1966
April 22
May 28

BYRON PAVLIDES
and
THE REPUBLIC OF CYPRUS, THROUGH
1. THE COMMISSIONER OF INCOME TAX,
2. THE ATTORNEY-GENERAL AS SUCCESSOR TO THE GREEK COMMUNAL CHAMBER

[MUNIR, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

BYRON PAVLIDES,,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
1. THE COMMISSIONER OF INCOME TAX,
2. THE ATTORNEY-GENERAL AS SUCCESSOR TO THE GREEK COMMUNAL CHAMBER,

Respondents.

(Case No. 153/65).

Income Tax—Recourse against respondent's decision not to refund to applicant a sum allegedly paid to the respondent in excess of applicant's tax liability under Laws 16 of 1961, 18 of 1962 and 9 of 1963 of the Greek Communal Chamber, for the years of assessment 1961–1963—Applicant assessed with two different assessments, first and second, in respect of the same years of assessment—Second assessments, made in error, properly and effectively cancelled by the respondent—Decision of the Supreme Court in the case of Panayides and the *Republic etc. (1965) 3 C.L.R. p. 107, does not have retrospective effect to invalidate tax assessments in cases where tax liabilities had been assessed, determined, finalized and ultimately discharged by the taxpayers prior to such decision.*

Constitutional Law—Constitutionality of statutes—Legal effect and consequences of a declaration by the courts that particular statutory provision is unconstitutional.

Administrative Law—Administrative Acts—Defective Administrative Act—Effect of an error on an administrative act—An administrative act done in error must, in most cases, be cancelled when the author of such act has become aware of such error—Without prejudice, of course, to the rights of the citizen to obtain redress in cases where he may have suffered damage in consequence of such error.

Withdrawal of erroneous administrative acts or decisions—See above.

Revocation of erroneous administrative acts or decisions—See above.

Administrative acts or decisions—Erroneous decisions or acts—Cancellation of—See above.

Constitutional and Administrative Law—Recourse under Article 146 of the Constitution—Whether in the present case there exists an administrative decision which can form the subject-matter of such recourse viz. *a decision within Article 146.1 of the Constitution—Whether there exists a legitimate interest under Article 146.2 —Whether the recourse is out of time under Article 146.3 of the Constitution.*

Constitutional Law—Equality—Principle of equality—Unequal treatment—Principle of certainty of law and justice, is an equally essential feature of the basic rule of law as the principle of equality.

Equality—Principle of equality—See above.

Certainty—Principle of certainty of law and justice—See above.

The applicant in this recourse complains against the decision of the respondent not to refund to him the sum of £511.260 mils alleged to have been paid by him in excess of his income tax liability under Laws 16/61, 18/62 and 9/63 of the Greek Communal Chamber for the years of assessment 1961, 1962 and 1963.

Under an assessment made on the 30th November, 1964 on the basis of the scales applicable to unmarried persons the applicant who is a bachelor, was assessed to pay a total amount of £1,333.385 mils in respect of the above 3 years of assessment, which he paid on the 5th January, 1965.

By virtue of the judgment of the Supreme Court delivered on the 2nd March, 1965 in the case of *Panayides and the Republic*, (1965) 3 C.L.R. p. 107, it was held that those provisions of the aforesaid Law 16/61 of the Greek Communal Chamber which had made a distinction, for the purposes of the taxation imposed by the said Law, between married and unmarried persons, were unconstitutional.

Then on the 11th June, 1965, the respondent made three other assessments on the applicant in respect of the same three years of assessment, the subject matter of this recourse, whereby he was assessed to pay a total amount of £822.125 mils. On the 5th August, 1965 the applicant wrote through his counsel to the Income Tax Office asking for a refund of the sum of £511.260 mils being the difference between the £1,333.385 mils, which the applicant had already paid on the 5th January, 1965, as a result of the first assessment

The Commissioner of Income Tax replied by his letter of the 18th August, 1965, wherein he stated *inter alia*, that the assessments of the 11th June, 1965 were done so under a misapprehension and should now be considered as cancelled, the reason being that the applicant had already paid the tax on the original assessments.

Counsel for the respondents raised the following three preliminary objections :

(1) that the recourse is out of time under paragraph 3 of Article 146 of the Constitution ;

(2) that there is no administrative decision before the Court which can form the subject-matter of a recourse under Article 146; and

(3) that the applicant has no existing legitimate interest under paragraph 2 of Article 146.

The case for the applicant was based on the two points, namely—

(1) that the second assessments constitute valid administrative acts which have become binding on both the citizen and the Administration alike and that unless such administrative acts are revoked afresh by subsequent administrative acts, *i.e.* by a third series of assessments, then the second assessments are, valid and must be taken to express the Administration's latest decision in the matter ; and

(2) that the applicant having paid the tax assessed upon him by the first assessments prior to the decision of the Supreme Court in *Panayides* case (*supra*) should not be in a worse position than a person who was also so assessed but who has not met his obligations promptly like the applicant and who has only done so after the decision of the Supreme Court in the aforesaid Panayides case.

Held, (I) on the preliminary objections raised by the respondent :

(1) With regard to the allegation of counsel for respondent that the recourse is out of time, it is correct, of course, that the validity of the first assessments, which were made in 1964, cannot, as such, be attacked by the present recourse which was filed on the 26th August, 1965, long after the

lapse of the period of seventy-five days, provided by paragraph 3 of Article 146, from the making of the first assessments and even from the date of the payment by the applicant on the 5th January, 1965, of the amounts assessed thereunder. I am of the opinion, however, that as it is the decision of the respondent contained in *Exhibit* 3 (which is dated 18th August, 1965) not to refund the difference between the first assessments and the second assessments, which is in effect the decision which is being attacked by this recourse, this Application is not out of time because it has been made well within the period of seventy-five days prescribed in paragraph 3 of Article 146, from the date on which the letter (*Exhibit* 3) communicating such decision to the applicant was written. It should also be noted, in this connection that the question of a refund of the difference, as such, between the first assessments and the second assessments only arose, and could only have arisen, after the second assessments were made on the 11th June, 1965. This first preliminary objection of counsel for the respondent cannot, therefore, in my opinion succeed.

(2) As to the second preliminary objection raised by counsel for the respondent, namely, that there is no administrative decision before the Court which can form the subject-matter of a recourse, respondent's reply contained in the letter of the 18th August, 1965 (*Exhibit* 3), when read in conjuction with the letter to which it is a reply, namely, (*Exhibit* 2), amounts, in my view, to a decision on the part of the respondent not to make the refund of the difference between the first and the second assessments as claimed in the said (*Exhibit* 2). This being so, I am of the opinion that *Exhibit* 3 does, on the face of it, constitute the communication of a decision which can form the subject-matter of a recourse under Article 146 of the Constitution and this preliminary objection of counsel for respondent must, therefore, also fail.

(3) Coming now to the third preliminary objection of counsel for respondent, namely, that the applicant has no existing legitimate interest under paragraph 2 of Article 146. While it may well be that the legitimate interest which the applicant had, at one time, to attack the first assessments, which were made in 1964, has long since ceased to exist because such interest was extinguished upon the full compliance by the applicant on the 5th January, 1965, with the administrative acts giving rise to the first assessments,

namely, by the payment in full of the amounts assessed by the first assessments, the applicant, nevertheless, has, in my opinion, an existing legitimate interest to attack the decision which was communicated by *Exhibit* 3 and which I have found, for the reasons stated earlier in this Judgment, form the subject-matter of a recourse under Article 146 of the Constitution. I am, therefore, of the opinion that the applicant has an existing legitimate interest in the sense of paragraph 2 of Article 146. This being so, this preliminary objection of counsel for respondent must also, in my view, fail.

(*II*). *On the 2nd issue raised by counsel for the applicant :*

(1) I have given this important issue most careful and anxious consideration and I am of the opinion that, while each case must obviously be decided on its own merits and facts and especially in the light of the particular statutory provision which has been declared unconstitutional and the particular provision of the Constitution which has been contravened, in a case such as the one now before me, where a Court has declared the provisions of a particular taxing statute unconstitutional, and where prior to the date of such declaration the State and the taxpayers alike have for many years acted on the assumption that such statutory provisions were constitutional, it would be right and proper, in the circumstances, and in the interest both of the principles of certainty of the law and equality and justice, that such declaration should not have retrospective effect to invalidate tax assessments in cases where tax liabilities have been assessed, determined, finalized and ultimately discharged by the taxpayers paying the respective amounts assessed upon them, prior to such declaration, in the belief, both on the part of the State and the taxpayer, at all material stages, that such assessments were not unconstitutional. In the words of Chief Justice Hughes in the *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S 371 60 S. Ct. 317, 84 Law. ed. *329* (1940) the "actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration ". Just as in a case before the German Federal Constitutional Court (reported at p. 92 of the United Nations' "Year book on Human Rights for 1957") the Court decided that the legislator was free to choose between the principle of certainty of the law and the principle of equality, so I feel that this Court,

in endeavouring to do justice in the matter and in the absence of any legislation to the contrary regulating such matter, is free to choose between the said two principles, having regard to all the circumstances of the particular case before it. A line must be drawn somewhere, and, in my view, in a case of this nature, the line must be drawn between those cases which have been finalized *prior* to the decision in question of the Court declaring the statutory provisions concerned unconstitutional and those cases which had not been already finalized prior to such date and which, therefore, still require further administrative action *after* such decision of the Court

Held, (III) on the 1st issue raised by counsel for the applicants:

(1) In my opinion an administrative act which has been done in error must, in most cases, be cancelled when the author of such act has become aware of such error. Such cancellation is, of course, without prejudice to the rights of the citizen to obtain redress in cases where he may have suffered any damage in consequence of such error

(2) In the present Case the applicant was assessed to pay certain amounts of tax in respect of the three years of assessment in question in accordance with the respective Laws which were in force at the material times and *prior* to the particular statutory provisions in question being declared unconstitutional on the 2nd March, 1965 On the 5th January, 1965, the applicant fully met and discharged such liabilities again *prior* to the said declaration in question At the time the first assessments were made on the applicant and at the time he discharged his liabilities in respect of such taxes by paying in full the amounts so assessed on him, the statutory provisions in question had not been declared unconstitutional by the Supreme Court and were, therefore, believed to be constitutional for all purposes and were so acted upon by everybody concerned up till the 2nd March, 1965. This being so the applicant was, until the 11th June 1965, in exactly the same position as every other unmarried citizen who had been assessed and who had paid his taxes in accordance with the assessments made on him *prior* to the 2nd March, 1965. The applicant, in meeting and discharging his tax liabilities on the 5th January, 1965, in accordance with the first assessments and not having raised any objection to them, did, as already stated, pay in full the amounts so assessed upon him

(3) Having found that the second assessments, which were made in error, were, in any case, properly and effectively cancelled by the respondent, it follows that I have come to the conclusion that such assessments have ceased to exist, at any rate, as from the date on which *Exhibit* 3 was written, namely, the 18th August, 1965

(4) Counsel for applicant in the course of his argument before the Court has generally laid great stress on the importance of the principle of equality, but having come to the conclusion, as I have, that the decision of the Supreme Court in *Panayides Case* (*supra*) does not have retrospective or retroactive effect so as to invalidate all assessments of tax which had been made, finalized and discharged *prior* to the said date, if the applicant were to be put in a more advantageous position than all the other citizens who had likewise been assessed and who had likewise met their tax liability in full *prior* to the said decision and if it were to be possible for the applicant to take advantage of an understandable and not unreasonable error which appears to have been made by the respondent in good faith in his case, then surely the very principle of equality, which counsel for the applicant has so zealously purported to uphold, would itself be defeated

(5) In support of his case for the refund which the applicant is claiming by this recourse, counsel for applicant has also endeavoured to invoke the respective provisions of the three Laws in question of the Greek Communal Chamber, which relate to the circumstances under which repayment of tax may be made and which statutory provisions correspond to section 46 of the old Income Tax Law (Cap 323), that is to say, the provisions of section 33 of Law 16/61 of the Greek Communal Chamber and section 46 of Laws 18/62 and 9/63 of the Greek Communal Chamber As I have held that the decision of the Supreme Court in *Panayides Case* (*supra*) does not have retrospective effect so as to invalidate assessments which had already been made, finalized and discharged prior to the date of the said decision, it must follow that in this Case the respective amount with which the taxpayer was charged was the amount with which he was " properly chargeable " at the material times and that, the aforesaid statutory provisions can, therefore, have no application in this Case, because it could not be said in such Case that there was an " excess " of the amount with which

such taxpayer was "properly chargeable" at the material times, in the sense of the aforesaid statutory provisions

(6) I am, therefore, of the opinion that the applicant is not entitled to the refund of the sum of £511 260 mils, which is the subject-matter of this recourse and that the decision of the respondent, not to make such a refund, which was communicated to the applicant by the respondent's letter of the 18th August, 1965, (*Exhibit* 3) was properly and validly taken

Application dismissed No order as to costs

Cases referred to

Ioannis Panayides and the Republic, (1965) 3 C L R p 107,

Norton v *Shelby County*, 114 U S 425, 442 (1886), 30 Law ed 178 (1886),

Chicot County Drainage District v *Baxter State Bank*, *308* U S 371 60 S Ct 317, 84 Law ed 329 (1940),

Judgment of the German Federal Constitutional Court of the 12th December 1957, (*CBV ref GE7/194*) *published at p* 92 *of the United Nations Yearbook on Human Rights for* 1957 " *under the heading "Equal Treatment in general"*

Recourse

Recourse against the decision of the Respondent not to refund to Applicant the sum of £511 260 mils which has been paid to the Respondent in excess of the Applicant's tax liability for the years of assessment 1961, 1962 and 1963.

A. Triantafyllides for the Applicant

L. Loucaides, Counsel of the Republic with *Ch. Paschalides* for the Respondents

Cur. adv. vult.

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The following Judgment was delivered by:-

MUNIR, J.: The Applicant, by this recourse under Article 146 of the Constitution, attacks the decision of the Respondent not to refund to him the sum of £511.260 mils which the Applicant alleges has been paid to the Respondent in excess of the Applicant's tax liability under Laws 16/61, 18/62 and 9/63 of the Greek Communal Chamber for the years of assessment 1961, 1962 and 1963.

The basic facts of this Case are not in dispute and may briefly be stated as follows:-

The Applicant, of 13, Evagoras Avenue, Nicosia, is a bachelor. On the 30th November, 1964, the Applicant was assessed by the Respondent under Laws 16/61, 18/62 and 9/63 of the Greek Communal Chamber, in respect of the years of assessment 1961, 1962 and 1963, respectively, to pay the following taxes:-

(i)	Year of assessment 1961	£	260.735
(ii)	Year of assessment 1962		529.425 mils
(iii)	Year of assessment 1963		543.225 mils
	Total	£	1,333.385 mils

The above three assessments, which were made on the basis of the scales applicable to unmarried persons under and in accordance with the relevant provisions of the aforesaid three Laws of the Greek Communal Chamber, are hereinafter in this Judgment, for the sake of convenience, together referred to as "the first assessments".

On the 5th January, 1965, the Applicant paid the total sum of £1,333.385 mils in settlement of all three amounts which had been assessed upon him under the first assessments.

On the 2nd March, 1965, the Supreme Court delivered its judgment in the case of *Ioannis Panayides and The Republic*, etc. ((1965) 3 C.L.R. p. 107), in which it was held that those provisions of Law 16/61 of the Greek Communal Chamber which had made a distinction, for the purposes of the taxation imposed by the said Law, between married and unmarried persons, were unconstitutional.

On the 11th June, 1965, the Respondent made three other assessments on the Applicant in respect of the same three

years of assessment which are the subject-matter of this recourse, namely, the years of assessment 1961, 1962 and 1963. These latter assessments (which in this Judgment are hereinafter, for the sake of convenience, referred to as "the second assessments") were notified to the Applicant on three separate Forms I.R.9, dated the 11th June, 1965, in respect of each of the three years of assessment 1961, 1962 and 1963. The originals of the said three forms have been produced and have, by consent, been put in evidence as *Exhibits* 1A, 1B and 1C, respectively. It will be observed from these three Exhibits that the second assessments were made as follows:-

(i)	Year of assessment 1961	£	194.225 mils
(ii)	Year of assessment 1962		309.350 mils
(iii)	Year of assessment 1963		318.550 mils
	Total	£	822.125 mils

It appears that the second assessments, which as will be seen were made after the decision of the Supreme Court in *Panagides Case* (supra), were made in disregard of the respective provisions of the three Laws in question of the Greek Communal Chamber which, in contravention of the Constitution, had discriminated between married and unmarried persons and had imposed a higher rate of tax on unmarried persons.

The Applicant, as in the case of the first assessments, made no objection to the second assessments (which is not surprising in view of the fact that they were much lower than the first assessments) and on the 5th August, 1965, a letter was written on behalf of the Applicant by his legal advisers to the Income Tax Office asking for a refund of the sum of £511.260 mils being the difference between the £1,333.385 mils, which the Applicant had already paid on the 5th January, 1965, as a result of the first assessments and the £822.125 mils, being the amount assessed on the Applicant under the second assessments. A copy of the said letter of the 5th August, 1965, which is attached to the Application and marked "Ex. 1", has by consent, been put in evidence as *Exhibit* 2.

On the 18th August, 1965, a letter was written on behalf of the Commissioner of Income Tax to the Applicant's legal advisers in reply to *Exhibit* 2 in which it is, inter alia, stated-

"that it has now come to light that the notices sent to your client on 11.6.65 in respect of his assessments for the years 1961, 1962 and 1963 were done so under a misapprehension and should now be considered as cancelled, the reason being that he had already paid the tax on the original assessments. This fact was only brought to my notice after the assessments referred to in your letter had been sent out".

A copy of the aforesaid letter of the 18th August, 1965, which is attached to the Application and marked "Ex. 2" has, by consent, been put in evidence as *Exhibit* 3.

Exhibit 3 offers to make a refund of the sum of £124.200 mils in respect of the three years of assessment in question, as a result of certain adjustments which had been agreed to between the parties and which had been made to the first assessments. It is common ground, however, that this refund, which is offered by Respondent in *Exhibit* 3, has no relationship to, and is not in any way connected with, the refund of £511.260 mils, which was claimed by Applicant by *Exhibit* 2, on the basis of the difference in amount between the first assessments and the second assessments.

At the hearing of this Case counsel for Respondent raised three preliminary objections, namely–

(1) that the recourse is out of time under paragraph 3 of Article 146 of the Constitution;

(2) that there is no administrative decision before the Court which can form the subject-matter of a recourse under Article 146; and

(3) that the Applicant has no existing legitimate interest under paragraph 2 of Article 146.

With regard to the allegation of counsel for Respondent that the recourse is out of time, it is correct, of course, that the validity of the first assessments, which were made in 1964, cannot, as such, be attacked by the present recourse which was filed on the 26th August, 1965, long after the lapse of the period of seventy-five days, provided by paragraph 3 of Article 146, from the making of the first assessments and even from the date of the payment by the Applicant on the 5th January, 1965, of the amounts assessed thereunder. I am of the opinion, however, that as it is the decision of

the Respondent contained in *Exhibit* 3 (which is dated 18th August, 1965) not to refund the difference between the first assessments and the second assessments, which is in effect the decision which is being attacked by this recourse, this Application is not out of time because it has been made well within the period of seventy-five days, prescribed in paragraph 3 of Article 146, from the date on which the letter (*Exhibit* 3) communicating such decision to the Applicant was written. It should also be noted, in this connection that the question of a refund of the difference, as such, between the first assessments and the second assessments only arose, and could only have arisen, after the second assessments were made on the 11th June, 1965. This first preliminary objection of counsel for the Respondent cannot, therefore, in my opinion succeed.

As to the second preliminary objection raised by counsel for the Respondent, namely, that there is no administrative decision before the Court which can form the subject-matter of a recourse, Respondent's reply contained in the letter of the 18th August, 1965 (*Exhibit* 3), when read in conjuction with the letter to which it is a reply, namely, *Exhibit* 2,amounts, in my view, to a decision on the part of the Respondent not to make the refund of the difference between the first and second assessments as claimed in the said *Exhibit* 2. This being so, I am of the opinion that *Exhibit* 3 does, on the face of it, constitute the communication of a decision which can form the subject-matter of a recourse under Article 146 of the Constitution and this preliminary objection of counsel for Respondent must, therefore, also fail.

Coming now to the third preliminary objection of counsel for Respondent, namely, that the Applicant has no existing legitimate interest under paragraph 2 of Article 146. While it may well be that the legitimate interest which the Applicant had, at one time, to attack the first assessments, which were made in 1964, has long since ceased to exist because such interest was extinguished upon the full compliance by the Applicant on the 5th January, 1965, with the administrative acts giving rise to the first assessments, namely, by the payment in full of the amounts assessed by the first assessments, the Applicant, nevertheless, has, in my opinion, an existing legitimate interest to attack the decision which was communicated by *Exhibit* 3 and which I have found, for the reasons stated earlier in this Judgment, can form the subject-matter

of a recourse under Article 146 of the Constitution I am, therefore, of the opinion that the Applicant has an existing legitimate interest in the sense of paragraph 2 of Article 146. This being so, this preliminary objection of counsel for Respondent must also, in my view, fail

Counsel for Applicant has mainly based his case on the following two points:-

(1) He has submitted that the second assessments constitute valid administrative acts which have become binding on both the citizen and the Administration alike and that unless such administrative acts are revoked afresh by subsequent administrative acts, i e by a third series of assessments, then the second assessments are, he submitted, valid and must be taken to express the Administration's latest decision in the matter.

(2) Counsel for Applicant has further submitted that the Applicant, having paid the tax assessed upon him by the first assessments prior to the decision of the Supreme Court in *Panayides Case* (supra), should not be in a worse position than a person who was also so assessed but who has not met his obligations promptly like the Applicant and who has only done so after the decision of the Supreme Court in the aforesaid *Panayides Case* (supra) Counsel for Applicant has submitted that if the contrary view were to be held then this would result in penalizing the diligence of a taxpayer and in rewarding to negligence or omission of other taxpayers He further submitted that the matter should not be decided contrary to the principle of equality and contrary to the principle of unlawful enrichment Counsel for Applicant drew attention to the fact that the principle of unlawful enrichment is recognized by the Civil Code of Greece and in this connection he also cited from Litzeropoulos "Civil Code", p 195 In further support of his argument on the principle of unlawful enrichment counsel for Applicant referred to the provisions of the three Laws in question of the Greek Communal Chamber which correspond to section 46 of the former Income Tax Law, Cap. 323. He submitted that those statutory provisions impose a duty on the State to refund any amount paid by a taxpayer which is proved to be in excess of the amount with which a taxpayer is properly chargeable He, therefore, submitted that under these statutory provisions alone the Respondent has a duty to refund

the difference of £511.260 between the first assessments and the second assessments.

For the sake of convenience I shall first deal with the second of the two issues raised by counsel for Applicant (i.e. Issue No.2 referred to above.) On this issue counsel for Respondent has submitted in reply, that the decision of the Supreme Court in *Panayides Case* (supra), does not have retrospective effect prior to the date on which the judgment of the Court in that case was delivered, because, in the submission of counsel for Respondent, a decision as to the constitutionality of a statutory provision applies only to the particular case in which such a decision was given and that the decision, as such, does not cover future cases; he submitted, however, that in practice such a decision would be applied by the Administration to similar future cases. As the Administration would no longer have to deal with cases which have already been determined and finalized before the date of the decision of the Supreme Court in the *Panayides Case* (supra), counsel for Respondent submitted that the question of the Administration applying the said decision to past cases would not arise.

The various arguments which have been advanced by counsel for Applicant in support of his contention on Issue No. 2, whereby he has also invoked the principle of equality, the principle of unlawful enrichment and the statutory provisions of the three Laws in question of the Greek Communal Chamber, i.e. section 33 of Law 16/61 and section 46 of Laws 18/62 and 9/63 (which respectively correspond to those contained in section 46 of Cap. 323), in my view all really turn on the question whether the decision of the Supreme Court in *Panayides Case* (supra) is one which has such retrospective or retroactive effect as to apply to cases where the tax liability of the taxpayer has already been assessed, determined and fully discharged by the taxpayer by payment before the said decision or whether, as a result of the decision in the *Panayides Case* (supra), there is an obligation on the part of the Respondent to apply that decision to past cases also by reopening all cases in which unmarried persons had already discharged their tax liabilities, (which had been assessed at the higher rate) between the coming into force of our Constitution on the 16th August, 1960, and the delivery of the Judgment of the Supreme Court in the *Panayides Case* (supra) on the 2nd March, 1965.

This is certainly not an easy question to decide and in endeavouring to find an answer which would be just and proper in the circumstances of this particular case it is interesting to examine how this issue, that is to say, the legal effects and consequences of a declaration by the courts that a particular statutory provision is unconstitutional, has been approached and resolved in other countries and to see what guidance can be obtained in this respect from the position in other countries.

The position in Greece is summarized in the following passage from Kyriakopoulos' "Greek Administrative Law", 4th edition, vol. 1, p. 108:-

> "In examining the constitutionality of laws, the court does not annul the law found by it to be unconstitutional, but confines itself to not applying it in the particular case which is under consideration by the court. The decision is effective in respect of the case in question only; no right can be derived therefrom by a third party. The law, however, remains in force. Not even the Council of State is competent to annul the law".

It would appear from the above statement of the legal position in Greece that declarations by courts of unconstitutionality of statutory provisions do not have retrospective effect so as to invalidate administrative acts which have otherwise been validly done prior to such declarations.

In the United States of America it had been decided by Mr. Justice Field in the case of *Norton v. Shelby County,* 114 U.S. 425, 442 (1886), 30 Law. ed. 178 (1886) that:-

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed".

In the case of *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 Law. ed. 329 (1940), which appears to be the leading case in the United States on this point, Chief Justice Hughes made the following statement (which appears to be quoted with approval in most American text-books on the subject of Constitutional and Administrative Law) in holding that an unappealed decision applying the Municipal Bankruptcy Act was res judicata

despite the subsequent decision of the Supreme Court in another case that the Act was unconstitutional:-

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County,* 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co.* v. *Hackett,* 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified".

It appears that in most of the states of the United States the legislature has taken positive action in the matter and that statutes commonly authorise the refund of taxes illegally assessed or collected and this, very often, include taxes paid or collected under an unconstitutional statute.

Coming to more recent times the Federal Constitutional Court of the Federal Republic of Germany had occasion to deal with a similar problem in 1957. A brief report of the case appears at p. 92 of the United Nations' "Yearbook on Human Rights for 1957" under the heading "Equal Treatment in General". In that case the joint assessment of married couples, which up to then had been legal and customary, had been declared by the Court on the 21st February, 1957 to be unconstitutional. The Federal Constitu-

tional Court ruled on the 12th December, 1957 (BV ref. GE7/194) "that no person could demand the adjustment of a tax assessment which had become final before the 21st February, 1957, on the ground of the principle of equality". It was held by the Federal Constitutional Court "that this involved no violation of the Basic Law, since the certainty of the law and justice were equally essential features of the rule of law" and that "the legislator was at liberty to decide to which of these two principles he wished to give preference; inequality thereby created did not offend against the principle of equality". Before leaving this case I must make mention of the commendable conduct of counsel for Applicant in citing this case to the Court well knowing that it was a case which might be against him rather than in his favour. Counsel nevertheless did his duty and drew the Court's attention to the case, but endeavoured, at the same time, to distinguish it from the Case now before us on the ground that in the German case in question the matter was left to the legislator to regulate and to decide between the principles of certainty of the law and equality.

I have given this important issue most careful and anxious consideration and I am of the opinion that, while each case must obviously be decided on its own merits and facts and especially in the light of the particular statutory provision which has been declared unconstitutional and the particular provision of the Constitution which has been contravened, in a case such as the one now before me, where a Court has declared the provisions of a particular taxing statute unconstitutional, and where prior to the date of such declaration the State and the taxpayers alike have for many years acted on the assumption that such statutory provisions were constitutional, it would be right and proper, in the circumstances, and in the interests both of the principles of certainty of the law and equality and justice, that such declaration should not have retrospective effect to invalidate tax assessments in cases where tax liabilities have been assessed, determined, finalized and ultimately discharged by the taxpayers paying the respective amounts assessed upon them, prior to such declaration, in the belief, both on the part of the State and the taxpayer, at all material stages, that such assessments were not unconstitutional. In the words of Chief Justice Hughes in the *Chicot County Drainage Case* (supra), the "actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot

justly be ignored. The past cannot always be erased by a new judicial declaration". Just as in the case before the German Federal Constitutional Court, referred to above, the Court decided that the legislator was free to choose between the principle of certainty of the law and the principle of equality, so I feel that this Court, in endeavouring to do justice in the matter and in the absence of any legislation to the contrary regulating such matter, is free to choose between the said two principles, having regard to all the circumstances of the particular case before it. A line must be drawn somewhere, and, in my view, in a case of this nature, the line must be drawn between those cases which have been finalized *prior* to the decision in question of the Court declaring the statutory provisions concerned unconstitutional and those cases which had not been already finalized prior to such date and which, therefore, still require further administrative action *after* such decision of the Court.

Having, therefore, come to the conclusion that where a taxpayer has been assessed to pay a particular amount of tax and the liability to pay such tax has been met and discharged by the taxpayer *prior* to the date on which the decision of the Supreme Court in *Panayides Case* (supra) was delivered on the 2nd March, 1965, the said decision does not have such retrospective effect as to entitle the taxpayer to a refund of the difference between the tax which he had already actually paid and the tax which he would have paid if the decision in *Panayides Case* (supra) had existed at the material time, the next question which arises is whether the present Case now before me differs from other cases in which such tax liability was met and discharged before the 2nd March, 1965, having regard to the fact that in this particular Case a second series of assessments were made on the Applicant by the Respondent on the 11th June, 1965, in respect of the same three years which are the subject-matter of this recourse, namely, the years of assessment 1961, 1962 and 1963. This, therefore, now brings me to Issue No. 1 which has been argued by counsel for Applicant and which is referred to earlier in this Judgment. Counsel for Applicant has submitted that the second assessments of the 11th June, 1965, constitute valid administrative acts which have become binding both on the citizen, who had not objected to them, and on the Administration alike. Counsel for Applicant has advanced the argument that such administrative acts, i.e. the second assessments, can only

be revoked by subsequent administrative acts, namely, by a third series of assessments revoking and replacing the second assessments.

I should here observe that counsel for Applicant, in his address to the Court has not excluded the possibility that the second assessments may have been made by the Respondent in error and he did not dispute that the second assessments may have been made under a misapprehension, but he submitted that if the Respondent has made such a mistake then it must pay for it.

It seems clear from what has been stated by counsel for Respondent in Court, which has not been disputed or challenged by counsel for Applicant, that the Applicant, in meeting and discharging in full the amounts originally assessed on him by the first assessments paid the whole of this amount on the 5th January, 1965, at the appropriate office of the Respondent in Limassol. I am satisfied from the statement made by Respondent in *Exhibit* 3 (to the effect that the fact that the Applicant had already paid the amounts assessed upon him under the first assessments was only brought to the notice of the Respondent *after* the second assessments had been made) which statement, in the absence of any evidence to the contrary, I accept and find to be a correct statement of the factual position in this respect, that when the Commissioner of Income Tax, at his office in Nicosia, made the second assessments on the 11th June, 1965, and so notified the Applicant by *Exhibits* 1A, 1B and 1C, he was not aware, at that time of the fact that the second assessments, which he was purporting to make in June, 1965, were in respect on non-existent liabilities which had already been met and discharged by the Applicant in Limassol some six months previously on the 5th January, 1965. It should be observed in this connection that there appears to be nothing in *Exhibits* 1A, 1B and 1C, as far as I have been able to ascertain, which makes any reference to the first assessments of 1964 or anything therein indicating in any way that the first assessments were being revoked and replaced by the second assessments. The absence of any such indication in *Exhibits* 1A, 1B and 1C, would also appear to support my finding that when the second assessments were made, and *Exhibits* 1A, 1B and 1C were sent to the Applicant, the Respondent was not aware that the tax liabilities of the Applicant under the first assessments, in respect of the very same three years

of assessment, had already been met and discharged. I am, therefore, satisfied that the second assessments were made in error and under a misapprehension as to the factual position and in ignorance of the material fact that the tax liabilities to which such second assessments related were in fact non-existent by reason of their already having been met and discharged by the Applicant.

The question which then arises is: "What is the position with regard to, and the fate of, the three administrative acts constituting the three assessments comprising the second assessments? Professor Ernst Forsthoff, the former President of the Supreme Constitutional Court of Cyprus, in his Book "Lehrbuch des Verwaltungrechts" (excerpts from which have been translated by Dr. Heinze and published in 1963 in English in the book entitled "The Administrative Act") deals at great length in Chapter 2 of "The Administrative Act" with "The Defective Administrative Act". At page 41 of the said English translation Professor Forsthoff deals with the effect of an error on an administrative act and it is useful to quote in this connection the following passage from that page:-

> "Correctly speaking, an *error* does not constitute in itself an independent instance of defectiveness of an administrative act. This is clear from the body of laws in force which, as a rule, make reference to an objective element, that is the incongruity of an administrative act with the true factual or legal situation. Such incongruity leads to cancellation, no matter whether it has its reason in an error, in thoughtlessness or malice of an administrative officer. There is no sufficient reason to depart from this principle in cases where the incongruity is derived from the party concerned. Therefore, in such a case the administrative act should be cancelled because it is incorrect in its substance and not because the party concerned has deliberately or negligently supplied wrong information to the authority".

It will be seen, therefore, that the incongruity of an administrative act with the true factual or legal situation leads to cancellation of such administrative act "no matter whether it has arisen in an error, in thoughtlessness or malice of an administrative officer".

In my opinion an administrative act which has been done in error must, in most cases, be cancelled when the author of such act has become aware of such error. Such cancellation is, of course, without prejudice to the rights of the citizen to obtain redress in cases where he may have suffered any damage in consequence of such error.

In the present Case the Applicant was assessed to pay certain amounts of tax in respect of the three years of assessment in question in accordance with the respective Laws which were in force at the material times and prior to the particular statutory provisions in question being declared unconstitutional on the 2nd March, 1965. On the 5th January, 1965, the Applicant fully met and discharged such liabilities again prior to the said declaration in question. At the time the first assessments were made on the Applicant and at the time he discharged his liabilities in respect of such taxes by paying in full the amounts so assessed on him, the statutory provisions in question had not been declared unconstitutional by the Supreme Court and were, therefore, believed to be constitutional for all purposes and were so acted upon by everybody concerned up till the 2nd March, 1965. This being so the Applicant was, until the 11th June, 1965, in exactly the same position as every other unmarried citizen who had been assessed and who had paid his taxes in accordance with the assessments made on him prior to the 2nd March, 1965. The Applicant, in meeting and discharging his tax liabilities on the 5th January, 1965, in accordance with the first assessments and not having raised any objection to them, did, as already stated, pay in full the amounts so assessed upon him.

It is just and proper that the Applicant should benefit as the result of an understandable and not unreasonable error on the part on the Respondent which had been made by making the second assessments on the Applicant on the 11th June, 1965, some six months after he had already met and discharged his tax liabilities in respect of the three years in question (which second assessments were made at a reduced rate in view of the decision of the Supreme Court in *Panayides Case* (supra), which had been given in the meantime) and that he should be put in a more advantageous position than those citizens who, like him, had already met their tax liabilities and with regard to whom no such error had been made? I think that the answer to this question must be in the negative.

As I have already stated, the Respondent, in my opinion, had a duty, in accordance with the accepted principles of Administrative Law pertaining to administrative acts which have been done in error, to rectify such error by cancelling such administrative act. I am of the opinion that this duty to cancel the three administrative acts, which resulted in the second assessments in respect of the three years of assessment in question, was duly discharged by the Respondent when he became aware of the error and the Applicant was accordingly informed of this by *Exhibit* 3, where it was expressly stated that the assessments in question "were done o under misapprehension and should now be considered as cancelled, the reason being that he (the Applicant) had already paid the tax on the original assessments". As the second assessments have thus, in my opinion, effectively been cancelled by the Respondent it becomes unnecessary for me, for the purposes of this Judgment, to decide whether I would agree with counsel for Respondent and go so far as to say that the second assessments were invalid *ab initio* from the moment they were made on the ground that they were defective administrative acts.

Having found that the second assessments, which were made in error, were, in any case, properly and effectively cancelled by the Respondent, it follows that I have come to the conclusion that such assessments have ceased to exist, at any rate, as from the date on which *Exhibit* 3 was written, namely, the 18th August, 1965.

Counsel for Applicant in the course of his argument before the Court has generally laid great stress on the importance of the principle of equality, but having come to the conclusion, as I have, that the decision of the Supreme Court in *Panayides Case* (supra) does not have retrospective or retroactive effect so as to invalidate all assessments of tax which had been made, finalized and discharged prior to the said date, if the Applicant were to be put in a more advantageous position than all the other citizens who had likewise been assessed and who had likewise met their tax liability in full prior to the said decision and if it were to be possible for the Applicant to take advantage of an understandable and not unreasonable error which appears to have been made by the Respondent in good faith in his case, then surely the very principle of equality, which counsel for the Applicant has so zealously purported to uphold, would itself be defeated.

In support of his case for the refund which the Applicant is claiming by this recourse, counsel for Applicant has also endeavoured to invoke the respective provisions of the three Laws in question of the Greek Communal Chamber, which relate to the circumstances under which repayment of tax may be made and which statutory provisions correspond to section 46 of the old Income Tax Law (Cap. 323), that is to say, the provisions of section 33 of Law 16/61 of the Greek Communal Chamber and section 46 of Laws 18/62 and 9/63 of the Greek Communal Chamber. As I have held that the decision of the Supreme Court in *Panayides Case* (supra) does not have retrospective effect so as to invalidate assessments which had already been made, finalized and discharged prior to the date of the said decision, it must follow that in this Case the respective amount with which the taxpayer was charged was the amount with which he was "properly chargeable" at the material times and that, the aforesaid statutory provisions can, therefore, have no application in this Case, because it could not be said in such Case that there was an "excess" of the amount with which such taxpayer was "properly chargeable" at the material times, in the sence of the aforesaid statutory provisions.

I am, therefore, of the opinion that the Applicant is not entitled to the refund of the sum of £511.260 mils, which is the subject-matter of this recourse and that the decision of the Respondent, not to make such a refund, which was communicated to the Applicant by the Respondent's letter of the 18th August, 1965, (*Exhibit* 3) was properly and validly taken.

For all the reasons given above this Application cannot succeed and is hereby dismissed accordingly. Having regard to all the circumstances of this Case and the fundamental points of law involved therein, I do not propose to make any order as to costs.

Application dismissed.

No order as to costs.