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

In the matter of an Application for mandates in the nature of Writs of *Certiorari* and *Mandamus* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.

CA/WRT/0652/2023

Alaris Lanka (Pvt) Ltd,
No. 9/3, Horana Road, Kesbewa, Piliyandala.

Petitioner

Vs.

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

2. **D. B. N. Smarathunga**,
   Director of Customs (Revenue Task Force) Sri Lanka Customs,
   Customs House No. 40, Main Street, Colombo 11.

3. **P. N. P. P. Premarathne**,
   Senior Deputy Director of Customs, (Revenue Task Force) Sri Lanka Customs, Customs House No. 40, Main Street, Colombo 11.

4. **A. W. L. C. Weerakoon**,
Deputy Director of Customs (Revenue Task Force) Sri Lanka Customs,
Customs House No. 40, Main Street,
Colombo 11.

Respondents

Before: **M. T. MOHAMMED LAFFAR, J.**

Counsel: Nihal Jayawardana, P.C. with A. R. P. Bandara, instructed by Emal Gunasekara for the Petitioner.

Ms. Chaya Sri Nammuni, DSG for the Respondents.

Argued on: 16.02.2024

Written Submissions on: 01.04.2024 by the Petitioner
03.05.2024 by the Respondents

Decided on: 13.06.2024

MOHAMMED LAFFAR, J.

The Petitioner to this Application is before this Court seeking, *inter alia*, the following reliefs.

b) An order quashing the decision made by the 1st to 4th Respondents not to release the consignment (CUSDEC) No. 28817of 5/10/2023

c) An order directing the respondents to grant Duty, VAT, and CESS exemptions on the product NUFLAM.

d) An interim order releasing the consignment Under (CUSDEC) No. 28817 dated 5th October 2023.

e) An order to waive off demurrage on this consignment.

However, at the outset it must be stated that, as submitted by the Learned Counsel for the Respondents, prayers b) and d) are now futile as the consignment of goods have been released to the Petitioner based on a bank guarantee as evinced in **1R8** to the Objections of the Respondents. Therefore, it is for this Court to only adduce whether such a consignment is free from Duty, VAT, and CESS.

The Petitioner company engaged in the business of import and distribution of pharmaceuticals products. The Petitioner imported a consignment of 471 packs of MOMCAL which is registered as "Medicine" and 2698 packs of NUFLAM (**P2a** and **P2b**) registered as a "Borderline Product" by the National Medicine Regulatory Authority (NMRA). It is stated by the Petitioner that, when the consignment in question came into Sri Lanka on 05/10/2023, as NUFLAM is registered as a "Borderline Product", the Petitioner entered the relevant code (707) in the goods declaration form, as depicted in **P2a**, to get the due Duty, VAT, and CESS exemptions.

Thereafter, on 05/10/2023 the said consignment of medicine was stopped by an officer attached to the 4th Respondent, Revenue Task Force of Sri Lanka Customs, who informed the Petitioner that the Duty, VAT and CESS exemptions could not be granted for NUFLAM and instructed the clearing agent to pay all the applicable taxes due. In response to this, the Petitioner made an appeal to the 1st Respondent through letter dated 19/10/2023, marked **P3**, requesting to release the consignment as per the acceptable practice carried out by the Sri Lanka Customs since 2011, to which the 4th Respondent verbally declined. It is clear that such a decision to have the Petitioner pay the relevant dues on NUFLAM stems from the

categorization of NUFLAM as 'Borderline Product' which is not exempt from the relevant dues.

NUFLAM could be understood to be a capsule containing 500mg of Glucosamine Sulphate, listed in the British National Formulary for treating rheumatic diseases, marked **P7c**, and it holds a Certificate of a Pharmaceutical Product issued by the Department of Health Therapeutic Goods Administration in Australia, marked **P21**.

Prior to the implementation of the National Medicine Regulatory Authority Act, No. 5 of 2015, the Cosmetics Devices and Drugs Act, No.27 of 1980 controlled the import of drugs, all medicines. And dietary supplements with medicinal properties were accorded registration as "Drug" under the CDDA. NUFLAM previously carried the registration as a "Drug" issued by the CDDA. After the establishment of the National Medicine Regulatory Authority (NMRA), the NMRA continued with the registration of NUFLAM as "Drugs" for a period of 5 years. Thereafter, the NMRA replaced the category of "Drugs" registered by the CDDA with two new designations, namely "Medicine" and "Borderline Product". After the introduction of the new registration criteria, NMRA registered NUFLAM under the "Borderline Product" category.

As per the interpretation of Section 146 of the National Medicine Regulatory Authority Act, No. 5 of 2015, borderline products are interpreted as follows:

> *"borderline products" means the products having combined characteristics of medicines and foods, medicines and medical devices or medicines and cosmetics and in deciding whether a product is a borderline product the following shall be taken into consideration:-*

(a) the intended use of the product (or its primary function) and its mode of action;

(b) the therapeutic claims that the manufacturer makes about the product (claims to treat or prevent disease or to interfere with the normal operation of a physiological function of the human body);

(c) the pharmacological active substance(s), if any, used in the product;

(d) the concentration of the active substances;

(e) the level of efficacy of the active substance of the product; and

(f) the ingredients used and the concentrations at which they are used;

It is submitted that medicines classified under HS Heading 30.04 is tax exempt. However, dietary supplements with medicinal properties are not accepted under HS Heading 30.04. Instead, it is the practice that has been adopted by Sri Lanka Customs to classify dietary supplements with medicinal properties under HS Heading 21.06 and grant Duty, VAT and CESS exemptions where such products are registered as borderline medicine under the NMRA. Furthermore, as per the Customs Tariff, there is a list of exemptions (**P10**) to exempt dues to products and preparations certified by the Ministry of Health as having been registered as drugs under the NMRA. An exemption introduced under HS heading 30.04 to grant duty exemption for products other than medicine.

In adducing whether the importation of NUFLAM should exempt from Duty, VAT, and CESS as prayed for in paragraph c) to the Prayers of the Petition, it is my view that NUFLAM should be granted Duty, VAT, and CESS exemptions based on several compelling factors.

Firstly, its classification as a "Borderline Product" under the NMRA aligns it with the characteristics of medicinal products, which are typically recognized for their therapeutic benefits and pharmacological effects and its primary function as a treatment for rheumatic diseases, a purpose clearly outlined in its registration and certification. Secondly, there has been a historical and consistent practice by Sri Lanka Customs to exempt such products under HS Heading 21.06, acknowledging their medicinal properties even when they possess attributes of dietary supplements. This practice reflects a recognition of the therapeutic claims and the active pharmacological ingredients in products like NUFLAM. Lastly, the therapeutic claims and pharmacological composition of NUFLAM meet the criteria for tax exemption as specified in the Customs Tariff exemptions for registered drugs. These exemptions are designed to support products with significant medicinal benefits, a category into which NUFLAM undeniably falls. Therefore, the refusal to grant these exemptions contradicts established regulatory practices.

In these circumstances, I hold that the Petitioner is entitled to reliefs as prayed for in the prayers to the Petition. This application is allowed without costs.

Application Allowed. No costs.

JUDGE OF THE COURT OF APPEAL