

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

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

Unilever Sri Lanka Limited,
No. 258, M. Vincent Perera Mawatha,
Colombo 14.

Petitioner

C.A. Case No. WRT-19/21

Vs.

1. Major General (Retired) G. Vijith Ravigpriya.
Director General of Customs,
Sri Lanka Customs,
Customs House,
No. 40, Main Street,
Colombo 11.

- 1A. Director General of Customs,
Sri Lanka Customs,
Customs House,
No. 40, Main Street,
Colombo 11.

Substituted 1A Respondent

2. J. M. M. G. W. Bandara.
Deputy Director of Customs,
Sri Lanka Customs,
Customs House,
No. 40, Main Street,
Colombo 11.

3. Sanjaya Ravindra.
Superintendent of Customs,
Sri Lanka Customs,
Customs House,
No. 40, Main Street,
Colombo 11.

Respondents

BEFORE : **M. T. MOHAMMED LAFFAR, J**
WICKUM A. KALUARACHCHI, J

COUNSEL: Dr. K.Kanag- Iswaran, PC, with Nigel Bartholomewz
and Shivaan Kang- Iswaran for the Petitioner.
Sumathi Dharmawardene, ASG, PC with
A. Gajadeera, SC, for the Respondents.

SUPPORTED ON : 14.09.2023

WRITTEN SUBMISSIONS

TENDERED ON : 03.10.2023 (On behalf of the Petitioner)
02.10.2023 (On behalf of the Respondents)

DECIDED ON : 25.10.2023

ORDER

WICKUM A. KALUARACHCHI, J.

This application has been filed by the petitioner seeking a writ of certiorari quashing the decision of the 2nd respondent, marked A-32 to proceed with the inquiry to recover exercise duty under the Customs Ordinance. In addition, the petitioner seeks a Writs of Prohibition restraining the 1st and/or 2nd and/or 3rd respondent from proceeding with any inquiry with the view of recovering excise duty under the Customs Ordinance, giving effect to the Gazettes Extraordinary, marked A-9, A-10, A-17(a), A-34, A-35, and a writ of prohibition restraining the respondents from claiming on and/or encashing the

twenty one (21) bank guarantees submitted by the petitioner in respect of the consignments as set out in the document marked A-5 with the petition.

In addition, the petitioner seeks an interim order restraining the aforesaid respondents from proceeding with the inquiry in Customs Case No. PCAD/00006/CCR/00259 until the determination of this petition. Another interim order has been sought restraining the above respondents from claiming on and/or encashing the aforesaid 21 bank guarantees submitted by the petitioner.

In support of this application, the learned President's Counsel for the petitioner made oral submissions and the learned Additional Solicitor General for the respondents replied. In furtherance, both parties filed written submissions. This court has to decide whether there is a sustainable case for the petitioner to issue notices to the respondents and whether interim reliefs prayed for in the petition could be granted.

Factual Background

The petitioner in this application has been importing "Industrial Monocarboxylic Fatty Acid" (Distilled Fatty Acid/DFA) under "HS Code 3823.19.90 – Other" from various jurisdictions in respect of the local manufacture of soap since 2006, according to the petitioner. For a period of approximately 13 years, the petitioner has been importing DFA into Sri Lanka under the said HS Code. The petitioner states that during the period of 2007 to 2020, the petitioner imported DFA from India, Malaysia, and Indonesia, and customs duty of Rs. 11.2 billion had been duly paid to the State.

The incident that led to institute this application was that the officers of the Sri Lanka Customs seizing a shipment of DFA for an investigation under the Customs Ordinance. During the period in which the said investigations were being carried out, Sri Lanka Customs permitted the

petitioner to clear its shipment of DFA on the submission of 21 bank guarantees, currently being held by the 1st respondent to the value of Rs. 246 million.

According to the petitioner, the petitioner company discovered Gazette Extraordinary No. 2092/8 of 8th October 2018, which had been published under the Revenue Protection Act No. 19 of 1962, creating a new “HS classification 3823.19.20 – Palm Oil Fatty Acids” and another Gazette Extraordinary No. 2092/5 of 8th October 2018, which had been published under the Excise (Special Provisions) Act No. 13 of 1989, whereby an excise duty of 25% was imposed on the newly created HS classification. The said two gazettes have been marked as A-9 and A-10. The learned President’s Counsel pointed out that by new HS classification, Palm Oil Fatty Acid was exempted from payment of any customs duty, and an excise duty of 25% was being imposed.

After the aforesaid seizure, the Director General of Customs proceeded with a customs inquiry. The jurisdiction of the customs to proceed with the inquiry has been challenged on behalf of the petitioner on the basis that, in terms of Sections 8 and 9 of the Customs Ordinance, the 1st and 2nd respondents were authorized to carry out inquiries only in matters relating to customs, and the matter that was being considered at the inquiry was a matter relating to excise duty. The learned President’s Counsel contended that the jurisdiction for the recovery of excise duty was with the Director General of Excise and not with the Director General of Customs. The learned President’s Counsel submitted further that the petitioner offered the Director General of Excise to accept payment of excise duty but did not accept. The learned President’s Counsel also contended that although a jurisdictional objection was taken at the inquiry, without making an order regarding the said objection, the inquiry proceeded. That is why according to the learned President’s Counsel, the petitioner came before this court.

The learned Additional Solicitor General appearing for the respondents raised a preliminary objection that, according to the reliefs prayed for in the petition, the Director General of Excise is a necessary party, and without making him as a party, this application could not be maintained. The learned President's Counsel contended in reply that the Director General of Excise is not a necessary party because an order can be effectively made without him, and without his presence, a complete and final decision on the questions involved in the application can be made.

In considering the facts and circumstances of this application, it appears that no relief has been prayed for by the petitioner against the Director General of Excise. In addition, without the presence of the Director General of Excise, the issue of whether the Director General of Customs has the authority to inquire and recover the excise duty can be determined. If the 1st respondent, the Director General of Customs has the authority to proceed with the inquiry and recover excise duty, he can demonstrate to this court under what authority he can hold an inquiry and recover excise duty. What this court needs to ascertain is whether the Director General of Customs has the authority to recover excise duty. If he does not have the said authority, it is not needed to ascertain to whom the said authority is vested. Therefore, the Director General of Excise is not an essential party to this application. Accordingly, this application need not be dismissed for the reason of not adding the necessary parties.

Apart from the aforesaid preliminary objection, the Learned Additional Solicitor General raised the following issues and urged to dismiss the application without issuing notices to the respondents.

- I. The petitioner cannot absolve from not paying excise duty for the mere fact that they were not privy to a change of law as per the legal maxim *ignorantia juris neminem excusat*.

- II. As there was no determination and only an inquiry has been commenced, the instant writ application should be dismissed *in limine* as a premature application.
- III. Section 10(1)(a) of the Customs Ordinance provides for a right of appeal to the Director General. As the petitioner has failed to exercise the said statutory right of appeal, the writ application should be dismissed.
- IV. The petitioner was guilty of laches.

Ignorance of law excuses no one.

The learned Additional Solicitor General contended that the petitioner cannot absolve from not paying excise duty as per the legal maxim *ignorantia juris neminem excusat* because the petitioner stated in his petition that the petitioner was unaware of the communication dated 3rd May 2019 about the change in classification of Industrial Monocarboxylic Fatty Acid. I agree with the contention of the learned Additional Solicitor General that the petitioner cannot absolve from not paying excise duty, stating that he was unaware of the change of law.

Whether the application is premature

It is correct that there is no determination regarding the excise duty. The contention of the learned Additional Solicitor General was that the petitioner should invoke the jurisdiction of this court only after the determination and not at the present stage of proceeding with the inquiry. In considering the principal issue raised in this application, it is apparent that the petitioner challenges the jurisdiction of the customs officers to hold an inquiry. Therefore, to challenge the jurisdiction to hold an inquiry, it is not necessary to wait until the matter is determined. Hence, this is not a pre-mature application.

Whether the petitioner failed to exercise the statutory right of appeal

Section 10(1)(a) of the Customs Ordinance provides for an application to the Director General for determination when there is a dispute relating to the imposition or exemption of customs duty on any goods, any condition or exception to the payment of customs duty on any goods. Firstly, this is not a dispute relating to customs duty but a matter relating to excise duty. Secondly, an application should be made to the Director General under the said Section of Customs Ordinance only if the custom officers have authority to hold an inquiry. As the issue relating to this writ application is whether the custom officers have the jurisdiction to hold an inquiry, the issue of failing to exercise the statutory right of appeal does not arise.

Whether the petitioner is guilty of laches

The learned President's Counsel for the petitioner stated that the petitioner raised a preliminary objection to the inquiry held by the 2nd respondent on the basis that the inquiry was totally devoid of jurisdiction and ultra vires the powers of the Customs Ordinance and called for an order regarding the objection from the 2nd respondent. It was further submitted that, without issuing a ruling on the said objection, the 2nd respondent decided to continue with the customs inquiry. It is apparent from the proceedings of 22nd September 2020, marked A-32 with the petition that the 2nd respondent proceeded with the inquiry, stating that the Director General of Customs had duly appointed him to inquire this matter. The learned President's Counsel submitted that, after obtaining certified copies of those proceedings of the inquiry, this application was filed and there was no laches on the part of the petitioner. Within four months of the said decision of the 2nd respondent to proceed with the inquiry, this application has been filed. Considering the above circumstances, I hold that the said delay is not a reason to dismiss this application without considering its merits.

Now, I turn to consider the main issue of this application. As stated previously, the main contention of the learned President's Counsel for the petitioner was that the Director General of Customs is not authorized to hold an inquiry in respect of the matters relating to the recovery of excise duty. The learned Additional Solicitor General contended that the inquiry in question was held in terms of Section 8(1) of the Customs Ordinance and not under Section 9 of the Excise (Special Provisions) Act No.40 of 1989. He contended further that the purpose of a Section 8 inquiry under the Customs Ordinance is to ascertain the truth of statements made relative to the customs, and although the words "relative to the customs" are mentioned, a statute must be read as a whole. The learned President's Counsel for the petitioner contended that in terms of Sections 8 and 9 of the Customs Ordinance, the 1st and/or 2nd respondent were authorized to carry out inquiries only in matters "relative to the customs". He contended further that the jurisdiction for the recovery of excise duty was with the Director General of Excise and not with the Director General of Customs.

In determining the issue of jurisdiction to hold the said inquiry, the following judicial authorities submitted by the learned Counsel for both parties are important. In substantiating his position, the Learned President's Counsel for the petitioner submitted the case of ***Wasana Trading Lanka (Private) Ltd v. Sudharma Karunaratne and Six Others*** - C.A Writ Application No.689/08, decided on 18.01.2011 wherein it was held that the Director General of Customs cannot recover or collect an unpaid excise duty after the removal of the goods from the customs.

The learned Additional Solicitor General submitted the case of ***PolyStar Poly Products (Private) Limited v. Sudharma Karunaratne and Four Others*** - C.A. Application Number 368/2010, decided on 15.01.2023 wherein it was held as follows:

“The petitioner admitted that the Director General of Customs is statutorily authorized to demand and levy excise (Special Provisions) duty from importers of goods at the time of importation under section 5(2)(a) of the Act No. 13 of 1989, ... the Director General of Customs is exercising these functions merely for the convenience of the other departments.”

In this judgment, it is also stated that the appointment of the Director General of Customs as the Director General of Excise is an independent act of the Cabinet in terms of the Act. That indicates that the cabinet has approved the Director General of Custom as the Director General of Excise as well.

The Learned President’s Counsel for the petitioner explained the difference between the decisions of the aforesaid two cases. He pointed out that in the PolyStar case, the excise duty was imposed at the time of importation and in the Wasana Trading case, it had been clearly held that the Director General of Customs cannot recover or collect an unpaid excise duty after the removal of the goods from the customs. The Learned President’s Counsel contended that in the case before us also, the shipment was cleared from customs after paying all relevant duties to the State and thus, the Director General of Customs has no authority to proceed with the inquiry in order to recover excise duty.

In considering the aforesaid judicial authorities with the facts of this application, I see that there is a legal issue to be looked into by this court in respect of the jurisdiction of the Director General of Customs to hold the aforesaid inquiry. Therefore, I hold that notices need to be issued to the respondents.

The other matter to be considered is whether the interim reliefs prayed for in the petition could be granted. The petitioner sought an interim order restraining the respondents from proceeding with the customs inquiry and restraining the respondents from claiming or encashing the

21 bank guarantees. Undisputedly, this is revenue due to the government. Even the petitioner admits the fact that due excise duty has to be paid by him. The learned President's Counsel submitted that the petitioner offered the same to the Director General of Excise, but he did not accept. The petitioner's complaint is that the Director General of Customs has no authority to hold an inquiry in order to recover excise duty after the removal of the goods from customs.

We are mindful of the fact that delaying the recovery of revenue due to the government is not at all appropriate. However, excise duty must be recovered by following the correct legal procedure. As stated previously, the petitioner in this application challenges the jurisdiction of the Director General of Customs to hold an inquiry to recover excise duty. Therefore, it is a purposeless exercise to allow the Director General of Customs to proceed with the inquiry and then decide whether the Director General of Customs has the authority to hold the said inquiry. Hence, restraining the 1st, 2nd and 3rd respondents from proceeding with the inquiry is a necessary step.

Therefore, I hold to issue interim orders as prayed for in the prayers (p) and (q) in the petition until further order is made.

The Registrar of this court is directed to issue notices to the respondents when tendered.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J

I agree.

JUDGE OF THE COURT OF APPEAL