

1984 November 13

[TRIANTAFYLIDIS, P., HADJIANASTASSIOU, A. LOIZOU,
DEMETRIADES, STYLIANIDES, JJ.]

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF INCOME TAX,

Appellants,

v.

THE CYPRUS PORTS AUTHORITY,

Respondent.

(Revisional Jurisdiction Appeal No. 303).

Income Tax—The Cyprus Ports Authority—It should be regarded as in consimili casu with servants of the Republic—Therefore, the Authority is not liable to income tax.

5 *Ports and Harbours—Outline of the legal position in Cyprus since 1878 to the present day—Their management, functions and operation are matters of a Governmental nature regulated by statute and delegated legislation—The Cyprus Ports Authority Law 1973—The establishment of the Authority cannot be considered as abandonment of State*
10 *responsibilities for Ports and Harbours, but only a mode of operation in respect of which considerable control was retained by the State.*

15 The Commissioner of Income Tax raised assessments for the years of assessment 1978 (Year of income 1977 and 1981 (Year of income 1980) by which the Cyprus Ports Authority was assessed to pay as income tax £1,453.500 mils and £18,608.835 mils respectively. The Cyprus Ports Authority challenged the said assessments by means of a recourse. A Judge of this Court
20 annulled the said assessments on the ground that the said Authority was not liable to income tax, because it was an agency of the State in consimili casu to servants of the State, carrying out governmental duties and discharging State responsibilities.

Hence the present appeal.

Held, dismissing the appeal (1) It is clear from an outline of the legal position in Cyprus as emanating from numerous statutes enacted since the British assumed the administration of the Island in 1878 (The Customs and Excise Regulation Law 1879 subsequently embodied in Law 24/1879 repealed by Law 31/1936—The Port Regulation Law 19/1879, which, as in the meantime amended, was published in the Cyprus Laws (Revised Edition) of 1959 as Cap. 294, repealed by the Port Regulation (Repeal) Law 1/1976—The Port Workers (Regulation of Employment) Law, Cap. 184—The Department of Ports (Regulation and Transfer of Powers) Law, 1968—The Cyprus Ports Authority (Amendment) Law 28/1979—The Piers Law, Cap. 78 amended by Law 39/1973—The Port Charges Laws—The Cyprus Ports Authority Law 1973 that the ports and harbours, their management, function and operation, were the exclusive responsibility of the State and as being matters of a governmental nature obviously following the established position in England that though coming at Common Law within the ambit of the Royal Prerogative, are now regulated almost entirely by Statute, both public and local and by delegated legislation.

(2) As immediately upon the British assuming the administration of the Island in 1878 these matters were regulated entirely by Statute and delegated legislation, there is no need to examine to what extent, if at all, the prerogatives of the British Crown apply to Cyprus, which has since August 1960 become independent under a Republican Constitution.

(3) By virtue of the Department of Ports (Regulation and Transfer of Powers) Law 1968, the Republic not only reconfirmed the responsibility of the State in matters relating to ports and harbours, but it gave more emphasis to these governmental duties by setting up a separate Department with exclusive responsibility for the ports and harbours.

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5 (4) The question is whether the respondent entrusted with the management, control, functioning of ports and harbours might be considered in consimili casu to servants of the State carrying out governmental duties and responsibilities.

10 (5) The Cyprus Ports Authority was established by Law in 1973 as a result of an agreement with the International Bank of Reconstruction and Development. The establishment of the Authority cannot be considered an abandonment of State responsibilities, but only a mode of operation in respect of which considerable control was retained by the State.

15 On the totality of the circumstances, looking at the historical background regarding the legislation that has affected the establishment, operation and administration of ports and harbours, the reasons that led to the setting up of the Authority as an independent body, the legislation governing it and its operation and the significance of its operation in relation to other branches of Government responsibility, such as finance and security, the Court reached the conclusion that the respondent Authority is entitled to exemption from taxation, its functions being a province of Government as exercising functions required and created by the Government, and should be regarded as in consimili casu with servants of the Republic. *British Broadcasting Corporation v. Johns (Inspector of Taxes)* [1964] 1 All E.R. 923 distinguished).

Appeal dismissed.
No order as to costs.

30 Cases referred to:

Bank Voor Handel En Scheepvaart N.V. v. Administrator of Hungarian Property, 3 S.T.C. 311;

British Broadcasting Corporation v. Johns (Inspector of Taxes) [1964] 1 All E.R. 923;

35 *R. v. McCann* [1868] L. R. 3 Q. B. 141.

Appeal.

Appeal against the judgment of a Judge of the Supreme

Court of Cyprus (Pikis, J.) given on the 11th March, 1983 (Revisional Jurisdiction Case No. 202/82)* whereby it was decided that the respondents in this appeal were not liable to income tax.

A. *Evangelou*, Senior Counsel of the Republic, for 5
the appellants.

T. *Papadopoulos*, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will 10
be delivered by Mr. Justice A. Loizou:

A. LOIZOU J.: This is an appeal from the judgment of
a Judge of this Court by which he found that the Cyprus
Ports Authority, the respondents in this appeal, were not
liable to income tax, hence the annulment of the assessments
of Income Tax for the years of Assessment 1978 (Year 15
of Income 1977) and that of 1981 (Year of Income 1980).
by which tax was assessed on it at C£1,453.500 mils and
C£18,608.835 mils respectively. These assessments were
raised under sections 5(1) and 6 of the Income Tax Laws
1961 - 1977 and 1979, and sections 3, 13(3) and 23(1) of 20
the Assessment and Collection of Taxes Laws 1978-1979.

The grounds of appeal and the reasons thereof relied
upon by the appellant are the following:-

“1. The Honourable Court erred in law in reaching 25
the conclusion that the Cyprus Ports Authority was an
agency of the State in consimili casu to servants of the
State and consequently could claim immunity from
income tax.

2. The Honourable Court misconceived the concept 30
of the prerogative in that -

(a) prerogative does not apply, even in cases in
which it is otherwise applicable, where there are
statutory provisions regulating the matter and in
Cyprus there are such provisions regulating ports,

* Reported in (1983) 3 C.L.R. 385.

(b) prerogative does not apply to territories which acceded to independence and especially under a Republican Constitution.

5 3. The Honourable Court failed to take into account material factors in determining whether the Authority was to be accorded the status of the government and in particular:

10 (a) failed to take into account the status, powers, duties and activities of the Authority as contained, inter alia, in sections 10, 12, 14, 16, 20 and 33,

15 (b) failed to take into account that the Authority is a corporate body with perpetual succession established by law and does not perform functions of strictly governmental nature,

(c) attached too much importance to the control factor and too little to the functions and activities of the Organization.

20 4. The Honourable Court erred in law in that, though referring to the case of *Mersey Docks and Harbour Board Trustees v. Cameron* [1864] 11 H.L.C. 443, failed to appreciate the authoritative guidance given by the House of Lords in that case."

25 The learned trial Judge, whose judgment is reported as *The Ports Authority of Cyprus v. The Republic of Cyprus, through The Commissioner of Income Tax* (1983) 3 C.L.R., p 385 after referring to the prerogatives over ports and harbours vested in the Crown under English Common Law and expounded his views that such prerogatives were saved and vested subject to certain qualifications in the Republic
30 upon Independence concluded as follows at p. 396:-

35 "In the light of the above analysis of the law, I conclude that the control and management of ports and harbours is the exclusive responsibility of the State; these responsibilities were discharged through the C.P.A., the vehicle chosen by the State for the discharge of its fundamental responsibilities in respect

of ports and harbours. An examination of the provisions of Law 38/73 (including its amendments), inexorably leads to the conclusion that the C.P.A. was an instrument of the State, an agency of the State in every respect. The Board of the Directors is appointed by the Council of Ministers and their services are liable to be terminated at any time at the discretion of the Council (see section 5). Public officers previously manning government services in relation to ports and harbours, became the employees of the C.P.A., whereas power is reserved in a Minister of the State, the Minister of Communications and Works, to give directions as to the exercise of the functions of the corporation. The Council of Ministers retains power to close any port to shipping in the interest of the State. The revenue of the C.P.A. shall be exclusively applied towards meeting operating expenses and providing for the development and replacement of assets (see section 20). The same pattern is followed in respect of every activity of the Cyprus Ports Authority. The C.P.A. is the body set up by the State to exercise its powers and perform its responsibilities respecting the ports and harbours of the country.

In my judgment, the C.P.A. was an agency of the State in consimili casu to servants of the State, carrying out governmental duties and discharging State responsibilities. Consequently, the claim to immunity from income tax is valid and the recourse succeeds. The assessment to income tax complained of, is hereby annulled.

This being my decision, it becomes unnecessary to debate the remaining issues or pronounce upon their validity, although it seems to me, I must note that success in that area is hard to visualise."

At Common Law the Crown by virtue of the Royal prerogative enjoys the exclusive right of erecting ports and harbours and assigning their limits. A port ought to be free and open to all to go and come subject to the payment of proper tolls and dues. Sea-ports are open in time of peace to all ships. Furthermore at Common Law ports

and havens may be created by proclamation where the ownership remains with the Crown or may be granted to a subject by Charter as a liberty or franchise. Ports and havens may also be created by statute or delegated legislation with rights and liberties similar to those of Common Law ports. Although the owner of the soil of a creek or harbour may load and unload his goods, there is not a legal port at Common Law unless created by the authority of the Crown and except by Charter prescription or statute the owner cannot make a port even for the landing of his own goods by his own tenants. Moreover, he may not land goods which are customable on his own land or anywhere which is not a public port and a place where such goods may be landed. Upon payment of the statutory rates and subject to the other statutory provisions the harbour, dock or pier is to be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.

We have taken the above extracts from Halsbury's Laws of England 4th Edition Volume 36 paragraphs 402-414 in order to show the extent of the prerogative of the Crown and the powers it had over them. As further pointed out in Halsbury's Laws of England (supra) paragraph 405, "Ports and harbours are now regulated almost entirely by statute, both public and local, and by delegated legislation. The Harbours Acts 1814 contains provisions restricting the casting and unloading of ballast in harbours. The Harbours, Docks and Piers Clauses Act 1847 contains model clauses with regard to the construction and administration of harbours, docks or piers, and extends only to such harbours, docks or piers as are authorised by statute or by delegated legislation which declares that "the Act of 1847 is to be incorporated with it or with which that Act is deemed to be incorporated".

We have limited the quotation from the aforesaid textbook as it will serve no purpose to enumerate all the legislation in force in England which deals with the construction and administration of harbours and the control of harbour development. There is no doubt that what has all along been in England a matter of Royal prerogative is now regulated almost entirely by statute.

With regard to the position in Cyprus one has to look back to the history of the subject and its legislative developments. When the British assumed the administration of the Island in 1878 one of their first Legislative enactments was the Customs and Excise Regulation Law of 1879, which was subsequently embodied in Law No. 24 of 1879. This law remained in force subject to amendments until 1936 when it was repealed by Law 31 of 1936. By virtue of Sections 2 to 4 which come in the part of the Law entitled "Ports", it was prescribed (section 2) that no goods should be imported or exported from the Island except into or from the ports of Larnaca, Limassol, Famagusta, Carpas, Kyrenia, Lefka, Paphos, unless by the special permission of the Principal Officer of Customs of the District. By virtue of section 3 subsection 1, thereof the High Commissioner, could by Order in Council appoint any port sub-port, haven, or creek, in the Island and declare the limits thereof and appoint proper places to be legal quays for the lading and unloading of goods and declare the bounds and extent of any such quays and annul the limits of any port, sub-port, haven, creek or legal quay, already pointed out or hereafter pointed and declare the same to be no longer a port etc.

Alongside with the aforesaid enactment there was enacted the Port Regulation Law of 1879, (Law No. 19 of 1879.) By its Section 14, there are enumerated the powers that the Superintendent of any port in Cyprus has and the directions that he might give for all or any of the purposes set out therein which referred to a number of matters relating to the use of ports by vessels. Furthermore we see in Section 18 thereof the provision regarding the power of the Marine Police to board vessels and of section 19, the obligation of the master of every vessel on his arrival in the Island to declare to the office of the Superintendent of the Port all passengers on board his vessel. This Law, as in the meantime amended, has remained in force to our times and in the Cyprus Laws (Revised Edition) of 1959 it is published as Cap. 294, the date of enactment given therein being the 16th April 1879. This Law was repealed by the Port Regulation Law (Repeal) Law, 1976 (Law No. 1 of, 1976), although subsidiary legislation made by

virtue of it was kept in force until repealed by the Council of Ministers. Reference may also be made to the Port Workers (Regulation of Employment) Law, Cap. 184, which shows the extent of the concern of the State in the functioning of the ports.

Significant also is the Department of Ports (Regulation and Transfer of Powers) Law, 1968, which provided that there would continue to exist in the Ministry of Transport and Public Works a Department of Ports for the purpose of the supervision, administration and regulation of the operation of ports in the Republic and every subject relating to them as well as every matter referring to Merchant Shipping and Seamen in accordance with the provisions in force from time to time of any law or administrative act relating to ports or to such matters (section 3). We need not refer to its other provisions as its relevance lies in the sense, that apart from the aforesaid general provision, the powers as regards the administration of numerous laws and matters relevant to the port management, were transferred to that Department and its Director, retrospectively as from the 16th August 1960, obviously to fill a legislative gap which existed by the separation of Customs and Port Services as from that time. Sections 2, 3, 4 and 5 and the First Schedule to this Law were repealed by the Cyprus Ports Authority (Amendment) Law of 1979 (Law No. 28 of 1979).

Reference may also be made to the Piers Law, Cap. 78, which was amended by the Piers (Amendment) Law, 1973, (Law No. 39 of 1973), following the enactment of the Cyprus Ports Authority Law 1973. Another relevant law or series of laws are The Port Charges Laws, which were successively amended and we see the Shipping Dues Law of 1917, making provisions regarding the payment of dues in respect of every ship arriving in every port in Cyprus and the exemptions thereof.

Finally reference may be made to the three Schedules of the Cyprus Ports Authority Law, 1973 and the laws set out therein, which are affected by it. In particular noteworthy is its section 35 which makes provision for the transfer of public officers, who immediately before the date

of the coming into force of this Law were serving in the Department of Ports in the Ministry of Communications and Works, to the Authority.

It is clear from the above outline of the legal position in Cyprus as emanating from numerous statutes enacted since the British assumed the administration of the Island in 1878 and this Country was introduced thereby into what basically was the English legal system—hence we did not examine the situation beyond that point—that the ports and harbours, their management, function, and operation, were the exclusive responsibility of the State and as being matters of a governmental nature obviously following the established position in England that though coming at Common Law within the ambit of the royal prerogative, are now regulated almost entirely by Statute, both public and local and by delegated legislation.

Likewise in Cyprus whatever the origin of this authority and governmental duty was in the notions of the English Constitutional Law, they were immediately, upon the British assuming responsibility, converted into a matter regulated entirely by Statute and delegated legislation. We need not therefore examine, if and to what extent, if at all the prerogatives of the British Crown apply to Cyprus, which has since August 1960 become Independent under a Republican Constitution. Needless to highlight that by virtue of the Department of Ports (Regulation and Transfer of Powers) Law, 1968, the Republic reconfirmed the responsibility of the State in matters relating to ports and harbours, as it pre-existed under the Colonial Administration and in fact it gave more emphasis to these governmental duties by setting up a separate Department with exclusive responsibility for the ports and harbours than as until 1960 the position was, by having these services operating then within the Customs Department.

The question therefore that turns for determination by us is whether the respondent Authority entrusted with the management, control, functioning of ports and harbours, though not strictly servants of the State might be considered in consimili casu to servants of the State carrying out

governmental duties and discharging State responsibility or not.

5 Before, however, dealing with the legal aspect, a brief reference may be made to the Cyprus Ports Authority Law, 1973, by virtue of which the respondent Authority was established and from which it derives all its powers and duties. Admittedly this course was followed as a result of an agreement with the International Bank of Reconstruction and Development published in the Official Gazette of the Republic of the 19th September 1969, under Notification 10 748. Indeed the establishment of the Authority could not be considered as an abandonment of State responsibilities but only a mode of operation in respect of which considerable control was retained by the State.

15 As pointed out by Lord Reid in *Bank Voor Handel En Scheepvaart N.V. v. Administrator of Hungarian Property*, 3 S.T.C. 311 at p. 346:

20 "The starting point of any discussion of these questions must be three decisions of this House: *Mersey Docks and Harbour Board v. Cameron*, 11 H.L.C. 443. *Greig v. University of Edinburgh*, L.R. 1 Sc. & Div. 348, and *Coomber v. Justices of Berks*, 2 T.C. 19 App. Cas. 61."

25 His Lordship went on then to review the authorities which we need not do here as the issue before us is whether the respondent Authority, though not strictly a servant of the State might be considered in consimili casu.

30 In the case of the *British Broadcasting Corporation v. Johns (Inspector of Taxes)* [1964] 1 All E.R. 923, the question arose and it was held that the Corporation was not entitled to the Crown's exemption from taxation because broadcasting was not a province of Government and the Corporation was an independent body, corporate, which was not exercising functions required and created by the 35 Government.

We do not intend to embark on a discussion as to the grounds on which this case is distinguishable from the one in hand. What need be said is that unlike broadcasting,

which could have been developed in many ways, including that of making it a private enterprise and not a function of Government, the functions of ports and harbours, have all along been a function of Government, in view of their intrinsic nature, their utmost importance in relation to other functions of Government, such as security and finance. Therefore the approach in the B.B.C. case cannot help us except that there is a useful exposition of the law and reference to the authorities on the subject. 5

As pointed out in the case of *R. v. McCann* [1868] 10 L.R. 3 Q.B. 141, the Crown and in our case the State, is no doubt entitled to operate through servants or agents who are incorporated. In our case the reason that obviously prompted Government to set up the respondent Authority was not because it was thought to be in the public interest that the operation of ports should not be conducted by a Government agency as a Government function but for the only purpose of facilitating its international financing. 15

Another observation that has to be made is that unlike the case of the *British Broadcasting Corporation (B.B.C.)* 20 in the Television Act 1954, section 1 subsection 12, it is expressly declared that "the Authority are not to be treated for the purposes of the enactments and rules of law relating to the privileges of the Crown as a body exercising functions on behalf of the Crown". In that case, as it was observed, the matter was made perfectly clear and it was a pity that the position of the B.B.C. was not also made clear, as to which side of the line it was intended to fall. 25

The same observations could be made here as certainly legislative clarity on such important issues would have rendered unnecessary this litigation. No doubt a public authority, as the respondent is, has not been set by the Government for it to collect taxes from their incomes. 30

On the totality of the circumstances, looking at the historical background regarding the legislation that has affected the establishment, operation and administration of ports and harbours, the reasons that led to the setting up of the Authority as an independent body, the legislation governing it and its operation and the significance of its operation in relation to other branches of Government res- 35 40

possibility, such as finance and security, has led us to the conclusion that the respondent Authority is entitled to exemption from taxation, its functions being a province of Government as exercising functions required and created
5 by the Government, and should be regarded as in consimili casu with servants of the Republic.

For all the above reasons the appeal is dismissed but in the circumstances there will be no order as to costs.

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Appeal dismissed.
No order as to costs.