IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DR. HARRYS M. TYMVIOS, M.D.,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF FINANCE AND ANOTHER,

Respondent.

(Case No. 287/66).

Customs—Custom duty—The Customs Tariff Law 1961 *(Law No.* 32 *of* 1961*), tariff items* 721—06, 721—11, 861—03—*The Customs Management Law, Cap.* 315, *section* 140—*The Standard International Trade Classification—Apparatus known as "home sauna"—Correct classification as "electrothermic appliances" under tariff item* 721—06—*And not either as "Electric apparatus for medical purposes" under tariff item* 721—11, *or as "Medical appliances" under tariff item* 861—03—*Decision of the Respondent Comptroller neither in excess of power nor arbitrary.*

Import duty—Classification—See above.

"Home Sauna"—Classification for import duty purposes—See above.

This recourse under Article 146 of the Constitution concerns the correct classification under the Customs Tariff Law, 1961 (Law No. 32 of 1961) of certain apparatuses commonly known as "home sauna".

The Applicant, who is a medical practitioner imported the goods in question from West Germany. There arose some dispute as to the correct tariff item under which the goods should be classified, for import duty purposes, and eventually the Comptroller of Customs classified them as "electrothermic appliances" under paragraph (c) of tariff item 721—06 of the Second Schedule to the said Law; under this tariff item the goods became subject to import duty at the rate of 24% ad valorem. The Applicant claimed that the goods should be classified as "electrict apparatus for medical purposes" under tariff item 721—11 or as "medi-

cal appliances....." under tariff item 861—03, in which case they would be exempt from import duty.

Dismissing the recourse the Court:

Held, (1). It is common ground that apparatuses of this kind are being used extensively, *inter alia,* in beauty parlours, gyms and also by individuals. On the other hand, there can be not the slightest doubt that all items under tariff item 721—11, with the heading "Electric apparatus for medical purposes and radiological apparatus.....",—are apparatuses *solely* and *exclusively* used for medical purposes. It should be stated that at the hearing counsel for Applicant based his case on tariff item 721—11 and made no reference at all to tariff item 861—03 (relating to "medical appliances").

(2) Considering the evidence adduced and bearing in mind the Customs Management Law, Cap. 315, section 140 (*Note:* See the relevant part of this section in the Judgment, post) I am far from satisfied that the decision of the Respondent to classify the goods as "electrothermic appliances" under tariff item 721—06 and not under tariff item 721—11, was in any way either in excess of authority or arbitrary.

Recourse dismissed with costs.

Recourse.

Recourse concerning the correct classification, under the Customs Tariff Law 1961 (Law 32 of 1966), of certain apparatuses commonly known as "home sauna".

D. Liveras, for the Applicant.

M. Spanos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:

LOIZOU, J.: This recourse, in effect, concerns the correct classification under the Customs Tariff Law (No. 32/61) of certain apparatuses commonly known as "home sauna".

The Applicant is a medical practitioner and has a private clinic in Nicosia. He imported the goods in question himself from West Germany. There arose some dispute as to the correct tariff item under which the goods should be classified, for import duty purposes, and eventually the Comptroller

of Customs classified them under paragraph (c) of tariff item 721-06 of the Second Schedule to the said Customs Tariff Law; under this tariff item the goods became subject to import duty at the rate of 24% ad valorem. The Applicant claimed that the goods should be classified either under tariff item 721-11 or under tariff item 861-03 in which case they would be exempt from import duty.

On the 14th October, 1966, the Applicant cleared the goods from the customs, having paid the import duty claimed under protest, and on the 22nd November, 1966, he filed the present recourse claiming the following relief:

"(a) That the decision of the Comptroller of Customs to impose and collect import duty on three electro-medical phototherapeutic apparatus each consisting of I HOME SAUNA B 'Combination Type' cabin and 1 infra red (electric) heating stool, imported directly by Dr. Harry M. Tymvios M.D. for therapeutic use in his private clinic, is in excess of authority, arbitrary and thus *null* and *void* and of no effect whatsoever.

(b) That the decision of the Comptroller of Customs to impose and collect import duty on the above described articles by classifying same under Tariff Item 721-06 and not under Tariff Item No. 861-03 or under Item No. 721-11 of Law 32/61 Second Schedule, Part One, is *null* and *void* and of no effect whatsoever".

The Application is based on the following ground of law:

"The above described articles by reason of their nature and/or for the purpose for which they were imported are under Law 32/1961 second Schedule Part I tax free and the decision of the Comptroller of Customs to impose and collect tax on same is contrary to that Law".

A second ground of law set out in the Application was abandoned in the course of the hearing.

It is convenient at this stage to set out the various tariff items mentioned in the Application as they are set out in the Customs Tariff Law:

«721-06 Ἠλεκτροθερμικαὶ συσκευαὶ (περιλαμβανομένων οἰκιακῶν συσκευῶν, οἷον φούρνων, θερμάστρων, σιδέρων σιδερώματος, βραστήρων καὶ φρυγανιέρων) ὡς ἀκολούθως:

(α) Βιομηχανικῶν τύπων, κατ' ἔγκρισιν τοῦ Πρώτου Τελωνειακοῦ Λειτουργοῦ. Συγκολλητικαὶ συσκευαί, σίδηρα σιδηρώματος, ἀποθηκευτικοὶ βραστῆρες ὕδατος χωρητικότητος 30 γαλονίων καὶ ἄνω .....

(β) Λοιπαὶ θερμάστραι, φοῦρνοι, μαγειρικαὶ ἑσχάραι καὶ βραστῆρες ὕδατος.....

(γ) Λοιπαὶ .....

721–11 'Ηλεκτροϊατρικαὶ καὶ ραδιολογικαὶ συσκευαὶ (μὴ περιλαμβανομένων ἐργαλείων ἁπλῶς τιθεμένων εἰς ἐνέργειαν δι' ἠλεκτροκινητήρων).....

861–03 Χειρουργικά, ἰατρικὰ καὶ ὀδοντοϊατρικὰ ὄργανα καὶ ἐξαρτήματα, κατ' ἔγκρισιν τοῦ Πρώτου Τελωνειακοῦ Λειτουργοῦ.....»

I think it should be stated at the outset that learned counsel for the Applicant all through the hearing made no reference at all to tariff item 861–03, but based his case on the ground that the goods should have been classified under tariff item 721–11.

It is common ground, indeed it is a notorious fact, that apparatuses of this kind may be bought freely by anybody wishing to buy them and are being used extensively, *inter alia*, in beauty parlours, gyms and also by individuals.

It was argued on the part of the Applicant that the goods ought to have been classified under tariff item 721–11 on the ground "that they are for therapeutic and/or electro-medical and/or infra-red emitter apparatuses", and are, therefore, medical appliances. It was further contended that the goods fall under the heading "phototherapeutic apparatuses" and "lamps, infra-red, with stands", both of which items are to be found under item No. 721–11 of the Standard International Trade Classification.

In support of his case the Applicant gave evidence himself and called one witness, the Director of Medical Services, Dr. Zenon Panos, who, on the 1st October, 1966, *i.e.* during the time that the goods were lying at the customs and the dispute as to the correct tariff item applicable was going on between the parties gave a certificate (*exhibit* 3) to the following effect: "This is to certify that 'Heimsauna' as appears in the attached booklet is a medical appliance".

The Applicant has stated in evidence that infra-red has therapeutic pathological qualities, that he had himself applied the infra-red lamp for medical treatment, and that it cures inflamations and chronic rheumatic arthritis. He has further stated that the apparatuses imported by him are an improvement of the old infra-red lamps, they emit infra-red rays, and cannot be used safely by any person who has no medical knowledge or medical supervision and that they have no use other than medical use. In answer to counsel for the Respondent he said that the apparatuses are dangerous only if used by persons who suffer from some sort of disease like heart trouble in which case they are dangerous in the same way as a hot bath or a turkish bath or a swim in the sea would be dangerous.

The Director of Medical Services who, as stated earlier on, gave evidence for the Applicant, confirmed the statement in his certificate and went on to say that these home sauna emit infra-red heating and in certain cases are beneficial to the health of the people if used by an expert or under medical guidance. The impression I gathered from his evidence is that he certified the home sauna to be a medical appliance, because amongst other purposes it may be used for therapeutic purposes.

For the Respondent it was contended that the decision complained of was properly and lawfully taken and that the goods were correctly classified.

It is convenient at this stage to refer to the specific provision in the Customs Management Law, Cap. 315 which deals with the classification of goods. Such provision is to be found in section 140 of the said law, the relevant parts of which read as follows:

> "140.(1) Goods shall, *prima facie*, be classified for the purposes of Customs Duty in accordance with the classification set out in Part I of the Second Schedule to the Customs Tariff Law, or any Law amending or substituted for the same.
>
> (2) Where for any reason, it is, in the opinion of the Comptroller, not clear under what item in Part I of the Second Schedule to the Customs Tariff Law any goods fall, such goods shall, subject to the provisions of this Law be classified by reference to the appropriate item in the Item Index to the Standard

International Trade Classification and where it is not clear under which item thereof such goods shall be classified classification shall be effected as follows:-

(a) the item of the Item Index aforesaid which provides the most specific description shall be preferred to items providing a more general description;

(b) .....

.....

(c) goods not falling clearly within any item in accordance with paragraphs (a) or (b) of this sub-section shall be classified under the item which the Comptroller considers appropriate to the goods to which they are most akin.

(3) Where any goods cannot be classified in accordance with sub-section (1) or sub-section (2) of this section by virtue of the fact that they are or can be classified under two or more items of the Item Index to the Standard International Trade Classification with a resulting difference as to Customs duty, Customs duty shall be charged when it is a difference between liability to or freedom from duty, and the higher or highest of the Customs duties applicable shall be charged when it is a difference as to two or more Customs duties.

(4) .....

....."

The Collector of Customs who dealt with this case gave evidence for the Respondent and explained why he classified the goods under tariff item 721-06 and not 721-11 as claimed by the Applicant.

According to the evidence of this witness the apparatus in question consists of a stool inside which there is a heat generator which is electrically operated and emits heat radiation; the stool is used for the person treated to sit on and round the stool there is a plastic cover like a small tent which is normally up to the neck of the person sitting on the stool. By generating heat the air gets hot and the person under treatment starts perspiring. It will be observed that as to the question of what this home sauna emits the evidence

of this witness tallies with that of witness No. 2 for the Applicant, the Director of Medical Services, who also said that it emits infra-red heating.

In classifying the goods, the witness went on to say, he based himself on the nature of the goods which in his opinion are electrothermic appliances and are covered by tariff item 721–06. But in view of the argument put forward by the importer, the Applicant, and in order to obviate any possible doubt, following the provisions of section 140 of the Customs Management Law (Cap. 315) he referred to the corresponding items in the Standard International Trade Classification the numbers of the items of which correspond to the numbers in our own Customs Tariff Law. Photostat copies of these two items of the Standard International Trade Classification signed by both counsel have been filed in court after the conclusion of the hearing and I have marked them as *exhibits X and Y* respectively. Under tariff item 721–06, the witness said, there are two commodities which are identical or closely resemble the goods the classification of which is in dispute. The one is "Douches, hot-air, Electric" and the other "Electrothermic apparatus, including domestic appliances". Then, he said, he turned to tariff item 721–11 under which the Applicant claimed his goods should be classified and after going through the various items he came to the conclusion that he could not classify the goods under this item. It is interesting to note that the heading of tariff item 721–11 is "Electric apparatus for medical purposes and radiological apparatus—not including tools and instruments merely actuated by electric motors" and the item includes goods such as diathermic apparatus; diathermic short-wave machines; electro-cardiographs; electro-magnets, occulists; electro-encephalographs; electro-narcosis instruments for electrical shock treatment etc. There can be not the slightest doubt that all items under tariff item 721–11 are apparatuses solely and exclusively used for medical purposes. It is equally clear to me, on the material before me, that the goods imported by the Applicant do not belong to this class and could not have been classified under this tariff item. I think that the customs official who dealt with this case and gave evidence for the Respondent was quite right in his view that just because the heat generated by the apparatus may have a beneficial effect on certain maladies—in the same way that a turkish bath has—it could be described as a medical appliance and classified as such under tariff item 721–11.

For all the above reasons I am far from satisfied that the decision of the Respondent to classify the goods under tariff item 721–06 and not under tariff item 721–11 was in any way either in excess of authority or arbitrary. On the contrary, in my view, the classification was in accordance with the provisions of the relevant Customs Law, and, to say the least, it was perfectly open to the Respondent, in the circumstances of this case, to reach the decision complained of.

In the result this recourse must fail.

Case dismissed with costs.

Application dismissed with costs.