1964
Nov. 20,
Dec. 15
1965
Jan. 9,
June 28

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRIOU ICE AND COLD STORES CO. LTD.,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF FINANCE,

Respondent.

(Case No. 70/63).

Administrative Law—Revenue — Import Duty—The Customs Management Law, Cap. 315—Decision of Respondent to demand from Applicants the payment ex post facto of import duty, under section 155(1) of the Law, in respect of importations of cold-storage freezers—Respondent has acted under a misconception of the true facts and especially under a misconception concerning the actual knowledge by the Customs authorities at the time of the essential nature of the matter.

Applicants seek a declaration that the decision of Respondent to collect from Applicants an amount of £1358.220 mils by way of import duty due in respect of four importations of cold-storage freezers, between April 1960 and April, 1961, should be annulled.

Respondent has made the demand for the payment ex *post facto* of import duty under section 155(1) of Cap. 315 (Editorial note: Section 155(1) is set out in full in the judgment of the court at p. 367 post).

Held, 1. *On the merits:*

(a) The Respondent has decided to demand the import duty in question under a misconception of the true facts and especially under a misconception concerning the actual knowledge by the Customs authorities at the time of the essential nature of the matter.

(b) Consequently the sub judice decision of the Respondent should be declared *null* and *void* and of no effect whatsoever.

(c) Even if I had only a doubt as to whether Res-

pondent has acted under a misconception I should have given the benefit of this doubt to Applicants (see *Photiades and The Republic,* 1964, C.L.R. 102).

(d) It is now up to Respondent to decide, in the light of this Judgment and free from misconceptions, whether the relevant action, at the time, of the Customs authorities should be regarded as being inconsistent with tariff-item 716-12a and should and can properly be revoked either under section 155 or otherwise, if at all.

2. *As regards costs:*

(a) I award part of the costs in favour of Applicants and against Respondent, which I assess at £30.-

Sub judice decision declared null and void.

Cases referred to:

Photiades and The Republic, (1964 C.L.R. 102).

Recourse.

Recourse against the decision of the Respondent to collect or charge or impose, customs duty amounting to £1,358.220 mils in respect of importations of cold-storage freezers.

Fr. Markides with A. Triantafyllides, for the applicants.

A. Frangos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The facts of the Case sufficiently appear in the following judgment delivered by:—

TRIANTAFYLLIDES, J.: In this Case the Applicants seek a declaration that the decision of Respondent to collect from Applicants an amount of £1358.220 by way of import duty due in respect of four importations of cold-storage freezers, between April 1960 and April, 1961, should be annulled.

The Applicants are a company which has a cold storage plant, an ice-making plant and also manufactures and distributes ice-cream.

The salient facts of this Case are as follows:—

In May, 1959, Applicants were about to clear, at the Famagusta Customs, freezers such as those involved in the importations in question and the problem then arose as to whether such freezers were to be classified under tariff item 716-12(*a*) of the Customs Tariff Laws 1954-1959—later Cap. 316—which would enable the clearance to be made free of import duty, or under tariff item 716-12(*b*), which involved the payment of 24% import duty.

The then Comptroller of Customs, having gone into the matter and having sought also the advice of the then Attorney-General, decided to allow the classification, under item 716-12(*a*), of such freezers but made it a condition that they would be marked with the trade-mark of Applicants and that they would not be sold or hired. Clearance was eventually effected on the 8th May, 1959.

This lot of freezers is no longer involved, as it will be seen later, in the Respondent's claim for import duty, but its clearance is still a matter of basic significance for the purposes of this Case because it was then that the arrangement was made under which the subsequent lots of freezers were imported and cleared free of duty.

When the said freezers were cleared on the 8th May, 1959, they were described by Applicants in the relevant clearance entry as follows: "Refrigerating equipment forming part of our ice making plant". The relevant invoice, however, was endorsed, for purposes of the clearance, by Mr. George Lewis, a senior Customs Officer at Customs Head-quarters, as follows:— "Ice cream special deep freezers 716-12a". Such endorsement, in my opinion, is a most material factor for the determination of this Case, in that it indicates the Customs' view of the essential nature of the matter irrespective of anything stated by Applicants in the clearance entry.

On the 8th April, 1960, the same Mr. Lewis addressed a note to a certain Mr. Loukis Atteshlis, who was then an officer in Famagusta Customs, in relation to a later lot of freezers which had arrived and which were about to be cleared by Applicants. It appears that Mr. Atteshlis had some doubts whether to allow them in free of import duty and he communicated for the purpose with Customs Headquarters with the result that Mr. Lewis wrote to him the said note (*exhibit* 14) which reads as follows:—

"The freezers in question specially imported by Demetriou Ice Cold Stores for storing ice cream (and not for sale) have been admitted previously by the C.C.E."—Comptroller of Customs and Excise—"as forming part of their industry and have been treated under (*a*) of item 716-12 therefore I see no reason why they should be treated otherwise this time. If however you have reasons to believe that these freezers are not used by them, please let us know to investigate in the case".

These freezers were described by Applicants in the relevant clearance entry as "Cold storage freezers" and it was added: "The above form part of our Cold Storage Plant"; but the Customs authorities endorsed the relevant invoice as follows: "Ice cream special deep freezers for plant".

There followed—in addition to the second importation which was made on the 8th April, 1960 and in relation to which the aforesaid note was exchanged between Mr. Lewis and Mr. Atteshlis—the importation of three more lots of freezers, the last one in April, 1961. The demand for import duty, which gave rise to this Case, relates to these four lots of freezers—involving in all 94 freezers—imported from April, 1960, onwards.

In the clearance entries relating to the three importations after the 8th April, 1960, the freezers were described by Applicants as follows:— "Refrigerating equipment". It was also added again: "The above form part of our Cold Storage Plant".

The invoices relating to two of these three lots were endorsed by the Customs authorities in terms referring to ice cream i.e. "ice cream conservators" and "ice cream special deep freezers for cold storage plant". The invoice of the last lot was endorsed by the Customs authorities as follows:— "Deep freeze for ice plant".

As stated already, the last importation of such freezers by Applicants took place in April, 1961. Until October, 1962, when import duty was demanded from them in relation to such freezers, Applicants had no reason to suspect that they would be called upon to pay such duty. As it will appear from what follows the Customs authorities had themselves no reason to suspect or intend anything of the sort, either.

The question of claiming *ex post facto* import duty was not

raised by the Customs authorities. It was raised by the Auditor-General who sent on the 17th April, 1961, a "general query" to the Customs authorities stating that he was of the opinion that the freezers imported were common ice cream freezers and not refrigerating equipment forming part of the cold storage plant of Applicants; thus, they should be classified under tariff item 716-12(*b*) and not 716-12(*a*).

There followed a reply by the Customs authorities stating that the freezers were imported free under item 716-12(*a*) as they formed part of the importers' ice cream plant and then the Auditor-General wrote back saying that such reply was "rather superficial" and insisting that duty at 24% ought to have been levied. As a result on the 25th September, 1961, the Collector of Customs Famagusta was directed by the Director of Customs to take steps to collect the import duty in question.

The said Collector of Customs at the time was the aforesaid Mr. Lewis, who wrote back to the Director on the 27th September, 1962, stating what was the correct position in his opinion. It is relevant to quote the following history, which he gives, of the matter:—

"Importers did dispute the payment of any duty for the deep freezers in question; when they (as far as I remember) imported them the first time, being Officer in charge of the Valuation and Jerquing Section, the case was referred to me and naturally I decided that the goods were dutiable as similar goods imported by other importers were subject to duty. Importers did not agree with me and they asked an interview with the then Comptroller who accepted my view that the goods were dutiable. Later importers consulted their legal advisor, and they informed us that they would take their case to Court. The whole case has been reconsidered by Mr. Hudson, and later by Mr. Peden",—the then Comptroller and Assistant Comptroller of Customs—"after they consulted the then Attorney-General, who (from what I was given to understand) decided that there was no chance for us if the case was presented to Court, and the Comptroller decided to classify all such deep freezers under (*a*) of item 716-12, provided that they were neither to be hired nor sold, and each one to be neatly marked with the word "FRESCO" the trade marks of the Manufacturing enterprise".

Mr. Lewis received a letter from the Director of Customs,

dated the 23rd October, 1962, in which it was stated: "Messrs. Demetriou would have been entitled to exemption, and their declaration to the effect that the freezers in question formed part of their ice making plant would have been correct, if the freezers in question were intended solely for use in their factory, which is not the case. In fact such declaration is a false one, punishable by Law, but, as it had been accepted by the Customs Officers concerned, who presumably examined the matter perfunctorily I do not propose to take any legal action against importers". Mr. Lewis was, further, instructed to take action to collect the duty which had not been paid originally.

As a result, on the 27th October, 1962, a "demand note" based on section 155 of the Customs Management Law Cap. 315 and claiming duty at 24% on the value of the said freezers was sent to Applicants; such note included, also, the original lot of freezers imported on the 8th May, 1959. But counsel for Respondent at the hearing has informed the Court that Respondent did not insist any longer on the payment of duty in respect of this first importation (presumably in view of the provisions of Part XIV of Cap. 315). So we are concerned now only with the four importations from April 1960 onwards.

On the 3rd November, 1962, Applicants wrote to the Director of Customs stating that the matter had been settled in May, 1959, when these freezers were let in free of duty "for the exclusive use of our ice cream manufacture" and that all four subsequent importations were governed by the first decision taken in the matter as above. They added that they were taken by surprise in being faced with a claim for duty after all this time and stated that had they been asked to pay import duty for the original lot of freezers they might not had effected the four other importations.

The Director of Customs wrote back on the 15th November, 1962, stating that import duty had not been collected originally due to error and that the said freezers had been classified by mistake under 716-12(*a*). He stated, moreover, that Applicants had misled the authorities by stating on the relevant Customs entries, at the time of clearance of the freezers in question, that they formed part of the "ice making plant"; apparently he was referring to the original importation of the 8th May, 1959.

Applicants replied on the 18th December, 1962, denying that they had made a misleading statement and stating that they had been allowed to act all the time on the assumption that such freezers were properly imported free of duty. They also wrote and complained to the Minister of Finance on the 18th December, 1962.

The Minister of Finance on the 12th January, 1963, sought explanations from the Department of Customs and the Director of Customs wrote back to him on the 8th February, 1963, that the question of the duty due had arisen after it was detected by the Auditor-General. He proceeded to add that he presumed that what had taken place was that the Customs authorities, at the time, acted as they did through a misunderstanding.

On the 25th February, 1963, the Ministry of Finance wrote to Applicants confirming the decision to insist on collection of the duty in question.

Respondent has made the demand for the payment *ex post facto* of import duty under section 155(1) of Cap. 315 which reads as follows:—

> "155.(1) When any Customs duty has been short-levied or erroneously refunded, the person who should have paid the amount short-levied or to whom the refund has erroneously been made shall pay the amount short-levied or repay the amount erroneously refunded, on demand being made by a collector".

The "Description of Goods" part of Tariff-item 716-12, as it was, at the material time, in the relevant Law, later Cap. 316, reads as follows:—

"716-12 Air conditioning and refrigerating equipment (excluding electric fans, classified under 721-12, and domestic refrigerators, classified under 899-08) as follows:—

(*a*) Forming part of mining, manufacturing or cold storage plant, admitted as such by the Comptroller.

(*b*) Other".

Articles falling under (*a*) above, were admitted free of

import duty. Articles falling under (*b*) above, were subject to 16% import duty, *ad valorem*, under the preferential tariff and to 24% duty, under the general tariff.

Tariff item 716-12 has subsequently been amended by Law 12/63 but such amendment is not applicable to the present Case.

In this judgment I have not found it eventually necessary to go into the question of whether or not the present Case is an instance of short-levying of duty, in the sense of section 155(1), or into the question of the exact effect of tariff item 716-12, because such questions would had only arisen for determination if I were to find that the Respondent has acted in this matter with the proper conception of the factual situation and, thus, there had fallen to be examined next whether the law had been properly applied to such situation. I have come, however, to the conclusion, for the reasons that follow in this judgment, that Respondent has acted under basic misconceptions of the true factual situation and in the result, therefore, the decision, as taken, to claim the import duty in question has to be annulled.

In the letter of the 23rd October, 1962, addressed by the Director of Customs to the Collector of Customs, Famagusta, it was stressed that the Applicants "would have been entitled to exemption, and their declaration to the effect that the freezers concerned formed part of their ice making plant would have been correct, if the freezers in question were intended solely for use in their factory" and that in fact such declaration has turned out to be a false one "punishable by law"—though in the circumstances no proceedings were to be taken. It was added that the Customs officers concerned "presumably examined the matter perfunctorily".

In the letter of the 15th November, 1962, addressed by the Director of Customs to Applicants it was reiterated, with emphasis, that the statement of Applicants that the freezers in question formed part of their ice making plant had been misleading, in that the said freezers were not destined for their plant but were placed at various places in relation to the selling of their products.

In the minute of the Director of Customs, addressed to the Ministry of Finance, dated 8th February, 1963, it was stated as follows:— "I cannot believe that any of my predecessors

has taken the alleged decision, in respect of which there are no records, except what is now stated at red 16"—which is the letter of the Collector of Customs, Famagusta, to the Director of Customs, dated the 27th September, 1962, and which has been mentioned earlier in this judgment—"but that, what I presume took place, was that applicants represented at the beginning that a small number of freezers and spares imported by them was to be used solely in their factory, and regarded by my predecessor as 'part of the plant' ". He proceeded to state that the various lots of freezers were allowed in free "presumably through a misunderstanding".

In the Opposition, filed by counsel for Respondent, it is stated in ground of law No. 3 that the relevant goods were differently classified previously owing to a misrepresentation; in paragraph 1 of the Opposition it is alleged that the mistake in the classification originated from the fact that the Customs authorities were deceived by the declaration made by Applicants on the clearance entries, at the time of clearance, to the effect that these goods formed part of Applicants' cold storage plant. Further, in paragraph No. 5 of the Opposition, it is stated that the authorities on the fist importation, on the 8th May, 1959 as well as on all other subsequent importations, were deceived by the Applicants' statement on the clearance entries, and being under the wrong impression that the goods in question formed part of Applicants' manufacturing plant, erroneously allowed clearance of the goods under tariff item 716-12(*a*) free of duty.

At the hearing of the Case, counsel for Respondent stated right at the outset that the Customs Authorities were deceived by the entries made by Applicants, for the purposes of clearance of the goods, and he has insisted all along on this line.

Having listened to the evidence of Mr. George Demetriou, one of the Directors of Applicants, who was involved in the clearance arrangements of the 8th May, 1959, and which evidence I do accept as substantially correct, and bearing in mind the evidence of Mr. George Lewis,—an ex-Customs Officer also involved in the said arrangements—as well as other material which is before me, I have reached the conclusion that no question arises of Applicants having actually misled or deceived the Customs authorities at the time as to the essential nature of the matter and, further, no question

arises of such authorities having acted in any way perfunctorily and without due examination; on the contrary, it is clear from the aforequoted letter of Mr. Lewis (then Collector of Customs, Famagusta) to the Director of Customs, dated 27th September, 1962, that there was a lengthy consideration of the matter and even the Attorney-General was consulted. Also, Mr. Lewis has stated in his evidence that he was detailed at the time, in May, 1959, by his superiors, to go to the plant of Applicants, investigate the matter of the freezers on the spot, and report back, and that he did so. So the Customs authorities, in May, 1959, acted with their eyes wide open.

The view taken by Respondent that Applicants at the time actually misled the Customs authorities into treating the freezers in question as things which were to be used in relation to Applicants' ice making plant or cold storage plant is erroneous and not supported by the facts. On the material before me I am satisfied that it was decided then to allow in the freezers concerned free of import duty, under item 716-12(*a*), on the ground that they were needed in relation to the ice cream side of the business of Applicants. This is clear from the fact that though in the relevant clearance entries no mention of the ice-cream side of the business of Applicants was made, nevertheless, the Customs authorities, as shown by their endorsements on practically all the invoices concerned, as well as by the aforementioned note of Mr. Lewis to Mr. Atteshlis, on the 8th April, 1960, were quite well aware of the need of the freezers by Applicants in relation to the ice cream side of their business.

Consequently, I do not place much weight on the statements made in the relevant clearance entries themselves concerning the use of the freezers in question; they definitely cannot be held to have been the basis on which the freezers were allowed in free, on the 8th May, 1959 and subsequently. The Customs cannot be said to have been under any false impression, created by such statements.

In my opinion, therefore, any reference made in the said clearance entries to ice-making or cold storage plants must have been made and accepted with the full knowledge and consent of the Customs authorities, at the time, for the purpose of describing the general head of exemption under which such freezers were imported free of duty, and for no other sinister motive.

It has been contested whether or not at the material time the Customs authorities *did vizualize, at least*, that the said freezers were to be used *outside* the plant of Applicants in connection with the ice-cream side of the business of Applicants. Mr. Demetriou has testified that this was so and I do accept his evidence, in spite of the fact that the evidence of Mr. Lewis does not appear to support him on this. I have chosen to rely on the evidence of Mr. Demetriou on this point because, in addition to the excellent impression which his demeanour in the witness-stand has made to me, I have borne in mind, also, that any doubt on this point, that might have existed, ought to be resolved in favour of Applicants, in view of the fact that it has largely arisen due to the failure of the Customs authorities in their plain duty to keep at the time proper official records of the grounds for their original decision to exempt the freezers in question from duty; it is common ground that no proper contemporaneous official records exist at all. Moreover, I have found as most indicative of the possibility having been envisaged by the Customs authorities that the freezers were going to be used by Applicants *outside* their plant itself, the fact that such authorities laid down the condition that the said freezers were to be marked with Applicants' trade-mark and were not to be hired or sold. Such conditions need never had been imposed if they were to be used *only* in the plant of Applicants at Famagusta; on the contrary, this would had been stated, instead, expressly as the only condition necessary.

I am satisfied, in the light of all the foregoing and of generally all the circumstances of this Case, that the Respondent has decided to demand the import duty in question under a misconception of the true facts and especially under a misconception concerning the actual knowledge by the Customs authorities at the time of the essential nature of the matter.

Consequently the sub judice decision of the Respondent should be declared *null* and *void* and of no effect whatsoever.

Even if I had only a doubt as to whether Respondent has acted under a misconception, I should have given the benefit of this doubt to Applicants (see *Photiades and The Republic*, 1964, C.L.R. 102).

It is now up to Respondent to decide, in the light of this Judgment and free from the misconceptions dealt with herein

(and especially bearing in mind that the Customs authorities, in May 1959, admitted the freezers in question free of duty without having been misled by Applicants and knowing fully well that they were going to be used in relation to Applicants' ice-cream side of the business and vizualizing that they might be used outside Applicants' plant) whether the relevant action, at the time, of the Customs authorities should be regarded as being inconsistent with tariff-item 716-12a and should and can properly be revoked either under section 155 or otherwise, if at all.

In the circumstances of this Case, I award part of the costs in favour of Applicants and against Respondent, which I assess at £30.-

Sub judice decision declared null and void. Part of the costs, assessed at £30.-, *awarded to Applicants and against Respondent.*