1986 September 18

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MATERO LTD.,

Applicant,

v.

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

Respondents.

(Case No. 673/84).

Legitimate interest—Acceptance of an administrative act or decision—Deprives acceptor of his legitimate interest, if the assent to the act or decision in question is expressed clearly and distinctly and by an unambiguous conduct—Customs duties—Recourse challenging classification of imported goods under Tariff Heading 84.11.20—Recourse filed after payment of the duty imposed—In the light of s. 161(1) of the Customs and Excise Law 82/67 and the circumstances of this case applicants were not deprived of their legitimate interest.

Customs Duties—The Customs and Excise Duties Laws 1978-1984—Tariff Headings 84.11.20 and 85.01.90— Interpretative Rule 2(a) and the Explanatory Notes to the Brussels Nomenclature—Electrical fans—Importation of their two component parts, namely eletric motors and fan blades, in an unassembled condition—When and in what circumstances the motors are imported duty free.

Companies—The notion of separate corporate personality—The rule in Salomon and Co. Ltd. *[1897] A.C. 22—Exceptions*

to the rule against lifting the company's veil of incorporation—Analysis of such exceptions.

Customs Duties — The Customs and Excise Law 82/67 —Section 161.1—Its application not confined only to cases where there is a dispute as to the value of the imported goods—Procedure to be followed in case of dispute as to the value of the goods and procedure to be followed in any other case within the ambit of the section.

The applicants are a company of limited liability. Some of their shareholders are the shareholders of another company of limited liability, namely *Glamourgo Trading Co. Ltd.* Mr. T. Aristotelous, one of such shareholders, was at the material time the director of both the above companies.

By virtue of the Customs and Excise Duties Laws, 1978 to 1984, when electrical fans are imported into Cyprus from E.E.C. they are classified under Tariff Heading 84.11.20 and are subject to payment of import duty at the rate of 15.6%, but if the two components of electrical fans, namely the electric motor and the fan blade, are imported separately in an unassembled condition, the fan blades are classified under the said heading, whilst the electric motors under heading 85.01.90, which is duty free.

Being aware of the above provisions Mr. T. Aristotelous, acting on behalf of both companies, ordered for the account of Glamourgo 1400 fan blades and for the account of the applicants 1980 electric motors from the same suppliers in Italy. All goods were shipped in the same container, but when they arrived in Cyprus, respondent 2, having obtained an advice from the Attorney-General to the effect that Interpretative Rule 2(a)* of the Nomenclature should apply in the case in hand, decided as regards the number of motors which corresponded to the number of the fan blades imported as aforesaid that both motors and fans should be regarded as constituting fans in an unassembled condition, thus classifiable under Heading 84.11.20.

* Quoted at p. 1582 post.

As a result, the applicant paid the import duty payable under Heading 84.11.20, and challenged the said decision by means of this recourse.

Counsel for the respondents raised the preliminary objection that the applicants have no legitimate interest to challenge the said decision as they have accepted same unreservedly and paid the relevant duty. He admitted, however, that the applicants did not originally agree with respondent's view and that their director had the several meetings, which the applicants alleged that he had, with respondent 2 in respect of the matter.

Held, annulling the sub judice decision: (1) Section 161(1)* of Law 82/67 applies where "any dispute arises as to whether *any* or *what* customs duty is payable". The section provides a procedure for (a) cases where the dispute is in relation to the value of the goods and (b) in any other case. The submission of counsel for the respondents that the section is only applicable where there is a dispute as to the actual value of the goods cannot be maintained. Notwithstanding that the applicants disputed the liability to pay import duty in respect of the motors, they had to pay the duty imposed and then proceed in accordance with the procedure of paragraph (b) of s. 161(1).

For the assent to an administrative act to be such as to deprive the person concerned of his legitimate interest to challenge it by a recourse to this Court, it must be expressed clearly and distinctly and by an unambiguous conduct from which it is necessarily inferred that it was intended to assent to the act in question.

Bearing in mind the provisions of s. 161(1) and the facts of this case it cannot be said that the applicants accepted the sub judice decision clearly and distinctly or by an unambiguous conduct.

(2) One of the corner stones of modern company law is the notion of separate corporate personality. This principle has been rigorously applied by the Courts since the case of *Salomon* v. *Salomon and Co. Ltd.* [1897] A.C. 22.

* Quoted at pp. 1586-1587 post.

There have been only a few cases where the Courts disregarded the corporate personality and paid attention to the real control and beneficial ownership of the undertaking of the company Such cases are mostly cases in which the Courts relied either on the principle of public policy or on the principle that devices used to perpetrate fraud or evade obligations will be treated as nullities or on a presumption of agency or trusteeship.

(3) From the provisions of Interpretative Rule 2(a) and the explanatory Notes* to the Brussels Nomenclature it is clear that if in the circumstances of this case the goods in question were dispatched to one and the same person, whether assembled or disassembled, they should be classified as complete or finished and the import duty payable would be that payable in respect of assembled goods The question, therefore, is whether, bearing in mind that the electric motors were consigned to the applicant company and the blades to another company, such goods can be treated as consigned to the same person

(4) The law itself affords the opportunity not only in the case of two different importers, the one importing the motors and the other the fans, but also to one and the same person to take advantage of the customs legislation on the matter and order the motors and the fans unassembled to be dispatched to him in two separate consignments Once such an advantage is provided by the law itself this Court cannot consider it as an attempt of evasion of a statutory regulation which by express provision affords such an opportunity to importers

(5) In this case no relationship of parent-subsidiary company has been established to exist between the applicant company and Glamourgo Trading Co. Ltd There is nothing to show that either of such companies was set up under the cloak of a mere facade or sham to deceive the customs authorities The fact that they are managed by the same person and that they sought to take advantage of a concession in the Customs legislation in respect of

* Quoted at pp 1582-1583 post

import duty are not sufficient to justify departure from the rule in *Salomon* v. *Salomon*, supra.

(6) In the light of the above the conclusion is that the act of respondent 2 to treat the said two companies as one and the same person was wrong and also that his decision to classify the motors under Tariff Heading 84.11.20 was taken under a misconception of law.

Sub judice decision annulled.
£75.- costs in favour of applicants.

Cases referred to:

In re E. Philippou Ltd. (1984) 1 C.L.R. 757;

Kritikos v. *The Republic* (1985) 3 C.L.R. 2638;

Tomboli v. *CY.T.A.* (1980) 3 C.L.R. 266 and on appeal (1982) 3 C.L.R. 149;

Salomon v. *Salomon & Co. Ltd.* [1897] A.C. 22;

Gilford Motor Co. Ltd. v. *Horne* [1933] Ch. 935; [1933] All E.R. Rep. 109;

Jones v. *Lipman* [1962] 1 All E.R. 442;

Bank Voor Handel etc. v. *Statford* [1953] 1 Q.B. 248;

Michaelides v. *Gavrielides* (1980) 1 C.L.R. 244;

In re F.G. (Firms) Ltd. [1953] 1 W.L.R. 483;

Merchandise Transport Ltd. v. *British Transport Commission* [1962] 2 Q.B. 173;

Decision of the Greek Council of State No. 1341/66.

Recourse.

Recourse against the decision of the respondents to classify electric motors imported by applicant on 20.9.84 under Tariff Heading 84.11.20 and impose duty at the rate of 15.6%.

St. Triantafyllides, for the applicant.

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

Cur. adv. vult.

SAVVIDES J. read the following judgment. By this recourse the applicant prays for a declaration that the decision of the respondents to classify electric motors imported by the applicant on 20.9.84 under Tariff Heading 84.11.20 and impose duty at the rate of 15.6%, which was communicated to the applicant by letter dated 18.10.84 (exhibit 1) is null and void and of no effect whatsoever.

Applicant is a company of limited liability. The shareholders of such company are the following:

1. Tefkros Aristocleous 11,000 shares 55%
2. Georghia Aristocleous 3,000 shares 15%.
3. Michael Aristocleous 3,000 shares 15%.
4. Christodoulos Aristocleous 3,000 shares 15%.

The above shareholders with the exception of Georghia Aristocleous are also the sole shareholders in Glamourgo Trading Co. Ltd. another company of limited liability, as follows:

1. Tefkros Aristocleous 1,000 shares, 50%.
2. Michael Aristocleous 500 shares, 25%.
3. Christodoulos Aristocleous 500 shares, 25%.

From what appears in a written statement made by Mr. Tefkros Aristocleous on 2.10.1984 to the Customs Authorities, Mr. T. Aristocleous was at the material time the director of both the above companies.

By virtue of the Customs and Excise Duties Laws, 1978 to 1984 when electrical fans are imported into Cyprus from the E.E.C., they are classified under Tariff Heading 84.11.20 and are subject to payment of import duty at the rate of 15.6%. On the other hand if the two composite parts of electrical fans (the electric motor and the fan

blade) are imported separately, as parts in an unassembled condition, and not as electrical fans, the position is as follows: The fan blades are classified under Tarrif Heading 84.11.20 and are subject to payment of import duty at the rate of 15.6% whereas the electric motors are classified under Tariff Heading 85.01.90 which is duty free.

Being aware of the above advantage afforded by the Law, Mr. Tefkros Aristocleous acting on behalf of both companies, that is the applicant and Glamourgo Trading Company Ltd., instead of importing assembled electric fans, ordered for the account of Glamourgo Trading Company Ltd., 1400 fan blades and for the account of the applicant 1980 electric motors from the same suppliers in Italy. In a letter dated 12th April, 1984, signed by A. Taff as Managing Director of the applicant addressed to the Italian firm of manufacturers, the following are stated inter alia:

"

> According to the local customs and excise law, all motors when imported complete with impellers, the importer has to pay import duty 15.6% on the whole consignment. If, however, they are shipped in different consignments then we pay import duty only on impellers not on the motors. It follows therefore that the motors should be shipped on a C.A.D. basis in the name of our company Matero Ltd, whereas the impellers in the name of our sister company Glamourgo Trading Co. Ltd., both housed at the same address...."

The Italian firm following the instructions received when the order was made, shipped, in the same container, the goods ordered as follows:

(a) 1980 electric motors to the applicant company.

(b) 1400 fan blades to Glamourgo Trading Company.

When the goods arrived at Limassol port, applicant sought to clear the 1980 electric motors shipped to it, as goods falling under Tarriff Heading 85.01.90. However,

the Customs in Limassol refused to allow the clearance of such goods free of tax under Tariff Heading 85.01.90. As a result Mr. T. Aristocleous acting on behalf of the applicant company made an oral protest to respondent 2 to whom he explained his reasons against the refusal of the Customs Authorities to allow clearance of such goods duty free. Respondent 2, after having obtained advice from the Attorney-General sent to the applicant the following letter dated the 18th October, 1984:

"Re: 1980 electric motors imported on 20.9.84 per m/s 'Kathe Joanna' Rot. 2726/84 and entered by you for clearance under Limassol Import Entry No. 2605 of 28.9.84 and 1400 fan blades imported on the same date in the same vessel and entered for clearance by your Sister Company Messrs Glamourgo Trading Ltd. under Limassol Import Entry No. 2602 of 28.9.84.

I refer to the above subject and wish to inform you that the Attorney-General of the Republic, before whom I had brought it for advice, has opined that the provisions of Interpretative Rule 2(a) of the Nomenclature should apply in the present case and therefore both motors and fan blades should be regarded as constituting fans in an unassembled condition thus properly classifiable under Tarrif Heading 84.11.20 @ 15.6% E.E.C. rate of duty and not separately as electric motors and fans under Tariff Heading 85.01.90 free, and 84.11.20 @ 15.6% respectively as declared.

It should be clarified that the said provisions relate to an equivalent number of motors and fans and therefore the quantity from the above motors which exceeds the number of fans i.e. 580 pc remain classified under Tariff Heading 85.01.90 as originally entered.

In view of the above I have to request you to contact the Senior Collector of Customs Limassol and arrange payment of the import duty shortpaid and clearance."

In view of such decision the applicant paid the duty imposed on such goods and filed the present recourse challenging the decision of respondent 2 contained in his letter of 18th October, 1984.

The legal grounds on which the recourse is based are:

1. The decision of the respondent is contrary to the Constitution, the Law and the principles of administrative Law.

2. The decision of the respondents was taken in abuse and/or excess of power.

3. The decision of the respondents was not at all and/or duly reasoned.

4. The decision of the respondents is contrary to the previously followed administrative practice.

By their opposition the respondents raised a preliminary objection that the applicant has no legitimate interest to challenge the sub judice decision as it has accepted same unreservedly and paid the relevant duty. Respondents further contended that the sub judice decision was taken lawfully and correctly in accordance with the Interpretative Rule 2(a) and the Second Schedule to the Customs and Excise Duties Law (Law 18 of 1978).

Interpretative Rule 2(a) to which reference is made both in the letter of respondent 2 embodying the sub judice decision and also in the opposition, provides as follows:

> "2 - (a) Any reference in a heading to an article.... as imported.... 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 these Rules), imported unassembled or disassembled."

In accordance with the explanatory Notes to the Brussels Nomenclature -

> "The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that

article incomplete or unfinished, provided that, as imported, it has the essential character of the complete or finished article....

The second part of Rule 2(a) provides that complete or finished articles imported unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so imported, it is unusually for reasons such as requirements or convenience of packing, handling or transport.

The classification Rule also applies to incomplete or unfinished articles imported unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.".

It is clear from the above that if, in the circumstances of the present case, the goods had been dispatched to one and the same person, the goods should be classified as complete or finished, irrespective of the fact that such goods were imported unassembled or disassembled and the import duty payable would be that payable in respect of assembled goods. This appears to have been clear in the mind of Mr. T. Aristocleous who was acting on behalf of the applicant as in his written statement obtained from him by the Customs Authorities on 2.10.84 he said the following in this respect:

"I know that the importation of motors and fan blades by the same person in the same consignment renders them liable to an import duty of 15.6%..."

He went on however to give his reasons why in the circumstances of the present case no import duty was payable for the electric motors, as follows:

".... Due to the fact however that the two particular importations have been made by two different legal persons and due to the fact that the fan blades fall within the sphere of activities of Glamourgo Co., I demand delivery of the goods to the above two companies in accordance with the declaration of our clearing agent."

The question therefore which poses for determination is whether in the circumstances of the present case and bearing in mind the fact that the electric motors were consigned to the applicant company and the fan blades to another company, such goods could be treated as goods consigned to the same person and as such be classified under Customs Tariff 84 11 20 and be subject to import duty at the rate of 15 6% as in the case of assembled electric fans

In advancing his arguments, in support of this recourse, counsel for applicant submitted that the respondents reached their decision based on elementary misconception of law in that they treated the two companies as one legal person and not as two completely independent legal entities He elaborated on the principles that a company is a completely different entity from its shareholders and that the veil of incorporation should not be lifted in cases similar to the present one He submitted that irrespective of the fact that the veil of incorporation cannot be lifted where the relation of the companies is not that of parent—subsidiary (i e the one company holds shares in the other) or companies owned beneficially by persons in equal proportions, in the present case the fact that the two companies have some of the shareholders in common does not make them associated companies related to each other as parent-subsidiary companies or companies owned beneficially by the same person in equal proportions Counsel in dealing further with the "lifting of the veil" drew the distinction between cases in which the veil can be lifted pursuant to a statutory provision and other cases and submitted that the present case is not one in which any statutory provision exists allowing the lifting of the veil of incorporation Counsel concluded his address by submitting that "under no theory of law could the respondents deem the applicant and Glamourgo as one person If the corporate veil were to be lifted, which we do not believe is possible in the first place, all that could be demonstrated is that the applicant could not be considered as one entity with Glamourgo and that the sub judice decision is wrong"

Counsel for the respondents though accepting the prin-

ciple that a company is a legal person, separate and distinct from its members, contended that under certain circumstances it is possible to by-pass the separateness of a company and its shareholders by the process known as lifting or piercing the veil of incorporation that prevents their assimilation. He argued that the Courts may refuse to apply the principle if it is too flagrantly opposed to justice, convenience or the interests of the revenue. In support of his arguments that the present case is a proper one for lifting the veil of incorporation, counsel submitted that there are instances where the company is regarded as agent of its controlling shareholders either in respect of a particular transaction or as regards the whole of the company's business, in which the Courts occasionally invoked the principle of lifting the corporate veil in order to prevent the use of corporate personality for the evasion of statutory regulation. Also there are instances where the device of incorporation is used for some illegal or improper purpose. He concluded his address by submitting that in the circumstances of the present case and in the light of all material before the Court it is apparent that the intervention of the two companies in the matter was purely colourable and they had been used as a cloak to avoid payment of import duty. In his submission the two companies are not the real importers of the unassembled parts and that they acted, in so far as they acted at all, in the matter, merely as the nominees of the agent, the trader Aristocleous, or of one another and consequently the sub judice decision of respondent 2. was correctly taken.

Before embarking on the substance of the case I find it necessary to deal first with the preliminary objection raised by counsel for the respondents, that the applicant by having accepted the sub judice decision and having paid the import duty freely and without reservation does not possess a legitimate interest within the meaning of Article 146 of the Constitution.

In expounding on his objection counsel for the respondents submitted that section 161 of the Customs and Excise Law, 1967 (Law 82/1967) on which the applicant relied has no relevance to the present case as in his sub-

mission "such section applies only where there is a dispute as to the actual value of the goods."

Counsel for applicant refuted the contentions of counsel for the respondents that the applicant by his conduct accepted the sub judice decision freely and unreservedly and laid stress to the following facts of the case.

When the goods arrived in Cyprus the applicant tried to clear the electric motors by classifying them under Tariff Heading 85.01.90 as free of duty. When the Customs Officer in Limassol refused to clear the goods the Managing Director of applicant had a meeting with respondent 2 in an effort to clear the goods which proved fruitless as respondent 2 by his letter dated the 18th October, 1984, communicated his decision to the applicant. The Managing Director of the applicant after receipt of such letter communicated again personally with respondent 2 in an effort to persuade him that his decision was unacceptable and that he was going to attack same in Court, having first to pay the duty in accordance with the provisions of s. 161 of Law 82/67, which he did by filing the present recourse.

When the case was fixed for classifications and evidence counsel for the respondents made an admission to the effect that applicant did not originally agree with respondents' view and that in fact its managing director had the several meetings with respondent 2 as alleged by applicant's counsel. As a result of such admission the applicant did not call any evidence to prove such facts, once they were admitted.

It is useful to quote in full sub-section (1) of section 161 of Law 82/67 which reads as follows:

«161 (1) Έάν, πρίν ή εισαχθέντα έμπορεύματα παραδοθῶσιν έκ τοῦ τελωνειακοῦ ελέγχου, άναφυῆ, οίαδήποτε διαφορά καθ' ὅσον άφορᾶ εἰς τὸ ἐάν ὀφείλεται ἐπ' αὐτῶν οἱοσδήποτε δασμὸς ἤ τὸ ποσὸν τούτου, ὁ εἰσαγωγεὺς ὀφείλει νὰ καταβάλη τὸ αἰτούμενον ὑπὸ τοῦ ἁρμοδίου λειτουργοῦ ποσόν, δύναται ὅμως ἐντὸς τριῶν μηνῶν τὸ βραδύτερον ἀπὸ τῆς πληρωμῆς·

(α) ἐάν μὲν ἡ διαφορὰ ἀφορᾶ εἰς ἀξίαν τῶν ἐμπο-

ρευμάτων, νὰ ἀπαιτήση ὅπως τὸ ζήτημα παραπεμφθῆ εἰς τὴν διαιτησίαν προσώπου, διοριζομένου ὑπὸ Δικαστοῦ τοῦ Ἀνωτάτου Δικαστηρίου, καὶ μὴ τελοῦντος ἐν τῇ ὑπηρεσίᾳ οἱουδήποτε Κυβερνητικοῦ Τμήματος, οὗτινος ἡ ἀπόφασις εἶναι τελειωτικὴ καὶ ἀνέκκλητος· ἢ

(β) ἐν πάσῃ ἑτέρᾳ περιπτώσει νὰ ὑποβάλῃ αἴτησιν τῷ ἁρμοδίῳ δικαστηρίῳ δι' ἀπόφασιν αὐτοῦ περὶ τὸ ποσὸν τοῦ τυχὸν 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 -

(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

(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.)"

The above provision was considered by this Court in two recent cases, *In Re E. Philippou Ltd.* (1984) 1 C.L.R. 757 and *Kritikos* v. *The Republic* (1985) 3 C.L.R. 2638. In the first case an application was made under section 161(1)(a) of 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 p. 759:

"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.

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

The second case concerned the import duty payable on a second hand car the value of which was assessed on the basis of its market value as a second hand car. After drawing a distinction between that case and the case *In Re E. Philippou Ltd.* I said the following (at p. 2649):

"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."

It is clear from the provisions of s. 161 and its con-

struction in the above two cases that it applies where "any dispute arises as to whether *any* or what customs duty is payable" and then a procedure is provided for (a) cases where the dispute is in relation to the value of the goods and (b) in any other case. Therefore, the submission of counsel for respondents that s. 161 in its totality has no relevance to the case as it applies only where there is a dispute as to the *actual value* of the goods cannot be maintained in view of the express words of the law and the dicta in the two decisions hereinabove.

In the present case the dispute arose before the delivery of the goods from customs charge and although the applicant was all along contesting the liability for payment of import duty he had to pay the duty and then proceed under paragraph (b) of sub-section (1) of section 161. Applicant's recourse was filed on 12th December, 1984, which is within the 75 days prescribed by Article 146 of the Constitution both in respect of the date when the decision was communicated to the applicant and the date of payment of the duty and in any event within the time limits provided under s. 161.

Having dealt with the provisions of s. 161 I am coming now to consider whether the payment by the applicant company of the import duty has deprived it of a legitimate interest to pursue this recourse.

The effect of acceptance of an administrative act or decision on an existing legitimate interest to challenge same, has been considered by this Court time and again. The principle emanating from our case law and the jurisprudence and case law in Greece has been expounded by me in *Tomboli* v. *CY.T.A.* (1980) 3 C.L.R. 266 and on appeal by the Full Bench (1982) 3 C.L.R. 149 in which our case law on the matter is reviewed. It is well settled in the administrative law of Cyprus, on the basis of the relevant principles which have been expounded in Greece in relation to legislative provisions there (section 48 of Law 3713/1928) which corresponds to our Article 146.2 that a person who expressly or impliedly, assents to or accepts an act or decision of the administration, is deprived, because of such acceptance, of a legitimate interest entitling

him to pursue an administrative recourse for the annulment of such act or decision. The above principle is, however, subject to the qualification that for the assent to an administrative act or decision to be such as to deprive the person concerned of the right to make a recourse against it, it must be expressed clearly and distinctly and by unambiguous conduct from which it is to be necessarily inferred that it was intended to assent to the administrative act or decision in question. (See Case 1341/66 of the Greek Council of State; also *Tomboli* v. *CY.T.A.* (supra) at p. 279).

Bearing in mind the facts of the case and the circumstances under which the payment was made and also the provisions of section 161(1)(b) I cannot say that the applicant accepted the decision of the respondent clearly and distinctly or by an unambiguous conduct, but on the contrary all along, through its managing director, it was protesting against the payment and had repeated interviews with respondent 2 to persuade him of its claim that no duty was payable in the present case and when as a result of the sub judice decision of respondent 2 and the refusal of respondent 2 to review his decision it paid the duty in view of the express provisions of s. 161 of Law 82/67 ("the importer *shall* pay the amount demanded") and proceeded to challenge such claim both under s. 161 (1)(b) and Article 146.2 of the Constitution. The objection of applicant to pay the duty appears also in the written statement of the Director of the applicant to the customs dated 2.10.84.

In the result I find the preliminary objection raised by counsel for the respondents as untenable and I shall proceed to deal with the substance of the case.

One of the corner stones of modern company law is the notion of separate corporate personality. That has been so firmly established for the last 90 years, that it is hard to contemplate any different general guiding principle. The leading decision in which the concept received the highest judicial approval is *Salomon* v. *Salomon & Co. Ltd.* [1897] A.C. 22 (H.L.) and it may be summarized in the words of Lord Macnaghten at p. 51 as follows:

"The company is at law a different person altogether from the subscribers to the memorandum, and; though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of subscribers or trustee for them. Nor are the subscribers or members liable, in any shape or form, except to the extent and in the manner provided by the Act."

The principle of the company's separate legal personality has been rigorously applied by the Courts since *Salomon's* case. There have been only a few cases where the Court has disregarded the company's corporate personality and paid attention to where the real control and beneficial ownership of the company's undertaking lay. Such cases are mostly cases in which the Court relied either on the principle of public policy, or on the principle that devices used to perpetrate frauds or evade obligations will be treated as nullities, or on a presumption of agency or trusteeship.

In Pennigton's Company Law, Fourth Edition, exceptions to the Rule of separate legal personality of a company are given at pp. 45, 46 where we read the following:

"Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes...

The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company

has been formed to evade obligations imposed by the law, and by the Courts implying in certain cases that a company is an agent or trustee for its members."

The two sections of the Companies Act, 1948, above mentioned are s. 31 (liability of members for the company's debts where the number of members is reduced below the minimum provided by the law) and s. 332 (responsibility for fraudulent trading of persons concerned). The above sections correspond to sections 32 and 311 of our Companies Law, Cap. 113.

Examples of cases of paramount public interest in which the Court has disregarded the separate legal personality of a company and has investigated the personal qualities of its shareholders or the persons in control of it are given in Pennington (supra). All these cases involved questions of nationality and all of them, except one, were decided in wartime when the nationalities involved were those of enemy aliens.

There are also a few cases where the Court has disregarded the separate legal personality of a company because it was formed or used to facilitate the evasion of legal obligations. They are mainly cases in which a company was formed by the defendant to carry on a competing business where he was bound by an agreement of employment not to solicit the plaintiff's customers or to compete with it for a certain time after leaving its employment and the Court found that its formation was a mere "cloak or sham" to enable the defendant to break his agreement with plaintiff *(Gilford Motor Co. Ltd.* v. *Horne* [1933] Ch. 935, [1933] All E.R. Rep. 109); also where a vendor of land sought to evade specific performance of a contract for sale by conveying the land to a company which he bought for the purpose *(Jones* v. *Lipman* [1962] 1 All E.R. 442).

Cases in which the Courts have made an inroad on the principle of the company's separate legal personality on the ground of implied agency and trusteeship, are mainly cases of holding and subsidiary companies and I need not expound at length on this exception as in the present case the relationship of holding and subsidiary company does

not exist irrespective of the fact that the shareholders in one company are the majority shareholders in the other.

It has always been recognized that "the legislature can forge a sledgehammer cracking open the corporate shell" (per Devlin J. in *Bank Voor Handel etc.* v. *Statford* [1953] 1 Q.B. 248 at 278). The question as to whether and when the Courts can disregard the notion of separate corporate personality, a process generally described as that of "lifting the veil" is very lucidly dealt with by Gower in Principles of Modern Company Law, Fourth Edition under Chapter 6 pp. 112-138. A classification is made therein of the cases where the fundamental principle of corporate personality itself is disregarded. The distinction is drawn between statutory and judicial inroads to the principle in *Salomon's case*. Before enunciating certain conclusions on the matter he stresses the fact that "it would be idle to pretend that they can be reduced to any consistent principles on the matter". The author concludes his topic on "lifting the veil" in the following words (at p. 138).

> "It is not possible to go in attempting to present in a rational form a development which has been essentially haphazard and irrational. Until very recently the Courts and the legal profession have failed to see the interconnection between the various situations in which the problem arises, with the result relevant decisions taken in one context have not been cited in litigation in another context. That, at least, is better now. But we have not made much progress in producing principles or a consistent policy. The most that can be said is that the Courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules".

The concept of the separate legal personality of a corporation has been stressed by our Court of Appeal in *Michaelides* v. *Gavrielides* (1980) 1 C.L.R. 244 in which Hadjianastassiou, J. in delivering the judgment had this to say at pp. 250-251 and 258:

"We think that it is necessary to state that since the decision *Salomon & Co. v. Salomon* [1897] A.C. 22, it has been said time and again that a company and the individual or individuals forming a company were separate legal entities, however complete the control might be by one or more of those individuals over the company. That is the whole principle of the formation of a limited liability company, and it would be contrary to the scheme of the Company Acts to depart from that principle.

The learned President, dealing with the corporate veil of a company, referred to a number of cases, indicating readiness on the part of the Court to pierce the corporate veil, if that was deemed necessary in the interests of justice. It is true that in some instances modern company law disregarded the principle that the company is an independent legal entity, and generally speaking the Courts are more inclined, in appropriate circumstances, to lift the veil of the corporateness where question of control is in issue than when a question of ownership arises.

. . . . . .

In the present appeal, there is no escape from the fact that the company is a legal entity entirely separate from its corporation. Here the company and the two individuals, the son and his wife, forming the company, are entirely separate entities, however complete the control might be by the two individuals over the company. Each can sue and be sued in their own right. Even the holder of one hundred per cent of the shares in a company does not by that holding become so identified with the company that he can be said to carry on the business of the company."

Counsel for the respondents in the present case in concluding his argument submitted that having regard to the facts of the present case the intervention of the two companies in the matter was purely colourable and they have been used as a cloak to avoid payment of import duty. I find myself unable to accept such contention.

The law itself affords the opportunity not only in the case of two different importers, the one importing the motors and the other the fans, but also to one and the same importer to take advantage of the Customs legislation on the matter and order the motors and the fans unassembled to be dispatched to him in two separate consignments. Once such an advantage is provided by the law I cannot consider it as an attempt of evasion of a statutory regulation which by express provision affords such an opportunity to importers. The case of *In Re F.G. (Films) Ltd.*, [1953] 1 W.L.R. 483 on which counsel for the respondents sought to rely is completely different from the present case as that case turned upon the construction of a provision under the Cinematographic Films Act 1938 and whether in view of the provisions of such Act the applicants were or not the "makers" of the film within the meaning of sections 25(1)(a) and 44(1) of the said Act. The next case relied upon by counsel for the respondents *Merchandise Transport Ltd.* v. *British Transport Commission* [1962] 2 Q.B. 173 is, as the majority of recent cases touching the unveiling of corporate entity by the Courts, a case where a parent - subsidiary relationship existed between the two companies and in fact the subsidiary was wholly owned by the parent company.

The question of lifting of the corporate veil in cases of holding and subsidiary companies is expounded in an editorial Article in the Journal Business Law, 1980 at pp. 156-161, useful reference to the introductory part of which may be made, which reads as follows (at p. 156).

> "The question whether in the relationship of a holding company and its wholly owned or controlled subsidiaries the corporate veil should be lifted cannot be answered by a simple statement of general application. The answer depends on two sets of circumstances: in which legal connection does the problem arise; and what are the facts of the individual case? Legal problems may arise in a variety of circumstances, e.g. whether the subsidiary is an agent of the holding company, whether it is a mere sham or facade, whether the Courts of the country in which

the holding company resides have jurisdiction over a foreign subsidiary, whether those courts can order discovery of documents held by the foreign subsidiary, whether the holding company shall be liable for the debts of the subsidiary and so forth. The facts of the individual case may vary. There may be cases of virtual autonomy, in particular, if the subsidiary, though wholly owned, is resident in a foreign country and its local management has to comply with the laws and the public policy of the host country, and there may be other cases in which a one-man company is, in effect, the alter ego of the dominant shareholder."

In the case under consideration no relationship of parent-subsidiary companies has been established. The applicant and Glamourgo Company are two different companies established under the Companies Law and in consequence two independent legal entities. The only thing in common between the two companies is that some of the shareholders of the one are shareholders in the other, that the managing director is the same in both and that they have the same address as their registered office. Nothing has been proved that either company is in any way subsidiary to or dependent on the other or that either of them was set up in this particular case under the cloak of a mere sham or facade to deceive the customs authorities. The fact that they are managed by the same person and that they sought to take advantage of a concession in the Customs Laws in respect of import duty are not such matters as to allow me to depart from the well established principle in *Salomons's* case. There is no escape in the present case from the fact that each of the two companies is a legal entity entirely separate from its corporators. This is not a matter of form; it is a matter of substance and reality. Each company can transact business in its own name without in any way binding or be bound by the other.

In the light of the above I have come to the conclusion that the act of the respondent Director of Customs and Excise to treat the two companies as one and the same legal entity was wrong and also that his decision com-

municated to the applicant by letter dated 18.10.84 to classify the electric motors imported by the applicant under Tariff Heading 84.11.20 subject to payment of import duty was wrong and was taken under a misconception of law and has to be annulled.

In the result the sub judice decision is annulled with £75.- against costs, in favour of the applicant.

Sub judice decision annulled. £75.- costs in favour of applicant.