1987 October 23

[A. LOIZOU, MALACHTOS, SAVVIDES, STYLIANIDES AND KOURRIS, JJ.]

HELLENIC BANK LTD.,

Appellants-Applicants,

v.

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

Respondents

(Revisional Jurisdiction Appeal No. 565)

Taxation — Income tax — Deductions — Interest on special contributions for the years 1979 and 1981 — Such interest was paid during the aforesaid years — Claim that relevant amounts be deducted from taxpayer's taxable income for 1982 — Claim correctly rejected as the relevant amounts were neither a liability for 1982 nor were they incurred for the production for such year's income

Taxation — The Assessment and Collection of Taxes Law 4/78, section 38 — Claims for repayment of tax paid — Scope of the section — It does not apply where the taxpayer makes up his accounts and submits his returns to the Commissioner — Finalised assessments cannot be challenged under the section — The section applies only in respect of tax paid «by deduction or otherwise» — When tax is considered as paid by deduction — Whether «or otherwise» should be construed «ejusdem generis»

Taxation — Income tax — Deductions — Special contribution — Fact that it is deductible as a matter of law (section 8 of the Special Contribution (Temporary Provisions) Law) does not automatically lead to the conclusion that interest paid thereon is, also, deductible as a matter of law

Taxation — Income tax — Tax concessions — The approach of this Court — Claim for the retrospective application of a tax concession — It is contrary to the principles of administrative law against retrospectivity

Words and Phrases «By way of deduction or otherwise» in section 38 of the Assessment and Collection of Taxes Law 4/78

In June 1983 the appellants submitted their income tax returns for the year 1982 and claimed by way of deduction from their taxable income the interest

paid on special contribution for the years 1979 and 1981 (£10,964 and £4 - respectively) The Commissioner, however, refused to make any allowance or deduction for the payment of the aforesaid amounts as he considered that the said sums were not a liability as at 31st December 1982, that they had been finally determined and paid in 1979 and 1981 respectively and the accounts of the appellants-applicants for those years could not be altered by later events, and that the aforesaid amounts representing interest paid on special contribution levied was not an expense wholly and exclusively incurred in the production of the income liable to special contribution

This is an appeal from the judgment of a Judge of this Court, dismissing appellants' recourse, whereby the validity of the aforesaid decision of the Commissioner had been impugned

Held, *dismissing the appeal* (1) The claim of the applicants was correctly rejected by the respondent Commissioner as such was made by them by way of deduction from their taxable income in respect of their tax liabilities for the year 1982, notwithstanding the fact that such amount claimed to be deducted was neither a liability for the year of 1982, nor was it incurred for the production of their income for such year, but was interest paid in the years 1979 and 1981 on special contribution for those years

(2) This case is outside the scope of section 38 of the Assessment and Collection of Taxes Law 4/78 This section gives a tax payer the right to claim repayment of tax paid «by way of deduction or otherwise» within six years from the end of the year of assessment to which such claim relates Where a taxpayer makes up his accounts and submits his returns to the Commissioner, as it is the case of the appellants, it is not a case where tax is paid by deduction and is therefore outside the scope of section 38

Moreover, finalised assessments cannot be challenged under section 38 as the proper procedure is for an aggneved taxpayer to make an objection against a decision of the Commissioner and if not satisfied to file a recourse within of course the prescribed time limits If he fails to do so within time he cannot later try to invoke the provisions of section 38

(3) The fact that special contribution is itself deductible as a matter of law (section 8 of the Special Contribution (Temporary Provisions) Law) does not necessarily lead to the conclusion that the interest payable thereon must also be deductible as a matter of law

The fact that interest, is deductible on the basis of administrative practice which takes the form of a concession by the respondent Commissioner, cannot by itself defeat a tax payer's tax liability as imposed by law, as concessions do not have the force of law and do not strictly form part of the tax code

In the present case what is in fact claimed by the taxpayer-appellant is for such a concession to be applied retrospectively in respect of their tax liabilities which have already been paid and settled and are in all respect finalised Such a claim is contrary to the generally accepted principles of administrative law against retrospectivity

(4) The approach of this Court as regards the question of concessions is that the Commissioner of Income tax may make concessions provided they are not inconsistent with any statutory provision though the law may not expressly allow them They are applied generally for the benefit of all tax payers not by way of favour but by way of fair administration and they are publicly known

Appeal dismissed No order as to costs

Cases referred to

Singer Sewing Machine Co v Director of the Department of Inland Revenue (1979) 3 C L R 507,

A G v Seccombe [1911] 2 K B 688

Eton Rural Distnct Council v Thames Conservators [1950] 1 Ch 540

Rose Smith and Co Ltd v Inland Revenue Commissioners [1933] 17 Tax Cases 586,

Vestey and Others v Commissioner of Inland Revenue, 54 T C 503,

F S Securities Ltd v Commissioners of Inland Revenue [1963] 1 W L R 1223,

Commissioners of Inland Revenue v Bates [1968] A C 483,

Commissioners of Inland Revenue v Korner [1969] 1 W L R 554,

HadjiPavlou v The Republic (1967) 3 C L R 711,

Makrides v The Republic (1983) 3 C L R 1381

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Pikis, J) given on the 7th February, 1986 (Revisional Jurisdiction Case No 426/84)* whereby appellants' claim for the deduction of the amounts of £10,964 - and £4 - paid by way of

* *Reported in (1986) 3 C L R 267*

interest for special contribution for the years 1979 and 1981 respectively, from their taxable income for the year 1982 was dismissed.

G. Triantafyllides, for the appellants.

A. Evangelou, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

A. LOIZOU J. read the following judgment of the Court. This is an appeal from the judgment of a Judge of this Court whereby the recourse of the appellants/applicants against the decision of the respondents to refuse their claim to deduct the amounts of £10,964.-and of £4.- paid by way of interest for special contribution for the years 1979 and 1981 respectively, from the taxable income of the applicants for the year 1982 was dismissed.

The aforesaid amounts were paid as interest for the delay in the discharge of their obligations to make special contributions under the provisions of the Special Contribution (Temporary Provisions), Law 1974 (Law No. 55 of 1974).

The assessments raised by the respondents for the aforesaid years made no allowance for the payment of the above amounts and as no objections were filed thereto, as provided under section 20(1) of the Assessment and Collection of Taxes Law 1978 to 1979, they became final.

In June 1983 the appellants submitted their income tax returns for the year 1982 and claimed by way of deduction from their taxable income the interest paid on special contribution for the years 1979 and 1981 referred to above. The Commissioner, however, refused to make any allowance or deduction for the payment of the aforesaid amounts as he considered that the said sums were not a liability as at 31st December 1982; they had been finally determined and paid in 1979 and 1981 respectively and the accounts of the appellants/applicants for those years could not be altered by later events; and that the aforesaid amounts representing interest paid on special contribution levied was not an expense wholly and exclusively incurred in the production of the income liable to special contribution.

The appellants/applicants objected against the decision of the respondent Commissioner, through their auditors by letter of 1st

March, 1984, but as the respondent rejected their objection, they filed a recourse The present appeal was filed as against the decision of the Court dismissing such recourse on the ground that special contribution is deductible from tax payer's income only because of the express provisions of section 8 of the Special Contribution (Temporary Provisions) Law 1974 (Law No 55 of 1974), otherwise being a form of taxation (see *Singer Sewing Machine Co , v Director of the Department of Inland Revenue* (1979) 3 C L R 507 at p 511) it would not be so deductible Furthermore it was held that the provisions of section 8 do not extend to the payment of interest for failure to pay special contribution within time as such interest is «a payment intended to compensate the state for the loss suffered for the delay of the tax payer to pay his special contribution in time »

The main argument of the appellants is that the trial Judge wrongly dismissed their recourse because interest on special contribution is deductible as a matter of law and not merely by way of concession in that since special contribution is deductible as a matter of law under section 8 of The Special Contributions (Temporary Provisions) Law No 34 of 1978, the same provisions must necessarily extend and apply to interest charged on such special contribution But even if, it was argued, it is deductible by way of concession, such concession must be offered to everybody since a differentiation between tax payers who owe interest on their special contribution in respect of the years prior to 1982 - who are allowed to deduct any interest they pay from their chargeable income for income - tax purposes - and tax payers who paid interest on special contribution owed prior to 1982 (like the respondents) and who do not get a deduction, would be contrary to Article 28

Finally, it was submitted that as the Court has power under section 38 of the Assessment and Collection of Taxes Law 1978 (Law No 4 of 1978) (as so renumbered by Law No 41 of 1979) to go back six years and collect tax due but not paid, in the same way a tax payer may claim a refund for tax already paid, and though admittedly a claim was not made in respect of the years of 1979 and 1981 but was instead included in the returns submitted for the year 1982, nevertheless it could so be done as the claim concerned an expenditure incurred in the sense of section 11 of the Income Tax Laws, that is, it was wholly and exclusively

incurred in the production of income. Also since section 38(2) does not specify how such a claim can be filed, it could validly be so filed through the 1982 tax returns.

The basic argument on behalf of the respondents, with which we agree, is that the claim of the applicants was correctly rejected by the respondent Commissioner as such was made by them by way of deduction from their taxable income in respect of their tax liabilities for the year 1982, notwithstanding the fact that such amount claimed to be deducted was neither a liability for the year of 1982, nor was it incurred for the production of their income for such year, but was interest paid in the years 1979 and 1981 on special contribution for those years.

It was further submitted that in any event the provisions of section 38 of Law No. 4 of 1978 which give a tax payer the right to claim repayment of tax paid within six years from the end of the year of assessment to which such claim relates, would not apply to the case of the applicants, since the section applies where tax has been paid «by deduction or otherwise» as the expression «or otherwise», should be construed «ejustem generis»; see: *A.G. v. Seccombe* [1911] 2 K.B. 688 at 703; *Eton Rural District Council v. Thames Conservators* [1950] 1 Ch. 540; also Maxwell on Interpretation of Statutes 12th Edition, at p. 300, to the effect that the words «or otherwise» should be restricted to the word that precedes them, in this instance being the words «by deduction».

We consider, with all due respect to the trial Judge, that tax is generally paid «by deduction» where the imposition of such tax is outside the control of the tax payer, as it is deducted normally at source by somebody else, for instance,

(a) in respect of emoluments pursuant to s. 49 of the Income Tax Laws 1961-1981;

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

(c) 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 nonresident as provided by ss. 37-39 of the Income Tax Laws and s. 14 of the Assessment and Collection of Taxes Laws; and

(d) 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.

As rightly contended by counsel for the respondents, where a tax payer makes up his accounts and submits his returns to the Commissioner, as it is the case of the appellants, it is not a case where tax is paid by deduction and is therefore outside the scope of section 38.

It was further submitted, with which we fully agree, that finalised assessments cannot be challenged under section 38 as the proper procedure is for an aggrieved taxpayer to make an objection against a decision of the Commissioner and if not satisfied to file a recourse within of course the prescribed time limits. If he fails to do so within time he cannot later try to invoke the provisions of section 38.

Similar provisions as to time limit appear in the English Taxes Management Act 1970 where in section 118(4) thereof it is provided that the amount of tax covered by an assessment cannot be altered after an assessment becomes final and conclusive, when an appeal against it is finally determined or where there is a time limit for appealing and no appeal has been made within that limit. (See Halsbury's Laws of England (4th Edition), Volume 23 paragraph 1585 page 1153.)

It was further submitted on behalf of the respondents that interest payable for failure to pay special contribution in time is, unlike the contribution itself, not deductible from income liable to tax.

On this point it was stated by the trial Court:

«Special contribution levied under the provisions of the *Special Contribution (Temporary Provisions) Law 1974* (as amended) are deductible from the tax-payers' chargeable income not because of their intrinsic nature but because of the express statutory provisions of s. 8 of the Law. Otherwise, the payments would not be deductible from the chargeable income being, as the Supreme Court acknowledged in *Singer Sewing v. The Republic* (1973) 3 C.L.R. 507, 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* (3rd Ed. B, para BI, 590) the State's portion of the profit, not a disbursement for the production of income.»

There is no specific provision in the Law regarding interest paid on special contribution but, as submitted by the respondents, upon consideration of the decision of the Full Bench in *The Singer Sewing Machine Case* (supra), in which however, no reference is made as to what interest amounts to, the respondent Commissioner decided that such exemption should also extend to interest

We feel, however, that the fact that special contribution is itself deductible, as a matter of Law, does not necessarily lead to a conclusion that the interest payable must also be deductible as a matter of law.

The trial Judge stated on this point:

«The exemption authorised by s. 8 of the *Special Contribution (Temporary Provisions) Law* does not extend 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.»

The fact that interest, as explained above, is deductible on the basis of administrative practice which takes the form of a concession by the respondent Commissioner, cannot by itself defeat a tax payer's tax liability as imposed by law, as concessions do not have the force of law and do not strictly form part of the tax code (see Halsbury's Laws of England 4th Edition Volume 23 paragraph 1681, page 1213).

There is no dispute in the present case whether such practice exists which in any event is not a question of law but it is at all times a question of fact. (See *Rose Smith and Co. Ltd., v. Inland Revenue Commissioners* [1933] 17 Tax Cases 586).

We consider therefore that concessions are within the discretion of the Commissioner to give or not and though they are of a general application they will not be granted for purposes of tax avoidance. They normally operate to mitigate what would

otherwise be the unintentionally harsh effect of certain provisions of the Tax Acts if applied strictly, though some are in effect additional exemptions from tax liability (Halsbury's Laws of England (4th Ed.) Vol. 23 para. 1681).

Nevertheless, in the present case what is in fact claimed by the taxpayer/appellant, is for such a concession to be applied retrospectively in respect of their tax liabilities which have already been paid and settled and are in all respects finalised, which claim we consider to be contrary to the generally accepted principles of administrative law against retrospectivity.

Whilst on this question of concessions we feel it useful to give our approach to it. In England reference is made to it in the British Tax Encyclopedia, Whitman and Wheatcroft on Income Tax, second edition at pp. 33-34. which we need not reproduce here as in the case of *Vestey and others v. Commissioner of Inland Revenue*, 54 T.C. p. 503, Lord Edmond Davies dealt at some length and reviewed the position in England regarding the question on concessions at pp. 599B-601A of his opinion. We shall only refer to a brief passage which reads:

> «It has recently been pointed out in an article to which I am considerably indebted (David W. Williams, 'Extra Statutory Concessions' 1979 British Tax Review 137) that Sir Stafford Cripps said in 1949 that they had come into existence 'without any particular legal authority under any Act of Parliament but by the Inland Revenue under my authority' (466 H.C. Deb., 6 July 1949, col. 2267). And, despite the reliance sometimes placed upon the Income and Corporation Taxes Act 1970, s. 115(2), the Taxes Management Act 1970, s 1, and the Inland Revenue Regulation Act 1890, s 1, the fact is that there exists no statutory support for the assessment procedure adopted in the present case. And, even were there some statutory or other basis for the published list of concessions, Walton J. [1979] Ch 198, 204, made the important point that:
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> '.... they do represent a published code, which applies indifferently to all those who fall, or who can bring themselves, within its scope. What is claimed by the Crown now is something radically different. There is no published code, and no necessity for the treatment of all those who are in consimilu casu alike. In one case the Crown can remit one

third, in another one-half, and in yet another case the whole, of the tax properly payable, at its own sweet will and pleasure If this is indeed so, we are back to the days of the Star Chamber Again, I want to make it crystal clear that nobody is suggesting that the Crown has or indeed ever would, so utilise the powers which it claims to bring about unjust results, The root of the evil is that it claims that it has, in fact, the right to do so '

Judicial comment regarding extra-statutory concessions has been mixed Speaking 'in no spirit of criticism' Donovan L J observed in F S *Securities Ltd , v Commissioners of Inland Revenue* [1963] 1 W L R 1223, 1233 'This is a difficult code to administer, and practical considerations no doubt justify at times some departure from strict law for the common convenience of the Revenue and the taxpayer ' Even Lord Upjohn spoke with two voices In 1968 he said in *Commissioners of Inland Revenue v Bates* [1968] A C 483, 516

The Commissioners, realising the monstrous result of giving effect to the true construction of the section, have in fact worked out what they consider to be an equitable way of operating it which seems to them to result in a fair system of taxation I am quite unable to understand upon what principle they can properly do so '

Yet in the following year he said in *Commissioners of Inland Revenue v Korner* [1969] 1 W L R 554, 558, of an unpublished concession 'This practice is very old, works great justice between the Crown and the subject and I trust will never be disturbed '»

In Cyprus this Court had the occasion to refer to concessionary policies and practices though it was not called upon directly to adjudicate on them In the case of *HadjiPavlou v The Republic* (1967) 3 C L R 711, at pp 719-720 Triantafyllides, J , as he then was said the following

«Regarding the issue concerning the disbursement of £315 -, for the funeral expenses of the late Chairman of the Applicant, Mr Christodoulos Haggipavlu, counsel for the Applicant has not put his case higher than this Though it is not in the strict sense a trading expense, nevertheless, it is a disbursement which has been treated in the past as

deductible, by way of established practice of the Income Tax Authorities in the United Kingdom, it is an accepted concession.

No specific instances in Cyprus have been referred to so as to show that a similar practice has been established in Cyprus, too, and thus to lay, possibly, the foundation for a complaint by the Applicant that it has been discriminated against by means of the sub judice decision of the Respondent.»

A more recent one is the case of *Makrides v. The Republic* (1983) 3 C.L.R. 1381. Reference is made to a concessionary arrangement but at p. 1385, Pikis, J., emphasized that the legitimacy of the concessionary arrangement was not probed in those proceedings, not being an issue before him, and concluded by saying «to the extent that the decision in *Federation of Selfemployed* [1981] 2 All E.R. 93, may be relevant in Cyprus and, I express no opinion on the subject, it suggests that a concessionary policy may be evolved provided it is not unlawful or ultra vires the law.»

The practice of extra statutory concessions is claimed to stem from the provisions of section 3(1) of the Income Tax Laws 1961-1986 and under section 4 of the Assessment and Collection of Taxes Law 1978, which imposes upon the Commissioner of Income Tax the responsibility for due administration of the Law.

In our view the Commissioner of Income Tax may make concessions provided they are not inconsistent with any statutory provision though the Law may not expressly allow them. They are applied generally for the benefit of all tax-payers not by way of favour but by way of fair administration and they are publicly known.

It may be said here that similar provisions to our section 38(2) appear in section 33 of the English Taxes Management Act 1970, where it is provided in subsection 1 thereof:

«(1) If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than six years after the end of the year of assessment (or, if the assessment is to corporation tax, the end of the accounting period) in which the assessment was made, make a claim to the board for relief.»

The proviso to subsection (2) thereof states as follows:

«Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made.»

It is evident therefore from the above proviso that no relief is available where the returns were made «on the basis or in accordance with the practice generally prevailing».

In the present instance there is no question of the appellants having paid beyond their tax liability according to law. The assessments for the years 1979 and 1981 were not done in error in order that the Court might be under a duty to rectify such error, but they were made in accordance with the legal provisions in force at the time.

In conclusion we are of the opinion that the trial Court rightly decided that the respondent Commissioner correctly rejected the claim of the appellants. In the result this appeal is dismissed, but in the circumstances there will be no order as to costs.

Appeal dismissed with no order as to costs.