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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition in terms of in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Dialog Axiata PLC
No. 475, Union Place
Colombo 02.

CA (Writ) Application No: 383/2018 PETITIONER

Vs

1. (Ms.) S.P. Charles,
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

1A. Maj. Gen. (Retd.) Vijitha Ravipriya,
Director General of Customs,
Customs House,
Colombo 11.
(Substituted 1A Respondent)

1B. B. P. S. C. Nonis,
Director General of Customs,
Customs House,
Colombo 11.
(Substituted 1B Respondent)

2. Mr. M. R. Ranaraja,
Deputy Director of Customs,
Sri Lanka Customs,
Customs House,

No.40, Main Street,
Colombo 11

RESPONDENTS

Before:	Dhammika Ganepola, J. Damith Thotawatte, J.
Counsels:	Sanjeewa Jayawardena PC with Suren De Silva and Lakmini Warusavithana, instructed by Sudath Perera Associates for the Petitioner. Chaya Sri Nammuni, D.S.G. for the Respondents.
Argued:	27-09-2024, 03-12-2024, 11-02-2025, 21-03-2025, 03-04-2025
Written submissions tendered on:	03-02-2022, 04-07-2025, 11-07-2025 By the Petitioner 09-02-2023, 21-07-2025By the Respondents
Judgement Delivered on:	25-09-2025

D. Thotawatte, J.

Factual Background

Introduction:

The impugned Sri Lanka Customs inquiry stemmed from a post-clearance investigation into the importation of submarine telecommunication cables by Dialog Axiata PLC for the Bay of Bengal Gateway ("BBG") project. The Petitioner, a telecommunications service provider, participated as a member of an international consortium responsible for establishing this undersea fiber-optic cable system connecting Sri Lanka with the Middle East and Asia. In furtherance of this project, Dialog Axiata PLC (hereinafter sometimes referred to as the "Petitioner") together with other members of the consortium had entered into a what is described by the Petitioner as a "turnkey" contract (hereinafter

sometimes referred to as the "contract") with Alcatel-Lucent Submarine Networks of France (hereinafter sometimes referred to as the "ALSN"), for "work and build the system" which inter alia consisted of supply and installation of the Sri Lankan segment of the submarine cable system. According to clause 13.1.1 of the contract, the total contract price amounted to USD 179,705,194 on Delivered Duty Unpaid terms (DDU), of which Dialog's investment was approximately USD 32.5 million. Significantly, clause 13.2.2 of the contract expressly stipulated that all taxes, duties, and levies imposed in any purchaser's country would be borne exclusively by the purchaser. Accordingly, the Petitioner was obligated to pay all applicable Sri Lankan import duties and taxes.

Customs Declarations:

In 2017, pursuant to the contract, the Petitioner had imported several consignments of submarine cable and related equipment into Sri Lanka. These imports were declared to Sri Lanka Customs via 17 Customs Declarations (hereinafter sometimes referred to as the "CusDecs"). Following the import and clearance of the cable materials, the Sri Lanka Customs had conducted a Post Clearance Audit and found discrepancies in the Petitioner's CusDecs. In particular, with regard to two CusDecs S-17693 and S-28036 [annexed marked respectively as P19(b) and P20(b)] the Petitioner appears to have failed to declare the value of the goods/articles in accordance with the provisions of schedule "E" of the Customs Ordinance, omitting;

(a) freight charges,

(b) insurance costs (in one entry),

(c) cable laying/installation charges, and

(d) the value of a portion of cable laid in Sri Lanka's Exclusive Economic Zone (EEZ).

By not including these in the declared value, the Petitioner was initially suspected of deliberately or inadvertently under-reporting the transaction value.

In Sri Lanka, Customs duty on imports and other levies is calculated on *"*customs value*",* is a statutory expression[1] which establishes the legal base for levying ad valorem customs duty that must be determined according to Schedule E of the Customs Ordinance[2]. The "customs value" of imported goods shall be the *"*transaction value*,"* the price actually

[1] Article 9, Schedule E of SLCustoms Ordinance
[2] Section 51 of the Ordinance

paid or payable for the goods when sold for export,[3] adjusted in accordance with the provisions of Article 8.

Article 8 of Schedule E requires that certain elements be added to the price actually paid or payable if not already included. These include:

- Transport (freight) to the port/place of importation.
- Loading, unloading, and handling charges.
- Insurance cost.

If explained in a simple manner, these adjustments together effectively convert a FOB invoice price into a CIF equivalent customs value (Cost + Insurance + Freight), and the CIF value is thus 'generally' the basis for duty assessment.

Regardless of the INCOTERMS used or whether the total value mentioned in the CusDec includes the cost of freight and Insurance or not, in order for the customs to arrive at the "customs value", the Customs need to know exactly the cost of freight (freight component) and the cost of Insurance (Insurance Component) separately. If freight or insurance amounts are not declared, Customs cannot leave them at zero; the law obliges Customs to include them in the "customs value". However, Customs cannot apply arbitrary or fictitious values. The statutory requirement is that any addition must be founded on objective and quantifiable data.[4]

It is accepted that in the CusDec S-17693 (hereinafter sometimes referred to as the "P19(b)"), the cost of the freight and Insurance components is not shown separately, and in the CusDec S-28036 (hereinafter sometimes referred to as the "P20(b)"), only the Insurance component has been shown separately.

The reason for the difference may be the fact that in P19(b) the INCOTERM is declared as CIF, and in P20(b) the INCOTERM is declared as CFR.

Further, the Petitioner's CusDecs did not include the portion of the contract price attributable to the cable-laying/installation services within Sri Lankan territorial waters. It is the position of the Customs that the commodity (the cable) achieves its purpose and accordingly the 'value' after it has been laid on the seabed of the Sri Lankan territorial waters.

[3] Article 1 Schedule Eof SL Customs Ordinance
[4] Article 8(2) of Schedule E

It is of importance to note at this stage that, out of the four aspects initially subjected to inquiry (as stated above), the allegation concerning the length of cable laid within Sri Lanka's Exclusive Economic Zone was withdrawn by the Customs Inquiry Officer (the 2nd Respondent), upon acceptance of the Petitioner's contention that the Customs Ordinance has no application beyond the limits of the country's territorial waters.

The inquiry proceeded only in respect of the remaining charges, namely, the alleged omission of freight, insurance, and cable-laying/installation costs (within the territorial waters).

The Petitioner, throughout customs inquiry, had categorically and continuously stated that they are unable to provide the missing values separately, as contract between them and ALSN, being a so-called "turnkey" contract, ALSN is contractually obligated to complete and hand over the "works and the system" in an operational state. As such, the price quoted by ALSN is inclusive of total expenses incurred (obviously inclusive of the profit margin) up to the moment of handing over to the Petitioner. It is the Petitioner's position that, as no breakdown of the price has been given to them, they are unable to ascertain freight, insurance, and cable-laying/installation costs separately. Further, that they do not want to notionally separate these expenses from the rest, as that would amount to a false declaration.

The Petitioner has further contended that, as ALSN had used their own specialised ships to lay the cable up to Sri Lankan shores, and as such, there is no ship owner, charterer, or freight forwarder who can supply the absent freight amounts.

The Petitioner is heavily reliant on a letter marked as D6 dated 08th March 2018 received from ALSN in response to a letter sent to them by the Senior General Manager, M. H. Hettiarachchi. In the letter marked D6, it is stated that the freight and insurance components are already included in the price and cannot be specifically identified for each item. Further, that the FOB price is the same as the DDU price.

In short, what the Petitioner appears to be saying is "It's all there, but it isn't visible".

Customs Inquiry Proceedings

The inquiry commenced under the Customs Ordinance on 15th May 2017 to ascertain the truth of the declarations made by the Petitioner and to determine if an offence had been committed. At the inquiry, Customs officers led evidence outlining the suspected undervaluation. Petitioner was also given an opportunity to cross examine witnesses in

its defence. After the evidence was concluded, the inquiring Customs Officer (2nd Respondent) issued a Show Cause Notice setting out two charges against the Petitioner. The charges required the Petitioner to show cause not only as to why the Petitioner should not be found guilty of violating Schedule E, but also as to why the Petitioner should not be held liable for forfeiture and penalties under Sections 47, 51, 52, and 129 of the Customs Ordinance.

After considering the materials submitted by the Petitioner, on 09.11.2018, the 2nd Respondent has made the following order:

1. *I impose a mitigated forfeiture of Rupees Thirteen Million Four Hundred and Ninety Seven Thousands One Hundred and Sixty Six (Rs. 13,497,166/=) on M/S Dialog Axiata PLC, represented by its Head of Business, Global and Content Services, Mr. Mangala Hettiarachchi, in terms of Sections 51, 52, 163 and 166B of the Customs Ordinance.*
2. *I elect to impose a further mitigated forfeiture of Rupees One Million (Rs. 1,000,000/-) on M/S Dialog Axiata PLC, represented by its Head of Business, Global and Content Services, Mr. Mangala Hettiarachchi, in terms of Section 129 of the Customs Ordinance.*

The Petitioner, aggrieved by the above order, has filed this instant application challenging its legality and validity on following procedural and statutory grounds:

I. Whether the Petitioner's omission to separately declare freight and insurance charges violated Article 8(1)(e) of Schedule E of the Customs Ordinance (which requires adding those costs to the transaction value),

II. Whether the evidence has established that the Petitioner wilfully and knowingly undervalued the goods with intent to defraud revenue, as required to sustain the forfeiture and penalty under Sections 52 and 129 of the Ordinance.

III. Whether Customs' failure to follow the procedure under Section 51A of the Customs Ordinance (the special provision for revising declared values in cases of doubt) prior to pursuing penal action renders the inquiry *ultra vires.*

IV. If an importer on the basis of CIF value, is unable to separately declare freight and insurance components, it should be computed using the prescribed methodology.

V. Whether the charges for Installation/Laying of the submarine cable should be part of the dutiable value of the imported goods, or treated as post-importation services (which are generally not dutiable).

VI. Whether the Customs inquiry was conducted in breach of natural justice. The Petitioner alleges in particular that the inquiry officer, in issuing the show cause charges, failed to provide reasons or disclose the basis of the allegations, thereby denying the Petitioner a fair opportunity to defend itself. Further, avers that the entire process was biased and predetermined to impose a penalty.

By the Petition dated 06th December 2018, the Petitioner seeks reliefs, inter alia,

c) For granting of a mandate in the nature of a Writ of Certiorari quashing the said order of the Inquiring officer as set out in the proceedings of 09.11.2018 marked "A7".

d) Issue a Writ of Prohibition restraining the 1st Respondent or any other person acting under his its authority from making any demand or taking any steps to recover any monies in terms of the aforesaid purported Order set out in the proceedings of 09.11.2018 marked "A7";

Whether the non-declaration of freight and insurance is a violation of Article 8(1)(e) of Schedule E of the Customs Ordinance.

In the present case, the importer declined to furnish a separate declaration of freight and insurance charges, maintaining instead that the supplier's lump sum price was inclusive of all expenses. Such a position cannot absolve the importer of the statutory duty imposed by Article 8(1)(e) of Schedule E of the Customs Ordinance. This mandatory statutory provision requires that the cost of transport of the imported goods to the port or place of importation, together with loading, unloading, handling charges and the cost of insurance, be added to the transaction value.

As the assessable Customs value is arrived at by adding the value of freight and insurance to the transaction value, the importer's refusal to declare freight and insurance separately could result in the reduction of the base on which assessable Customs value is calculated, thereby reducing Customs duty, and other charges payable to the State.

By failing to separately declare freight and insurance charges, the importer violated Article 8(1)(e) of Schedule E of the Customs Ordinance, rendering the declaration non-compliant.

Failure to disclose freight or insurance as evidence of intent to defraud revenue

The Petitioner has taken the position that, as the contract with ALSN was a "turnkey" contract, and as such, the goods were delivered on DDU terms, without separate disclosure of freight and insurance or tendering distinct invoices for such charges. However, the absence of freight or insurance being separately mentioned does not negate the existence of an actual cost of freight or insurance. The Petitioner's support of the position taken by ALSN that these costs could not be extricated from the DDU amount has resulted in the base upon which "customs value" is calculated being substantially reduced or of undervaluation.

It is a well-established principle of commercial jurisprudence that the primary object of trade is the making of profit. To achieve profitability, a trader must ascertain with precision the total expenditure incurred until the product is ready for delivery to the purchaser, so that the sale price may be fixed with an appropriate margin of profit.

It is untenable for an international corporate entity to profess ignorance of the costs incurred in placing goods in a saleable condition, particularly where those very costs were borne by the entity itself. Such a position is contrary to commercial common sense and inconsistent with ordinary accounting practice.

The price schedules of the contract (at Part 2 - Provisioning Schedules of the Contract) under the heading "Submersible Plant – Sri Lankan Seas", the "FOB price" (Free on Board) for the Sri Lankan segment of the undersea cable, is shown to be the same as the "DDU price" (Delivered Duty Unpaid) implying that transport expenses or insurance up to delivery to the destination was already included in the FOB price. The expenses are not separately itemised, but rather incorporated into a single composite price.

Even though it can be argued that INCOTERMS are not pricing methods, the question remains as to why an INCOTERM, such as FOB, which would specifically make it appear that the cost of freight and insurance is not included in that amount, isused to describe the unit price as well as the total price.

I am satisfied that the refusal of the Petitioner to provide a breakdown of freight and insurance creates a grave suspicion that the amount described as the FOB price or the DDU price does not include the freight and insurance charges. By concealing freight and insurance, there can be a substantial reduction in customs duties for the Petitioner. The Petitioner undoubtedly would be the main beneficiary of this situation.

This issue is compounded by the fact that although the amount declared for clearance in the 17 CusDecs submitted by the Petitioner is USD 2,401,596.99, the amount paid to the Contractor (exporter) as verified by the Petitioner (by the document marked P 29) is USD 29,639,661.60. Although it is possible that there could be legitimate situations where additional payments are required, under the circumstances, it is obligatory upon the Petitioner to explain to the court these additional payments in detail in order to establish that these are not payments made for freight, insurance, and cable laying costs which has not been declared. However, the Petitioner has failed to account for these additional payments.

While the impugned order avoids an explicit declaration that the Petitioner "committed fraud", it clearly proceeds on the basis that fraud was suspected and proven sufficiently to impose penalties under Sections 52 and 129 of the Customs Ordinance.

In the written submissions dated 09th February 2023, the Respondents are far more explicit, stating that the evidence that transpired at the inquiry eventually established that the provisions of Section 51A are inapplicable in this case for the simple reason that the Petitioner had deliberately declared a lower value of the goods.

Customs' failure to follow the procedure under Section 51A of the Customs Ordinance

Section 51 and its related provisions are triggered when the declared value is found to be unacceptable. This inquiry is held for the Customs to determine the value of imported goods in accordance with the sequential methods set out in Schedule E (Articles 1–7). The Section 51A inquiry is thus limited to valuation and ensures that the "customs value" is determined on the basis of objective and quantifiable data. This section is designed for instances where Customs doubts the correctness of the declared value, but is not applicable to instances wherebad faith or fraud is alleged.

Where evidence discloses a possibility of willful suppression or fraudulent conduct, it's no longer an adjustment matter under Section 51A valuation procedure but should be considered as a Customs offence and dealt with accordingly. As such, I reject the Petitioner's contention that this matter should have continued to be dealt with under Section 51A.

Freight and insurance components to be computed using the prescribed methodology

In considering whether freight and insurance components can be ascertained using Customs Valuation Rules in Schedule E, the starting point would be the fact that Articles 2

to 7 describe methods to calculating the transaction value, but not the value of freight and insurance which is to be added to the price actually paid or payable in order to arrive at the customs value or transaction value.

If in an entry the Transaction value is unreliable or rejected, Customs can use Articles 2 to 7 of Schedule E, sequential methods to establish an alternate "transaction value" or the "Customs value" of the goods. Customs Valuation Rules in Schedule E cannot be utilised to ascertain freight and insurance components separately.

Gazetted formula for the calculation of freight

In order to address instances where freight or insurance charges are not separately ascertainable, subordinate legislation has been promulgated under the Customs Ordinance prescribing default percentages. Government Gazette No. 1756/29, dated 4th May 2012, stipulates that where goods are imported on vessels owned or operated by the importer and where freight is not invoiced, freight shall be computed at fifteen percent (15%) of the FOB value.

The customs using this method have calculated the freight component that should be added to the Transaction Value (or FOB value). However, the Gazette applies solely to importers utilising their own vessels, whereas in the present case, the vessel belongs to the exporter. However, as this method is utilised when the freight component cannot be extricated from other expenditure by virtue of the vessel belonging to the importer, it would stand to reason that the same method can be adopted when the freight component cannot be extricated from other expenditure by virtue of the vessel belonging to the exporter. In the circumstances, it would appear reasonable to calculate freight based on that principle.

CusDec P20(b) reflected an insurance entry of USD 5,540.98, equivalent to 1.5% of its invoice value. Though the basis for this percentage is not explained by the Petitioner, Customs has evidently adopted the same percentage when determining the insurance element of CusDec P19(b). It appears that the customs have adopted this percentage on the basis it has been declared by the Petitioner itself with regard to a similar consignment. In the circumstances, this would also appear reasonable and logical.

Installation/Laying Charges

The Petitioner's position is that, as this was a "turnkey" contract, the contract price included everything and ALSN undertook to deliver a fully operational submarine cable system, including transport, assembling, and laying, for one unified price. And as such, no separate value was allocated to laying the cable within Sri Lankan waters.

The laying was integral to importation. The cable had no utility until it is installed; the vessel's operation was not mere transport but simultaneous installation. Under Article 8(1)(e)(ii) of Schedule E, "handlings associated with transport" includes the controlled discharge of the cable along the seabed. Thus, what was imported was not just coils of cable, but a functioning segment of the network delivered into Sri Lanka's territory. Same as the freight and Insurance, it should be calculated and separately added.

Allegations of bias and breach of natural justice

The Petitioner's contention that the inquiry offended the principles of natural justice is devoid of merit. A show-cause notice is required only to set out the allegations, and not the underlying reasons for such allegations, particularly where the notice is issued at the conclusion of an inquiry in which the Petitioner has actively participated. The obligation to provide reasons arises at the stage of the final order. In the present instance, the Petitioner was clearly informed that the charges pertained to the failure to declare freight, insurance, and laying costs. The Petitioner responded to these charges by filing detailed written submissions.

The allegation of bias is wholly unsubstantiated. On the contrary, the record demonstrates impartiality on the part of the inquiry officer, who, upon considering the Petitioner's position, accepted it and accordingly withdrew one of the charges. The Petitioner was afforded an unimpeded opportunity to adduce evidence. It is also of significance that the inquiry extended over several hearings, during which both parties were represented by legal counsel.

In the circumstances, I am satisfied that the inquiry was conducted in conformity with the rules of natural justice, and that no infringement of those principles has been disclosed.

On 11th September 2018, at the conclusion of the prosecution case, the 2nd Respondent has issued a detailed show cause notice with the relevant values and penal sections. As such, once the show cause notice was issued, the Petitioner should have been fully aware

of the issues which he has elected to challengeby this instant application after the final order was delivered against the Petitioner.

As I have previously reasoned in this judgement, the position of the petitioner that the cost of freight and insurance cannot be extricated separately from what the Petitioner insist is an all-inclusive amount is inconceivable and defies commercial common sense. Further, the Petitioner has failed to account for the additional payments made to the contractor (exporter). Considering the circumstances of this case the only reasonable conclusion that can be reached is that the Petitioner is deliberately suppressing material facts. As emphasised in ***Namunukula Plantations Ltd. v. Minister of Land and Others***[5] and followed in a long line of authorities, an applicant for prerogative writs needs to come with clean hands and refrain from concealment or misrepresentation. The Petitioner in the instant case, had not met that standard and has contributed to the very situation of which it now complains. It is trite that a prerogative writ will not issue to vindicate a cause tainted by suppression or want of *uberrima fides*. I hold that this is not a fit and proper case for the intervention of this Court in the exercise of its writ jurisdiction. The application is therefore dismissed subject to cost.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree

Judge of the Court of Appeal

[5] [2012] 1 Sri LR 365