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

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

CA (Writ) Application No. 41/2019

Ensen Trading & Industry (Pvt.) Limited
No. F.107, People's Park Complex,
Colombo 11.

Petitioner

Vs.

1. Hon. Mangala Samaraweera,
   Minister of Finance and Mass Media,
   Ministry of Finance and Mass Media,
   The Secretariat, Colombo 1.

2. Dr. R.H.S. Samaratunga,
   Secretary to the Treasury and
   Secretary to the Ministry of Finance
   and Mass Media,
   Ministry of Finance and Mass Media,
   The Secretariat, Colombo 1.

3. P.S.M. Charles,
   Director General of Customs.

4. Additional Director General of Customs,
   (Revenue & Services),

5. Director of Customs (Declarations),

6. Director of Customs (Legal),

7. Deputy Director of Customs (Long Room),

   3rd to 7th Respondents are from:
   Sri Lanka Customs Headquarters,
   No. 40, "Customs House",
   Charmer's Quay, Main Street, Colombo 11.

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

Respondents

Before: **Deepali Wijesundera, J**
Arjuna Obeyesekere, J

Counsel: K. Deekiriwewa with Dr. (Ms.) M.K. Herath, L.M. Deekiriwewa and Dr. Kanchana De Silva for the Petitioner

Manohara Jayasinghe, Senior State Counsel for the Respondents

Supported on: 14th February 2019

Written Submissions: Tendered on behalf of the Petitioner on 1st March 2019

Tendered on behalf of the Respondents on 6th March 2019

Decided on: 1st April 2019

Arjuna Obeyesekere, J

The Petitioner has filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the Order made by the 1st Respondent, Minister of Finance and Mass Media under Section 2(3) of the Special Commodity Levy Act No. 48 of 2007, published in Extraordinary Gazette No. 2089/16 dated 17th September 2018, annexed to the petition marked '**X3**';[1]

b) A Writ of Mandamus directing the 3rd – 6th Respondents to apply the Special Commodity Levy set out in the Order published in Extraordinary Gazette No. 2084/30 dated 16th August 2018, annexed to the petition marked '**X2G**', on the sugar imported by the Petitioner.

The facts of this matter very briefly are as follows.

Section 2(1) of the Special Commodity Levy Act No. 48 of 2007 (the Act) enables the Minister of Finance to impose a levy on commodity items, known as the 'Special Commodity Levy'. In terms of Section 2(5) of the said Act, the special commodity levy so imposed shall be a composite levy and no other tax, duty, levy or cess or any other charge imposed in terms of the laws specified in the Schedule to the Act[2], can be imposed in respect of the said commodity, while the Order made under Section 2(1) of the Act is valid.

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[1] By the said Order 'X3', the Minister of Finance rescinded the earlier Order 'X2G' by which the Special Commodity Levy had been imposed for sugar and related products.

[2] The laws specified in the Schedule are the Customs Ordinance, Sri Lanka Export Development Act No. 40 of 1979; Excise (Special Provisions) Act No. 13 of 1989; The Finance Act No. 11 of 2002; Value Added Tax Act No. 14 of 2002; The Finance Act No. 5 of 2005.

By the said Order made under Section 2 of the Act and published in Gazette Extraordinary No. 2084/30 dated 16th August 2018, marked '**X2G**', the Minister of Finance and Mass Media had declared that the goods set out in the schedule thereto which included 'White crystalline cane sugar'[3] shall be charged the corresponding Special Commodity Levy set out therein. The said Order '**X2G**' was valid for a period of 6 months – i.e. until 16th February 2019 - and was subject to the provisions of Section 2(3) of the Act, which specified that the said Order "may be amended or varied by adding thereto or removing therefrom any item or by revising the rates specified therein".

By a further Order made under Section 2 of the said Act and published in Gazette Extraordinary No. 2089/19 dated 17th September 2018, marked '**X3**', the Minister of Finance and Mass Media had rescinded the aforementioned Order '**X2G**' with effect from 18th September 2018.

The effect of the Order '**X3**' was that 'White crystalline cane sugar' referred to in '**X2G**' would no longer be charged with the Special Commodity Levy at the point of importation but instead will be charged customs duties, levies and other charges as per the tariff rates published in terms of Section 10 of the Customs Ordinance as well as any other applicable laws including the laws set out in the Schedule to the Act.[4]

This Court must observe at this stage that according to the Petitioner,[5] the amount payable as a Special Commodity Levy under **'X2G'** is lower than the

[3] Bearing HS Code No. 1701.99.10
[4] Supra.
[5] Paragraph 35 of the petition.

customs duties, levies and other charges payable under **'X3'**. Thus, as admitted by the Petitioner, **'X2G'** is more favourable to the Petitioner.

The Petitioner, who is an importer of food items including 'White crystalline cane sugar' specified in the schedule to the Order '**X2G**', complained to this Court in CA (Writ) Application No. 18/2019 that the Minister of Finance does not have the power to rescind the said Order '**X2G**'. This Court, having heard both Counsel and being satisfied that there is no merit in the application, refused to issue notices on the Respondents, for the reasons recorded in its Order and dismissed the said application, on 1st February 2019.

Even though the Petitioner has a right of appeal against the said Order in terms of Article 128(1) or 128(2) of the Constitution, no proof has been submitted to this Court whether the Petitioner has exercised that right.

Be that as it may, the Petitioner filed this application on 5th February 2019 seeking the aforementioned relief. At the time of filing this application, the Petitioner had stated in the motion dated 5th February 2019 that, "since there is no rule of Court or principle of law which precludes the filing of a fresh application with respect to the same subject matter where new material has surfaced I am tendering herewith the proxy ....". This statement,[6] whilst not mentioning the fact that this Court refused to issue notices in CA (Writ) Application No. 18/2019 only after hearing submissions of the learned Counsel for the Petitioner and the learned Senior State Counsel for the Respondents on the merits, is an admission that unless 'new material has surfaced' the identical matter cannot be re-agitated before this Court.

[6] The identical statement is found in paragraph 40(b) of the petition and paragraph 42(b) of the affidavit.

When this application was taken up for support on 14th February 2019, the learned Senior State Counsel for the Respondents raised a preliminary objection relating to the maintainability of this application on the basis that this Court has already adjudicated on the matter in dispute by the aforementioned Order in CA (Writ) Application No. 18/2009. The position of the learned Counsel for the Petitioner was that this application is not identical and that he has tendered 'new material' in this application. Having heard learned Counsel for both parties on the preliminary objection as well as on the substantive issue, this Court directed the parties to tender written submissions, on the preliminary objection as well as on the substantive issue.

The learned Senior State Counsel has submitted to this Court, a copy of the petition filed in CA (Writ) Application No. 18/2019. This Court has examined the said petition and observes that the issue before this Court in both applications is whether the revocation of the Order '**X2G**' by Order '**X3**' is illegal. Therefore the question to be decided in both applications is identical. Furthermore, paragraphs (b), (c), (d) and (e) of the prayer in CA (Writ) Application 18/2019 is identical to paragraphs (b), (c), (d) and (f) in this application. The only "new" prayer at paragraph (e) is connected to and is dependent on the rest of the paragraphs in the prayer. Paragraph (e) therefore does not differentiate this case from the previous application.

This Court is of the view that the Petitioner is estopped from re-agitating the same issue before this Court through this application. "Issue estoppel" is a principle of law which prevents re-litigation of disputes before Courts. It applies to facts directly decided by Courts, and those matters which form part

of the decision which were necessary to making the finding of fact or law. When a judgment of a Court is final and conclusive, it decides the issues in dispute before it once and for all, and cannot be disputed by the same parties again before the same Court. These principles of law exist as a matter of public policy so that disputing parties are prevented from re-raising the same disputes and to ensure that finality is brought to disputes between the parties.

In **New Brunswick Rail Co. v British and French Trust Corporation Ltd**[7] the House of Lords made the following observation:

> "The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."

In these circumstances, this Court would now consider if the Petitioner has adduced any 'new material' in this application. The 'new material' that the learned Counsel for the Petitioner claims to have submitted in this application are the Orders published prior to **'X2G'**, by which a Special Commodity Levy had been imposed on sugar. This Court has examined the said Orders, annexed to the petition marked '**X2A**' – '**X2F**' and find that these orders had been issued during the period July 2016 – February 2018. These documents are public documents and reference has in fact been made in '**X2G**' to the previous Order '**X2F**'. Thus, **'X2A'**- **'X2F'** are not "new material" as claimed by the Petitioner. The Petitioner has not taken up the position that these documents were not

[7] 1939 AC 1 at pages 19-20.

available to him at the time CA (Writ) Application No. 18/2019 was filed. Thus, this Court cannot agree with the learned Counsel for the Petitioner that this application has been filed since "new material has surfaced" after the previous application was dismissed.

The necessity for this Court to determine whether a second application can be filed when new material has surfaced does not arise in view of the finding of this Court that the Petitioner has not adduced any new material, suffice to say that there is nothing to prevent a petitioner from invoking the jurisdiction of this Court where the cause of action is genuinely different to a previous application. This Court uses the word 'genuine' in order to make it clear that a shrewd litigant who has not been successful in round one will not be allowed to have 'another bite of the cherry' by putting a spin on his story. Such a person will not be entertained by this Court and will not be allowed to undermine the integrity and credibility of the judicial system of this Country.

In the written submissions filed by the Petitioner, it has taken up the position that even though an application has been dismissed by this Court, the same grievance can be re-agitated all over again in the same Court by filing a fresh application. This is borne out by the following paragraph in the written submissions:

> "It is also pertinent to state that in the manner the Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules, 1990 had been couched it is gleaned that there is no bar in filing a writ application in respect of the same matter twice or thrice as the case may be, provided that when filing the 2nd or 3rd application, a disclosure of relevant particulars with regard

to the previous application(s) if any is needed. If the disclosure is false or incorrect the application may be dismissed."

In its written submissions, the Petitioner has also referred to paragraph 40 of the petition where the Petitioner had stated as follows:

> "The Petitioner has not previously invoked the jurisdiction of Your Lordship's Court in respect of this matter except the fact that Court of Appeal (Writ) Application bearing No. 18/2019 that was filed and on the supporting date the notice had been refused. Hence, there was no adjudication of the matter and the matter in dispute has not been put to rest by a decision of a Court of Law."

This Court will consider both of the above matters together.

Rule 3(3) of the Court of Appeal (Appellate Procedure) Rules, 1990, which applies to applications made under Article 140 of the Constitution, specifies that "every application which is accepted and registered shall be listed for support in open Court." In terms of Rule 3(4), the Court will consider the issuing of notices only after the application is supported in open Court. The effect of Rule 3(4) is that Court will issue formal notice only if Court is satisfied that the Petitioner has made out a 'prima facie case'. The fact that notice is refused without proceeding to hear the Respondent, does not mean that there has not been an adjudication of the matter or that the matter has not been decided by a Court of Law. Thus, when notice is refused in an application under Article 140, that is the Order of this Court on the dispute placed before Court in the petition and it is a final Order.

In CA (Writ) Application No. 18/2019, this Court heard the learned Counsel for the Petitioner as well as the learned Senior State Counsel for the Respondents on the facts and law pleaded by the Petitioner and, it was only thereafter that this Court refused to issue notices. The refusal of notice by this Court is the adjudication of the matter in dispute, namely, that the revocation of the Order '**X2G**' by the Order '**X3**' is not illegal. The said Order is final and conclusive as far as the jurisdiction of this Court is concerned. The Petitioner therefore cannot be heard to say that there has not been an adjudication of the matter in dispute.

Article 128 of the Constitution provides a litigant who is dissatisfied with an order made by this Court to invoke the appellate jurisdiction of the Supreme Court. That is the remedy available against an order made by this Court, either when notices are refused at the time the application was supported or when the application is dismissed after issuing notices and hearing the Respondents. This Court is of the view that a litigant cannot come back to this Court over and over again, until he receives a judgment favourable to him.

Preventing applications containing a dispute already adjudicated by this Court from being re-agitated has been addressed though Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules 1990, which reads as follows:

> "The petition and affidavit except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked the petition shall contain an

averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed."

This Court observes that Rule 47[8] of the Supreme Court Rules 1978 is similar to Rule 3(2).

These two rules were considered by this Court in **Jayawardena and Five Others v Dehiattakandiya Multi Purpose Co-operative Society Ltd. and Fifty Others.**[9] This was a case where the petitioner filed a fresh application having withdrawn the previous application without reserving his right to file a fresh application itself. An objection was taken that the petitioners cannot seek to invoke the jurisdiction of Court once again in respect of the same matter. S.N. Silva, J. (as he then was) held as follows:

> "The formulation of the foregoing Rules that a petition should contain an averment that the jurisdiction of this Court has not been previously invoked in respect of the same matter, **clearly indicates that a party may not institute fresh proceedings in respect of the same matter after the previous application has been concluded**. This formulation is a **clear guide that there could be no situation where a second application can be filed by the same party on the same subject matter**. Indeed, there could be situations **where there is fresh material on the basis of which a party may seek leave of court to institute fresh proceedings in**

[8] Rule 47 reads as follows: "The petition and affidavit except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not been previously invoked in respect of the same matter. Where such averment is found to be false the application may be dismissed"

[9] 1995 (2) Sri LR 276.

respect of the matter challenged in the previous proceedings. There may also be situations where a **specific reservation is made**, reserving the right of the petitioner to institute fresh proceedings at a future date. In the absence of any **exceptional circumstances** such **as fresh material or reservation as aforesaid**, it would be inconsistent with the said Rules for a party to institute a subsequent application regarding the matter that has been challenged in a previous application." (emphasis added)[10]

His Lordship then referred to the latin maxim "*nemo debet bis vexari pro una et eadem causa*[11] which is itself an outcome of the wider maxim *interest reipublicae ut sit finis litium*[12] and stated that:

"It is thus seen that it is in the public interest that a party should not be vexed twice upon litigation in respect of the same matter. The Supreme Court Rules have clearly an underpinning of the aforesaid element of public interest. It is for that reason that the Rules require a petitioner to state that he has not invoked the jurisdiction of the court previously in respect of the same matter. The basic assumption is that if a party has invoked the jurisdiction of the Court previously in respect of the same matter, he is barred from invoking the jurisdiction for the second time, save in exceptional situations as noted above. If this principle is not applied, it would happen as in this case, where a party who has withdrawn his earlier application without any reservation retains another Counsel and makes a second foray to this court by way of a fresh

[10] At page 281.
[11] Broom's Legal Maxims (11th Edition) page. 239 - "It is a rule of law that a man shall not be twice vexed for one and the same cause."
[12] Broom's Legal Maxims (11th Edition) page. 240 – "It concerns the State that there be an end to law suits."

application."[13]

This Court reiterates that CA (Writ) Application No. 18/2019 was dismissed after hearing the oral submissions of the learned Counsel and after having considered the material presented with the petition. It was not a withdrawal as in **Jayewardene's** case and therefore the reasoning in **Jayawardena's** case applies with greater force.

This same issue has been considered in several other cases in recent times, thus demonstrating an unhealthy trend on the part of litigants to agitate the same dispute over and over again.

The learned Senior State Counsel drew the attention of this Court to the judgment in **Vehicles Lanka (Private) Limited and another vs Jagath Wijeweera, Director General of Customs and 94 others.**[14] The facts in the present application are almost identical with the facts of that case, in that the petitioners had filed CA (Writ) Application No. 446/2014 after the Court of Appeal had refused to issue notices in CA (Writ) Application No. 57/2013[15]. The only difference between the two cases is that the petitioner in CA (Writ) 57/2013 had appealed against the order of this Court and the Supreme Court too had refused to grant Special Leave to Appeal.[16]

This Court, in upholding the preliminary objection raised by the Hon. Attorney General had held as follows:

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[13] Supra. at pages 281- 282.
[14] CA (Writ) Application No. 446/2014; CA Minutes of 12th February 2016. Judgment of Vijith Malalgoda, J, P.C; P/CA (as he then was).
[15] Notices had been refused as the Petitioner was guilty of suppression and misrepresentation of material facts.
[16] SC Special Leave to Appeal Application No. 76/2013.

"Therefore I am of the view that the decision in CA/Writ/57/2013 is a final and conclusive decision, when the said decision is considered with the facts of the present case. In a prerogative writ this Court is not inclined to re-consider the same issues which were considered once by this Court. It is trite law that there needs to be finality to litigation and therefore, parties are estopped from bringing multiple suits on the same issue resulting in over burdening the court. Therefore, this court is not inclined to issue notices on the Respondents as moved by the Petitioners."

The effect of Rule 3(2) was considered by this Court in **Global Lifestyle Lanka Limited vs The Monetary Board of the Central Bank of Sri Lanka and others**.[17] This was also a case where the Petitioner, having not been successful with the first writ application, filed a second writ application challenging the same decision but on the pretext that it was adducing new material in the second application. Upon an objection taken by the Hon. Attorney General that the two applications are identical and that the decision in the first application was final and conclusive, this Court held as follows:

"It is the view of this Court that the purpose of requiring that any application shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter is precisely to avoid any possible re-agitation of the same issues after the Court has pronounced decisions on them. The requirement that such application shall contain an averment disclosing relevant particulars of the previous application, if such jurisdiction has previously been invoked by

[17] CA (Writ) Application No. 221/2017; CA Minutes of 29th March 2018. Judgment of Padman Surasena J, P/CA (as he then was).

the Petitioner, is for the Court to ascertain and form an opinion whether the Court has indeed decided the relevant issues previously."

In **People's Bank and seven others v Yasasiri Kasthuriarachchi**[18] the Bank had adopted a resolution to sell the borrower's mortgaged property by public auction. The respondent filed Writ Application No. 1268/98 in December 1998 seeking a Writ of Certiorari to quash the said resolution. The said application was dismissed by this Court in February 2008. Special Leave to Appeal to the Supreme Court was also denied by the Supreme Court in December 2008.

On 25th March 2009, the respondent, who was the Managing Director of the Company that filed the earlier application, instituted Writ Application bearing No. 188/09 seeking to prevent the Bank from taking steps to sell the property by way of parate execution. This Court had initially issued notices and subsequently issued an interim order, preventing the Bank from selling the mortgaged property. On an appeal filed by the Bank, the Supreme Court, having observed that the main issue in both cases was the validity of the resolution passed by the bank to sell the mortgaged property by parate execution, held as follows:

"It is clear that the present Writ Application by the respondent is a deliberate and calculated attempt to prevent the bank from proceeding with the auction sale and to circumvent and pervert the effect of the decision of the Court of Appeal and this Court in the said Writ Application No: 1268/98, affirmed by this Court. I find that the Court of Appeal has erred in granting the interim stay order which had the effect

[18] 2010 (1) Sri LR 227.

of subverting the express intention and direction of the decision in the Writ Application No. 1268/98 on the same subject matter and between, in effect, the same parties."

"I find that the judgment of this Court in SC (SPL) LA 60/2008 [C. A. Application 1268/98] acts as a complete bar to a proceeding by the same party which once again seeks to question the validity of Parate resolution dated 10th July 1997."

This Court is of the view that the decision of the Supreme Court in the **People's Bank** case is equally applicable to this application, even though an appeal has not been filed against the first order to the Supreme Court.

In these circumstances, this Court holds that the Petitioner is prevented by Rule 3(2) from re-agitating the identical issue in this application.

The learned Counsel for the Petitioner has cited the judgment of this Court in **Lanka Maritime Services Ltd v. Sri Lanka Ports Authority and 6 Others**[19] in support of its argument that it can file a fresh application in spite of its previous application having been dismissed on the merits.

The petitioner, Lanka Maritime Services Limited had filed CA (Writ) Application No. 1534/2004 and while the said application was pending, had filed a second application No. 2173/2004 on the identical issue but on the basis that 'new material had surfaced'. Thus, Lanka Maritime Services dealt with two applications which were pending at the same time whereas, this application

[19] 2004 (3) Sri LR 332; Order of Saleem Marsoof J, P.C, P/CA (as he then was).

was filed only after the first application namely, CA (Writ) Application No. 18/2019 was dismissed.

The respondents took up the position that as the two applications relate to the same matter, the second application must be dismissed in *limine*. This Court, while over ruling the said objection, held as follows"

> "It is trite law that the doctrine of *res judicata* precludes *fresh proceedings only where there is a previous judicial decision on the same cause between the same parties.* It is common ground that there is no prior judicial pronouncement to thwart the application made by the Petitioner in this case. The question for determination on the preliminary objection taken on behalf of some of the Respondents is whether the wider maxim *interest reipublicae ut sit finis litium* which when converted to contemporary language would mean that "it is in the public interest that there should be an end to litigation" would preclude the Petitioner from maintaining the present application.
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> "It will follow ... that where there is no prior judicial pronouncement (including a withdrawal without reservation of the right to initiate fresh proceedings) in a case involving the same parties and the same cause, a Court will not dismiss any fresh action or application in *limine*, and will entertain the subsequent action or application."

The above paragraph clearly establishes that the preliminary objection was over ruled as the first application was still pending. Thus, the judgment in **Lanka Maritime Services** does not support the argument of the Petitioner.

A discussion on this matter would not be complete without considering the power of this Court to strike down vexatious applications of this nature and prevent an abuse of the process of Court. The doctrine of abuse of process engages the inherent power of the Court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.[20]

In **'Res Judicata, Estoppel and Foreign Judgments'** by Peter R Barnett, it has been observed as follows:[21]

> "In its most general and widest sense, the doctrine of abuse of process advocates that subsequent proceedings should be precluded *if it is necessary for a Court to prevent a misuse of its procedure* in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people. As such, the doctrine rests upon the inherent power of any court of justice to prevent a misuse of its procedure."

In **Walton v Gardiner**,[22] the High Court of Australia held that abuse of process in the widest sense "extends to *all* categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness... Proceedings before a court should be stayed as an abuse of process if,

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[20] Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A.
[21] Oxford University Press 2001, pg 185.
[22] (1993) 177 CLR 378, 395, HCA.

notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which had already been disposed of by earlier proceedings."

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to re-litigate a claim which the court has already determined.[23] This is precisely what the Petitioner in this case has attempted to do. This Court holds that the filing of the second application is vexatious, oppressive and is a complete abuse of process. This Court takes serious note of the conduct of the Petitioner and holds that the Petitioner has not come before this Court with clean hands. Taking into consideration all of the above circumstances, this Court upholds the preliminary objection of the learned Senior State Counsel.

Although this Court is of the view that the Petitioner's application ought to be dismissed on the strength of the aforementioned preliminary objection raised by the learned Senior State Counsel, this Court would like to consider the substantive issue that has been raised in this application with the sole intention of putting to rest any concerns the Petitioner may have with regard to the validity of the Order '**X3**'.

The argument of the Petitioner is that the Minister of Finance does not have the power to 'rescind' the Order **'X2G'** and therefore, the 'rescinding' of **'X2G'** by the Order '**X3**' is invalid and illegal. The consequence of this argument is that there has not been a valid removal of 'White crystalline cane sugar' from

[23] See House of Spring Gardens Ltd. v. Waite [1990] 3 W.L.R. 347 at page. 358.

the list of commodities to which the Special Commodity Levy in **'X2G'** would apply. In other words, the Petitioner is stating that 'White crystalline cane sugar' imported by the Petitioner should be charged the Special Commodity Levy set out in **'X2G'** and not customs duties and levies under the Customs Ordinance, Excise (Special Provisions) Act and other applicable laws.

Section 2(3) of the Act is relevant to this issue, and reads as follows:

> "Every Order made under subsection (1) which is valid for a period of over thirty days, may be amended or varied by **adding thereto** or **removing therefrom** any item or by revising the rates specified therein"

'X3', by which sugar has been removed from the list of commodities to which the Special Commodity Levy would apply, reads as follows:

> "By virtue of the powers vested in me under Section 2 of the Special Commodity Levy, Act No. 48 of 2007, I, Mangala Samaraweera, Minister of Finance and Mass Media of the Democratic Socialist Republic of Sri Lanka, do by this Order, declare that the Gazette Notification No. 2084/30 of 16th August 2018, issued under Section 2 of the Special Commodity Levy Act, No. 48 of 2007 is hereby rescinded with effect from September 18th 2018."

The power to amend or vary granted under Section 2(3) extends *inter alia* to adding food items to the existing Order or removing food items from the existing Order. The only items on **'X2G'** are sugar and related items. By **'X3'**, the Order **'X2G'** has been rescinded or to use a synonym, has been cancelled.

This Court is of the view that the power to amend or vary an order by adding an item or by removing an item would necessarily include the power to rescind or cancel a previous Order. The effect of rescinding or cancelling '**X2G**' by '**X3**' is to remove sugar from being a commodity to which the Special Commodity Levy would apply. This is certainly the intention of the Minister as admitted by the Petitioner itself.[24]

In any event, the power to cancel '**X2G**' is clearly provided for by Section 18 of the Interpretation Ordinance which reads as follows:

> "Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to issue any proclamation, or make any order or notification, any proclamation, order, or notification so issued or made may be at any time amended, varied, rescinded, or revoked by the same authority and in the same manner, and subject to the like consent and conditions, if any, by or in which or subject to which such proclamation, order, or notification may be issued or made."

Thus, this Court is of the view that the Minister has the power to amend, vary, rescind, or revoke the Order '**X2G**' and that such rescinding, revocation or cancellation has been done in terms of the law. Thus, this Court does not see any merit in the argument of the Petitioner and does not see any legal basis to issue the Writs of Certiorari sought by the Petitioner. The necessity for this Court to consider the prayer for Writs of Prohibition and Mandamus does not therefore arise.

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[24] Paragraph 20 of the petition.

In the above circumstances, this Court refuses to issue notices on the Respondents. This application is dismissed, with costs fixed at Rs. 100,000 payable by the Petitioner to the State.

Judge of the Court of Appeal

Deepali Wijesundera, J

I agree

Judge of the Court of Appeal