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

In the matter of an Application for Orders in the nature of Writs of Certiorari, Prohibition and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

HSBC Electronic Data
Processing Lanka (Pvt.) Limited,
Mireka Tower, 324/9, Havelock Road,
Colombo 06.

CA (Writ) App. No. 75/2024

PETITIONER

Vs.

1. P.B.S.C. Nonis,
   Director General of Customs,
   Sri Lanka Customs,
   No. 40, Main Street, Colombo 11.

2. J.L.K. Fernando,
   Senior Deputy
   Director of Customs, Sri Lanka
   Customs,
   No. 40, Main Street, Colombo 11.

3. K.M.B.N. Wijepala,
   Assistant Superintendent of Customs,
   Sri Lanka Customs
   No. 40 Main Street, Colombo 11.

4. N.S. Kumaranayaka,

Deputy Director of Customs,
Sri Lanka Customs
No. 40 Main Street, Colombo 11.

5. H.M.N.S. Rajaguru,
Deputy Director of Customs,
Sri Lanka Customs
No. 40 Main Street, Colombo 11.

6. J.T.A. Jayakody,
Assistant Superintendent of Customs,
Sri Lanka Customs, No. 40 Main
Street, Colombo 11.

7. S. Nithipan,
Assistant Superintendent of Customs,
Sri Lanka Customs, No. 40 Main Street,
Colombo 11.

8. A.M.T.B. Adikaram,
Deputy Director of Customs,
Sri Lanka Customs,
No. 40 Main Street, Colombo 11.

RESPONDENTS

Before: Dr. D. F. H. Gunawardhana, J.

Counsel:

Chanaka de Silva, PC with Dilrukshi Paul instructed by Malin Rajapakse for the Petitioner.

Chaya Sri Nammuni, DSG for the Respondents for the Respondents.

Argued on: 06.03.2026 and 30.03.2026

Delivered on: 30.06.2026

Dr. D. F. H. Gunawardhana, J.

Judgement

Introduction

The Petitioner imported certain material for the purpose of relocating its office complex in two premises. The said importation had been approved by the BOI as the Petitioner is a BOI company. Accordingly, the Petitioner gets custom duty exemptions for importation.

However, when the Petitioner submitted the Customs Declaration along with the relevant supporting documents, the Petitioner claims that by mistake it had not submitted one of the commercial invoices and thereby omitted to mention the same in the Customs Declaration. Based on that, the Customs registered the case bearing No. ENSP/PCU/2023/0011/CCR/0063 and held an inquiry and finally decided to forfeit the imported goods, and in lieu of the forfeiture imposed a fine. The Petitioner challenges the same in this Application.

After the issuance of formal notice, the Respondents have filed their Objections. This was argued before me on 06.03.2026 and 30.03.2026, and the following arguments were advanced by the counsel; hence, this judgement.

Arguments

The first argument advanced by Mr. de Silva, P.C., is that the 2nd Respondent (Inquiring Officer) came to the view that there is no intention to defraud despite the fact that there is an omission of mentioning or referring to the invoice concerned in the Customs Declaration. Thus, the final conclusion of the Inquiring Officer imposing the penalty is stultified by such view; he relies upon the case of *Toyota Lanka (Pvt) Ltd v. Jayatilleke and Another* [2009][1].

The second argument is that once the Inquiring Officer had formed the opinion that there is no intention to defraud the Customs or the Government, the burden shifts onto the prosecutor to prove that there was an intention to defraud, which falls within Section 47 of the Customs Ordinance. The same has not been denied by the Respondents.

The third argument advanced was that though the omission was made by an officer by mistake, it does not benefit the Petitioner; therefore, it cannot be held that the Petitioner had an intention to defraud the Government.

On the other hand, Ms. Nammuni argued that undeclared goods do not absolve the Petitioner from liability; therefore, *Toyota Lanka (Pvt) Ltd* case does not apply.

Since **P9(a)** was declared but not **P10(a)**, along with the submitted Customs Declaration, there is a non-declaration on the part of the Petitioner; therefore, it falls within Section 47 of the Customs Ordinance as it is undeclared goods.

Further, she distinguishes undeclared goods and undervalued goods by relying on Section 129, which is on undervalued goods while Section 47 is on undeclared goods.

In reply, Mr. de Silva distinguishes the strict liability imposed upon the Customs Officers.

The Petitioner's position

The Petitioner is a company incorporated under the Companies Act, No. 7 of 2007, and it has marked its Certificate of Incorporation as **P1**. In addition to that, it is recognized as a BOI company

[1] 1 Sri L.R. 276.

and, accordingly, it has been issued with a BOI Registration Certificate marked as **P2(a)**. Further, it has entered into an agreement with the BOI, which is reflected in document **P2(b)**. Moreover, the Petitioner asserts that it has obtained a license to operate its banking business in terms of Act, No. 30 of 1988. Accordingly, the Petitioner claims that it is a subsidiary of Hongkong and Shanghai Banking Corporation, (hereinafter referred to as "HSBC") which is a reputed International Bank incorporated with its headquarters situated in Hong Kong. The Petitioner functions as an English Language processing for key functioning of HSBC's Global Service Centres including banking operations, risk operations, card operations, market and security services, global publishing services, and Global Hub and Core Banking support.

Further, the Petitioner claims that it employs approximately 3,000 employees in Sri Lanka. The Petitioner further claims that it generates substantial foreign income and that, in the year 2023 alone, it generated approximately USD 40 Million (United States Dollars Forty Million). In addition to that, it has won several national and international awards.

The Petitioner claims that it was initially located at No. 439, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya. Thereafter, it decided to relocate to two separate premises, namely, No. 163, Union Place, Colombo 2, and 'Mireka Towers' situated at Havelock City, Colombo 5.

For that purpose, the said relocation programme was named as "Project Dawn", and the necessary BOI approval had also been obtained. Further, the Petitioner had appointed Leema Creations as the general contractor for the programme, and the said contractor had been engaged in the sourcing, purchasing, and importation of the necessary materials, equipment, and furniture on behalf of the Petitioner. In addition to that, the Petitioner claims that it had engaged a company named 'Logicentrix' as the forwarding and clearance agent on behalf of the Petitioner for forwarding, freight, and shipping purposes, which is also a subsidiary owned by Dart Global Group.

The Petitioner asserts that, by the time the Petition was filed, a total of 81 consignments of materials, equipment, and furniture had been shipped and imported into Sri Lanka for "Project Dawn". Further, the Petitioner states that, except for the issue which arose in relation to one particular consignment, there had been no issue whatsoever with the remaining consignments imported into Sri Lanka out of the said 81 consignments.

However, on or around November, the general contractors of Project Dawn, Leema Creations, had placed an order with Associated Decor Limited, an Indian company, for the purchase of Melamine Faced Chip Boards and high-pressure laminates for shipment to Sri Lanka on CIF delivery terms. The aggregate value of the purchase was USD 81,534.75 (United States Dollars Eighty-One Thousand Five Hundred and Thirty-Four and Cents Seventy-Five), and the proforma invoice relating thereto has been marked as **P6**. The same had also been approved by the BOI as a duty-free consignment, except in respect of certain 11 melamine chip boards and 30 high-pressure laminates, which is reflected in the documents marked as **P7** and **P8** annexed to the Petition.

However, thereafter, upon the Letter of Credit being opened by HSBC, the said consignment had been imported. Nevertheless, the Associated Decor, being the exporter, had invoiced the said consignment under two separate invoices, as described in paragraph 26 of the Petition, one for the value of USD 48,283.21 (United States Dollars Forty-Eight Thousand Two Hundred and Eighty-Three and Cents Twenty-One), and the other for the value of USD 33,251.54 (United States Dollars Thirty-Three Thousand Two Hundred and Fifty-One and Cents Fifty-Four). The same have been marked as **P9(a)** and **P9(b)**, and **P10(a)** and **P10(b)**, respectively, and annexed to the Petition; thereby, the said consignments had been loaded to the vessel "*Al Manamah*" on the 21st of February 2023.

Accordingly, the Bill of Lading drawn as only one document, which has been marked as **P11** annexed to the Petition. Thereafter, the relevant documents relating to the said import had been forwarded.

Furthermore, the Petitioner asserts that by 23.02.2023, the shipper who shipped the relevant consignment had sent the relevant documents to Logicentrix and Leema Creations, which are marked as **P12**. Further, Leema Creations had forwarded the same to the freight forwarding and clearing agent, Logicentrix, which is marked as **P9(a)** and **(b)** and **P10(a)** and **(b)**.

However, it is the Petitioner's position that, due to the inadvertence of certain officers of the Petitioner at the stage of clearance, one of the commercial invoices had not been given to the officer of Logicentrix, who prepared the customs declaration. The said commercial invoice is the one initially marked as **P10(a)**, and package list used is **P10(b)**. Therefore, the goods in the consignment related to the said commercial invoice were not reflected in the customs declaration. Accordingly, the customs officers, having found the said discrepancy, registered the declaration as Customs Case No. ENSP/PCU/2023/0011/CCR/0063, as referred to in paragraph 38 of the Petition.

Thereafter, an inquiry was conducted in Customs Case No. ENSP/PCU/2023/0011/CCR/0063, as referred to in paragraph 44 of the Petition. Subsequently, after the inquiry, the inquiring officer decided that the undeclared goods could be forfeited. However, pending the inquiry, the Customs decided to release the same upon a bank guarantee.

Thereafter, a show cause notice was issued, and the final conclusion of the inquiry was that the undeclared goods should be forfeited under Section 47 of the Customs Ordinance. The Petitioner challenges the same on this occasion.

The Respondents' Objections

The Respondents, by way of their Objections, have taken up the position that the Petitioner had misrepresented the facts and not disclosed the facts correctly, since Logicentrix was never the official clearing agent or forwarding agent, as they had not been registered with the Customs. Therefore, they were unable to log in to the Automated System for Customs Data (ASYCUDA) system engaged by the Customs for processing Customs declarations. As such, the Customs Declaration that had been submitted for processing by the Petitioner, bearing numbers CBBII S-14224 and CBBCD I-2036, were never prepared by Logicentrix or any officer of Logicentrix.

Further, one of the witnesses called Mr. Sampath, who is the representative of Dart Global Group and who was involved with the preparation of the relevant documents, stated that he prepared the Customs Declaration on the basis of the material and documents submitted to him by Mr. De Saa, the Vice President of the Petitioner. In fact, it was Mr. De Saa who may not have provided the relevant commercial invoice for the preparation of the Customs Declaration, except for one invoice which was declared and included in the Customs Declaration, while another had been omitted. Therefore, it was the position of the Respondents that if there was an inadvertent mistake on the part of the declarant, it is their duty and burden to establish what actually happened in terms of Section 152 of the Customs Ordinance.

The other matter taken up by the Respondents is that the Petitioner had imported certain goods which had not been exempted from Customs Declaration. Therefore, the provisions of Sections 47 and 57 automatically apply. Further, it is their position that the witnesses who gave evidence at the inquiry admitted those facts. Therefore, the Petitioner has not come with clean hands. As such, they move for the dismissal of the Application.

Further, they assert that a fair inquiry was afforded to the Petitioner. As such, the findings and conclusions arrived at by the Respondents and the Inquiring Officer are justified. Therefore, they move for the dismissal of the Application.

Thereafter, the Petitioner, by way of Counter Affidavits, denied the averments contained in the Objections, and it is their position that, in fact, the Inquiring Officer had clearly come to the finding that there was a mistake made by an officer of the Petitioner company in not submitting one of the invoices. Having come to the finding that there was an inadvertent mistake on the part of the officer who handled the importation on behalf of the Petitioner, the Inquiring Officer nevertheless, arrived at the erroneous conclusion that the Petitioner is liable to pay the penalty imposed on the basis of mandatory forfeiture.

The omission made

As mentioned above, the position taken up by the Petitioner is that it is an omission due to the inadvertence on the part of an officer of the Petitioner; however, the Petitioner, or any officer thereof, never intended to defraud the Sri Lanka Customs of the State of Sri Lanka on any duty, particularly custom duty, and therefore the Respondents should not have treated the said omission in terms of Section 47 of the Customs Ordinance. The Petitioner heavily relies upon the finding of the Inquiring Officer to the effect that the Petitioner never intended to defraud the State or the Sri Lanka Customs and it was a human mistake made by an officer; however, as there was no declaration on the part of the Petitioner as the declarant of the imported goods, held the Petitioner is responsible for such mistake. As such, the provisions of Section 47 were applied.

Now I will consider some relevant parts of the evidence adduced in the inquiry which I am of the view are germane to the findings.

At the inquiry, the prosecuting officer had called three witnesses. One is the producing officer who had investigated the matter based on the Customs Declaration and the discrepancy of the goods with the packing list. However, since the Customs Declaration does not bare any goods that had been consigned by the consignor or the exporter from India to the consignee under the invoice marked as **P10(a)** along with the Petition; the packing list in relation to the said goods is marked as **P10(b)**. The said invoice bears the No. ADL/MLR/EXP/2022-23/117, whereas the declared goods in relation to the declared Customs Declaration is in relation to the goods contained in the commercial invoice bearing No. ADL/MLR/EXP/2022-23/116, marked as **P9(a)**, and the packing list marked in relation thereto as **P9(b)**.

It is common ground that the Petitioner has imported the said consignment for the purpose of "Project Dawn" for relocating its office complex at Mireka Tower, Havelock City, and it transpired in evidence that about seventy or more shipments had been shipped from India by the same consignor to the Petitioner as the consignee based on the orders placed by Leema Creations, the general contractor employed by the Petitioner for the "Project Dawn", and in relation to all those consignments, the Dart Global had acted as the clearing agent though the Petitioner claims that Logicentrix was the forwarding and clearing agent who acted in Sri Lanka on behalf of the Petitioner even in relation to the preparation of the Customs Declarations. Therefore, though the Petitioner claims that Logicentrix was its clearing agent, there was no evidence to that effect; thus, as the Respondents claim, Logicentrix is not in the picture and therefore, it does not have any relevance or bearing on the issue before me.

However, Mr. Sampath, who happened to be the officer from Dart Global had filled the Customs Declarations marked at the inquiry as **P2(a)** and **P2(b)**, gave evidence to the effect that he had prepared the two Customs Declarations based on the shipping documents including the Bill of

Lading, commercial invoices, packing lists, and other relevant documents sent by HSBC through another officer of Dart Global Group, Mr. Pilawala, who was also called to give evidence. According to Mr. Sampath, once he was satisfied with the documents, he had prepared the Customs Declarations and got the signature of Mr. De Saa as the declarant and thereafter keyed it to the ASYCUDA system. However, when it was questioned in cross-examination whether he compared it with the other documents which Dart Global had already received, he had not given a clear answer except the fact that he filed the Customs Declarations based on what he had received as the relevant shipping documents from Mr. De Saa through Mr. Pilawala. Additionally, he categorically stated that the goods contained in the commercial invoice **P10(a)** and the packing list **P10(b)** annexed to the Petition are not included in any of the Customs Declarations since he had not received it.

It also transpired by that time Dart Global Group had received the pre-shipment packing list, commercial invoice, and other relevant documents by mail; nevertheless, he had never compared them.

I reproduce the relevant part of the evidence from the Customs inquiry;

> *"Q: මෙම භාණ්ඩ සඳහා රේගු සටහන්කර දෙකක් යොමු කිරීමට සිදු වූ කරුණ පැහැදිලි කරන්න?*
>
> *A: මා වෙත ලැබුණු ඉන්වොයිසිය අනුව BOI අනුමැතිය ලැබී තිබුණේ එහි සඳහන් ප්‍රමාණයෙන් කැබලි 11කට අඩුවෙන්. එම නිසා එම අනුමැතිය ලත් ප්‍රමාණයට රේගු සටහන්කරයක් BOI ආයතනය වෙත යොමු කර ඉතිරි භාණ්ඩ සඳහා රේගු සටහන්කරයක් ශ්‍රී ලංකා රේගුව වෙත ඉදිරිපත් කරන ලදී.*

Q: එම සටහන්කර දෙකේම තොරතුරු නිවැරදි බවට සහ ඒ හා සම්බන්ධව පරිගණක පද්ධතිය හරහා යවන ලද තොරතුරු නිවැරදි බවට HSBC EDP ආයතනයේ නිලධාරියෙක් සහතික කර ඉහත කී වික්‍රම නැමැති අය මඟින් ඔබට කඩදාසිවල මුද්‍රිත පිටපතක් ලැබුනේ ද?

A: ඔව්

Q: එහි අත්සන යොදා ඇති පුද්ගලයා පිළිබඳව ඔබ දැනුවත් ද?

A: නොදනී.

Q: ඔබ වෙත HSBC EDP ආයතනය විසින් මෙම ප්‍රශ්නගත රේගු සටහන් කර දෙක සකස් කිරීම සඳහා ලබා දුන් ලියකියවිලිවල මුල් පිටපත් හෝ වෙනත් ලියකියවිල්ලක හෝ විද්‍යුත් තැපෑලක හෝ දුරකථනයෙන් ඔබ වෙත කරන ලද දැනුම් දීමකින් හෝ මෙම රේගු සටහන්කර හා සම්බන්ධ වන භාණ්ඩවල high pressure laminate නැමැති භාණ්ඩ වර්ගයක් තිබෙන බවට ඔබට දැනුම් කර තිබුනේද?

A: නැත, Sheets තමයි තිබුනේ.

Q: මෙම අවස්ථාවේ දී P2a හා P2t ලෙස නම් කර ඇති රේගු සටහන්කර පෙන්වයි. මෙම ලියකියවිලි අනුව ඔබට එම භාණ්ඩ වර්ගයේ නම නිවැරදිව කිව හැකිද?

A: පුළුවන්, Melamine Chip Board

Q: ඉහත සඳහන් වූ ඉන්වොයිසියේ වටිනාකම කීයද?

A: USD 48,283.21

Q: ඔබ ASYCUDA පද්ධතියට මෙම දත්ත ඇතුලත් කරන විට මෙම අගය සහිතව බැංකු පද්ධතියේ විදේශ විනිමය සම්ප්‍රේශනය වූ යොමුවක් හා ගැලපීමක් සිදු කරන්නේ ද?

A: ඔව්

Q: එසේ සිදු කරන විට එහි වටිනාකම් වල වෙනසක් තිබුනහොත් එම ගැලපීම සිදුකල හැකිද?

A: බැහැ

Q: මෙම වටිනාකම සහිත ඉන්වොයිසිය ආනයනය කරන ලද භාණ්ඩවලට අදාළ බවට ප්‍රකාශකර ඔබ වෙත ලබා දුන්නේ කවුරුන් විසින්ද?

A: මා වෙත ලැබුනේ විකුම් නැමැති පුද්ගලයාගෙන් වන අතර ඔහුට ලබා දෙන්නේ HSBC EDP ආයතනය විසිනි.

Q: මෙම භාණ්ඩහැර වෙනත් කිසියම් වූ භාණ්ඩ මෙම රේගු සටහන්කර වල සඳහන් වූ බහාලුම් හතේ (7) තිබෙන බවට ඔබව HSBC EDP ආයතනය හෝ HSBC EDP ආයතනය විකුම් හරහා ඔබව දැනුවත් කර තිබුනේද?

A: නැත ”[2]

Now I will reproduce the relevant part of the cross-examination of Mr. Pilawala in the Customs inquiry with regards to the preparation of the Customs Declaration and what is depicted in the commercial invoice and the packing list;

‘Q: ඔබ P11 ලෙස ලේඛනයක් ලකුණු කළා මතකද?

A: ඔව්.

Q: P11 ලේඛනයේ පළවෙනි අයිතමයේ සඳහන් වන්නේ Commercial Invoice එක නේද?

A: ඔව්.

Q: ඒ Commercial Invoice පත්‍රයේ අංකය කීයද?

[2] Page 275 to 276 of the document marked as **X** annexed to the Petition.

A: ADL/MLR/EXP/2022-23/116.

P2d ලේඛනය සාක්ෂිකරුට පෙන්වා සිටී.

Q: P2d ලේඛනය P11 ලේඛනයේ පළවෙනි අයිතමයේ සඳහන් Commercial Invoice පත්‍රයද?

A: ඔව්.

Q: P2d කියන ලේඛනයේ වටිනාකම කොපමණද?

A: ඇමරිකානු ඩොලර් 48,283.21 යි.

Q: සහ P2t කියන රේගු සටහන්කර අදාල වන්නේ P2d කියන ඉන්වොයිස් පත්‍රයේ සඳහන් භාණ්ඩ වලටද?

A: ඔව්.

P2f ලේඛනය පරීක්ෂා කරන්න.

Q: P2f ලේඛනය යනු කුමක්ද?

A: Packing List එක.

Q: P2f කියන Packing List එක අදාල වන්නේ P2d කියන ඉන්වොයිස් පත්‍රයට නේද?

A: ඔව්.

Q: P2f කියන Packing List එකේ භාණ්ඩ ප්‍රමාණය කොපමණද?

A: 1319 ප්‍රමාණයක්.

P2e කියන ලේඛනය පරීක්ෂා කරන්න.

Q: P2e කියන්නේ Packing List එකක් කිව්වොත් හරිද?

A: ඔව්. නිවැරදියි.

Q: P2e කියන ලේඛනයේ ඉන්වොයිස් අංකයක් සඳහන් වෙනවා නේද?

A: ඔව්.

Q: ඒ ඉන්වොයිස් අංකය කුමක්ද?

A: ADL/MLR/EXP/2022-23/117

Q: ඔය Packing List එකේ තිබෙන භාණ්ඩ ප්‍රමාණය කොපමණද?

A: 1139 ක්.

Q: මම P2a හා P2t කියන රේගු සටහන්කර ඔබගේ අවධානයට යොමු කළා මතකද?

A: ඔව්.

Q: P2e Packing List එකේ සඳහන් භාණ්ඩ ප්‍රමාණය P2a හා P2t කියන රේගු සටහන්කර වල ඇතුලත් කර තිබෙනවාද?

A: ඇතුලත් කර තියෙනවා. කන්ටේනර් 07 ක් ලෙස

Q: P2e Packing List එක P2a හා P2t කියන රේගු සටහන්කර වලට අමුණලා ඉදිරිපත් කර තිබෙනවාද?

A: ඔව්.

Q: P2a හා P2t කියන රේගු සටහන්කර වල P2e Packing List සම්බන්ධයෙන් කරුණු ඇතුලත් කර තිබෙනවාද?

A: තියෙනවා.

Q: P2e Packing List එකට අදාල Commercial Invoice අංක ADL/MLR/EXP/2022-23/117 දරණ ඉන්වොයිස් පත්‍රය P2a හා P2t කියන රේගු සටහන්කර සමග ඉදිරිපත් කර තිබෙනවාද?

A: නැහැ.

P2a රේගු සටහන්කරය පරීක්ෂා කරන්න.

Q: දැන් මම ඔබගෙන් ඇසුවා එම රේගු සටහන්කරයේ භාණ්ඩ ප්‍රමාණය සටහන්ව තිබෙනවාද කියා?

A: 7 x 20 GP FCL ලෙස සටහන්ව තිබෙනවා.

දැන් 31 වෙනි කොටුව බලන්න.

Q: එහි Description සහ Quantity ලෙස සටහන්ව තිබෙනවාද?

A: ඔව්.

Q: එය කොපමණද?

A: 1308 යි.

Q: P2t කියන රේගු සටහන්කරයේ 31 වෙනි කොටුවේ භාණ්ඩ ප්‍රමාණය ලෙස සටහන් වන්නේ කොපමණද?

A: 11 යි.

Q: එතකොට ඒ රේගු සටහන්කර දෙකෙහිම 31 වන කොටුවේ සටහන් වන භාණ්ඩ වල එකතුව කීයද?

A: 1319 යි.

Q: 1319 යි කියන්නේ P2f කියන Packing List එකේ සහ P2d කියන ඉන්වොයිස් පත්‍රයේ සඳහන් භාණ්ඩ ප්‍රමාණය නේද?

A: ඔව්. 1319 යි.

P2e කියන Packing List එක බලන්න.

Q: P2e කියන Packing List එකේ භාණ්ඩ ප්‍රමාණය 1139 යි නේද?

A: ඔව්.

Q: 1139 යි කියන භාණ්ඩ ප්‍රමාණය P2a සහ P2t කියන රේගු සටහන්කර වල 31 වන කොටුවේ ඇතුලත් කර තිබෙනවාද?

A: Quantity එක ලෙස ඇතුලත් කර නොමැත.

P11 ලේඛනය පරීක්ෂා කරන්න.

Q: ඔය P11 කියන ලේඛනයට අනුව HSBC Electronic Data Processing Lanka Pvt Ltd විසින් Dart Global Logistics Pvt Ltd වෙත ADL/MLR/EXP/2022-23/117 යන Commercial Invoice පත්‍රය ලබාදී තිබේද?

A: නැත"[3]

For further clarity, I reproduce below the relevant statement made by Mr. De Saa during cross-examination;

"Q: Would it be correct to say that the current shipment in question is the 70th shipment or a shipment near that number?

[3] Page 329 to 332 of the document marked as **X** annexed to the Petition.

A: Not 70th This shipment must be 15th or 16th

Q: From the inception of the importation of the said consignments were you the person who handle the import consignments?

A: Yes.

Q: Also were you the person who signed the printed copy of Customs declarations in relation to the said imports?

A: Yes.

Q: When you place the signature in the printed copies of the Custom Declarations in cage 53 it states that 'I do hereby confirmed that all particulars entered by me or on my behalf in the CusDec and electronically transferred to the Sri Lanka Customs are true and correct and that the same particulars appeared in print form on this document.' Is it correct?

A: Correct.

Q: Also before the shipment in question was detained, is it correct to say that you have signed at least 14 printed Customs deflations in relation to prior imports made for project Dawn?

A: Yes. Because at the time of signed particular of Cusdec No. 14224 all the information I have given to Dart Global Logistics Pvt Ltd on 10.03.2023 were matching. That is value, invoice number, the description of the goods and quantity.

Q: In your previous answer you stated that 'all the information I have given to Dart Global Logistics Pvt Ltd'. Can you elaborate that?

A: The most important document is bank endorsed original invoice and other related documents such as BL, Insurance, Packing list, certificate of origin and beneficiary certificates.

Q: With regard to the shipment that is in question you state that you provided the documents stated in your previous answer. What is the number of the bank endorsed original invoice that you have said to have provided to Dart Global Logistics Pvt Ltd?

A: It is ADL/MLR/EXP/2022-23/116 and the amount is USD 48,283.21 and bank reference No. COR300812FCB from Associate Décor Ltd.

Q: Did you provide any other invoice to Dart Global Logistics Pvt Ltd in order to prepare the CusDec S 14224 of 30.03.2023 and I 2036 of 03.04.2023?

A: No.

Q: Did the current shipment in question contain only the goods mentioned in commercial invoice bearing No. ADL/MLR/EXP/2022-23/116?

A: No. When I was called here by Mr. Rajaguru, I was asking to come as they wanted to get some information and wanted to release the shipment before the weekend. During those discussions only Mr. Nithipan who is officer at Customs pointed out they got some information from India or some place. One by one they showed me the documents and stated that HSBC is tr*ying to deprive state revenue by not declaring exact quantities then only I explained HSBC has no such intention and this must be a genuine mistake done by the clearing agent.*"[4]

[4] Page 336 to 337 of the document marked as **X** annexed to the Petition.

The omission cannot be attributable to any particular person

On the other hand, the Producing Officer who gave evidence has also not ascertained who made the mistake. The above evidence obtained through the three witnesses called by the prosecution clearly establishes that there was an omission on the part of somebody. In particular, Mr. Sampath, who prepared the Customs Declaration, was aware that Dart Global Group had already received the two invoices bearing Nos. ADL/MLR/EXP/2022-23/116 and ADL/MLR/EXP/2022-23/117 and two separate packing lists. However, when he prepared the Customs Declarations, he made use only of Invoice No. ADL/MLR/EXP/2022-23/116 and the packing list relating thereto, and he proceeded to feed the same into the ASYCUDA system. Therefore, there appears to have been a lapse on his part.

Further, according to the above-mentioned evidence, even Mr. Pilawala, who collected the documents, does not know why Mr. Sampath, who prepared the Customs Declaration, failed to include the descriptions and items covered by Commercial Invoice No. ADL/MLR/EXP/2022-23/117. Further, he also does not know who was responsible for the omission.

In addition to that, Mr. De Saa, who happened to be the declarant in the Customs Declaration and who placed his signature therein, attributed the mistake to the clearing agent. Therefore, even the Producing Officer who investigated this matter had not clearly ascertained who was responsible for the omission. Accordingly, it is very clear that although a mistake had occurred, nobody has attributed the same to HSBC, the Petitioner. Even the Producing Officer has not investigated that aspect of the matter so as to attribute strict liability to the Petitioner.

For further clarity, I reproduce the relevant part of evidence of the Producing Officer of the Customs inquiry;

"Q: When you recorded the statement from Mr. Sampath of Dart Global Logistics, did you ascertain whether in facts the consignee had submitted only one of the commercial invoices or whether both invoices had been submitted to Dart Global Logistics Pvt Ltd?

A: We have not ascertained that from Mr. Sampath. He stated that they submitted the CusDecs using the documents provided by the consignee.

Q: Is it correct to state that HSBC EDP does not have access to the ASYCUDA system?

A: I don't know."

In that backdrop, the observations made by the inquiry officer to that effect is justified.

For further clarity, I reproduce the Observation 3;

"Observation 3:

The investigation officers and prosecution have failed to prove a deliberate attempt to evade revenue.

In light of the above observations, I proceed to issue the following show cause notice.

Show Cause

1. I call upon M/s. HSBC Electronic Data Processing Lanka Pvt Ltd, No 439, Sri Jayawardanapura Mw, Welikada, Rajagiriya , presently located at 324/9, Havelock road, Colombo 06 represented by its Director cum Country Head Mr. S.M.B. Dassanayake, to show cause as to why I should not forfeit the Consignment imported under the Cusdec bearing number CBBI S 14224 dated 30.03.2023 and more fully described in the inventory marked as P4a-P4h valued at Rs. 38,884,769/- in terms of Sections 47 of the Customs Ordinance.

At this stage on behalf of M/s. HSBC Electronic Data Processing Lanka Pvt Ltd, I respectfully request for an opportunity to reply in writing in respect of the show cause read out today." [Emphasis is mine]

In addition to that, it also transpired in evidence that since all the goods sent under the commercial invoice of **P9(a)** annexed to the Petition was not exempted from customs duty because the BOI had not approved all the goods; certain goods were therefore, subjected to customs duty, and under the two Customs Declarations marked as **P2(a)** and **P2(b).** As such, the Petitioner had paid the due customs duty which was clearly admitted by all three witnesses including the producing officer. Therefore, the second commercial invoice, namely **P10(a)** (marked as **P2(e)** at the Customs inquiry), was omitted from declaring; thus, there was no Customs Declaration made based on it, or keyed to the ASYCUDA system.

As such, certain goods were identified by the Customs on inspection as undeclared goods. Nevertheless, there was no finding by the Inquiring Officer that the Petitioner or its officers intended to avoid paying customs duties. In addition to that, there is particularly no refusal on the part of the BOI to have any exemption in respect of those goods brought under the invoice marked as **P10(a)** and the packing list **P10(b)**. Therefore, the Inquiring Officer has clearly identified that the Petitioner has never intended to defraud the Customs or avoid payment of duty. However, the Inquiring Officer forfeited the goods based on the non-declaration which he is of the view falls within the ambit of Section 47, which the Petitioner challenges in this Application. The reason given in the order reads as thus;

"Defense's failure to prove mistake:

The defense, in its attempts to refused the charges. has failed to substantiated the claim that the omission of the part of goods in the Customs declaration was a mistake and the responsibility should to the declarant. namely M/s. Dart Global Logistics Pvt Ltd. 260 Sri Ramanathan Mawatha, Colombo 15. In my opinion the evidence and arguments put forth by the defense lack the necessary creditability to support the such a connection.

Consideration the facts presented and failure of the defense to prove the alleged mistakes. I hereby make the following orders."

Therefore, it is my view that if the Petitioner has not intended to avoid the payment of any taxes or avoid any duty from been imposed on those goods, then even non-declaration does not amount to defraud.

Genuineness of the Petitioner established

In this case, after the Petitioner came to be aware of the fact that consequent to the Customs Declarations made for the clearance of the imported goods, and that by mistake, there was an omission to hand over one of the commercial invoices along with its packing list sent by the shipper to the Mr. Pilawala or Mr. Sampath, who gave evidence in support of the prosecution at the inquiry, for the preparation of the Customs Declaration.

For further clarity, I reproduce below the relevant statement made by Mr. De Saa during cross-examination;

"Q: How did you first come to know that there was an issue in relation to this shipment?

A: On 21st of April I received a call from Sudesh, Dart Global Logistics Pvt Ltd and then phone was given to one of the Directors who wanted me to call over Sri Lanka Customs to *get some details on his request I call over at PCU and met Mr. Rajaguru, Mr. Kumanayake and they explained the issue.*

Q: Shown statement of witness marked page P13f the starting from 10^{th} line, it read as follows 'the statement recording officer now asked me if I will be able to provide a clarification for this discrepancy'. Is that correct?

A: Yes.

Q: What is your reply?

A: What I have to state for this is I don't know the reason for the discrepancy in this. I promised that I will submit the laps documents at my earliest to Customs if these documents are available with me

Q: In your opinion, who is responsible for the discrepancy that is the subject matter of this inquiry?

A: It is Dart Global Logistics Pvt Ltd."

Further, the omission that had taken place due to the inadvertence or mistake on the part of the people who are responsible for handling is well established and buttressed by the very evidence adduced by the producing officer who investigated into the matter after the submission of the Customs Declarations. It is his position that he had never investigated to ascertain as to what happened and as to why the omission had occurred, and whether Mr. Sampath, who was called to give evidence on behalf of the Customs, admitted the fact that whether he made the mistake or any other person had made the mistake.

In addition, in fact the genuineness of the Petitioner is further established by the evidence given by Mr. De Saa, who handled the documentation of the Petitioner and signed the Customs Declaration, and admitted that it was his mistake who omitted to hand over the entire set of documents including the commercial invoice marked as **P10(a)** and packing list in relation to that marked as **P10(b)** to Mr. Sampath or Mr. Pilawala for the purpose of preparing the Customs Declarations.

Further, in the prayer *(c)* itself, the Petitioner seeks a *Writ of Mandamus* compelling the Respondents to permit the Petitioner to pay the customs duty, if any.

Application of Section 47

Now the question arises whether the Respondent can treat such an omission under Section 47 of the Customs Ordinance.

It was argued on behalf of the Petitioner that the forfeiture was ordered due to the sole reason, as mentioned in the order by the Inquiring Officer, that the Petitioner had failed to establish that there had been a mistake on the part of the officer of the Petitioner. Thus, now the question arises that since the Inquiring Officer has not found any intention or knowledge of defrauding the Customs or State of Sri Lanka by the said omission made, whether the Inquiring Officer should treat the said omission under Section 47 which itself becomes an offence.

On a perusal of Section 47, it is very clear that when somebody does not declare in the Bill of Lading, namely the Customs Declaration, all the goods that the person has imported or when there is a discrepancy in the description of the goods in the Customs Declaration, or if the valuation of the imported goods are not given properly, it is an offence committed in terms of Section 47. In such an event, the Custom can impose Rs. 1,500/- (One Thousand Five Hundred Rupees) as a fine. However, the Section further elaborates by saying that such goods can be forfeited as well;

> *"47. 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 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 is mine]

The first part of the Section creates that of an offence, empowering the Customs to impose a fine of Rs. 1,500/-; however, the second part of the Section empowers the Customs to forfeit the property so brought. On careful analysis of the said Section, it clearly creates an offence with strict liability therein; therefore, the Customs does not need to prove or establish anything other than for the mere discrepancy of the description of the goods mentioned in the Customs Declaration with the goods imported, or non-declaration of such goods not mentioned in the Customs Declaration that the importer has imported.

Strict liability

On a perusal of the provisions of Section 47, one would find that the very prosecution do not require to prove anything except non-declaration of the goods imported, or the importer had failed to declare the goods imported with sufficient description in the Customs Declaration. Such an act itself constitutes an offence under the Section 47. Therefore, as Chief Justice Sanath de Silva clearly held in the case of *Toyota Lanka (Pvt) Ltd and Another v. Jayathilaka and Others*[5], strict liability is imposed by this section; thus, in such a scenario, unless and until the prosecution proves that by such an act, an importer had always entertained fraudulent intentions to avoid the payment

[5] [2009] 1 Sri L.R. 276.

of customs duty, the *actus reus* does not constitute the commission of offence falling within the Section 47 since the strict liability is presumed.

To buttress my view above, I rely on the judgement in the case of *Harding v Price*[6].

In the said case, on 24th July 1947, at about 12 noon, the Appellant was driving a lorry with a trailer attached thereto on a road in Swansea Island. While the lorry and the trailer passed a motor car parked close to the curb on the Appellant's side, collided with the motor car, causing damage to the motor car. The Appellant did not know that the accident had occurred**,** by reason of the noise and vibration caused. Therefore, the Appellant did not stop after the accident, and the Appellant did not inform the police, as required by Section 22 of the Road Traffic Act, 1930. According to the amended provisions of the law, the knowledge or ignorance of the Appellant is immaterial; accordingly, the Appellant was found guilty in the original court. On appeal, for and on behalf of the King's Bench Division, this is what the Court held;

> *"The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in Brend v. Wood (4): 'It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.' In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-*

[6] [1948] 1 KB 695.

abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever ..."[7]

"There are two possible ways of construing s. 22, and, in my view, the court ought not to adopt one which would mean that a person is called on to do the impossible, or to suffer conviction if he fails to do it, when there is another equally reasonable construction which avoids that position arising. I am of opinion that the appeal should be allowed, and the conviction quashed"[8]

In this case, the third observation made by the Inquiring Officer as I have mentioned above, is to the effect that the Petitioner never intended to evade paying duty, that itself denotes and connotes that the Petitioner never entertained any fraudulent intent. Therefore, he cannot forfeit the goods imported under the Invoice marked as **P10(a)** and the packing list **P10(b)**; thereby, stultifying his own observation 3. Therefore, the Section 47 cannot be applied; if at all, Section 18(2) can be applied.

Further, the reason for the application of Section 47, as stated by the Inquiring Officer is that the Petitioner to this Application has failed to establish that there was a mistake on the part of the officers of the Petitioner. However, such a requirement is never expected under this section when strict liability is attributable. In addition to that, requiring such a fact to be established is against the very norm created by this section. Therefore, the order to apply Section 47 cannot be tenable in any law.

Respondents' decision is irrational and *ultra vires*

[7] [1948] 1 KB 700.
[8] [1948] 1 KB 704.

In this case, there was definitely a non-declaration of imported goods. However, even if it is declared, it appears to be a case where the Petitioner would have obtained the BOI approval for the exemption of the customs duty. As such, as claimed by the Petitioner, he might not be liable to pay the customs duty; therefore, even if the omission had not taken place, it would have been declared, and the Petitioner would have entitled to the exemption. Thus, since the Inquiring Officer had decided that there was no intention to defraud, he should not have forfeited the goods under the second part of the said Section, which is my view, has exceeded the limits of the power amounting to *ultra vires*.

As such, the forfeiture of the goods on the basis that it falls within the second part of Section 47 is irrational and *ultra vires*, and thus, is liable to be quashed as sought by the Petitioner.

When the Director General of Customs and his subordinate officers are vested with the power to take decisions, affecting the rights of the people, they must be more careful. When they take decisions based on such powers, they must be cautious and act judiciously without directly invoking or triggering such provisions of the Customs Ordinance where strict liability is imposed, particularly when acting under Section 47 and similar provision because under strict liability the act itself is sufficient to create the offence without proof of *mens rea*.

Therefore, when they trigger or invoke the provisions of such sections, it is pertinent that the inquiring officer should consider the other circumstances, as in the instant case where 70-odd shipments were brought into Sri Lanka without any issue and also under a BOI contract, under which customs duty was exempted. Therefore, where there is a mistake attributable to an importer who does not entertain any *mens rea*, an offence may nevertheless be created by such omission itself.

However, attributing liability based on such an action may be incongruous with the circumstances; therefore, the Director General and its officers must avoid such applications of penal provisions; because once forfeiture is imposed, the importer loses the imported goods.

In addition to that, the Director General, as a responsible officer, must ensure that forfeiture is not imposed mechanically in every case unless an offence is committed intentionally or with knowledge, because otherwise it may be counterproductive, and allegations can readily be made against the customs officers and the Director General himself. This is particularly so since most officers tend to make forfeiture orders because of the huge reward involved, as they are entitled to receive a substantial benefit of 70%, as observed by Chief Justice Sarath N. Silva in the case of *Toyota Lanka (Pvt) Ltd.* Therefore, such course of action itself amounts to corruption committed in the name of enforcing a statutory provision.

On a careful consideration of the different parts of the Customs Ordinance, it is very clear that the rationale behind the Customs Ordinance is to mainly to create a mechanism to regulate the exports and imports of the country; in addition to that, to recover the import and export duties on items that is decided from time-to-time. In that process, the Director General of Customs and his Officers of the Department of Customs are empowered to carry out various duties; in that, they are empowered to investigate, hold inquiries, and impose duties and collect the same. However, in such course, certain administrative decisions are taken which are *quasi-judicial* in nature, but when they exceed their limits or when they tend to act out of the authority so given by the Ordinance, then the courts will interfere in review and take the necessary measure to put them in their place. This is what is expected under Judicial Review, which is part of the scope of Administrative Law.

In this case, what the Respondents have done collectively and separately is that they have acted as investigators and judges exercising certain judicial functions which have to be reviewed when each and every case demands.

Conclusion

For the reasons adumbrated above, the order marked as **P21** cannot stand; therefore, I grant relief as prayed for in prayers *(b)*, *(c)*, and *(d)* of the Petition.

JUDGE OF THE COURT OF APPEAL