

1979 November 26

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

TAKIS MAKRIDES,

Applicant,

v.

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

Respondents.

(Case No. 135/77).

Administrative Law—Administrative practice—Change of—When possible in Law.

Administrative Law—Import duty—Classification of goods—An Administrative Court has no competence to substitute its own discretion in the place of the proper authorities—But has to examine the legality of the sub judice decision and also whether it was reached through any misconception and cognate matters. 5

Import duty—Classification of goods for purpose of —An administrative Court has no competence to substitute its own discretion in the place of the proper authorities—But has to examine the legality of the classification and also whether it was reached through any misconception and cognate matters—Materials used for “manufacture” of paints—Classification of, under tariff heading No. 32.09 of the Customs and Excise Duties Law, 1975 (34/75) reasonably open to respondent and support therefor can be found in the expert’s report—And once its legality cannot be questioned and there has been no misconception or other relevant matter on the part of the respondents this Court has no competence to substitute its own discretion in the place of that of the appropriate authority. 10
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Words and phrases—“I aint”—“Material”—“Manufacture”.

The question for determination in this recourse was whether certain materials imported by applicant could be considered as

“paints” within the meaning of tariff heading 32.09* of the Customs and Excise Duties Law, 1975 (34/75) or “materials for use in the manufacture of paints” within the meaning of tariff heading 03.08* of the same Law and as such could be imported free of import duty or failing the above whether they could be treated under tariff heading number 32.08*.

Though applicant has been importing the above materials free of duty since March, 1973, following the expression of opinion by senior customs officials to the effect that they were not “raw materials for the manufacture of paints”, falling under tariff heading 03.08, but “paints and lacquers” falling under tariff heading 32.09 and therefore they should have been charged with duty at the time of clearance, a team of Customs Officials visited the premises of the applicant for verification and closer examination of the process of manufacture and were satisfied that the goods in question were in fact “raw materials” and not “ready-made paints”.

On November 11, 1976 the Collector of Customs Limassol having questioned once more the relief on a consignment of similar goods the officer in charge of the Nomenclature of the Department of Customs scrutinized the clearance documents and the samples sent and came to the conclusion that the goods were ready paints and came under tariff heading 32.09, having, also, pointed out that the only process required and carried out by the applicant was the mere mixing of various paints for producing the required colour. After a visit to the premises of the applicant by the same team that had made the earlier visit and their suggestion for a reconsideration of the whole case so that the goods should be classified under tariff heading 32.09

* Tariff headings 32.09, 03.08 and 32.08 read as follows:

- “32.09 Varnishes and lacquers; distempers; prepared water pigments of the kind used for finishing leather; paints and enamels; pigments in linseed oil, white spirit, spirits of turpentine, varnish or other paint or enamel media; stamping foils; dyes and other colouring matter in forms or packings of a kind sold by retail”.
- “03.08 Materials for use in the manufacture of artificial teeth, buttons, paints, varnishes or composite solvents and thinners for varnishes and similar products”.
- “32.08 Prepared pigments, prepared opacifiers and prepared colours, vitri-fiable enamels and glazes, liquid lustres and similar products, of the kind used in the ceramic, enamelling and glass industries; engobes (slips); glass frit and other glass, in the form of powder, granules or flakes”.

the Director of the Department of Customs and Excise decided that the disputed cases should be allowed clearance under relief and as from 1.1.1977 any future consignments of the goods be classified under tariff heading 32.09 and be charged with duty accordingly. This new decision was made known to the applicant in writing and hence this recourse. In reply to the written address of counsel for the applicant the respondents have filed a written address and attached thereto an expert opinion* from the General and Technical Manager of the Cyprus Paint Company KEX Ltd. which was to the effect that the articles imported by applicant were semi-finished paints and resin/binders and which by a simple operation were mixed into finished paints and therefore no process or manufacturing was applied or required by the applicant to turn the imported articles into paints.

Held, (1) that the change of approach by respondents was in Law possible if arrived at after a full and due inquiry called by the circumstances and if cogently reasoned; and that this course was duly followed by respondent 2 through his appropriate officers and the material in the file reveals a cogent reasoning for the new approach (see, also, *P.M. Tseriotis Ltd. and Others v. The Republic* (1970) 3 C.L.R. 135 at p. 143).

(2) That in matters of classification of goods an administrative Court has no competence to substitute its own discretion in the place of the discretion of the proper authorities though, as in every other case of recourse under Article 146 of the Constitution, the Court has to examine the legality of the *sub judice* decision and also whether it was reached through any misconception and cognate matters (see *A. & S. Antoniadis & Co. v. Republic* (1965) 3 C.L.R. 673 at p. 680); that no doubt the *sub judice* decision was reasonably open to the respondent and support for it can be found in the report of the expert, filed by the respondents in lieu of oral evidence, and once its legality cannot be questioned and there has been no misconception or other relevant matter on the part of the respondents, this Court, in the exercise of its administrative jurisdiction, finds that on the authority of *Antoniades (supra)* has no competence to substitute its own discretion with that of the appropriate authority; and that, accordingly, the recourse must fail.

* The text of the opinion is quoted at pp. 594–8 *post*.

Held, further, on the alternative submission of the applicant that the goods in question should be classified under tariff heading 32.08: That this heading is inapplicable as it refers to "prepared pigments, prepared opacifiers and prepared colours, vitrifiable enamels and glazes, liquid lustres and similar products, of the kind used in the ceramic, enamelling and glass industries, engobes (slips), glass frit and other glass, in the form of powder, granules or flakes", whereas the subject goods are used for painting cars.

Application dismissed.

10 Cases referred to:

P.M. Tseriotis Ltd. and Others v. The Republic (1970) 3 C.L.R. 135 at p. 143;

A. & S. Antoniadis and Co. v. The Republic (1965) 3 C.L.R. 673 at p. 680.

15 **Recourse.**

Recourse against the decision of the respondents to classify certain materials as paints under tariff heading No. 32.09 instead of as raw materials under item No. 03, sub-heading 08, of the fifth Schedule to the Customs and Excise Duties Law 1975 (Law 34/75) and collect import duty at the rate of 35% instead of nil.

R. Michaelides, for the applicant.

Cl. Antoniadis, Counsel of the Republic, for the respondents.

Cur. adv. vult.

25 A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks:-

(a) A declaration of the Court that the decision of the respondents dated 18.2.1977 to classify certain materials as paints under tariff heading No. 32.09.90 instead of as raw materials under item No. 03, sub-heading 08, of the fifth Schedule of the Customs and Excise Duties Law 1975, (Law No. 34 of 1975), and collect import duty at the rate of 35% instead of nil, entertained in Form G.2, is null and void and contrary to law and/or it was taken in abuse of powers and/or under a misconception of law or fact.

(b) A declaration of the Court that the decision of the respondents dated 11.3.1977 to classify certain materials

as paints under tariff heading No. 32.09.90 instead of
as raw materials under item No. sub-heading 08, of
the fifth Schedule of the Customs and Excise Duties
Law 1975, (Law No. 34 of 1975), and collect import
duty at the rate of 36% or 35% respectively, instead
of nil, as stated in Form C.2, is null and void and
contrary to law and/or it was taken in abuse of powers
and/or under a misconception of law or fact. 5

The facts of the case as appearing from the statement of facts
in the application and the opposition, the correspondence 10
exchanged and the relevant file of the administration, are as
follows:-

The applicant, who had decided to set up a unit to manufa-
cture car paints, varnishes, lacquers, thinners and glues, called
on 9.8.1972 at the office of the Director of the Department of 15
Customs and Excise, respondent 2, and inquired whether certain
materials which he intended to import, could be classified under
relief item 15(h) of the fourth Schedule to the Customs and
Excise (Duties and Drawbacks) Law 1967, (Law No. 81 of 1967),
and so import them free of customs duties as he claimed that 20
these materials were destined to be used by him in the factory he
was proposing to establish for the manufacture of car paints.
He produced also some samples of the materials and a formula
leaflet.

The applicant then reduced into writing his case in a letter 25
dated 10.8.1972 and called also at the office of respondent 2,
on the 25th August, 1972. After a discussion on the whole
subject, he was requested to supply respondent 2 with full and
detailed particulars of the materials and/or paints to be used
with an outline of the manufacturing process involved up to the 30
end of the product. This request is also contained in a letter
addressed to the applicant on the same day, (copy of which is
attached to the application, marked 'B', and which reads as
follows:-

“ I refer to your letter TPM/JAE of the 10th August, 1972, 35
enquiring as to whether materials to be imported for use
in the manufacture of car-paints can be so imported free
of duty under the existing legislation and inform you that,
in accordance with item 15(h) of the Fourth Schedule to
Law No. 81/67 such materials may be imported free of any 40

duty provided that they are imported directly by a manufacturer of paints for use exclusively in the manufacture of paints.

5 It is requested that a list of products to be used for this purpose is submitted to me, at your earliest convenience, together with a brief outline of the manufacturing process involved to the end product”.

10 On 2.3.1973, the applicant effected his first clearance of the goods at issue through Limassol Customs and continued his clearances till 19.5.1976. On all these clearances the Customs Authorities of Limassol and Famagusta, through which stations the goods at issue were cleared, accorded Relief under the respective Relief Items of the aforesaid Laws, thus, the goods were imported and cleared by the applicant free of Customs
15 duties, despite the doubts raised, by both stations, as to the proper classification of the goods.

On 5.10.1973 the Senior Collector of Customs Famagusta addressed to respondent 2 a letter (*exh.* 1 bl. 14) and submitted that the materials covered by Famagusta Import Entry C.B.
20 No. 1404 of 24.9.1973, were *not* “raw materials for the manufacture of paints”, as declared by the applicant on the Import Entry lodged with him, but “paints and lacquers” falling under tariff heading 32.09.90 and, therefore, duty should have been charged at the time of clearance. Together with the clearance
25 documents the Senior Collector dispatched to respondent 2 samples of the goods and requested for instructions.

These samples were then sent to the Government Analyst who by his report of the 17.10.1973 (*exh.* 1 blue 16) expressed the opinion that the goods were falling under tariff heading 32.09
30 but on the same date he personally stated to the Officer in charge of the Relief Section of the Department of Customs and Excise that the goods could not be used as paints or lacquers in the state they were imported. A team of Customs Officials visited the premises of the applicant for verification and closer examination
35 of the process of manufacture and after being satisfied that the goods in question were in fact “raw materials” and not “ready-made paints”, the goods were allowed to be cleared on relief under Relief Item 03.08 of the fifth Schedule to the Customs and Excise Duties Law 1973, (Law 57 of 1973) then in
40 force; but for some items duty was charged and paid.

On subsequent clearances through the Limassol Customs, both by the applicant and other importers, the Collector there raised again the same doubts as to the proper classification of the goods in question and suggested that same should have been classified under tariff heading 32.09.90 and not Relief as he himself was sure that the goods were definitely paints and not raw materials. In spite of this, these goods were again released to the applicant under Relief prior, as claimed, to instructions from respondent 2. 5

On the 11th November, 1976, the Collector of Customs Limassol, questioned once more the Relief on a consignment of similar goods imported by a certain Nicos Theodorou of Nicosia and requested reconsideration of the whole case. The Officer in charge of the Nomenclature of the Department of Customs, scrutinized the clearance documents and the samples sent and came to the conclusion (see blue 21 of *exhibit 1*) that the goods were ready-paints and came under tariff heading 32.09.90 and pointed out that the only process required and carried out by the applicant was the mere mixing of various paints for producing the required colour of the car. The Deputy Chief Inspector of Customs also urged the re-classification of the goods as they were paints and lacquers and not raw materials. A visit was then paid to the premises of the applicant by the same team that had earlier paid a similar visit and they thereafter suggested reconsideration of the whole case submitting that the goods did fall under tariff heading 32.09.90 and that duty ought to be charged accordingly. 10
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Respondent 2 then, in view of the aforesaid facts and as stated in the statement of facts attached to the opposition (page 4), "having in mind the heretofore evolution of the whole subject and the prevailing practice, decided that the so disputed cases be allowed clearance under Relief and as from 1.1.1977, any future consignments of the goods at issue be classified under tariff heading 32.09.90 and be charged with duty accordingly (blue 24 of *exhibit 1*)." This new decision was made known to all persons concerned in writing and all Customs Stations were also informed accordingly (blues 25-28 of *exhibit 1*). 30
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On the 7th January, 1977, the applicant informed respondent 2 in writing of his opposition to the new decision and that he would pay under protest any duties demanded on future consign- 40

ments. On the 16th March, 1977, counsel for the applicant addressed to respondent 2 the following letter copy of which is attached to the application and marked 'A'—

5 “ We have been instructed by our clients Messrs. Taksan of Limassol, to reply to your letter dated 27.12.76 addressed to our clients on the subject whether certain materials essential in the process and manufacture of paints are exempted from custom duty or not and to inform you of the following:—

10 At this stage we are not commenting on your advices concerning such subject in your letter dated 25th August, 1972.

15 Moreover at this stage we are not commenting on the detrimental effects upon our clients' manufacturing unit and consequently their business.

20 However, at this stage our clients comment that your previous decision on the subject as set out in your letter dated 25th August, 1972, is the correct approach and your view taken in your letter dated 27th December, 1976, is erroneous.

First of all such materials so imported formerly were covered by Item 15(h) of the fourth Schedule to Law No. 81/67.

25 The same provision is reiterated in the Fifth Schedule under class 03 No. 03 of Law 34/75 at page 933.

The said provision reads that 'materials for use in the manufacture of paints'.

It is the submission of our clients that the goods so imported are materials within the said provision.

30 And in the circumstances the materials in question are exempted from duty.

35 It would be pertinent at this stage to refer to your comments in your letter dated 27th December, 1976, to the effect that you treat the materials in question as mixing colours or consider them as ready-made car paints and we wish on this issue to state our clients' views.

The materials in question are not mixing colours and definitely they are not ready-made car paints.

The materials in question are not even pigments either in the chemical sense or in the common use.

The staff in question constitute essentially materials and each by itself do not tantamount to colours or paints. The said materials after certain processing and suitable mixing yield the end result of colours or paints for use accordingly. 5

It should be noted that if the said materials do not undergo the required processing and the correct mixing they cannot be used on their own. 10

In the circumstances our clients had set up the unit in question towards such processing and manufacturing, thus contributing to the economy of this country. 15

At this stage our clients would like to turn on the definition of materials referred to in the Fifth Schedule to the Law 34/75. And they maintain that the goods in question are materials in the sense of such Fifth Schedule. Anyhow our clients would be pleased to hear your views of the definition of 'materials' used in such context. 20

Our clients would like you to reconsider the matter and we entertain the belief that you would revert to your previous decision.

In the meantime our clients have imported such materials and have paid the import duty under protest and with full reservation of their rights if need be to resort to the proceedings under section 161 of Law 82/67. 25

Please may we have your views at the earliest".

Respondent 2 replied to the above letter of the applicant by letter dated the 28th May, 1977, (*exhibit* 1, blue 31) which reads: 30

" I refer to your letter of the 16th March, 1977 in connection with my letter No. C.R. 03.08 of 27.12.76 addressed to your clients Messrs. Takisan Limassol, concerning the classification of paints. 35

Item 03.08 of the Fifth Schedule to Law No. 34/75

refers to materials for use in the manufacture of paints. In the present case the goods imported are in themselves paints, as also declared by the suppliers on the invoices issued by them, and as such are not covered by the above
5 relief.

The delay in replying to your letter is regretted.”

With regard to the nature of the process, counsel for the applicant has included the following in his written address:-

“The processing is as follows:

10 The paints are manufactured according to formulae and technique of DU PONT. Naturally the very technique and formulae cannot fully be disclosed for professional reasons.

15 The articles by themselves cannot be used as paints. Some have no colour at all and are colourless and some are clear and some if they contain certain colouring pigment have no decorative or adhesive or resisting qualities or properties.

20 The articles which are used to produce the finished product are about 6 to 11 in addition to other tints for colouring adjustment.

The articles by themselves are completely unsuitable at any as paints.

25 In the processing the exact formulae and the technique should be used. Also the exact ingredients have to be used to obtain adhesion, durability colouring and gloss.

30 Two thirds consist of clears and/or binders and/or balancers. They are designed for blending acrylic and NC enamels. Then several tints are used for colour and colouring adjustment.

The blended materials are then adjusted with regard to proper level of hiding and processed on the thrift-o-matic power agitator and the very technique lies in the performance of the agitator and its timing.

35 Then the blending is tested with the paint conditioner, check colour match and finally the gloss is measured with the electronic gloss tester.

It should be noted that certain articles have to be brought to a certain temperature during the processing for purposes of achieving the necessary shell of life.

After that the finished product is packed in tins”.

In reply thereto the respondents have asked the General and Technical Manager of the Cyprus Paint Company KEX Ltd. for his opinion as an expert on the matter by putting to him the following three questions:- 5

1. What is paint manufacture?
- (2) Is mixing considered manufacture? 10
- (3) Whether the submitted “samples” are ready-made paints which merely require further mixing with other materials such as binders, hardeners, etc.

His report with his covering letter were attached as Schedule ‘A’ to the written address of counsel and it reads as follows:- 15

“*Paint* (surface coating)

The terminology is somewhat confusing—when describing ‘Paint’ it usually refers to materials which are applied for their decorative effect, any protection afforded is of secondary importance. The term ‘surface coating’ is generally applied when protection is of prime consideration. 20

Paint manufacture is the use of organic, and in some cases inorganic coatings, composing of finely dispersed pigments suspended in a binder/resin which is usually dissolved in solvents, additions of plasticizers, stabilizers, metal driers, and other chemicals are required. 25

The processing, of the various chemicals involves the use of ‘specialist machinery’ in which both chemical and physical changes occur to the ingredients when forming a homogeneous liquid/paste this is the manufacturing stage The application of the paint or surface coating may be by conventional methods brush, spray, dipping etc., or by more sophisticated electrostatic, electrophoresis techniques. 30

As the ‘paint’ film dries the binder/resin changes its 35

'form'—from a liquid into a solid—this is effected by one or more of several mechanisms—

Evaporation, (of the solvents)

Oxidation, (of a drying oil)

- 5 Polymerisation, (by the application of heat, addition of a—catalyst or combinations of reactive—components).

Paint or surface coatings can be theoretically divided into two parts:—

- 10 Physical properties and chemical properties.

(A chemical composition and a mechanical process which has a physical suitability in ascertaining the durability of the surface).

Examination of samples.

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- | | |
|---------------|------------|
| 1. Black | No. 405 L |
| 2. Red Orange | No. 436 L |
| 3. Yellow | No. 453 L |
| 4. White | No. 401 L |
| 5. Binder | No. 575 V. |

- 20 With the exception of sample No. 5 the above products represent a series of pigments powders pre-ground (milled) into a resin/binder base technically these are semi-finished paints.

- 25 To produce a 'finished paint' from the above products, is a very simple operation ... known as The 'Weighing Method' ... sometimes described as Mother colours + Binder.

Materials required.

- 30
- *1. Single mixer or stirrer—(can be manual or power).
 2. Precision weighing scales.
 3. Formulations ... the % base colour and Binder required to obtain a specific—colour/shade.

*(Sometimes 'electric shakers' are recommended for the mixing stage ... this is not necessary).

- 35 Such equipment can be installed in retail shops and the time involved in obtaining a finished colour is about 5

minutes providing the bases and binder are weighed accurately.

The mechanical operation is 'mixing' whether electrical/mechanical/manual and should not be confused with dissolving. The 'mixing aspect' is merely the method of obtaining a homogeneous product from *pre-determined, pre-manufactured* 'Bases', and Binders. The method used is much the same as the— 5

—I.C.I. car paint system

—Robbilac colourizer system. 10

Also it can be said of the two-pack products such as epoxide—polyurethane paints.

Semi-finished paints.

These types of products are usually termed "Bases" and consist of a high percentage of pigment (dry colour) which is dispersed in a small quantity of resin (liquid binder). The 'Base' itself cannot be used as a finished paint solely to the lack of resin (binder) content, or conversely its excessive pigmentation. However an addition of resin (binder) enables the base to function as a finished paint, this extra addition gives the surface characteristics required—drying, flexibility, adhesion, degree of gloss, etc., etc. 15 20

The 'manufacturing aspect' is the production of the 'Base'—this is the grinding/dispersion of the dry pigment into the resin binder to effect this procedure the following stages are required— 25

1. Premix—known as 'pugging'—mechanical heavy duty power machinery—This 'pugging' produces a coarse mixture of the pigment and binder—called 'Slurry' or 'Paste'. 30

2. Grinding—termed 'milling'—involving special machinery—e.g. Ball mills, Single or Triple Roll mills, Pearl Mills, Micro-wave Mills, Attritors, etc. etc. 35

This is the 'critical stage' of paint manufacture

the pre-mixed stage—'Slurry' or 'Paste' consists of pigment particles of varying shapes and sizes which require breaking down to a given degree of fineness, by use of one or more of the above mentioned machines this is obtained and it is called Milling, Grinding, Dispersion during this process the surface characteristics of the pigments and resins themselves under-go changes.

It is a physico-chemical process which is too highly complex to be explained in a few sentences.

3. *Blending*

This operation is carried out after the 'milling', 'grinding' stage further additions of various chemicals—or premade 'bases' are incorporated thereby ensuring stability of the base and ensuring that the final addition of a 'binder' by a non-technician—(retailer) will produce the required finish The 'blending' stage involves the use of high-speed dissolver/mixer.

20 *Binders*

The appearance of a binder and or resin is similar to that of a clear varnish ... but dependant upon its chemical composition may be drying or non-drying ... In this specific case the 'binder' in question is not produced from an oil basis. (The manufacture of 'resins' is a very complex technology ...). However some binders can be fairly easily produced as is an acrylic binder the acrylic resin in this instance is in the form of a free flowing white powder, which will dissolve in certain solvents or rather blends of solvents and diluents when subjected to a temperature controlled high-speed dissolving machine.

It is also possible to utilize the 'binder' as a clear finished lacquer, however some slight modification during the manufacturing stage is usually necessary.

35 From the above it may be realised that the 'manufacture' is the production of the 'bases' and 'binders' both of which require stocks of raw materials—chemicals, special machinery, and technical knowledge to produce.

Mixing semi-finished bases and binders can be equated with producing Jellies, 'blancmange' or any other premade commodity ...".

Both sides elected to adduce no evidence and the case, therefore, has to be decided, as far as the facts are concerned, on the material which is contained in the relevant file and that herein-above set out which has been made part of their respective addresses. 5

Before examining the arguments advanced, it may be useful to quote here the tariff headings connected with this case. 10
Tariff heading 32.09 of Law 34 of 1975, reads as follows:

"32.09 Varnishes and lacqueres; distempers; prepared water pigments of the kind used for finishing leather; paints and enamels; pigments in linseed oil, white spirit, spirits of turpentine, varnish or other paint or enamel media; stamping foils; dyes and other colouring matter in forms or packings of a kind sold by retail: 15

10 Distempers

90 Other." 20

Item No. 03, sub-heading 08, of the fifth schedule, which is related to section 11 of the said Law and contains a list of goods of specified description conditionally eligible for relief from import duty, reads as follows:-

"03.08 Materials for use in the manufacture of artificial teeth, buttons, paints, varnishes or composite solvents and thinners for varnishes and similar products." 25

The question that falls for determination is whether the goods imported, could as such be considered as "paints" and therefore be classified under tariff heading 32.09 or materials for the use for the manufacture of "paints" coming under relief item 03.08; or that failing the above they should be treated under tariff heading number 32.08.90. 30

In support of his case which has already been outlined by reproducing the contents of his letter of the 16th March, addressed to respondent 2, counsel for the applicant, has invited 35

the Court to rely on the Golden Rule of construction so that the material words in the aforesaid provisions—on the meaning and effect of which the outcome of the classification for import duty purposes turns—should be given their ordinary meaning.

- 5 For that purpose reference has been made to the meaning of these words as given in the Concise Oxford Dictionary 3rd edition. “Paint” is defined in the Concise Oxford Dictionary 3rd edition as “solid colouring-matter suspending in liquid vehicle so as to impart colour to a surface.” “Material” means
- 10 “matter from which a thing is made, as raw ‘unmanufactured’”. “Manufacture” as a noun means “the making of articles by physical labour or machinery, especially on a large scale”. And the transitive verb to “manufacture” means “work up material for use; produce articles by labour, especially on a large scale.”
- 15 In Halsbury’s Laws of England 3rd Edition volume 29 para. 51 the meaning of “manufacture” has been said to be

- “ that a ‘manufacture’ must have some reference to trade or commerce, and that it must be for, or have as its product, something of a material nature. These conditions how-
- 20 ever, if necessary, are certainly not sufficient. One test for ‘manufacture’ is whether a vendible product is produced, improved, restored or preserved, and whilst this test is somewhat narrow, absence of a vendible product ordinarily negates patentability. Not all vendible products, however,
- 25 are produced by manufacture, which is concerned only with the useful as distinct from the fine arts, and with industry as distinct from agriculture and other such applications of natural processes. ‘Manufacture’ has been defined as a ‘manner of adapting natural materials by the hands of
- 30 man or by man-made devices or machinery’, and as ‘the making of an article or material by physical labour or applied power’; but the practice is to accept as ‘manufacture’ a wider range of industrial activities than such a definition would suggest. It includes articles made in
- 35 situ as well as articles made in a factory.”

No definition is given in the Customs Law of the aforesaid terms and they must, generally speaking, be understood in their popular sense. Useful reference may be made also to the rules set out in the Law for the interpretation of the nomencla-

ture. Relevant in my view, in the present case is rule 2 thereof which reads as follows:

- “2.-(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as imported, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), imported unassembled or disassembled. 5 10
- (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.” 15 20

In the present case the respondent Director of Customs after a new and full inquiry into the matter changed his original approach and classified the materials under consideration under tariff heading 32.09.90. In his letter of the 27th December, 1976 of *exhibit* 1, blue 27, he confirmed the view expressed earlier by one of his officers, that the mixing of colours imported by the applicants under relief item 03.08 of the 5th Schedule to the Law were ready-made car paints and not materials for making such paints. As such they were not covered by the said relief item and informed the applicants that any future importations would be charged under the tariff heading already mentioned. He further informed the applicants that the binder and balancer used with the said paints “being solutions of plastic resins the solvents of which exceed 50% of the weight of the solution were also to be classified under the said tariff heading”. In essence the respondent has treated the mixing of paints by the process followed by the applicant, as not amounting to a “manufacture” of paints, especially when seen in the light of the materials used, which are in themselves paints, though not capable of use in the . () 25 30 35

state they are imported without that mixing and addition of hardener, etc.

Such a change of approach was in Law possible. It had, however, to be arrived at after a full and due inquiry called by the circumstances and cogently reasoned. A course duly followed by respondents 2, through his appropriate officers and the material in the file reveals a cogent reasoning for the new approach. Moreover the new decision was made effective prospectively and all interested parties were informed accordingly.

In the case of *P.M. Tseriotis Ltd., and others v. The Republic* (1970) 3 C.L.R. p. 135, Triantafyllides, J., as he then was, at p. 143 said: "Of course if the practice followed in the past by the department in question was contrary to Law it cannot create a legal rule which would enable the applicants to succeed in these recourses."

As stated in the case of *A. & S. Antoniadis and Co., v. The Republic* (1965) 3 C.L.R. p. 675, at p. 680, "In matters of classification of goods, such as the present Case, an Administrative Court has no competence to substitute its own discretion in the place of the discretion of the proper authorities (*vide* Decisions of the Council of State in Greece 479/1938, 564/1949); but, of course, as in every other case of recourse under Article 146 the Court has to examine the legality of the *sub judice* decision, and also whether it was reached through any misconception and cognate matters."

No doubt the sub-judice decision was reasonably open to the respondent and support for it can be found in the report of the experts on paints, filed in lieu of oral evidence, and once its legality cannot be questioned and there has been no misconception or other relevant matter on the part of the respondents, in the exercise of my administrative jurisdiction, I find that on the authority of Antoniadis, (*supra*) I have no competence to substitute my own discretion with that of the appropriate authority. The recourse therefore should be dismissed.

Before, however, doing so, I would briefly deal with the alternative submission of the applicant that the goods in question should be classified under tariff heading number 32.08. In my

view this heading is inapplicable as it refers to “Prepared pigments, prepared opacifiers and prepared colours, vitrifiable enamels and glazes, liquid lustres and similar products, of the kind used in the ceramic, enamelling and glass industries; engobes (slips); glass frit and other glass, in the form of powder, granules or flakes”, whereas the subject goods are used for painting cars. 5

For all the above reasons this recourse is dismissed but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs. 10