[LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CLEANTHIS CHRISTOPHIDES LTD.,

Applicant,

and

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

Respondent.

(Case No. 54/64).

Income Tax—Assessment—Deductible expenses—Respondent disallowing part of Director's salary of a private company as a deductible expense in arriving at the profits of the company for income tax purposes—Evaluation of the Director's services—Age factor—Age factor alone cannot be conclusive in evaluating the services of anybody and especially of a company director—Therefore, the decision complained of is the result of a defective exercise of Respondent's powers and, consequently, taken in abuse and excess of powers—Section 11 of the Greek Communal Chamber Law No. 9 of 1963.

Income Tax—Expenses wholly and exclusively laid out for the purposes of a company's income—See above.

Administrative Law—Discretionary powers—Defective exercise—Abuse and excess of powers—See above under Income Tax.

Discretionary powers—Defective exercise of—See above.

Abuse and excess of powers—See above.

By this recourse the Applicant company challenges the validity of the decision of the Respondent to disallow part of the salary of one of its Directors as a deductible expense in arriving at the profits of the company for income tax purposes for the year of assessment 1964. On the 20th July 1954, Mrs. Christofides was appointed a life director of the company by special resolution at an extraordinary general meeting; her remuneration was fixed at £600 per annum. As a result of this resolution Mrs. Christofides was being paid this remuneration regularly to this day, the Commissioner of Income Tax allowing it to be deducted from the company's profits

as deductible expense. But in 1964 the Commissioner decided to allow only £360 out of the salary of Mrs. Christofides as an expense of the Applicant company, on the sole ground that the director in question being 67 years of age could not have been in a position to render satisfactory services or services worth the salary of £600 paid to her as aforesaid. In reaching this conclusion it seems that the Commissioner was influenced by the consideration that the age of 60 is the retiring age for civil servants also.

In annulling the decision complained of, the Court:

Held, (1). There is no question that by virtue of section 11 of the Greek Communal Chamber Law No. 9 of 1963 it is open to the Commissioner, in a proper case, to disallow any expenses which are solely and exclusively, expended for the purpose of the company's income; it is also clear that the fact that a certain sum is paid to a director of a company as remuneration it is not for that reason alone necessarily to be regarded as wholly and exclusively laid out for the purposes of the company's trade (See *Copeman (H. M. Inspector of Taxes)* v. *William Flood and Sons Ltd. Tax Cases Vol. XXIV. Part II* p. 53).

(2) *(a)* At no time the Respondent made any inquiry or query regarding the extent and nature of the services rendered by the said director before making his *sub judice* decision.

(b) It clearly appears from the evidence adduced that the sole matter that the Respondent took into consideration in taking the subject decision was the age of the said Director, Mrs. Christofides.

(3) I am, therefore, satisfied that, in taking the decision complained of, the Respondent Commissioner acted somewhat arbitrarily in the sense that he was not then in possession of all relevant facts of the case to which the law had to be applied; this in my view renders his decision a result of a defective exercise of his powers and, therefore, in abuse and excess of his powers and such decision has to be and is hereby, annulled. It is now up to the Respondent to deal with the matter anew bearing in mind all relevant considerations. There will be no order as to costs.

Decision complained of annulled.
No order as to costs.

Cases referred to:

Argyris Mikrommatis and *The Republic*, 2 R.S.C.C. 125;

Copeman (H. M. Inspector of Taxes) v. *William Flood and Sons Ltd.* Tax Cases vol. XXIV Part II p. 53.

Recourse.

Recourse against the validity of the decision of the Respondent to disallow part of the salary of one of the Directors of the Applicant company as a deductible expense in arriving at the profits of the company for income tax purposes for the year of assessment 1964.

L. Demetriades, for the Applicant.

M. Spanos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:-

LOIZOU, J.: By this recourse the Applicant challenges the validity of the decision of the Respondent to disallow part of the salary of one of its Directors as a deductible expense in arriving at the profits of the company for income tax purposes for the year of assessment 1964.

The Applicant is a private company limited by shares incorporated in Cyprus sometime in 1949.

The shareholders of the company are Mr. Cleanthis Christofides, his wife Mrs. Maria Christofides, their son Mr. John Christofides and the heirs of a deceased daughter. Up to 1962 there was another shareholder a brother-in-law of Mr. Cleanthis Christofides.

The present Directors are the father, the mother and the son.

On the 20th July, 1954, Mrs. Christofides was appointed a Life Director by special resolution at an extraordinary general meeting of the company; her remuneration was fixed at £600 per annum. The resolution is *exhibit* 1.

As a result of this resolution the Director concerned is being paid this remuneration regularly to this day.

The husband of this Director, who is also a Director of the company receiving salary, used, prior to the Judgment of the Supreme Constitutional Court in the case of *Argyris*

Mikrommatis and *the Republic* (2 R.S.C.C. p. 125), to add his wife's salary from the company to his own income for income tax purposes. Up to the year of assessment 1964 the Respondent made no query regarding the amount of the salary of Mrs. Christofides but in 1964, when, in view of the aforesaid Judgment, the salary of the wife was no longer added to that of her husband, the Commissioner decided to allow only £360 out of the salary of Mrs. Christofides as an expense of the Applicant company. It has been stated by counsel for the Respondent that the reason no query was raised by the Respondent prior to 1964 regarding the salary of Mrs. Christofides was because "in the previous years the salary of Mrs. Christofides was added to the income of her husband and in this way there was virtually no loss of tax".

As a result of the decision of the Commissioner the income tax payable by the Applicant company was increased by £102.

Before the final assessment which appears to have been made on the 11th January, 1966, some correspondence was exchanged between the Applicants through their accountants and the Respondent.

By his letter dated 17th March, 1965 (*exhibit* 5) addressed to the Applicants' accountants, Messrs. Russel & Co., the Respondent referred to the accounts submitted by them on behalf of their clients and informed them, *inter alia*, that the salary paid to Mrs. Maria Christofides would be restricted to £360. The accountants, it would appear, objected to this and on the 7th May, 1965, the Respondent wrote to them the letter *exhibit* 2*B* informing them that he was unable to alter his decision. On the 11th May, 1965, the accountants wrote to the Respondent the letter *exhibit* 4 (a copy of this letter has also been produced and has been marked *exhibit* 2*A*) stating that their clients were unable to accept his decision for disallowing part of the salary of their Director. "We would inform you" they say in this letter "that the remuneration of £600 has been paid to Mrs. Christofides since 1954 in accordance with a special resolution passed in that year. Our clients point out that the company is obliged to pay this remuneration in accordance with the resolution and it has not been recently voted to Mrs. Christofides for the purpose of taking advantage of the decision of the Constitutional

Court under which it is not necessary to add the earned income of the wife to the income of her husband".

The Commissioner referred this letter to his Principal Assessor who was dealing with the case, with a note on it that "for income tax purposes we can only allow so much as is proper remuneration for the services rendered irrespective of the amounts actually paid by the company".

The Principal Assessor, on behalf of the Commissioner of Income Tax, wrote to the accountants the letter dated 27th May, 1965 (*exhibit* 3) which reads as follows:

> "I have the Honour to acknowledge receipt of your letter dated 11th May, 1965 and to inform you that though I appreciate the reasons stated therein, nevertheless, for income tax purposes Mrs. Maria's remuneration must be evaluated on such factors as the extent of the services she renders to the company, her age etc. Having all this in mind I consider that a yearly remuneration of £360 is more than fair and I regret I am unable to alter my decision as communicated to you by my letter dated 7th May, 1965".

On the 29th November, 1965, the Applicants' accountants gave formal notice of objection (attached to the application) on the ground "that you have disallowed part of the salary paid by the company to Director Mrs. Maria Christofides which our clients are not prepared to accept".

Finally the Respondent made his final assessment on the 11th January, 1966, which like the previous one allowed only £360 of the salary as a deductible expense of the company.

This Application is based on the following grounds:

1. The acts or decisions to disallow the said Director's salary and the assessment complained of are contrary to Laws 7/64 and 9/63 enacted by the Greek Communal Chamber and/or are not envisaged or not warranted thereby.

2. The acts or decisions to disallow the said Director's salary and the assessment complained of are contrary to Articles 6, 24 and 28 of the Constitution.

In the course of the hearing the Applicant also raised the question of excess or abuse of powers and the Court heard argument on this issue also.

There is no question that, in so far as ground 1 is concerned, by virtue of section 11 of the Law 9/63, it is open to the Commissioner, in a proper case, to disallow any expenses which were not solely and exclusively expended for the purposes of the company's income; it is also clear that the fact that a certain sum is paid to a director of a company as remuneration it is not for that reason alone necessarily to be regarded as wholly and exclusively laid out for the purposes of the company's trade. See *Copeman (H. M. Inspector of Taxes)* v. *William Flood & Sons Ltd.*, Tax Cases vol. XXIV Part II p. 53.

With regard to ground 2 all that has been submitted in support of the allegation that there was discrimination was that in the case of the husband of the Director in question, who is also a Director of the company and receives salary, the whole of his salary was allowed as a deductible expense. This fact by itself does not, in my view, establish discrimination especially in view of the absence of any proof that the nature and the extent of the services rendered by each of the said Directors are the same.

The only question, therefore, that falls for consideration in the present case is whether the Commissioner in the exercise of his powers under the law acted properly and within his powers or whether he acted in excess or in abuse of the powers vested in him.

It is clear from the correspondence exchanged between the parties that Applicants' objection to the Respondent's decision was based on the fact that the Director's salary was a legal liability which the company was bound to pay and, to the knowledge of the Respondent, was in fact paying to the Director since 1954. At no time, in the course of the negotiations, was any attempt made by the Applicants to show the nature and extent of the services rendered by this Director; at the same time it may be said at this stage that the Respondent made no inquiry or query regarding the extent and nature of the services rendered by the said Director before making his decision.

On the other hand it clearly appears from the evidence adduced that the sole matter that the Respondent took into consideration in rejecting Applicants' objection was the age of the Director. The Commissioner himself gave evidence and said that he made enquiries from the passports office

regarding the age of the Director and he was told that she was 67. He went on to say: "My object in making enquiries regarding her age was this: if she was under 60 I would have accepted the whole sum of the £600 as an expense deductible for income tax purposes otherwise I would not". And further down in answer to counsel for the Respondent he said: "The reason why, as I have said, I would have allowed the whole of the £600 to be deducted from the taxable income of the Applicant company if I found that the Director was under 60 is that the age of 60 is the retiring age and the person who reaches that age cannot be expected to offer satisfactory services. Civil servants also retire at 60".

Mr. Angelos Nicolaou one of the partners in the firm Russel & Co., the Applicants' accountants, gave evidence for the Applicants and said that either on the Thursday or Friday prior to the 20th October, 1966 *i.e.* long after the decision was taken and shortly before the hearing of the case Mr. Karakanas the Principal Assessor in the Income Tax office who, on behalf of the Commissioner, took the decision complained of, rang him up and asked him about the age of the Director and also about her qualifications and how many meetings of the company she attended. The evidence of this witness remains unchallenged and uncontradicted throughout and I have no reason to doubt that it is true.

To sum up, the position shortly appears to be that for a period of ten years from 1954–1964 the Respondent allowed the Director's salary as a deductible expense for income tax purposes because, as it was stated, it did not make much difference to the revenue. In 1964 when in view of the Judgment in the *Mikrommatis* case it did make some difference he restricted the salary to £360 on the sole ground that the director in question was over 60 years old and, therefore, because of this, in his view, she could not have been in a position to render satisfactory services or services worth the salary paid to her. In reaching this conclusion it seems that the Commissioner was influenced by the fact that the age of 60 is the retiring age for civil servants also.

With regard to the Principal Assessor it appears that he, also, was completely unaware of the nature and extent of the services rendered by the director and in his case it is doubtful if he knew even her age. Be that as it may, I cannot accept the view that the age factor alone can be conclusive

in evaluating the services of anybody and especially of a company director; nor do I agree with the suggestion that a person who reaches the age of 60 must of necessity be incapable of rendering services as satisfactory as one who is below that age or that the fact that civil servants retire at 60 is a valid argument for holding that a person over that age is not capable of rendering sufficient and satisfactory services.

I am satisfied, on the material before me, that in taking the decision complained of the Respondent acted somewhat arbitrarily in the sense that he was not in possession of all the relevant facts of the case to which the law had to be applied; this in my view renders his decision a result of a defective exercise of his powers and, therefore, in abuse and excess of his powers and such decision has to be annulled. It is now up to the Respondent to deal with the matter anew bearing in mind all relevant considerations.

In the circumstances of this case I have decided to make no order as to costs.

The decision complained of is hereby declared null and void and of no effect whatsoever.

No order as to costs.

Order, and order as to costs, in terms.