

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

CA (Writ) Application No. 26/2021

1. Lu Fortune Investment (Private) Limited,
No.20, Deanstone Place, Colombo 03.

And No.32A, Shrubbery Gardens,
Colombo 04.

2. Lu Zengshan,
No.60, Guang Weilong Jinanqu,
Fuzhou Fujian, China.

Presently at:-
No.108, Siribopura, Hambantota.

PETITIONERS

Vs

1. Major General (Retired) Vijitha Ravipriya,
Director General of Customs.
2. A.M.K.D. Adikari,
Deputy Director of Customs.
3. W.M.S.N. Wijesundara,
Assistant Superintendent of Customs.
4. T.E. Hewathenna,
Assistant Preventive Officer.

The 1st – 4th Respondents at
Sri Lanka Customs,
Customs House, Colombo 12.

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

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal
Mayadunne Corea, J**

Counsel: Nihal Jayawardena, P.C., with Malik Hannan for the Petitioners

Ms. Chaya Sri Nammuni, Senior State Counsel with Dr. Charuka Ekanayake, State Counsel for the 1st and 2nd Respondents

Supported on: 10th February 2021 and 1st March 2021

Written Tendered on behalf of the Petitioners on 23rd February 2021

Submissions:

Tendered on behalf of the Respondents on 7th April 2021

Delivered on: 27th April 2021

Arjuna Obeyesekere, J., P/CA

This matter was taken up for support on 10th February 2021. The primary grievance of the learned President's Counsel for the Petitioners during the course of his oral submissions was that the 2nd Petitioner, being a Chinese national, does not understand English, and that the 2nd Petitioner was handicapped as a result thereof at the Customs Inquiry, especially as he was not represented by an Attorney-at-Law when the evidence of the Producing Officer was led. Having heard the submissions of the learned President's Counsel and the learned Senior State Counsel, this Court inquired from the learned Senior State Counsel whether the Petitioners could be afforded a further opportunity of cross examining the Producing Officer, as the 2nd Petitioner has now retained the services of an Attorney-at-Law.

When this matter was mentioned on 25th February 2021, the learned Senior State Counsel informed this Court that the Inquiry Officer is agreeable to such a course of

action, as it was a suggestion by Court, even though the Inquiry Officer was of the view that the Petitioners had been afforded every opportunity of effectively defending their interests. However, the learned President’s Counsel for the Petitioner was not agreeable to the said course of action, unless the Inquiry Officer was willing to withdraw the notice by which the Petitioners have been asked to show cause. As the learned Senior State Counsel was not agreeable to the said suggestion, this matter was re-fixed for support for 1st March 2021.

I shall first deal with the matters that were raised during the course of the oral submissions and thereafter deal with the issues of law that have been raised in the written submissions filed on behalf of the Petitioners.

The 1st Petitioner is a company duly incorporated under the Companies Act No. 7 of 2007. The 2nd Petitioner is its Managing Director. The Petitioners state that the 1st Petitioner is a trading company supplying goods of Chinese origin to companies and individuals in Sri Lanka.

The Petitioners admit that the 1st Petitioner has imported the following goods during the period December 2017 – June 2020 under three Customs Declarations (Cus Dec):

Date	Cus Dec No. and Marking	Description of the Goods	Value - USD
20 th December 2017	216836 - P2(a)	2200 latex pillows 136 latex mattresses	6305.80
28 th December 2018	213052 - P3(a) – (c)	14 Hand chain hoists 28 Hydraulic Jacks 6 pneumatic pumping units 100 sets car tyres Car tubes	9557.12
10 th June 2020	70533 - P5(a) – (zj)	504 different items of food and household materials in 7786 cartons	37152.90

The Petitioners state that while the goods under the first Customs Declaration had been allowed, the value declared by the 1st Petitioner for the goods imported under the second and third Customs Declarations had been amended by Sri Lanka Customs. The Petitioners admit that they did not protest about the amendment effected by Sri Lanka Customs and that the difference in duty arising from the declared value being enhanced was paid by the Petitioners without any protest. The goods had been released to the Petitioners thereafter by Sri Lanka Customs.

The Petitioners state that a post clearance investigation had been initiated by Sri Lanka Customs in June 2020 in relation to the goods imported by the Petitioner under the last of the aforementioned Customs Declarations. While it is admitted that the 2nd Petitioner was questioned by Sri Lanka Customs and a statement of the 2nd Petitioner was recorded on 3rd July 2020, the 2nd Petitioner has claimed that he was forced to make the said statement.

By letter dated 19th August 2020 marked 'P7', the 2nd Petitioner had been requested by Sri Lanka Customs to be present for an inquiry on 28th August 2020. The 2nd Petitioner had presented himself before the Inquiry Officer on the said date. The proceedings of that date marked 'P8a', the accuracy of which has not been questioned in this application, reveal the following:

- a) The 2nd Petitioner had been asked if he had any objection to the 2nd Respondent conducting the Inquiry, to which the 2nd Petitioner had replied in the negative;
- b) The 2nd Petitioner had been asked if he required legal assistance, to which the 2nd Petitioner had replied in the negative;
- c) Upon being asked if he required any assistance with regard to translation of the proceedings from English to Chinese, the Petitioner had replied in the affirmative;
- d) The Inquiry Officer had adjourned the Inquiry for 2nd October 2020 to enable the Officer Assisting the Inquiry to obtain the services of an interpreter;
- e) Thus, no evidence has been recorded on the first date of inquiry.

The 2nd Petitioner therefore had a period of five weeks to obtain the services of an Attorney-at-Law if he was of the view that his supposed lack of knowledge in English would affect his interests, as well as to obtain the services of an interpreter.

The inquiry commenced on 2nd October 2020 with the participation of the 2nd Petitioner and an English-Chinese translator. The Inquiry Officer had asked the 2nd Petitioner whether he has any objection to the translator chosen by Sri Lanka Customs, to which the 2nd Petitioner had replied in the negative. The basis for Sri Lanka Customs to commence an investigation and thereafter proceed with an inquiry in terms of the Customs Ordinance is clearly set out in the opening submissions of the Officer Assisting the Inquiry. The said basis can be summarised as follows:

- a) The investigation against the Petitioners had been initiated on information received during a visit to a Chinese supermarket (in the course of another investigation) that the goods cleared in June 2020 by the Petitioners under the aforementioned third Customs Declaration had been undervalued;
- b) The commercial invoice which was available on the mobile phone of the 2nd Petitioner in relation to the third Customs Declaration contained a value of USD 142,836.76 whereas the value declared by the Petitioners to Sri Lanka Customs in the said Customs Declaration had been USD 37,152.90;
- c) When confronted by the officers of Sri Lanka Customs with this information, the 2nd Petitioner had deleted the invoices from the 'V Chat' service. Sri Lanka Customs had however recovered the relevant evidence by accessing the phone memory;
- d) Officers of Sri Lanka Customs had also accessed the email account of the 2nd Petitioner [luzingshan@163.com] where they had found communications relating to the previous shipments. Here again, the value declared to Sri Lanka Customs at the point of clearance was less than the actual value of the goods as set out in the said communications.

Thus, according to Sri Lanka Customs, this was not a simple case of the importer having made a mistake when declaring the value, for which the possible remedy is an adjustment of the value in terms of Section 51A(2) and the recovery of the short levy

as provided in Section 18(2) of the Customs Ordinance.¹ This was instead a case, according to Sri Lanka Customs, where the importer had deliberately withheld the true value from Sri Lanka Customs and made a false declaration, thereby attracting the provisions of Section 52 of the Customs Ordinance. Hence, the necessity to conduct an inquiry, thereby affording the Petitioners an opportunity of presenting their side of the story.

The necessary evidence, both oral and documentary, had been elicited through the Producing Officer during the proceedings held on 2nd October 2020. The 2nd Petitioner, who had informed the Inquiry Officer on the first date that he does not wish to have the services of an Attorney-at-Law, had cross examined the Producing Officer. The 2nd Petitioner had thereafter given evidence. At the end of the evidence, the Inquiry Officer had framed three charges and directed the 2nd Petitioner to show cause. The inquiry had thereafter been adjourned for 23rd October 2020.

The Petitioner filed this application on 13th January 2021, seeking *inter alia* the following relief:

- a) To quash the decision of the Inquiry Officer to conduct a Customs Inquiry in accordance with the Show cause issued on 2nd October 2020;
- b) A Writ of Mandamus directing the 1st Respondent, the Director General of Customs to carry out a proper investigation and to conduct an inquiry only if there is evidence to do so;
- c) An interim order preventing Sri Lanka Customs from carrying out an inquiry other than for the purpose of recovering any short levy in duties in terms of Section 18(2) of the Customs Ordinance.

¹ Section 18(2) reads as follows: When any duties, dues or charges on any goods, imported or exported, have been short levied or where any such duties, dues or charges after having been levied, have been erroneously refunded, the persons chargeable with the duties, dues or charges so short levied or to whom such refund has erroneously been made shall pay the deficiency or repay the amount so erroneously refunded, if the payment of the amount short levied or erroneously refunded shall be demanded within twenty- four months from the date of such short levy or refund

Whether Sri Lanka Customs should act under Sections 51A(2), 18(2) or under Section 52 is a matter that must be decided by the Inquiry Officer at the end of the inquiry. Hence, the interim order sought by the Petitioners is misconceived.

At the time this matter was supported, the position advanced by the learned President's Counsel for the Petitioner was that the 2nd Petitioner is not conversant with English and that the 2nd Petitioner has been prejudiced by the inquiry being conducted in English. The learned Senior State Counsel submitted that the 2nd Petitioner has conducted business in Sri Lanka for almost ten years and that he is in fact conversant with the English language. As I have already observed, the services of an English-Chinese Translator was made available by the Inquiry Officer, and the 2nd Petitioner had no objection to the inquiry proceeding with that translator. Furthermore, the Petitioner declined the services of an Attorney-at-Law when the Inquiry Officer inquired from the 2nd Petitioner on the first date of the inquiry whether he required the services of an Attorney-at-Law. That, together with the fact that the Petitioner had ample time to obtain the services of an Attorney-at-Law between the first and second date of the inquiry fortifies my view that the Petitioner has been afforded a fair hearing. I therefore do not see any merit in the said submission on behalf of the Petitioner.

Several questions of law have been raised in the written submissions filed on behalf of the Petitioners. Prior to considering the said questions, it would be appropriate to discuss the provisions of the Customs Ordinance relating to the declaration of a value of a good.

The importance of an importer declaring to Sri Lanka Customs the correct value of a good was considered by this Court in **Mark Santhakumar Sandanam vs Chulananda Perera, Director General of Customs and Others**,² where it was held as follows:

“The Customs Ordinance stands on three important pillars. The first is that all goods imported (or exported) to the country must be declared to Sri Lanka Customs³. The second is that a proper and truthful description of the goods must be made at the time of importation. The third and final pillar is that the

² CA (Writ) Application No. 304/2017; CA Minutes of 19th October 2018. The Supreme Court has refused special leave to appeal in SC (Spl LA) Application No. 406/2018; SC Minutes of 8th August 2019.

³ Section 47 of the Customs Ordinance.

price actually paid or payable for the goods must be declared at the time of importation⁴. One without the other will not enable Sri Lanka Customs to charge the correct import duties and taxes on the goods imported into the country. This is reflected in Section 10 of the Customs Ordinance, which reads as follows:

“The several duties of customs, as the same are respectively inserted, described, and set forth in figures in the table of duties (Schedule A)⁵ shall be levied and paid upon all goods, wares, and merchandise imported into or exported from Sri Lanka”.

Several provisions of the Customs Ordinance require an importer to declare the value of the goods and sets out the consequences of not doing so. In terms of Section 47 of the Customs Ordinance, every consignee is required to tender a Bill of Entry, commonly referred to as the Customs Declaration or ‘Cus Dec’ setting out the details that are required in the said declaration including the value of the goods that are the subject matter of the said Bill of Entry.

Section 51 of the Customs Ordinance specifies that, ‘In all cases when the duties imposed upon the importation of articles are charged according to the value thereof, the respective value of each such article shall be stated in the entry together with the description and quantity of the same, and duly affirmed by a declaration made by the importer or his agent on a form⁶ ... as may be specified by the Director General and such value shall be determined in accordance with the provisions of Schedule E, and duties shall be paid on a value so determined.’

*As set out earlier, **a truthful declaration of the price actually paid or payable for a good is paramount, for the Customs to determine the value of the import and thereby, for a proper working of the Customs Ordinance. It is for this reason that Sri Lanka Customs has the power to investigate any instance of suspected***

⁴ In terms of Schedule E of the Customs Ordinance, the customs value of any imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to Sri Lanka, as may be adjusted and determined in accordance with the provisions of Schedule E.

⁶ This form is known as the ‘Value Declaration Form.’

undervaluation.⁷ In terms of Section 51A(2) of the Customs Ordinance, Sri Lanka Customs has the power to amend the value declared at the time of importation, even after the goods have been cleared by Customs. Section 51A(2) reads as follows:

*“If an officer of customs is satisfied as a result of an examination or investigation, or an audit carried out under section 128A, **at any time** prior to or **after the clearance of the goods** that **the value declared** by the importer or his agent under an Article of Schedule E under which the value was initially accepted, **is not appropriate** the officer of customs **may amend the value** in accordance with the appropriate Article of Schedule E.”*

Where however, **the importer has deliberately declared a lower value than what was actually paid**, Sri Lanka Customs can act in terms of Section 52 of the Customs Ordinance, which reads as follows:

*“Where it shall appear to the officers of the customs that the value declared in respect of any goods according to section 51 is a **false declaration**, the goods in respect of which such declaration has been made **shall be forfeited** together with the package in which they are contained. Where such goods are not recoverable, the person making such false declaration shall forfeit either treble the value of such goods or be liable to a penalty of one hundred thousand rupees, at the election of the Collector of Customs.”* [emphasis added]

This brings me to the several questions of law raised by the learned President’s Counsel for the Petitioners, which can be summarised as follows:

- (a) Once the goods have been released by Sri Lanka Customs, and that too, after Sri Lanka Customs have amended the value declared by the importer, Sri Lanka

⁷ In terms of Section 51A(1) of the Customs Ordinance, “whenever an officer of customs has reason to doubt the truth or accuracy of any particulars contained in a bill of entry or a declaration made under section 51 or the documents presented to him in support of a bill of entry under section 47, the officer of customs may require the importer or his agent or any other party connected with the importation of goods, to furnish such other information, including documentary or other evidence in proof of the fact that the declared customs value represents the total amount actually paid or is payable for the imported goods as adjusted in accordance with Article 8 of Schedule E.”

Customs is *estopped* from forfeiting the goods even though evidence of undervaluation by the importer is revealed thereafter;

- (b) The only remedy available to Sri Lanka Customs is to recover any short levy in terms of Sections 18(2) or 51A(2) of the Customs Ordinance.

A consideration of these questions requires me to consider the amendments introduced by the Customs (Amendment) Act No. 2 of 2003 which marked a fundamental shift in the Customs valuation procedure pursuant to commitments undertaken before the World Trade Organisation.⁸

Prior to Act No. 2 of 2003, Section 51 only required the submission of a Cus Dec by the importer with the value of the goods declared therein. The Customs officers would determine the value of the good based on the provisions of the repealed Schedule E of the Customs Ordinance. This involved the Customs officers embarking upon an examination of each import to ascertain its value and the Officers of Sri Lanka Customs not relying upon the declared values. Officers of Sri Lanka Customs could thus uplift the values declared by the importer.

The amendments introduced by Act No. 2 of 2003 are based on the *Trust the Trader* principle. In terms of the said Act, in order to determine the Customs Value the importer or his agent is required to make a declaration on a form specified by the Director General of Customs. This form is a reflection of Article 8 of Schedule E and is known as the 'Value Declaration Form' (VDF). It is only if the VDF is duly and properly completed that the Customs Officer will be able to make the "adjustments" as required by law and arrive at the final customs value.

Although Customs Officer would generally accept the transaction value declared by the importer and arrive at the Customs Value in accordance with Article 1 of Schedule E, as adjusted by Article 8,⁹ the Customs Officer is not bound to accept the value given by importers. A Customs Officer is empowered to seek clarifications or call for further information to ascertain the true value in the event the Customs

⁸ See *Commercial Bank of Ceylon Limited vs The Director General of Customs and Others* [(2003) 2 Sri LR 386] for a discussion on the introduction of Act No. 2 of 2003 to fulfill the WTO commitments.

⁹ However, if the Customs Value cannot be determined under Article 1 of Schedule because of the circumstances of the import or the nature of the goods, then it will have to be determined under Articles 2-7.

Officer doubts the truth or accuracy of the values so provided. Section 51A was introduced to facilitate this process of ascertaining the true value and to provide for a mechanism to deal with inaccuracies in the information provided in the VDFs submitted under Section 51.

A close examination of Section 51A would therefore reveal that it caters to four different scenarios. The first is, where the VDFs and supporting documents reflect the correct customs value, the declared value will be accepted and the goods will be released by Sri Lanka Customs upon the payment of the Customs duties calculated in terms of Section 10 of the Customs Ordinance.

The second scenario is where there is a doubt as to the **truth or accuracy** of any particulars contained in a Bill of Entry, the VDFs and supporting documents presented in respect of a Bill of Entry under Section 47, **prior to the acceptance of the value declared in the VDFs**, and prior to the release of the goods. At this point, Section 51A(1) is triggered and the Customs Officer is empowered to determine and amend the Customs value in accordance with the appropriate Article of Schedule E. The goods shall be released upon the payment of duties on the amended value as determined by Customs.

The third scenario is provided in Section 51A(2). Accordingly, where Sri Lanka Customs finds after an examination, investigation or post audit carried out under Section 128A, **after the values declared in the VDFs have been accepted** but **before the goods are cleared** that the values declared are inappropriate, the Customs officer is empowered to amend the value in accordance with the appropriate Article of Schedule E. Here too, the goods shall be released upon the payment of duties on the amended value as determined by Customs.

The fourth scenario is where the Sri Lanka Customs finds after an examination, investigation or post audit carried out under Section 128A, **after the VDFs have been accepted and after the goods are cleared** that the values declared are inappropriate, Sri Lanka Customs is empowered by Section 51A(2) to amend the value in accordance with the appropriate Article of Schedule E.

Section 51A(2) will apply only where the value declared in the VDF has been initially accepted – though the goods may or may not have been cleared. Since the words *initially accepted* only appear in Section 51A(2), the conclusion that can be drawn is that Section 51A(1) will apply to instances prior to acceptance of the values declared in the VDF. This is substantiated by the fact that Section 51A(1) refers to the bill of entry and documents supporting a bill of entry in addition to the VDF.

Prevailing over and above scenarios two, three and four are the provisions contained in Section 52. Accordingly, where there is evidence that a false declaration has been made, Section 52 will apply, irrespective of whether the goods are still at Customs or have been released with or without any adjustment to the value declared by the Petitioner.

Very importantly, Act No. 2 of 2003, while introducing the elaborate mechanism in Section 51A, amended Section 52 to deal with false declarations made under Section 51. It is clear that the falsity referred to in Section 52 is clearly expected to deal with situations **where there is evidence that the importer attempted to undervalue the goods or that the non inclusion of a factor covered under Article 8 of Schedule E was intentional and not a mere oversight or mistake of fact.**

In essence, the different scenarios under Section 51A permit the amendment of the customs value by Customs Officers to reflect the appropriate customs value upon further information that they may obtain. However, the mere amendment of the value does not and should not mean that the importer can get away scot-free, if subsequently it emerges that there has been a false declaration. Thus, the provisions of Section 52 may come into effect at any time before, during or after the procedures set out in Section 51A are followed.

Thus, with the new scheme put in place by Section 51A, where an importer has made a genuine mistake or misunderstood the criteria set out in Article 8, the importer will be asked to pay the appropriate value, as **amended** in terms of Section 51A. Where it can be established that the value declared is false, the goods shall be forfeited under Section 52. The rationale for maintaining this distinction between Section 51A and 52 is very clear – if an importer does not face any penalty for undervaluing, all importers will deliberately undervalue their goods – for even if they are discovered,

they will only need to pay the amount that they would have been required to pay had they been truthful in their original declaration. Unless this distinction is maintained, the clear deterrent effect as intended by the legislature through Section 52 would be rendered nugatory.

Thus, where upon the additional information submitted it is possible to determine the appropriate customs value under Section 51A(1)(c) or 51A(2), a Customs officer may do so. However, there may be situations where the additional material adduced under Section 51A is insufficient to determine the precise customs value, particularly where fraud is suspected and the importer attempts to hide his activities. In those instances it is essential that the Customs officer conducts investigations and/or inquiries to obtain all relevant information and determine the value as well as determine if Section 52 has been contravened. Since no specific provision has been made with regard to the procedure that needs to be followed where a false declaration is suspected under Section 52, judicial precedent in this regard, and the rules of natural justice dictate that the general provisions pertaining to inquiries should be followed, ensuring that the importer is given a right to a hearing.¹⁰

Even though the above narration reflects the position in the Customs Ordinance with regard to undervaluation and its consequences, the learned President's Counsel for the Petitioner has cited the penultimate paragraph from the judgment of the Supreme Court in **Toyota Lanka (Pvt) Limited vs Jayatilake, Director General of Customs and Others**¹¹ in support of his argument.

Before I re-produce the said paragraph, it is important to bear in mind two important matters. The first is that in **Toyota Lanka**, the issue related to one of description of the goods, and not its value. The second is that the judgment does not contain any reference to Section 52. The argument of the petitioner in that case was that the goods in question, a Toyota Land Cruiser motor vehicle was examined by Sri Lanka Customs prior to its release and that such an examination ought to have revealed the alleged discrepancy in the number of seats, which was the criterion that determined

¹⁰ See *Dias vs Director General of Customs* [(2001) 3 Sri LR 281] – ‘The scheme of the Customs Ordinance recognizes and gives an opportunity to the person whose goods are seized to vindicate himself at a subsequent inquiry. It should be kept in mind that the Court would interfere only if the statutory procedure laid down is insufficient to achieve justice. I hold that there is nothing wanting in the procedure set out in the Customs Ordinance.’ –per J.A.N. De Silva, J 9as he then was).

¹¹ [2009] 1 Sri LR 276.

the relevant HS Code classification and thereby the duty that should be charged. **Toyota Lanka did not relate to value and undervaluation.** This is clearly borne out at the beginning of the judgment where the Supreme Court stated *“that the issue to be decided could be narrowed down to the question, whether it is competent for an officer of customs to have recourse to Section 125 of the Customs Ordinance and effect seizure of goods in respect of which a Bill of Entry (CUSDEC) had been submitted, as provided in Section 47 and the goods released consequent to a **physical examination** and payment of duties that were levied.”*

It is in this context that the Supreme Court held as follows:

*“The Deputy Solicitor General submitted that the act of the 3rd Respondent and another Customs Officer in effecting the seizure under Section 125 is valid since “this fraud was discovered by the Post Audit Branch of the Customs”. It was submitted that the 3rd Respondent (Post Audit Branch) visited the premises of the 1st Petitioner for the purpose of conducting further inquiries and examined the vehicles. The implication of this submission is that an **examination of the goods** is not restricted to the stage prior to delivery as stated in Section 47 but that such **examination could be done at a subsequent stage** described as the “Post Audit Stage”.*

Let me now re-produce the next paragraph, referred to by the learned President’s Counsel for the Petitioner, which is the penultimate paragraph in the judgment:

*“It appears that the stage contemplated in the submission is that referred to in Section 128A of the Customs Ordinance introduced by the Amending Act No. 2 of 2003. In this regard I have to note initially that the “audit or examination” in terms of Section 128A(1) relates to the records an importer is required to maintain for a period of 3 years from the date of importation in terms of Section 51B. There is no provision for the **examination of goods** at that stage and any **such examination** is ipso facto ultra vires. Further, provisions of Section 128A read with Section 51A (2) show that the audit is carried out to determine the value of the goods. This could lead to an amendment of the value and an importer who is dissatisfied with any decision to amend the value has a right of appeal to the Director General in terms of Section 51A(6). There is no*

provision for a forfeiture of goods by operation of law in the event of an alleged undervaluation. Indeed such a provision would render importation of goods well nigh impossible except by the grace of an officer of the customs.”

In my opinion, any discussion whether the Customs Ordinance permits forfeiture where there is a false declaration, or in other words, whether forfeiture is possible where undervaluation has been established, would not be complete without a consideration of the provisions of Section 52. In the absence of any reference to Section 52, leave alone any consideration of Section 52, any reference to the consequences of undervaluation in **Toyota Lanka** is obiter.

If the interpretation that is sought to be given by the learned President’s Counsel for the Petitioner is accepted, Section 52 would be rendered a dead letter. This cannot be the interpretation to be adopted, because just as much as Section 51A was introduced by Act No.2 of 2003, Section 52 was also amended by Act No. 2 of 2003. This indicates clearly the intention of the legislature to maintain the distinction between payment of duty as amended by the Customs Officer (under Section 51A) and the consequences of a false declaration and undervaluation under Section 52.

I must state that the concern that the Supreme Court had in **Toyota Lanka** was permitting the Customs to forfeit, post clearance, goods which had been examined prior to being cleared. The Supreme Court was however mindful that it is not always that a good is capable of being examined and that the Customs relies on the *Trust the Trader* principle in accepting the description of a good. It is for that reason that the Supreme Court held as follows:

“Hence, when the goods are conveyed by stealth and in concealment to evade payment of customs duties, or the applicable prohibitions and restrictions, by operation of law such goods and other goods packed together and packages are forfeited.”¹²

“Hence I am fortified in the view and hold that the provision in Section 47 “but if such goods shall not agree with particulars in the bill of entry the same shall be forfeited” apply to a situation in which by means of a wrongful entry goods are

¹² Ibid; page 289

conveyed by stealth, to evade payment of customs duties or dues or contrary to prohibitions or restrictions. In such a situation of a wrongful entry and evasion, since the consequence of forfeiture is by operation of law, even if the officer had delivered the goods upon the submission of a CUSDEC, such goods may be seized at any subsequent stage in terms of Section 125.”¹³

If the principle laid down by the Supreme Court with regard to description is extended and applied to valuation, the position would be that any *bona fide* mistake in declaring the value would only attract the provisions of Sections 51A(1) and (2) and 18, while any intentional undervaluation or a false declaration would attract the provisions of Section 52.

Section 52 was considered by this Court in **Mireka Capital Land (Pvt) Limited vs Director General of Customs and Others**,¹⁴ where having referred to Section 52, Sri Skandarajah, J held as follows:

The operative words of the section are “the value declared in respect of any goods according to section 51 is a false declaration, the goods in respect of which such declaration has been made shall be forfeited.” Section 52 specifically incorporates the requirement of culpability as a precondition to forfeiture.

*Section 52 as it originally stood provided that where “it shall appear to the officers of the Customs that the value declared in respect of any goods is not in accordance with the provisions of Schedule E, the goods in respect of which such declaration has been made shall be forfeited..”. The legislature by a subsequent amendment effected to Section 52 by Section 4 of Act No. 2 of 2003 incorporated the mental element (*mens rea*) by providing that the forfeiture will be imposed only if there is a false declaration.*

The word ‘false declaration’ is not defined in the Customs Ordinance but as the forfeiture is penal in nature the word ‘false declaration’ could be interpreted with the aid of a penal statute. Making a false document is defined in Section 453 of the Penal Code.

¹³ Ibid; page 290

¹⁴ CA (Writ) Application No. 983/2007; CA Minutes of 15th June 2010.

A person is said to make a false document-

Firstly- who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document...; or

Secondly- who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof...; or

Thirdly- who dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document,...

A false declaration is a declaration made with a fraudulent or dishonest intent therefore there is no merit in the submissions of the Respondents that there is no necessity for the Customs to prove that the importer when making such declaration had the intention to defraud revenue in so far as Section 52 is concerned.

*The analyses of Sections 47 and 52 show that in the absence of culpability i.e. in the absence of the intention to defraud revenue one cannot act under the said sections.*¹⁵

The learned President's Counsel for the Petitioner had also referred to an order made by this Court in **Fonterra Brands Lanka (Private) Limited vs Director General of Customs and Others**¹⁶ at the time it issued notices on the Respondents. In that case, this Court first arrived at the following finding:

“The Court is unable to agree with the submission of the learned Senior State Counsel that the value declared by the Petitioner amounts to a false declaration within the meaning of Section 52, and as such, the person who made the false declaration should forfeit either treble the value of the imported goods or become liable to a penalty at the election of the Director General of Customs.”

¹⁵ Followed by this Court in Integrated Farmers Company [Pvt] Ltd and Another vs Director General of Customs and Others [CA (Writ) Application No. 602/2011; CA Minutes of 30th June 2015]

¹⁶ CA (Writ) Application No. 801/2007; CA Minutes of 15th October 2007.

It is only after Court held that the petitioner had not submitted a false declaration that this Court went onto hold as follows:

“if the Officer of the Customs is satisfied after an investigation that the value declared by the importer is not the appropriate or suitable value under the Schedule “E” all what the officer could do is to amend the value in accordance with the appropriate Article of Schedule “E” as provided in Section 51A(2) of the Act”.

Thus, the said Order in **Fonterra Brands** does not support the argument of the Petitioners.

In the above circumstances, I am of the view that even though goods have been released, and that too, after Sri Lanka Customs have amended the value declared by the importer, Sri Lanka Customs can yet carry out an investigation and inquiry where evidence of intentional undervaluation by the importer has emerged. If the Inquiry Officer is satisfied on the material led at the inquiry that the importer has submitted a false declaration, he can resort to the provisions of Section 52 instead of acting in terms of Sections 51A(2) and 18 of the Customs Ordinance.

I therefore do not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal