

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

1. Intergrated Farmers Company [Pvt] Ltd  
No.17/10, Negombo Road  
Padilithuduwa  
Kelaniya.
2. T.A.M.S.Mahamoor  
No.4/5, Devatagahawatta  
Padilithuduwa  
Kelaniya.

**Petitioners**

**C.A. [WRIT] APPLICATION**  
**NO.602/2011**

**VS**

1. Director General of Customs  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.
2. K.G.Jayawardane  
Superintendent of Customs  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.
3. D.Gunatilake  
Superintendent of Customs  
Department of Customs  
Customs House  
No.40, Main Stree  
Colombo 11.
4. W.M.Seneviratne Banda  
Appraiser Long Room  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.

5. M.H.Piyadeva  
Deputy Director of Customs  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.
6. H.K.K.Karunasekera  
Deputy Superintendent of Customs  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.
7. M.H.Seneviratne  
Superintendent of Customs  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.
8. H.M.S.Premaratne  
Deputy Director of Customs  
Department of Customs  
Customs House  
No.40, Main Street  
Colombo 11.

**Respondents**

**BEFORE** : **K.T.CHITRASIRI, J**  
**L.T.B.DEHIDENIYA, J**

**COUNSEL** : Faisz Musthapha P.C. with Faisza Markar and  
Thushani Machado for the Petitioner  
  
Viraj Dayaratne D.S.G. for the Respondents

**ARGUED ON** : 25.02.2015

**WRITTEN**  
**SUBMISSIONS** : 08.06.2015 by the Petitioner  
**FILED ON** 05.06.2015 by the Respondents

**DECIDED ON** : **30. 06.2015**

**CHITRASIRI, J.**

Two petitioners by their petition dated 05.10.2011 sought *inter alia* to have a mandate in the nature of a writ of certiorari quashing the order made by the Deputy Director of Customs (DDC) by which he made an order of forfeiture of 270 MT of Indian Yellow Maize in terms of Section 47 of the Customs Ordinance. Simultaneously, he made order to release the same on a mitigated sum of Rs.6,954,220/- of the forfeiture, in terms of Section 163 of the Customs Ordinance. He also imposed a penalty of Rs.100,000/- on the Chairman of the 1<sup>st</sup> petitioner-company. He further imposed a forfeiture of Rs.56,793,345/- on the 2<sup>nd</sup> respondent and it was mitigated to a sum of Rs.100,000 in terms of Section 163 of the Customs Ordinance (P15). The orders referred to above were made pursuant to an inquiry held by the said DDC in relation to the aforesaid consignment for the importation of 270 MT Indian Yellow Maize by the 1<sup>st</sup> petitioner company.

The 1<sup>st</sup> petitioner was carrying a business of cultivation of Maize and Soya Beans for distribution in the local market which is being used as animal food. The 2<sup>nd</sup> petitioner is the manager of a clearing company by the name of Universal Link (Pvt) Ltd whose services were retained by the 1<sup>st</sup> petitioner to clear the aforesaid consignment of goods through customs. Importation of those goods was made pursuant to a license being obtained by the 1<sup>st</sup> petitioner from the Department of Animal Production and Health to import 1000 MT of animal feed (Indian Maize). The said permit is filed with the petition and marked as P4 to P8

with the petition. Accordingly, it is seen that the 1<sup>st</sup> petitioner has obtained permission for the concessions in respect of customs duty for the importation of 540 MT of Maize from the Department of Trade, Tariff and Investment. The document issued for that purpose is marked as P9 filed with the petition. Accordingly, the 1<sup>st</sup> petitioner imported its first consignment of 270 MT of Maize and it arrived at the Port of Colombo on 02.08.2011. The 2<sup>nd</sup> petitioner's services were obtained to clear the consignment. The necessary custom declaration (CUSDEC) (P12 and P13) was tendered by the 2<sup>nd</sup> petitioner and thereafter the other formalities at the customs were attended to. However, when the consignment was sent to the Greyline yard of the customs for examination, the 2<sup>nd</sup> petitioner was informed that an incorrect 'Harmonized System Code' (HS Codes) has been entered in the CUSDEC. Thereafter, a custom inquiry had been conducted and at the conclusion of that inquiry it was found that the two petitioners have evaded the payment of customs duty and other levies payable on the said consignment. Thereafter, forfeiture order referred to in paragraph 1 of this judgment had been imposed on the petitioners by the inquiring officer.

Consequently, the two petitioners filed this application stating that the said decision of the DDC was not supported by evidence; and/or the said decision is based upon an unreasonable; and/or irrational evaluation of evidence; and/or that the DDC when he made the said decision has failed to consider relevant matters; and/or considered irrelevant matters. Those grounds upon which this application had been made are morefully described in paragraph 35 of the petition. Therefore, it is necessary to consider whether the

DDC exceeded authority (*ultra vires*) when making the impugned decision contained in the document marked P15 for the reasoning referred to in the aforesaid paragraph 35 of the petition.

When a consignment is received, an importer is required to submit a customs declaration [CUSDEC] along with supporting documents, including the import licenses where applicable. Thereafter such declaration is being examined by the customs officials and in that process it is subjected to acceptance, face-vet, keying in, numbering, appraising, satisfying and screening by the officials prior to the delivery of the goods. However, food and other perishable items, in order to ensure the expeditious processing of the CUSDEC when it comes to the Express (Unit E) of the long room, CUSDECS are being appraised within a short period of time probably on the basis that the importer has acted honestly and in good faith, when furnishing all relevant information and supporting documents tendered with the CUSDEC. In this instance too, it was the procedure that had been adopted.

However, when it was reached at the Greyline of Sri Lanka Customs, it was found that wrong clarification namely a wrong HS Code had been entered when clearing the consignment. Thereafter, an inquiry was held by the DDC.

In the declaration submitted by the 2<sup>nd</sup> respondent, it was declared under HS Code 1104.23 whereas it ought to have been declared under HS Code 1005.90. Import license issued in favour of the 1<sup>st</sup> respondent for the importation of Yellow Maize (Corn) was also not tendered to the customs. Finally,

it was found that the HS Code that was mentioned in the CUSDEC tendered in this instance is applicable to '*Maize otherwise worked*' but not for Yellow Maize. The National Imports Tariff Guide marked P11 shows the difference between the HS Code 1005.10 applied to '*Maiz Seeds*' and the HS Code 1104.23 applied to '*Maize otherwise worked*'. Admittedly, the correct HS Code for the consignment in dispute is HS Code 1104.23. Accordingly, the decision of the DDC for the forfeiture had been made in terms of Section 47 of the Customs Ordinance.

In numerous occasions this Court and the Supreme Court has dealt with the manner in which forfeiture under Section 47 of the Customs Ordinance could be made.

In **Toyota Lanka (Pvt) Ltd v. S.A.C.S.W.Jayathilake and others, S.C.Appeal 49/2008, S.C.Minutes of 20.03.2009, Chief Justice S.N.Silva PC** held as follows:

"Hence I am fortified in the view and hold that the provision in Section 47" *but I such goods shall not agree with particulars in the bill of entry the same shall be forfeited. ....*" apply to situation in which **by means of wrongful entry goods are conveyed by stealth, to evade payment of customs duties or dues** or contrary to prohibitions or restrictions. In such a situation of a wrongful entry and evasion, since the consequence of forfeiture is by operation of law, even if the officer had delivered the goods upon the submission of a CUSDEC, such goods may be seized at any subsequent stage in terms of Section 125".

In that judgment the concept of stealth was introduced by the Supreme Court. Stealth is established when the consignee purposely evaded paying the custom

duty. If no such evasion is found no stealth is established and therefore no forfeiture is permitted.

In the case of **Mireka Capital Land (Private Limited) v. S.A.C.S.W.Jayathilake and 11 others, C.A.Writ Application 983/2007, C.A.Minutes of 15.06.2010, Sriskantharajah, J** held that :-

*“The principle enumerated in the [Toyota] judgment is that the mandatory consequences of forfeiture that are penal in nature will arise in a situation of concealment and evasion to pay duties as distinct from a situation of misdescription and under payment of duties”.*

Underlying principle, pronounced in those decisions is to examine whether there is clear evidence of the mental element in defrauding the revenue by the consignee. 2<sup>nd</sup> petitioner being an experienced clearing agent, it is his duty to declare true and accurate facts to the best of his knowledge. He is a person with thorough knowledge as to the HS Code of Maize and Maize subjected to a process. It is more so, since he has cleared a similar consignment of Indian Yellow Maize imported by M /S Wayamba Traders previously. CUSDEC number given to the said consignment by Wayamba Traders is 96655.

At the inquiry held before the DDC, the 2<sup>nd</sup> petitioner has admitted that Sri Lanka Customs on the previous occasion had informed him that the HS Code for Indian Yellow Maize was HS Code 1005.90. Indeed, he has declared accordingly in respect of that consignment by M/S Wayamba Traders. (page 8 in the document marked P15 filed with the petition). Hence, it is crystal clear

that the 2<sup>nd</sup> petitioner was well aware even prior to submitting the CUSDEC marked P12 that the correct HS Code for the consignment subjected to in this case should have been HS 1005.90.

Therefore, the 2<sup>nd</sup> petitioner ought to have mentioned the correct HS Code when clearing the consignment subjected to in this case. Under those circumstances, it is clear that the 2<sup>nd</sup> petitioner was not acting in good faith when clearing the consignment.

The petitioners have stated that the HS Code was mentioned only after it was referred to the officials at the Customs Department. However, the 2<sup>nd</sup> petitioner having experience of clearing a similar consignment should not have acted on their opinion, when he had the firsthand knowledge of the HS Code applicable to this particular consignment. Moreover, it is revealed at the inquiry before the DDC that the 2<sup>nd</sup> petitioner was fully aware of the procedure to be followed when seeking an opinion as to the HS Code from the "D" Branch of the Customs Department. He, being an experience clearing agent, has not sought an opinion from the "D" Branch, following the accepted procedure. Instead, for the reasons best known to him, he has merely inquired it from a Deputy Director of Customs without resorting to the formal procedure by making an application having paid the prescribed fee for that purpose.

More importantly, it is necessary to note that the 2<sup>nd</sup> petitioner has not produced the import license (P8) or the documents marked P5 & P6 to the Customs along with the CUSDEC. Had it been produced at that point of time,



the officials of the Customs would have come to know the correct HS Code applicable to the goods that are permitted to import for a lesser duty. Even though the possession of those documents was in the custody of the 1<sup>st</sup> petitioner, those have not been tendered when clearing the goods. Such a conduct of the petitioners may lead to think that they have acted fraudulently when tendering the CUSDEC to clear the goods.

The conduct of the petitioners referred to above show that they have acted in a fraudulent manner at the time the CUSDEC was tendered. Hence, it is clear that there is evidence of the mental element on the part of the petitioners in defrauding the revenue of the Government. Therefore, it is my opinion that there exists wrongful importation through stealth in this instance.

In the circumstances, I do not see that the decision of the Deputy Director of Customs is unreasonable or irrational or it was made without supporting evidence. Accordingly, I am not inclined to interfere with the impugned decision of the Deputy Director of Customs.

For the aforesaid reasons, this application is dismissed without costs.

*Application dismissed.*

JUDGE OF THE COURT OF APPEAL

**L.T.B.DEHIDENIYA,J**

I agree

JUDGE OF THE COURT OF APPEAL