

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

In the matter of an application under
Article 140 of the Constitution for
mandates in the Nature of Writ of
Certiorari, Prohibition and Mandamus

CA (Writ) Application No. 335/2014

Green Up International (Private) Limited,
No. 136/2/F, Dam Street, Colombo 12.

Petitioner

Vs.

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

2. Dr. P.B. Jayasundera.

2A. Dr. R. H. S. Samaratunge,
Secretary to the Ministry of Finance.

3. S.R. Attygalle,
Deputy Secretary to the Treasury.

4. R. Semasinghe.

4A. K.N.D. Ranjith Asoka.

4B. K. A. Vimalenthirajah,
Director General,
Department of Tariff & Trade and
Investment Policy.

2nd to 4th Respondents at
Ministry of Finance and Planning,
The Secretariat, Colombo 1.

5. Jagath Wijeweera.

5A. K.A Chulananda Perera,
Director General of Customs.

6. M. Puviharan.

6A. D.A.I.Daranagama.

6B. K. D. Nicholas.

6C U. Liyanage,
Additional Director General of Customs,
(Revenue and Services)

7. T. A. L. Weerasinhge,
Director of Customs,
Policy Planning & Research Directorate

5th to 7th Respondents at
Sri Lanka Customs, Colombo 11.

8. Government Printer,
Department of Government Printing,
Colombo 8.

9. Hon. Ravi Karunanayake.

9A. Hon. Mangala Samaraweera,
Hon. Minister of Finance,
Ministry of Finance, Colombo 1.

Respondents

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

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

Vikum De Abrew, Senior Deputy Solicitor General
with Ms. Chaya Sri Nammuni, Senior State Counsel
for the Respondents

Argued on: 13th March 2020

Written Submissions: Tendered on behalf of the Petitioner on 20th August
2019 and 26th May 2020.

Tendered on behalf of the Respondents on 21st
August 2019 and 9th June 2020

Decided on: 29th June 2020

Arjuna Obeyesekere, J

The Petitioner has filed this application, seeking *inter alia* the following relief:¹

- (a) A Writ of Certiorari to quash the imposition of the Special Commodity Levy on Potatoes and B' Onions by the document annexed to the petition marked 'X2'; and
- (b) A Writ of Mandamus directing the Respondents to refund to the Petitioner the excess sums of money that were levied in terms of 'X2'.

¹ When this matter was taken up for argument, the learned Counsel for the Petitioner informed this Court that he will only be pursuing the said relief, which has been prayed for in paragraphs (b) and (e) of the prayer.

The facts of this matter very briefly are as follows.

The Special Commodity Levy Act No. 48 of 2007 (the Act) was introduced in 2007 to simplify the tax structure on commodity items imported into Sri Lanka. This is reflected in its preamble which states that it is an *“Act to provide for the imposition of a composite levy on certain specified commodity items in lieu of the amount chargeable on such commodity items as a tax, duty, levy, cess or any other charge in order to overcome the complexities associated with the application and administration of multiple taxes on such specified commodity items ...”*.

In terms of the Act, the Special Commodity Levy (the Levy) was to be applicable in lieu of the taxes that are imposed on imported goods in terms of the laws specified in the Schedule to the Act.²

The manner in which the Levy is to be imposed by the Minister is set out in Section 2(1) of the Act, which reads as follows:

“From and after the date of the coming into operation of this Act, there shall be imposed a levy to be called the “Special Commodity Levy” on certain commodity items which shall from time to time be specified by the Minister by Order published in the Gazette.”

The Petitioner states that the Minister of Finance and Planning had accordingly made the following two Orders under Section 2(1) of the Act:

² The laws specified in the Schedule are as follows: Finance Act No. 11 of 2002 (Part 1); Value Added Tax Act, No. 14 of 2002; Finance Act No. 5 of 2005 (Part I); Customs Ordinance (Chapter 235); Sri Lanka Export Development Act, No. 40 of 1979; Excise (Special Provisions) Act, No. 13 of 1989.

- a) Order published in Extraordinary Gazette No. 1875/17 dated 11th August 2014, annexed to the petition marked 'X4A', imposing the Levy at the rate of Rs. 5 per kg of B' Onions;
- b) Order published in Extraordinary Gazette No. 1875/30 dated 14th August 2014, annexed to the petition marked 'X4B', imposing a levy at the rate of Rs. 15 per kg of Potatoes.

It is agreed between the parties that the Orders 'X4A' and 'X4B' were valid for a period of four months, effective 12th August 2014 and 15th August 2014, respectively.

The Petitioner states that while 'X4A' and 'X4B' were in force, the 4th Respondent, the Director General of Trade Investment and Policy, Ministry of Finance and Planning had issued the document annexed to the petition marked 'X2' on 22nd August 2014, at 1740 hours, seeking to increase the Levy that had been imposed by 'X4A' and 'X4B', in the following manner:

| I වන තීරය | | | | II වන තීරය |
|-------------|-----------------|-----------------|--------------------|--------------------------|
| වෙළඳ හාණිකය | | | | |
| | සං.ව. ශීර්ෂය | සං.ව. සංකේතය | විස්තරය | විශේෂ වෙළඳ හාණික බද්ද |
| 1. | 07.01 | 0701.90 | අනෙකුත් - අර්තාපල් | කි.ග්‍රෑමයට රු 40.00 |
| 2. | 07.03 | 0703.10.20 | බොම්බයි එළු | කි.ග්‍රෑමයට රු 35.00 |

This Court has examined 'X2' and observes the following endorsements that have been made thereon:

- a) Directive by the 4th Respondent to the 5th Respondent, the Director General of Customs to *“Please implement the above rates with effect from midnight today”*;
- b) Directive by the Additional Director General of Customs (Revenue and Services) to the Directors of Customs (ICT) and (PP&R), *“To take immediate action to effect the above two changes from 12midnight (22/08 – 23/08)”*. This directive had been made at 1845 hrs of 22nd August 2014.

The Petitioner has produced with its petition, marked 'X6', Departmental Order No. DOPL 945 issued by the Director General of Customs, informing all Officers of Sri Lanka Customs that, *“General Treasury has informed the DGC that the Special Commodity Levy rates have been revised ... effective from 23.08.2014”*, with the revised rates being Rs. 35 for B' Onions and Rs. 40 for Potatoes.

The Petitioner has produced with its counter affidavit a letter sent by Sri Lanka Customs confirming that the above revision was duly published on the website of Sri Lanka Customs on 23rd August 2014. It is agreed between the parties that Sri Lanka Customs implemented the rates conveyed by 'X2' from 23rd August 2014. It is also agreed between the parties that in order to impose the above revised rates, the Orders 'X4A' and 'X4B' were cancelled by the Minister and a fresh Order under Section 2(1) of the Act was made in respect of the revised rates.³

³ The date on which the said Order was signed by the Minister has been disputed by the Petitioner.

The Petitioner, who is an importer of commodities, had submitted two Customs Declarations marked 'X8A' and 'X8B' on 5th September 2014 in respect of 32000 kg and 32800 kg of Potatoes, respectively. The Levy payable on potatoes has been declared in the said Customs Declarations at the rate specified in 'X2' and 'X6' and the Petitioner had paid the levy calculated at the rate of Rs. 40 per kg, and cleared the said consignments.

Having done so, the Petitioner filed this application, complaining to this Court that the imposition of the Levy in terms of 'X2' is illegal and therefore seeking *inter alia* the aforementioned relief.

Prior to considering the arguments advanced in this Court by the learned Counsel for the Petitioner, it would be appropriate for this Court to set out the submission of the learned Senior Deputy Solicitor General as to the reasons that led to the increase of the Levy on 22nd August 2014.

The learned Senior Deputy Solicitor General submitted that this Court must consider the Act as a whole and that this Court should not seek to interpret provisions of the Act in isolation. He submitted that while the Act has been introduced to simplify the tax structure on commodity items, the economic and market reality is such that the Government must be in a position to impose the Levy when required and thereafter be in a position to amend and/or cancel same without any restrictions, other than those specified in Section 2(3) or Section 2(4).

The learned Senior Deputy Solicitor General submitted further that it is the responsibility of the Minister of Finance to take decisions in the interests of the

national economy and the agricultural sector of the Country. He pointed out that B' Onions and Potatoes are two crops cultivated by local farmers and their livelihood depends on the income they generate from farming these commodities. He submitted that whenever the harvest in Sri Lanka is higher than expected, there can be a glut in the market if imports are allowed. Therefore he submitted, in order to minimise imports during the post harvest period, the Government increases the Levy thereby protecting the local farmer, and ensuring that their crop has a ready market.

Similarly, he submitted that there can be situations where the harvest may not be as expected or where the harvest is affected by floods or other natural causes, agricultural pests etc, which can result in a shortage of the commodity in the market, thereby increasing the price. He submitted that in such a situation, the Government steps in and lowers the Levy, thereby allowing the importation of these two important commodities at a lower price and ensuring the continuous supply of B' Onions and Potatoes at a reasonable price. In support of this position, the learned Senior Deputy Solicitor General drew the attention of this Court to Section 5(1) of the Act, where the Minister may, when he is of the opinion that in view of the prevailing economic conditions it is expedient to do so, waive the levy specified in an order made under Section 2, while an Order made under Section 2 (1) or (3) is in force. He therefore submitted that the Act does not prohibit an Order under Section 2(1), once made, from being cancelled prior to the expiry of its validity period, in order to address the economic considerations that prevail at a particular time.

Referring to the facts of this application, the learned Senior Deputy Solicitor General stated that the Minister of Finance, having published the Orders 'X4A'

and 'X4B' on 11th August 2014 and 14th August 2014 respectively, had to contend with a bumper harvest in the country soon thereafter. Therefore, in order to protect the local producer, as part of Government Policy, the Minister of Finance was compelled to increase the Levy on Potatoes and B' Onions in order to control the import of these two commodities. Hence, the necessity to increase the Levy on 22nd August 2014.

This Court shall now consider the two arguments of the learned Counsel Petitioner.

The first argument is that once an Order is made in terms of Section 2(1) of the Act, such Order cannot be amended or rescinded for a period of thirty days therefrom. The learned Counsel for the Petitioner is relying on the provisions of Section 2(4) of the Act in support of his argument. It was his position that the Order marked 'X4B' increasing the Levy in respect of Potatoes, having come into effect on 15th August 2014, could not have been amended and/or rescinded until 13th September 2014. He therefore submitted that the imposition of a revised Levy as reflected in 'X2' prior to the expiry of the said thirty day period, is *ultra vires* the powers of the Minister and is therefore illegal.

Determination of the first argument of the learned Counsel for the Petitioner requires this Court to consider the provisions of Sections 2(1) – 2(4) of the Act. This Court has already noted that the Order specifying the commodity in respect of which the Levy should apply is made by the Minister in terms of Section 2(1) of the Act.

In terms of Section 2(2), *“The period of validity of every such Order and the rate of the Special Commodity Levy to be imposed in respect of each such specified item, either on ad valorem or specific basis, shall also be specified in the Order.”* It is clear from the wording of Section 2(2) that while every Order made under Section 2(1) shall have a validity period, there is no requirement that the Order made under Section 2(1) must have a minimum validity period.

The question whether an Order made under Section 2(1) can be amended is addressed in Section 2(3), which is re-produced below:

“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.”

Thus, while an Order made under Section 2(1) can be valid for a period of less than thirty days, any Order which is valid for a period of over thirty days can be amended, or varied, in respect of two matters, namely by adding or removing a commodity from such Order, or by revising the rate of the Levy specified in such Order.

Section 2(4) of the Act specifies that, *“No Order made under **subsection (3)** may be amended or varied until the expiration of thirty days from the date of the making thereof.”*

Thus, there are two Orders that can be made in terms of Section 2 of the Act. The first is an Order under Section 2(1) imposing the Levy on a commodity specified in such Order at the rate and for the period specified therein. The

second is an Order under Section 2(3), amending an Order made under Section 2(1). It is significant to note that the Order that has been referred to in Section 2(4) in respect of which the limitation set out therein would apply, is an Order made under Section 2(3) of the Act, and not an Order made under Section 2(1).

As noted earlier, the effect of Section 2(2) is that while every Order under Section 2(1) must have a validity period, it is not mandatory that a minimum validity period be specified for such an Order. However, where the validity period has been specified as being more than thirty days, as in 'X4A' and 'X4B', such an Order can be amended, but only in respect of the two matters specified therein. An Order under Section 2(3) cannot extend the validity period of the Order made under Section 2(1) that it is seeking to amend. However, no such restriction would apply to a fresh Order made under Section 2(1), thereby distinguishing between an amendment and a cancellation. The inference that may be drawn here is that the legislature has not conferred the Minister with the power to amend an Order which is valid for a period of less than thirty days. What is important however is that a plain reading of Section 2(3) shows that it does not specify that the amendment can be done only after a certain number of days have lapsed after an Order under Section 2(1) has come into force, with the resultant position being that the rate of the Levy specified in 'X4A' and 'X4B' can be amended any time after 12th August 2014 and 15th August 2014, respectively.

Although the Act provides for the amendment of an Order made under Section 2(1), the Act does not provide for the cancellation of an Order. The power to cancel an order is clearly provided for in 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.”

Therefore, an Order made under Section 2(1) can be cancelled at any time and a fresh Order made in lieu thereof, in the absence of any restriction or prohibition in the Act relating to cancellation.

It is therefore the view of this Court that:

- (a) The argument that the Orders marked ‘**X4A**’ and ‘**X4B**’ cannot be amended or cancelled for a period of thirty days from the date of such Order becoming operational, is not correct.
- (b) The restriction on amending or varying an order contained in Section 2(4) applies only with regard to an Order made under Section 2(3) of the Act. As the Order that has been made by the Minister on 22nd August 2014 is not an Order under Section 2(3) but is an Order made under Section 2(1), the restriction contained in Section 2(4) of the Act will not apply to such Order.

There is one matter that this Court wishes to advert to, which is the judgment of this Court in **Deepak Kumar Krishnakumar Vasanji vs Hon. Ravi Karunanayke, Minister of Finance and Others**.⁴ In that case, an Order in terms of Section 2(1) of the Act had been published in Extraordinary Gazette No. 1931/7 dated 7th September 2015, whereby the Levy in terms of the Act was imposed on B' Onions for a period of 6 months from 8th September 2015. While the said Order was in force, the Minister of Finance had published an Order under Section 10A of the Customs Ordinance, in Extraordinary Gazette No. 1933/15 dated 22nd September 2015, imposing a surcharge, in addition to the Levy. The complaint of the petitioner was that in terms of Section 2(5) of the Act,⁵ no other tax can be imposed on any good under the Customs Ordinance while an Order made under Section 2(1) of the SCL Act subsists.

As in this application, the learned Senior Deputy Solicitor General who appeared for the respondents in that application submitted that the necessity to revise the Special Commodity Levy either upwards or downwards may arise at any time, and that the Government must be able to react in order to protect the national economy. The submission of the respondents that the mechanism that is available in order to address an excess harvest is to act under Section 10A of the Customs Ordinance and to impose a surcharge was accepted by this Court. Although this Court did not consider the provisions of Sections 2(1) – 2(4) in that application, upon a close analysis of those provisions, it is clear that the Government may address an increase necessitated by economic

⁴ CA (Writ) Application No. 69/2016; CA Minutes of 7th November 2019.

⁵ Section 2(5) reads as follows: "The Special Commodity Levy so imposed shall be a composite levy and during the period any Order published in terms of subsection (1) is in force, no other tax, duty, levy or cess or any other charge imposed in terms of any of the laws specified in the Schedule to this Act, shall be applicable in respect of the commodity items specified in any such Order."

considerations, by the procedure adopted by the Respondents in this application, as well.

This Court shall now consider the second argument of the learned Counsel for the Petitioner, which is twofold. The first is that the revision of the Levy as set out in 'X2' has been made by the Director General, Department of Trade and Investment Policy and not by the Minister of Finance, as required by Section 2(1) of the Act. The second is that the Order made by the Minister has not been published in the Gazette, prior to the implementation of the Levy, and therefore the imposition of the Levy at the rate of Rs. 40 is illegal.

Common to both aspects of the second argument are the provisions of Section 7 of the Act, which reads as follows:

“Every Order made by the Minister in terms of Section 2 and Section 5, shall—

- (i) be in operation immediately upon the Minister affixing his signature thereto;*
- (ii) be published in the Gazette as soon as convenient;*
- (iii) be approved by Resolution of Parliament as soon as convenient thereafter; and*
- (iv) if not approved by Parliament, be deemed to be rescinded with effect from the date of such resolution, without prejudice to anything previously done thereunder.*

It is clear that in terms of Section 2(1) of the Act, the power to make an Order in terms thereof is vested with the Minister. The learned Counsel for the Petitioner drew the attention of this Court to 'X2' and stated that 'X2' does not contain anything thereon to indicate that the decision to impose a levy at a new rate has been taken by the Minister. This Court has examined 'X2' and is in agreement with the position of the Petitioner.

In support of his position that the decision to impose an increased levy has not been taken by the Minister, the Petitioner has annexed to its counter affidavit, marked 'X19', a letter dated 22nd March 2017 issued by the Department of Immigration and Emigration confirming that the then Minister of Finance had left Sri Lanka on 22nd August 2014. The time of departure however has not been stated in 'X19'.

It is in this factual background that the learned Counsel for the Petitioner submitted that the Order 'X2' has not been issued by the Minister of Finance but has in fact been issued by the 4th Respondent, without any Order to that effect having been made by the Minister. If the position of the learned Counsel for the Petitioner is correct, the collection of the Levy at the rate specified in the two Customs Declarations ('X8A') is illegal.

As noted earlier, the Petitioner has produced marked 'X4A', the Gazette notification containing the Order made by the Minister on 11th August 2014 imposing a Levy of Rs. 25 on B' Onions. Annexed to 'X4A' is the Order signed by the Minister. Similarly, annexed to the Gazette notification marked 'X4B' is the Order signed by the Minister imposing a sum of Rs. 15 per kg of potatoes.

The Petitioner has produced with his counter affidavit, marked 'X15', the actual Order signed by the Minister of Finance on **22nd August 2014**, declaring that the two previous Orders made in respect of B' Onions and Potatoes (i.e. 'X4A' and 'X4B') are cancelled and that effective 23rd August 2014, the Special Commodity Levy on Potatoes shall be Rs. 40. This Court has examined 'X15' and observes that it contains the signature of the Minister, the commodities in respect of the which the Levy is to be collected, the rate at which the Levy is to be collected, the period for which the Order shall be valid, and is dated 22nd August 2014. Thus, on the Petitioner's own pleadings, there is an Order signed by the Minister on 22nd August 2014. No material has been placed before this Court to show that the Order 'X15' was not available to the 4th Respondent at the time he issued 'X2'. Furthermore, as is evident by the Petitioner's pleadings referred to earlier, the practice appears to be for the Minister to sign the Order and thereafter for the Ministry of Finance to implement the Order.

An Order for the imposition of the Levy comes into operation immediately upon the Minister signing such Order. Implementation of the said Order is in the hands of the Ministry of Finance and Sri Lanka Customs. The contents of 'X2' make it clear that 'X2' has been issued by the 4th Respondent to the 5th Respondent to enable the rates specified in the Order 'X15' to be implemented. On receipt of 'X2', Sri Lanka Customs is entitled to impose the levy at the rate specified therein from the date specified therein. In these circumstances, the only conclusion that this Court can arrive at is that 'X2' has been issued pursuant to the Order 'X15' having been issued under the hand of the Minister of Finance.

The second aspect of the argument of the learned Counsel for the Petitioner is that the imposition of the Levy cannot be done until the Order is published in the Gazette. The attention of this Court was drawn to the fact that even though 'X2' had been issued on 22nd August 2014, and the number of the Gazette in which the said Order was to be published has been stated on 'X2' as being "*No. 1876/42 dated 22nd August 2014*", even as at the date on which this application was filed, the said Order had not been published in the Gazette. In support of his position, the learned Counsel for the Petitioner has produced marked 'X3', a list of Gazettes printed by the Government Printer for the month of August 2014.

This Court has examined 'X3' and observes that even though "*No. 1876/42*" appears on it, 'X3' does not contain details of what has been published, and only states that the particular gazette number has been reserved for the Department of Trade and Policy. The Department of Government Printing has in fact confirmed to the Petitioner's Attorney-at-Law by a letter dated 20th December 2016 marked 'X16' that the manuscript for the said Gazette No. 1876/42 was received only on 1st October 2014 and the Gazette was published on the web site only on 11th October 2014. Having considered the above material, it is clear to this Court that even though 'X2' had been issued on 22nd August 2014, and the Order had in fact been published in Gazette No. 1876/42 bearing the date '*22nd August 2014*', the Order has been sent for publication only on 1st October 2014.⁶ While such a practice is irregular, what is important is that in terms of Section 7, publication of the Order in the Gazette is not a pre-condition for the Order to become operational. In fact, the requirement is that the Order shall *be published in the Gazette as soon as convenient*.

⁶ The Gazette Notification pertaining to 'X15' has been annexed to the amended petition filed by the Petitioner.

Therefore, this Court takes the view that the failure to publish the Order in the Gazette, on 23rd August 2014 does not affect the legal validity of the Order.

This Court is therefore of the view that the imposition of the Levy at the rate of Rs. 40 per kg of Potatoes has been done in terms of the Order marked 'X15' issued by the Minister of Finance, and hence, this Court does not see any merit in the second argument of the learned Counsel for the Petitioner.

The necessity for this Court to consider the prayer for the Writ of Mandamus therefore does not arise.

In the above circumstances, this Court does not see any merit in the application of the Petitioner. The application of the Petitioner is accordingly dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal