

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

In the matter of an Application for a mandate
in the nature of a Writ of Mandamus in terms
of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 210/2018

T&J Pharma Imports (Pvt) Limited,
Millagahawatte, Galthuda, Panadura.

PETITIONER

Vs

1. P.S.M.Charles,
Director General of Customs.
- 1A. Ganwarige Vijitha Ravipirya,
Director General of Customs,
Sri Lanka Customs,
No 40, Main Street, Colombo 11.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Pradeep Fernando for the Petitioner

Suranga Wimalasena, Senior State Counsel for the Respondents

Argued on: 28th September 2020

Decided on: 16th November 2020

Arjuna Obeyesekere, J

The Petitioner is a company duly incorporated under the Companies Act No. 7 of 2007. The Petitioner states that it is engaged in the importation and distribution of medicinal products in Sri Lanka, including a medicated bathing bar named *Psorolin*. The Petitioner states further that *Psorolin* is an Ayurvedic medicinal product which has been prescribed for the cure of a skin condition known as *Psoriasis*.

According to the Petitioner *Psorolin* has been registered with the Department of Ayurveda, as borne out by letter dated 21st July 2017 marked '**X2**' issued by the Department of Ayurveda, under Schedule 3 of the product classification issued by the Department of Ayurveda. Accordingly, this product cannot be sold over the counter and requires a prescription to be purchased by a consumer.

The issue that culminated in this application relates to one of classification of the said product *Psorolin*. It would therefore be appropriate to briefly consider at this stage the manner in which goods are classified for Customs purposes. The World Customs Organization (WCO),¹ recognising that all Customs and Border agencies around the world must classify the identical good in the identical manner for purposes of levying import and export tariffs, have developed and introduced a multipurpose international product nomenclature system known as the 'Harmonised Commodity Description and Coding System', which is generally referred to as the 'Harmonised System' or simply 'HS'. The Harmonised System is governed by the International Convention on the Harmonised Commodity Description and Coding System.

The Harmonised System is used by more than 200 countries and economies as a basis for levying Customs tariffs, and over 98% of the merchandise in international trade is classified in terms of the Harmonised System. The Harmonised System contributes to the harmonisation of Customs and trade procedures, and the non-documentary trade data interchange in connection with such procedures, thus reducing the costs related to international trade. The Harmonised System has been

¹ <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>

referred to as a universal economic language and code for goods, and is an indispensable tool for international trade.

Harmonisation of classification of goods which are imported and exported ensures that international trade takes place in a way that does not harm the economic interests of Member countries, and that there is no loss of revenue to the State in respect of customs duties and other fiscal levies due upon importation and exportation of goods. Proper and accurate classification is therefore vital in order to ensure Sri Lanka's international obligations as a Member of the World Customs Organization.

The Harmonised System comprises of more than 5,000 commodity groups; each identified by a six digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. While the first two digits refer to the Chapter of the Harmonised System Code, the last two digits are inserted by the National Body, in this instance, Sri Lanka Customs, to cater to the specific requirements of Sri Lanka. The Harmonised System has been introduced to Sri Lanka through the National Imports Tariff Guide issued by Sri Lanka Customs and published in the Government Gazette.

Chapter 30 of the National Imports Tariff Guide issued by Sri Lanka Customs, marked 'X4' is titled 'Pharmaceutical Products'. The Petitioner states that goods which have been certified by the Department of Ayurveda as being *Schedule 03 preparations* can be classified under HS Code Classification No. 30.04.90.13.

The Petitioner claims that it has imported *Psorolin* to Sri Lanka on several occasions, and has submitted Customs Declarations marked 'X5' – 'X9' in proof thereof. The Petitioner states that the goods imported under the aforementioned Customs Declarations have been declared under HS Code Classification No. 30.04.90.13, and have been cleared upon payment of duties due under HS Code Classification No. 30.04.90.13. I have examined the said Customs Declarations and observe that while the above statement of the Petitioner is correct, the Petitioner has described the goods as *Siddha medicines*, as opposed to describing the goods as medicinal soap.

The Petitioner states that he imported a further consignment of *Psorolin* in January 2018, and submitted Customs Declaration marked 'X10' under the same HS Code Classification as on previous occasions. I must however observe that in this instance – i.e. in 'X10' - the description of the goods was different than on previous occasions, in that, in addition to the words, *Siddha medicines*, the Petitioner has declared specifically that the goods are '*Psorolin Medicated Bathing Bar 75gm.*' The Petitioner states that even though he paid the Customs duty due under HS Code Classification No. 30.04.90.13, Sri Lanka Customs refused to release the goods to him on the basis that the HS Code classification is wrong.

At the request of the Petitioner, the matter had been referred to the Nomenclature Committee of Sri Lanka Customs. After an inquiry by the Nomenclature Committee, the Petitioner had been informed that the said product must be declared under HS Code Classification No. 34.01.11.90. The Petitioner had accordingly been directed to pay the duties due under HS Code Classification No. 34.01.11.90. It must be observed that the amount payable as duty and other levies under HS Code Classification No. 34.01.11.90 is higher than what is payable under HS Code Classification No. 30.04.90.13.

Being aggrieved by the said decision, the Petitioner filed this application, seeking a Writ of Mandamus directing Sri Lanka Customs to release the goods declared by 'X10'. This Court issued formal notice of this application on the Respondents on 19th July 2018. Having obtained a bank guarantee to cover the difference in duty between the two HS Code Classifications, Sri Lanka Customs released the said goods to the Petitioner, pending the determination of this application. The release of the goods, even though on a bank guarantee, is the final relief sought by the Petitioner in this application.

Although the Petitioner has not sought a Writ of Certiorari to quash the decision of Sri Lanka Customs to classify the goods under HS Code Classification No. 34.01.11.90, the learned Counsel for the Petitioner submitted that the said decision is illegal, unreasonable and contrary to the provisions of the National Imports Tariff Guide issued by Sri Lanka Customs. He reiterated that as the product *Psorolin* has been

registered by the Department of Ayurveda under Schedule 3, the correct HS Code Classification is 30.04.9013.

I must say that this Court does not have the expertise to engage in the classification of a good imported to the country, nor would it attempt to do so in the exercise of its Writ jurisdiction. That expertise lies with Sri Lanka Customs, and its Nomenclature Committee, as well as with the World Customs Organisation. In instances where Courts lack such expertise, Courts would defer to the views of such expert bodies.

The extent to which a Court exercising Writ jurisdiction should defer to the findings of an administrative body has been discussed by the Canadian Supreme Court in **Dunsmuir v. New Brunswick**² in the following passage:

“Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers” (Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, at p. 596, per L’Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”: “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., The Province of Administrative Law (1997), 279, at p. 286 (quoted with approval in Baker, at para. 65, per L’Heureux-Dubé J.; Ryan, at para. 49).”

Although Courts do show deference to the views of expert bodies, that would however not prevent this Court from examining the reasonableness of the decision taken by Sri Lanka Customs with regard to the classification of a good.

² [2008] 1 S.C.R. 190, 2008 SCC 9.

This position has been encapsulated in the following manner in **Administrative Law** by Wade and Forsyth:³

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority.....

Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court’s function to look further into its merits.”

It has been further stated in **De Smith’s Judicial Review**⁴ that:

“The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment (to use some of the terms variously employed) which Courts should grant the primary decision maker under this head of review is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. This is because there is often a fine line between assessment of the merits of the decision (evaluation of fact and policy) and the assessment of whether the principles of “just administrative action” have been met. The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide.”

Bearing this in mind, I shall now consider whether the decision of Sri Lanka Customs to reject the classification submitted by the Petitioner and the decision of Sri Lanka Customs to classify *Psorolin* under HS Code Classification No. 34.01.11.90, is legal, rational and reasonable.

³ H.W.R. Wade, C.F. Forsyth, *Administrative Law* (11th Edition, Oxford University Press 2014) page 302.

⁴ Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith’s Judicial Review* (8th Edition, Sweet & Maxwell 2018), page 592.

Chapter 30 of the National Imports Tariff Guide marked 'X4' issued by Sri Lanka Customs applies to Pharmaceutical products, while Chapter 34 of the said Tariff Guide marked 'X11' applies to soap. The learned Senior State Counsel submitted that even though preparations certified by the Department of Ayurveda under Schedule 3 fall within Chapter 30 and more specifically under HS Code Classification No. 30.04.90.13, Item 1(a) of the Notes to Chapter 30 has specified that the said Chapter does not cover '*soap or other products of heading 34.01 containing added medicaments*'. In other words, the submission of the learned Senior State Counsel is that medicated soap cannot be classified under Chapter 30 as the Harmonised System has excluded it from Chapter 30.

This position of the learned Senior State Counsel is confirmed by the Explanatory Notes to the Harmonised Commodity Description and Coding System [Sixth Edition (2017)] issued by the World Customs Organisation, marked 'R3'. While the Notes to Chapter 30 confirms the position in 'X4', 'R3' makes it clear that '*Medicated soaps however they are put up*' are excluded from the categorization of medicaments – vide paragraph (d) of the exclusions in 'R3'.

It is admitted by the Petitioner that *Psorolin* is an Ayurvedic medicinal product. Thus, by virtue of being a medicinal product certified by the Department of Ayurveda as an item coming under Schedule 3, *Psorolin could have been classified* under HS Code 30.04.90.13, **if not for the exclusion in the Notes to Chapter 30, of soaps that contain medicaments**. Thus, I agree with the submission of the learned Senior State Counsel that *Psorolin* cannot be classified under HS Code Classification No. 30.04.90.13. The decision of Sri Lanka Customs to reject HS Code Classification No. 30.04.90.13 for *Psorolin* reflects the clear position laid down in the National Imports Tariff Guide and the Explanatory Notes issued by the World Customs Organisation.

I shall now consider the decision of Sri Lanka Customs that *Psorolin* must be classified under HS Code Classification No. 34.01.11.90.

HS Code Classification No.34.01 carries the following description – '*Soap; organic surface-active products and preparations, in the form of bars, cakes, moulded pieces or shapes,...*'. In terms of Item 2 of the Notes to Chapter 34 of the National Imports

Tariff Guide marked '**X11**', *'Soap and the other products of heading 34.01 may contain added substances (for example, disinfectants, abrasive powders, fillers or medicaments).'*' While HS Code Classification No. 34.01.11 carries the description, *'For toilet use (including medicated products)'*, HS Code Classification No. 34.01.11.90 is for *bathing bars*. In terms of Chapter 34 of the Explanatory Notes '**R3**', soaps include *medicated soaps containing boric acid, salicylic acid, sulphur, sulphanomides or other medicated substances*.

It is admitted by the Petitioner that *Psorolin* is a medicated bathing bar. Whether it contains medicaments or not, it is a bathing bar, which therefore must be classified under HS Code Classification No. 34.01.11. While toilet soap and baby soap have been assigned the National Classification of '10', bathing bars have been assigned the National Classification of '90'. This is the reason for the decision of Sri Lanka Customs to apply HS Code Classification No. 34.01.11.90 for *Psorolin*.

In my view, the above decisions of Sri Lanka Customs reflect the position in the National Imports Tariff Guide and are decisions which are reasonable and rational. Applying the definition given to *irrationality* by Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**,⁵ it is certainly not a *decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*.

In these circumstances, I am of the view that even if the goods had still been in the custody of Sri Lanka Customs, this Court could not have issued a Writ of Mandamus directing the goods to be released. It is trite law that for a Mandamus to issue, the applicant must have a legal right to clear the goods, and Sri Lanka Customs must have a legal duty to release the goods. The legal right arises only if the goods have been declared by the submission of a bill of entry as required by Section 47, and the description, classification and value of the good have been entered correctly. Similarly, the public duty on the part of Sri Lanka Customs to release a good arises

⁵ [1985] AC 374.

only where there has been a truthful declaration of the description, classification and value of the goods.

Taking into consideration all of the above, I do not see any legal basis in the complaint of the Petitioner, nor any legal basis to grant the relief prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal