1979 January 25

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

AMATHUS NAVIGATION CO LTD. AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF FINANCE,
2. THE DIRECTOR OF THE DEPARTMENT OF CUSTOMS AND EXCISE,

Respondents.

(*Cases Nos.* 282–285/77, 287/77, 289/77 *and* 290–294/77).

Administrative Law—Executory act—Only executory acts can be made the subject of a recourse—Imposition of import duty on "short landed transit goods"—And communication of imposition by means of "Demand Note"—Letter by applicant's lawyers disputing imposition and reply by respondent stating the legal approach to the question—Imposition of import duty, as communicated by "Demand Note", the executory act that could be made the subject of a recourse under Article 146*–Said reply nothing more than a legal opinion and as such it could not be made the subject of a recourse—Position would not be any different even if it was taken to be a confirmatory act, which is not.*

On various dates during 1975 and/or 1977 the applicants were acting as agents for various ships calling at Limassol port and discharging cargoes in transit for other ports outside Cyprus. The applicant duly declared such cargoes to be in transit for other ports. Respondent 2 imposed import duty on certain quantities of such transit cargoes which were shortlanded from the relevant ships The imposition of import duty on such "shortlanded transit cargoes" was made against the applicants by means of the usual Demand Notes* of the Collector of Cu-

* A specimen of this Form is quoted at p. 19 *post.*

stoms. The applicants being of opinion that the imposition of import duty as above was wrongful and/or contrary to the Law they sought the decision of the respondents through the lawyers of the Cyprus Shipping Association of which they are members. The said lawyers addressed a letter* to respondent 2 (*exhibit* 2) dated 13th June, 1977 in which they expressed their opinion on the legal position and asked respondent 2 to reconsider his decision.

As respondent 2 gave no reply to the above letter the said lawyers addressed another letter** to him (*exhibit* 3) on the 23rd July, 1977 seeking a decision on the matters referred to in the first letter and dealing with all practical aspects of the matter.

Respondent replied by his letter (*exhibit* 1) dated 12th August, 1977, as follows:

> "I refer to your letter under Reference EP/FA/1120/77 of the 23rd July, 1977 and wish to inform you that after a careful examination of the case I have come to the conclusion that the legal position on the subject being clear and unambiguous it is my duty in all cases to demand duty on shortlanded goods whether in transit or otherwise unconditionally.
>
> It is, of course, open to the parties concerned to effect payment under protest or to institute legal proceedings to safeguard their rights, if any."

Hence the present recourses by means of which applicants seek a declaration that "the decision of the respondents in the letter of the respondents dated 12.8.1977 is *null* and *void* and of no effect whatsoever."

Respondents, by their opposition, raised, *inter alia*, the following point of law which with the consent of the parties was disposed of preliminarily to the hearing of the substance of the recourses.

> "That the decision complained of is not an administrative act or decision of an executory nature but it merely ex-

* Quoted at pp. 16–17 *post*.

** Quoted at pp. 17–18 *post*.

presses an opinion of the respondent Director on the legal position and cannot be made the subject of a recourse"

Held, (1) that the said letter (*exhibit* 1) contains nothing more than the construction by respondent 2 of the law and in particular sections 30(2) of the Customs and Excise Law, 1967 (Law No. 82/67) and section 3(1)(b) of Law 42 of 1977 under which provisions the import duty on such goods is imposed, that, in fact, such imposition as communicated to an importer by means of a demand note is the executory administrative decision that can be the subject of a recourse under Article 146 of the Constitution, as it is by means of such act that the will of the administrative organ is known in that respect, *i.e.* an act which is aimed at producing a legal situation, the obligation to pay import duty, which concerns the citizen affected and which entails its execution by administrative means, that the decision contained in the said letter is nothing more than a legal opinion or, to put it otherwise, a restatement in general of the legal approach on the question of the imposition of import duty on shortlanded goods and as such it could not be made the subject of a recourse (*Colocassides* v *Republic* (1965) 3 C L.R. 542 at p. 551 and *Erotokritou* v *Republic* (1972) 3 C L R 523 cited with approval)

(2) That this Court is not inclined to agree with the alternative submission of counsel for the respondent that the said letter might be a confirmatory act, as from the tenor of the correspondence it appears that there was no particular reference to any concrete administrative act and the decision contained in *exhibit* 1 cannot be said to contain the insistence of the administration on its previous acts based on the same factual and legal elements; that, in any event, if it was taken to be a confirmatory act, the outcome of these recourses would not be any different as such acts cannot be the subject of a recourse under Article 146 of the Constitution, as it is conceded that no new inquiry was carried out taking into consideration any new facts; and that, accordingly, these recourses will be dismissed.

Applications dismissed

Cases referred to:

Colocassides v. *Republic* (1965) 3 C.L R. 542 at p. 551;

Erotokritou v. *Republic* (1972) 3 C.L.R. 523.

Recourses.

Recourses against the decision of the respondents whereby import duty was imposed on shortlanded goods which were declared to be in transit.

E. Psillaki (*Mrs.*), for the applicants.

A. Evangelou, Counsel of the Republic, for the respondents.

Cur. adv. vult.

A. Loizou J. read the following judgment. By these eleven recourses the applicants, who are shipping agents in Cyprus, seek thereby a declaration that the decision of the respondents and/or either of them, contained in the letter of the respondents dated 12.8.1977 (*exhibit* 1) is *null* and *void* and of no effect whatsoever, being contrary to the law and/or as having been taken in abuse or excess of the powers vested in them. The grounds of law relied upon in each recourse are the following:-

"(a) The decision of the respondents and/or either of them was taken under a misconception of Law in that as the Law is, the applicants should not be made to pay import duty on goods which were duly declared to be in transit as such goods are expressly exempted from import duty by virtue of section 34 of Law 82 of 1967, irrespective of whether they are shortlanded or not.

(b) The respondents and/or either of them acted under a misconception of Law and/or of fact in that they have not taken into consideration that section 30 of Law 82 of 1967 expressly states that import duty is payable 'save in those cases in which it is otherwise provided in this Law or in any other Enactment relating to Customs'. The case of goods in transit, as above, is such a case in which other provisions exist.

(c) The Decision of the respondents and/or either of them was taken without taking into consideration all material facts and/or all relevant provisions of the Law."

The respondents raised by their opposition four points of law which were with the consent of the parties decided to be disposed of preliminarily to the hearing of the recourses on the substance. They are the following:-

"1. That the decision complained of is not an administrative act or decision of an executory nature but it merely expresses an opinion of the respondent Director on the legal position and cannot be made the subject of a recourse.

2. That the recourse does not attack a specific administrative act or decision, but the practice of the respondent Director on a particular matter.

3. That the recourse in so far as it relates to various decisions taken by the respondent Director in 1975, 1976 and 1977, is out of time *i.e.* it was filed after the lapse of the period of 75 days provided for in para. 3 of Art. 146 of the Constitution.

4. That applicant Company does not possess an existing legitimate interest in the sense of Art. 146 of the Constitution in that it accepted the decision of the respondent Director without reservation by paying the appropriate customs duty...".

Before, however, examining each one of them, reference should be made to such facts which are relevant to the determination of the aforesaid issues as appearing from Schedule 'B' attached to each recourse, the correspondence exchanged between the parties, the particulars filed in each reference pursuant to an order of the Court, as well as from the statement of facts as set out in the oppositions and in particular in Recourse No. 292/77 referred to by learned counsel for the respondents as the foundation of his legal argument are as follows:-

"*Shedule 'B'*:

(1) .....

(2) On various dates during 1975 and/or 1977 the applicants were acting as agents for various ships calling at Limassol, Cyprus and there discharging cargoes in transit for other ports outside Cyprus. The applicants duly declared such cargoes to be in transit for other ports, in the manner required by the Law.

(3) Such transit cargoes are by law expressly exempted from the obligation to pay import duty.

(4) The respondent No. 2 however proceeded to impose import duty on certain quantities of such transit cargoes as aforesaid, which were shortlanded from the relevant ship (hereinafter referred to as 'the shortlanded transit cargoes'). The imposition of import duty on such shortlanded transit cargoes was made against the applicants by means of the usual Demand Notes of the Collector of Customs.

(5) The applicants were of the view that the imposition of import duty on shortlanded transit cargoes was wrongful and/or contrary to the Law and in this respect they sought the decision of the respondents through the Lawyers of the Cyprus Shipping Association of which Association the applicants are members. The said lawyers acting for all members of the Cyprus Shipping Association (including the applicants) addressed a letter dated 13.6.1977 (*exh.* 2) to the respondent No. 2 which remained unanswered.

(6) A second letter seeking a decision on the matters referred to in *exhibit* 2 and dealing with all practical aspects of the matter was again addressed to respondent No. 2 on 23.7.1977 (*exh.* 3). The reply of the respondents (*exh.* 1) was addressed to the Lawyers of the said Cyprus Shipping Association to the effect that careful examination of the matter was made by respondent No. 2 but his decision was that shortlanded cargoes are liable to pay import duty, irrespective of whether they are in transit or not.

(7) The applicants proceeded and/or shall proceed to pay all duties imposed on them as above, under protest always, pending the judgment of the Honourable Court as to whether such duties are at all payable."

It is not accepted by the respondents that in all cases payment under protest was made but I shall deal with it when this issue is examined.

The procedure followed in each case is that the Customs Officer at the port of arrival on checking the cargo landed against the ship's report ascertained that certain goods declared in transit for other ports were not landed. The Collector of

Customs forwarded then to the applicants the prescribed form (Form C. 168) called "Ship's Outer Report and Discrepancies List" by which they were requested in accordance with Sections 30(2) of the Customs and Excise Law 1967 (Law No. 82 of 1967) to account for the goods being short of report within three months; failure to do so would render them liable to pay the duty assessed thereon on demand by the Collector. Each applicant failed to give the Collector a satisfactory explanation and thereupon the latter forwarded to them a Demand Note (Form C. 30) accompanied by a list of such goods and demanding the payment of the import duty involved. In the particulars filed in each recourse pursuant to the directions of the Court there appear the date, the ship, the amount of import duty, whether paid or not, and the date of such payment.

It is important to quote verbatim the two letters addressed to respondent No. 2 by counsel for the applicants but on behalf of the Cyprus Shipping Association of Limassol and the reply of the respondents of the 12th August, 1977, which contains the decision challenged by the present recourse. In their chronological order we have *exhibit* 2, letter of the 13th June, 1977; *exhibit* 3, letter of the 23rd July, 1977; and *exhibit* 1, letter of respondent 2 of the 12th August, 1977. They read:

"*Exhibit* 2:

Our clients, the Cyprus Shipping Association of Limassol Cyprus, have sought our advice on the matter of imposition by you of Customs import duty on the so called 'short-landed transit goods'.

Our reply to our clients was that imposition of such duty was contrary to the letter and the spirit of the Customs Laws in view of the following, *inter alia* reasons.

The goods in question are transit goods which in view of s. 34 of Law 82 of 1967 are not governed by or subject to the provisions of s. 3(1)(b) of Law 34 of 1975, or s. 30 of Law 82 of 1967. In both the latter two sections the cases in which other provisions are made by the Law are expressly exempted and we believe the present case to be such an exempted one in view of the provisions of s. 34 of Law 82 of 1967.

We would therefore kindly request you to reconsider

your decision to impose import duty on the so-called shortlanded transit cargoes, in such a manner as to exempt these cargoes from Customs import duty, in accordance with the general principles of Law and practice prevailing until now.

In case your decision shall not be favourable, we wonder whether you would kindly agree with us that just one test case should be brought before the Court, such as a recourse against your decision in one particular case, in order to save the unnecessary and high expenses which will result if we seek your decision in each isolated case, out of a few dozen small cases and then make many recourses accordingly. If you would agree with us in following this course we could choose the case of Messrs. James Moss-Lousides Agency in which you communicated your decision as to imposition of import duty by letter dated 13th May 1977 (No. 40.11 - 97.06) a photocopy of which we attach hereto for your easy reference.

This case can then serve as a test case the result of which can be followed in all cases.

Kindly let us have your views at your earliest convenience."

"*Exhibit* 3:

We refer to our telephone conversation, at our request, with your Mr. Lefteris Chrysochos 2-3 days ago and wish to comment as follows:-

Mr. Chrysochos has told us that no decision will be taken on and/or no reply will be given to our letter of 13.6.77 (despite your acknowledgment of 17.6.77 stating that a reply will be sent to us as soon as possible) until and when all individual Shipping Agents, most of them members of our client Association, have paid and discharged all duties on the so-called shortlanded cargoes owed by them in accordance with the standard demand notes issued by you.

We pointed out to Mr. Chrysochos that we have no objection to this course, and in fact we would have been the first to recommend to our clients' members to effect such payments, *under protest always*, as soon as you in-

formed us that this was your wish, which we believe you had a duty to do, prompted by etiquette, in view of the fact that we have made it clear to you by our letter dated 13.6.77 that we act in this matter for the great majority of shipping agents, members of the Association.

Mr. Chrysochos pointed out that this is a matter strictly between your Department and the individual bebtors, everyone of whom was contacted by you on the phone and was made to promise to pay. We understood also from Mr. Chrysochos that unless they do so, pay until the end of this month the work in respect of their ships will be ordered to stop.

Whilst we do not for a moment dispute your right to demand payment from your debtors without reference to their appointed lawyers, we still believe that if the above were communicated to us, unnecessary trouble would have been saved because we would have recommended strongly to our clients to implement your wishes, the soonest.

Furthermore we believe that you do owe us by now a decision on the matter raised in our letter of 13.6.77.

However, the subject matter of our said letter is indeed a complicated one and we understand the necessity for taking longer time, before deciding thereon. Therefore we would be most grateful if you would confirm to us in writing that your demand is that all shipping agents, members of the Association, should proceed to effect payments under protest pending your decision on the matter. In case we do not hear from you again within the next 3–4 days we shall still not fail to advise our clients to effect payments as above but we do like to stress that the nature of such payments will clearly be under protest, pending your decision on whether payments are due for this type of cargoes and pending the result of a recourse against such decision if contrary to the views expressed in our letter of 13.6.77.

Awaiting to hear from you."

"*Exhibit* 1:

I refer to your letter under Reference EP/FA/1120/77

of the 23rd July, 1977 and wish to inform you that after a careful examination of the case I have come to the conclusion that the legal position on the subject being clear and unambiguous it is my duty in all cases to demand duty on shortlanded goods whether in transit or otherwise unconditionally.

It is, of course, open to the parties concerned to effect payment under protest or to institute legal proceedings to safeguard their rights, if any."

I need not comment extensively on the contents of the aforesaid correspondence which indeed is self-explanatory; one thing is certain, that none of them refers to any particular instance, it was an exchange of legal opinions and what the Director of the Department of Customs was asked to do was to reconsider his interpretation and application of the relevant statutory provisions on the subject of imposition of import duty on the so-called "short landed transit goods." *Exhibit* 1 contains nothing more than the construction by respondent 2 of the law and in particular sections 30(2) of the Customs and Excise Law 1967 (Law 82 of 1967) and section 3(1)(b) of Law 42 of 1977, under which provisions the import duty on such goods is imposed. In fact, such imposition as communicated to an importer by means of a demand note is the executory administrative decision that can be the subject of a recourse under Article 146 of the Constitution, as it is by means of such act that the will of the administrative organ is made known in that respect, i.e. an act which is aimed at producing a legal situation, the obligation to pay import duty, which concerns the citizen affected and which entails its execution by administrative means. A specimen of such a demand note has been produced as *exhibit* 'A' and in so far as material it reads:-

"Messrs. etc. .....

I beg to inform you that an amount of ..... is due by you in respect of import duty on goods included in the report of s.s. ..... of 14.9.1975 and not produced to customs in accordance with section 30(2) of the Customs and Excise Law 82/67, and I shall be grateful if you will remit the amount at your early convenience and in any case not later than 7 days from the date thereof. .....".

Section 30(2) of the law reads as follows:

> "If any dutiable goods which are included in the report of any aircraft or vessel shall not be accounted for to the satisfaction of the collector, the master or owner of the aircraft or vessel or the agent thereof, shall on demand by the collector pay the duty thereon, as estimated by the collector, at the rate in force when such goods were reported."

As stated in the case of *Colocassides* v. *The Republic* (1965) 3 C.L.R., p. 542, at p. 551, by Triantafyllides J., as he then was (which was a judgment confirmed on appeal):

> "An administrative act (and decision also) is only amenable within a competence, such as of this Court under Article 146, if it is executory (ektelesti); in other words it must be an act by means of which the 'will' of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means (see Conclusions from the Jurisprudence of the Council of State in Greece 1929–1959, pp. 236–237).
>
> I am quite aware that in Greece this attribute of an act, which may be the subject of a recourse of annulment, is specifically stated in the relevant legislation (section 46 of Law 3713 as codified in 1961) but in my opinion such express provision was only intended to reaffirm a basic requirement of administrative law in relation to the notion of proceedings for annulment and, therefore, such requirement has to be treated as included by implication, because of the very nature of things, in our own Article 146, though it is not expressly mentioned."

As I have already stated the decision contained in *exhibit* 1 is nothing more than a legal opinion or to put it otherwise, a restatement in general of the legal approach on the question of the imposition of import duty on short landed goods. As such it could not be the subject of a recourse and if any authority is needed in this respect reference may be made to the case of *Erotokritou* v. *The Republic* (1972) 3 C.L.R., p. 523.

I am not inclined to agree with the alternative submission of counsel for the respondent that it might be a confirmatory act, as from the tenor of the correspondence it appears that there was no particular reference to any concrete administrative act and the decision contained in *exhibit* 1 cannot be said to contain the insistence of the administration to its previous acts based on the same factual and legal elements. In any event if it was taken to be a confirmatory act, the outcome of these recourses would not be any different as such acts cannot be the subject of a recourse under Article 146 of the Constitution, as it is conceded that no new inquiry was carried out taking into consideration any new facts.

In view of these conclusions which dispose of the recourses, I need not proceed to examine the other preliminary objections and consequently all these recourses are dismissed, but in the circumstances I make no order as to costs.

Applications dismissed.