

1985 December 9

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

MARIOS KRITIKOS,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE DIRECTOR OF CUSTOMS AUTHORITIES,

*Respondent.*

(Case No. 140/84).

—  
*The Customs and Excise Duty Law, 82/67, s.161(1)—Importation of a second hand car—Dispute as to the assessment of its market value—Applicant failed to follow the procedure laid down by said section—Therefore, he does not possess a legitimate interest to pursue his claim by the present recourse.* 5

*Administrative Law—Administrative act—Executory act—An act confirmatory of a previous decision or explanatory of the provisions of the law on which the previous decision was based lacks executory character—And as the previous decision had not been challenged within the prescribed time of 75 days, the recourse is out of time.* 10

*Time within which to file a recourse—Article 146.3 of the Constitution.*

*Legitimate interest—See above under the Customs and Excise Duty Law 82/67.* 15

On the 3.7.82 the applicant obtained a temporary permit for the temporary importation in Cyprus of his Mercedes car registered in Germany. The applicant was bound to re-export the said car within the period stipulated by 20

the Customs Authorities. Such stipulated date was the 2.10.1982.

5 On the 23.9.82 the applicant applied for permission to remove the engine of the said car and re-export it to Germany for the purpose of effecting repairs thereon. This application was approved on condition that after the removal of the engine the car will be placed in a general bonded warehouse.

10 On the 30.9.82 the said car was stored in a general bonded warehouse. The engine was re-exported to Germany on the 31.7.83. On the 5.8.83 the applicant filed with the Customs Authorities the necessary documents for the clearance of the said car without engine and gear box. By letter dated 17.9.1983 addressed to the Senior Collector of Customs with copy to the applicant the Director of the Department of Customs and Excise allowed the said clearance on the basis of a dutiable value to be assessed as follows, namely "original C.I.F. price of the car, plus any extras as may be ascertained by you, LESS the value of the 15 missing engine and gearbox estimated at £2,000, LESS normal wear and tear allowance from the resulting sum".

20 The car was cleared on the 14.10.83 upon payment by the applicant under protest of £5,789.180 mils being the assessed duty payable.

25 On the 19.12.1983 the applicant by letter to the Director of Customs and Excise protested against the estimation of the value of the car made by the customs authorities alleging inter alia that the value of the engine was much higher than £2,000 and requesting revision of the 30 duty imposed. By letter dated 9.1.1984 the Director informed the applicant of the relevant provisions of the Law, set out the basis on which the dutiable value had been assessed and finally stated that the matter cannot be reconsidered.

35 As a result the applicant filed the present recourse.

*Held, dismissing the recourse.*

\*(1) This case is covered by the provisions of section

161(1) (a)\* of Law 82/67.

The decision *In Re E. Philippou Ltd.* (1984) 1 C.L.R. 757, distinguished, on the ground that in that case the goods were imported as brand new on the basis of invoices and the Director of Customs and excised refused to accept as correct a lower value of the goods concerned than that shown in the invoices, whilst in the present case the car was imported not as a brand new car and its importation was not effected on the basis of the price shown on any invoice but on the basis of an assessment of its market value as a second hand car and the dispute arose in respect of such assessment.

Assuming that the facts of this case are in line with the facts in *In Re Philippou Ltd.*, the decision of the Director could be challenged under section 161(1)(b) of the said Law.

In any case since the applicant failed to follow the procedure envisaged by section 161(1) he does not possess a legitimate interest to pursue his claim by means of this recourse.

(2) The recourse is out of time. The contents of the letter dated 9.1.1984 do not add anything more to the previous decision of the Director dated 17.9.1983, but is a mere repetition of the mode of the assessment of the dutiable value, explaining also the relevant provisions of the Law. It follows that the letter of 9.1.1984 does not embody a new decision, but is merely confirmatory of a previous decision and as such it lacks executory character. Therefore and as the applicant failed to challenge the decision communicated by the letter of 17.9.83 or the subsequent act of the payment by him on 14.10.83 of the duty levied within the prescribed period of 75 days, this recourse is out of time.

*Recourse dismissed.*  
*No order as to costs.*

\* Subsection (1) of Section 161 of Law 82/67 is quoted at pp. 2647-2648 post.

Cases referred to:

*In Re Philippou* (1984) 1 C.L.R. 757.

**Recourse.**

5 Recourse against the decision of the respondent whereby he refused to reconsider applicant's request for the review of the import duty imposed for the importation by the applicant of a Mercedes car 300 D.

*D. Liveras*, for the applicant.

*M. Photiou*, for the respondent.

10

*Cur. adv. vult.*

SAVVIDES J. read the following judgment. Applicant in the present recourse is the owner of a Mercedes car which was registered in Germany and was temporarily imported in Cyprus by virtue of a temporary permit dated 3.7.82  
 15 after a declaration by the applicant that he was importing the said car temporarily and that he was undertaking to comply with the conditions laid down in the Laws and regulations of the Republic set out in a notice attached thereto under No. 28 and to re-export same within the  
 20 period stipulated by the customs authorities. Such stipulated date was the 2nd October, 1982 as appears on such form, copy of which was produced as exhibit 1.

The applicant on the 23rd September, 1982 applied for permission to remove the engine of the said car and export  
 25 it to Germany for the purpose of effecting repairs thereon. Such application was approved by the Director of Customs by letter dated the 24th September, 1982 which reads as follows:

30 "With reference to your letter dated the 23rd September, 1982 whereby you applied for permission to remove the engine of the said car under No. 617912-22142152 and export it to Germany for repair, I wish to inform you that your application has been  
 35 granted on condition that the car after the removal of the engine will be placed in a general bonded ware-

house and the exportation will be made on customs form C. 32”.

On the 30th September, 1982 the car was stored in a general bonded warehouse and the engine of the car was removed and exported on the 31st July, 1983. On the 5th August, 1983, the applicant filed with the department of customs the necessary documents for the clearance from the customs of his car without engine and gear box. As a result, the Senior Collector of Customs of Limassol addressed a letter, dated the 17th August, 1983 to the Director of the Department of Customs and Excise asking him for information as to the C.I.F. price of the said car, the date of registration of which appeared to be the 7th December, 1981. The Director of the Department of Customs and Excise by his letter dated the 1st September, 1983, addressed to the Senior Collector of Customs of Limassol replied as follows:

“I refer to your letter No. 135/83 of the 17th August, 1983 enquiring as to the C.I.F. price of the diesel engine and gear box of the above car which was exported per s/s “O ELYTIS” on the 31st July, 1983, and inform you that clearance to home use of this car should not be allowed until its engine is reinstated.”

The applicant made oral representations in protest to the said letter as a result of which the Director of the Department of Customs and Excise reconsidered the matter and by his letter dated the 17th September, 1983 addressed to the Senior Collector of Customs with copy to the applicant allowed the clearance for home use of the car in question subject to the satisfaction of certain conditions which were set out therein. The contents of such letter read as follows:

“I refer to my letter of even number dated the 1st September, 1983, and your letter No. 651/82 (S. 13) dated the 9th September, 1983, and inform you that clearance to home use of the car in question may be allowed on the basis of a dutiable value to be assessed as follows:

- (a) original C.I.F. price of the car,
- (b) plus any extras as may be ascertained by you,
- (c) LESS the value of the missing engine and gear-box estimated at £2,000 (two thousand),
- 5 (d) LESS normal wear and tear allowance from the resulting sum."

The car was cleared by the applicant for home use on 14.10.83 upon payment by him under protest of the sum of £5,789.180 mils, which was assessed as duty on the value of the car as estimated by the customs.

On the 19th December, 1983, the applicant by letter addressed to the Director of the Department of Customs and Excise, Nicosia, protested against the estimation of the value of the car by the customs authorities, which led to the imposition of the import duty paid by him under protest. and in particular in respect of the value of the engine and gearbox which was estimated at £2,000, contending that the value of such engine was much higher, alleging, inter alia, that he was treated in a discriminatory manner and requesting the Director to revise the duty imposed.

The Director of Customs by his letter dated the 9th January, 1984, rejected applicant's request. The contents of such letter which embody the decision challenged by this recourse read as follows:

"I wish to refer to your letter dated the 19th December, 1983, on the above subject and inform you that, according to the Law the dutiable value of any goods is their normal price, that is to say the price they would fetch on a sale in the open market between a buyer and a seller independent of each other, at the time of presentation of the home use entry.

In the case of private used motor cars which are not the subject of a bona fide commercial sale and therefore, their normal price cannot be documentarily established, the Customs Authorities assess their dutiable value taking into consideration the type of a car, its condition at the time of valuation and its age.

In your case the dutiable value of your above car was assessed on the following basis:

- (a) The original C.I.F. price of the car as shown in this Department's records;
- (b) Less the value of the missing engine and gear box estimated to be, at the time of its first registration, at £2,000.- to arrive at a C.I.F. price of the car without engine and gear box; 5
- (c) Less normal wear and tear allowance from the resulting sum i.e. after the deduction of the value of the engine and gear box, being already deducted in full and therefore no further depreciation allowance could be justified on something which was not in existence at the time of valuation. 10

The above assessment was based on the methods followed hitherto for all persons (your case was a special one, being a car without engine and gear box) and therefore you were not treated in a discriminatory manner as you allege in your aforementioned letter. The dutiable value arrived at is proper and reasonable and I regret to inform you that it cannot, therefore, be reconsidered." 15 20

As a result, applicant filed the present recourse challenging such decision and praying for the following relief: 25

"Declaration of the Court that the act and/or decision of the respondent communicated to the applicant by letter dated 9.1.1984 whereby his request that the appropriate authorities review the import duty which was imposed for the importation of a Mercedes car 300 D which was registered on 17.12.81 under foreign registration No. 890 - Z - 8713 and reduce the import duty according to the letter of the applicant dated 19.12.83 is null and void and of no legal effect whatsoever." 30 35

The legal grounds relied upon as set out in the application are the following:

1. The sub judice act or decision and/or omission amounts to an abuse and/or excess of power.
2. The respondent treated the applicant in a discriminatory manner, given that in similar cases he applied a different method of imposing import duty.
3. The respondent acted under a misconception of fact and failed to take into consideration material facts and/or relied on matters which could not be lawfully taken into consideration.
4. The respondent acted in violation of the Customs and Excise Law 1967 and in particular sections 30, 159, 163.
5. The respondent acted in contravention of the First Schedule of the regulations issued by virtue of section 159 (1) of the Customs and Excise Law of 1967.
6. The reasoning does not support the sub judice act and/or is not the proper one in the circumstances of the case.

By his opposition counsel for the respondent raised the following legal objections:

1. The procedure contemplated by section 161 of the Customs and Excise Law, 1967 should have been followed by the applicant before a legitimate right for filing a recourse could be acquired.
2. The act and/or decision of 9.1.1984 which is challenged by this recourse is not of an executory character but is merely confirming the decision of the applicant dated 14.10.83 to collect the respective import duty and, therefore, it cannot become subject of a recourse. The applicant failed to file a recourse against the decision of the respondent of 14.10.83, and, therefore, the present recourse is out of time.
3. Without prejudice to the above it is contended that the sub judice act and/or decision was taken lawfully and properly after a due inquiry in the matter and in accordance with the Customs and Excise Law of 1967 and especially sections 24 and 159 of the Customs and Excise Law of 1978 (Law 17/78).



By his written address counsel for applicant submitted that the procedure contemplated by section 161(1)(a) of Law 82/67 is not applicable in the present case as there is no dispute concerning the value of the engine which value is that which is referred to in the invoice and made reference in this respect to case No. 1/83 *In the matter of E. Philippou* (1984) 1 C.L.R. 757. 5

He further contended that:

(a) the decision contained in the letter is not of a confirmatory character of a previous decision but is the decision which was taken after a reconsideration of the matter on the application of the applicant and after a new inquiry was made. 10

(b) The decision of the Director to fix the value of the engine at £2,000 (equivalent of 10,000 DM) whereas its actual value was £3,000.- (14,000 DM) was arbitrary, unreasonable and unjustified. 15

(c) The Director acted all along under a misconception of fact in that the reduction of the original value of the car in respect of wear and tear for use of the same, was wrongly made after deducting the value of the engine therefrom whereas the correct method which should have been adopted was that the reduction for wear and tear for use should have been made on the original value of the car including the engine as the engine which the agent exported was also subject to wear and tear. 20 25

(d) The decision is not duly reasoned as no explanation is given why the Director proceeded as he did in imposing the tax without deducting the wear and tear for use of the engine and the gear box as well. 30

(e) The way that the Director has acted in the present case amounts to a discriminatory treatment of the applicant compared to other similar cases.

Counsel for respondent in his written address expounded on the grounds of law raised by him in his opposition. He submitted that the case of *E. Philippou Ltd.* is not applicable in the present case as that was a case of new goods which were imported on the basis of invoices on which 35

the value was recorded and that in the present case the failure of the applicant to follow the procedure contemplated by section 161 of Law 82/67 is a bar to the present recourse.

5 Counsel for respondent further expounded on the principles applicable to acts and/or decisions of a confirmatory character and submitted that in the present case the decision for the imposition of the duty complained of was  
10 taken on 14.10.83 and the applicant, once he did not make use of the procedure contemplated by section 161 of Law 82/67 should have filed a recourse within 75 days as  
15 from 14.10.83. As a result, he submitted that the present recourse cannot be entertained as it was filed out of time.

Counsel for respondent by his address explained the  
15 method adopted by the Director of Customs in arriving at the figure of the duty paid and made reference in this respect to the relevant provisions in the Customs Law 82/67.

Before embarking on the substance of the case, I shall  
20 deal first with the preliminary objections raised by counsel for respondent. It is useful to quote in full sub-section (1) of section 161 of Law 82/67 which reads as follows:

«161. - (1) 'Εάν, πριν ή εισαχθέντα έμπορεύματα παραδοθώσιν έκ του τελωνειακού έλέγχου, αναφυή οιαδήποτε διαφορά καθ' όσον άφορα εις τό εάν όφείλεται  
25 ήπ' αύτων οιοσδήποτε δασμός ή τό ποσόν τουτου, ό εισαγωγεύς όφείλει νά καταβάλη τό αίτούμενον υπό του άρμοδίου λειτουργού ποσόν, δύναται όμως έντός τριών μηνών τό θραδύτερον από της πληρωμής -

(α) εάν μέν ή διαφορά άφορα εις άξίαν των έμπορευμάτων, νά απαιτήση όπως τό ζήτημα παραπεμφθή  
30 εις την δισαιτησίαν προσώπου, διοριζομένου υπό Δικαστου του 'Ανωτάτου Δικαστηρίου, και μή τελούντος έν τή ύπηρεσία οιοσδήποτε Κυβερνητικού Τμήματος, ούτινος ή απόφασις είναι τελειωτική και  
35 άνέκκλητος' ή

(β) έν πάση έτέρα περιπτώσει νά υποβάλη αίτησιν τω άρμοδίω δικαστηρίω δι' απόφασιν αύτου περι τό

ποσόν τοῦ τυχόν κατὰ νόμον πληρωτέου ἐπὶ τῶν ἐμπορευμάτων δασμοῦ».

(161.- (1) If, before the delivery of any imported goods from customs charge, any dispute arises as to whether any or what duty of customs is payable on those goods, the importer shall pay the amount demanded by the proper officer but may, not later than three months after the date of the payment - 5

(a) if, the dispute is in relation to the value of the goods require the question to be referred to the arbitration of a referee appointed by a Judge of the Supreme Court, not being an official of any Government Department, whose decision shall be final and conclusive; or 10

(b) in any other case, apply to a competent Court for a declaration as to the amount of duty if any, properly payable on the goods). 15

The above provision was considered by this Court in *Re E. Philippou Ltd.* (1984) 1 C.L.R. 757 which was an application under section 161(1)(a) of the Customs and Excise Duty Law, 1967 (Law 82/67) for the appointment of an arbitrator to whom a dispute between the applicant in that case and the Director of Customs and Excise regarding the customs duty payable in respect of imported goods, was to be referred. Triantafyllides, P. in expressing his view as to the construction of section 161(1) had this to say at page 759: 20 25

“In my view the procedure regarding arbitration, envisaged by section 161(1)(a) of Law 82/67, can only be resorted to when there is a dispute as to the actual value of imported goods and not where the Director of the Department of Customs and Excise refuses to accept as correct a lower value of the goods concerned than that which is shown on the invoice in relation to which their import into Cyprus has taken place, as is the situation in the present case. 30 35

Consequently, I find that section 161(1)(a) is inapplicable to the dispute which has arisen on the pre-

sent occasion, when in effect, the Director is being asked, by the applicants, to value goods, imported by them, at a price less than that which is shown on the relevant invoice; and the adoption by him of such a course involves the exercise of discretionary powers on his part. I am of the view that the decision of the Director in a matter of this nature could conceivably be challenged only under paragraph (b) of section 161(1) of Law 82/67 which has to be read in conjunction with Article 146 of the Constitution.”

I wish, however, to draw a distinction between the above case and the present one. In the case of *In Re E. Philippou Ltd.* the goods were imported as brand new on the basis of invoices and the Director of the Department of Customs and Excise refused to accept as correct a lower value of the goods concerned than that shown on the invoices. In the present case the car in question was not a brand new car and its importation was not effected on the basis of the price shown on any invoice but on the basis of an assessment of its market value as a second-hand car and the dispute arose in respect of such assessment.

Bearing in mind the provisions of section 161(1) I am inclined to agree with the contention of counsel for applicant that the present case is one covered by section 161(1) (a).

Assuming, however, that the facts of the present case are in line with those *In Re E. Philippou Ltd.* and that in accordance with the construction of section 161(1) (a), to the extent mentioned in that case, the procedure envisaged by section 161(1) (a) is not applicable then on the strength of the judgment in that case, the decision of the Director would be a matter of a nature that could conceivably be challenged under paragraph (b) of section 161(1) of Law 82/67. The applicant having failed to follow the procedure envisaged by section 161(1) of Law 82/67, does not possess a legitimate interest to pursue his claim by means of this recourse.

Leaving aside the question of section 161(1) of Law 82/67, which, as I have already found is detrimental to applicant's case, and assuming that the decision of the

Director of Customs and Excise is by itself an executory administrative act subject to an annulment by recourse under Article 146 of the Constitution, the question arises as to whether the present recourse has been filed within the time limit of 75 days prescribed by paragraph 3 of Article 146. I shall proceed to examine this aspect of the case as well, as it touches the second preliminary objection raised by counsel for respondent. 5

The decision of the respondent as to the method of assessment of duty payable by the applicant on the importation of his car was communicated to the applicant by respondent's letter of the 17th September, 1983. On the basis of such decision the import duty was assessed at £5,789.180 mils and such amount was paid by the applicant, though under protest, on the 14th October, 1983. So, in any event the administrative act which followed the decision of the respondent was completed the latest on the 14th October, 1983. The applicant failed to challenge such decision within the time limit of 75 days fixed by paragraph 3 of Article 146. Instead he wrote a letter on the 19th September, 1983, protesting against the import duty levied on him and requested a review of the duty. 10 15 20

The respondent by his letter of the 9th January, 1984, informed the applicant that the matter could not be reconsidered explaining the reasons why such a reconsideration could not take place. The contents of such letter do not add anything more to the previous decision of the respondent of the 17th September, 1983 but is a mere repetition of the mode of the assessment of the dutiable value of applicant's car, explaining also to him the provisions of the law in respect of the importation of goods of the nature in question. 25 30

It is clear from the contents of the letter of the respondent dated the 9th January, 1984 that such letter does not embody a new decision but is merely a confirmatory of a previous decision and explanatory of the law and as such it does not amount by itself to a new executory act or decision which could be challenged by a recourse. Therefore, applicant's recourse is time barred through his failure to challenge the decision of the Director of Customs and 35 40

Excise dated the 17th September, 1983 or the subsequent act of the payment by him on the 14th October, 1983, of the duty levied, within the prescribed period of 75 days.

5 For all the above reasons this recourse fails and it is hereby dismissed. With great reluctance I have decided to make no order for costs.

*Recourse dismissed.*

*No order as to costs.*