

1983 March 11

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THE PORTS AUTHORITY OF CYPRUS,

Applicants.

v.

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

Respondents.

(Case No. 202/82).

Ports and harbours—Crown vested with prerogative over ports and harbours under English Common Law—Such prerogative saved and vested subject to certain qualifications, in the Republic, upon independence by virtue of Article 188.3 of the Constitution, section 33(1)(c) of the Courts of Justice Law, Cap. 8 and section 29(1)(c) of the Courts of Justice Law, 1960 (Law 14/60)—Therefore control and management of Ports the responsibility of the State—The Cyprus Ports Authority, set up under the Ports Authority Law, 1973 (Law 38/73), which was chosen by the State to discharge these responsibilities an agency of the State in consimili casu to servants of the State, carrying out governmental duties and discharging State responsibilities—Immune from payment of income tax.

The sole issue in this recourse was whether the Cyprus Ports Authority (“C.P.A.”) set up under the provisions of the Cyprus Ports Authority Law, 1973 (Law 38/73) is subject to the Tax Laws of the Republic and accountable to tax in respect of its income. It was common ground that, if the powers vested in C.P.A. and the duties imposed upon them by law belong to the category of powers and duties vested by law in the State, C.P.A. should enjoy a position similar to State functionaries, including immunity from income tax. As the Constitution did not expressly confer responsibility to the Republic for the control of ports and harbours and, no law currently in force constituted the

Republic the custodian or watchdog of ports and harbours, the question inevitably was one concerning the inherent powers of the Republic in relation to ports and harbours. These powers, if any, must derive from the powers vested in the State, as successor to the Crown upon independence.

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Held, (1) that under the common law the Crown has a prerogative over ports and harbours, a prerogative that acknowledges to the Crown sole responsibility for the erection of ports, harbours and the assignment of duties respecting their management; that the prerogative of the Crown under English Common law, in relation to ports and harbours, was saved and vested in the Republic, upon independence, by means of section 33(1)(c) of the Courts of Justice Law, Cap.8 and Article 188.3 of the Constitution; that the Courts of Justice Law, Cap.8, was repealed and replaced by the Courts of Justice Law 1960 - Law 14/60 - which, like its predecessors, it retained the common law as part of the law of the land, in virtue of s.29(1)(c) except to the extent that it was incompatible with the provisions of the Constitution; that there is no inconsistency between the provisions of the common law on the subject of the prerogative of the State in relation to ports and harbours and those of the Constitution; and that, therefore, the prerogatives of the Crown under English common law - and this statement is not confined to the prerogative in relation to ports and harbours - vested in the Republic subject to two qualifications:- Provided that -

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(a) it is compatible with the republican form of government and,

(b) it is exercised subject to the doctrine of separation of State powers entrenched in the Constitution.

(2) That the Crown prerogatives bearing on the legislative and judicial branches of government have, after independence, vested in the legislative and judicial authorities of the State, respectively; that that aspect of the Crown prerogative that relates to the executive powers of the State, has vested in the executive branch of government; that, therefore, the control and management of ports and harbours is the exclusive responsibility of the State; that 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

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and harbours, which was an instrument and an Agency of the State in every respect (see the provisions of Law 38/73); accordingly 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; and that, consequently, the claim to immunity from income tax is valid, the recourse succeeds and the assessment to income tax complained of, is hereby annulled.

Sub judice decision annulled.

10 Cases referred to:

National Association of Local Government v. Bolton Corporation [1942] 2 All E.R.443;

Electricity Authority of Cyprus v. Petrolina Co. Ltd. [1971] 1 C.L.R. 19 at pp. 69, 70;

15 *Gilbert v. Trinity House Corporation* [1886] 17 Q.B.D. 795;
Tanlin v. Hannaford [1949] 2 All E.R. 327;

Mersey Docks v. Cameron, Jones v. Mersey Docks [1865] 11 H.L. Cas. 443;

20 *Bank Voor Handel v. Hungarian Adminr.* [1954] 1 All E.R. 969
at pp. 978-987;

Fox v. Government of Newfoundland [1898] A.C. 667;

B.B.C. v. Johns [1964] 1 All E.R. 923.

Recourse.

25 Recourse against the decision of the respondent rendering the income of the applicants liable to tax.

T. Papadopoulos, for the applicants.

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

Cur. adv. vult.

30 PIKIS J. read the following judgment. We are required to decide whether the Cyprus Ports Authority, hereafter referred as C.P.A. for convenience, is subject to the Tax Laws of the realm and accountable to tax in respect of its income. The question was not resolved in any previous decision. It is a highly interesting one, involving important questions of constitutional law. The liability of C.P.A. to tax depends, in the first place, as acknowledged by counsel, on the powers, duties and responsibilities of the State in relation to ports and harbours

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and, whether the applicants, as a corporate entity, may properly be regarded in law as the agents of the State for the performance of functions belonging to the State.

It is common ground that, if the powers vested in C.P.A. and the duties imposed upon them by law belong to the category of powers and duties vested by law in the State, C.P.A. should enjoy a position similar to State functionaries, including immunity from income tax. As the Constitution does not expressly confer responsibility to the Republic for the control of ports and harbours and, no law currently in force constitutes the Republic the custodian or watchdog of ports and harbours, the question inevitably is reduced to one concerning the inherent powers of the Republic in relation to ports and harbours. These powers, if any, must derive from the powers vested in the State, as successor to the Crown upon independence. Therefore, a question of supreme constitutional importance must necessarily be determined in order to make a valid determination of the rights of the parties.

Immunity from taxation is also claimed on three other grounds to which reference shall be made in due course, when summarising the issues raised for determination.

Under English common law, the Crown enjoyed considerable privileges known as the prerogatives of the Crown. In the exercise of its prerogative the Crown was not bound by the laws of the realm. The prerogative could only be curtailed by an express provision in a statute of Parliament. Historically, the Crown embodied the State as an organic entity and enjoyed considerable powers in every sphere of government—the executive, the legislative and judicial branch of government. In very many areas, the Crown was the repository of State powers. In the early days of Anglo-Saxon history, the powers of the Crown were mostly exercised by the Sovereign personally. Gradually, with the democratization of the government of the State and its institutions, effective power passed to the elected government of the country and institutions of government ordained by law but lip service kept being paid to the Crown as the fountain of authority by governing in the name of the Crown, a fiction that helped sustain continuity in constitutional history. The Crown prerogative became effectively the prero-

gative of government. A multitude of government powers is still referable to the Crown prerogative and is exercised, as in days passed, without a duty of legal accountability. There is accountability in an indirect form, through votes of confidence for the acts of government in Parliament and through elections for the renewal of the popular mandate.

In the exercise of its powers the Crown is not subject to the laws of the realm, unless Parliament expressly makes its exercise subject to law. Presumably, the rationale behind this exception lies in the belief that laws are meant to facilitate and not hinder or restrict the exercise of governmental action. Under English constitutional law, the privileges, title, rights and interests of the Crown, are not subject to tax, unless the taxing statute expressly makes them liable to tax. (See, *Halsbury's Laws of England, 4th ed., Vol. 8, para. 1446*). The Crown has a juridical entity, encompasses the Sovereign personally and the officials of departments of government, from the Minister to the bottom of the hierarchical ladder. Consequently, departments of State and State functionaries in their official capacity, are not subject to Tax Law in the absence of an express provision to that end. The extension and multiplication of the functions of the State necessitated the entrustment of certain functions of the State to bodies, individuals and agencies outside government service. It is settled by authority that immunity from tax should be extended to such agencies as well, on grounds of comparability of duties to Crown servants and justifying their assimilation in this regard. (See, *Halsbury's Laws of England, 4th ed., Vol. 8, para. 1440*). The test relates to the nature of the functions of non governmental bodies and not the external characteristics of their status.

It is the case for the C.P.A. that they are an agency of the government of the State for the discharge of the responsibilities of the State in relation to the ports and harbours of the country and matters incidental thereto. And as such, they are not liable to income tax. The C.P.A. is the creature of statute, a public corporation set up under the provisions of the Cyprus Ports Authority Law 38/73 (amended by Laws 59/77 and 29/79). It succeeded to the powers previously exercised by a number of government authorities vested by a multitude of laws. The Cyprus Ports Authority Law consolidated the powers vested

by different laws, it extended them and vested them in the C.P.A., presumably in the interests of economy and efficiency. The C.P.A. may appropriately be regarded as the successor to the officers of the State it replaced and the powers earlier vested in them. In the submission of counsel for the applicants, they are in consimili casu to its predecessors servants of the State and immune, like they were, from taxation for the excess of their income over expenditure. Consequently, the Court is moved to set aside the decision of the Commissioner of Income Tax, dated 6th March, 1982, rendering their income liable to tax, as invalid and contrary to law.

Exemption from taxation is also claimed on three additional grounds:-

- (a) The C.P.A. does not carry on a business or trade within the meaning of s.5(1)(a) of the Income Tax Laws 1961-1977, a precondition for the valid imposition of income tax. The argument here is that the activities of C.P.A. are not in the nature of a business or trade and, consequently, outside the compass of the law. The charges collected are not levied in relation to a business or trade but in exercise of an obligation to provide these services on behalf of government. Motivation for profit is altogether missing.
- (b) The C.P.A. is not a person within the meaning of s.2 of the Tax Laws, a prerequisite for liability to income tax. The contention for the applicants is, as I understood it, that C.P.A. is a legal entity existing for the discharge of statutory duties and responsibilities and not a person of the kind envisaged by the Tax Laws, a person, body or association in being for purposes other than discharge of specific statutory functions.
- (c) The C.P.A. is exempt from taxation in virtue of the express provisions of s.29 of Law 38/73, conferring immunity upon the C.P.A. respecting income tax.

The respondents dispute the claim of the applicants to immunity from income tax on grounds of assimilation to government service and deny a right to exemption on any other ground. The C.P.A., in the submission of respondents, is a juridical

entity, separate and distinct from government, rendering services in the interests of the public but not for or on behalf of government. The control exercised by government over C.P.A. does not detract from the above proposition and is a factor neutral in itself.

The claim to immunity on grounds of non trading is ill-founded, in the contention of the respondents. Trading, in their submission, is a very wide concept that encompasses every activity bearing the insignia of trade. Trading is not dependent on profit motivation. It is a term of the widest scope in an etymological, technical as well as legal usage, as Lord Wright pointed out in *National Association of Local Government Officers v. Bolton Corporation* [1942] 2 All E.R. 443. (See also, the decision of *Triantafyllides, J.*, as he then was, in *Electricity Authority of Cyprus v. Petrolina Company Limited* (1971) 1 C.L.R. 19, 69, 70).

Equally unsustainable is, in the contention of counsel for the Republic, the claim to immunity on the ground that C.P.A. is a non person for the purposes of the Income Tax Laws. The C.P.A. qualifies as a person from a wide variety of views; its exclusion from the definition of a person under s.2 would be arbitrary. Consigned to failure is also the claim to immunity from taxation, in virtue of the provisions of s.29. As Mr. Evangelou suggested, the plain provisions of this section of the law, make it abundantly clear that they confer exemption in relation to duties, dues and charges, a form of taxation totally unrelated to income tax.

I took time to consider the issues raised for decision and studied every aspect of the case with care.

The first question I must answer is whether the C.P.A. is in effect an agency for the discharge of State functions and, consequently, assimilated to the government establishment. Is the C.P.A. the vehicle of the State for the discharge of its responsibilities in an area over which the State has responsibility, under the law?

If the answer is in the affirmative, the C.P.A. will be absolved of liability to income tax for the reason that it is not bound, in the same way that departments of the State are not bound

by the Income Tax Law. Attention, therefore, will be focused on resolving this issue before considering other aspects of the case, if at all necessary.

The Cyprus Ports Authority—The nature of its powers and their relationship to the duties of the State:

Extensive reference was made by counsel to case-law in order to postulate the precise circumstances under which non-governmental bodies can claim immunity on grounds of consimili casu. A test suggested and, occasionally applied for the determination of the nature of the functions of a given body in order to determine the validity of claim to immunity from taxation, is that found in *Gilbert v. Trinity House Corpn.* [1886] 17 Q.B.D. 795. It is this: Whether the powers exercised by the body in question are an emanation of the Crown. If the powers exercised emanate from the Crown and, properly fall in the domain of its prerogative, the corollary is that immunity ought to be granted, as in the case of the Crown. After all, these services are the same and are rendered for the same purpose, viz. in exercise of Crown prerogative. This test was found not to be sufficiently succinct and comprehensive by *Denning L.J.*, as he then was, in *Tamlin v. Hannaford* [1949] 2 All E.R. 327. He suggested a simpler test, that is whether a functionary may properly be regarded as the servant or agent of the Crown. Applying this test, he found that the *British Transport Commission*, a public corporation, was neither the servant nor the agent of government, inasmuch as the provision of public transport was not the responsibility of government, either by virtue of the prerogative of the Crown or any other powers assigned to government by law. The test is not whether the services rendered are of a public nature but a totally different one, whether the services rendered relate to responsibilities vested in government, in virtue of Crown prerogative or by law. Neither the control exercised by government over the appointment of the board of the British Transport Commission, nor the control exercised over its affairs could render the Commission the agent or servant of the Crown. An agent or servant of the Crown is only one who performs functions in exercise of government responsibilities.

Probably the first case in which the Court attempted to postulate the criteria relevant to deciding whether a body outside

government stands in consimili casu to Crown servants, is that of *Mersey Docks v. Cameron, Jones v. Mersey Docks* [1865] 11 H.L. Cas. 443. The first question is whether the operations carried out by the body claiming immunity fall within the
5 sphere of government responsibilities and, secondly, whether the assignment in question is undertaken in discharge of the duties of government under the law. In the words of Lord Watson, in consimili casu may be regarded persons who are
bare trustees for "purposes required and created by the govern-
10 ment of the State".

In grasping the principles relevant to the situation in hand, I derived invaluable assistance from the judgment of the House of Lords in *Bank Voor Handel v. Hungarian Adminr.* [1954] 1 All E.R. 969, particularly from the analysis of the law, made
15 by Lord Reid, at pp. 978-987. The learned Judge suggests the question should be approached by examining the status, duties and functions of the body claiming immunity. If upon this examination their status, duties and functions are compar-
20 able to those of servants of the Crown, then Crown privilege may properly be claimed but not otherwise. To qualify for the privilege, the body must be closely associated with the performance of functions of governmental character. In the
opinion of Lord Reid, a typical example of persons in consimili
25 casu are justices who may legitimately claim immunity, not for the benefit of their resources but in order that their functions should not be prejudiced. It does not necessarily follow that a non government body is entitled to immunity in respect of every part of its activities. Immunity may be limited to those
functions that bear the hallmark of government functions.

30 In *Handel supra*, the House of Lords held by majority that the Custodian of Enemy Property was immune from taxation for monies coming in his possession. For he held them on behalf of the Crown.

35 However intensive the element of public service may be in the services rendered by a non governmental body, it will not suffice to justify its assimilation to Crown service, unless the service is of a kind that government has a duty to provide. In *Fox v. The Government of Newfoundland* [1898] A.C. 667, a body set up to satisfy educational needs of the public, was not

regarded as being in consimili casu to a government department for, neither under the common law nor by statute was a responsibility cast on the State to provide for education. One may speculate that the decision would go the other way if the matter came up for reconsideration today but that in no way modifies the relevant principle which is that, unless services are rendered on behalf of government, the body providing them cannot claim immunity. For similar reasons, the claim of the British Broadcasting Corporation to immunity, was rejected in *B.B.C. v. Johns* [1964] 1 All E.R. 923. Applying these principles to the facts of our case, Mr. Papadopoulos submitted that C.P.A. is not liable to income tax. He rested his submission principally on the argument that the State was treaty bound to set up a ports authority and provide the services envisaged by Law 38/73 in accordance with its agreement with the *International Bank of Reconstruction and Development* that gained the force of law, as from 19th September, 1969, when gazetted —Notification 748. Agreements with international organizations become part of the municipal law upon publication in the Official Gazette of the Republic and, in fact, prevail in case of conflict with any provisions of municipal laws (Art. 169 of the Constitution). I cannot uphold this submission for, the obligations of the Republic to the countersigning party were fulfilled by the enactment of Law 38/73 and the incorporation therein of the obligations undertaken in virtue of the aforesaid international agreement. The agreement did not stipulate that the Republic of Cyprus should undertake towards its people the duty to provide appropriate services with regard to the management and control of ports and harbours. The government did not undertake a responsibility to the public as a necessary part of its governmental obligations to control ports and provide specific services. So, unless a duty was imposed upon the State to control and manage ports and harbours either in consequence of the prerogative of the Republic to govern or by virtue of any other law, the claim to immunity must fail. Mr. Papadopoulos argued that it is the undeniable responsibility of government to provide for and regulate the control and management of ports. But he did not indicate wherefrom this duty originated or was cast upon the State. Mr. Evangelou submitted for the respondents that the C.P.A. is nothing other than a public corporation set up

in the public interest, separate and distinct from government despite the control residing in government over its management and affairs. The test should be whether the functions performed by the C.P.A., as he put it, are closely connected with the exercise of royal prerogative of a kind that vested in the Republic of Cyprus under the provisions of Article 188.3 of the Constitution and, as no prerogative in the area of ports and harbours was inherited from the British Crown, the claim to immunity ought to be dismissed. It is difficult to reconcile the submission of counsel with legal realities. For under common law, the Crown has a prerogative over ports and harbours. It is a prerogative of considerable antiquity that acknowledges to the Crown sole responsibility for the erection of ports, harbours and the assignment of duties respecting their management. The prerogative extends to the ownership of the soil encompassed by a port, including that part of the soil that is covered by tidal waters. The subject is discussed in detail in *Halsbury's Laws of England, 4th ed., Vol. 36* (para. 401 et seq.). In virtue of this prerogative, the Crown is under a duty to keep the ports free and open to go and come, subject to the payment of proper tolls for use and keep the ports open in time of peace to all ships.

Ultimately, determination of the question of immunity of the C.P.A. from taxation, depends on whether the Republic became, upon independence, the vestee of the prerogative enjoyed by the British Crown over ports and harbours. In my judgment, the answer is in the affirmative.

The legislation in force at the time of the establishment of the Cyprus Republic, was expressly saved by the provisions of Article 188, subject to its consistency with the Constitution and necessary modifications to bring it in accord with its provisions. Para. 3 of Article 188 expressly lays down that reference to the Crown shall be construed as reference to the Republic. One of the laws in existence at the time of the birth of the Republic, was the Courts of Justice Law, Cap. 8. Section 33(1)(c) of the aforesaid Law, made the English common law and doctrines of equity applicable in Cyprus, save to the extent that the provisions of the common law and equity were expressly overridden by a Cyprus statute. Consequently, the prerogative of the Crown under English common law, in relation to ports and harbours, was saved and vested in the Republic. The Courts

of Justice Law, Cap. 8, was repealed and replaced by the Courts of Justice Law 1960—Law 14/60 which, like its predecessors, it retained the common law as part of the law of the land, in virtue of s.29(1)(c) except to the extent that it is incompatible with the provisions of the Constitution. There is no inconsistency between the provisions of the common law on the subject of the prerogative of the State in relation to ports and harbours and those of the Constitution. On the contrary, if no such prerogative existed, need would arise for a law to assign these responsibilities to the State as a necessary power for the effective discharge of governmental responsibilities.

In my judgment, the prerogatives of the Crown under English common law—and I am not confining this statement to the prerogative in relation to ports and harbours—vested in the Republic subject to two qualifications:— Provided that—

- (a) it is compatible with our republican form of government and,
- (b) it is exercised subject to the doctrine of separation of State powers entrenched in the Constitution.

Elaborating upon the latter qualification, the Crown prerogatives bearing on the legislative and judicial branches of government have, after independence, vested in the legislative and judicial authorities of the State, respectively. That aspect of the Crown prerogative that relates to the executive powers of the State, has vested in the executive branch of government. The Crown prerogatives vested in the Republic and are exercisable depending on their nature, by the three branches of government, the executive, the legislative and the judicial.

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 interests 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.

In the result, the sub judice decision is annulled. There shall be no order as to costs.

Sub judice decision annulled. No order as to costs.