

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

In the matter of an Application for an order in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No: 2196/2002**

1. Free Lanka Trading Company Limited.
2. Joseph Kenny,  
Executive Director.
3. Athula Srinama, Wharf Manager.
4. Nalin Wijeratne, Wharf Executive.
5. Bertram De Silva, Stores Manager.

All Petitioners at  
Free Lanka Trading Company Limited,  
Prince Alfred Towers,  
No. 10, Alfred House Gardens, Colombo 3.

**PETITIONERS**

Vs.

1. S.A.S.W.Jayatilake,  
Director General of Customs.
- 1a. P.S.M.Charles,  
Director General of Customs.
2. U. Liyanage,  
Assistant Director of Customs.

All Respondents at Customs Department,  
Customs House, Bristol Street,  
Colombo 1.

**RESPONDENTS**

**Before:** Arjuna Obeyesekere, J / President of the Court of Appeal

**Counsel:** Gamini Marapana, P.C., with Navin Marapana, P.C., Uchitha Wickremasinghe and Janani Peeris for the Petitioners

Milinda Gunatilake, Senior Deputy Solicitor General for the Respondents

**Argued on:** 6<sup>th</sup> July 2020

**Written** Tendered on behalf of the Petitioner on 2<sup>nd</sup> July 2019

**Submissions:**

Tendered on behalf of the Respondents on 9<sup>th</sup> October 2019

**Delivered on:** 30<sup>th</sup> March 2021

**Arjuna Obeyesekere, J., P/CA**

The 1<sup>st</sup> Petitioner, Free Lanka Trading Company Limited is a private limited liability company. The Petitioner states that *inter alia* it is engaged in the importation of wines, spirits and essences to Sri Lanka, the sale and distribution of liquor including Beehive Brandy and the export of liquor to India and Maldives. The 2<sup>nd</sup> – 5<sup>th</sup> Petitioners are employees of the 1<sup>st</sup> Petitioner.

The Petitioners state that for a long period of time, the Gal Oya Development Board held the franchise to manufacture Beehive Brandy in Sri Lanka and that Beehive Brandy Essence was imported to Sri Lanka during that time by the Gal Oya Development Board. On its liquidation, the sugar plantation and factory had become an independent enterprise known as Hingurana Sugar Company Limited.

The Petitioners state that in 1997, the 1<sup>st</sup> Petitioner became the franchise holder for the sale and distribution of Beehive Brandy in Sri Lanka. The 1<sup>st</sup> Petitioner had accordingly entered into an arrangement with M/s Adet Seward of France, who was the license holder for Beehive Brandy worldwide, to import Beehive Brandy essence. The 1<sup>st</sup> Petitioner had also entered into an agreement with Sri Lanka Distilleries Limited for the manufacture of Beehive Brandy. The Beehive Brandy manufactured

on its behalf by Sri Lanka Distilleries Limited was sold and distributed by the 1<sup>st</sup> Petitioner.

The Petitioners state that Sri Lanka Customs granted the 1<sup>st</sup> Petitioner a Bond facility by permitting the use of a bonded warehouse facility at No. 168, Negombo Road, Peliyagoda. The agreement between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent, the Director General of Customs setting out the terms of operation of such Bond facility is marked '**P3a**'. In terms thereof, goods imported by the 1<sup>st</sup> Petitioner are cleared by Sri Lanka Customs with the duty payable stamped on a form known as 'To Bond Entry'. The goods are thereafter required to be transported to the Bond and stored inside the Bond. When the goods stored therein are required for local manufacture or sale, the 1<sup>st</sup> Petitioner is required to raise a form known as 'Ex Bond Entry' and obtain the written permission of Sri Lanka Customs to clear the goods. Customs duties are paid only at the point the 'Ex Bond Entry' is raised. The goods are permitted to be taken out of the Bonded warehouse after the payment of duty and after the Bonding Division of Sri Lanka Customs has approved the 'Ex Bond Entry'.

The Petitioners state that on 16<sup>th</sup> May 2001, the Revenue Task Force of Sri Lanka Customs had checked the goods stored at the above Bonded warehouse of the 1<sup>st</sup> Petitioner and the records maintained at the head office of the 1<sup>st</sup> Petitioner. The Petitioners state that due to lack of space in the locked area of the Bonded warehouse, nine barrels of Beehive Brandy each containing 2290 litres of essence were kept outside the locked area of the bonded warehouse but within the premises of No. 168, Negombo Road, Peliyagoda. The Petitioners state further that four of these barrels were cleared after payment of customs duties on 31<sup>st</sup> May 2001 while the balance five barrels were cleared after payment of customs duties on 19<sup>th</sup> June 2001. The Petitioners however state that the necessary entries could not be made as Customs had removed the relevant books from the warehouse, a fact which has been disputed by the Respondents who state that approval to clear the goods had not been granted by the Bonding Division of Sri Lanka Customs.

The 1<sup>st</sup> Petitioner admits that Sri Lanka Customs thereafter recorded statements from its employees and initiated an inquiry in terms of Section 8 of the Customs Ordinance. The scope of the investigation and the inquiry was twofold. The first was that the 1<sup>st</sup> Petitioner had misdescribed 11810 litres of *Brandy Concentrate* as *Brandy*

*Essence.* The second was the failure of the 1<sup>st</sup> Petitioner to duly store within the approved Bond the aforementioned nine barrels of Brandy Essence, as well as 2748 empty glass bottles and 2 barrels of malt whisky.

It is admitted that the inquiry was held before the 2<sup>nd</sup> Respondent in October and November 2002 and that all Petitioners were afforded an opportunity of placing its side of the story before the Inquiry Officer. At the end of the Inquiry, the 2<sup>nd</sup> Respondent, by his Order dated 20<sup>th</sup> November 2002 marked 'P9' imposed the following in respect of the misdescription relating to the 11810 litres of brandy:

- a) Forfeiture of 11810 litres of the item declared as Beehive Brandy essence valued at Rs. 18,312,498 in terms of Sections 12, 43 and 47 of the Customs Ordinance, read with the provisions of the Excise Special Provisions Act;
- b) Forfeiture of Rs. 54,937,496 being treble the value of the goods in (a) in terms of Section 129 of the Customs Ordinance;
- c) Forfeiture of Rs. 500,000 and Rs. 300,000 on the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, the Executive Director and Wharf Manager, respectively of the 1<sup>st</sup> Petitioner, in terms of Section 129 and 163 of the Customs Ordinance.

With regard to the second issue, the Inquiry Officer imposed the following:

- a) Forfeiture of five barrels of the item declared as Beehive Brandy Essence valued at Rs. 1,700,419, four barrels of the items declared as Beehive Brandy essence valued at Rs. 1,034,417, 2748 empty glass bottles valued at Rs. 674,802 and 2 barrels of malt whisky valued at Rs. 478,527, in terms of Section 75 of the Customs Ordinance;
- b) Forfeiture of Rs. 3,888,165 on the 1<sup>st</sup> Petitioner represented by the 2<sup>nd</sup> Petitioner, its Executive Director being the single value of the goods listed in (a), in terms of Section 129 and 163 of the Customs Ordinance;
- c) Forfeiture of Rs. 200,000 each on the 4<sup>th</sup> and 5<sup>th</sup> Petitioners, the Wharf Clerk and Stores Manager, respectively of the 1<sup>st</sup> Petitioner, in terms of Section 129 and 163 of the Customs Ordinance.

Aggrieved by the above, the Petitioners filed this application seeking a Writ of Certiorari to quash the said order 'P9'.

I shall commence with the first issue. The question to be considered here is, what is the correct HS Code that should apply to the Beehive Brandy that is imported by the 1<sup>st</sup> Petitioner.

The position of the 1<sup>st</sup> Petitioner is that what was imported by it is *Beehive Brandy Essence*, whereas Sri Lanka Customs claims that what has been imported is *Beehive Brandy Concentrate*.

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' declaring the goods that are imported to the country. The consignee is required to provide the details that are specified in the said declaration including a proper and truthful description of the goods and the value of the goods that are the subject matter of the said Bill of Entry.

The importance of an importer making a proper and truthful declaration of a good to Sri Lanka Customs was considered by this Court in **Mark Santhakumar Sandanam vs Chulananda Perera, Director General of Customs and Others**,<sup>1</sup> where it was held as follows:

*“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 Customs<sup>2</sup>. 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 importation<sup>3</sup>. One without the other will not enable Sri Lanka Customs to charge*

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<sup>1</sup> CA (Writ) Application No. 304/2017; CA Minutes of 19<sup>th</sup> October 2018. The Supreme Court has refused special leave to appeal in SC (Spl LA) Application No. 406/2018; SC Minutes of 8<sup>th</sup> August 2019.

<sup>2</sup> Section 47 of the Customs Ordinance.

<sup>3</sup> 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.

*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) shall be levied and paid upon all goods, wares, and merchandise imported into or exported from Sri Lanka”.*

Thus, while every good that is imported must be declared to Sri Lanka Customs, the importer must declare, in addition to the transaction value of the good, the correct description of the good and the HS Code that is relevant to such description. The issue of classification was considered by the Supreme Court in **Toyota Lanka (Pvt) Limited vs Jayatilake, Director General of Customs and Others**.<sup>4</sup> In order to appreciate what was held by the Supreme Court, it would be important to reproduce Section 47 in its entirety:

***“The person entering any goods inwards, whether for payment of duty or to be warehoused, or for payment of duty upon the taking out of the warehouse, or whether such goods be free of duty, shall deliver to the Collector a bill of entry of such goods, on a form of such size and colour as may be specified in that behalf by the Collector by Notification published in the Gazette, and be fairly written in words at length, expressing the name of the ship, and of the master of the ship in which the goods were imported, and of the place from which they were brought, and the description and situation of the warehouse, if they are to be warehoused, and the name of the person in whose name the goods are to be entered, and the quantity, value and description of the goods, and the number, dimensions, and denomination or description of the respective packages containing the goods, and such other particulars as the Collector by that or a subsequent Notification may require him to furnish, and in the margin of such bill shall delineate the respective marks and numbers of such packages. The particulars furnished in the bill of entry shall be supported by such documents containing such particulars as the Collector may, by Notification published in the Gazette, require. If such person fails to deliver a bill of entry prepared, and supported by such documents, as aforesaid, he shall be liable to a penalty not***

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<sup>4</sup> [2009] 1 Sri LR 276.

*exceeding one thousand rupees. Such person shall pay any duties and dues which may be payable upon the goods mentioned in such entry; and such person shall also deliver at the same time two or more duplicates of such bill, in which bill all sums and numbers shall be expressed in figures, and the particulars to be contained in such bill shall be legibly written and arranged in such form and manner, and the number of such duplicates shall be such, as the Collector shall require, and such bill of entry when signed by the Collector, or person authorized by him, and transmitted to the proper officer, shall be the warrant to him for the examination and delivery of such goods ; but if such goods shall not agree with the particulars in the bill of entry the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained.” [emphasis added]*

In **Toyota Lanka**, the position of the petitioner was that the goods in question, a Toyota Land Cruiser motor vehicle was examined by Sri Lanka Customs prior to its release and that such an examination ought to have revealed the alleged discrepancy in the number of seats, which was the criterion that determined the relevant HS Code classification and thereby the duty that should be charged.

Chief Justice Sarath N. Silva, who delivered the judgment of the Supreme Court rejected the argument that a mere misdescription would attract the forfeiture provisions of Section 47. He thereafter considered the circumstances in which a forfeiture could take place for a contravention of Section 47, and held as follows:

*“The view stated above that the words in the last limb of Section 47 “but if such goods shall not agree with the particulars in the bill of entry the same shall be forfeited....” apply to a situation in which by means of a wrongful entry goods are conveyed by stealth to evade payment of customs duties and dues or contrary to prohibitions, restrictions and that such goods and other goods and packages as provided are forfeited by operation of law.”<sup>5</sup>*

*“Hence, when the goods are conveyed by stealth and in concealment to evade payment of customs duties, or the applicable prohibitions and restrictions, by*

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<sup>5</sup> Ibid; page 289

*operation of law such goods and other goods packed together and packages are forfeited.”<sup>6</sup>*

*“Hence I am fortified in the view and hold that the provision in Section 47 **“but if such goods shall not agree with particulars in the bill of entry the same shall be forfeited”** apply to a situation in which by means of a 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. I am further of the view and hold that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an underpayment or short levy of duties or dues. In such event the proper course would be a requirement for payment of the amount due prior to delivery of goods or the recovery of the amounts due in terms of Section 18.”<sup>7</sup>*

The legal position laid down by the Supreme Court therefore is that the forfeiture in terms of Section 47 would not apply, unless the importer has acted with stealth.

As noted earlier, the position of the 1<sup>st</sup> Petitioner is that what it imported at all times is Beehive Brandy essence and that the said Essence is used to manufacture Beehive Brandy in Sri Lanka. The manufacturing process adopted by the 1<sup>st</sup> Petitioner, as set out in **‘P1a’** is as follows. The 1<sup>st</sup> Petitioner states that it purchases Extra Neutral Alcohol with a strength of 96.2% from Pelawatte Sugar Company. The said alcohol is thereafter reduced in two stages to a strength of 40-50% alcohol by the addition of water. The Beehive Essence is added at this point to the diluted neutral alcohol, 10-13% in volume and kept in vats for 1-2 months. The said mixture is thereafter matured in Casks for a period of 3-30 months. In order to produce the finished product, blending is done by mixing brandy from several casks consisting of several ages and caramel is added to obtain a uniform colour. It is on this basis that the 1<sup>st</sup> Petitioner claims that what it imports is only Essence. In other words, it is the position of the 1<sup>st</sup> Petitioner that it simply adds Brandy Essence to an Extra Neutral

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<sup>6</sup> Ibid; page 289

<sup>7</sup> Ibid; page 290



Alcohol, the strength of which has been reduced from 96.2% to 40-50% through a manufacturing process. The alcohol content in the finished product, which is 40%, is obtained through the Extra Neutral Alcohol and not through the Essence that is added to it.

The Petitioners state that having obtained the franchise to manufacture Beehive Brandy in Sri Lanka in 1997, the very first consignment of Beehive Brandy Essence imported by it was declared under HS Code Classification No. 2106.90, and that it paid the necessary duty due under the said classification. The Petitioners state that the 1<sup>st</sup> Petitioner continued to clear Beehive Brandy Essence under the above HS Code. According to the Petitioners – vide 'P2a' - the 1<sup>st</sup> Petitioner had imported 29480 litres of Beehive Brandy Essence during the period 19<sup>th</sup> June 1997 – 16<sup>th</sup> August 2001.

The description of HS Code 2106, as is relevant to this application, is as follows:

***"21.06 – Food preparations not elsewhere specified or included"***

*2106.10 – Protein concentrates and textured protein substances.*

*2106.90 – Other*

***Provided that they are not covered by any other heading of the nomenclature, this heading covers:***

- (a) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk etc.) for human consumption.*
- (b) Preparations consisting wholly or partly of food stuffs, used in the making of beverages or food preparations for human consumption.*

*The heading includes inter alia:*

- (1) Powders for table creams, jellies, ice creams, or similar preparations, whether or not sweetened.*

- (2) *Flavouring powders for making beverages, whether or not sweetened, with a basis of sodium bicarbonate and glycyrrhizin or liquorice extract (sold as cocoa powder).*
- (7) *Non alcoholic compound preparations or compound preparations having an alcoholic strength by volume not exceeding 0.5% volume used for making beverages (liqueurs, etc.), unless they are included elsewhere in the nomenclature... compound preparations of this type having an alcoholic strength by volume exceeding 0.5% volume are excluded (heading 22.08).*
- (12) *Preparations for the manufacture of lemonades or other beverages... such preparations are intended to be consumed as beverages after simple dilution with water or after further treatment. Certain preparations of this kind are intended for adding two other food preparations."*

The position of the Respondents is that the heading 2106 is for food preparations not elsewhere specified or included and is also a residual heading for classification purposes. Under 2106, there are two headings, namely, 2106.10 is for protein concentrate and textured protein substances and 2106.90 is for 'other'. Therefore, in order to classify a substance under 2106.90, the item must have some food value. Accordingly, an item which is in substance and content a 'spirit' cannot be classified under the heading 2106.

HS Code 2106 can therefore be summarised as follows:

- a) Goods can be classified under Section 2106 only if they are not covered by any other heading of the nomenclature;
- b) Compound preparations having an alcoholic strength by volume exceeding 0.5%, which should come under HS Code 2208, are excluded.

The Petitioners state that in August 2000, a Superintendent of Customs had directed the 1<sup>st</sup> Petitioner to amend the classification heading to 3302.10.09. The 1<sup>st</sup> Petitioner has duly complied with it and paid the necessary duties due under the said classification.

“33.02 – Mixtures of Odoriferous substances and mixtures including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry

3302.10 - Of a kind used in the food or drink industries

3302.90 - Other

*This heading covers the following mixtures provided they are of a kind used as raw materials in the perfumery, food or drink industries (example in confectionary, food or drink flavourings) or in other industries (example, soap making;*

*(1) Mixtures of essential oils;*

*(2) Mixtures of resinoids;*

*(3) Mixtures of synthetic aromatics;*

*(4) Mixtures consisting of two or more odoriferous substances (essential oils, resinoids and synthetic aromatics);*

*(5) Mixtures, whether or not containing alcohol, of products of other chapters (example, oleoresins) with one or more of the substances referred to in (1) – (4) above, provided the latter form the basis of the mixture.*

*In particular, the heading covers perfume bases consisting of mixtures of essential oils and fixatives, not ready for use until after the addition of alcohol. The heading also includes solutions in alcohol (example, ethyl alcohol, isopropyl alcohol) of one or more odoriferous substances **provided** these solutions are of a kind used as raw materials in the perfumery, food, drink or other industries.*

*The heading **excludes**, compound alcoholic preparations of a kind used for the manufacture of beverages (heading 22.08; non alcoholic preparations of this type are classified in heading 21.06 unless they are included elsewhere in the nomenclature).”*

It is therefore clear that compound alcoholic preparations which should come under HS Code No. 2208 are excluded from HS Code No. 3302.

Pursuant to the investigation launched by Sri Lanka Customs, it had determined that the Beehive Brandy imported by the 1<sup>st</sup> Petitioner should have been classified under HS Code 2208.20, and that the 1<sup>st</sup> Petitioner had deliberately declared the goods under a wrong classification. Chapter 22 covers four main groups, namely, (1) water and other non alcoholic beverages and ice; (2) fermented alcoholic beverages (beer/wine); (3) distilled alcoholic liquids and beverages and ethyl alcohol; and (4) vinegar and substitutes for vinegar.

HS Code No. 2208 reads as follows:

*“Undenatured Ethyl Alcohol of an alcoholic strength by volume of less than 80% volume; Spirits, Liqueurs and other Spirituous beverages*

*2208.20 - Spirits obtained by distilling grape wine or grape marc;*

*2208.30 - Whiskies*

*2208.40 - Rum and Tafia*

*2208.50 - Gin and Geneva*

*2208.60 - Vodka*

*2208.70 - Liqueurs and Cordials*

*2208.90 - Other*

***The heading covers, whatever their alcoholic strength:***

***(A) Spirits produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable product, without adding flavouring.....”***

The position of Sri Lanka Customs is that what was imported by the 1<sup>st</sup> Petitioner is Brandy Concentrate which has been misdescribed by the 1<sup>st</sup> Petitioner as Brandy

Essence. The Respondents state further that the 1<sup>st</sup> Petitioner ought to have obtained a classification ruling from the D branch of the Sri Lanka Customs which the 1<sup>st</sup> Petitioner had initially failed to do and when requested, refused to do.

The Respondents state that at the inquiry it was found that the item is not an essence but a distilled alcoholic liquid containing 40% ethyl alcohol obtained from distilling grape wine. Therefore, the item is a spirit and not an essence or a food preparation as claimed by the Petitioner.

The position of Sri Lanka Customs is supported in three ways.

The first is by a letter dated 16<sup>th</sup> July 2001 marked '2R8' sent by M/s Adet Seward, the supplier of the goods in question, to the 2<sup>nd</sup> Respondent:<sup>8</sup>

*"Dear Joseph*

*We are pleased to advise that the **Beehive concentrate** we ship to you is a **mixture of high quality grape brandy concentrate** and other essences and cannot be used as it is for normal human consumption.*

*This concentrate must be blended with local neutral alcohol with a proportion of 13% of beehive concentrate and matured 3 – 6 months in oak whiskey casks before bottling.*

***This concentrate is shipped at alcohol 40% volume** so as to preserve the concentrate during transport and maturation.*

*This beehive concentrate is the same we used to ship to Hingurana sugar company."*

This letter makes it clear that what is being imported has an alcoholic content of 40%. Thus, it cannot be classified under HS Code No. 2106.10 for the simple reason that the alcoholic strength by volume exceeds 0.5% volume, and is therefore

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<sup>8</sup> This letter has been annexed marked '2R8' to the Statement of Objections filed in CA (Writ) Application No. 159/2002 filed by the Petitioner.

excluded from 2106. Similarly, the product being a compound alcoholic preparation is excluded from HS Code No. 3302.

The second ground relied upon by Sri Lanka Customs is that the product that was imported by Hingurana Sugar Industries Limited, which as admitted by M/s Adet Seward is identical to what the 1<sup>st</sup> Petitioner was importing, was classified under HS Code 2208.90. The Petitioners admit that prior to obtaining the franchise, Hingurana Sugar Industries Limited manufactured Beehive Brandy having imported the same raw material from the same supplier. The Respondents have filed, marked '2R2', a Customs Declaration submitted by Hingurana Sugar Industries limited where the HS Code is given as 2208.20.

The third ground relied upon by Sri Lanka Customs are the reports of the Government Analyst. It is admitted that Sri Lanka Customs drew a sample from the consignment imported by the 1<sup>st</sup> Petitioner and had it examined by the Government Analyst. The first report of the Government Analyst dated 25<sup>th</sup> September 2001, marked '2R5' reads as follows:

*"The sample was labeled 'Sample of brandy Concentrate declared as Brandy Essence – 18.09.2001', and contained dark brown coloured liquid.*

***The alcohol content of the sample was 40% by volume.***

*Further analysis revealed that it is a distilled product obtained from wine, which contained 8.6% soluble solids."*

The Customs had led the evidence of Mr. K Sivaraja who at that time was the Government Analyst. Shown the report '2R5', Mr. Sivaraja was asked whether he could explain what is meant by a distilled product and why he had stated that the product had been obtained from wine. The answer is reproduced below:

*"This sample was submitted as sample of brandy concentrate declared as brandy essence. By definition, brandy is a distillate of wine. Actually burnt wine. There are two types of alcoholic beverages, one is a fermented liquor, and the other one is distilled spirit. Always the distilled spirit are obtained from fermented liquor by a process of distillation. For example, distilled spirit arrack*

*is obtained from the fermented liquor toddy. Similarly, brandy spirit is obtained from fermented liquor wine. And each has its own characteristic. That is, arrack has characteristic of toddy, and similarly, brandy has characteristic of source of wine. When it is said brandy, it is from wine and wine is obtained from grapes."*

It is also admitted that another sample was drawn directly by the Government Analyst. The report on this sample, dated 8<sup>th</sup> November 2011 and marked '**2R6**' reads as follows:

*"The bottle was labeled 'Beehive Brandy essence – Free Lanka' and contained a dark brown coloured liquid.*

***The alcohol content of the sample was 40.1% by volume.***

*Further analysis revealed that the secondary constituents associated with brandy were identified in the sample.*

*It is a distilled product obtained from wine, which contained 8.4% soluble solids.*

***In my opinion, it is a brandy concentrate and not a preparation based on odoriferous substances."***

The Government Analyst was thereafter shown his second report '**2R6**' and was asked to explain the meaning of concentrate and why he said the sample was not a preparation based on odoriferous substances. His reply is as follows:

*"Odoriferous substances mean in the preparations of this particular sample that is synthetically prepared, substances are mixed. Concentrate is product prepared in natural way and you can obtain the final product by diluting an appropriate ratio. For example, Sunquick concentrate and orange flavoured powdered drink. The secondary constituent associated with brandy were identified in the sample. Any liquor, whatever the type is you identify the liquor in secondary constituents. Those are the ones that contribute to the bouquet and taste. There are some toxic alcohol contained in liquor. In brandy, contain toxic known as methyl alcohol which is not present in arrack. In every natural*

*brandy, methyl alcohol is present. In this sample, methyl alcohol was identified and that is why I say this is not a mixture of odoriferous substances.”*

While the reports of the Government Analyst confirms the position of the supplier M/s Adet Seward that the product has alcohol 40.1% by volume, the evidence of the Government Analyst before the Customs Inquiry establishes that the item imported by the Petitioner is a spirit and a brandy concentrate, and is not a food preparation nor a preparation based on odoriferous substances.

The issue of the correct classification was considered by the Nomenclature Committee of Sri Lanka Customs at its session held on 4<sup>th</sup> December 2001. Having considered the material that was available the Nomenclature Committee had arrived at the following conclusions, as borne out by the minutes of the meeting marked ‘2R16’:<sup>9</sup>

*“Heading 3302 covers “mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for the manufacture of beverages.” To fall within this heading the product must have a basis of one or more odoriferous substances as described in Note 2 to Chapter 33, which are used primarily to impart a fragrance and secondarily to give a flavour to beverages. Though the supplier claims that 0.10% of vanilla extract is used to produce the product, according to exclusion (a) of the Explanatory Notes to heading 33.01, vanilla extract has been excluded from heading 33.01. Therefore, this product cannot be considered a preparation based on odoriferous substances. Hence, the product cannot be classified within HS 3302.*

*Heading 21.06 covers “food preparations not elsewhere specified or included.” To fall under this heading, the product in question should not be covered by any other heading of the Nomenclature. Though the product in question as presented is not intended for consumption as beverage, it is a distilled product obtained from wine, which contain 40% or 40.1% alcohol by volume and*

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<sup>9</sup> The minutes have been annexed marked ‘2R16’ to the Statement of Objections filed in CA (Writ) Application No. 159/2002 filed by the Petitioner.



*secondary constituents (such as esters which give the spirit, its peculiar individual flavours and aroma) associated with brandy. Hence this product has the essential characteristics of a spirit obtained by distilling wine.*

*Heading 22.08 covers undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% volume; spirits, liqueurs, and other spirituous beverages. The subheading 22.08.20 covers "spirits obtained by distilling grape wine or grape marc". **According to explanatory notes to heading 22.08, the heading covers, whatever their alcoholic strength, spirits produced by distilled wine.** In addition to undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% volume, the heading includes spirits obtained by distilling grape wine or grape marc.*

*According to the Government Analyst report, this product has been obtained by distilling wine which contained 8.4% soluble solids and the secondary constituents associated with brandy were identified in the sample. The government analyst is also of the opinion that it is a brandy concentrate and not a preparation based on odoriferous substances.*

*On the basis of the above the committee decided as follows:*

- (1) If the wine used for the manufacture of the product in question had been obtained from grape or grape marc the product should be classified within HS 2208.20*
- (2) If the wine used for the manufacture of the product in question had been obtained other than from grape or grape marc then the product should be classified within HS 2208.9009."*

In his Order '**P9**', the Inquiry Officer has held as follows:

*"To prove misdescription and incorrect classification, the prosecution led the evidence of several witnesses and marked several documents at the inquiry. The main documents were invoices, Government analysts report, CISIR report, minutes of the NC Committee meeting. To determine the correct rate of duty of*

*any item imported for the first time, the importer has to find out the HS Classification of the item.*

*According to the regulations of the Customs Ordinance, the importer is bound to give the correct description to the customs to determine the correct classification. If the item is not correctly classified, the Customs is unable to collect the due revenue.*

*In this case, a very vital point, which is the alcoholic strength which separates the item from classification chapters 22 and 21 which also deals with whether the item is dutiable under Excise Special Provisions Act was not declared to the Customs by the importer.*

*This information is very clearly stated in the invoice marked as 'X10'. In addition, the invoice qualifies item adding a word brandy immediately after the words 40%. Although the defence state that the word brandy applies to*

*Prosecution led evidence to prove that the final product of Beehive brandy is manufactured from the item in question, namely Beehive brandy concentrate, by only adding extra neutral alcohol and water. According to the evidence led through witness Wijeyapala with documents marked 'P60', it is proved before me while other essences added in very small quantities to produce various types of other liquor, in the case of manufacturing Beehive brandy, the item called Beehive brandy essence is added 20% - 30% and sometimes more."*

Having considered the above material, I am satisfied that the conclusion reached by the Inquiry Officer with regard to classification is based on the material that was available to him, and hence, the said findings are neither illegal nor irrational.

This brings me to the question, whether the Inquiry Officer could have imposed a forfeiture. As held by Chief Justice Sarath N. Silva, a forfeiture in terms of Section 47 would not apply, unless the importer has acted with stealth. In my view, the following evidence before the Inquiry Officer, which I have already referred to in detail, supports a finding of stealth on the part of the 1<sup>st</sup> Petitioner:

- a) The 1<sup>st</sup> Petitioner is an importer of wines, spirits and essences to Sri Lanka, and is engaged in the sale and distribution of liquor including Beehive Brandy and the export of liquor to India and Maldives. The 1<sup>st</sup> Petitioner was also engaged in the manufacture of alcoholic beverages.
- b) The 2<sup>nd</sup> Petitioner in his evidence has explained the manner in which he met the representatives of the supplier, M/s Adet Seward, and negotiated the arrangement between the two Companies to manufacture Beehive Brandy in Sri Lanka. It is thereafter that the 1<sup>st</sup> Petitioner obtained the franchise to manufacture Beehive Brandy. Such an arrangement could not have been agreed upon in ignorance of what it entails.
- c) The 1<sup>st</sup> Petitioner was the entity that was engaged right throughout the manufacturing process as confirmed by Sri Lanka Distilleries Limited by its letter marked '2R1'. Therefore, the 1<sup>st</sup> Petitioner would obviously know the specific qualities of the item that it was importing, if not for any other reason, simply to engage in the manufacturing process and in order to source the other necessary raw materials and thereafter to price the product.
- d) Above all, there can be no ambiguity that HS Code No. 2106 is a residual classification, and specifically excludes products having more than 0.5% alcohol.

In the above circumstances, I am of the view that the decision to impose a forfeiture in respect of the 11810 litres of the item declared as Beehive Brandy is in terms of the law. Hence, I see no legal basis to issue a Writ of Certiorari to quash that part of the order 'P9'.

This brings me to the second issue, which is the failure by the 1<sup>st</sup> Petitioner to store the aforementioned goods inside the Bond. In terms of Section 69 of the Customs Ordinance:

*"The Director - General may from time to time by notice in writing under his hand, appoint warehouses or places of security for the purpose of this Ordinance and direct in what different parts or divisions of such warehouse or places, and in what manner, and under what regulations, any and what sort of*

*goods may be warehoused, kept, and secured without payment of duty upon the first entry thereof, ....”*

In terms of the agreement between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent marked 'P3a', the 1<sup>st</sup> Petitioner has undertaken as follows:

*“...that it shall, subject to and in conformity with the said Operating Instructions, **duly store the said items** in its warehouse appointed by the Director General under Part XI of the Customs Ordinance ...”*

It is clear that the Bond is the warehouse and that the goods that are released upon the 'To Bond Entry' must therefore be stored inside the Bond. It is however admitted that the goods which I have referred to earlier were stored outside the warehouse, although it was within the premises of No. 168, Negombo Road, Peliyagoda, which is where the warehouse was situated .

The Respondents submitted further that there are two sets of bonding registers that are maintained, one at the bonding division of the Customs and the other at the bonded warehouse. Goods can be removed from the bonded warehouse only after the officer in charge of the bonding register enters the data in the bonding register maintained at the bonding division. The Respondents submitted that the wharf clerk has not followed the above procedure in allowing the clearance of the nine barrels, and even though Customs duties were paid on the said nine barrels, the proper procedure has not been followed.

In his Order 'P9', the Inquiry Officer, having considered the defence of the Petitioners, has held as follows:

*“The prosecution beyond all reasonable doubt proved that the items 1 to 4 of the production list were kept outside the bonded warehouse. This position was not challenged by the defence. The defence pointed out to me that due to a technical reason these goods were kept outside Bond but it was proved to me that the goods were kept outside the bond for a long time and for 1 or 2 days. The defence also pointed out that the goods in question were kept outside the Bond with the consent of the Customs Inspector – the locker. But this was not proved at the time of leading the evidence of the Customs Inspector, Mr.*

*Upasoma. The Customs Inspector at the Bond is a minor employee of Customs and he has no authority whatsoever to give permission to the Bondsmen to store cargo outside the Customs Bond on which the duties and levies were not paid as it is contrary to the provisions of the Customs Ordinance.*

*It is proved that the Wharf Clerk, Nalin Wijeratne and Stores Manager, Bertram De Silva with their knowledge, stored goods outside the bonded warehouse at No. 168, Negombo Road, Peliyagoda within the Free Lanka Trading Company Limited premises. The suspects namely Nalin Wijeratne and Bertram De Silva have long experience in Bonding and Ex-Bonding of cargo. There is no doubt they have knowledge of the Customs regulations applied to bonded warehouse scheme.”*

Section 75 of the Customs Ordinance reads as follows:

*“If any goods entered to be warehoused shall not be duly warehoused in pursuance of such entry, or being duly warehoused shall be fraudulently concealed in or removed from the warehouse, or abstracted from any package, or transferred from one package to another, or otherwise, for the purpose of illegal removal or concealment, they shall be forfeited, together with the goods with which they shall have been so packed, and the packages in which they shall have been concealed.”*

According to the reasons provided in ‘P9’, it is clear that the provisions of Section 75 have been contravened. The finding of the Inquiry Officer is therefore not illegal, and I see no basis to issue a Writ of Certiorari to quash that part of the order of the Inquiry Officer.

This application is accordingly dismissed, without costs.

**President of the Court of Appeal**