

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

Sri Lanka Telecom PLC,
Telecommunications
Headquarters Building,
Lotus Road,
Colombo 01.
Petitioner

CASE NO: CA/WRIT/387/2014

Vs.

1. Jagath P. Wijeweera,
Director General of Customs,
Sri Lanka Customs Department,
No.40, Main Street,
Colombo 11.
- 1B. Chulananda Perera,
Director General of Customs,
Lanka Customs,
Head Office,
Bristol Street,
Colombo 01.

- 1C. P. S. M. Charles,
Director General of Customs,
Lanka Customs,
Head Office,
Bristol Street,
Colombo 01.
- 1D. Rtd. Major General G. V.
Ravipriya,
Director General of Customs,
Lanka Customs,
Head Office,
Bristol Street,
Colombo 01.
2. M. Paskaran,
Director of Customs,
Sri Lanka Customs Department,
No.40,
Main Street,
Colombo 11.
3. Saman de Silva,
Deputy Director of Customs,
Sri Lanka Customs Department,
No.40, Main Street,
Colombo 11.
4. D. K. S. Ravindra,
Deputy Superintendent of
Customs,
Sri Lanka Customs Department,
No.40, Main Street,
Colombo 11.
- Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Faisz Mustapha, P.C., with Suren de Silva and
Faiza Markar for the Petitioner.
Manohara Jayasinghe, S.S.C., for the
Respondents.

Argued on: 28.07.2020

Decided on: 21.09.2020

Mahinda Samayawardhena, J.

The Petitioner, Sri Lanka Telecom PLC, filed this application against the Respondents, including the Director General of Customs, seeking predominantly to quash the Order marked X13 whereby a forfeiture was imposed on the Petitioner under the Customs Ordinance in a sum of Rs.5,461,506,186, which was later mitigated to a sum of Rs.1,820,502,062, on the premise that the Petitioner imported free of duties and sold CDMA telephone sets contrary to the Agreement entered into by the Petitioner with the Board of Investment of Sri Lanka.

The Petitioner challenges this decision on several grounds. The main ground goes to the jurisdiction of the tribunal that made the said decision.

The Petitioner is an enterprise registered with the Board of Investment of Sri Lanka.

Section 17 of The Board of Investment of Sri Lanka Law, No.4 of 1978, as amended, reads as follows:

17(1) The Board shall have the power to enter into agreements with any enterprise in or outside the area of authority and to grant exemptions from any law referred to in Schedule B hereto, or to modify or vary the application of any such laws, to such enterprises in accordance with such regulations as may be made by the Minister.

(2) Every such agreement shall be reduced to writing and shall upon registration with the Board, constitute a valid and binding contract between the Board and the enterprise.

The Customs Ordinance is one such law referred to in Schedule B to The Board of Investment of Sri Lanka Law.

The Agreement entered into by the Board of Investment of Sri Lanka Law with the Petitioner is marked X2.

In paragraph 6 of the statement of objections, the Respondents correctly say *“the crucial question to be decided (in this case) is whether the CDMA Units were sold to the customers in breach of the Petitioner company’s agreement with the Board of Investment.”*

In paragraph 34 of the statement of objections, the Respondents state that R4 lays down the conditions for the duty exemptions provided for in the Agreement X2 and conclude that the Petitioner breached the conditions upon which such exemptions were granted.

Paragraph 34 of the statement of objections reads as follows:

The Respondents submit further that the Board of Investment wrote to the Managing Director of the Petitioner Company on 18th August 2014. The said letter laid down

the conditions for the duty exemptions provided for in the Agreement between the Petitioner and the Board of Investment.

This letter has emphasized that the company is not permitted to sell the equipment imported under any circumstances.

The Petitioner is also required to record all such equipment as assets of the company.

The letter also requires the Petitioner Company to submit a list of their registered customers within three months of the date of the agreement.

The Respondents submit that the Petitioner has failed to comply with all these requirements and have thereby breached the conditions upon which the exemption was granted.

A copy of the said letter is marked as R4 and pleaded as part and parcel hereof.

If I may repeat, the 2nd Respondent imposed the above staggering forfeiture on the basis that the Petitioner violated the Agreement X2 read with R4 entered into with the Board of Investment.

Does the 1st Respondent Director General of Customs or the 2nd Respondent inquiring officer have the jurisdiction to come to such a conclusion and impose such a forfeiture? The answer to this question shall be in the negative.

Clause 7(iii)(a) of the Agreement X2 states:

All imports/local purchases of project related capital items as approved by the Board to be used for and by the Enterprise (the Petitioner) for the purpose of the business, shall be free from custom duty during the project implementation period and free of import restrictions under the Imports and Exports (Control) Act, No.1 of 1969.

Clause 7(vi) states:

The provisions of the laws set out in Schedule B of the said Law No.4 of 1978 which are inconsistent with the benefits and/or exemptions and/or privileges set out in sub-clauses (i) to (iv) above shall not be applicable to the Enterprise in relation to the business. The Enterprise shall be subject to all other laws, not referred to in Schedule B of the Law No.4 of 1978 save and except any exemptions and/or benefits and/or privileges specifically granted to it by such other laws and/or orders and/or regulations framed thereunder.

Clause 8 of the Agreement is intensely relevant:

8(i) Any default and/or failure of the Enterprise in performing or complying with any duty or obligation imposed on the Enterprise by this Agreement and/or any failure to comply with any representations, undertakings or commitments referred to in Clause (1) of this Agreement, the Board may by notice in writing, immediately withdraw and/or cancel all rights, privileges and benefits conferred in terms of this Agreement in toto or in part, effective from the date as may be specified by the Board.

8(ii) In the event of the Board withdrawing and/or cancelling in toto or in part the rights, privileges and

benefits as aforesaid the approval granted to the Enterprise shall deemed to have been cancelled, and all rights and privileges conferred upon the Enterprise for and in connection with conducting and/or operating the said business shall thereupon cease, without prejudice to any claim by the Board against the Enterprise arising out of the breach of any covenant or term of this Agreement. The Enterprise if so determined by the Board, shall be liable to pay the customs duty and other levies as determined by Sri Lanka Customs on the terms imported on duty free basis by the Enterprise for the purpose of the said business. The Enterprise shall have the right, if approved by the Board in writing to sell/transfer the items referred to above to any other Enterprise eligible for duty free facility in respect of same or to re-export same free of customs duty or restrictions provided the Board reserves to itself the right to cause or permit to be caused the examination of such items goods for the purpose of this Agreement.

In terms of clause 8, the violation of the Agreement shall be decided by the Board of Investment, not by any other party, including Sri Lanka Customs, and once it is so decided by the Board of Investment, the Petitioner “*shall be liable to pay the customs duty and other levies as determined by Sri Lanka Customs on the items imported on duty free basis by the Enterprise [the Petitioner] for the purpose of the said business.*”

The Respondents have no authority to decide that the Petitioner breached the Agreement entered into between the Petitioner and the Board of Investment and order payment of customs duty on the imported CDMA telephone sets. The Board of Investment

does not allege violation of the Agreement, nor has it cancelled the approval granted to the Petitioner. Clearly the Respondents have acted *ultra vires* in holding an inquiry without any participation of the Board of Investment and imposing forfeiture in a sum of Rs.5,461,506,186, which was later mitigated to Rs.1,820,502,062.

There is no necessity to consider the other grounds of challenge.

I quash the said decision by certiorari. I also direct the 1st Respondent by mandamus to refund the cash deposit and return the Bank Guarantee to the Petitioner.

The reliefs as prayed for in paragraphs (b), (d), (e) and (g) of the prayer to the petition are granted.

The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal