

**IN THE SUPREME COURT OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

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**S.C. Appeal No. 79/2002**  
**S.C. (Spl.) L.A. No. 242/2002**  
**C.A. (Writ) Application No. 1416/2000**

Ceylon Quartz Industries (Private)  
Limited, "Bartleet House",  
65, Braybrooke Place,  
Colombo 2.

**Petitioner-Appellant**

Vs.

1. The Director General of Customs  
Customs House,  
Bristol Street,  
Colombo 1.
2. H.M.H.B. Seneviratne,  
Assistant Director of Customs,  
Customs House,  
Bristol Street,  
Colombo 01.
3. Hon. The Attorney General,  
Attorney General's Department,  
Hulftsdorp Street,  
Colombo 12.

**Respondents-Respondents**

**BEFORE** : Dr. Shirani A. Bandaranayake, CJ.  
N.G. Amaratunga, J. &  
P.A. Ratnayake, PC., J.

**COUNSEL** : Romesh de Silva, PC., with Geethaka Gunawardena and Shanaka Cooray for Petitioner-Appellant

F. Jameel, DSG., with Rajiv Gunatilake, SC., for Respondents-Respondents

**ARGUED ON:** 07.02.2011 and 09.02.2011

**WRITTEN SUBMISSIONS**

**TENDERED ON:** Petitioner-Appellant : 21.03.2011  
Respondents-Respondents : 22.03.2011

**DECIDED ON:** 04.10.2012

**Dr. Shirani A. Bandaranayake, CJ.**

This is an appeal from the judgment of the Court of Appeal dated 05-09-2002. By that judgment the Court of Appeal had dismissed the application of the petitioner-appellant (hereinafter referred to as the appellant) who had sought Writs of Prohibition and Certiorari. The appellant preferred an application to this Court for special leave to appeal for which this Court had granted special leave to appeal on the following questions:

1. Can the Customs interpret the nature of the goods that can be exported under and in terms of the Agreement X8?
2. Is the power of the Customs restricted to verifying whether the goods exported conform to the goods said to be exported by exporters?

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows.

The appellant is a duly incorporated limited liability company that was formed to setup and operate a business of mining and processing of Silica Quartz for export. Processed Silica had never been exported from Sri Lanka and if the project was successful it would not only be profitable for the appellant company, but also would have brought a large number of foreign exchange to the country.

Silica Quartz is used, *inter alia*, for the manufacture of chips in computers, quality tumblers and quality ornaments.

The Board of Investment, which was formerly known as the Greater Colombo Economic Commission (hereinafter referred to as the BOI) had always invited business ventures of this nature and had also offered itself as a One Stop Shop. This provided the infrastructure and facilities necessary for entrepreneur businessman to conduct its business and to export its products without unnecessary bureaucratic hindrances (X1). In view of the undertakings given by the BOI, which had the authority of the Government of Sri Lanka, the appellant had applied for BOI status as well as to enter into an agreement with the BOI.

Thereafter the appellant and the BOI had entered into an agreement and in terms of the said Agreement the BOI had granted approval to the appellant to operate business for the mining and processing of Silica Quartz for export (X8).

The appellant, acting in terms of the said Agreement had mined and processed Silica Quartz and thereafter had taken steps to export it. At that stage, the respondents-respondents (hereinafter referred to as the respondents), after inspecting the said items, had taken the view that Customs duty was leviable for

the export of Silica Quartz as the appellant was only entitled to export Silica in the form of powder, in terms of the Agreement X8.

Having taken the said view the respondents had proceeded to inquire into the said matter, without referring that to arbitration in terms of the Agreement. At that stage the appellant had filed the application before the Court of Appeal praying for a writ of prohibition restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from continuing with the said inquiry and from imposing any export duty or penalty or forfeiture in respect of the consignment of 100MT of semi processed Silica Quartz and for a writ of certiorari quashing the Order of the 1<sup>st</sup> respondent imposing a requirement that the appellant to give a Bank guarantee before exporting the said consignment (X2 and X3).

Learned Deputy Solicitor General for the respondents strenuously contended that the BOI Agreement had given the appellant concessions of duty only where the product in question was to be exported and that the item that was agreed upon to be exported was not semi processed quartz, but only Silica Powder. It was also contended that as there was no dispute between the BOI and the appellant, there was no necessity to refer it to Arbitration.

Learned President's Counsel for the appellant took up the position that the appellant had entered into an agreement with the BOI and once such an agreement is entered into, the CUSDEC forms have to be submitted to the BOI and only the BOI could grant approval. Learned President's Counsel further submitted that in the event if there was no approval granted by the BOI, the appellant has the right to go for Arbitration. It was strenuously contended by the learned President's Counsel for the appellant that the Customs has neither the power nor the jurisdiction to get involved in this dispute.

Having said that let me now turn to consider the appeal on the basis of the questions of law on which special leave to appeal was granted.

It is not disputed that the appellant had entered into an agreement with the BOI on 12-12-1991 (X8). In that it is stated that the appellant had requested to set up/conduct and operate a business of mining and processing of Silica Quartz for export in collaboration with a Japanese Company. The Agreement has clearly stated that Greater Colombo Economic Commission, which has been later renamed as the BOI, had approved the said application subject to the terms and conditions stipulated in the said Agreement. The said Agreement, as submitted by the learned President's Counsel for the appellant, contained, *inter alia*, the following provisions:

" 10) In accordance with and subject to the powers conferred on the Commission under Section 17 of the said Law, No. 4 of 1978 and regulations that may be applicable thereto the following benefits and/or exemptions and/or privileges are hereby granted to the Enterprise in connection with and/or in relation to the said business.

. . . .

(ix) All goods, articles manufactured and/or produced by the Enterprise in accordance with this agreement may be exported outside Sri Lanka free of export duty and any Custom or export control or other like restriction. Provided always that any Governmental authority may examine the correctness of any declaration made and for such purpose exercise such powers in such manner as may be directed by the Commission. . . .

- (xii) The provisions of the laws set out in Schedule B of the said Law, No.4 of 1978, which are inconsistent with the benefits and/or exemption and/or privileges set out in Sub-Clauses (i) to (xi) above shall not be applicable to the Enterprise in relation to the said business.”

Learned President’s Counsel for the appellant contended that Clause 10 (xii) of the Agreement marked X8, which was referred to above, deals with the Schedule B of Law, No.4 of 1978. According to the submissions of the learned President’s Counsel Customs Ordinance is also set out in Schedule B of the said Law, No.4 of 1978. In the circumstances, it was contended on behalf of the appellant that by the inclusion of the said Clause 10 (xii) of the Agreement X8, the provisions contained in the Customs Ordinance, which are inconsistent with the benefits and/or exemptions and/or privileges set out in the said Agreement (X8) are clearly excluded.

Learned Deputy Solicitor General for the respondents contended that, the appellant had submitted the Customs Declaration Form, commonly known as, CUSDEC (P8) to the Customs Department. At that stage the officer in charge had examined the said document and had found in Column 33 that the Commodity Code had been entered as 2506. Since the said Code, being the General Heading, the officer had become suspicious and had decided to examine the Cargo to ascertain the exact nature of the goods that were to be exported.

Accordingly, learned Deputy Solicitor General for the respondents submitted that, on examination Customs had found that the goods sought to be exported were in fact Quartz, but had attracted a duty of 20% since it was not processed quartz. According to the learned Deputy Solicitor General only processed quartz would attract the duty free concession.

The main contention of the learned President's Counsel for the appellant was that once an agreement is entered into between the appellant and the BOI, the Customs has neither the power nor the jurisdiction to take any further steps in this matter. Learned President's Counsel relied on the Agreement that was entered into and the procedure that has been stipulated in terms of the said Agreement.

It is to be noted that the appellant, as has already been stated, had entered into an agreement with the BOI. Facilitating investments in Sri Lanka, began with the introduction of the Greater Colombo Economic Commission in 1978. Fourteen (14) years later, that Commission was reconstituted as the BOI for it to function as a central facilitation point for investors.

The BOI Act, in its objects had clearly stipulated that it shall diversify the sources of foreign exchange earnings and increase the export earnings. It is with that objective the BOI has been granted the power to enter into agreements with any enterprise in or outside the Area of Authority in terms of Section 17 of the Act. Moreover, when entered into such agreements, the BOI has the power to grant exemptions from any law referred to Schedule B. The said Section 17 is as follows:

- " (1) The Board shall have the power to enter into agreements with any enterprise in or outside the Area of Authority and to grant exemptions from any law referred to in Schedule B hereto, or to modify or vary the application of any such laws, to such enterprises in accordance with such regulations as may be made by the Minister.

- (2) Every such agreement shall be reduced to writing and shall upon registration with the Board, constitute a valid and binding contract between the Board and the enterprise.”

The BOI had published a brochure describing its operations and services. The brochure released on 15-07-1998, which is filed of Record, refers to the role of the BOI in terms of Section 17 of the BOI Act.

In that it is clearly stated thus:

“Under Section 17 of the Act, the BOI is empowered to grant special concessions to companies satisfying specific eligibility criteria, which are designed to meet strategic economic objectives of the government. The mechanism through which such concessions are granted is the Agreement which modifies, exempts and waives identified laws in keeping with the BOI Regulations. These laws include Inland Revenue, Customs, Exchange Control and Import Control.”

These are attempts made to attract investments both by foreign and local enterprises. In fact the purpose of the brochure is to demonstrate the advantages in entering into Agreements with the BOI. When considering the structure of the BOI, as they too has advertised, it is apparent that it is to function as a central facilitation point for investors both national and international.

By entering into an Agreement with a special business entity, BOI undertakes to facilitate investment process at different stages. Clause 10 (ix) of the Agreement referred to earlier, deals with the conditions that are applicable to such Enterprises with regard to Custom or Export Control. The BOI Brochure had also

clearly stipulated that it would facilitate import/export clearance and Customs procedure for import of Capital goods, raw materials and the export of the final products.

In these circumstances, a question arises as to the role of the BOI once the Agreement was entered into between the appellant and the BOI.

It is not disputed that the objective in introducing BOI was for it to function as a central facilitation point for investors. It had introduced itself as a One Stop Centre, which had categorically stated in their brochures that when entered into an Agreement with the BOI, the process and the spirit of it cannot be changed.

It is in the light of the above that consideration should be given for the services rendered by the BOI for investors on imports and exports.

The BOI in its publication titled "Guidance for Investors on Imports and Exports" has stated that the BOI is responsible for permitting imports and exports of Enterprises regulated under Section 17 of the BOI Act. It also has a responsibility to provide other investor related services. For this purpose a separate Investor Services Department has been established by the BOI. It is of interest to refer to the facilities that are provided by the said Department of the BOI, which includes the following:

1. Processing of Import/Export documents
2. Verification of Cargo, Imports and Exports
3. Issue of Certificates of Origin for Apparel and Textile Products for EU countries
4. Approval for clearances from Bonded Warehouses
5. Approval for Subcontracts, Transfers and Local Sales
6. Re-Import and Re-Export items

7. Recommendations for issue of expatriate Visas (in respect of Zones)
8. Other approvals related to Investor Services activities

The said handbook also refers to the procedure that should be followed in effecting exports for enterprises, which have entered into agreements with the BOI. It is therefore apparent that the BOI has undertaken to provide necessary and relevant measures to examine imports and exports at the premises of the enterprise and not at the Port or the Airport.

Learned Deputy Solicitor General for the respondents strenuously contended that although Section 17 of the Act refers to the exemptions from any law referred to in Schedule B of the Act, which included the Customs Ordinance and contended that exemptions could be granted for an enterprise provided such exemptions, variations or modifications are in accordance with the Regulations made by the Minister under Section 24.

Learned Deputy Solicitor General contended that there are no Regulations, which take away the requirement of a BOI company from submitting a CUSDEC nor empowering BOI employees to examine the CUSDEC and grant approval before the Export or Import takes place. Since there are no such Regulations, the final determination and approval, according to the learned Deputy Solicitor General, is with the Customs.

It was further contended that unless the appellant proves that there are Regulations, which permit the BOI to completely suspend the total operation of the laws in Schedule B to all BOI enterprises, the entire Customs Ordinance applies to all BOI enterprises and the only exemptions that can lawfully be granted are in respect of duty and port dues.

As referred to earlier BOI was introduced and established chiefly for the purpose of attracting investments within the country. With the said objective in mind various concessions were offered for the investors. In this process the BOI was introduced as a 'One Stop Shop' mainly to indicate that there will not be any unnecessary hazzles in carrying out their business by the investors. This position is clearly demonstrated by Clause 10 of the Agreement, which lists out the benefits, exemptions and/or privileges that are granted to the Enterprises in connection with the relevant businesses. In that, Sub Clause (ix), referred to earlier, clearly stated that, all goods, articles, manufactured and/or produced by the Enterprises may be exported outside Sri Lanka free of export duty and more importantly, **any custom or export control**. The said Clause 10 (ix) also states that, the said goods produced by the Enterprises should be in accordance with the agreements entered into by the said Enterprise with the BOI.

The position therefore is quite clear. Business Enterprises were invited to enter into agreements with the BOI offering different types of concessions for them. This included in terms of Clouse 10 (ix) concession from export duty and any custom or export control. To obtain such concessions, it would be necessary that the relevant goods and articles are manufactured or produced in accordance with the Agreement. It is also necessary to refer to the provisions of Clause 10(ix). It provides for any Governmental authority to examine the correctness of any declaration made. However this is subject to the condition that such authority should be exercised in the manner as directed by none other than the BOI.

In the light of the above, it is necessary to consider the Agreement that was entered into between the appellant and the BOI. According to the said Agreement appellant was requested to setup/conduct and operate a business of mining and processing of Silica Quartz for export. The second schedule to the

said Agreement refers to the details of the said project by the two documents dated 15-04-1991 and 07-05-1991, respectively.

The 1<sup>st</sup> document dated 15-04-1991 is the application for approval of an investment. In that a brief description is given on the summary of the project. The said summary is as follows:

- “ 1. Processing of Silica Quartz for exports.
2. Rock vein Quartz is crushed, chemically treated and graded for exports.” (P1)

The second document, which is a letter from the Managing Director of the appellant company to the Director General of the former Greater Colombo Economic Commission, sets out the details regarding the procession of Silica Quartz for export. The said details are as follows:

“ **Processing procedure of Silica Quartz**

**1<sup>st</sup> Stage**

Powdering, purifying and grading of Silica Quartz for export.

**Stage 2**

Introducing chemical treatment and de-magnetizing at the factory for the export of highly purified chemically treated Silica.

**Stage 3**

Introducing a melting plant for already powdered Silica Quartz and processing into purified Silica for the Silicon Industry.

#### **Stage 4**

Introducing Silica based industries such as glass and allied products." (P2)

Considering the Agreement and the two letters P1 and P2 referred to above, it clearly appears that the appellant was to carry out a business of mining and processing of Silica Quartz as stipulated in the Agreement dated 12-12-1991.

The said project had been approved by the BOI and the BOI had permitted the appellant to carry out business as stipulated in the said Agreement dated 12-12-1991. In terms of the said Agreement, as stated earlier the goods manufactured under the said Agreement could be exported free of export duty and any custom or export control and if any Governmental authority is to examine "the correctness of any declaration made and for such purpose exercise such power in such manner", the said direction should be given by the BOI.

It is therefore apparent that if at all there was a matter to be examined by the Customs that should be carried out only if there was a direction given to that effect by the BOI. The evidence of A.A. Piyaseeli, Assistant Manager of BOI on 09-11-2000 (P12) before the Customs inquiry clearly shows that there was no such direction given by the BOI.

"Q. This Clause also mentioned that any Governmental authority may examine the correctness of the declaration made and for such purpose exercise such powers as such manner as can be directed by the Commission.

A. Yes.

Q. Does the word "Commission" meant the BOI?

A. Yes.

Q. Did the BOI give any orders to the Customs regarding this matter?

A. No.”

The BOI was created by the amendment to the former Greater Colombo Economic Commission Law No. 4 of 1998. The said Law was introduced to vest the said Commission with powers necessary for the development and resurgence of the economy of the country. By the amending Acts and specially with the introduction of the BOI, efforts were made to attract investors and investments to the country. It is structured to function as a central facilitation point for investors and for investments which are designed to meet strategic economic objectives of the government. Investors, who would be entering into Agreements with the BOI in terms of Section 17 of the Act would be granted special concessions. One such concession would be the reliefs that are stipulated in Clause 10 (ix) of the Agreement. If the objectives of the BOI is to attract investments by giving them special concessions on the basis of its Agreement, it would be the duty of the BOI to ensure that such agreements are fully complied with, without any undue interferences.

In the event if there had been any breach of the said Agreement then steps should have been taken by way of Arbitration as provided for in the arbitration clause.

In such circumstances, for the reasons aforesaid the question on which special leave to appeal was granted are answered as follows.

1. The Customs cannot interpret the nature of the goods that can be exported under and in terms of the Agreement X8;
2. The power of the Customs is restricted to verifying whether the goods exported confirm to the goods said to be exported by exporters.

This appeal is accordingly allowed and the Judgment of the Court of Appeal dated 05-09-2002 is set aside. I grant a writ of prohibition restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from continuing the inquiry and from imposing any Customs duty or penalty or forfeiture in respect of the consignment of the 100MT semi processed Silica Quartz described in the invoice of 23-05-2000. I also grant a writ of certiorari quashing the order of the 1<sup>st</sup> and 2<sup>nd</sup> respondents imposing a requirement that the appellant give a bank guarantee before exporting the consignment of the 100MT of semi processed Silica Quartz described in the invoice of 23-05-2000.

I make no order as to costs.

Chief Justice

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, PC., J.

I agree.

Judge of the Supreme Court