

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 writs of
Certiorari and Mandamus in terms
of Article 140 of the Constitution

C A (Writ) Application No. 155 / 2015

W T L Automobiles (Private)

Limited

No. 310,

Negombo Road,

Welisara,

Ragama

PETITIONER

Vs

1. K A Chulananda Perera

Director General of Customs

2. R Rajendran

Additional Director General of
Customs, (Corporate)

3. R P D T Seneviratne

Additional Director General of
Customs (Provincial) & Vice
Chairman of the Nomenclature
Committee

4. A Kulendran

Additional Director General of
Customs (Enforcement) & Member
of the Nomenclature Committee

5. D A Idaranagama

Additional Director General of
Customs (Revenue & Services)

6. S Mahesan

Director of Customs & Member of
the Nomenclature Committee

7. D M N Dissanayake

Deputy Director of Customs &
Secretary, Nomenclature
Committee

8. J A D A Perera

Deputy Director of Customs &
Member of the Nomenclature
Committee

9. H K Janaka Fernando

Deputy Director of customs &
Member of Nomenclature
Committee

10. S Anandeeswaran

Deputy Director of customs &
Member of the Nomenclature
Committee

11. L P Ariyaratne

Deputy Director of Customs &
Member of the Nomenclature
Committee

12. H L N P Wanigasekara

Superintendent of Customs &
Member of the Nomenclature
Committee

13. M K S P Jayawardena

Superintendent of Customs,
D-Branch

14. K G Jayawardena

Superintendent of Customs,
D-Branch

15. Hon. Ravi Karunanayake,

Minister of Finance

16. Dr R H S Samaratinga,

Secretary to the Treasury and
Secretary to the Ministry of
Finance

17. S R Attygalle,

Deputy Secretary to the Treasury

18. Hon. Attorney General,

Attorney General's Department

Colombo 12

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

P. Padman Surasena J

Counsel: Mr. Deekiriwewa for the Petitioner

Mrs. F. Jameel, Senior DSG with Arjuna Obeysekera, DSG for
Respondents

Written submissions of the Petitioners filed on: 2016.06.06

Written submissions of the 1st Respondent filed on: 2016.06.07

Decided on: 2016.06.27

ORDER**P Padman Surasena J**

The Petitioner had imported 6 Mitsubishi Outlander Plug-in Hybrid Electric Vehicles (PHEV) during the period September 2014 - January 2015. He submitted bills of entry (commonly referred to as "cus decs") with regard to these vehicles under SHS classification of HS 8703.90.30 which is the code under which electric vehicles have been classified. After examining the vehicles Sri Lanka Customs took the view that the proper HS classification code for this vehicle should be HS 8703.23.53 which is the HS classification for Hybrid Vehicles.

It is to be noted that the duty payable for this vehicle if it is classified as a Hybrid Vehicle is approximately Rs. 3.4 Million higher than the duty payable, if it was classified as an electric vehicle and that was the reason why the Petitioner had insisted that this vehicle should be classified as an Electric Vehicle. Due to this dispute and at the written request of the Petitioner, Sri Lanka Customs referred this matter to "Nomenclature Committee". Pending its decision, Sri Lanka Customs released these vehicles to the Petitioner in

January 2015 on a bank guarantee to cover the duty difference between a hybrid vehicle and an electric vehicle.

On 2015-07-15, the Nomenclature Committee by majority view came to the conclusion that the said vehicles should be classified as an electric vehicle.

The said decision was thereafter submitted by this committee to the 1st Respondent who is the Director General of Customs (DGC).

Upon receipt of that decision, the 1st Respondent decided to seek a clarification on this matter by referring this issue of classification to the world customs organization (hereinafter referred to as WCO) by a request letter dated 2015-07-23.

The WCO advised the 1st Respondent by its report dated 2015-10-01 that this vehicle should be classified under HS 8703.23 for following reasons:

- a) the vehicle in question is fitted with a gasoline 2.0 litre (1,998 cc) engine, a generator, a drive battery and two electric motors;
- b) the gasoline engine has been adapted to drive the generator and assist the electric front motor.
- c) the vehicle has three modes of driving, namely:
 - i. the EV drive mode which is an all electric mode in which the electric front and rear motors drive the vehicles using

only electricity from the Drive Battery. In this mode, the gasoline engine does not run.

ii. Series Hybrid Mode where the gasoline engine operates as a generator supplying electricity to the electric motors.

The system switches to this mode when the charge in the EV mode falls below a pre-determined level or where greater performance is required, for example where accelerating is required to overtake a vehicle or climbing a steep hill.

iii. Parallel Hybrid Mode where the gasoline engine provides most of the motive power, assisted by the electric motors and the vehicle is 'run' on gasoline.

d) The Mitsubishi Outlander PHEV should be classified in subheading HS 8703.23 by application of the General Rules of Interpretation (GIR) 3(b) and 6.

Upon receipt of the opinion expressed by the WCO, the Nomenclature Committee re-considered its view on 2015-11-05 and decided to adopt and implement the WCO decision.

Learned counsel for the Petitioner in the course of his submission in supporting these applications before this court advanced 3 main arguments.

They are as follows:

1. The Director General of Customs must accept the decision of the Nomenclature Committee and has no power to refer the matter to the World Customs Organization;
2. The vehicles in question falls within HS classification 8703.90.33 given in 'X 15' and the rate of duty given therein must be applied to the said vehicles.
3. The subsequent amendments made to 'X 15' by way of 'X 17' are *ultra vires* the powers of the Deputy Secretary to the Treasury.

It is appropriate at this stage to look at section 2 of the Customs Ordinance. According to section 2 of the Customs Ordinance, the Director General of customs shall throughout Sri Lanka have the general superintendents of all matters relating to the Customs. It is understandable, that it is practically difficult for the Director General being a single person, to attend to every transaction dealt with by Sri Lanka Customs personally. It is for that purpose that he has set up a Nomenclature Committee comprising of some other officers of the Customs Department to consider and advise him on

issues of classification of goods whenever a dispute arises. It cannot be seen as a delegation of the Director General's functions as the Nomenclature Committee only makes recommendations to the Director General. Further, as per section 2 of the Customs Ordinance as has been mentioned above, it is the Director General who has the power of general superintendence of all matters relating to customs throughout Sri Lanka.

Learned Senior Deputy Solicitor General who appeared for the 1st Respondent drew our attention to a judgment of this court in Navarathne Vs Director General of Customs and others 2003 (3) SLR 310. This court in that case held as follows:

"The provisions of section 2 of the Customs Ordinance vested the Director General of Customs with the power of superintendence . To 'superintendent' means to 'regulate with authority' and to regulate means, 'to adjust by rule, method or established mode, subject to governing principles of law (Black's Law Dictionary)'.

In that case this court has held that when the Director General revises an order by one of his subordinates which is not validly made, the Director

General is acting within his powers of superintendence vested in him under section 2 of the Customs Ordinance.

In these circumstances this court is of the view that there is no merit in the submission that the Director General of Customs must accept the decision of the Nomenclature Committee.

It is the position of the learned Senior Deputy Solicitor General,

- I. that the WCO is a body consisting of customs departments from all countries including Sri Lanka
- II. its primary focus is to promote security and facilitate international trade
- III. for this purpose it has a duty to harmonize customs procedure
- IV. towards achieving this it takes steps to harmonize the classification of all items
- V. therefore, the Mitsubishi Outlander PHEV vehicle must have one classification all over the world.
- VI. it is by adopting a set of rules known as the General Interpretation Rules known as the GIR that the WCO determines the classification of a given item.

Although learned counsel argues that the 1st Respondent should not have corresponded with WCO, in view of the above positions taken up by the learned Senior DSG we are unable to see anything wrong, irregular, illegal or unacceptable in the action by the 1st Respondent. Further, the WCO has given reasons as to why it should be classified under HS 8703.23.

Learned counsel for the Petitioner was unable to submit any acceptable basis for this court to form an opinion that the reasoning by the WCO is incorrect or arbitrary.

Therefore there is no basis for this Court to agree with the submission of the learned counsel for the Petitioner that either the WCO or the 1st Respondent has arbitrarily classified this vehicle under subheading HS 8703.23

The Petitioner by the amended petition dated 2016-03-15 has prayed for:

A. writs of Certiorari to quash:

- i. 'X 9', which was the decision taken at the meeting of the Additional Directors General held on 2015-03-09. 'X 9' had been annexed as 'X 11' to the original petition;

- ii. 'X 17' - a letter dated 2015-12-03 written by the Deputy Secretary to the Treasury;
- iii. 'X 18' - the Revenue Protection Order published in Gazette Notification No. 1941/42 dated 2015-11-20;
- iv. 'X 19' - the Order made under the Excise (Special Provisions) Act and published in Gazette Notification No. 1941/29 dated 2015-11-21;
- v. 'X 20' - the letter dated 2016-02-09 sent by the DGC informing the Petitioner the reasons for classifying the said vehicle as a Hybrid.

B. Writs of Prohibition consequential to the above Writs of Certiorari;

C. Writ of Mandamus compelling the DGC to make a determination with regard to the classification of the said vehicle.

The order of the minister marked X 15 is dated 2015-11-20. The order marked X 15 has thereafter been amended by the document marked X 17 dated 2015-12-03.

Order of the Minister marked X 15 has no application to the importation of these vehicles which arrived well before the order marked X 15 was made.

Section 3 of the Revenue Protection (Special Provisions) Act No. 1 of 2006 reads as follows:

"Notwithstanding anything to the contrary in any other law 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 out of Sri Lanka, the date of importation or exportation as the case may be, shall be the date of delivery to the DGC, of the Bill of Entry relating to the goods on which such tax, duty, surcharge, levy or other charge is charged."

X 09 is an official internal document of Sri Lanka Customs. It is not a communication sent to the Petitioner. Petitioner is silent as to how he was able to lay his hands on this document. These importations have been made between the period 2014 - 2015. By the actions of the Petitioners who filed various kinds of litigations in court on grounds which have now turned out to be baseless, a huge amount of revenue has been lost to the state. Benefits of non-payment of that amount is accrued to the petitions.

In these circumstances we see no merit in this case. Hence, we decide to refuse issuing notices on the Respondents.

At the commencement of the submission, learned counsel for both parties agreed that, the applications bearing numbers C A (writ) Application No. 155 / 2015. C A 156 / 2015, C A 454 / 2015, C A 37 / 2016, C A 40 / 2016, C A 41 / 2016 and C A 68 / 2016 are all on the same issue. There are 22 vehicles which are the subject matter of these applications. The "cus decs" in respect of all these vehicles have been submitted to Sri Lanka customs prior to the publication of document marked **X 15**. 2015-09

It is the same counsel who appeared for parties in all these applications. They agreed at the commencement of their submissions and during their submissions that the issues to be contested are the same in all these cases. Therefore they agreed it would suffice for this court to pronounce one judgment namely the order in this case. They also agreed that the findings in this judgment must apply to the other cases as well because the issues to be decided in the other cases are identical.

Therefore in above numbered cases, namely C A (writ) Application No. 155 / 2015. C A 156 / 2015, C A 454 / 2015, C A 37 / 2016, C A 40 / 2016, C A 41 / 2016 and C A 68 / 2016, also we decide not to issue notices on the Respondents as there is no merit in the arguments. Those applications C A (writ) Application No. 155 / 2015. C A 156 / 2015, C A 454 / 2015, C A 37 /

2016, C A 40 / 2016, C A 41 / 2016 and C A 68 / 2016, should also stand dismissed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL