1988 November 29

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SUN ISLAND CANNING LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF THE DEPARTMENT OF CUSTOMS AND EXCISE,

Respondent.
(Case No. 867/85).

Customs and Excise Duties—The Customs and Excise Duties Laws, 1967 (Law 82/67)—Whether administration possess power to revoke an illegal decision levying duty—Question determined in the affirmative—In the absence of a specific legal provision, the matter is governed by the general principles of administrative law applicable to the case of revocation of an unlawful administrative act—Refusal to revoke an act levying duty—Refusal based on ground of absence of power to revoke—Annulled for misconception of law.

Misconception of law—Refusal to revoke an act on ground that relevant legislation did not give power to revoke it—In fact, the act could have been revoked by applying the general principles of administrative law relating to revocation of unlawful acts—Refusal annulled.

The applicants imported goods which, having been classified in accordance with the declaration filed by applicants' agents, were cleared from customs. The applicants paid the correct amount of duty, which such classification entailed.

Some time later the applicants applied for reclassification of the goods on the ground that the goods did not in fact contain sugar, as the applicants originally thought.

Respondent turned down the application on the ground that as there

was no dispute prior to the clearance of the goods in question, he had no power to accede to applicants' request for reclassification.

The said refusal was annulled by the Court. The principles expounded by the Court in this case appear sufficiently from the hereinabove headnote.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Director of the Department of Customs and Excise v. Grecian Hotel Enterprises Ltd. (1985) 1 C.L.R. 476;

Yiangou and Another v. The Republic (1976) 3 C.L.R. 101;

Kolokos v. The Republic (1965) 3 C.L.R. 558.

Recourse.

Recourse against the refusal of the respondents to refund to applicants the sum of £1803.33 paid in excess as import duty for "frozen concentrated pineapple juice".

G. Agapiou with A. Ioannou (Mrs.), for the applicants.

Gl. Hadjipetrou, for the respondents.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. On the 2nd February 1985, the applicants through their clearing agent, deposited with the Customs Authorities Limassol a Clearance Form together with all the other relevant documents for the purpose of clearing from Customs a quantity of concentrated juice which they described as "Frozen Concentrated Pineapple Juice". The Clearing Agent of the applicants declared the above goods under Tariff Heading 20.07.19 in relation to which there is provided a duty at a rate of 40% ad valorem. The above declaration was accepted by

the Customs Officer and on the 5th February 1985, they collected the appropriate import duty amounting to £4,828.88 and the said goods were delivered to the applicants.

By means of their letter dated the 31st May 1985, the applicants alleged that the said concentrated juice did not contain sugar and it ought not to have been classified under Tariff item 20.07.19 but under Tariff item 20.07.11 in relation to which the duty payable is at a rate of 25% ad valorem. By means of the same letter the applicants were claiming the refund of £1,803.33 which represented the difference of 15% between the above two Tariff items. Also the applicants presented a declaration of their suppliers to the effect that the concentrated juice did not contain sugar.

In reply the respondents addressed to the applicants the following letter dated the 27th July 1985.

" I refer to your letter under reference JCS/AS 247 of the 31st May, 1985, in connection with your claim for reclassification and refund of the import duty allegedly overpaid on the above juice, on the ground that it should have been classified under Tariff Heading 20.07.11 @ 25% ad valorem general rate of duty and not under Tariff Heading 20.07.19 @ 40% ad valorem, as declared by your Clearing agents and paid.

I regret to inform you that as your Customs agents declared the juice under Tariff Heading 20.07.19 and as no dispute arose prior to its removal from Customs control, I am unable to accede to your request."

The applicants by means of a letter of their counsel dated the 13th August 1985, sought a reconsideration of their matter. The respondents rejected the claim for consideration, by their letter dated the 31st August 1985, which reads:

"I refer to your letter under reference JA/KC/2440 of 13

August 1985 concerning the above subject, I would inform you that in accordance with the Customs and Excise Law No. 82/67 unless the overcharge is the result of a mistake of fact, claims for refund of import duty paid on goods already delivered from Customs charge can be considred only in the cases falling in Section 161(1) thereunder.

There is no other provision in the above mentioned Law empowering me to reconsider the tariff classification of a product and refund of any duty overpaid thereon.

In the present case the declaration under tariff heading 20.07.19 was made on behalf of your clients by their clearing agents who were duly authorized by them to make such a declaration, and no dispute arose prior to the delivery of the goods from Customs charge.

Therefore, I am not, as you will appreciate, in a position to re-examine the tariff classification of the goods under reference."

As a result of the rejection of their claim the applicants on the 9th October 1985, filed the present recourse whereby they pray:

"1. That the decision of the Director of the Department of Customs and Excise communicated to the Applicants by their letter No. 20.07 dated 27/7/85 and re-confirmed by letter on the 31/8/85 is contrary to the law and/or is made in excess or in abuse of powers vested in the said Director.

2. A declaration that the Applicants are entitled to a refund to them of the sum of £1803.33 paid by the Applicants in excess of what was rightly payable by them."

The contentions of learned counsel for the applicants that the classification of the goods under tariff item 20.07.09 and not under tariff item 20.07.11 was due to a common mistake of fact that is the clearing agent, on the one hand, without being aware of the

true position and believing that the juice contained sugar, he did in fact declare that it contained sugar, and the customs officer, on the other hand accepted such declaration and acted upon it and determined the duty payable with regard to goods containing sugar, by acting in the same way and making the same mistake as the clearing agent. They further contended that on the basis of the facts of their case respondents unjustifiably refused to reconsider the classification of the said goods and refund the excess import duty which they collected by mistake and/or illegally, contrary to the provisions of existing legislation, the Constitution and the judgment of the Supreme Court in *Director of the Department of Customs and Excise v. Grecian Hotel Enterprises Ltd.*, (1985) 1 C.L.R. 476 and/or in excess and/or abuse of their powers.

On the other hand learned counsel for the respondents submitted that the matter is governed by section 161 of the Customs and Excise Law 1967, (Law No. 82 of 1967), whose provisions are only applicable in the cases of disputes which arise before the removal of the goods from customs; and not in instances such as this one where the dispute arose after the goods had been removed from customs.

In *Director of the Department of Customs and Excise v.Grecian Hotel Enterprises (supra)* the question that fell for consideration was this: "Do the Customs Authorities have power to revoke, amend, or modify a decision levying duty on imported goods after clearance." (See the judgment of Pikis J., at p. 479). Pikis J., delivering the first judgment of the Court answered the question as follows at pp. 481-482:

> "Having given due consideration to every aspect of the case, we are unable to uphold the judgment of the trial Court. The imposition of customs duties is an administrative act and like every administrative act it may, in appropriate circumstances, be revoked. As Triantafyllides, J., as he then was, observed in *A. & S. Antoniades & Co. v. The Republic* (1965) 3 C.L.R. 673, there is power in administrative law to revoke an erroneous decision and decisions of the customs au-

thorities are no exception. A decision revoking an earlier one, is reviewable under Article 146.1 of the Constitution, in accordance with settled principles of administrative law pertaining to the validity of revocatory acts. As explained by Stassinopoulos in Law of Administrative Disputes p. 230, there is power in administrative law to revoke an illegal administrative act, that is, an act contrary to law. Thus there is amenity on the part of the Administration to recall a decision claimed to be contrary to law. Whether this power was properly exercised in the present case, is a matter of no concern to us for the review of any such act could only be undertaken in the context of proceedings challenging the act, under Article 146.1 of the Constitution. Every illegal administrative act is liable, in appropriate circumstances, to revocation, the effect of which is to remove the decision recalled and create a new situation in law, definitive of the rights of those affected thereby. Once there was discretion to revoke in this case the original decision for the classification of the marble on the ground it was taken contrary to law, namely the classification of goods under the Customs and Excise Law, the original decision disappeared and a new situation arose, imposing a burden on the respondents to pay duty according to the new decision. They had a right to question the decision of 17.4.78, a right they forfeited by failing to mount a challenge before the Supreme Court in its revisional jurisdiction within 75 days, as required by Article 146.3 of the Constitution. Only the Supreme Court could inquire, on a recourse into the presumed validity of the revocatory act, as provided in para. 1 of Article 146. Thereafter, the debt or obligation of the respondents accruing under the decision of 17.4.78, was recoverable in a customs prosecution as the appellants sought to recover it by the present proceedings. To this claim respondents had no valid defence; therefore, appellants were entitled to judgment for a sum of C£3,346."

Triantafyllides P., stated the following at pp. 483-484:

"In the light of the material before the Court it is evident that the initial classification of the goods in question was errone-

ous, and, therefore, contrary to the relevant legislative provisions, and that the aforesaid 'demand note' was the result of the proper application of such provisions even belatedly.

As this was an instance of revocation of an unlawful administrative decision it is useful, as regards the general principles of administrative law applicable thereto, to refer to, inter alia, *A. & S. Antoniades & Co. v. The Republic*, (1965) 3 C.L.R. 673, 683, 684, *Pavlides v. The Republic* (1966) 3 C.L.R. 530, 549-551, and on appeal (1967) 3 C.L.R. 217, 228, *Zenios v. The Republic*, (1967) 3 C.L.R. 364, 371, 372, *Karayiannis v. The Republic*, (1974) 3 C.L.R. 420, 433, 434, *Yiangou v. The Republic*, (1975) 3 C.L.R. 228, 243, 244, and on appeal (1976) 3 C.L.R. 101, 105-108, *Michael v. The Republic* (1979) 3 C.L.R. 499, 501, 502, and *Georghiou v. The Republic* (1983) 3 C.L.R. 827, 837-840. It is pertinent to point out, too, that such principles differ from those which apply to the revocation of lawful administrative decisions, as they were expounded in, inter alia, *Paschali v. The Republic* (1966) 3 C.L.R. 593, 608, *Saranti v. The Republic* (1974) 3 C.L.R. 338, 341, 342, and on appeal (1979) 3 C.L.R. 139, 143, 144, *Ioannou v. The Republic* (1979) 3 C.L.R. 423, 441, *Peristianis v. The Republic* (1981) 3 C.L.R. 92, 101, *Louca v. The Republic*, (1981) 3 C.L.R. 190, 193, and *Charalambous v. The Minister of Interior* (1981) 3 C.L.R. 203, 213.

Moreover, it is apparent from a perusal of the Customs and Excise Law, 1967 (Law 82/67) that the initial decision regarding the importation free of duty of the quantity of marble in question was not revoked by virtue of any specific legislative provision in Law 82/67, or in any other Law, which could be treated as excluding, in whole or in part, the application of the general principles of administrative law governing the revocation of unlawful administrative decisions (see, in this respect, inter alia, the *Antoniades*, case, supra, the *Saranti* cases, supra, in the first instance and on appeal, the *Yiangou* cases, supra, in the first instance and on appeal, *Curzon Tobacco Company Limited v. The Republic* (1975) 3 C.L.R. 363, 368, and

on appeal, (1979) 3 C.L.R. 151, 156, 157, *Michaelides v. The Attorney-General of the Republic*, (1978) 3 C.L.R. 285, 300, and on appeal (1984) 3 C.L.R. 1596, the *Louca* case, supra, *The Group of Five Bus Tour Ltd. v. The Republic*, (1983) 3 C.L.R. 793, 808, 809 and *Petrides v. The Republic*, (1983) 3 C.L.R. 1355, 1358, 1359)."

In effect the applicants' contention was that the classification in question was made in a manner contrary to the relevant legislative provisions and thus amounted to an unlawful administrative act. Further the applicants by their claim were in effect asking the respondents to revoke their previous classification. As it will appear from the facts above referred to the respondents rejected the applicants claim on the sole ground that the relevant legislation did not empower them to do so.

As was held by Pikis J., in the *Grecian Hotel* case (supra), the Customs Authorities have power to revoke, amend, or modify a decision levying duty on imported goods after clearance.

Further Triantafyllides, P., stated in the *Grecian Hotel* (supra), that in the absence of a provision in the relevant legislation (Law 82/67) for revocation of erroneous decisions imposing import duty their revocation should be governed by the general principles of administrative law governing revocation of unlawful administrative decisions. The principles governing the revocation of unlawful administrative acts were stated in the case of *Yiangou and Another v. The Republic* (1976) 3 C.L.R. 101 in which Triantafyllides P., giving the judgment of the Full Bench said the following at pp. 105-106:

"The revocation of an unlawful administrative act is a course lawfully open to the administration and it is based on the notion of the preservation of legality; the relevant principles are to be found in Stasinopoullos on the law of Administrative Acts (1951), at pp. 398-399; and it is useful to refer, too, to the decisions of the Council of State in Greece in cases 796/1964, 1750/1965, 1531/1966, 3027/1967 and 458/1968; in

particular in the decision in case 3037/1967 the following are stated as regards the revocation of unlawful administrative acts:

'... η ανάκλησις, και παρανόμου έτι διοικητικής πράξεως δεν είναι επιτρεπτή μετά την πάροδον ευλόγου χρόνου, κρινομένου κατά τας εκάστοτε συνθήκας, εάν εξ αυτής παρήχθη πραγματική κατάστασις προστατευτέα εν όψει των αρχών της χρηστής Διοικήσεως, πλην εάν αύτη προεκλήθη δι' απατηλής ενεργείας του ενδιαφερομένου ή δεν ετηρήθει υπ' αυτού όρος τεθείς εν αυτή με την επιφύλαξιν της ανακλήσεως ή συντρέχη λόγος δημοσίου συμφέροντος.'

('... the revocation of even an unlawful administrative act is not permissible after the lapse of a reasonable period of time, to be judged in the light of the circumstances of each case, if there has been created from the beginning a situation needing protection on the basis of the principles of proper administration, unless the unlawful administrative act has been caused by fraudulent conduct of the person concerned or there has not been observed by him a condition included in the act subject to the reservation that there might be revocation or there exist reasons of public interest'.)"

Similar approach is to be found in Spiliotopoullos Manual on Administrative Law 2nd Edition, at pp. 174-176.

Almost to the same effect is the approach in Dagtoglou General Administrative Law A' 2nd edition at p. 239.

As it appears from the above passages and from the case-law referred to in the judgment of Triantafyllides P., in the *Grecian Hotel* case (supra) the administration, in its discretion, may revoke an unlawful administrative act. In this case, however, the administration declined to exercise any discretion in favour or against revocation, and the reason for adopting such a course was because it was labouring under the misconception of law that it had no power under the law to revoke its previous decision,

whereas in fact it had such a power under the principles of administrative Law governing revocation of unlawful administrative decisions. This being the position, the sub judice decision has to be annulled as being a decision which was taken under a misconception of the correct legal position (see *Kolokos v. The Republic* (1965) 3 C.L.R. 558).

As the question of revocation or not falls within the discretion of the administration I need say no more on the matter. It is referred to the respondents for reconsideration in the light of this decision and of the facts of the case.

In the result the sub judice decision is annulled. In the circumstances, however, there will be no order as to costs.

Sub judice decision annulled.
No order as to costs.