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 Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 423/2020

1. SKT Traders (Private) Limited,
   No. 266/18, Canal Road,
   Hendala, Wattala.

2. Kathirgamathamby Sajeevan,
   Director,
   SKT Traders (Private) Limited,
   No. 24, Sagara Road, Colombo 4.

PETITIONERS

Vs.

1. Hon. Mahinda Rajapaksa,
   Hon. Prime Minister and Hon. Minister of Finance, Economy and Policy Development,
   Ministry of Finance, Economy and Policy Development,
   The Secretariat, Colombo 1.

2. S.R. Attygalla,
   Secretary to the Minister of Finance, Economy and Policy Development,
   Ministry of Finance, Economy and Policy Development,
   The Secretariat, Colombo 1.

3. T V D Damayanthi S. Karunarathne,
   Controller General,
   Department of Imports & Exports Control,

York Street, Colombo 01.

4. Major General G.V. Ravipriya (Retd.),
   Director General of Customs,
   Sri Lanka Customs,
   Sri Lanka Customs Headquarters,
   Charmers Quey,
   No. 40, Main Street, Colombo 11.

5. Hon. Rohitha Abeygunawardena,
   Hon. Minister of Port and Shipping,
   Ministry of Port and Shipping,
   No. 19, Chaithya Road, Colombo 01.

6. Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 01.

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

RESPONDENTS

Before:	**Arjuna Obeyesekere, J / President of the Court of Appeal** **Sobhitha Rajakaruna, J**
Counsel:	K. Deekiriwewa with L.M. Deekiriwewa, Dr. M.K. Herath and Dr. Kanchana De Silva for the Petitioners Manohara Jayasinghe, Senior State Counsel with Ms. Indumini Randeni, State Counsel for the Respondents
Supported on:	17th December 2020
Written submissions:	Tendered on behalf of the Petitioners on 18th December 2020
Decided on:	8th February 2021

Arjuna Obeyesekere, J., P/CA

The 1st Respondent, the Minister of Finance, acting in terms of Section 14 of the Imports and Exports Control Act No. 1 of 1969, as amended (**the Act**) read together with Section 20 thereof, has issued the Imports and Exports Control Regulation No. 3 of 2019, marked '**X4**'. In terms of the said Regulations, which have been published in Extraordinary Gazette No. 2152/63 dated 6th December 2019, any person desirous of importing *inter alia* Turmeric is required to obtain a license from the 3rd Respondent, the Controller General of Imports and Exports.

The 1st Petitioner is a limited liability Company, while the 2nd Petitioner is a director of the 1st Petitioner. The Petitioners state that they imported 89.2MT of Turmeric from India in **May 2020** at a cost of USD 111,600. It is admitted that the Petitioners have not obtained a license to import the said consignment of Turmeric, as required by '**X4**'. Although the Petitioners claim that the 3rd Respondent did not entertain any applications for a license, the Petitioners have not adduced any proof to establish that they in fact made an application for a license, or that the 3rd Respondent refused to entertain an application for a license. Thus, while it is safe to assume that the Petitioners have not applied for a license, there is no dispute that the Petitioners had not been issued with a license to import the said consignment of Turmeric. The fact remains therefore that the Petitioners had imported the above consignment of Turmeric without complying with the requirements of '**X4**' that any import of Turmeric is subject to a license from the 3rd Respondent.

The Petitioners filed this application in December 2020, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the aforementioned Regulations '**X4**' made by the 1st Respondent under the Imports and Exports Control Act;

b) A Writ of Prohibition preventing the Respondents from invoking and applying the provisions of '**X4**' on the consignment of Turmeric imported by the Petitioners;

c) A Writ of Mandamus directing the 3rd Respondent, the Controller General of Imports and Exports to issue the 1st Petitioner a license in respect of the consignment of Turmeric imported by the 1st Petitioner.

There are two Sections of the Act that play a pivotal role in the determination of this application, namely Section 20(3) and Section 20(4). In terms of Section 20(3) of the Act:

> '*Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of publication or on such later date as may be specified in the Regulation.*'

Section 20(4) provides that:

> '*Every regulation made by the Minister shall be* ***brought before Parliament*** *within a period of one month from the date of the publication of that regulation under subsection (3), or, if no meeting is held within that period, at the first meeting after the expiry of that period, by a motion that such regulation shall be approved*.'

The provisions of Sections 20(3) and (4) can be summarised as follows:

a) Every Regulation made by the Minister shall be published in the Gazette;

b) Such Regulations shall come into operation on the date of publication or on such later date as may be specified in the Regulation;

c) Such Regulation shall be **brought before Parliament** within a period of one month from the date of publication of that Regulation;

d) If however, no meeting of Parliament is held within that period, such regulation shall be brought before Parliament at the first meeting after the expiry of that period, for approval of Parliament.

The following facts are admitted by the parties:

(a) '**X4**' was published in Extraordinary Gazette No. 2152/63 dated 6th December 2019 and became effective on the same date;

(b) Parliament was prorogued from midnight of 2nd December 2019. The ceremonial opening of Parliament took place on 3rd January 2020, and Parliamentary sessions were held on **7th January 2020**;

(c) The Regulations '**X4**' have been presented to the Members of Parliament by the Chief Government Whip on **8th January 2020**, as borne out by the Parliamentary Debates (Hansard) marked '**X6**';

(d) The said Regulations have thereafter been placed on the '*Order Paper of Parliament for 6th February 2020*' marked '**X7**';

(e) The Regulations have been approved by Parliament thereafter.

It is in the above factual and legal background that the learned Counsel for the Petitioners submitted that the Regulations '**X4**':

(a) were *not brought before Parliament* within one month from the date of its publication in the Gazette – i.e. on or before 6th January 2020;

(b) were in fact *brought before Parliament* only on 8th January 2020,

and for that reason the said Regulations are of no force or avail in law.

The learned Counsel for the Petitioners submitted further that in the absence of a valid set of Regulations, there is no legal requirement to obtain a license for the consignment of Turmeric imported by the Petitioner.

The learned Senior State Counsel for the Respondents submitted that the Regulations '**X4**' have in fact been **brought before Parliament** within a period of one month from the date of its publication, and that the provisions of Section 20 have been complied with by the Respondents. In support of his submission, the learned

Senior State Counsel drew my attention to a letter dated 26th December 2019 marked '**R1A**', sent by the 1st Respondent to the Secretary General of Parliament, which reads as follows:

> "1969 අංක 1 දරන ආනයන හා අපනයන පාලන පනත යටතේ පල කරන ලද 2019.12.06 දිනැති අංක 2152/63 දරන අතිවිශේෂ ගැසට් පතය පාර්ලිමේන්තුවේ අනුමැතිය සඳහා ඉදිරිපත් කිරීමට අවශ්‍ය කටයුතු සම්පාදනය කර දෙන මෙන් කාරුණිකව ඉල්ලා සිටිම්"

The issue that arises then is, what is meant by *brought before Parliament*.

Having carefully considered the provisions of Section 20(4) of the Act, I am of the view that the words, '**brought before Parliament**' must mean that the 1st Respondent is only required to submit to Parliament the Regulations in question, within a period of one month from the date of its publication. The 1st Respondent has performed that obligation by bringing the Regulations to the attention of the Leader of the House and the Secretary General of Parliament – vide '**R1A**' – on 26th December 2019. Once the Regulations were brought before Parliament by the 1st Respondent by '**R1A**', the administrative responsibility of placing the Regulations on the Order Paper of Parliament is with the Leader of the House and the Secretary General of Parliament. The Petitioners have not named either of them as a respondent nor are the Petitioners complaining of any inaction on their part.

Once brought before Parliament, placing the Regulations on the Order Paper of Parliament is not a function of the 1st Respondent and in fact is beyond the control of the 1st Respondent. Any other interpretation that places the burden on the Minister to have the Regulations placed on the Order Paper of Parliament within one month of its publication is in violation of Article 3 of the Constitution, which provides for the separation of powers between the branches of Government. The Minister acting as a member of the Executive cannot impose his will on the Legislature. The Minister has discharged his obligation upon forwarding the Gazette to Parliament and requesting that it be approved by Parliament. It is the Leader of the House who must specify a date suitable for Parliament to take up the Regulations for debate and approval.[1] If Parliament decides that it does not have enough time, it will allocate

[1] 'The member of the Government who is primarily responsible for the arrangement of government business in the House of Commons is known as the Leader of the House. The Leader manages the arrangement of

another date for the matter. The important feature is that since '**X4**' is delegated legislation, the delegate (Minister) has to inform the principal (Parliament) of the action he has taken. It is up to the principal to decide on what steps to take next.

The 1st Respondent cannot go beyond this. The law does not expect the 1st Respondent to do the impossible and ensure that the Regulations are placed on the Order paper of Parliament. It is therefore my view that by forwarding the Regulations '**X4**' to the Secretary General of Parliament by his letter '**R1A**', the 1st Respondent has discharged his obligation of bringing the Regulations '**X4**' before Parliament within a period of one month. I do not therefore see any merit in the submission of the learned President's Counsel.

Provisions similar to Sections 20(3) and (4) of the Act are found in Section 3(4) of the Excise (Special Provisions) Act No. 13 of 1989. In **TDH International (Private) Limited vs Hon. Ravi Karunanayake, Minister of Finance and Others**,[2] a Writ of Certiorari had been sought to quash two Orders made under Section 3(1) of the Excise (Special Provisions) Act No. 13 of 1989, which had been published in the Extraordinary Gazettes of 29th January 2015 and 26th February 2015, respectively.

Section 3(4) of the said Act provided that:

> "*Every Order made by the Minister under subsection (1) shall come into force on the date of its publication in the Gazette or on such later date as may be specified in such Order and* ***shall be brought before*** ***Parliament within a period of three months from the date of its publication*** *in the Gazette or, if no meeting of Parliament is held within such period, at the first meeting of Parliament held after the expiry of such period, by a motion that such Order be approved.*"

While the first Order had been rescinded by the second Order, the second Order had been sent to Parliament with Cabinet approval within two months of its publication in the Gazette – i.e. on 20th April 2015. The Order, however, had been approved by Parliament only on 5th November 2015, which is over 8 months after its publication.

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business in the House while the programme and details are settled by the Government Chief Whip.' - Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament [25th Edition; 2019] page 48.

[2] CA (Writ) Application No. 310/2015; CA Minutes of 3rd April 2018.

The argument that was taken up on behalf of the petitioner was identical to the argument that has been taken up in this application, namely that the Orders have not been brought before Parliament within the time period stipulated in Section 3(4) and are therefore invalid.

Referring to Section 3(4) of that Act, P. Padman Surasena, J., P/CA (as he then was), with Shiran Gooneratne, J agreeing, held as follows:

> "*A closer look at the above section shows that the validity of such order would commence from the date on which the Minister affixes his signature on such order and not from the date on which it is approved by the Parliament. It is also to be noted that the obligation imposed by law on the Minister is to bring the relevant order before Parliament within the period of three months from the date of its publication in the Gazette.*
>
> *The Act does not impose an obligation on the Minister to <u>obtain</u> the approval of the Parliament within three months. In any case, it would not be possible for the Minister to comply with such requirement (even if there is any), since he does not have control over the Parliamentary proceedings. As has been pointed out by the learned Additional Solicitor General, this Court cannot interpret this provision in that way as the law does not contemplate to compel any person to do anything impossible (Lex non cogit impossibilia). Therefore, it is the view of this Court that the Minister's obligation is only to take steps towards presenting such Order before the Parliament within three months.*
>
> *The Order marked <u>X4</u> was issued on 2015-02-26 and it was forwarded to the Parliament on 2015-04-20. Thus, the 1st Respondent has discharged the obligation imposed on him by law under section 3(4) of the Act.*"

Thus, my view is fortified by the above judgment of this Court.

The learned Senior State Counsel submitted that even if the argument of the learned Counsel for the Petitioners is accepted, the provisions of Section 20(4) are not mandatory, and are only directory. He premised this argument on the basis that the Act does not provide that the Regulations shall be invalid unless placed before

Parliament within the period stipulated in Section 20(4). In **Stafford Motor Company (Private) Limited vs Commissioner General of Inland Revenue**,[3] Janak De Silva, J held as follows:

> "*The question whether a provision in a statute is mandatory or directory is not capable of generalization but when the legislature has not said which is which, one of the basic tests for deciding whether a statutory direction is mandatory or directory is to consider whether violation thereof is penal or not. It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non-compliance with the provisions, of a statute may held to be directory*."

In terms of the Act, the only instance where the Regulations shall not have any force is where *Parliament refuses to approve the Regulations,* as provided for in Section 20(5) of the Act, and that too only after the date that Parliament refuses to approve the regulations.[4] The fact that the legislature did not impose a sanction for the failure to bring before Parliament the regulations within the one month period but only provided that the regulations will not be valid if Parliament refuses to approve it, and that too with prospective effect, is a further indication that the provisions of Section 20(4) are directory. The situation that has arisen in this application does not fall within Section 20(5). On the contrary, Parliament did approve the Regulations '**X4**' and most importantly, prior to the impugned shipment of the 1st Petitioner. Thus, by the time the impugned goods arrived in Sri Lanka, there was in place a set of Regulations that had been approved by Parliament, and valid in terms of the law.

Thus, even if the words, **brought before Parliament** were interpreted to mean that the Regulations must be placed on the Order Paper of Parliament, as opposed to tendering it to the Secretary General of Parliament, within one month of its publication, I am of the view that in the absence of any sanction for failure to do so, its legality is not affected.

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[3] CA (Tax) Appeal No. 17/2017; CA Minutes of 18th March 2019.

[4] In terms of Section 20(5), 'Any regulation which Parliament refuses to approve shall be deemed to be rescinded but without prejudice to the validity of anything previously done thereunder or to the making of any new regulation. The date on which such regulation shall be deemed to be rescinded shall be the date on which Parliament refuses to approve the regulation.'

It would perhaps be useful to refer at this stage to the judgment of the Supreme Court in **H.R. Podi Appuhamy vs The Government Agent, Kegalla**.[5] The facts of that case briefly are as follows. Section 2 (1) of the Heavy Oil Motor Vehicles Taxation Ordinance provided that the tax in respect of Heavy Oil Motor Vehicles shall be paid in accordance with the rates prescribed in the First Schedule to the Ordinance. The Finance Act No. 2 of 1963 amended Section 2 of the said Ordinance by inserting therein a new sub-section (7) which provided for the rates prescribed in the First Schedule to the Ordinance to be varied by the Minister of Finance from time to time by Order published in the Gazette.

Section 2(7)(b) provided as follows:

> "*Every Order made under paragraph (a) of this sub-section shall come into force on the date of its publication in the Gazette or on such later date as may be specified in the Order, and* ***shall be brought before the House of Representatives*** *within a period of one month from the date of the publication of such Order in the Gazette, or, if no meeting of the House of Representatives is held within such period, at the first meeting of that House held after the expiry of such period, by a motion that such Order shall be approved.*"

I must note that the wording of Section 2(7)(b) is more or less identical to the wording in Sections 20(3) and (4) of the Imports and Exports Control Act.

An Order made by the Minister under Section 2(7)(a) had been published in the Gazette of 29th April 1963 prescribing the new rates to be effective from 1st May 1963. It was in evidence that the first meeting of the House of Representatives after the publication of the said Order was on 17th July 1963. The Order had been brought up only at the fifth session of Parliament which took place on 20th August 1964. It was argued that the regulations had not been brought before the House of Representatives in one month, that non-compliance with the provisions of Section 2(7)(b) renders the Order invalid, and therefore cannot be utilised for the imposition of any tax.

[5] 70 NLR 544.

Having considered whether the provisions of Section 2(7)(b) are mandatory or directory, Alles, J held as follows:

> *"The question whether words similar to that found in sub-section (7) (b) are mandatory or directory has been the subject of discussion by commentators. Craies (Statute Law 9th Edn. p. 317) seems to take the view that requirements relating to time are only directory in nature. In the latest edition of Allen 'Law and Orders' (1965) the following passage appears at pp. 145 and 146:-*
>
> > *"If the statute expressly indicates what the effect of non-compliance is to be, the matter is plain; but in many cases it merely gives its command and says nothing about the consequences of disobedience. The courts then have to look at the general intendment of the section, and often of the whole statute, and, although there can be no invariable rule, the general principle of interpretation is well stated by Maxwell:*
> >
> > *'Where the prescriptions of a statute relate to the performance of a public duty ; and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only.'*
>
> *Although it is a little startling to say that a command to lay Ministerial regulations before the Legislature is 'a mere instruction for the guidance and government of those on whom the duty is imposed', it is believed that this principle is applicable to Statutory Instruments which are required to be laid and are subject to negative resolution. I understand that this view has always been held in the departments, and it is supported by the fact that it is not uncommon to insert in statutes a provision that if a Statutory Instrument is annulled within the prescribed period, this shall be without prejudice to acts done before the annulment.*

In the present case the Order is to come into force on the date of its publication in the Gazette (language similar to some of the local Statutes referred to earlier) and also requires 'a positive Parliamentary resolution for its confirmation or continuance'. ***The sub-section merely 'gives its command and says nothing about the consequences of disobedience'*** *and* ***the general principle of interpretation stated by Maxwell in the above passage would be applicable particularly in regard to the functions of the Government Agent who issues the certificate and has no control over the proceedings in the House.***

I am inclined to adopt the principles laid down by Allen and hold that in this case, even though there is no strict compliance with sub-section (7)(b), the Order P2 is a valid Order under which a certificate could be issued for the recovery of the tax. I would therefore dismiss the appeal."[6] (emphasis added)

The judgment of Alles, J therefore supports the argument advanced by the learned Senior State Counsel, with which I have agreed, that the provisions of Section 20(4) are only directory, and that the validity of the Regulations '**X4**' are not affected even if the interpretation given to Section 20(4) by the learned Counsel for the Petitioner is accepted.

In May 1968, approximately six months after the above judgment of Justice Alles was delivered, the Supreme Court was again called upon to decide the validity of the same Order in **Illeperuma Sons Limited vs Government Agent, Galle**.[7]

Chief Justice H.N.G. Fernando, influenced by the '*fundamental principle of British Constitutional Law that the subject cannot be taxed except directly by Statute enacted by Parliament, or alternatively by Resolution of the House of Commons passed by virtue of enabling power in a Statute*'[8] refused to follow the judgment of Alles, J and went on to state as follows:

"Provisions of the nature contained in the sub-section (7), which gives statutory force to a taxation Order prior to its being approved by the House of Representatives is considered to be expedient only because it is sometimes

[6] Ibid; at page 546-547.
[7] 70 NLR 549
[8] Ibid; at page 551.

necessary to prevent speculative dealings and other similar transactions which might take place in the interval between the time when notice of a motion or resolution is given in Parliament and the time when the motion or resolution is actually passed. But a sine qua non for such temporary validity of a Taxation Order is that ***the Minister responsible must perform the obligation which he owes to Parliament*** *to bring the Order before the House of Representatives for approval.*

Paragraph (c) of the new sub-section no doubt provides that even if the House refuses to approve a Taxation Order and the Order thereby becomes revoked, the levy of the taxes prior to the time of such revocation will be valid. But this validity flows, in my opinion, from the fact that the law is observed and that ***Parliament is duly invited to consider*** *whether or not to approve the Order. But in a case where the order is not brought before Parliament at all or where as in this case the order is brought before Parliament long after the prescribed time, paragraph (c) is of no avail. The simple reason I have for this conclusion is that paragraph (c) does not contemplate either any omission or any delay in moving the requisite motion for approval.*

I hold for these reasons that the failure to comply with the provisions of paragraph (b) of the new sub-section (7) had the consequence that the Order as published in the Gazette of 29th April 1963 had no validity as such."

Although Chief Justice Fernando took the view that the impugned provision is mandatory, he did say that, '*But a sine qua non for such temporary validity of a Taxation Order is that* ***the Minister responsible must perform the obligation which he owes to Parliament*** *to bring the Order before the House of Representatives for approval.*' The above passage is an indication that in that case, the Minister did not submit the Order to the Clerk of the House of Representatives within the stipulated period.

In any event, even if the view of Chief Justice Fernando that the requirement is mandatory is accepted, **Illeperuma** does not assist the Petitioner in this case, for two reasons. The first is that the factual position in this application is different since, as I have already held, the 1st Respondent in this application has performed that

obligation referred to by Chief Justice Fernando within the stipulated time period – vide '**R1A**'.

The second reason is that, having arrived at the above conclusion, Chief Justice Fernando went on to consider the fact that by the time action was filed to recover the taxes in terms of the said Order, Parliament had approved the said Order, and stated as follows:

> "*Different considerations however arise by reason of the fact that the House of Representatives did approve the new rates of tax by the motion passed on 20th August 1964……*
>
> *The Minister's Order is temporary and provisional**. But the motion in the House is intended both to validate the Minister's Order and to approve the new rates of tax permanently**. The House of Representatives having thus approved the new rates of tax permanently by the motion passed on 20th August 1964, the constitutional requirement that taxation must be approved in the House has been satisfied. In these circumstances the Court must be slow to hold that the proceedings in the House were a nullity. Accordingly I hold that the new Schedule of rates became valid and operative as from the date of the passing of the motion of approval, i.e., as from 20th August 1964*."[9]

It is admitted that Parliament had approved the impugned Regulations '**X4**' by the time the Petitioners imported the goods to Sri Lanka. Thus, applying the above reasoning of Chief Justice Fernando in **Illeperuma**, there was a valid legal requirement imposed by the Regulations '**X4**' to obtain a license to import Turmeric by the time the commercial invoice was issued for the goods and by the time the goods imported by the Petitioners arrived in Sri Lanka.

In the above circumstances, I am satisfied that the provisions of Section 20(4) have been complied with and I take the view that the Regulations '**X4**' are legal and valid, with the necessary consequence that the Petitioners are not entitled to the aforementioned Writs of Certiorari and Prohibition.

[9] Ibid; at page 552.

Although the necessity for me to consider the Writ of Mandamus does not arise in view of the above conclusion, I must state that by virtue of '**X4**', Turmeric is a restricted item, the importation of which, without complying with the provisions of '**X4**' would trigger the provisions of the Customs Ordinance,[10] thereby ousting the jurisdiction of the Controller General of Imports and Exports in respect of such goods. The Controller therefore is under no legal duty to issue a license to the Petitioners, and the Petitioners have no legal right to seek a license. For that reason, I am of the view that the Petitioners are not entitled to the Writ of Mandamus prayed for.

Taking into consideration all of the above, I see no legal basis to issue notice of this application on the Respondents. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Sobhitha Rajakaruna, J

I agree

Judge of the Court of Appeal

[10] Sections 4(1) and 21(1)(b) of the Imports and Exports Control Act, and Sections 12 and 43 of the Customs Ordinance.