions were offered for the investors. In this process the BOI was introduced as a ‘One Stop Shop’ mainly to indicate that there will not be any unnecessary hazzles in carrying out their business by the investors. This position is clearly demonstrated by Clause 10 of the Agreement, which lists out the benefits, exemptions and/or privileges that are granted to the Enterprises in connection with the relevant businesses. In that, Sub Clause (ix), referred to earlier, clearly stated that, all goods, articles, manufactured and/or produced by the Enterprises may be exported outside Sri Lanka free of export duty and more importantly, any custom or export control. The said Clause 10 (ix) also states that, the said goods produced by the Enterprises should be in accordance with the agreements entered into by the said Enterprise with the BOI.”

“The position therefore is quite clear. Business Enterprises were invited to enter into agreements with the BOI offering different types of concessions for them. This included in terms of Clouse 10 (ix) concession from export duty and any custom or export control. To obtain such concessions, it would be necessary that the relevant goods and articles are manufactured or produced in accordance with the Agreement. It is also necessary to refer to

the provisions of Clause 10(ix). It provides for any Governmental authority to examine the correctness of any declaration made. However this is subject to the condition that such authority should be exercised in the manner as directed by none other than the BOI.”

In the said case of ***Ceylon Quartz Industries (Private) Limited***, the Court has noted that the words 'concession from any custom or export control' were reflected in the respective BOI agreement. However, no such strong provisions are embodied in the Agreement marked 'P3' entered into between the Petitioner and the BOI in the instant case. It is observed that several clauses of the said Agreement 'P3' tend to provide that all other taxes and levies in respect of import of items other than the customs duty are payable as applicable. Moreover, the Petitioner is not entitled to import items referred to in the Negative List as enumerated in the Second Schedule thereto published by the Secretary to the Treasury. It appears that the Petitioner (the Enterprise) shall be subject to all other laws, not referred to in Schedule 'B' of the said BOI Law, save and except any exemptions and/or benefits and/or privileges specifically granted to it by such other laws and/or orders and/or regulations framed thereunder. Clause 16(iv) & Clause 16(vii) of 'P3' reads;

iv. 'All imports/local purchases of business related capital and construction items other than the items in the Negative List published by the Secretary to the Treasury as may be approved by the Board to be used for and by the Enterprise for the purpose of the business shall be free of customs duty during the project implementation period of Thirty Six (36) months from the date hereof. All other taxes and levies in respect of import of items other than the customs duty are payable as applicable. Provided that this exemption shall not apply to any personal effects imported by the Enterprise for the private and personal use of any person in the Enterprise and provided that the Board reserves to itself the right to cause or permit to be caused the examination of any import for purposes connected with this Agreement.'

'Provided that the Enterprise shall not be entitled to import items referred to in the Negative List as enumerated in the Second Schedule hereto, published by the Secretary to the Treasury. However, any importation of items in the Negative List shall be considered by the Board where such items are either not wholly manufactured in Sri Lanka or are not available in sufficient quality, quantity and on time delivery to meet the time line of project completion.'

'Provided further, prior to import/purchases of any items on duty free basis as aforesaid, the Enterprise shall obtain the prior written approval from the investment Appraised Department of the Board.'

- vii. *'The provisions of the laws set out in Schedule B of the said Law No. 4 of 1978 which are inconsistent with the benefits and/or exemptions and/or privileges set out in sub-clauses (i) to (iv) above shall not be applicable to the Enterprise in relation to the business. The Enterprise shall be subject to all other laws, not referred to in Schedule B of the said Law No. 4 of 1978 save and except any exemptions and/or benefits and/or privileges specifically granted to it by such other laws and/or orders and/or regulations framed thereunder.'*

Onril (Pvt.) Limited vs. The Director General of Customs, CA/Writ/760/2008 decided on 24.07.2013 is another judgement relied on by the Petitioner. The Court of Appeal in the said case giving reference to the above ***Ceylon Quartz Industries (Private) Limited*** case has carefully considered the consequences when an investor imports goods other than what were permitted by BOI. Gooneratne J. referring to the question of lawful importation has stated;

“In all cases involving imports of goods, there is no doubt that the Customs Ordinance would apply and any violation of those provisions has to be dealt according to law. What goes to the root of the matter is the question of lawful importation. The Customs Ordinance is so designed to cater to all kinds of violations and the burden would shift to the Petitioner to establish and prove lawful importation. Even if the state is called upon to prove importation, the Petitioner would not be relieved of the burden of proving lawful importation. A mere authority obtained under another statute cannot be the final authority in cases involving import of goods/articles. In terms of Sections 12, 43, 125 & 152 of the Customs Ordinance goods could be seized at any point of time if same is illegally imported contrary to the above sections of the Customs Ordinance. The degree of required proof had been discussed in 'Govindasamy's case 1980 (2) SLR 278.”

In the instant Application, the Respondents do not raise the issue of unlawful importation. However, the issue referred to Court is whether the Petitioner has imported goods which do not fall within the classification 'HS Code 8479.89.90'.

Giving due consideration to both above judgements and in light of my above findings, I take the view that an investor who imports goods under a BOI agreement would be liable to pay CESS for any goods imported unless such goods are exempted from CESS by an order of the relevant minister or it is expressly excluded in the BOI agreement with prior approval. The CESS is a levy distinct to the Customs duties referred to in Section 10 of the Customs Ordinance and further, the CESS is levied under a separate written law (SLED Act) which is not excluded in terms of Section 17 of the Customs Ordinance. In such a backdrop, an appropriate branch of the Government must have the authority to inquire into related goods which are imported against the terms of such BOI agreements. The Agreements entered into with BOI in the instant case do not illustrate any such exclusion or exemption of CESS in favour of the Petitioner.

It is apparent that none of the Agreements entered into between the Petitioner and the BOI exempt the Petitioner from paying CESS and it is the duty of the Petitioner to obtain prior approval, if necessary, from relevant authorities in that regard.

Anyhow, the final question which arises here is whether Sri Lanka Customs has authority to revisit the classification prescribed by the BOI. As per the decision of Dr. Shirani A. Bandaranayake CJ. in the above *Ceylon Quartz Industries (Private) Limited* case, any Governmental authority to examine the correctness of any declaration is subjected to the condition that such authority should be exercised in the manner as directed by none other than the BOI. It can be assumed on the strength of the above two judgements in *Ceylon Quartz Industries (Private) Limited* and *Onril (Pvt.) Limited* cases that the Sri Lanka Customs should have the power to use their authority under the Customs Ordinance when an investor (who enters into an agreement with BOI) imports any goods different to the prescribed specification or such investor engage in unlawful importation in violation of the respective BOI agreements.

Most importantly it is observed that the issue on CESS is not involved in both the above two judgements. The contention of the Petitioner is that the BOI has repeatedly informed the Sri Lanka Customs that the consignment of goods in terms of CUSDEC No. 12970 were part and parcel of the essentials of the particular Cleanroom.

The Petitioner drew the attention of this Court to the below paragraph of the letter addressed to the Director of Customs by the Executive Director (Investor Services) on 24.04.2022 ('P25');

'As per the import Customs tariff under **levy of customs duty** (copy annexed), any plant, machinery and equipment, if imported disassemble or unassembled for convenient of packing, handling, transportation and presented in the same consignment or imported in different consignments are to be classified as the commodity resulting after the assembly.'

In line of the judicial precedent enunciated in the above two judgements, it seems that the sole authority of deciding whether the items imported by the Petitioner fall within the HS Code 8479.89.90 is with the BOI. However, it is a vital fact that the specialty of determining the HS Code is vested in Sri Lanka Customs. At this juncture, I must draw my attention to the judgement in *T & J Pharma Imports (Pvt.) Limited, Millagahawatte, Galthuda, Panadura vs. P. S. M. Charles, Director General of Customs and others, CA/Writ/210/2018 decided on 16.11.2020*, a case heavily relied on by the Respondents. Arjuna Obeyesekere, J. held in the said judgement that;

"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 Organisation. In instances where Courts lack such expertise, Courts would defer to the views of such expert bodies."

The BOI cannot have any control over levying of CESS since BOI has no power to grant exemptions from any law which are not referred to in the Schedule 'B' of the BOI Law. The SLED Act is not in the list of written laws which are exempted in terms of the Section 17 of the BOI Law. Anyhow, such exemption may be granted at the time of entering into an agreement under the said Section 17 of the BOI Law with prior approval and according to law. Interestingly, the goods imported under HS Code 8479.89.90 by any consignee other than an investor under the said Section 17 is also exempted from CESS as the said HS Code is any way not included in the order made by the minister under SLED Act. Therefore, I am not inclined to accept the argument of the Petitioner that the Sri Lanka Customs has no

authority to inquire into the correctness of the specifications for the purpose of levying CESS in respect of the items which do not fall within the HS Code 8479.89.90.

Thus, I take the view that the Sri Lanka Customs has the authority to inquire into any matter pertains to making an assessment whether the items imported by the Petitioner is a partial shipment of EU GMP Cleanroom Compliant equipment and whether the accessories imported in terms of CUSDEC No. 12970 are items which are liable to be levied CESS.

Reliefs

In light of the foregoing and based on the special circumstances of this case, I am of the view that the reliefs sought by the Petitioner for a mandate in the nature of a writ of Certiorari quashing the decision of the 1st to 5th Respondents to detain the consignment of goods in terms of CUSDEC No. 12970 should be refused. The mandate in the nature of a writ of Mandamus prayed for by the Petitioner will not arise at this stage as the subject consignment of goods have already been released subject to certain conditions. Further, I am not inclined, in view of my above reasons, to restrain the 1st Respondent holding an inquiry in relation to CUSDEC No. 12970 by way of a writ of Prohibition. I clearly observe that the process of finalizing the decision of Sri Lanka Customs in respect of the issue on the respective HS Code in the instant Application is not completed and accordingly, the Petitioner still has the opportunity to engage in an appeal process against any final decision of the Sri Lanka Customs in this regard.

Thus, I proceed to dismiss the Application of the Petitioner. I order no costs.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal