

**VASANA TRADING LANKA (PVT) LTD.  
VS  
MINISTER OF FINANCE AND PLANNING AND OTHERS**

COURT OF APPEAL  
SRIPAVAN, J.  
BASNAYAKE, J.  
CA 2144/04  
June 16, 2006,  
AUGUST 26, 2005

*Customs Ordinance - amended by Act, No. 2 of 2003-Excise Duty (Sp. Pro.) Act, No. 13 of 1989 - Validity of an order not gazetted - Can the order published in the Gazette operate retrospectively - quashing a document not before Court- Is it permitted? Can a relief different to that prayed be granted? Ceiling on Housing Property Law - S 17 (1)*

The petitioner seeks to quash the orders revising the depreciation table and the excise duty payable on imported used motor vehicles commencing from 15.10.2004. These orders were issued on 14.10.2004 but the gazette notification is dated 20.05.2005 and it was contended that on 15.10.2004 no gazette notification in terms of Act, No. 2 of 2003 was in operation in relation to the said order.

The petitioner further sought to challenge the order made by the Minister in terms of s.3 of Act, No. 13 of 1989, on the ground that when the impugned order was put into operation there was no gazette notification publishing the said order.

**HELD**

- (i) Considering the language in Art 10 - Schedule E-Act, No. 2 of 2003 the Ministers' order shall come into operation of the date on which it is published in the gazette. The said gazette would not apply to vehicles imported on a date prior to 20.10.2004, as a reasonable inference could be drawn that the notification in the gazette was published after 20.10.2004. There was no gazette notification in operation in relation to the impugned order on 15.10.2004.
- (ii) In terms of s3 of Act, No. 13 of 1989 the order made by the Minister shall come into force on the date of its publication in the Gazette or on such later date as may be specified in the said order. A perusal of the gazette dated 28.05.2004 shows that the order shall take effect with effect from 19.05.2004. The said order will operate with effect only from 20.05.2004.
- (iii) The order published in the gazette cannot operate retrospectively for the reason that it has to come into force on a later date.

per Sripavan, J.

"Though the petitioner moves to quash the said gazette notification by way of a Writ of Certiorari, I do not think that I should do so, I can only invalidate the gazette notification in so far as it affects the petitioner's rights, for the avoidance of doubts. I hold that the said notification does not apply to articles manufactured/produced or imported into Sri Lanka prior to 20.05.2004.

**HELD FURTHER**

- (4) The petitioner's application to quash gazette notification 1362/12 which is yet to be published cannot be granted, as Court cannot and will not quash a document that is not before Court.
- (5) The reliefs sought in the counter objections cannot be granted as the petitioner cannot set up a new case in his counter objections which was not the subject matter in his original petition.

**APPLICATION for a Writ of Certiorari****Cases referred to :**

1. *Johnson vs. Sargant and Sons - 1918-KB Vol. 1 - at 101*
2. *Sirisena vs. Doreen de Silva and Others - 1998-3 Sri LR 199*
3. *Nilia Silva vs. Commissioner of National Housing and Another - 1999-1 Sri LR 291*
4. *Sriyani Perera Roopasinghe vs. Minister of Agriculture and Lands - CA 1123/98 CAM 1.4.2003.*

M. K. Deekiriwewa for petitioner.

Ms. Farzana Jameel, S. S. C., with M. R. Ameen, SC, for the respondents.

cur. adv. vult

October, 21 2005

### **SRIPAVAN, J.**

The petitioner filed three petitions dated 4th November 2004, 22nd November 2004 and 29th November 2004. However, notice was issued on the petition dated 4th November, 2004. When the application was taken up for hearing, the learned counsel submitted that the petitioner was seeking reliefs only in terms of the petition was seeking dated 4th November 2004, dated 04th November, 2004.

The petitioner in paragraph 9 of the petition states that the first and the second respondents purporting to act under the Customs Ordinance and Excise Duty (Special Provisions) Act, No. 13 of 1989 have issued orders revising the Depreciation Table and the Excise Duty payable on imported used motor vehicles with immediate effect commencing from 15th October, 2004. These orders are marked X2 and X3 and the corresponding gazette notifications are marked X4 dated 14th October, 2004 and X5 dated 20th May, 2005 respectively. The petitioner challenges the aforesaid orders and the corresponding gazette notifications on the basis that no such gazette notifications were in fact published on the said date as stipulated in such orders.

The order of the Minister revising the Depreciation Table marked X2 and the relevant gazette notification marked X4 were challenged on the ground that at the time the order X2 was put into operation, namely, on 15th October 2004, no gazette notification was in operation in relation to the said order.

It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. In terms of Art 10 of Schedule "E" of the Customs (Amendment) Act, No. 2 of 2003, such an obligation is imposed on the subject only when the Minister publishes the order in the gazette fixing the minimum values for goods. In the case of *Johnson Vs. Sargant and Sons*<sup>(7)</sup> the date on which a statutory order made by the Food Controller was considered. An order made by the Food Controller under the Defence of the Realm Regulation was dated 16th May 1917, but was not made known to the parties to the

action or to the General Public till 17th May. The court held that the order came into operation only when it became known, namely on 17th May. Thus, it is clear that statutes which impose pecuniary burdens are subject to the rule of strict construction.

A similar approach was expressed by his Lordship G. P. S. de Silva C. J. (as he then was) in the case of *Sirisena vs. Doreen de Silva and Others*<sup>(2)</sup> where the Minister signed the vesting order on 12th October, 1976. However, the said order was not published in the gazette as expressly required by the provisions of Sec. 17(1) of the Ceiling on Housing Property Law. The court observed that there was no valid order "vesting" the premises in the respondent - as such no rights could flow from the purported order signed by the Minister on 12th October, 1976. (Also *vide Nilia Silva vs. Commissioner for National Housing and another*<sup>(3)</sup>).

Considering the language used in Art 10 of Schedule "E" namely the expression "**by order published in the gazette fix.....minimum values for any goods and the duties on those goods**", I hold that the Minister's order shall come into operation the date on which it was published in the gazette. The court should be alert to see that the powers conferred by statute are not exceeded or abused. However, a person charged with customs duty by a statutory instrument may have a defence available to him, if he can show that at the time of importation, the gazette notification had not been published.

The second respondent in paragraph 8 of his affidavit dated 7th December, 2004 states that the impugned order was signed by the Hon. Minister on 14th October, 2004 and the notice in respect of the Depreciation Table was also signed on the same day, namely on 14th October, 2004. It would appear that the Ministry of Finance received a draft and after proof reading, the draft was handed back to the Printing Department on 20th November, 2004. Therefore, a reasonable inference could be drawn that the notification was published in the Gazette after 20th October, 2004. Hence, I hold that the said gazette would not apply to vehicles imported on a date prior to 20th October, 2004.

The ground on which the petitioner challenges the order made by the Minister in terms of Sec. 3 of the Excise (Special Provisions) Act, No. 13 of 1989 and marked X3 is set out in paragraph 12 of the Petition. Counsel argued that when the impugned order was put into operation there was no

gazette notification publishing the said order. In terms of Sec. 3 (4) of the said Act, the order made by the Minister shall come into force on the date of its publication in the gazette or on such later date as may be specified in such order. A perusal of the said gazette dated 20th May, 2004 marked X5 shows that the order shall take effect with effect from 19th May, 2004. The order published in the gazette cannot operate retrospectively for the reason that it has to come into force on a **later date** (emphasis added) as stated in Sec. 3 (4). Therefore, I hold that the said order will operate with effect from 20th May, 2004.

The petitioner moves to quash the said gazette notifications by way of a writ of certiorari. I do not think that I should do so. I can only invalidate the gazette notifications in so far as it affects the petitioner's rights. For the avoidance of any doubt I hold that the said notification marked X5 does not apply to Articles manufactured/produced or imported into Sri Lanka prior to 20th May, 2004.

The petitioner also seeks to quash a gazette notification number 1362/12 which according to him is yet to be published (*vide* paragraph "d" of the prayer to the petition). This court cannot and will not quash a document that is not before it. Hence, the relief sought in terms of paragraph "d" of the prayer to the petition is refused. The petitioner sought further reliefs in his counter objection dated 14th December, 2004. The court is of the view that the petitioner cannot set up a new case in his counter objections which was not the subject matter in his original petition dated 4th November, 2004. It is not open to a petitioner in an application for writ of certiorari and mandamus to present a case not set out in the petition or obtain reliefs on a basis not averred in the petition. In the case of *Sriyani Perera Roopasinghe vs. Minister of Agriculture and Lands*<sup>19</sup> - this court remarked that "a relief different to that prayed for cannot be granted by court unless the petition is amended and the respondents are given an opportunity to file objections to the amended petition." In view of the foregoing, the reliefs sought in the petitioner's counter objections are also refused.

Subject to the observations made as aforesaid, the petitioner's application is dismissed. There will be no costs.

*Eric Basnayake, J.* - I agree.

Application dismissed.

The impugned gazette notification in so far as it affects the petitioners rights are invalidated.