1986 February 7

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

HELLENIC BANK LIMITED,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,

Respondents.

(Case No. 426/84).

The Assessment and Collection of Taxes Law, s. 38—Refund of overpaid tax—A claim of refund for alleged overpayment of tax in one year is irrelevant to the taxpayers' tax liability in respect of a subsequent year—Such claim cannot be included in the returns for any such subsequent year—The claimant should apply for the revision of the assessment for the year in which the overpayment was allegedly made—Such application should be made within the six year statutory period.

Income Tax—The Special Contribution (Temporary Provisions) Law 1974 as amended, s. 8—Interest payable for failure to pay such contribution within the statutory period—Amount of such interest not deductible from the taxpayer's chargeable income.

Interpretation of Statutes—Ejusdem Generis—The prerequisites for the applicability of the said rule of construction.

Constitutional Law—Constitution, Article 28—An administrative practice having no sanction in Law cannot legitimise a claim for equality.

Income Tax—No provisions in the tax legislation entitling the Commissioner to collect taxes less than the Statute warrants.

The applicants, a bank, paid in 1979 the amount of £10,964 interest for delay in the discharge of their obligation to make special contributions under The Special Contributions (Temporary Provisions) Law 1974 as amended. In 1981 they paid an amount of £4.- by way of interest for similar reasons. No claim was made for the deductions of the above amounts from the applicants' chargeable income for 1979 and 1981. The assessment raised for 1979 and 1981 made no allowance for the said payments. The assessments became final.

In their income tax return for 1982 submitted in June 1983 the applicants claimed by way of deduction from their taxable income for 1982 the said payment of interest. The Commissioner refused to allow such a deduction and dismissed the objections raised by the applicants' auditor.

As a result the applicants filed the present recourse. The questions raised for determination are the following three, namely (a) The applicability of s. 38 of the Assessment and Collection of Taxes Law to the facts of this case, (b) The deductability from the chargeable income of interest paid for failure to pay a tax liability, such as Special Contribution, and (c) The implications of an administrative practice adopted in 1982 to allow deduction of interest paid for failure to meet special contributions in cases of assessments raised after 1982. This practice was evolved as a concession to the taxpayer, not an exception warranted by law.

It should be noted that as regards the said administrative practice the applicants submitted that the conduct of the Commissioner was discriminatory in that he did not follow the same practice as regards the applicants in respect of the said amounts which they had paid in 1979 and in 1981 as aforesaid.

Held, dismissing the recourse (1) Section 38* of the

* Section 38(1) is quoted at p. 273 post.

Assessment and Collection of Taxes Law specifically intended to provide for the refund of overpaid tax in any particular year. The claim for a refund cannot be included in the returns of income for any year subsequent to that in which it was paid, for the obvious reason that it is not an expenditure made in the year to which the return relates. To claim a refund the taxpayer must seek, within the six-year statutory period (s.38(2)) the revision of the assessment for the year in which the alleged overpayment was made (in this case years of assessment 1979 and 1981). Consequently the claim of the applicants to deduct the said amounts was irrelevant to their tax liabilities for 1982. The Commissioner correctly dismissed such a claim. On the other hand the submission of counsel of respondent that s 38 is confined to the four cases he enumerated* on the ground that the words in the section "or otherwise" should be interpreted ejusdem generis is unfounded because before this rule of construction finds application two or more words must be used disclosing a genus, in which case, depending on the context, particularly the nature of the genus, the Court may interpret expressions following thereto as referring to the same genus, not exhausted by the categories specifically mentioned.

(2) Special Contributions levied under the relevant legislation are deductible from the tax-payers' chargeable income not because of their intrinsic nature but because of the express provision of s. 8 of the Special Contribution (Temporary Provisions) Law 1974 as amended. The exemption authorised by s. 8 does not extend to the payment of interest, which is a payment to compensate the State for the delay in receiving the special contribution.

Only a practice established pursuant to the provisions of the law or in accordance with discretionary powers vested thereby to the Administration can generate rights in law.

There is no provision in the tax legislation entitling

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* See footnote (2) of page 273.

the Commissioner to collect taxes less than the Statute warrants. The acknowledgment of any such power to the Commissioner, outside the ambit of the law would be inconsistent with the supremacy of the law as well as the duty of the Administration to administer the law, as laid down in the Statute.

Recourse dismissed.
No order as to costs.

Cases referred to:

Tillmans and Co. v. *SS. Knutsford Ltd.* [1908] 2 K.B. 385;

Ridge v. *Baldwin* [1964] A.C. 40;

Singer Sewing v. *The Republic* (1979) 3 C.L.R. 507;

Lanitis v. *The Republic* (1984) 3 C.L.R. 1583;

Voyiazianos v. *The Republic* (1973) 3 C.L.R. 239;

Christodoulides and Others v. *The Republic* (1985) 3 C.L.R. 357;

Cubay v. *Kington* [1984] 1 All E.R. 513;

Shamassian v. *The Republic* (1973) 3 C.L.R. 341.

Recourse.

Recourse against the decision of the respondents whereby they failed to deduct from applicants' taxable income for 1982 the amount of C£10,968.- which was paid by applicants as interest for the delay in the discharge of their obligations under the provisions of the Special Contribution (Temporary Provisions) Law, 1974 (Law No. 55 of 1974).

G. Triantafyllides, for the applicants.

A. Evangelou, Senior Counsel of the Republic with *Y. Lazarou*, for the respondents.

Cur adv. vult.

PIKIS J. read the following judgment. The applicants, a

bank, paid in 1979 the amount of C£10,964.-, interest for delay in the discharge of their obligations to make special contributions under the provisions of The Special Contribution (Temporary Provisions) Law 1974 [1]. In 1981 they paid an amount of £4.- by way of interest for similar reasons. No claim was made for the deduction of the above amounts from their chargeable income in their returns for the year 1979 and 1981, submitted on 13.9.80 and 30.6.1982, respectively. The assessments raised on 1.6.81 and 2.7.82 for the corresponding years of assessment made no allowance for the payment of the above amount. In the absence of objection thereto and failure to mount a challenge by way of judicial review[2], the assessment became final and the tax levied thereby payable.

In June, 1983, applicants submitted their income tax return for the year 1982. They claimed by way of deduction from their taxable income the interest paid in the years 1979 and 1981, referred to above. Deduction was claimed notwithstanding the fact the payment was not made in 1982 nor did it constitute a liability of the company on 31.12.82, a prerequisite for the allowance of a deduction in any one year. The Commissioner refused to make any allowance or deduction for the payment of the aforesaid amounts and dismissed the objection raised by the auditor of the applicants on their behalf (dated 1st March, 1984). The Commissioner persisted in his decision on the ground that taxation for the years 1979 and 1981 was, for the reasons earlier indicated, closed, advising applicants to have recourse to the Court in case they felt aggrieved. The present recourse is directed towards ventilating the grievance of the applicant and seeking relief by way of annulment of the decision for the failure of the Commissioner to deduct from their taxable income of 1982 the amount of C£10,968.-.

The case for the applicants is founded on the provisions of the tax legislation and the discriminatory conduct of the tax Authorities resulting from their practice adopted in 1982 to allow deduction of interest paid for failure to meet

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[1] (Law 55/74, as amended by Laws 43/75, 67/75 and 15/76).
[2] See, sections 20 and 21 of the Assessment and Collection of Taxes Law, 1978-1979, and Article 146 of the Constitution).

special contributions in cases of assessments raised after that year. The practice was evolved, as explained by counsel for the Commissioner, as a concession to tax payers. not as an exception warranted in law. According to this practice deduction of interest is allowed, provided it was paid, or the liability was incurred in any particular year of assessment and the payment of tax was not settled by raising an assessment under the law. Counsel for the applicants argued that if his clients had defaulted to make returns of income for the years 1979 and 1981 prior to 1982, they would be allowed the deduction for the monies in question. The argument overlooks two points:-

(a) That deduction would be allowed in respect of the year of assessment and not for any subsequent year.

(b) The obligation of a tax-payer to submit returns in accordance with s.5 of the Assessment and Collection of Taxes Law and the sanctions to which a person in default, is liable to under the provisions of s. 53 of the same legislation.

The questions raised for determination are the following three -

(i) The applicability of the provisions of s.38 of the Assessment and Collection of Taxes Law to the facts of the case;

(ii) the deductability from the chargeable income of interest paid for failure to pay a tax liability, such as a special contribution; and

(iii) the implications of an administrative practice designed to make concessions to tax-payers by reducing their statutory liability to pay tax.

If it is decided that s. 38 has no application to the facts of the case the recourse must necessarily be dismissed. We are not in these proceedings concerned to review the assessments raised for the years 1979 and 1981. What is at issue is the right of the applicants to claim, under s.38 the deduction of monies paid in previous years from their taxable

income in the particular year of assessment; in this case, the year 1982.

Section 38 is not a hybrid provision for the recovery of overpaid tax but one specifically intended to provide for the refund of overpaid tax in any particular year. Section 38(1)[1] says so expressly: "If it be proved to the satisfaction of the Director that any person for any year of assessment has paid tax by deduction or otherwise in excess of the amount with which he is properly chargeable, such person shall be entitled to have the amount so paid in excess, refunded." The claim for a refund cannot be included in the returns of income for any year subsequent to that in which it was paid, for the obvious reason it was not expenditure made in that year. To claim a refund under the provisions of s. 38 the claimant must seek, within the six-year statutory period, specified in subsection 2 of s.38, the revision of the assessment for the particular year in which tax was allegedly overpaid; in this case. years of assessment 1979 and 1981, respectively. Consequently, the Commissioner was perfectly right to dismiss the claim for a deduction of interest paid for delayed payment of special contributions in previous years, as irrelevant to the tax liabilities of the applicants in the year of assessment 1982.

On the other hand, I cannot sustain the submission of counsel for the respondents that a claim for deduction under s. 38(1) is confined to the four cases instanced at p.5 of his address[2]. The suggestion that the expression "or otherwise" should be interpreted ejusdem generis, the word

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[1] Assessment and Collection of Taxes Law.

[2] (i) in respect of emoluments pursuant to s.49 of the Income Tax Laws 1961-1981;

(ii) in respect of dividends pursuant to ss.35 and 36 of the aforesaid Laws and s.37 of the Assessment and Collection of Taxes 1978-1979;

(iii) in respect of income derived from property or concern under the direction, control or management of trustees, or income received by the agent of a non-resident as provided by ss.37-39 of the Income Tax Laws and s.14 of the Assessment and Collection of Taxes Laws; and

(iv) in respect of income from royalties, premiums, or film rentals or income derived by public entertainers as provided under ss 30-33 of the Income Tax Laws.

that precedes it, notably "deduction", is unfounded for before this rule of construction finds application, two or more words must be used, disclosing a genus; in which case, the Court may, depending on the context of legislation[1], particularly the nature of the genus disclosed thereby, interpret expressions following thereto as referring to the same genus, not exhausted by the categories specifically mentioned.

In view of the conclusion reached above, on the inapplicability of s. 38 and the irrelevance of the payment made by way of interest for the computation of the taxable income of the applicants in the year 1982, the recourse must necessarily be dismissed. However, in case the matter goes higher and I am overruled on this score, I consider it prudent to probe the remaining two questions and attempt to answer them, too.

It has been faintly suggested on behalf of the applicants that interest paid for failure to pay a special contribution in time is, like the contribution itself, deductible from income liable to tax. Respondents deny the validity of this proposition. Special contributions levied under the provisions of the *Special Contribution (Temporary Provisions) Law 1974* (as amended)[2] are deductible from the taxpayers chargeable income not because of their intrinsic nature but because of the express statutory provisions of s.8 of the Law[3]. Otherwise, the payments would not be deductible from the chargeable income being, as the Supreme Court acknowledged in *Singer Sewing* v. *The Republic*[4], a species of taxation. Tax payment is not, because of its nature, deductible from the chargeable income of the tax-payer. It represents, as stated in *Simon's Taxes*[5] the State's portion of the profit; not a disbursement for the production of income.

The exemption authorised by s. 8 of the *Special Contri-*

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1 Tillmanns & Co. v. SS. Knutsford, Ltd. [1908] 2 K.B. 385; Ridge v. Baldwin [1964] A.C. 40.
2 Law 55/74; see, also, Laws 43/75, 67/75, 14/76, 15/76 and 34/78.
3 Special Contribution (Temporary Provisions) Law.
4 (1979) 3 C.L.R. 507.
5 3rd ed., B, para. BI. 1211, p. 590.

bution (Temporary Provisions) Law does not extent to the payment of interest levied for failure to pay special contribution within the statutory period. It is a payment primarily intended to compensate the State for the loss suffered from the delay in receiving a special contribution. Neither on principle nor on authority can its deduction be justified from the chargeable income. Consequently, applicants could not ground a valid claim in law for the deduction of interest payments from their chargeable income. Could they ground such claim on the basis of the administrative practice evolved after its payment? This is the last question we must answer.

Administrative practice, whether it takes the form of a concession or any other form, cannot be a source of rights unless evolved within the framework of the law and derives legitimacy from its provisions. The mere existence of a practice is not of itself a valid basis for legal rights. Only a practice established pursuant to the provisions of the law or in accordance with discretionary powers vested thereby to the Administration can generate rights in law.

Both sides appear to subscribe to the view there is authority or discretion under the income tax legislation and the Assessment and Collection of Taxes Law to make concessions in the computation of the taxable income. What divides the parties are the implications of the concessionary policy in question, namely, to deduct after 1982, from the chargeable income, interest paid for delay in the payment of special contributions. Counsel for the Commissioner argued the line of demarcation drawn between assessments finalised and those not made, is a sound one considering the implications of disturbing retrospectively the finality of assessments; while counsel for the applicants suggested the differentiation or distinction is arbitrary and one that cannot be reconciled with the principle of effective equality before the Administration, safeguarded by Article 28.

I can trace no section of the tax legislation entitling the Commissioner to collect taxes less than the Statute warrants. The acknowledgment of any such power to the Commissioner, outside the ambit of the law, would be inconsistent with the supremacy of the law, as well as the duty

of the Administration to administer the law, as laid down in the Statute. The decision of the Full Bench of the Supreme Court, in *Lanitis* v. *Republic*[1] supports the view that "administrative practice cannot defeat a tax liability". Nor one may add, can a concession be evolved in opposition to the law. It is worth reproducing the dicta of *Lord Brightman* in *Cubay* v. *Kington*[2] in order to remind the Commissioner and those applying the income tax legislation that they have no authority to collect tax less than the relevant Statute requires. "The Crown has, in general, no option but to claim such tax as the Statute says should be payable. If the Statute is obscure, as here the case, the Crown has, in general, no option but to ask the Court to interpret it."[3]

That the obligation to pay tax sounds in the domain of public law, does not lessen its efficacy nor does power vest in the Administration to absolve those obligated thereby from discharging it. As in the case of obligations in the domain of private law, the machinery of the law or the Administration must be moved with equal efficacy to identify, in the first place, the obligation and then enforce its performance in the case of recalcitrance.

Once it has been found that the concessionary policy relied upon by applicants to their claim fo equal treatment has no sanction in law, no case of equality before the Administration can arise. For such a claim can only be found on equality if the Administration operates within the bounds of the law, not outside it. A practice having no sanction in law, cannot legitimise a claim for equality[4].

For all the above reasons the recourse fails. It is dismissed with no order as to costs.

Recourse dismissed.
No order as to costs.

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[1] (1984) 3 C.L.R. 1583, 1594.

[2] [1984] 1 All E.R. 513 (HL).

[3] p. 527, Letters H-J.

[4] See, inter alia, Voyiazianos v. The Republic (1967) 3 C.L.R. 239, Shamassian v. Republic (1973) 3 C.L.R. 341; Christodoulides and Others v. Republic (1985) 3 C.L.R. 357.