

The Attorney General
The Attorney General's Department
Colombo 12

26th Oct 2015



Notice under Section 461 of the Civil Procedure Code

In terms of Section 461 of the Civil Procedure Code, you are hereby served notice, on the impending legal proceedings that would be initiated against the Director General of Customs (DGC), for his dismal failure to restore the Rule of Law in the Department of Customs, full details of which are provided in the ensuing paragraphs.

Abuse of Customs Law relating to valuation of Motor Vehicles

2. The **Section 51** of the Customs Ordinance stipulates that where the duties are charged on the imported goods (according to the value thereof), the respective values shall be entered in the Cusdec (Import Declaration) and such values shall be determined according to the **Schedule E** of the Ordinance. The **Article 1 of the Schedule E** of the said Schedule provides that the primary source of valuation for Customs purposes is the **transaction value**, agreed upon by the buyer and the seller, on which all levies shall be recovered. And cases where value for Customs purposes cannot be determined according to the Transaction Value declared by the importer, the law provides (Section 51A) that the declared transaction value be adjusted in accordance with the Article 8 of Schedule E. The Departmental Order No. 861 of 22nd May 2013, further emphasizes that in all cases, concerning valuation of goods for Customs purposes, the same shall strictly be determined in accordance with the **Section 51A** and in cases of false declaration of value for Customs purposes, the law provides forfeiture of goods and if any such goods cannot be recovered, the treble the value of the goods may be imposed (Section 52).

Alleged revenue losses on vehicle imports & discontinuance of transaction value

3. However, further to certain allegations made against the motor vehicle import trade for causing heavy revenue losses, a policy decision was taken by the Minister of Finance in Nov 2013, ostensibly 'in the national interest', to take the motor vehicles out of the application of GATT Valuation Agreement VII. Instead, a new regime was formulated to charge levies on **minimum value as determined by the Director General of Customs, based on the prices furnished by the vehicle manufacturers**. Thereupon, under the power vested in the Minister, required gazette notifications were published for the information of the public under Article 10 of the Schedule E. The objective of the new valuation regime was to maintain the actual value of the motor vehicles for proper collection of revenue.

Subordinate Regulations cannot supersede the Primary Law

4. However, it is observed that no Rule of Law prevails in the Customs, concerning the taxation of motor vehicles, where some officers are allowed to abuse the new valuation regime as they please. These officers challenge the new valuation regime, which sets out a mandatory requirement to recover the **levies on the base value as determined by the DGC**. These officers demand payment of levies on the transaction value, which is outlawed, with the minimum value regime established UNDER Article 10 of Schedule E to charge statutory levies.

5. It is noted that once such a decision is made by the Minister of Finance (ref para 3 above), it shall only be the basis for recovery of levies (as specified in Article 10 itself)

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although the strict application of new valuation regime for motor vehicles was inequitable and unjust. This is amply demonstrated by the new valuation regime that specifies the same value for both used and brand new motor vehicles.

6. It is evident that some officers, resort to penalize the importers who have paid levies on the minimum Customs value so determined by the DGC, despite such moves are manifestly unlawful. This is because once a commodity is taken out from the application of the GATT Valuation regime and brought under the **Minimum Value Regime**, (under Article 10 of the Schedule E for motor vehicles), it is unlawful to apply GATT Valuation regime, unless regulations so framed under Article 10 are expressly withdrawn.

7. It is apparent that these officers have been misdirected by certain untenable regulations framed UNDER Article 10, which are clearly inconsistent with the Article 10 itself. These regulations state that, levies shall be paid on the higher of the alternate values (values determined by the DGC or Transaction Value).

8. These regulations are effectively void *in limine*, as such regulations violate the Primary Law, the Article 10 itself, UNDER which the said regulations have been framed. It is observed that this anomaly has been recently rectified by the gazette notification (No 1933/16 of 22nd Sep 2015), which rules that value of motor vehicles for customs purposes shall be determined on the Minimum Value Regime. This makes it clear that the Transaction Value is no more applicable for recover of levies.

Detention of vehicles by Customs violating the stipulated law

9. It is observed that despite a proper valuation regime for motor vehicles is in force, a Superintendent of Customs, named S K A S Senanayake continues to defy the law and deliberately harass importers by refusing to abide by the new valuation regime, under the pretense that transaction value continues to apply for determination of value for motor vehicles. As at the moment over 100 units of motor vehicles are been detained at the port of Hambantota by the said officer attached to CIB Directorate, challenging the minimum value on which all levies have been paid by the importers.

Dire need to restore Rule of Law in the Customs Department

10. There is no ambiguity in the Customs Law and procedure on seizure/detention of goods and the Departmental Orders. The Departmental Order No: 733 of 08th Nov 2010, has given clear directions in this regard to curb the abuse of law and procedure. This Order plainly stipulates that no goods shall be seized or detained merely on suspicion, unless there is a probable cause or prima facie case against the importer. Yet, it is observed that some officers such as SC, Senanayake are allowed to abuse the law, driven by obsession for cash rewards from penalties unjustly imposed on the importers.

Representations made to the DGC regarding the abuse of law

11. On 19th Oct 2015, a written and oral representations (copy enclosed) on the subject with full details of the abuse of law, was made to the DGC (Acting) and the ADGC (Enforcement), urging strict compliance with the law relating to the valuation of motor vehicles.

Valuation Committee endorses the representations made (para 11 above)

12. On 20th Oct 2015, the Head of the Customs Enforcement Cluster, Mr Thilak Perera, referred the said written submission to the Chairman of the Customs Valuation Sub Committee on Motor Vehicles calling for observations on the matter. The

Committee provided the following observation, in keeping with the law as it stands, which is plainly clear and unambiguous.

'Once value for motor vehicles are determined by the DGC, it shall be the Customs Value for recovery of taxes and when complied with (by the importers), no penal sanctions provided by Customs Ordinance can be invoked.'

13. Further to the aforesaid clarification provided by the Customs Valuation Sub Committee, the same has been referred to the DC (CIB) by the ADGC (Enforcement) for immediate compliance. Yet, the SC, Senanayake, who is responsible for the purported seizure of the vehicles has defied the order and refused compliance. Instead the officer continues to detain a large number of vehicles in the Hambantota port, whilst a huge demurrage being incurred, causing tremendous hardships to the trade, in spite of total compliance with the Customs minimum value regime in force by the importer which has been accepted by the Customs Imports Directorate, on which all levies have been recovered.

14. It is observed that despite the directions given by the Director of Customs CIB to SC, Senanayake to comply with the Order issued by the ADGC (Enforcement) he has refused to release these vehicles.

15. Later, on the instructions of the DC (CIB) one importer furnished a bank guarantee equivalent to the alleged short levy to have his vehicle released. However, the said officer refused to comply with the said order, forcing the DC (CIB) to cancel his own order (copy enclosed).

16. This officer has taken the law into his hand and in this case he demands a bank guarantee equivalent to the alleged 'under payment of levies' (arbitrarily determined by him), plus a sum equivalent to said 'under payment' to be applied as a penalty. This is absolutely ultra vires and untenable and amply demonstrates that the officer is driven by obsession for cash rewards.

17. For the foregoing reasons, this notice is served before instituting legal proceedings against the Director General of Customs (DGC), for his dismal failure to restore the Rule of Law in the Department of Customs.

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Copy to: The Director General of Customs