1988 May 26

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRYSTALLENI A. KALLIMACHOU AND OTHERS,

Applicants.

v.

THE MUNICIPALITY OF POLIS CHRYSOCHOUS,

Respondents.

(Cases Nos. 396/87, 397/87, 398/87).

Misconception of fact—Objective non existence of facts taken into consideration in reaching the sub judice decision—Amounts to a misconception of fact.

Misconception of fact—Acting in ignorance of essential and material facts—Amounts to a misconception of fact. 5

Reasoning by an administrative act—Facts stated in the opposition not supported by actual facts of the case.

In this case the Court reached the conclusion that in imposing the sub judice professional taxes the respondents took into consideration non-existent income from leases of premises and building sites (Cases 396/87 10 and 398/87) and from cultivation of land (Case 397/87). As a result the sub judice decisions were annulled on the grounds of misconception of facts and lack of due reasoning.

Sub judice decisions annulled.
No order as to costs. 15

Cases referred to:

Fournia v. The Republic (1983) 3 C.L.R. 262;

Mallouros and Another v. The Electricity Authority of Cyprus and Another (1974) 3 C.L.R. 220;

Christodoulou v. C.Y.T.A. (1978) 3 C.L.R. 61;

Skaros v. The Republic (1986) 3 C.L.R. 2109;

5 *Christofides v. The Republic* (1966) 3 C.L.R. 732;

Iordanou v. The Republic (1967) 3 C.L.R. 245;

Ioannides v. The Republic (1972) 3 C.L.R. 318;

Mikellidou v. The Republic (1981) 3 C.L.R. 461;

Skapoullis v. The Republic (1984) 3 C.L.R. 554;

10 *Economides v. The Republic* (1985) 3 C.L.R. 222.

Recourses.

Recourses against the decision of the respondents to impose profesional tax upon applicants for the year 1976.

M. Kyriakides, for the applicants.

K. Chrysostomides, for the respondents.

15

Cur. adv. vult.

A. LOIZOU P. read the following judgment. These three recourses were heard together as they deal with common questions of law and fact.

20 By means of the prayer for relief the respective applicants pray for: -

"A declaration of the Court that the imposition of profes-

sional tax of £70 upon the applicant by the respondent Municipality in respect of the year 1986 is contrary to Law in excess or abuse of power, null and void, and of no legal effect whatsoever."

There is no agreement between the parties with regard to the facts that gave rise to the sub judice acts. They agree only on the point that they have emanated from the fact of ownership of immovable property by the applicants within the municipal limits of Polis Chrysochous. It is therefore necessary to deal with the respective factual background as set out in each party's case. It was the contention of the applicants in the facts given in support of their recourses that they do not reside and they do not carry on any business within the said municipal limits.

On the other hand the facts stated in support of the opposition in each of the above recourses are:

"(1) The applicant is not a resident of Polis Chrysochous but she is the owner or co- owner of a house at Grivas Dhigenis Street at Polis, in which she stays during the summer months and during her visits at Polis for the carrying out of her various trades.

(2) The applicant is the owner and/or co-owner of building-sites and/or premises which she leases to other persons and/or the owner and/or co-owner and/or occupier of various lands situated within the municipal limits of Polis Chrysochous, many of which she cultivates on a partnership basis and they yield income to her."

In reply to the above statement of facts in the opposition, each of the applicants in recourses 396/87 and 398/87 contended the folowing:

"(1) Regarding paragraph 1 of the opposition the applicant alleges that she is not the owner or co-owner of a house, but she is offered hospitality by her mother for a period of ten to

fifteen days during the summer months for holiday purposes with her family.

(2) Regarding paragraph 2 of the opposition the applicant denies that she is the owner of any building-site or premises, but she is the owner of agricultural land within the municipal limits of Polis Chrysochous which she cedes to third persons in return of one half of the income without participating in the losses and she is collecting seventy to one-hundred and fifty pounds annually during the recent years."

The reply of the applicant in Recourse No. 397/87 was as follows:

"(1) With regard to paragraph 1 of the opposition the applicant admits that she is the owner of a house in which she, however, stays for a few days in the summer only but she denies that she is doing any work at Polis.

(2) Out of paragraph 2 of the opposition the applicant admits only that she is the owner of shops which are leased to statutory tenants since many years and in any case she is not carrying on business or trade within the municipal limits of Polis."

In the written address of the respondents under the heading "Facts" we read the following which are identical in so far as Recourses 396/87 and 398/87 are concerned: -

"(1) Though the applicant is not a resident she stays at the house of her mother at Grivas Dhigenis Street at Polis Chrysochous whenever this is necessary for the carrying out of their professional and other trades as well as during the summer vacation.

(2) The applicant is together with her sister Dora M. Kyriakides (applicant in Recourse No. 398/87), co-owner of the following immovable properties which she exploits and/or leases

to third persons against a rent which corresponds to a percentage of the profits.

(a) Veris, 49 donums, one evlek.

(b) Veris, 43 donums, three evleks.

(c) Latsi, 8 donums.

(d) Kambos - Latsi, 16 donums.

(e) Sikari - Poli, 6 donums.

(f) Kokkina - Poli, 6 donums.

(g) Gonia, 22 donums.

(h) Kilades, 10 donums.

(3) In view of the amount of the income which was reasonably expected to be derived by the applicant by the exploitation and/or lease of her lands, the respondents, i.e. the Municipal Corporation of Polis Chrysochous, imposed on the applicant by means of a notice dated 23rd October 1986, professional tax of seventy pounds in respect of 1988."

The applicants in their written addresses in reply to the written address of the respondent and in dealing with the aforequorted paragraph 2, contended that they do not own the whole share of the lands under (a), (b), (c), and (d) of the said paragraph 2, but each one of them owns 1/4, 1/2, 1/4 and 1/2, respectively of the said lands. They also added "that they have never collected any amount from the lands under (e), (f), (g), and (h) above and they do not know where they are exactly situated, and if they have been cultivated they have been cultivated unlawfully without their consent and without any benefit for them. They are not the owners of any premises."

At the clarification stage, learned counsel for the respondents made the following statement:

"I would like to make a correction to our written address in Recourses Nos. 396/87 and 398/87, third page, third paragraph. The words 'it is admitted in the reply of the applicant, that she is the owner of premises which are leased to statutory tenants since many years' to be substituted by the words 'that applicant is the owner of agricultural land which she disposes for production of cereals and she gets a share of the income.'"

I have set out hereinabove details of the various versions of the respondents regarding the facts, wherefrom it clearly appears that respondents have put up the following three versions:

(a) One in the opposition.

(b) One in their written address.

(c) One in the clarification stage.

The version of the applicants is the one appearing in paragraph 2 of their aforequoted reply to the opposition which more or less tallies with respondents' version, as ultimately formulated at the clarifications stage, subject to the difference regarding the extent of ownership of the various plots of land.

There was no dispute that the sub judice professional tax was imposed in exercise of the powers given to the respondents by virtue of section 104, 105, and 106 of the Municipal Corporations Law, 1986 (Law No. 111 of 85). Under the aforesaid section 105, any person exercising for profit within any municipal limits, any business, trade, calling or profession shall obtain a licence therefor upon an application for the grant of such a licence and the Municipal Corporation shall determine the fees payable for the issue of such a licence which should not exceed the fees in the Third Schedule.

The case of the applicants comes under paragraph (i) of the said Third Schedule whereby the fee payable is "not exceeding one-hundred and fifty pounds".

The main contentions on behalf of the applicants were that (a) they were not carrying on any business within the meaning of sections 104-106 of Law 111/85 (b) that the reasoning of the sub judice act was nonexistent and/or misconceived, and (c) that respondents acted under a misconception of fact and law.

As already stated the respondents allege in the opposition that the applicants in Recourses Nos. 396/87 and 398/87, are owners of building-sites and/or premises which they lease to other persons, and the applicant in Recourse No. 397/87, owner of agricultural land which yields income to her. It is clear from such a statement that in taking the decision to impose seventy pounds professional tax, on the applicants, out of the maximum of one-hundred and fifty pounds provided by the Law, the respondents must have taken into consideration also, the income derived from the lease of their premises and building sites in the case of the applicants in Recourses Nos. 396/87 and 398/87, and in the case of the applicant in Recourse 398/87 from the cultivation of their lands. It is, also, clear that at the clarifications stage the respondents resigned from the allegations that the applicants in Recourse Nos. 396/87 and 398/87 derived income from the lease of premises and building sites and that the applicant in Recourse No. 397/87 derived income from the cultivation of land. So the true position is that the applicants in recourses Nos 396/87 and 398/87 do not derive income from the lease of premises or building sites and applicant in Recourse No. 397/87 does not derive income from the cultivation of land. It is, therefore, clear, that in taking the sub judice decision, the applicants took into consideration nonexistent facts namely income from lease of premises and building sites, in the case of the applicants in Recourses No. 396/87 and 398/87, and income from cultivation of land in the case of the applicant in Recourse No. 397/87.

It has therefore to be examined what is in law the effect of

such a situation According to Spiliotopoullos Manual on Administrative Law 2nd Edition p. 409:

"452. Κατά την κρατούσαν ορολογίαν, συντρέχει 'πλάνη περί τα πράγματα' οσάκις αποδεικνύεται η αντικειμενική (ήτοι άνευ ουσιαστικής κρίσεως) ανυπαρξία των πραγματικών ή νομικών καταστάσεων, αι οποίαι ελήφθησαν υπ' όψιν υπό του διοικητικού οργάνου δια την εφαρμογήν του προβλέποντος την έκδοσιν της πράξεως απροσώπου κανόνος δικαίου, δηλαδή όταν αποδεικνύεται ότι το διοικητικόν όργανον πεπλανημένως εξέλαβεν ότι υφίστανται αι νόμιμοι προϋποθέσεις (ΣΕ 143/1954)."

"According to the prevailing terminology, there exists 'misconception of fact when there is proved the objective non-existence of the factual or legal situations, which were taken into consideration by the administrative organ for the application of the impersonal rule of law providing for the issue of the act, that is to say when it is proved that the administrative organ mistakenly took it that there exists the lawful prerequisites."

In *Fournia v. The Republic* (1983) 3 C.L.R. 262, Savvides J., said at p. 279:

"The fact that the respondent took into consideration matters which were not in existence, renders the sub judice decision bad, on the ground of misconception of facts. Even mere probability of such misconception is enough to vitiate the administrative decision involved."

And the learned judge went on to cite in support of this statement of the law a paragraph from the judgment delivered in *Mallouros and Another v. The Electricity Authority of Cyprus and Another* (1974) 3 C.L.R. 220 at p. 224.

In the cases in hand there has been clearly proved the objective non-existence of the factual situation which was taken into con-

sideration by the respondents, namely, objective non-existence of income from lease of premises and building-sites in the case of the applicants in Recourses Nos. 396/87 and 398/87 and income from cultivation of land in the case of applicant in Recourse No. 397/87. Therefore this is a clear case of the sub judice decision having been taken under a misconception of fact. It is a settled principle of administrative law that "material misconception of fact or even the probability of its existence justifies the annulment of an administrative act. (See, inter alia, *Christodoulou v. C.Y.T.A.* (1978) 3 C.L.R. 61.).

In view of the aforesaid misconception of fact which is a material one the sub judice decision must be annulled as taken under such a misconception which makes it a decision contrary to the well settled principles of Administrative Law and as such a decision contrary to law, and in excess of powers in the sense of Article 146.1 of the Constitution. (See *Ioannides v. The Republic* (1972) 3 C.L.R. 318.)

The sub judice decisions must also be annulled for another reason which again amounts to misconception of fact, the following:-

In these cases we are faced with the situation whereby the respondent organ failed to make a due inquiry with the result that it acted in ignorance of the essential and material facts; and such a situation amounts to a misconception of fact. (See *Skaros v. The Republic* (1986) 3 C.L.R. 2109; *Christofides v. The Republic* (1966) 3 C.L.R. 732; *Iordanou v. The Republic* (1967) 3 C.L.R. 245; *Ioannides v. The Republic* (1972) 3 C.L.R. 318; *Mikellidou v. The Republic* (1981) 3 C.L.R. 461; *Skapoullis v. The Republic* (1984) 3 C.L.R. 554.)

It should be stressed that my conclusion about misconception is not of theoretical or academic interest, but it has a material bearing on the case. This is so because the amount of the fee is determined by reference to the income derived from the particular business or trade, which is carried on. Consequently the taking into

consideration of a species of income which was non-existent inevitably must have affected the amount of the fee and as such, amounts to material misconception.

Further the sub judice decisions must be annulled for lack of due reasoning in that the facts stated in the opposition are not supported by the actual facts of the case. (See *Economides v. The Republic* (1985) 3 C.L.R. 222.)

Having dismissed the recourse as above, I need not deal with the remaining grounds of law.

In the result the sub judice decisions are annulled, but in the circumstances there will be no order as to costs.

Sub judice decisions annulled.
No order as to costs.