**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/or Prohibition.

1. Utsch Lanka (Pvt) Ltd,
   No.26 Anderson Road,
   Colombo 5.
2. George Lopez
   27, Anderson Road,
   Colombo 5.
3. Jan Vlaskamp
   Au Couders Haut,
   Paulin 24590
   Saliganic Eyvgues,
   France.
   And also of
   27, Anderson Road,
   Colombo 5.
4. Nihal Hettiarachchi
   107 A Devala Road
   Nugegoda.

**Petitioners**

C.A.Writ Application No. 82/2007

Vs

1. Poothathamby Yoganathan
   Deputy Director of Customs
   Department of Customs,
   Times Building, Colombo 1

2. Director General of Customs,
   Department of Customs,
   Times Building, Colombo 1.
3. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

**Respondents**

| | | |
|---|---|---|
| BEFORE | : | **S. SRISKANDARAJAH, J.** |
| COUNSEL | : | Nigel Hatch PC with Ranjith de Alwis, Ms.K.Geekiyanage and Ms. P. Abeywicrama for the Petitioner. F.Jameel DSG for the Respondents. |
| Argued on | : | 12.01.2011 & 25.02.2011 |
| Written Submissions on | : | Petitioner : 01.04.2011 Respondent: 04.04.2011 |
| Decided on | : | 28.04.2011 |

**S.Sriskandarajah J,**

Erich Utsch AG ( a company incorporated under the laws of Germany) entered into an agreement with the Commissioner of Motor Traffic on the 11th of October 1999 (P3) for the manufacture, supply and delivery of retro-reflective number plates with embossed number and 3rd number plate sticker for windscreen for a period of five years subject to the terms and conditions of the said agreement. The 1st Petitioner Company was incorporated in Sri Lanka to facilitate the above agreement. The 1st Petitioner in order to perform its business entered into a license agreement with the said Erich Utsch AG of Germany on 21st March 2000 (P5). In terms of this agreement Erich Utsch AG as licensor granted an exclusive right to the 1st Petitioner to use the

necessary technology expertise and to obtain the training required by the 1st Petitioner as licensee in connection with the manufacture, supply and delivery of retro-reflective number plates with embossed number and 3rd number plate sticker for windscreen. The terms and conditions of the said agreement include a payment of royalty fee of ten per cent (10%) per annum of the total turnover of the 1st Petitioner as per the audited accounts. Even though the said agreement P5 did not specify the role of the 1st Petitioner in executing the agreement P3, according to the evidence the 1st Petitioner's role is engaging in the business of embossing and printing motor vehicle numbers in blank plates imported from Erich Utsch AG and delivering the completed number plates for vehicles as an when required by the Commissioner of Motor Traffic in terms of agreement P3. A building belonging to the Commissioner of Motor Traffic has been given to the 1st Petitioner for the storage of imported blank plates and to emboss numbers in the blank plates.

The 1st Petitioner imported blank plates and other raw materials for this purpose from Erich Utsch AG on a commercial basis after making the purchase price for the goods imported. For the purpose of this importation the Petitioners submitted that they relied on an advise sought and obtained by Asia Capital Ltd on a Tariff Classification on the applicable Harmonized System (HS code) to the samples attached to the application No TC/99/177 dated 25.11.1999. The tariff classification advice was that the HS Code applicable to the product described in the application as per sample is 7616.00. The sample submitted with the said application according to the Petitioners is a blank aluminium plate containing yellow and white reflective sheeting with government emblem, laser branded serial number and ensure marks. The Respondents admitted that samples were given to the customs to obtain a ruling but denied any markings in the blank aluminium plates. As the samples submitted are not available with the customs it is not possible to verify this position. The Asia Capital Ltd sought and obtained this Tariff Classification as it was the local agent for Erich Utsch AG prior to the incorporation of the 1st Petitioner Company. As advised the 1st Petitioner had been declaring the imported aluminium blank plates to

customs under this HS code until one of the imports was questioned at the examination point of customs in January 2003. This required the Petitioner to obtain a second ruling and it was obtained on 24.07.2003. According to the 2nd classification advise the goods are classified under Harmonized System (HS code) 8310.00.

The Customs investigations into the imports of blank number plates by the 1st Petitioner commenced in 2004. An inquiry was held under the Customs Ordinance in the year 2006. The Inquiry proceeded on the basis of suspicion that the offences of misdescription and undervaluation of the goods imported were committed.

The Petitioners were charged by the customs in relation to 53 consignments imported by M/S Utsch Lanka (Pvt) Ltd from M/s Erich Utsch AG of Germany since 25th April 2000 to 24th March 2005. The items imported are rectangular aluminium plates of various dimensions ( with rounded corners and raised edges, covered with a reflective foil with several lion water marks , pre-engraved secret numbers and the national emblem of Sri Lanka), hot stamping foils, 3rd licence plate stickers, TTR foils. These items were intended for the embossing and printing of motor vehicle number plates.

The charges levelled against the Petitioners were as follows:

(1) M/S Utsch Lanka (PVT) Ltd pays annually a royalty to M/S Erich Utsch AG of Germany which is 10% of the total turnover of the respective financial year.

The importer has failed in all the instances to declare the royalty payments to the Customs which is dutiable. As a result the importer has defrauded Rs.49,773,031/= of government revenue. The total actual value of the consignment is Rs 392,008,184/= whereas the total declared value is Rs.335,692,996/=. Therefore the importer and the declarant shall be dealt with in terms of Section 47 and 52 of the Customs Ordinance.

(2) Out of the 53 consignments the importer has failed wilfully to classify and pay the customs duty and other levies correctly on the aluminium based plates on 22 occasions.

The Petitioners' position with regard to the payment of royalty (1st charge); is that the payment of royalty by the Petitioners is on a local transaction between the 1st Petitioner and the Commissioner of Motor Traffic which is not within the scope of the Customs Ordinance as amended in 2003 and/or as royalties are not paid directly or indirectly by the 1st Petitioner as a condition of the sale of the goods being valued, instead it is paid by the 1st Petitioner for the provision of technology used in relation to the embossing and printing of numbers in imported blank plates.

With regard to the 2nd charge the Petitioners contended that at all material time the 1st Petitioner not only sought tariff classification ruling in relation to the classification of goods imported by the 1st Petitioner but also abided by the ruling given by the Customs in declaring the goods at the time of importation.

At the conclusion of the inquiry the Petitioners were called upon by the 1st Respondent to show cause for charges framed against them and the order was delivered on 16.01.2007 as follows:

(a) Order forfeit M/s Utsch Lanka (Pvt) Ltd represented by Mr. George Salis Lopez, Director - General Manager, Mr. Jan Vlaskamp, Director and Mr. R.N.Hettiarachchi, Director, Rs.184,260,095/- in terms of Section 47 of the Customs Ordinance ( Chapter 235);

(b) Order forfeit M/s Utsch Lanka (Pvt) Ltd represented by Mr. George Salis Lopez, Director - General Manager, Mr. Jan Vlaskamp, Director and Mr. R.N.Hettiarachchi, Director Rs.88,609,608/- at my election in terms of section 52 and 166B of customs Ordinance( Chapter 235);

(c) Order forfeit Mr. George Salis Lopez, Director - General Manager, Rs. 10,000,000/- in terms of Section 129 and 166B of the Customs Ordinance (Chapter 235).

(d) Order forfeit Mr. Jan Vlaskamp, Director Rs. 10,000,000/- in terms of Section 129 and 166B of the Customs Ordinance (Chapter 235).

(e) Order the importer to disclose all the relevant and material evidence to the Customs valuation division in order to decide the actual ratio of the royalty payment which is liable for Customs valuation purpose, with respect to the imports whichever not considered at this inquiry for the purpose of recovering Customs duties and levies short paid.

The Petitioners in this application has sought a writ of certiorari to quash the aforesaid orders dated 16.01.2007 among other reliefs.

## Offence of Misdescription

The order of forfeiture of the goods valued at Rs. 184,260,095/- in terms of Section 47 of the Customs Ordinance (Chapter 235) is based on the allegation that the importer has wilfully failed to classify and pay in relation to 22 consignments the customs duties and other levies correctly on the aluminium based plates.

In *Toyota Lanka (Pvt) Limited v S.A.C.S.W. Jayathilaka Director General of Customs Court of Appeal Application No 2093/2005 C.A Minutes 1.10.2007* , the Toyota Lanka (Pvt) Limited cleared 64 units of vehicles from customs after paying the duty attached to the relevant classifications. Subsequently the Customs Department issued a seizure notice acting in terms of Section 125 of the Customs Ordinance in relation to 31 units of the said vehicles and seized the vehicles on the basis that in the customs declaration the vans are incorrectly classified as buses under HS Code 8702.10.13.

This decision was challenged by way of a writ of certiorari in the above case and the Court of Appeal quashed the decision to seize the vehicles for the reason : "When a declarant enters a HS Code in the CUSDEC which in his opinion is the correct classification of the goods imported, the disagreement of the classification of the goods by the Director General of Customs will not attract the forfeiture contemplated in Section 47 and hence the vehicles cannot be seized under section 125 of the Customs Ordinance. The Court also observed:

> "If the Director General of Customs is of the opinion that in fact the correct classification (HS Code) has not been included in the CUSDEC and in consequence the customs has short levied any duty, it could make a determination of the correct classification (H.S Code) of the goods imported and the customs duty short levied could be recovered under Section 18 of the Customs Ordinance."

The Supreme Court in *Toyota Lanka (Pvt) Limited v Director General of Customs* SC Appeal 49/2008 SC Minutes 29th March 2009 held:

"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 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. I am further of the view and hold that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an under payment of short levy of dues or duties. In such event the proper course would be a requirement for payment of the amount due prior to delivery of goods or the recovery of the amounts due in terms of Section 18."

Both the Court of Appeal and the Supreme Court held that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods in the absence of an intention of defrauding the revenue.

The Respondents' contention in this instant case is that the importer has **wilfully** failed (intentionally defrauded the revenue) to classify and pay the customs duties and other levies correctly on the aluminium based plates. The Respondents' contention is that the Petitioners have wilfully classified the "Aluminium Plates" under H.S.Code 7606.99.09 disregarding the fact that the invoices (2R1 to 2R4) from M/s Erich Utisch AG, state that the HS Code as 8310.00. In this regard the dates of the invoices are relevant. Invoice 2R1 is dated 20.10.1999 and invoices No 2R2 to No 2R4 are dated 03.11.1999. The Petitioners have relied on a Tariff Classification Advice dated 25.11.1999 bearing No TC/99/177. The Custom Department has a special unit to give such advice and according to this advice the advice sought is in relation to an article: 'Rectangular Aluminium Plates in sizes as per attached letter' and they are imported in the form: 'Aluminium plate form as per sample attached with reflective foil' . For this product the tariff classification given by the Custom Department is H.S 7616.9909. The Petitioners are bound to rely on this advice given by the Customs Department even though the Petitioner or its supplier holds a different opinion in relation to HS code of the said product. The Petitioner relied on this advice until he was compelled to seek an advice on 24.07.2003 and by this advice the Petitioner was advised that the product in relation to which he has sought advice is HS 8310.00. It is admitted that the Petitioners thereafter classified this item under HS code 8310.00 for its imports.

The imports of the blank aluminium plates in issue with regard to classification are in relation to the period 17.12.1999 to 24.07.2003. The Petitioners' position is that he correctly described the article imported under HS Code 7616.9909 on the classification advice sought and obtained from the customs bearing No TC/99/177 dated 17.12.1999. The position of the Respondents is that the classification given as

HS 7616.9909 to a product described as " Aluminium Plate form as per sample attached with reflective foil". In the said advice of the Customs bearing No TC/99/177 dated 17.12.1999 in the **comments column** it has been specifically stated that " If the plates imported bear any letters, numbers or designs they would fall under 8310.00". It is admitted that the blank plates imported contains several lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka (here in after referred to as security features). After importation the importer as per agreement embosses, two letters, four numbers across the plate separated by a dash with a provincial identification (two) letters.

The Position taken by the Petitioners is that the sample of the blank aluminium plate with the security futures was submitted with the document by which the advice was sought (The Respondents states that the said sample is not available with the customs to confirm whether the said sample contained the security features but it was admitted by the Respondents that the sample of the blank plate was given ) if the Customs officers had thought that the security features could be considered as letters, numbers or design then they need not make a special note that if the plates imported bear any letters, numbers or designs they would fall under 8310.00" instead they would have classified under HS code 8310.00 but as they have considered the aluminium plate submitted and advised that it will fall under the classification HS 7606.11 shows that the Customs Department has decided that the security features will not fall under the description stated by them in the comments. The Petitioners on this basis imported blank aluminium plates declaring HS Code No 7606.11 in the CUSDEC.

The Position of the Respondents is that the sample submitted for advice is only a rectangular blank aluminium plate without lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka (security features), this position was taken by the Respondents because of the comments made in the said advice that 'if the plats imported bear any letters, Nos or designs they would fall under 8310.00'.

It is in evidence that when these goods are cleared the advice bearing No TC/99/177 dated 17.12.1999 was also attached for easy reference. As contended by the Respondents that the position of the customs from the very inception that if the plates imported contained the security features (any letters, numbers or designs on them) they will be classified under HS 8310.00, is correct then the custom officers when passing the goods after inspection would not have released the goods to the importer as the goods are classified under HS 7606.11 based on the advice bearing No TC/99/177 dated 17.12.1999. Further if it is clear in the minds of the officers of the Customs that the security features could be considered as letters, numbers or design then they need not have referred this issue of classification to the World Customs Organization on 25.08.2003 after giving a second advice on 24.07.2003 informing the Petitioner that the same product falls under classification HS 8310.00.

The Director of Customs by his letter dated 25th August 2003 addressed a letter to the World Customs Organization and has given the description of the Article as follows:

*"Rectangular aluminium plates of various dimensions, with rounded corners and raised edges, covered with a reflective foil with security features, intended to be used for the manufacture of motor vehicle license number plates. As presented the plates already bear several "Lion" watermarks, as well as pre-engraved secret numbers. The national emblem of the country of use is printed in the corner of the plate. After importation, this information is supplemented by the national license number plate of the corresponding motor vehicle and the plate is issued to the owner."*

*And sought advice: whether the product should be classified in heading 83.10 or in heading 76.16.*

*The Secretariat's opinion: The article in question is an aluminium plate which already contains pre-printed security information which determines its future use. On the basis of its content and presentation Secretariat concludes that this is a licence number plate presented unfinished but already displaying the essential characteristics of a motor vehicle licence number plate. This interpretation is supported by the second paragraph of the explanatory note to this heading which stipulates that "some plates...designed for the subsequent insertion of details" belong in heading 83.10.*

The World Customs Organization has described the goods in issue under heading 83.10 not because the blank plate contains any letters, numbers or designs on them

(comments made by the Sri Lanka Customs in advise No TC/99/177 dated 17.12.1999 that if the plats imported bear any letters, Nos or designs they would fall under 8310.00) but because the plate is designed for the subsequent insertion of details.

The above facts show that the Customs Department itself had doubts as to whether the number plates containing security features (such as lion water marks , pre-engraved secret numbers and the national Emblem of Sri Lanka) should be classified in heading 83.10 or in heading 76.16. In these circumstances the Petitioners' claim that they relied on the advice bearing No TC/99/177 dated 17.12.1999 that the aluminium plate they imported with security features falls under HS coded 7616.99 and declared accordingly in the CUSDEC cannot be said to have been done with the intention of defrauding the Revenue. The Supreme Court in *Toyota Lanka (Pvt) Limited v Director General of Customs (supra)* held that in the absence of stealth, to evade payment of customs duties or dues that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an under payment of short levy of dues or duties.

But now an opinion has been obtained from the World Customs Organization that the aluminium plate with the security features is a licence number plate presented unfinished but already displaying the essential characteristics of a motor vehicle licence number plate. This interpretation is supported by the second paragraph of the explanatory note to this heading which stipulates that "some plates...designed for the subsequent insertion of details" belong in heading 83.10. In view of this opinion all the consignments of aluminium plates imported by the 1st Petitioner falls within the classification of HS Code 8310.00 in the circumstances the duties short levied in the imports of the said 22 consignments of the 1st Petitioner could be recovered as provided for under Section 18 of the Customs Ordinance.

## Undervaluation by non declaration of royalty

The principal agreement dated 11th of October 1999 for the manufacture, supply and delivery of retro-reflective number plates with embossed number and security sticker for windscreen was between Erich Utsch AG and the Commissioner of Motor Traffic. The principal contractor by his letter dated 13th January 200 informed the Commissioner of Motor Traffic that for the purpose of having a local contract with the Department of Motor Traffic and as it is easier for the project implementation and monitoring with a local team, the contractual obligation of Erich Utsch AG was assigned to Utsch Lanka (Pvt) Ltd the 1st Petitioner, a Company incorporated in Sri Lanka under the terms and conditions agreed upon between these two parties. One of the terms of the said agreement is that the Licensor pay the Licensee a royalty fee for the provision of technology, expertise and training for the project by the Licensor. The payment related to the royalty was embodied in an agreement between Erich Utsch AG and the 1st Petitioner dated 21st March 2000 (P5). One of the conditions of the said agreement is the payment of Royalty Fee of ten per cent (10%) per annum of the total turnover of the 1st Petitioner as per the audited accounts.

The charge against the Petitioner is that it has failed in all the instances to declare the royalty payments to the Customs in order to determine the value of the goods imported. As such the Petitioner has undervalued the goods imported and defrauded the revenue by not paying the correct customs duty.

The above charge is in relation to the Customs valuation of the goods imported by the 1st Petitioner. For the purpose of customs duty the value of the goods has to be determined at the time of importation. As provided by Section 51of the Customs Ordinance it is the duty of the importer or his agent to state the value of the article imported in the 'Sri Lanka Customs - Value Declaration Form" together with the description and quantity of the same. Such value shall be determined in accordance with the provisions of Schedule E, of the Customs Ordinance and duties shall be paid on a value so determined.

The said form in Column 16 requests the declaration of the following particulars:

| |
|---|
| 16. Declare any of the following costs & services and not included in the invoice value in terms of Article 8(1)and 8(2) of Schedule E for the Customs Ordinance: |
| (a) Brokerage and Commission: N/A (b)Cost of Containers: N/A |
| (c) Packing Costs: N/A (d) Cost of goods and services supplied by the buyer: N/A |
| (e) Royalties and license fees: N/A ( f) Value of Proceeds which accrue to sellers: N/A |
| (g) Loading, Unloading, Handling Charges: N/A (H) Insurance EURO 606.12 |
| (In the country of exportation) |
| (i)Fright: N/A (j) Other payments, if any: N/A |

The Petitioner in the said Value Declaration form declared against the Column Royalties and license fees - N/A ( not applicable). On the value declared by the Petitioner in the Value Declaration Form value was determined and the customs duties were paid by the Petitioner.

The Respondents submitted that according to the license agreement between Erich Utsch AG and the 1st Petitioner dated 21st March 200 P5 a payment of 10% royalty for the provision of technology, expertise and training for the project has to be paid to Erich Utsch AG per annum of the total turnover of the 1st Petitioner as per the audited accounts. Hence the 1st Petitioner should have declared in the Value Declaration Form the payment of royalty. Whether a payment of royalty is applicable to customs valuation purpose or not is a matter for customs to decide upon accurate information in consultation with each other. Therefore the failure to declare the royalty payments has clearly deprived customs of that opportunity and has helped the Petitioner to evade due payment of customs duty.

The question is whether the royalty payment of the Petitioner for the provision of technology, expertise and training for the project has to be added to the value of the

goods imported? If not is it necessary to declare the payment of royalty in the Value Declaration Form?

As observed above the determination of the value of the goods imported is for the purpose of determining the customs duty. According to Section 51 the value of the goods imported has to be determined in accordance with Schedule E of the Customs (Amendment) Act No.2 of 2003. Article 1 of Schedule E states: 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 adjusted with the provisions of Article 8. Article 8(1) of the said schedule states;

In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

(a)..

(b)...

(c) Royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued to the extent that such royalties and fees are not included in the price actually paid or payable.

.....

There is no issue as to the declaration of the price actually paid to the imported goods. It is admitted that the royalty is not included in the price actually paid. The issue is whether the royalty that has to be paid by the Petitioner for the provision of technology, expertise and training for the project be added to the prices actually paid for the imported goods for the purpose of determining the customs value of the goods in order to determine the customs duty.

It is important to note that the duties of customs shall be levied and paid upon all goods and merchandise imported into or exported from Sri Lanka under Section 10

of the Customs Ordinance at the time of importation or exportation. Therefore the price of the goods has to be determined at the time of importation to facilitate the payment of customs duty at the time of importation. Article 1 of Schedule E states: 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 adjusted with the provisions of Article 8. The price of the goods at the time of importation is:- price actually paid with royalty paid or payable **to the goods imported**.

For example if the goods are imported under a foreign trade mark, the value of the right to use the patent, protected design or trade mark, shall be added to the normal price. It is admitted that the goods imported are rectangular aluminum plates of various dimensions, with rounded corners and raised edges, covered with a reflective foil with several lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka. It is also admitted that no royalty is paid or payable to the technology used in the manufacture of the said blank aluminum plates or for the inscription of lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka. Therefore it is evident that the royalty is not paid or payable to anything done or contain in the said plate at the time of importation.

The royalty is paid for the provision of technology, expertise and training for the embossing and printing of motor vehicle number (with two letters, four numbers across the plate separated by a dash with a provincial identification (two) letters) on the aluminium plate imported. Number of imported aluminium plates (goods) used for embossing is independent of the quantity of the goods imported. The payment of royalty is defined under Article 8 of Schedule E, accordingly the royalty and license fees should be related to the goods being valued, and royalty and license fees should be a condition of sale of the goods being valued.

Is royalty related to the goods being valued? The Petitioners' contended that the goods imported are raw materials and consumables required for the manufacture and supply of number plates. The royalty paid under the said license agreement does not relate to the said imported goods as they are not imported pursuant to the

license agreement (P5). The royalty that is paid is not in respect of imported goods but in relation to the necessary technology, expertise and training used in the process of manufacturing of number plates and the sale of number plate takes place in Sri Lanka to the Department of Motor Vehicle. The contention of the Respondents is that the technology cannot be used by the importer on any product except the product imported from the exporter. Thus the royalty is clearly related to the goods. A similar position was taken by the Revenue of India in *Commissioner of Customs (Port), vs M/S Toyata Kirloskar Mpotor Pvt Appeal (Civil) 3635 of 2006 on 17 May 2007* "The payments of royalty, according to the Revenue, have a direct nexus to the imported goods as the same go into the manufacture of the licensed vehicles and spare parts. The Court observed: "The basic principle of levy of customs duty, in view of the aforementioned provisions, is that the value of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payment required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is completed, inter alia by way of transfer of license or technical knowhow for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post importation service or activity, would not, therefore, come within the purview of the determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise".

The goods valued are the 'Rectangular Blank Aluminum Plates' (with rounded corners and raised edges, covered with a reflective foil with several lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka) and not the finished number plates. There is no royalty payment attached to the imported 'Rectangular Blank Aluminum Plates' at the time of valuation or at any later stage. But the royalty would accrue if and when the numbers are embossed on the plates and sold. The royalty have a direct nexus to the finished product but it does not have a direct nexus to the imported goods.

Is royalty payment a condition of sale? The Petitioner contended that under the license agreement P5 the royalty is paid on the total annual turnover as per the audited accounts of the 1st Petitioner hence it cannot be said that the royalty is paid as a condition of sale of the goods being valued. The entire transaction between the parties establishes that the payment of royalty is not a pre condition for the sale of raw materials. The submission of the Respondents is that the agreement between the Petitioner and Erich Utsch AG is for the complete transaction as such the importation, embossing and sale are linked together and the failure on the part of the Petitioner to pay the royalty would amount to the refusal of future sale of the aluminum plates. The Respondent further contended that the 'condition of sale' should not be read as 'a condition of contract of sale'; *Chief Executive Officer of the New Zealand Customs Service v Nike New Zealand [2004] 1 NZLR 238.* The Respondents submitted that in the given circumstances the royalty payment is a condition of sale. In *Commissioner for the South African Revenue Service v Delta Motors Corporation (Property) Limited, Supreme Court of Appeal of South Africa Case No 279/2001 minutes 23rd September 2002* the Court considered the payment of royalty in relation to the customs duty. The Respondent Company was a motor vehicle manufacturer and distributor. It imported vehicle parts completely knocked down (CKD) from Opeal Germany. Four years it paid customs duty calculated on the invoice amount per kit which invoiced amount included not only the purchase price but also an unspecified charge by Opeal for engineering, styling and tooling (EST). The company requested refund of customs duty on the ground that the EST charge paid to Opal and included in the invoiced amount was not part of the price payable for CKD but instead a non-dutyable royalty. The court held "In the present matter the sale of kits to the respondent is regulated by the supply agreement. Nothing in that agreement makes the charges now in dispute payable as a condition of sale. The engineering and styling charges constitute the royalty payable, not in terms of the supply agreement but the A and D agreement. As for the tooling charges (assuming they amount to royalty or license fees) they too are not payable pursuant to anything contained in the supply agreement. The ETS charges are consequently not payable 'as a condition of sale'. On the contrary, in so far as the supply agreement does apply to these charges it makes them payable even if no kits are sold (so long, of

course, as assembled vehicles are sold). It follows further from what has been said already that the EST charges are paid "in respect of "assembled vehicles sold and not " in respect of " imported kits. The terms of S 67(1) (c) are accordingly inapplicable and in consequence the EST charges were not dutiable".

Article 8 (C) of Schedule E of the Customs (Amendment) Act No 2 of 2003 contain similar provisions of that of Section 67(1) (c) of the Customs and Excise Act 91 of 1964 of the South African Act. In the instant case too, the royalty is paid on the finish product and not on the aluminum plate imported. Even though the finish products were made out of the aluminum plates sold it does not mean that the sale of the aluminum plates has a direct link to the manufacture of the finish product. As I have observed above the number of aluminum plates sold to the licensor need not be equal to the manufacture of the number plates, taking in to consideration the stock in trade, waste and damages etc. The sale of the aluminum plates with security features to the 1st Petitioner was under the terms and condition of the principal Agreement dated 11th of October 1999 and by the assignment of the contractual obligation of Erich Utsch AG to Utsch Lanka (Pvt) Ltd the 1st Petitioner, by letter dated 13th January 2000. The payment of royalty is not included in any of these agreements. The royalty is paid in relation to an agreement entered between Erich Utsch AG and the 1st Petitioner on 21st March 2000 (P5) and the royalty is paid not on a fixed rate or based on the purchase price but on the sale of the completed number plates. As such the royalty payment depends on the rate of manufacture of the vehicle number plate. There is nothing to prevent the 1st Petitioner to purchase large quantities of aluminum plates from Erich Utsch AG and after having a substantial stock with it, to start manufacture of the number plates. There is no merit in the submission of the Respondents that the sale of the aluminum plates depends on the payment of royalty.

When considering all the facts and circumstances of this case it is clear that the royalty payment is not related to the imported goods or it is a condition of sale of the imported goods (aluminium plates) therefore the royalty payment need not be added to the price actually paid. Hence the failure to enter the payment of royalty in

the Customs Value Declaration Form will not amount to a false declaration to charge the Petitioners under Section 52 of the Customs Ordinance.

In the above circumstances this court issue a writ of certiorari to quash the order of the 1st Respondent dated 16.01.2007 marked P18 (f). Application for a writ of certiorari is allowed as prayed for in prayer (d) of the Petition without costs.

Judge of the Court of Appeal