

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

C.A(Writ) Application No. 304/2017

Mark Santhakumar Sandanam,
carrying on a sole proprietorship under
the name, style and firm of
“Greenways”

at No. 65/311, Vystwyke Road,
Mattakkuliya, Colombo 15.

And presently at No. 93, 2nd Floor,
“Chathura Plaza Complex”,
1st Cross Street, Colombo 11.

Petitioner

Vs.

1. K.A. Chulananda Perera,
Director General of Customs.

1(A) P.S.M. Charles,
Director General of Customs.

2. C. Perinpanayagam,
Deputy Director of Customs,
Inquiring Officer.
3. J.C. Godakanda,
Deputy Superintendent of Customs,
Producing Officer.

All of whom are from
Sri Lanka Customs Headquarters,
Customs House, Charmers Quay,
No. 40, Main Street, Colombo 11.

4. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: P. Padman Surasena, J / President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: K. Deekiriwewa for the Petitioners

Ms. Nayomi Kahawita, State Counsel for the 1st – 4th Respondents

Supported on: 18th July 2018

**Written Submissions of the
Petitioner tendered on:** 07th August 2018

**Written Submissions of the
Respondents tendered on:** 20th September 2018

Decided on: 19th October 2018

Arjuna Obeyesekere, J

The Petitioner has filed this application on 12th September 2017 seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision taken on 4th October 2016 by the 2nd Respondent to proceed with Customs inquiry No. PCAD/HQO/36/2016;
- b) A Writ of Prohibition preventing the Respondents from proceeding with the said inquiry;
- c) A Writ of Mandamus to compel the 1st Respondent to appoint another Officer of Sri Lanka Customs as Inquiry Officer, in place of the 2nd Respondent.

Having heard the submissions of the learned Counsel for the Petitioner in support of this application, Court directed that written submissions be tendered by both parties. In the written submissions filed on behalf of the Respondents, the learned State Counsel has informed this Court that the 1st Respondent Director General of Customs has appointed a new Inquiry Officer in place of the 2nd Respondent, as a compromise to re-commence the Customs Inquiry. Thus, the necessity for this Court to consider the Writ of Mandamus does not arise. The learned State Counsel has also submitted that when the Inquiry re-commenced under the new Inquiry Officer, an objection had been taken by the Petitioner that the 3rd Respondent cannot be a witness for the reason that he had retired from service. Although the said objection had been

overruled by the Inquiry Officer, the Petitioner had not taken part at the inquiry thereafter, bringing the said inquiry to a halt.

The facts which are relevant to the consideration of the relief sought are as follows.

The Petitioner is carrying on a sole proprietorship under the name, style and firm of 'Greenways'. The said entity is engaged in the importation of electrical goods and gas (LPG) cookers, gas (LPG) regulators and other LPG appliances.

The Petitioner claims that without having an 'iota of evidence' against him, the officers of Sri Lanka Customs had 'raided' his shop situated at Colombo 11 and requested the Petitioner to grant them access to his email accounts without having a Court order to that effect. The Petitioner states that Sri Lanka Customs had thereafter commenced an inquiry against the Petitioner, with regard to certain imports made by the Petitioner. The Petitioner has annexed to the petition, marked 'X4', a copy of the inquiry proceedings and the documents marked at the said Inquiry.

This Court has examined 'X4' and observes that the Inquiry had commenced on 26th April 2016 and proceedings have been held over several days during the course of which the evidence of the Customs Officers who had been involved in the investigations had been recorded. This is inspite of the Inquiry having been postponed on several occasions, due to the absence of the Petitioner. This Court also observes that the Petitioner had been represented by an Attorney-at-Law at the Customs Inquiry and that the prosecution witnesses had been cross examined by the Petitioner's Counsel.

According to 'X4', the prosecution officer at the Inquiry had submitted that when the officers of the Post Audit Compliance and Facilitating Directorate of the Sri Lanka Customs examined the previous import documents of the Petitioner, it was discovered that the values declared by the Petitioner are very low compared to similar goods in the market. Therefore, Sri Lanka Customs had decided to investigate the previous imports of the Petitioner and had called over at the address declared by the Petitioner to Sri Lanka Customs. However, the customs found that there was no such business at the given address.

The Officers of Sri Lanka Customs had later found that the Petitioner was operating from a different address, and had then visited the said premises. After questioning the Petitioner, the Officers of Sri Lanka Customs had removed the computers of the Petitioner for further examination. The Officers of Sri Lanka Customs had retrieved deleted email correspondence between the Petitioner and his business counterparts which had revealed evidence suggestive of the Petitioner having undervalued the goods imported by him.

In considering the relief sought by the Petitioner, the first step for this Court is to examine the basis of the application in the context of the provisions of the Customs Ordinance.

The Customs Ordinance stands on three important pillars. The first is that all goods imported (or exported) to the country must be declared to Sri Lanka Customs¹. The second is that a proper and truthful description of the goods must be made at the time of importation. The third and final pillar is that the price actually paid or payable for the goods must be declared at the time of

¹ Section 47 of the Customs Ordinance.

importation². One without the other will not enable Sri Lanka Customs to charge the correct import duties and taxes on the goods imported into the country. This is reflected in Section 10 of the Customs Ordinance, which reads as follows:

“The several duties of customs, as the same are respectively inserted, described, and set forth in figures in the table of duties (Schedule A)³ shall be levied and paid upon all goods, wares, and merchandise imported into or exported from Sri Lanka”.

Several provisions of the Customs Ordinance require an importer to declare the value of the goods and sets out the consequences of not doing so. In terms of Section 47 of the Customs Ordinance, every consignee is required to tender a Bill of Entry, commonly referred to as the Customs Declaration or ‘Cus Dec’ setting out the details that are required in the said declaration including the value of the goods that are the subject matter of the said Bill of Entry.

Section 51 of the Customs Ordinance specifies that, ‘In all cases when the duties imposed upon the importation of articles are charged according to the value thereof, the respective value of each such article shall be stated in the entry together with the description and quantity of the same, and duly affirmed by a declaration made by the importer or his agent on a form⁴ ... as may be specified by the Director General and such value shall be determined in accordance with the provisions of Schedule E, and duties shall be paid on a value so determined.’

² In terms of Schedule E of the Customs Ordinance, the customs value of any imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to Sri Lanka, as may be adjusted and determined in accordance with the provisions of Schedule E.

⁴ This form is known as the ‘Value Declaration Form.’

As set out earlier, a truthful declaration of the price actually paid or payable for a good is paramount, for the Customs to determine the value of the import and thereby, for a proper working of the Customs Ordinance. It is for this reason that Sri Lanka Customs has the power to investigate any instance of suspected undervaluation.⁵ In terms of Section 51A(2) of the Customs Ordinance, Sri Lanka Customs has the power to amend the value declared at the time of importation, even after the goods have been cleared by Customs. Section 51A(2) reads as follows:

“If an officer of customs is satisfied as a result of an examination or investigation, or an audit carried out under section 128A, at any time prior to or after the clearance of the goods that the value declared by the importer or his agent under an Article of Schedule E under which the value was initially accepted, is not appropriate the officer of customs may amend the value in accordance with the appropriate Article of Schedule E.”

Where however, the importer has deliberately declared a lower value than what was actually paid, Sri Lanka Customs can act in terms of Section 52 of the Customs Ordinance, which reads as follows:

“Where it shall appear to the officers of the customs that the value declared in respect of any goods according to section 51 is a false

⁵ In terms of Section 51A(1) of the Customs Ordinance, “whenever an officer of customs has reason to doubt the truth or accuracy of any particulars contained in a bill of entry or a declaration made under section 51 or the documents presented to him in support of a bill of entry under section 47, the officer of customs may require the importer or his agent or any other party connected with the importation of goods, to furnish such other information, including documentary or other evidence in proof of the fact that the declared customs value represents the total amount actually paid or is payable for the imported goods as adjusted in accordance with Article 8 of Schedule E.”

declaration, the goods in respect of which such declaration has been made shall be forfeited together with the package in which they are contained. Where such goods are not recoverable, the person making such false declaration shall forfeit either treble the value of such goods or be liable to a penalty of one hundred thousand rupees, at the election of the Collector of Customs.”

This Court has examined the evidence led at the Inquiry in the presence of the Petitioner and his Attorney-at-Law and notes that Sri Lanka Customs has obtained from the custody of the Petitioner and produced documents relating to several instances of alleged undervaluation by the Petitioner. According to the evidence of the Customs Officer, the aggregate of the taxes not paid as a result of the undervaluation amounted to Rs. 26,491,087.

According to the Respondents, one such instance of undervaluation is revealed by the documents marked as ‘D10a’ – ‘D10e’ at the Customs Inquiry. According to the invoice submitted by the foreign supplier⁶ on 23rd June 2015, the actual value of the goods is USD 25038. However, by an email⁷ sent the same day by the Petitioner to one Andy Su, the Petitioner had stated that a sum of USD 10030 has already been paid and proposed that the invoice value be reduced to USD 15008. This was followed by the Petitioner himself sending to the supplier an amended invoice, quoting a price of USD 15008. The supplier has in turn sent the Petitioner the invoice⁸ for USD 14341 for the gas cookers, and a sum of USD 667 for miscellaneous items, attached to his email of 24th June 2015⁹. In respect of this transaction, the Customs Declaration¹⁰ to clear the

⁶ Invoice has been marked as ‘D10j’ at the Inquiry.

⁷ The email has been marked as ‘D10h’ at the Inquiry.

⁸ The amended invoice has been marked as ‘D10d’ at the Inquiry.

⁹ The email sent by the supplier is found at the bottom of ‘D10h’.

¹⁰ The Customs Declaration has been marked as ‘D10b’ at the Inquiry.

goods gives the value of the goods as USD 14341. The Petitioner has even submitted a value declaration form¹¹ in respect of this transaction. According to the Customs Declaration, the customs duty has been calculated on the lower value of USD 14341, thus causing a loss of revenue to the State, on the face of the documents. It is emphasised at this stage that this Court has not arrived at any finding that the Petitioner has undervalued goods imported by him, which is a determination that the Inquiry Officer may make, should he be satisfied that there is sufficient evidence in that regard, after having considered the evidence at the inquiry.

It is in these circumstances that the Petitioner is seeking a Writ of Certiorari to prevent Sri Lanka Customs Ordinance from proceeding with the inquiry. In considering this application, it would be appropriate for this Court to bear in mind the following statement of Lord Diplock in the case of Council of Civil Service Unions vs Minister for the Civil Service¹²:

“Judicial review has, I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “**illegality**”, the second “**irrationality**” and the third “**procedural impropriety.**”

The learned Counsel for the Petitioner has presented four arguments to support his position that the inquiry should not be proceeded with. It is observed that the Petitioner is not complaining of any irrationality or

¹¹ Section 51 requires every importer to submit a value declaration form (VDF). The VDF has been annexed to the Customs Declaration marked ‘D10b.’

¹²1985 AC 374.

procedural impropriety but is claiming that the collection of evidence and the decision to hold the inquiry is illegal, which Diplock J, has described as follows:

“By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

The Petitioner claims that Customs duty on the goods imported by him has been imposed not on the value of the good but on ‘per piece’ basis. The Petitioner’s first argument therefore is that where customs duty on a good is not charged based on its value, Sri Lanka Customs cannot invoke the provisions of Section 51 of the Customs Ordinance. This Court has examined the documents marked at the Inquiry in the presence of the Petitioner and his Attorney-at-Law, and notes that the Petitioner has in fact submitted Value Declaration Forms in terms of Section 51, at the time he submitted the Customs Declarations, which indicates that customs duty is payable on the value. Furthermore, this Court observes, as per some of the Customs Declarations produced at the inquiry that customs duties have been charged on the value of the goods imported as opposed to the number of pieces.¹³

Thus, the first argument of the Petitioner is incorrect and is devoid of any merit. This Court is of the view that issues such as the basis of calculating duties and the rate at which customs duties have in fact been paid, are matters that need to be decided at the Customs Inquiry, where the Petitioner will be afforded an opportunity of challenging the evidence led.

¹³ This is borne out by the Customs Declarations marked as ‘D10b’, ‘D11b’, ‘D12b’, ‘D13b’, ‘D14b’, ‘D15c’ and ‘D20b’ at the Inquiry.

The second argument of the Petitioner is that the goods that he had imported were not liable to customs duty but were only liable to Value Added Tax (VAT), Port and Airport Levy (PAL) etc and that value is immaterial. This argument is not accurate as this Court observes that the Petitioner has in fact paid customs duties on the goods imported by him on several occasions, as borne out by the Customs Declarations produced at the Customs Inquiry¹⁴, while on some other occasions, no customs duties have been paid. In any event, VAT and PAL are calculated on the value of the goods and for that reason, declaration of the transaction value is important.

The third argument of the Petitioner is that Sri Lanka Customs cannot 'recover' VAT, after the goods have been cleared by Sri Lanka Customs. The Petitioner contends that Sri Lanka Customs can only collect VAT at the point of importation¹⁵ but has no basis to proceed with an inquiry to 'recover' VAT, as the power of 'recovery' of VAT is vested with the Commissioner General of Inland Revenue. In support of this argument, the Petitioner has referred to several judgments of this Court and the Supreme Court.

This Court observes that the scope of the Customs Inquiry against the Petitioner relates to ascertaining whether there has been undervaluation. The commencement of every customs inquiry cannot be presumed to be aimed at "recovery" of duties or "levies." If the declaration of the value is false, the Inquiry Officer is empowered to forfeit the goods in terms of the law. If however, there is no evidence of undervaluation and the evidence reveals that there has been only a short levy of duties due, then the Director General of

¹⁴ *ibid.*

¹⁵ Section 2(3) of the Value Added Tax Act No. 14 of 2002, as amended, reads as follows: 'The tax on the importation of goods, shall be charged, levied and collected as if it is a customs duty and as if all goods imported into Sri Lanka are dutiable and liable to customs duty'.

Customs is empowered to demand the short levy in terms of Section 18(2) of the Customs Ordinance which reads as follows:

“When any duties, dues or charges on any imported or exported, have been short levied or any such duties, dues or charges after having been levied, have been erroneously refunded the persons chargeable with the duties, dues or charges so short levied or to whom such refund has erroneously been made shall pay the deficiency or repay the amount so erroneously refunded.”

This Court is of the view that Section 18 of the Customs Ordinance is based on the principle of *nunc pro tunc* – now for then. Thus, when acting in terms of Section 18(2), Sri Lanka Customs has the power to collect the same duties, dues or charges that it ought to have collected at the time of the importation of the goods. In doing so, Sri Lanka Customs is not usurping the powers conferred on the Commissioner General of Inland Revenue to ‘recover’ Value Added Tax, for the simple reason that what Sri Lanka Customs is doing is not ‘recovery’ but ‘collection.’

This position is further buttressed by the provisions of Section 51A (2) which specifically provides that, “the officer of customs may amend the value in accordance with the appropriate Article of Schedule E.” The necessary consequences of amending the value is the collection of customs duties, taxes and levies that ought to have been collected at the time of the importation of the goods if the declaration had reflected the correct value of the good. The legislature certainly has not prohibited Sri Lanka Customs from collecting all taxes that should have been collected at the point of importation and this Court cannot read such a restriction into Section 51A(2) or Section 18.

In the event the declaration of the value is false, the Inquiry Officer has the power to act in terms of Section 52 of the Customs Ordinance and forfeit treble the value of the goods. The forfeiture does not amount to a recovery of taxes. Thus, this Court is of the view that there is no merit in the third argument of the learned Counsel for the Petitioner.

The fourth argument of the learned Counsel for the Petitioner is that the evidence that has been presented by Sri Lanka Customs is based on emails that the Petitioner exchanged with his suppliers, which the Petitioner claims are privileged and protected by privacy laws. The Petitioner claims that by being asked to divulge the contents of the said emails, the Petitioner has been compelled to incriminate himself. This contention is incorrect in view of the provisions of Sections 128 and 128A of the Customs Ordinance, which will be referred to below.

The claim of self incrimination is misplaced in this instance because Section 128(1) of the Customs Ordinance empowers Customs Officers to enter and search premises and collect evidence, examine records etc. The following provisions of Section 128 of the Customs Ordinance are relevant to a consideration of the Petitioner's argument and hence, are re-produced.

Section 128(1)

“The Director-General or any officer of customs authorised in that behalf in writing by the Director-General may-

- (a) at all reasonable hours by day or night enter and search any building or place in which he suspects there are:
 - (iii) Any books of accounts or other documents containing any evidence relating to an offence under this Ordinance which, or which he suspects, has been or is being committed”
- (b) Break open any door, vault, chest, trunk, package or other place of storage which he may consider reasonably necessary to break for the purpose of exercising his powers under the preceding provisions of this subsection; and
- (c) Where he discovers any such goods, books or documents, seize and store them in a place of security selected by the Director-General.

Section 128A of the Customs Ordinance confers wide powers of investigation on the officers of the Sri Lanka Customs for the purpose of audit and examination of records. The provisions of Section 128A which are relevant to this application are as follows:

“(1) The Director-General or any officer of customs authorized in that behalf in writing by the Director-General may-

- (a) at all reasonable hours of the day or night enter any building or place where records are kept in accordance with section 51B and audit or examine such records on any matter pertaining to customs either in relation to specific transactions or to the

adequacy and integrity of the manual or electronic systems by which such records are created and stored.

- (b) open and examine any receptacle where any book of account register, record or any other document may be found for the purposes of the preceding provisions of this Ordinance.
 - c) examine and take copies of or make extracts from or take possession of any book of account register, other document found in such place or building.
 - (d) operate any computer found in any building and make copies or take printouts of the whole or part of any entries recorded or stored therein.
- (3) Any book of account, register, record or other document taken into his possession under subsection (1) by any officer may be retained in the possession of such officer for the examination of such book, register, record or document or for the institution of legal proceedings against the person to whom such book, register, record or other document belongs.”

This Court must note that any person who obstructs the Director-General or an officer of customs in exercising any of his powers vested under Section 128 and 128A shall be guilty of an offence¹⁶.

¹⁶ Section 128(3) and Section 128A(5) of the Customs Ordinance.

In the context of the fourth argument made by the learned Counsel for the Petitioner, this Court observes that Officers of Sri Lanka Customs have been given access to the computers and to the email addresses of the Petitioner by the Petitioner himself. Had the Petitioner refused to give such access to the email addresses maintained by him, the said Officers could have obtained an order from the Magistrate's Court. However, the necessity to do so did not arise as the Petitioner himself had provided access.

This Court is of the view that the wide investigative powers conferred on the officers of Sri Lanka Customs permit the officers to obtain copies of email correspondence between an importer and his consignor or any other person and to utilise such materials to prosecute an importer for any offence under the Customs Ordinance. The law does not prohibit email correspondence exchanged between an importer and a third party being used by Sri Lanka Customs to establish that an importer is guilty of violating the provisions of the Customs Ordinance and therefore this Court does not see any illegality in using emails as evidence. Furthermore, no special importance should be attached to electronic evidence or email correspondence and it is in law similar to evidence that Sri Lanka Customs may recover from an importer.

This Court would now consider if the Petitioner had been compelled to incriminate himself. This Court observes that after the conclusion of the evidence by the prosecution, the Petitioner had commenced his evidence, at which point this application was filed by the Petitioner, seeking to prevent Sri Lanka Customs from proceeding with the said Inquiry on the basis that the Petitioner cannot be compelled to testify against himself or to confess guilt.

The scope of an inquiry conducted by Sri Lanka Customs has been considered by this Court in the case of Anton Clement Thomas Dawson and another V. Neville Gunwardena¹⁷, where Sri Skandaraja J held as follows:

"It appears that the inquiry is to ascertain what are the charges that could be framed in the given circumstances. So it is left to the Customs Officials to ascertain facts either from any witness or from suspects to frame a charge and thereafter to explain the charge to the suspect and to give him an opportunity to call for evidence. But at the end of leading evidence if the Customs find, that there cannot be charge(s) framed, the inquiry will come to an end at that point. "

The purpose of Sri Lanka Customs conducting the inquiry which is the subject matter of this application is to determine whether the evidence establishes that an offence has been committed under the Customs Ordinance. In this particular instance, the offence suspected to have been committed was one of undervaluation, which could be dealt with under Section 51A(2) or Section 52 of the Customs Ordinance.

Section 51A was introduced by the Customs (Amendment) Act No. 2 of 2003 and as observed by Sripavan J (P/CA)(as he then was), "it is to be borne in mind that the amending act No. 2 of 2003 enables the officers of the customs to take a decision in accordance with the principles of natural justice. It is implied by natural justice in the construction of all laws, that no one ought to suffer any prejudice without having first an opportunity of defending himself. The opportunity would be given to the petitioner, if requested, once the customs

¹⁷CA (Writ) Application No. 77/2012 - CA Minutes of 16th March 2012. Referred to in Dialog Axiata PLC vs Director General of Customs and another CA (Writ) Application No. 87/2012 CA Minutes of 2nd September 2015.

officer amends the customs value, in accordance with the appropriate Article of Schedule E.”¹⁸ The evidence that would transpire at the inquiry would also enable the Customs Officer to inform the basis upon which the amendment, if any, is made to the initial value¹⁹.

Thus, it appears that the purpose of recording the evidence of the Petitioner was to enable the Petitioner to give his side of the story prior to arriving at a determination. If the Inquiry Officer is satisfied, after hearing the evidence of the importer that there is insufficient evidence to amend the value, the inquiry ends there. However, in the event the Inquiry Officer is satisfied that there is sufficient evidence that the value declared by the importer which was initially accepted, is not appropriate, then, the Inquiry Officer can act under Section 51A(2) and amend the value. An importer who is dissatisfied with any decision of the Inquiry Officer in terms of Section 51A(2) has been conferred a right of appeal to the Director General, who is required to give written reasons for his decision. The final situation is where the Inquiry Officer is satisfied on the evidence that the Petitioner has submitted a false declaration, in which event the provisions of Section 52 may be applied.

This Court has examined 'X4' and is of the view that the Petitioner has not been compelled to give evidence or to incriminate himself. Thus, this Court does not see any merit in the fourth argument of the learned Counsel for the Petitioner.

The Petitioner has not submitted any material to establish that the actions of Sri Lanka Customs are illegal or that Sri Lanka Customs have not followed the

¹⁸ Fonterra Brands Lanka (Private) Limited vs Director General of Customs – CA (Writ) Application No.801/2008 CA Minutes of 15th October 2007 and 2008 [B.L.R] 346.

¹⁹ Section 51A(4) of the Customs Ordinance requires Sri Lanka Customs to provide to the importer, if requested, a written explanation as to how the declared value, was amended in terms of Section 51a(2).

due process. This Court is satisfied that the Respondents have adhered to the statutory procedure laid down in the Customs Ordinance and does not see a legal basis to interfere with the statutory process. In these circumstances, this Court does not see any illegality with the decision of the Inquiry Officer to proceed with the customs inquiry and therefore does not see any legal basis to issue notices on the Respondents.

This application is accordingly dismissed, without costs. This Court directs the 1st Respondent to ensure that the Customs Inquiry is proceeded with and concluded expeditiously, as a period of over two and half years has lapsed since the commencement of the inquiry.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal