1988 January 20

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

RODAFINIA IMPORTS EXPORTS LTD.,

Applicants,

v.

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

Respondent.

(Case No. 623/84).

Customs and excise duties—Import of goods—Classification of—Judicial control—Principles applicable.

Customs and excise duties—The Customs Duties and Excise (Imposition and Refund) Law, 1978, as amended, Tariff 90.18 and 94.01 para. 99—The Brussels Nomenclature—The Rules for the Interpretation of Nomenclature, Rules 3(a) and 3(c).

The applicant company applied for the clearing from customs of a "massage chair", which they classified under class 90.18 (free of import duty).

The respondent did not accept the said classification, but, by means of the sub judice decision, classified the said chair under tariff 94.01 para. 99. In reaching such decision he relied on a finding that the chair in question was an ordinary chair with an additional massage mechanism and on Rule 3(c)* of the Rules for the Interpretation of the Brussels Nomenclature.

Held, annulling the sub judice decision: (1) In matters of classification of goods, an Administrative Court has no competence to substitute its own discretion in the place of the discretion of the proper authorities but, of course, has to examine the legality of the sub-judice decision, and

* *Rule 3(c) is quoted at pp. 48-49 post.*

also whether it was reached through any misconception and cognate matters *(A & S Antoniades and Co. v. Republic* (1965) 3 C.L.R. 673 at p. 680 adopted).

(2) The leaflet concerning the chair in question leads to the unequivocal conclusion that it is nothing but a massage apparatus and the massage mechanism is not additional but is incorporated in the chair and is part and parcel of same.

It is obvious therefore that the finding of the respondent to the effect that the massage chair in question is "an ordinary with an additional massage mechanism" was reaced through a misconception as to material facts.

(3) But even if we were to accept that the "massage chair" could be prima facie classified under two classes, the respondent should act under Rule 3(a) - and not under Rule 3(c) - of the Rules for the Interpretation of the Nomenclature. Class 90.18 is the class which provides the more specific description and should be preferred to classes providing a more general one.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

A and S Antoniades and Co. v. Republic (1965) 3 C.L.R. 673;

Makrides v. Republic (1979) 3 C.L.R. 584;

Demetriou Dairy Products v. Republic (1985) 3 C.L.R. 758.

Recourse.

Recourse against the decision of the respondents to classify "Massage Chairs" imported by applicants under customs tariff 94.01 instead of class 90.18.

L. Papaphilippou, for the applicants.

Y. Lazarou, for the respondent.

Cur. adv. vult.

LORIS J. read the following judgment. The gist of the present recourse is the Customs Tariff applicable to the imported by the applicants "Massage Chairs" cleared from Customs on 16.10.1984.

It was the stand of the applicants throughout, that the Massage Chairs in question should be classified under class 90.18 - (free from import duty) whilst the Respondent held the view that same should be classified under customs tariff 94.01 para. 99, code 821.0199 Part XX, Chapter 94 of the Second Schedule of the Customs Duties and Excise (Imposition and Refund) Law 1978, as amended.

On the 17th of October 1984, the applicant company acting through its clearing agent filed with the Customs Authorities an import clarification - Form C2 - together with other documents, attached to the recourse, for the clearing from customs of the said massage chair, which they classified under class 90.18 (free of import duty.

The above classification was not accepted by the customs officer in charge who decided that (a) Class 90.18, invoked by the applicants included massage apparatuses like those referred to in the corresponding class of the Brussels Nomenclature (vide appendix 5 attached to the opposition) which was not the case of the applicants as the chair in question was an ordinary chair with an additional massage mechanism and its correct classification should be 94.01 which covers "chairs and other seats even capable of being converted into beds and parts thereof", and in particular 94.01 para 99 under the heading "Ετερα".

(b) Even in case the massage mechanism were to be taken into account then Rule 3(c) of the Rules for the Interpretation of the Nomenclature would be applicable and accordingly customs duty should be levied under tariff 94.01 para 99.

Relying on the above decision the respondent classified the Massage Chairs in question under class 94.01 para 99 and levied customs duty amounting to £288.54, which was paid by the applicants under protest.

Hence the present recourse by means of which the applicants pray that the jub-judice decision of the respondent be declared null and devoid of any legal effect whatever.

Before going into the merits of this case I consider it necessary to set out herein below the relevant parts of Rule 3 of the Rules for the Interpretation of the Nomenclature, for purposes of easy reference:

"3. Οσάκις δι' οιονδήποτε λόγον, εμπορεύματα δύνανται εκ πρώτης όψεως να καταταχθούν εις δυο ή περισσοτέρας κλάσεις, η κατάταξις ενεργείται ως ακολούθως:

(α) Η κλάσις η οποία δίδει την πλέον ειδικήν περιγραφήν προτιμάται των κλάσεων αι οποίαι δίδουν πλέον γενικήν περιγραφήν (των εδαφίων των κλάσεων μή λαμβανομένων υπ' όψιν).

(β)

.....

(γ) Οσάκις η κατάταξις εμπορευμάτων δεν δύναται να γίνη συμφώνως προς το 3(α) ή το 3(β), ταύτα κατατάσσονται εις την κλάσιν εκείνην η οποία απαντάται τελευταία μεταξύ των εξ ίσου χρηζουσών μελέτης κλάσεων."

(And in English:

"3. Where for any reason goods can be prima facie classified under two or more classes, the classification shall be effected as follows:

(a) The class which provides the more specific description shall be preferred to classes providing a more general description (the items of the classes not taken into consideration)

(b)

.....

(c) Where the classification of the goods cannot be effected according to 3(a) or 3(b), goods are being classified under that class which is met last among classes equally meriting consideration".).

"In matters of classification of goods, such as the present case, an Administrative Court has no competence to substitute its own discretion in the place of the discretion of the proper authorities (vide Decisions of the Council of State in Greece 479/1938, 564/1949); but of course, as in every other case of recourse under Article 146 the Court has to examine the legality of the sub-judice decision , and also, whether it was reached through any misconception and cognate matters" (per *Triantafyllides J.*, as he then was - in *A & S Antoniades & Co., v. Republic* (1965) 3 C.L.R. 673 at p. 680).

To the same effect vide also cases: *Makrides v. Republic* (1979) 3 C.L.R. 584 at p. 601 and *Demetriou Dairy Products v. Republic* (1985) 3 C.L.R. 758 at p. 766).

Having carefully considered the material before me I have come to the conclusion that the respondent failed to carry out an inquiry before reaching at the sub-judice decision and as a result he acted under a misconception as to material facts for the following reasons:

A thorough examination of both leaflets (exh. 4 and ex. 5 attached to the written address of the applicant) leads to the unequivocal conclusion that the "massage chair" in question is nothing but a massage apparatus and the massage mechanism is not additional but is incorporated in the chair and is part and parcel of

same. The fact that the massage apparatus is in the shape of a chair (Ex. 4) is of no significance for it is the use of same that counts and not the shape.

It is obvious therefore that the finding of the respondent to the effect that the massage chair in question is "an ordinary chair with an additional massage mechanism" was reached through a misconception as to material facts; it is clear from Ex. 4, which was before the respondents as well, that the massage chair in question is an apparatus for massage of parts of the body and is "power operated" as required by the corresponding item of the Brussels Nomenclature (vide appendix 5 attached to the opposition). In the circumstances therefore the apparatus in question ought to have been classified under class 90.18 (free of import duty).

But even if we were to accept that the "goods" in question (the massage chair) could be prima facie classified under two classes, I hold the view that the respondent should act under Rule 3(a) - and not under Rule 3(c) - of the Rules for the Interpretation of the Nomenclature (set out above) in which case the goods in question would have been classified under class 90.18, which is the class which provides the more specific description and should be preferred to classes providing a more general one.

In the result the present recourse succeeds and the sub-judice decision is hereby annulled, but in the circumstances I make no order as to costs.

Sub judice decision annulled.
No order as to costs.