KARUPPIAH AND OTHERS
v.
THE DIRECTOR-GENERAL OF CUSTOMS

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
SC APPEALS NOS. 108/96
AND 109/96
CA APPLICATIONS NOS. 387/92
AND 403/92
JULY 15, 1998.

Writ of Mandamus – Customs Ordinance – Surcharge on customs duty – Order under s. 10A of the Ordinance – Applicability of the surcharge to goods coming within the preview of the surcharge in consequence of a waiver of customs duty.

The appellants imported two consignments of yeast in June and December, 1990, respectively. The rate of customs duty for yeast was 35% of which 30% had been waived by the respondent, the Director-General of Customs in 1988. Consequently, both consignments were cleared on payment of 5% duty. In March, 1989, the Minister of Finance acting under s. 10A of the Customs Ordinance made an Order (A4) levying a surcharge of 5% "on all imported goods (other than five specified items) on which the rate of customs duty is five per centum" with effect from 15.3.89 for a period of two years. Long after the consignments in question had been released the respondent decided that the surcharge was payable on them as well and demanded payment. S. 10A reads:

> "In addition to any duties *leviable* under this Ordinance, the Minister may, with the approval of the Cabinet of Ministers, by Order published in the *Gazette,* levy a surcharge on the customs duty *payable* on such imported goods as are specified in such order, if he deems it expedient in the interest of the national economy to do so".

It was argued for the respondent that the Order A4 should be read as if it read "goods on which the rate of customs duty *payable* is five per centum".

Held :

The Order A4 referred to the goods on which the rate of duty (duly prescribed by statute or subordinate legislation) was 5%. The language used in the Order does not suggest that it was the Minister's intention to recover the surcharge only in respect of goods on which the duty actually paid was 5%.

Per Fernando, J.

> "While 'payable' would, in certain contexts have a different meaning to 'leviable', in s. 10A 'payable' does not mean anything more, or less, than 'leviable' . . . The customs duties which are 'leviable' (or 'levied') by the State are thus identicle – in rate and amount – to what is 'payable' (or 'paid') by the importer".

APPEAL from the judgment of the Court of Appeal.

S. Sivarasa PC with *C. Vivekananthan* for the appellants in both appeals.

K. Sripavan DSG for the respondent in both appeals.

Cur. adv. vult.

September 25, 1998

FERNANDO, J.

I have had the advantage of reading the draft judgment of Bandaranayake, J. in which the relevant facts, statutory provisions,

and submissions have been set out. While agreeing with her conclusion and order, I wish to state my reasons more fully on the question of interpretation which arises.

The facts are not in dispute. The first appeal relates to two consignments of yeast imported in July and August, 1990, and the second to two consignments imported in June and December, 1990. The rate of customs duty on yeast according to the Sri Lanka Customs Import Tariff Guide in 1987 was 35%, and that was the same rate set out in *Gazette* No. 564/7 of 30.6.89. By letter dated 25.5.88 the Director of Fiscal Policy (of the Ministry of Finance) authorized the respondent, the Director-General of Customs, to grant a partial waiver of duty (of between 5% and 30%) on yeast. That was what both counsel termed an "administrative arrangement"; it was not sanctioned either by section 19 of the Customs Ordinance, or by any other statutory provision which was brought to our notice; and the appeals were argued on the assumption that such waiver was lawful. Accordingly, the respondent granted a 30% waiver, and duty was recovered at 5% on the consignments imported by the appellants.

Section 10A of the Customs Ordinance provides:

> "In addition to any duties *leviable* under this Ordinance, the Minister may, with the approval of the Cabinet of Ministers, by Order published in the *Gazette*, levy a surcharge on the customs duty payable on such imported goods as are specified in such Order, at such rates and for such periods as are specified in such Order, if he deems it expedient in the interest of the national economy to do so."

In March, 1989, acting under that provision, the Minister of Finance had made an Order (A4) levying a surcharge of 5% "on all imported goods (other than five specified items) on which the rate of customs duty is five per centum", with effect from 15.3.89 for a period of two years. Long after the consignments in question had been cleared, the respondent decided that the surcharge was payable on them as well, and demanded payment – threatening that, otherwise, he would refuse to pass future consignments of other goods imported by the appellants.

The question is whether yeast fell within the category of "imported goods on which the rate of customs duty is five per centum", within the meaning of the Order A4.

There are several reasons why I cannot accept Mr. Sripavan's interpretation of the Order A4.

First, section 10A required the Minister to *specify* the imported goods on which he wished to impose the surcharge. He could have specified them individually, laboriously describing each and every item which he had in mind, together with its Customs Tariff number. Instead, he described the entire class of goods collectively, ie goods (subject to five exceptions) "on which the rate of customs duty is five percentum". That, in my view, referred to the goods on which the rate of duty (duly prescribed by statute or subordinate legislation) was 5%. The language used in the Order does not suggest that it was the Minister's intention to recover the surcharge only in respect of goods on which the duty *actually paid* was 5%. Perhaps he could have done so, but in that event he should have said so plainly. At all material times, the rate of customs duty on yeast was 35%.

Second, Mr. Sripavan tried to get over that difficulty, by arguing that "payable" in section 10A of the Customs Ordinance means something different to "leviable". He argued that whatever may be the statutory rate of duty "leviable" on imported goods, what was "payable" by the importer could be different; in the present case, it was the reduced rate of 5% applicable after the waiver. Therefore, he contended, since section 10A authorised the Minister to impose a surcharge on the customs duty "payable", his order must be interpreted with the word "payable" interpolated; as if it read "goods on which the rate of customs duty *payable* is five percentum".

While "payable" would, in some contexts, have a different meaning to "leviable", in section 10A "payable" does not mean anything more, or less, than "leviable". Those two expressions refer to one and the same concept, but from two different points of view: that of the state and that of the importer. Correlative to the State's *power* to impose or levy customs duties is the importer's *liability* to pay those duties. The customs duties which are "leviable" (or "levied") by the state are thus identical – in rate and amount – to what is "payable" (or "paid") by the importer. Indeed, that is implicit in section 10, which refers

to the "several duties of customs", set forth in the schedule, which "shall be *levied and paid* " upon all goods imported into or exported from Sri Lanka; the schedule refers to a preferential rate and a general rate, and draws no distinction between rates to be "levied" and rates to be "paid". What is levied, and what has to be paid, are therefore one and the same.

Finally, to allow such a distinction to be made would permit an unacceptable degree of uncertainty, and even speculation, as to the rates and amounts "payable". While in this case we are concerned with low rates (5%) of duty and surcharge, the same principles must govern a surcharge of, say, 50% on goods for which the rate of duty was, say, 35%. Looking at the relevant statutes and the published subordinate legislation, how would a prospective importer know what he would be required to pay upon importation? And even if he knew of the "administrative arrangement", how would he know whether or not the Director-General of Customs would choose to exercise his discretion? If that officer did not, it would be 35% duty and 50% surcharge; and if he did, it would be 5% duty and no surcharge. From the point of view of the state, section 10A empowers the Minister to make an order for the purpose of increasing revenue, "in the interest of the national economy". He can do so only with the approval of the Cabinet, and his order has also to be placed before Parliament. On the day the order A4 came into force, if the question had been asked, "Does it apply to yeast?", the answer would have been in the negative – because the rate of duty on yeast was then 35%. If the subsequent waiver of duty by the respondent made the order applicable to yeast, that was a result which the order did not contemplate. In the absence of express provision authorising such a result, I do not think that the applicability of the order A4 – despite Cabinet and Parliamentary approval – can be made to depend on the decision (not sanctioned by any statutory provision) of the Director-General of customs to grant or to refuse a waiver.

I therefore agree that in each case the judgment of the Court of Appeal be set aside, and that Mandamus do issue to the respondent directing him to accept and pass bills of entry correctly framed by the appellants under section 47 of the Customs Ordinance in respect of goods imported by the appellants without requiring them first to frame and pass additional bills of entry, and/or to pay a surcharge of 5%, in respect of the aforesaid consignments of yeast imported

by them (in July and August, 1990, and in June and December, 1990, respectively). In each case, the respondent will pay the appellants a sum of Rs. 20,000 as costs in both courts.

WADUGODAPITIYA, J. – I agree.

BANDARANAYAKE, J.

When SC (Appeal) No. 108/96 was taken up for hearing the counsel for petitioners and respondent in SC (Appeal) No. 109/96 informed us that the subject matter in both the cases are similar and that they have no objection to both matters being taken up for hearing together. Accordingly both appeals were so heard.

The 1st and 2nd petitioners are husband and wife and carry on business in partnership dealing with the import of foodstuffs and raw materials for the hotel and bakery trade under the name, style and firm of S. P. Shahul Hameed and Brothers. They are importers of yeast, which, for the purpose of customs duty, was classified as natural yeast (active or inactive) in the customs tariff. The general rate of duty payable for natural yeast was 35% per kg (A1). In or about March or April, 1988, a waiver of duty between 5% and 35% per kg. on yeast was granted by the Director of Policy Planning and Revenue of the Ministry of Finance and Planning. According to the petitioners, all the importers of yeast, claimed this concession and submitted their entries to the office of the Director, Fiscal Policy and Revenue setting out the rate of duty at 35%, whereupon, the Director, Fiscal Policy and Revenue in a letter addressed to the respondent, authorised the waiver of 30% of the duty payable.The customs authorities accordingly noted the waiver of 30% in the Bill of Entry and duly collected the balance 5% duty on yeast (A2).

Thereafter by letter dated 25.05.1988, the Director, Fiscal Policy and Revenue of the Ministry of Finance and Planning authorised the Principal Collector of Customs himself to grant a partial waiver of duty between 5% and 35% per kg of yeast until further notice (A3).

By order made under section 10A of the Customs Ordinance and published in the *Government Gazette Extraordinary* No. 549/13 of 15.03.1989, the Minister of Finance, imposed a levy on all imported goods (other than certain exempted goods) on which the rate of

customs duty was 5%, a surcharge of percentage points on such rates of duty with effect from midnight of 15/16th March, 1989, for a period of 2 years (A4). Thereupon, the Director-General of Customs issued to all officers of the Customs a circular dated 15.03.1989 incorporating the above order (A5).

According to the petitioners after the publication of the order marked A4 and the issue of the circular marked A5:

(*a*) natural yeast (active or inactive) was again classified in *Government Gazette* No. 564/7 of 30.06.1989 under Tariff item No. 21.02 with the same general import rate of duty of 35% per kg (A6).

(*b*) upon framing the Bills of Entry at 35% by the petitioners and other importers of yeast such being the rate of duty leviable according to the said classification, the customs recovered from the petitioners and others 5% duty being the balance duty payable after granting a waiver and the petitioners and other importers of natural yeast were not required to pay the surcharge of 5%.

However, from February, 1991, one month prior to the expiration of the period of validity of the order marked A4, the customs authorities demanded that a surcharge of 5% should be paid on future imports of natural yeast. The petitioners submitted that notwithstanding the protests made by the petitioners and other importers of yeast, they were required to pay the surcharge of 5% on the yeast imported by them.

In October, 1991, the Deputy Collector of Customs, by his letter dated 21.10.1991 stating that the petitioners had failed to pay the additional 5% surcharge on Red Star Dry Yeast imported on 16.08.1990, called upon the petitioners to pass an additional entry for the surcharge (the duty short paid) within two weeks of that date (A7). Also by his letter dated 21.10.1991, the Deputy Collector of Customs, stating that the petitioners have failed to pay the surcharge 5% duty on Red Star Bakery Dry Yeast imported on 30.07.1990 called upon the petitioners to pass an additional entry for the duty short paid within two weeks of that date (A7A). Thereafter by his letters dated 31.10.1991 (A7B), 12.11.1991 (A7C), 14.01.1992 (A7D), 21.02.1992 (A7E) and 21.02.1992 (A7F), the Deputy Collector of Customs required the petitioners to pay the said surcharge of 5% duty on yeast imported and cleared from

the customs warehouses by the petitioners before February, 1991 and stated that in the event of failure to pay the same, action would be taken under the provisions of the Customs Ordinance.

The petitioners, by their letter dated 30.11.1991 to the respondent protested against the said additional surcharge (A8).

Consequent to this letter, the respondent sent a letter dated 05.02.1992 (A9) addressed to the petitioners stating that the Treasury has directed that the surcharge of 5% would apply when the duty rate is reduced to 5% through a partial waiver of duty. The petitioners submit that this letter is in general terms and no specific mention is made to the case of import of yeast. The petitioners and other importers of the yeast on which the surcharge of 5% was demanded sent several letters to the authorities concerned and the respondent thereupon forwarded two letters, both dated 30.04.1992, to the petitioners stating that they were final reminders and that if an additional entry is not passed for duty short period within 2 weeks from date of those letters, he would be compelled to refuse to pass goods consigned to the petitioners (A10 and A11) under section 18 (3) of the Customs Ordinance. The petitioners invoked the jurisdiction of the Court of Appeal by way of an application for a Writ of Mandamus on the respondent to accept and pass Bills of Entry correctly framed by the petitioners without stipulating and enforcing that additional entries should be framed and passed and the surcharge on goods referred to in the letters marked A10 and A11 should be paid. The Court of Appeal refused to grant the Writ of Mandamus on the respondents. The petitioners appealed to the Supreme Court. Special leave to appeal was allowed on the following question:

Did the surcharge imposed by A4 apply to importation of yeast in respect of which the customs rate of duty was 35%?

Learned President's Counsel, for the petitioners submitted that the surcharge is applicable only to goods carrying, an import duty of 5%. His position was that the surcharge of 5% is not applicable to the commodity of yeast as the correct duty applicable according to BTM No. 21.06(1) (A1) is 35% with a partial and special waiver of 30% which the respondent was authorized to grant (A3). The petitioners were granted this special waiver for each consignment when papers for each such consignment were submitted to the respondent, for that

purpose. The position of learned President's Counsel for the petitioners was that the duty levied for yeast is 35% and not 5% in so far as the interpretation of the circular A5 was concerned. He furter submitted that even after the publication of the order A4 and the issue of the circular A5, natural yeast (active or inactive) was again classified in *Government Gazette* No. 564/7 of 30.06.1989 (A6) under tariff item No. 21.02 with the same general import rate duty of 35% per kg.

The position of learned Deputy Solicitor-General for respondent was that Part II of the Customs Ordinance, deals with 'levying of customs duties' and section 10 of the Customs Ordinance contemplates the manner in which duties shall be *levied* and *paid* upon all goods, wares and merchandise imported into and exported from Sri Lanka. Learned DSG submitted that section 10A empowered the Minister to levy a surcharge on the *customs duty payable* on such imported goods as are specified in such order and since A4 was made under section 10A, the Minister imposed a surcharge of 5% on goods where the customs duty payable is 5 percentum.

Learned DSG further submitted that the Customs Ordinance deals with 2 types of situations. One is categorised as duties 'leviable on goods' and other is the duty actually payable on 'imported goods'. His position is that the order made under the Revenue Protection Act, No. 19 of 1962 (A6) levies customs duty at the rate of 35% on natural yeast and therefore the duty leviable on yeast is 35%; the duty actually payable on the said yeast after the waiver is 5% thereby attracting a surcharge of 5% as evidenced by A4.

I am unable to agree with the submission of the learned Deputy Solicitor-General for the following reasons. The Government notification dated 15.03.1989 (A4) stated as follows:

The Customs Ordinance (Chapter 235)
Order under section 10A

By virtue of the powers vested in me under section 10A of the Customs Ordinance (Chapter 235) as amended by Act No. 83 of 1988, I, Dingiri Banda Wijetunga, Minister of Finance, with the approval of the Cabinet of Ministers, do by this order levy on all imported goods other than –

i.	Unground Rock Phosphate	– Tariff Heading No. 25 10A (i)
ii.	Ground Rock Phosphate	– Tariff Heading No. 25 10B (i)
iii.	Cement Clinker	– Tariff Heading No. 25 23 (ii)
iv.	Pharmaceuticals Products	– Tariff Heading Nos. 30.01, 30.02 and 30.03
v.	Fertilisers	– Tariff Heading Nos. 31.01, 31.02 31.03, 31.04 and 31.05

on which the rate of customs duty is five percentum, a surcharge of five percentage points on such rates of duty with effect from midnight of 15th/16th March, 1989, for a period of two years.

According to the Government notification dated 30.06.1989 (A6), the import duty on yeast (active or inactive) at the relevant time was 35%.

The Director, Fiscal Policy and Revenue of the Ministry of Finance and Planning by his letter dated 25.05.1988 (A3) had authorised the Principal Collector of Customs to grant a partial waiver of duty on import of yeast until further orders. Based on this authorisation, a 30% duty waiver was granted and 5% duty was collected from the petitioners on the importation of yeast.

The circular on 'levy of a surcharge on import duty' dated 15th March, 1989 (A5) states that the Minister of Finance has issued an order to levy a surcharge of five percentage points on all imported goods having an import duty rate of five percent other than the following:

a. unground rock phosphate;
b. ground rock phosphate;
c. cement clinker;
d. pharmaceutical products;
e. fertilisers.

According to the Sri Lanka Customs Import Tariff Guide, 1987 (A1) (subsequently amended as HS Code 21.02 (10) (A2), the rate of duty for natural yeasts (active or inactive) was 35%. By the letter dated 25.05.1988 (A3), the Director/Fiscal Policy and Revenue authorised the Principal Collector of Customs to grant a partial waiver of duty to yeast importers until further orders were given. This special waiver

was granted to the importers for each consignment when papers for each such consignment were submitted to the respondent for that purpose. The Gazette notification (A4) and the issue of the circular (A5) on levy of a surcharge on import duty were dated 15.03.1989. Three months later on 30.06.1989, natural yeast (active or inactive) was again classified in Government Gazette No. 564/7 (A6) under tariff item No. 21.02 with the same general rate of duty of 35% per kg.

On a plain reading, it is clear that the intention of the Gazette notification A4 and the circular A5 was to levy a surcharge of '5 percentage points on all imported goods having an import duty rate of five percent'. In construing the meaning of ambiguous words or words which are capable of giving two interpretations, N. S. Bindra on Interpretation of Statutes, made the following observation:

> An authority to impose a tax or to levy fees cannot be deduced from provisions of doubtful import and when the words used in a statute are capable of two interpretations, one in favour of the taxing authority and the other in favour of the subject, the latter interpretation must hold the field. The reason for these rules is that it is opposed to the well-recognised conceptions governing a progressive state of society to permit statutory bodies to assume by inference from the words of an enactment the authority to impose taxes or to levy fees, as nothing is more liable to abuse than such supposed authority (*Mewa Ram v. Mattra Municipal Board*, LR 1939 All 770 : AIR 1939 All 466, 471 (FB) (taxes on stands for motor cars, lorries and hackney carriages); *Central India, etc., Co., Ltd. v. Municipal Committee, Wardha* AIR 1958 SC 341, 344). Hence, if there be any doubt or if there be two alternative interpretations possible, taxing statute must be interpreted in favour of the assessee and against the revenue authority (p. 792).

Accordingly in my view, the 5% surcharge that should be levied on imported goods under the notification A4 will not be applicable to the importation of yeast.

For the aforesaid reasons, in each case the judgment of the Court of Appeal is set aside and I direct that Mandamus be issued to the respondent directing him to accept and pass Bills of Entry correctly framed by the petitioners under section 47 of the Customs Ordinance

in respect of goods imported by the petitioner, without stipulating and enforcing that additional entries should first be framed and passed and the surcharge on goods referred to in A13 and A14 should be paid.

I make order that in each case the respondent will pay the appellants a sum of Rs. 20,000 as costs in both Courts.

Appeals allowed.
Order made directing Writs of Mandamus to issue.