

1985 February 21

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ERICH HUEBENER.

Applicant.

v.

THE COMMISSIONER OF INCOME TAX,
THROUGH THE MINISTRY OF FINANCE.

Respondent.

(Case No. 458/82).

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- 5 *Income tax—Foreigner—Professionally employed in Cyprus as a consultant engineer—His earnings taxed under section 5(1)(b) of the Income Tax Law, 1961 (Law 58/61) as emoluments derived from a contract of employment—*
- 10 *Benefit of section 32 of the Law denied to him because its application was treated as dependent of the provisions of section 8(u)(i) of the Law—Commissioner never examined facts of the case by reference to the concept of "ordinary residence" in section 32—Reasons for sub*
- judice decision vitiated by a misconception of the Law and lack of proper inquiry into the facts relevant to determining the nature of the residence of the applicant—*
- 15 *Misconception material going to the root of the decision, rendering it liable to be set aside.*
- 20 *Residence—Ordinary residence—Not dependent on stay for any particular length of time—Sections 8(u)(i) and 32 of the Income Tax Law, 1961 (Law 58/61).*

The applicant was an engineer in the beer production technology. On the recommendation of the German manufacturers of the sterilisation plant imported by K.E.O. wine and beer manufacturers, he was employed by the latter to advise on the management and maintenance of the plant, as well as help in the training of personnel in

its use. His employment lasted for about two years; he was paid a monthly salary of £1,000.- plus rent allowance of £150.- per month. His wife stayed behind in Germany and looked after the family home, visiting Cyprus occasionally to see her husband. At the end of his employment with K.E.O. he joined his family in Germany. It was an incontrovertible fact that applicant's stay in Cyprus was meant from the beginning to be of limited duration; and ended when his employment by K.E.O. came to an end.

The Commissioner of Income Tax taxed the earnings of the applicant for the years 1980-81 under s.5(1)(b) of the Income Tax Law, 1961, as emoluments derived from a contract of employment. He denied him the benefit of s.32 for the following reasons:

“(a) Section 32 of the law is not applicable in your case as during the above mentioned years you were resident and ordinarily resident in the Republic. You had a place of abode in Cyprus and you stayed here for a period of more than six months in each income year. In the circumstances, your income is liable to tax as per scale of Rates in the Second Schedule of the Law”.

Upon a recourse by the applicant:

Held, that it is clear that the Commissioner misconceived the effect of section 32 of the Law and treated its application as dependent on the provisions of s.8 (u)(i), exempting from taxation non-residents temporarily employed in Cyprus, provided their stay does not exceed 183 days; that Ordinary residence in any one place is not dependent on stay for any particular length of time; that it depends not only on the length of stay but on the purpose of stay, often contrasted with special, occasional or casual residence; that the Commissioner never examined the facts of the case by reference to the concept of ordinary residence in s.32; that what he seems to have done is to have applied, without justification in law, the mechanistic formula of s.8(u)(i) in determining the quality of the residence of the

5 applicant in Cyprus; that, consequently, the reasons given for the decision are vitiated by a misconception of the law and lack of proper inquiry into the facts relevant to determining the nature of the residence of the applicant that the misconception is material and goes to the root of the decision and, as such, renders it liable to be set aside.

Sub judice decision annulled.

Cases referred to:

- 10 *Papadopoulos v. Republic* (1968) 3 C.L.R. 662 at p. 674;
Cyprus Cement Co. Ltd. v. Republic (1974) 3 C.L.R. 304;
 and on appeal (1980) 3 C.L.R. 69 at pp. 75, 76;
Decisions of the Greek Council of State Nos. 666/36,
 1606/50 and 1850/50.

15 **Recourse.**

Recourse against the income tax assessment raised on applicant for the years 1980 and 1981.

K. Chrysostomides with E. Protopapa (Miss), for the applicant.

- 20 *A. Evangelou, Senior Counsel of the Republic with M. Photiou*, for the respondent.

Cur. adv. vult.

25 PIKIS J. read the following judgment. At issue is the liability of the applicant to pay income tax under section 5(1)(b) of the Income Tax Law ¹, in respect of his income in the years 1980 and 1981. The decision is challenged as ill founded in fact because, contrary to the finding of the Commissioner, he was not ordinarily resident in Cyprus and, incorrect in law because he was not liable to be
 30 taxed under the provisions of s.5(1)(b). Notwithstanding

¹ Law 58/61 as amended.

the reasons for the decision¹, erroneous and ill founded, as acknowledged on behalf of the respondent, counsel submitted the decision must be upheld. It is supportable as inescapable on proper application of the law to the facts of the case, namely, that applicant was the recipient of a salary. Premising his submission on the proposition² that administrative action is sustainable, irrespective of the unsoundness of the reasons given in support of it, if unavoidable on proper application of the law, counsel invited the Court to dismiss the recourse. In order to resolve the liability of the applicant to tax in a correct perspective, we must first trace the facts of the case.

Facts Relevant to Applicant:

The applicant is an engineer in the beer production technology, an expert in that field, as counsel for respondent acknowledged. On the recommendation of the German manufacturers of the sterilisation plant imported by K.E.O. wine and beer manufacturers, he was employed by the latter to advise on the management and maintenance of the plant, as well as help in the training of personnel in its use. His employment lasted for about two years; he was paid a monthly salary of £1,000—plus rent allowance of £150.—per month. His wife stayed behind in Germany and looked after the family home, visiting Cyprus occasionally to see her husband. At the end of his employment with K.E.O. he joined his family in Germany. It is an incontrovertible fact that applicant's stay in Cyprus was meant from the beginning to be of limited duration; it ended when his employment by K.E.O. came to an end.

The Sub Judice Decision:

The Commissioner of Income Tax taxed the earnings of the applicant for the years 1980-81 under s.5(1)(b) as emoluments derived from a contract of employment. He

¹ Set out in the letter of the Commissioner addressed to the respondent on 14.8.82.

² See, *Miltiades Papadopoulos v. Republic* (1968) 3 C.L.R. 662, 674; *Cyprus Cement Co. Ltd v. Republic* (1974) 3 C.L.R. 304; and on appeal, *Cyprus Cement Co v. Republic* (1980) 3 C.L.R. 69, 75, 76; *Greek Administrative Law—by Kyriacopoulos. Volume B*, p. 387; *Decisions of the Greek Council of State—666/1936, 1606/1950, 1850/1950.*

denied him the benefit of s.32 for the following reasons:¹

5 “(a) Section 32 of the law is not applicable in your case as during the above mentioned years you were resident and ordinarily resident in the Republic. You had a place of abode in Cyprus and you stayed here for a period of more than six months in each income year. In the circumstances, your income is liable to tax as per scale of Rates in the Second Schedule of the Law.”

10 To my mind, it is clear the Commissioner misconceived the effect of s.32 and treated its application as dependent on the provisions of s.8(u) (i), exempting from taxation non residents temporarily employed in Cyprus, provided their stay does not exceed 183 days. Counsel for the Re-
15 public noticed the error as well as the confusion under which the respondent laboured in his appreciation of the concept of ordinary residence, as encountered in s.32. Ordinary residence in any one place is not dependent on stay for any particular length of time, as counsel for the
20 applicant explained in his address by reference to numerous cases. It depends not only on the length of stay but on the purpose of stay, often contrasted with special, occasional or casual residence. I shall not examine the precise effect of “ordinary residence” in
25 the context of s.32 for, as counsel for the respondent admitted in their address and clarified before me, the Commissioner never examined the facts of the case by reference to the concept of ordinary residence in s.32. What he
30 seems to have done is to have applied, without justification in law, the mechanistic formula of s.8(u) (i) in determining the quality of the residence of the applicant in Cyprus. Consequently, the reasons given for the decision are vitiated by a misconception of the law and lack of proper inquiry into the facts relevant to determining the nature of the
35 residence of the applicant. The misconception is material and goes to the root of the decision and, as such, renders it liable to be set aside.

Nevertheless, counsel for the respondent invited the

¹ See paragraph (a) of the letter of 14.8.82.

Court to sustain the decision as inevitable on proper application of the law to the facts of the case otherwise undisputed. Earlier, reference was made to the amenity of the Court to sustain a decision despite the invalidity of its reasoning. This is only feasible if on the uncontested facts of the case the application of the law would inexorably lead to the decision taken. Thus it was submitted that applicant, being a salaried person, as the evidence establishes, he could only be taxed under s.5(1)(b). Accepting as I do, the remuneration of the applicant was calculated on a monthly basis, the pertinent question is whether the nature of his residence was at all relevant to his taxability. The essence of the submission of counsel for the Republic is that salaried persons are taxable under s.5(1)(b) notwithstanding the fact that they may not be ordinarily resident in Cyprus. For the applicant it was contended that the application of s.32 is subject to no such restriction on any construction of its wording. This is correct. I may add, if the submission of counsel for the Republic is right, section 32 would be largely superfluous; for, s.5 purports to tax income from every quarter, independently of the source of earnings, that is, whether they derive from a contract of service or services. For example, s.5(1)(a) clearly makes taxable income from the exercise of an independent profession and includes earnings from a contract to render services.

Section 32 is a specific provision that aims to place on a different basis the taxability of income earners who are not ordinarily resident in Cyprus. A person exercising an independent or other profession or vocation (οιουδήποτε ελευθέρου ή άλλου επαγγέλματος) is, unlike income earners residents of the country, taxable at a flat rate of 10% on his gross income. On any definition of the word «επάγγελμα», it includes professional persons engaged in a profession or vocation, irrespective of the basis upon which they are remunerated. From whatever angle we examine the facts, the applicant was professionally employed as a consultant engineer and fell, in this regard, within the provisions of the law. Consequently, if he was not ordinarily resident in Cyprus, in the sense of s.32, he was entitled to be taxed under s.32. As earlier indicated, this aspect of the case, involving a mixed question of law and fact, was never

inquired into by the Commissioner of Income Tax. His reasoning on the nature of the residence of the applicant, as explained at the outset, is indisputably erroneous. Therefore, the decision must necessarily be annulled. I have
5 purposely limited discussion of the concept of "ordinary residence" in this judgment, to leave the ground clear for the Commissioner to take any decision that the facts of the case, as ascertained after proper inquiry, may warrant. Also, I refrained from examining submissions relevant to
10 distinctions made under English tax legislation between the taxability of professional earnings from a contract of services as contrasted to a contract of service. Counsel for the applicant rightly drew attention to differences in this regard between Cyprus and English legislation. The appli-
15 cation of s.32 is not dependent on the contractual basis of the services rendered but on the quality of the services. If of a professional kind the earner is entitled to the benefits of s.32, provided he is not ordinarily resident in the country.

20 For the reason explained above, the recourse succeeds. The sub judice decision is set aside. Let there be no order as to costs.

*Sub judice decision
annulled. No order
as to costs.*

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