IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KANTARA SHIPPING LIMITED,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE DIRECTOR OF THE DEPARTMENT OF INLAND REVENUE,

Respondent.

(*Case No.* 41/67).

Taxation—Tonnage tax—The Merchant Shipping (Taxing Provisions) Law, 1963 (*Law No.* 47 *of* 1963) *as amended by Law No.* 34 *of* 1965—*The Tonnage Tax and Crew Tax Regulations* 1965 (*published in Supplement No.* 3 *of the Official Gazette of January* 7, 1966 *under Not.* 3), *regulation* 3—*Default of payment of said Tonnage tax on due date—Imposition of a* 5 *per centum surcharge under section* 8(1) *of the Tax Collection Law,* 1962 (*Law No.* 31 *of* 1962)—*Cf. section* 4(2)(4) *of the Merchant Shipping (Taxing Provisions) Law* 1963 *etc.* (supra).

Taxation—Surcharge on non payment on due date—See above and, also, herebelow.

Constitutional Law—Section 8(1) *of the Tax Collection Law,* 1962 *imposing a surcharge of* 5% *for non-payment of taxes on due date, is not unconstitutional—It does not contravene Articles* 8.1, 12.3 *and* 4, 24.1, 28 *and* 30.2 *of the Constitution—See, also, herebelow.*

Tax Collection Law, 1962 *section* 8(1)—*Surcharge—Does not offend against the Constitution—See above, and, also, herebelow.*

Tax—Surcharge—Non payment of tax on due date and imposition of 5 *per centum surcharge—Do not constitute "an offence" and "punishment" within the scope of Article* 12, *paragraphs* 3 & 4 *of the Constitution—See, also, herebelow.*

Constitutional Law—Article 24.1 *is another aspect of the principle of equality safeguarded by Article* 28.1 *and* 2 *of the Constitution—It allows therefore, reasonable distinctions which have to be*

made in view of the intrinsic nature of things—Such as the surcharge under section 8(1) *of the Tax Collection Law,* 1962 (supra).

Constitutional Law—"Civil rights and obligations" in Article 30.2 *of the Constitution (corresponding to Article* 6(1) *of the European Convention for the Protection of Human Rights) relate to private Law—Article* 30.2 *not applicable in the present taxation case.*

Surcharge—For non-payment of tax—See above.

Words and Phrases—"Punishment" and "offence" in Article 12.3 *and* 4, *of the constitution—"Civil rights and obligations" in Article* 30.2 *of the Constitution.*

The Applicants are the owners of five Cyprus ships. In accordance with the provisions of section 4 of the Merchant Shipping (Taxing Provisions) Law, 1965 (34 of 1965) the tonnage tax levied on Applicants' ships, for the year 1967 was duly assessed at the rates set out in the Schedule to the said Law. Under the provisions of regulation 3 of the Tonnage Tax and Crew Tax Regulations 1965 half the tonnage tax so assessed amounting to £1722 became due and payable on the 15th January, 1967. The Applicants were duly notified of the said assessments by letters of the 26th October, 1966 and 4th November, 1966, respectively. The last paragraph of each of these letters contains a warning to the Applicants that if the said taxes were not paid on or before the prescribed date an additional 5 per cent surcharge on any amount of tax in default would become due and payable under section 8(1) of the Tax Collection Law, 1962. Eventually the aforesaid amount of £1722 was not paid until the morning of the 18th January 1967 viz. with three days delay. On the 25th January the Respondent informed the Applicants by letter that: "much as I appreciate the reasons for the small delay (as explained in the letter of Applicants' Counsel of the 18th January, 1967) in the payment of the tax I have no power under the Law to waive the 5 per cent penalty"; and requested them to remit the said sum amounting to £86 as soon as possible.

It is this decision of Respondent to claim the surcharge of 5 per centum that the Applicants challenge by the present recourse as being contrary to the provisions of Articles 8, 12.3, 24.1 and 30.2 of the Constitution.

Section 4(4) of the Merchant Shipping (Taxing Provisions)

Law, 1963 provides that if the tax (i.e. the tonnage tax (*supra*) is not paid within the prescribed time its collection is effected under the provisions of the Tax Collection Law 1962. Section 8(1) of the last mentioned Law provides:

"8.(1) Subject to any other provision in the relevant Law for a surcharge or increase in the amount due, a person owing any tax who has not paid the amount due by him within the period provided for payment allowed in the relevant Law shall be required to pay a surcharge equal to five per centum of the tax remaining unpaid after the expiration of the aforesaid period."

Article 8 of the Constitution provides:–

"No person shall be subjected to torture or to inhuman or degrading punishment or treatment".

Article 12.3 and 4 of the Constitution provides:

12.3. "No Law shall provide for a punishment which is disproportionate to the gravity of the offence".

12.4. "Every person charged with an offence shall be presumed innocent until proved guilty according to law".

Article 24.1 of the Constitution provides that every person is bound to contribute according to his means towards the public burdens.

Lastly, Article 30.2 of the Constitution reads:

30.2. "In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent impartial and competent Court established by law".

Dismissing the recourse, the Court:–

Held, (1). The imposition of an additional 5 per centum where the taxpayer fails to pay the tax by the due date on no account can be described as torture or as inhuman or degrading punishment or treatment within Article 8 of the Constitution (*supra*); nor do I think that this Article was meant to apply to cases such as the present one.

(2) It was further argued by counsel for the appellant that section 8(1) of the Tax Collection Law, 1962 (*supra*) offends

against paragraphs 3 and 4 of Article 12 of the Constitution (*supra*). But clearly, those paragraphs have no application to the present case because the non-payment of the tax on the due date and the imposition of the additional 5 per centum do not constitute an "offence" and "punishment" within the meaning of the words in the said paragraphs (*Haros and The Republic*, 4 R.S.C.C. 39 at p.44, *distinguished; Bankers Trust Co.* v. *Blodgett* (1923) 260 U.S. 647, considered; principles enunciated in Basu's Commentary on the Constitution of India, 5th ed. Vol. 2 at p. 4 dealing with clause 1 of Article 20 thereof *considered*).

(3) With regard to the argument based on Article 24.1 of the Constitution (*supra*) I am of the opinion that the provisions of this paragraph is another aspect of the principle of equality safeguarded by Article 28 of the Constitution. But the term "equal before the law in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things..... The above view regarding the application of the principle of equality applies also to the interpretation of paragraph 1 of Article 24." (see *Mikrommatis and The Republic*, 2 R.S.C.C. 125 at p. 131). Cf. *Georghallides and The Village Commission of Ayia Phyla*, 4 R.S.C.C. 94; and the principles set out in Kyriakopoulos on Greek Administrative Law Vol. Γ, 4th ed. p. 353.

In the result, I am inclined to agree with counsel for the Respondent and I find that there is no merit in this part of Applicant's case either.

(4) Lastly I come to Article 30.2 of the Constitution (*supra*). In my view "civil rights and obligations" in this paragraph are rights and obligations relating to private law, and consequently, paragraph 2 of Article 30 is applicable to such civil rights and obligations only. In other words the word "civil" in Article 30.2 should be read and understood in this restricted sense and not in its broadest sense as covering everything outside criminal law. (Cf. Article 6, paragraph 1 of the European Convention on Human Rights and the decision of the European Commission *X against Belgium* Application No. 2145/64 reported in volume 8 (1965) of the Yearbook of the European Convention on Human Rights p. 282). *Hannis Djirkalli and The Republic*, 1 R.S.C.C. 36, *distinguished.*

Recourse dismissed with costs.

Cases referred to:

Miliotis v. *The Police* (1966) 2 C.L.R. 62 at p. 69;

Bankers Trust Co. v. *Blodgett* (1923) 260 U.S. 439;

Haros and The Republic, 4 R.S.C.C. 39 at p. 44;

Mikrommatis and The Republic, 2 R.S.C.C. 125 at p. 131;

Georghallides and The Village Commission of Ayia Phyla, 4 R.S.C.C. 94;

X against Belgium, a decision of the European Commission on Human Rights in Application No. 2145/64, reported *in the Yearbook of the European Convention on Human Rights in volume* 8 (1965) p. 282.

Recourse.

Recourse against the decision of the Respondent to impose 5 per cent surcharge because of failure to pay tonnage tax on the due date.

G. Cacoyiannis, for the Applicant.

L. Loucaides, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following judgment* was delivered by:–

LOIZOU, J.: The facts in the present recourse are undisputed and are shortly as follows:

The Applicants are the owners of five Cyprus ships.

In accordance with the provisions of section 4 of the Merchant Shipping (Taxing Provisions) Law, 1963 (as amended by Law No. 34 of 1965) the tonnage tax leviable on Applicants' ships, for the year 1967, was assessed at the rates set out in the Schedule to the said Law. The Applicant company was notified of the assessments in respect of four of the ships by the letters dated 26th October, 1966, and in respect of the fifth ship by the letter dated 4th November, 1966. All five letters have been produced and are *exhibit* 1 in this case. The last paragraph of each of these letters contains a warning to the Applicants that if the tonnage tax assessed or any part

*For final judgment on appeal see (1971) 6 J. S. C. 839 to be reported in due course in (1971) 3 C. L. R.

thereof was not paid on or before the prescribed date an additional 5 per cent surcharge on any amount of tax in default would become due and payable under section 8 of the Tax Collection Law, 1962.

Under the provisions of regulation 3 of the Tonnage Tax and Crew Tax Regulations 1965 (published in Supplement No. 3 to the Gazette of the 7th January, 1966 under Not. No. 3) half the tonnage tax so assessed amounting to £1722. 140 mils became due and payable on the 15th January, 1967. On the same day, which was a Sunday, the letter *exhibit* 3 was drafted with a view to enclosing and forwarding the Applicants' cheque for the tax due to the Inland Revenue Department. One of the two Directors of the Applicant company with power to sign cheques, however, was not available in Limassol to sign the cheque until Tuesday the 17th January, 1967, and as a result the letter together with the cheque were not delivered to the Inland Revenue Department until the morning of the following day i.e. the 18th January, 1967, by hand.

The reasons for the delay are given in the letter of counsel for the Applicants of even date, *exhibit* 4.

On the 25th January, 1967, the Respondent replied to Applicants' counsel by his letter *exhibit* 2 informing them that "much as I appreciate the reasons for the small delay in the payment of the tax I have no power under the law to waive the 5 per cent penalty" and requesting them to remit the said sum as early as possible.

It is the Respondent's decision, contained in this last mentioned letter, to claim the additional 5 per cent, amounting to £86.107 mils, that the Applicants challenge by this recourse as being contrary to the provisions of Articles 8 and 12 of the Constitution and or that his decision not to waive the said penalty is in excess or in abuse of his powers. In the course of his address learned counsel appearing for the Applicants argued that section 8(1) of the Tax Collection Law, 1962, by virtue of the provisions of which the additional 5 per cent became payable, is unconstitutional not only in view of Articles 8 and 12.3 of the Constitution, but also in view of Articles 24.1 and 30 thereof.

There is no dispute either as to the amount of the tax due or as to the fact that the sum of £86.107 mils represents 5 per cent thereof.

Sub-section (2) of section 4 of the Merchant Shipping (Taxing Provisions) Law, 1963 makes provision regarding the mode and the time of payment of tonnage tax and sub-section (4) thereof provides that if the tax is not paid within the prescribed time its collection is effected under the provisions of the Tax Collection Law, 1962. The dates on which tonnage tax becomes payable are prescribed in the regulations to which I have already referred, made under section 7 of the same Law; regulation 3 thereof provides that tonnage tax should be paid in two instalments viz. on the 15th January, and the 15th July in each year.

Section 8(1) of the Tax Collection Law, 1962, reads as follows:

> "8.-(1) Subject to any other provision in the relevant Law for a surcharge or increase in the amount due, a person owing any tax who has not paid the amount due by him within the period provided for payment allowed in the relevant Law shall be required to pay a surcharge equal to five per centum of the amount of the tax remaining unpaid after the expiration of the aforesaid period."

In support of his argument regarding Article 8 of the Constitution learned counsel for the Applicants has merely cited *Milliotis* v. *The Police* (1966) 2 C.L.R. 62 at p. 69.

This Article reads as follows:

> "No person shall be subjected to torture or to inhuman or degrading punishment or treatment".

In my view the imposition of an additional 5% where the taxpayer fails to pay the tax by the due date, on no account can be described as torture or as inhuman or degrading punishment or treatment; nor do I think that Article 8 of the Constitution was meant to apply to cases such as the present.

Article 12: It was argued by learned counsel for the Applicants that section 8(1) offends both against paragraphs 3 and 4 of this Article.

The said paragraphs read as follows:

> "12.3. No law shall provide for a punishment which is disproportionate to the gravity of the offence."

"12.4. Every person charged with an offence shall be presumed innocent until proved guilty according to law."

In connection with paragraph 3 learned counsel submitted that it disregards completely the extent of the penalty and a person who has to pay a large sum of money by a certain date will incur a great penalty even though he effected payment within a few hours of closing time, whereas a person who owes a smaller amount, and hence it may be easier for him to pay it, will incur a smaller penalty even though the default may be for weeks or months.

With regard to paragraph 4 the reason advanced by learned counsel why section 8(1) offends against it is that anyone who delays payment is irrefutably presumed guilty contrary to this paragraph.

In order to determine this part of Applicants' case it is necessary to decide whether the delay in paying the tax amounts to an offence and the imposition of the additional 5 per cent to a punishment; because this Article deals exclusively with offences and judicial punishment and imposes certain limitations on the power of the State to enact and enforce laws which create offences and provide punishment therefor.

Basu in his commentary on the Constitution of India, 5th ed. vol. 2, in dealing with clause 1 of Article 20 thereof, which is similar to our Article 12.1, says (at p. 4) that failure to pay compensation for which provision is made in the law is not made an "offence" though the money may be recovered by a coercive process, and the person may be imprisoned for failure to pay, under the revenue law for coercive recovery of the amount. With regard to the second part of the paragraph which provides that "no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for by law at the time when it was committed", it was held that this provision does not ban retrospective legislation imposing heavier penalty for failing to pay taxes.

In *Bankers Trust Co.* v. *Blodgett* (1923) 260 U.S. 439 by a section of a statute of the State of Connecticut passed in 1915, it was provided that "all taxable property of any estate upon which no town or city tax has been assessed..... or upon which no tax has been paid to the state during the year preceding the date of the death of the decedent, shall be liable to a tax of 2 per centum per annum on the appraised inventory

value of such property for the five years next preceding the date of the death of such decedent....."

The deceased person whose property became liable to the tax provided by the section above-quoted died in May, 1919, and as prior to the enactment of the said section the penalty provided by law in case of omission was the addition of 10 per cent to the assessed valuation of the omitted property, therefore, it was contended, in one of the years (1914) of the five of omission to pay taxes the attempt of the section was "to reach into the past and provide 'greater punishment than the law did when the crime was committed' " and hence incur constitutional prohibition as an *ex post facto* law. Mr. Justice McKenna in delivering the opinion of the Court held that the contention was untenable in that the penalty of the statute was not in punishment of a crime, and it was only to such that the constitutional prohibition applied and it had no relation to retrospective legislation of any other description.

All cases cited by learned counsel for the Applicant in support of his argument regarding Article 12.3 are cases which involved criminal proceedings and there was provision in the relative laws for mandatory punishment thus preventing the Court from exercising its discretion in the matter according to the merits of the case.

It is true that in the present case there is no discretion in the Chief Revenue Officer to remit the surcharge, which is fixed by the law at 5 per cent, but for this case to come within the purview of Article 12 the delay must be an "offence" and the collection of the additional 5 per cent "punishment" for the commission of such offence within the meaning of the words in the said Article. In my view it is quite clear from the wording of Article 12 that its provisions do not apply to and cannot be invoked in cases such as the present one; and the fact that the rules in this Article may be applicable to disciplinary offences as well, as was held in the case of *Haros and The Republic*, 4 R.S.C.C. p. 39 at p. 44, does not in my opinion affect the issue one way or the other.

To sum up, I am of the view that paragraphs 3 and 4 of Article 12 have no application to the present case on the ground that the non-payment of the tax on the due date and the imposition of the additional 5 per cent do not constitute an "offence" and "punishment" within the meaning of the words in the said paragraphs.

Next I come to Article 24.1. This paragraph provides that every person is bound to contribute according to his means towards the public burdens. If the additional 5 per cent, learned counsel for the Applicant argued, is part of Applicant's taxing liability, then it contravenes the provisions of this paragraph because the liability according to the means has already been imposed under the relative law and anything beyond that is in excess of that law.

Learned counsel for the Respondent, on the other hand, has submitted that the 5 per cent surcharge is proportionate to the taxpayer's means because it is fixed with reference to his original liability to pay tax which is based on his means and in this way the principle of equality is preserved.

That this Article is another aspect of the principle of equality safeguarded by Article 28 was held in *Mikrommatis and The Republic*, 2 R.S.C.C. p. 125, where the Court, in connection with Article 28, said this (at p. 131):

> "In the opinion of the Court the term 'equal before the law' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. Likewise, the term 'discrimination' in paragraph 2 of Article 28 does not exclude reasonable distinctions as aforesaid". And then follows this paragraph:

> " The above view regarding the application of the principle of equality applies also to the interpretation of paragraph 1 of Article 24".

Kyriakopoulos in his textbook on Greek Administrative Law, vol. Γ, 4th ed. in the chapter dealing with Public Burdens and particularly with the payment of taxes has this to say at p. 353:

> «..... 'Εφ' ὅσον δὲ ὁ νόμος προέβλεψεν, εἶναι δυνατόν, ἐπὶ καθυστερήσει καταβολῆς τοῦ φόρου, νὰ ἐπακολουθήσωσιν ἐπιβαρυντικαὶ συνέπειαι διὰ τὸν φορολογούμενον. Οὗτος ὑποχρεοῦται, συνήθως, εἰς καταβολὴν τόκων ὑπερημερίας καὶ προσθέτων τελῶν. 'Αλλὰ γενικὴ πρὸς τοῦτο ὑποχρέωσις δὲν ὑφίσταται. Πάντως, ἡ ὑποχρέωσις πρὸς καταβολὴν

τόκων ὑπερημερίας ἢ προσθέτων τελῶν συνιστᾷ ἐπέκτασιν τῆς ἀρχικῆς φορολογικῆς ὑποχρεώσεως».

Finally learned counsel for the Respondent concluded his argument by submitting that on the authority of *Harris Georghallides and The Village Commission of Ayia Phyla*, 4 R.S.C.C. p. 94, the 5 per cent surcharge is a charge or rate (τέλος) which the defaulter has to pay in consideration or as compensation for the additional work and expenses which the administration has to bear for the collection of the tax or for putting into motion the machinery of tax collection.

Having given the matter due consideration I am inclined to agree with learned counsel for the Respondent and I find that there is no merit in this part of Applicant's case either.

Lastly I come to Article 30.2 the relevant part of which reads:

> " In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent impartial and competent Court established by law.....".

In support of his submission with regard to this Article learned counsel for the Applicant has cited the case of *Hannis Djirkalli and The Republic*, 1 R.S.C.C. p. 36 and suggested that a similar situation may arise in a case like the present if for instance the taxpayer is absent from Cyprus on the day the tax has to be paid.

The case cited is a case in connection with the Recovery of Compensation for Injury to Property Law, Cap. 84 (now repealed and substituted by Law 57 of 1962) and the Court held that sub-section (3) of section 8 thereof was contrary to Article 30.2 of the Constitution in view of the limitation imposed by such section on the persons upon whom was allocated the payment of compensation for the damage; the said sub-section set out the classes of objections which could be lodged with the appropriate authority but it made no provision whereby a person involved, who had nothing to do with the damage or destruction and was innocent of any complicity, could prove that fact and absolve himself of any liability.

Learned counsel has further stated that "on the question whether the 5 per cent is or is not payable there is no recourse

to any Court" and has submitted that if the payment of this surcharge is not a civil obligation then it can be nothing else other than a penalty under a criminal charge.

On the part of the Respondent, on the other hand, it was argued that the provisions of Article 30.2 are irrelevant to the present case because the paragraph refers to civil obligations and to criminal charge and that civil obligations are obligations falling within the domain of private law.

Having already decided, when dealing with Article 12, that the default in the payment of the tax on the due date is not an offence and the imposition of the 5 per cent surcharge is not a penalty within the meaning of that Article, the question which now falls for consideration is whether Applicant's obligations with regard to which the decision complained of was taken are "civil" ones within the meaning of paragraph 2 of Article 30 of the Constitution. This paragraph is almost a verbatim copy of paragraph 1 of Article 6 of the European Convention for the protection of Human Rights and some assistance may be derived from the decisions of the European Commission and European Court on Human Rights. In the case of X against Belgium, Application No. 2145/64 reported in volume 8 (1965) of the Yearbook of the European Convention on Human Rights p. 282, the Commission held (at p. 312) that Article 6(1) of the Convention was not applicable to a taxation case, even though the measure attacked had repercussions on the taxpayer's property rights, in view of the fact that the rights and obligations with regard to which the ruling challenged before the Commission was made related to fiscal law, a branch of public law, and not to private law. This, in my view, is a clear indication that "civil rights and obligations" are rights and obligations relating to private law and that, consequently, paragraph 2 of Article 30 is applicable to such civil rights and obligations only. In other words the word "civil" in Article 30.2 should be read and understood in this restricted sense and not in its broadest sense as covering everything outside criminal law.

For the above reasons I have come to the conclusion that Article 30.2 is not applicable in the present case.

Before I conclude with this case perhaps I should mention that the question of "excess or abuse of powers" raised in the

relief applied for was not touched at all, and quite rightly so in my view, and I, therefore, consider it unnecessary to deal with that issue.

In the result, this recourse fails and is hereby dismissed with costs.

Recourse dismissed with costs.