

1986 September 16

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ADAMOS KALOGIROU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,

Respondents.

(Case No. 302/81).

Income Tax—Interest on the amount of tax payable—Fraud or wilful default—Section 34(2) of the Taxes (Quantification and Recovery) Law 53/63 as amended by Law 61/69—Erroneous legal advice—Sufficient to establish absence of said mental element—Unjustifiable omission—Section 36(2) of the Assessment and Collection of Taxes Laws 4/78 (as amended by Law 41/79 and renumbered section 42(2)). 5

Income Tax—Relief in respect of children—Section 16 of the Income Tax Laws, 1961 - 1969—Wife's income not taxable due to the lapse of the six years' period—Therefore, the relief could not have been apportioned between the husband and the wife—Provisions of said section of mandatory nature. 10

Income Tax—Remittance to Cyprus of income earned abroad—The relief under section 5(4) of the Income Tax Laws, 1961 - 1969—Failure by applicant to declare the income he earned abroad—His tax liability finally settled as regards the years 1962 (1961) to 1966 (1965) in 1967, when the relevant offences were compounded under section 72 of the Income Tax Law, Cap. 323—Remittance to Cyprus effected in 1970—No further tax can be de- 15
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manded in respect of said years—And no tax could be demanded in respect of income, before 1961 because of the expiration of the six years' period (Section 23 of the Taxes (Quantification and Recovery) Laws, 1963 - 1969).

- 5 *Income Tax—Liability to pay accrues in the year that the income is earned—It follows that interest earned abroad and remitted to Cyprus is not taxable on a remittance basis but in the year when it was earned.*

10 The applicant is a commission agent and merchant carrying on business at Larnaca. In 1967 information was received that the applicant had bank accounts in the United Kingdom. Upon examination the applicant disclosed that part of his commissions earned abroad had been left in U.K. and that such commissions had not been
15 declared. Consequently the applicant agreed to pay additional tax in full and final settlement of his liability to tax in respect of the years of assessment 1962 to 1966 (years of income 1961 to 1965).

20 On 1.12.1970 the applicant transferred to Cyprus £23,314 from his and his wife's deposit account with the National and Grindlays Bank (Jersey) Ltd., Jersey. In the year 1969, the applicant transferred to Cyprus £600.-

25 In June 1974 the respondent raised additional assessments on the applicant, but such assessments were declared on 26.6.80 by this Court as null and void on the ground that the income of applicant's wife had been added to applicant's income.

30 As a result of such annulment the respondent raised fresh additional assessments on the applicant for the years of assessment 1969 to 1971. As a result the applicant filed the present recourse.

35 The applicant claimed that out of the sums remitted in Cyprus as aforesaid, only an amount of £2,720 representing interest credited in 1969 can be brought under assessment. The respondent, however, decided that the benefit of section 5(4) of the Income Tax Laws, 1961 to 1969 cannot apply in this case because the applicant had contravened the law by not declaring the commissions he earned

abroad during the period 1954 to 1966. It should be noted that soon after the enactment of the said section by Law 60/69 the applicant's tax consultant requested the respondent to give him the official interpretation of its provisions and that on 4.9.69 the respondent replied that under the said section "accumulated income of years prior to the year immediately preceding the year of transfer to Cyprus can be remitted to Cyprus free of income tax...."

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It should, also be noted that in accordance with the sub judge decision the applicant had to pay interest from the 1st December of each year of the relevant years of assessment on the ground that the delay in raising the additional assessment was due to applicant's unjustifiable delay.

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Held, annulling in part the sub judge decision: (1) The letter of the 4.9.69 cannot be relied upon by applicant, as it was written in reply to an inquiry of a general nature and the respondent did not have the specific and particular circumstances of the applicant in mind.

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(2) The applicant's tax liability for the years of assessment 1962 (1961) - 1966 (1965) was finally settled in October 1969 and the relevant offences in respect of the non-declarations of his income abroad were compounded on the basis of section 72 of the Income Tax Law, Cap. 323. Since by virtue of the aforesaid section 5(4) only income accrued abroad during the last year before the year of the transfer is taxable unless a contravention of the law has been committed, and since in this case the contravention in question has been compounded, no further tax can now be demanded in respect of the years 1962 (1961) - 1966 (1965).

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(3) Liability to pay tax accrues in the year that the income is earned. The argument of counsel for the respondent that the interest is taxable on a remittance basis, irrespective of the year in which it was accrued cannot be accepted. Consequently, applicant's income prior to

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1961, cannot be taxed due to the expiration of the six years' period provided by section 23 of the Taxes (Quantification and Recovery) Laws, 1963 - 1969.

5 (4) Section 34(2) of the Taxes (Quantification and Recovery) Law 53/63, as amended by Law 61/69 provides for the payment of interest as aforesaid when the delay in making the assessment is due to the tax payer's wilful default or fraud. Section 36(2) of the Assessment and
10 Collection of Taxes Law 4/1978 (as amended by Law 41/79 renumbered section 42(2)) provides for payment of interest as aforesaid when the delay is due to the tax payer's unjustifiable omission.

15 In this case no interest is due in respect of the years of which no income tax is payable, and in any event no fraud or wilful default on the part of the applicant was established, because he had been given erroneous legal advice as to his obligation to declare his income earned abroad. This is no defence in respect of his liability to
20 pay tax, but it is sufficient to establish the absence of the required mental element. Furthermore, the applicant's conduct as regards the year 1969 did not amount to an unjustifiable omission, because such income was declared in 1970, when it was remitted to Cyprus.

25 (5) The applicant's final complaint is that the respondent wrongly disallowed part of the relief under section 16 of the Income Tax Laws, 1961 - 1969 in respect of applicant's children. In fact the respondent in this case apportioned the relief between the applicant and his wife. The relevant provisions of section 16 are mandatory. In this
30 case the respondent was not entitled to make such apportionment, because the wife could not be taxed due to the lapse of the six years' period.

35 (6) In the light of the above the conclusion is that the only amount which could be taxed is the interest credited in respect of the year 1969 and remitted to Cyprus in 1970.

Sub judice decision annulled in part. No order as to costs.

Cases referred to:

Ioannides and Others v. The Republic (1979) 3 C.L.R. 295;

Ioannides v. The Republic (1985) 3 C.L.R. 1801;

Christou v. The Republic (1965) 3 C.L.R. 214. 5

Recourse.

Recourse against the income tax assessments raised on applicants for the years 1969 - 1971.

A. Triantafyllides, for the applicant.

M. Photiou, for the respondents. 10

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant applies for "a declaration that assessments Nos. 031358-69/81, 031358-70/81, 031358-71/81, are null and void and of no effect whatsoever and/or that the decision and act of the respondents to impose any additional income-tax on the applicant for the years of assessment 1969 to 1971, both inclusive, (years of income 1968 to 1970) is null and void and of no effect whatsoever". 15 20

The applicant is a commission agent and merchant carrying on business at Larnaca and the greatest part of his income is derived from commissions from foreign principals.

The additional assessments, raised on the applicant in June, 1974 for the years of assessment 1969 to 1971 assessing the incomes of husband and wife together, were first determined in July 1974. The applicant then filed with the Supreme Court Recourse No. 355/74 but following the decision of the Supreme Court in *Ioannides and Others v. The Republic* (1979) 3 C.L.R. 295 on the unconstitutionality of the aggregation of wife's income other than earned income, to that of her husband, the Court 25 30

declared on the 26th June 1980, the aforementioned additional assessments as null and void and decided that the respondent Commissioner would have to raise new assessments excluding the income of the wife of the applicant.

- 5 In pursuance of this, the respondent Commissioner in November, 1980, raised on the applicant fresh additional assessments for the years of assessment 1969 to 1971 excluding from the applicant's assessment the income belonging to the wife, that is income representing 50% of the
10 interest earned on Mr. and Mrs. G. Kalogiros joint bank accounts with banks in the United Kingdom in the respective years 1968 to 1970 and remitted to Cyprus on 1st December, 1970, as per the respondent Commissioner's
15 letters of 10th November 1980 and 18th June 1974 (Appendices "B" and "C" attached to the opposition). To these assessments the applicant objected through his Taxation Consultant Messrs. Phanos G. Ionides Ltd., on the 23rd December 1980.

The factual background of this recourse is as follows:-

- 20 In 1967, information was received from the United Kingdom Inland Revenue Authorities that the applicant had bank accounts in the United Kingdom. Upon examination the applicant disclosed that part of the commissions earned abroad had been left abroad and deposited with
25 Banks, Building Societies and other Financial Institutions in the United Kingdom and that such commissions earned abroad and not remitted to Cyprus had not been declared. The Bank accounts abroad existed from 1954 to 31st December 1965—if one wishes to go into the details of the
30 matter they are to be found in the statement of facts set out in the written address of counsel for the applicant and the correspondence exchanged, to which reference is made. Consequently the applicant agreed to pay additional tax of £4,676.700 mls for the income of the years of assessment
35 1962 to 1966 in full and final settlement of applicant's liability to tax upto and including the year ended 31st December 1965.

On the 1st December, 1970, the applicant transferred to Cyprus the sum of £23,315.- from his and his wife's deposit account with the National and Grindlays Bank (Jersey) Ltd., Jersey, details of which were given in a letter from the applicant's Tax Consultant Mr. Phanos Ionides dated 11th December 1970, (Appendix "D"). In the year 1969, the applicant transferred to Cyprus the sum of £600 representing interest earned abroad prior to 1960. 5

The applicant claimed that out of the above account under the Income Tax Laws only the amount of £2,720 representing interest credited in 1969 can be brought under assessment. The respondent Commissioner, however, decided that the benefit of section 5(4) of the Income Tax Laws 1961 to 1969 cannot apply in this case on the ground that a contravention of the Law had been committed by the applicant by not declaring his commissions earned abroad during the period from 1954 to 1966. Therefore, in the present case, income which arose abroad in the years 1968, 1969 and 1970 has been assessed in the years of assessment 1969, 1970 and 1971 respectively and income which arose in the years before 1968 has been assessed in the year of assessment 1971 as deemed to have arisen in the year 1970, the year in which it was remitted to Cyprus. 10 15 20

The letter of the Commissioner of Income tax to applicant's Tax Consultant dated 24th August, 1971 (Appendix "E") gives details of the calculations of interest remitted, taxed commissions remitted and untaxed commissions remitted making up the total of remittances made in 1969 as being £600 and in 1970, £23,321. 25 30

The letters by the respondent Commissioner sent to the applicant dated 18th June 1974, and 30th July, 1974, with copies to the applicant's Tax Consultant, give particulars of the then raised additional assessments and the reasons therefore (Appendix "C" and "F") which are not other than those for the additional assessments raised and which are subject matter of this recourse. 35

It is the contention of the respondent Commissioner that

the acts and/or decision complained of were properly and lawfully taken after all relevant facts and circumstances were taken into consideration, viz:-

5 “(a) The assessments for the years of assessment
1969, 1970 and 1971 (years of income 1968, 1969
and 1970) were raised under sections 5(1), 5(2) (c)
and 6 of the Income Tax Laws 1961 to 1969 and
sections 3, 13(2) (b) and 21(3) of the Assessment and
10 Collection of Taxes Laws 1978 to 1979, as renum-
bered by Law No. 41 of 1979.

 (b) The decision of the respondent Commissioner of
Income Tax not to accord to applicant the benefit
provided in section 5(4) of the Income Tax Laws
1961 to 1969 was properly taken on the ground that
15 a contravention of the Law had been committed by
applicant by his failure to declare commissions earned
abroad during the period from 1954 to 1966.

 (c) The respondent Commissioner correctly and
lawfully reduced the allowance to applicant in respect
20 of his children as provided under section 16(4) of
the Income Tax Laws 1961 to 1969.

 (d) The objection to the above assessments were
determined under section 20(5) of the Assessment and
Collection of Taxes Law 1978 to 1979 and that,

25 (e) the sub judice decision is duly reasoned.”

 The first argument of the applicant is that the amounts
remitted to Cyprus on 8th December 1970, consisted
partly of trading income on which he had already been
assessed and paid income tax and partly of investment in-
30 come (interest on bank deposits) which could lawfully be
remitted to Cyprus between the 18th April 1969 and 31st
December 1970 without payment of income tax, by virtue
of section 5, subsection 4 of the Income Tax Law 1969
(Law No. 60 of 1969).

35 According to the applicant (see exhibit 11) the income

brought in consists of:

a) Interest credited during years			
	1961 to 1966	£6,210.-	
b) Interest credited to	13.11.67	£ 2,100	
" "	to 13.11.68	£ 2,749	5
" "	to 13.11.69	£ 2,720	
" "	to 13.11.70	<u>£ 3,619</u>	
		£ 11,188.-	
c) Interest credited to him and			
his wife prior to 1961		£5,923.-	10
		<u>£23,321.-</u>	

Out of the above amounts he claims, only the amount of £2,720 in respect of the year 1969 is taxable by virtue of section 5(4). Instead, the respondent Commissioner raised additional assessments on income much higher than his chargeable income. 15

He further argued that soon after the enactment of the said Law No. 60 of 1969 a letter was addressed by his Tax Consultant to the respondent Commissioner requesting the official interpretation of the provisions of Section 5(4) to which the respondent Commissioner replied on the 4th September 1969 that: 20

“under sub-section (4) of Section 5 of the Income Tax Laws, 1961 to 1969, accumulated income of years prior to the year immediately, preceding the year of transfer to Cyprus can be remitted to Cyprus free of income tax irrespective of whether other points may be raised with regard to the capital which yielded such income abroad.” 25

On the strength of this letter as he claims, he proceeded to repatriate the money.

It is indeed contended by counsel for the respondent and it is his main argument that the applicant cannot benefit from the aforesaid section, having committed a contravention of the Income Tax Laws in relation to the money he remitted to Cyprus in 1970, by failing to declare the commissions earned abroad during the period 1954-1966, and the fact that his income tax liability was subsequently fully settled for the period up to and including the year ended 31st December 1965, does not mean that such contravention ceases to exist.

From the perusal of the documents before me, it transpires that the applicant's income tax liability, as regards years of assessment 1962 (1961) - 1966 (1965) was finally settled (as per exhibits 4, 5, and 6) in October 1969. Tax amounting to £4,676.700 was paid by him in full settlement of his aforesaid tax liability and the offences committed by him in respect of the non-declaration of his commissions (income) abroad were compounded on the basis of Section 72 of the Income Tax Law, Cap. 323. Therefore, since by virtue of section 5(4) of Income Tax Laws only income accrued abroad during the last year before the year of the transfer is taxable, unless a contravention of the law has been committed, in the present case the contravention in question having been compounded, no further tax can now be demanded or is due for the years 1961 - 1965, therefore only the income of the year 1969 is taxable.

As regards the respondent's letter of the 4th September, 1969, I consider that it can only be taken on its face value and that no greater effect can be given to it, as it was written in reply to an inquiry of a general nature, without the Commissioner having the specific and particular circumstances of the applicant in mind, and cannot thus be relied upon by the applicant.

The applicant's second argument is that the respondent Commissioner is estopped from raising any additional

assessment because the statutory period of six years, in which such income could properly be assessed in accordance with section 23 of the Taxes (Quantification and Recovery) Laws 1963 - 1969, had expired.

I do not agree with the submission of counsel for the respondent that the assessment of interest is made on a remittance basis, irrespective of the year in which such has accrued. Liability to pay tax accrues in the year that the income is earned (see *Ioannides v. The Republic* (1985) 3 C.L.R. 1801 at p. 1814); also *Christou v. The Republic* (1965) 3 C.L.R. 214 at pp. 228-229; therefore the period of six years should start to run from the expiration of the year when such income accrued and not from the year that such income was remitted to Cyprus. Consequently applicant's income, prior to 1961 cannot be taxed because of the expiration of the six years' period.

The third argument of the applicant is that interest was charged on the amounts of tax payable with effect as from 1st December of each of the relevant years of assessment on the ground that the delay in making the new additional assessments was due to the unjustifiable omission on the part of the applicant tax payer.

Section 34(2) of the Taxes (Quantification and Recovery) Law 1963, (Law No. 53 of 1963) as amended by section 16 of Law 61 of 1969 provides for payment as above when the delay in making the assessment is due to the tax-payer's wilful default or fraud.

And section 36(2) of the Assessment and Collection of Taxes Law 1978, (Law No. 4 of 1978) (as amended by Law 41 of 1979 and renumbered to section 42(2)) which law repealed the aforesaid Law 53 of 1963 provides for payment as above when the delay is due to the tax payer's unjustifiable omission.

In the first place I should state that no such interest is due or would be payable in respect of the income of the years of which no income tax is payable or can be raised.

But in any case, from the facts it appears to me that no fraud or wilful default can be established or inferred. As applicant states, he was given erroneous legal advice in respect of his obligation to declare his income abroad.

5 Though this is no defence in respect of his liability to pay tax, nonetheless it is sufficient to establish the absence of the mental element required on his part in order to substantiate any allegation of fraud or wilful default against him. Nor do I consider that his conduct amounts
10 to unjustifiable omission as regards the income of the year 1969, this having been declared in 1970 when remitted to Cyprus, and as regards the rest of his income in question, as already stated above no question of interest arises, income tax not being payable.

15 His final argument is that the respondent wrongly disallowed part of the relief which applicant is entitled under section 16 of the Income Tax Laws 1961 - 1969 in respect of his children, having allowed such part of the relief in respect of his wife's income.

20 Quite correctly as stated by the respondent the general principle is that the Commissioner has a discretion whether or not to apportion child relief "... where two or more individuals are eligible for a deduction in respect of the same child ...", however, I cannot agree in the
25 present case that the respondent Commissioner could apportion the deduction between the applicant and his wife since the wife could not be taxed due to the lapse of six year period.

30 The relevant provisions of section 16 are mandatory ".... any individual who proves shall be allowed....", leaving no discretion to the Commissioner in the matter. And further down in the same section the amount of the deduction to be allowed is specified; it is a fixed amount and not variable at the discretion of the Commissioner.

35 In conclusion I find that the only amount which is properly taxable by the respondent Commissioner is the interest credited to the applicant in respect of the year 1969 and which was remitted to Cyprus in 1970.

As regards the remainder of the amounts remitted to Cyprus, they are not taxable, those amounts representing income derived during the years 1961 - 1965 as having already been taxed in 1969 and those amounts derived during the years prior to 1961 as being outside the six year period allowed under Section 23 of the Taxes (Quantifying and Recovery) Laws 1963 to 1969. 5

For the reasons stated above this recourse succeeds subject to the applicant's obligation regarding income tax payable in respect of the year 1969 as aforesaid. In the circumstances there will be no order as to costs. 10

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