1988 May 20

[KOURRIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

N. SAVVA AND CO. LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF INCOME TAX,

Respondents.

(Case No. 426/85).

Taxation—Assessment and collection of taxes—Income tax—Burden of satisfying Court that an assessment is excessive lies on applicant—The Assessment and Collection of Taxes Laws 1978/1979, section 21(2).

Taxation—Assessment and collection of taxes—Special Contribution—Burden of satisfying Court that an assessment is excessive lies on applicant—Laws 34/78 and 55/74, section 6.

Due inquiry—Assessments of income tax and special contribution—Disallowing deduction of salary of one of the directors and of the secretary of a company limited by shares and registered under Cap. 113—Failure to ask the other director what such director's duties were and failure to ask such director herself in respect of her duties—Moreover, though respondent concluded that such director was not conversant with the business of the company, she was never questioned about such business at all—Sub judice assessments annulled for lack of due inquiry—And for misconception of fact.

Misconception of fact—Presumption that an administrative decision was reached after correct ascertainment of facts—Displaced if litigant succeeds in raising probability of misconception.

The facts of this case are in short that the respondent disallowed deduc-

tion of the salaries of one of the directors and of the secretary of the applicant company, because: (a) During a three day investigation of the company's books at the latter's office the director did not show up for work during the first two days, whilst on the third she appeared, but she only make coffees for the staff, (b) The secretary did not show up during the said period for work, and (c) Several phone calls were made at the company's office, but the reply was, always, that the said director was at home.

The legal principles expounded by the Court in annulling the sub judice decision as well as the factual reasons, which led to the conclusion for lack of due inquiry and misconception of fact, sufficiently appear in the headnote hereinabove.

Sub judice decision annulled.
Costs in favour of applicants.

Cases referred to:

Koussounides v. The Republic (1966) 3 C.L.R. 1;

Makrides v. The Republic (1967) 3 C.L.R. 146;

Lilian Georghiades v. The Republic (1982) 3 C.L.R. 659;

Hadjipaschali v. The Republic (1980) 3 C.L.R. 101;

Antoniou v. The Republic (1978) 3 C.L.R. 308;

Tourpeki v. The Republic (1973) 3 C.L.R. 592;

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

Aristidou v. The Republic (1983) 3 C.L.R. 1332.

Recourse.

Recourse against the income tax assessment raised on applicants for the yers 1978 - 1983.

J. Erotocritou, for the applicants.

Y. Lazarou, for the respondents.

Cur. adv. vult.

KOURRIS J. read the following judgment. By the present recourse, the applicant challenges the validity of the decision of the Commissioner of Income Tax contained in his letter of 2nd February, 1985, whereby tax amounting to £18,552 was imposed upon the applicant company in respect of the years 1978 - 1983.

Facts:

Applicant is N. Savva and Co. Ltd., a private company which was registered on 11.2.77 to take over as from 21.4.77 the business of the partnership "N. Savva & Co". The share capital of the company has been, since its formation £20,000 divided into 20,000 shares of £1 each. The shareholders of the company have been Mr. Nicodemos Savva (holder of 6,050 shares or 30.25%); Mrs. Maroulla Savva, wife of Mr. N. Savva, holder of 4,950 shares or 24.75%); and their daughters Marina, Anna and Myrto, each holding 3,000 shares of 15%. The directors of the company were N. Savva, and Mrs. Maroulla Savva. Miss Marina Savva was the secretary of the company.

During the years, subject matter of this recourse, applicant company derived its income from the import and sale of sewing machines and accessories.

Applicant company submitted accounts and computations for the years 1977 - 1980 through Messrs. Lantsias & Kashoulis, and for the years 1981 - 1983 through its new auditors Messrs. Makrides and Michaelides. The accounts and computations for the years 1977 - 1980 were examined in 1982 and were accepted by the respondent commissioner subject to certain agreed adjustments, which included disallowance of part of the salary of one of the directors, namely Marina Savva.

Following the examination of the said accounts and agreed ad-

justments to the submitted computations for the abovementioned years, assessments were raised by the respondent Commissioner in accordance with the adjusted computations.

In 1984 the accounts and computations for the years 1981 - 1983 were examined by the respondent Commissioner.

The examination involved the inspection of the books of applicant company, which was carried out, by prior arrangement and agreement with the Director N. Savva and the auditors of the applicant company at the company's premises.

The examination of the books lasted for 3 days and was carried out by two members of the assessing staff. During the first two days of the examination, the assessing officers noticed that neither Mrs. Maroulla Savva nor Miss Marina Savva were working in the applicant company's premises. On the third day, however, Mrs. Maroulla Savva showed up but the assessing officers noticed that she was holding certain documents only once. She was also observed to be making some coffees for the staff.

At later dates the assessing officers in a follow-up of the case inquired at the company's premises by telephoning whether Mrs. Maroulla Savva was working, but the replies received were that she was at home. At one time when the husband was abroad, that particular inquiry also established that she was again at home. As regards Miss Marina Savva, she was attending secondary school up to June, 1978 and she did not leave Cyprus until October, 1979 when she went abroad to attend university.

Following the result of the examination of whether Miss Maroulla Savva and Miss Marina Savva rendered any services to the company, the respondent Commissioner reached the conclusion that they did not render any services to the company and, therefore, their salaries charged in the accounts in respect of all years, including the years 1977 - 1980, for the alleged services were disallowed.

The respondent Commissioner then issued revised assessments dated 20.12.84, in respect of the years since the company was registered in 1977, in the light of the new facts which were established as a result of the examinations carried out. The decision of the respondent Commissioner to revise the assessments for the years 1981, 1982 and 1983 was communicated to the auditors, Messrs. Makrides and Michaelides by letter dated 20.12.1984 (appendix B to the opposition) and the decision to revise the assessments for the years 1977 - 1980 was communicated to the applicant company by letter dated 20.12.84 (appendix C to the opposition).

On 16.1.1985, the auditors of applicant company lodged an objection in writing against the Income Tax and special contribution assessments raised on 20.12.1984 by their letter dated 16.1.85 (appendix D to the opposition). Following the said objections, applicant company's auditors, called upon the respondent Commissioner to discuss the objections. The respondent Commissioner decided to maintain his decision of 20.12.1984 and proceeded on 2.2.1985 with the determination of the income tax and special contribution assessments, subject matter of this recourse. His decision was communicated to applicant company by letter dated 2.2.1985 (appendix E to the Opposition).

The applicant company, feeling aggrieved with the decision of the respondent Commissioner filed the present recourse alleging, mainly that the respondent Commissioner failed to carry out a due proper inquiry into the facts and circumstances of the present case.

The Law:

In view of the presumption of legality of administrative acts, the sub judice assessments should be presumed to be valid unless the applicant succeeds to prove the contrary. In the case of *Koussoumides v. The Republic* (1966) 3 C.L.R. 1, it was established that in a recourse to the Supreme Court under Article 146 of the Constitution it is on the applicant on whom lies the initial burden

of proof to satisfy the Court that it should interfere with the subject matter of the recourse. This was followed in the case of *Rallis Makrides. The Republic*, (1967) 3 C.L.R. 146 at p. 153. In the case of *Lillian Georhiades v. The Republic*, (1982) 3 C.L.R. 659, at pp. 667 - 669, the Full Bench of the Supreme Court has made it abundantly clear that if the respondent's decision is one which was reasonably open to them, then this Court will not disturb same. Furthermore, in income tax cases it is expessly stated in the relevant laws that the burden to satisfy the Court that an assessment is excessive, is on the person who attacks same. (See s. 21 (2) of the Assessment and Collection of Taxes Laws 1978 - 1979). This law applies also to the special contribution cases by virtue of s.6 of Laws 34/78 and 55/74.

The issue which falls for determination in the present case is whether it was reasonably open to the respondent Commissioner to reach the conclusion that Mrs. Maroulla Savva and Miss Marina Savva, who were Director and Secretary in the applicant company respectively, did not render any services to the company and hence disallowed their salaries in respect of the years 1978 - 1983 as a proper deduction in computing the applicant's taxable liability.

Counsel for the respondent submitted that the decision was reasonably open to the respondent Commissioner in the light of the material before him which was as follows: - (1) two assessing officers carried out an investigation into the applicant company's books at its premises which lasted for 3 days and during that time Miss Marina Savva never showed up for work while Mrs. Maroulla Savva made her appearance on the third day; while she was there she did nothing but make coffee and behave in a manner which indicated that she was not conversant with the company's business;

(ii) several telephone calls were made by the assessing officers to the company's premises at different dates and times so as to check whether Mrs. Maroulla Savva was actually at work, but the replies received were always the same, namely that she

was at home.

Counsel for the applicant submitted that a proper and sufficient inquiry was not carried out because Mrs. Maroulla Savva was in charge of the warehouse of the company and also in charge of costing and that her presence in the office of the company was not always necessary.

Further, he said, in the case of Miss Savva, the respondents have not taken into account a period of over one year, i.e. from June 1978 till October, 1979 when she was in Cyprus and working as the secretary of the company. Furthermore, they alleged that during summer vacations she used to come to Cyprus and render her services as secretary of the company and that she was certainly entitled to a salary.

It is obvious that the assessing officers failed to ask Mr. Savva what duties were allocated to Mrs. Savva and furthermore, they have never asked Mrs. Savva herself what her duties were and what services she rendered to the company; furthermore, the assessing offices reached the conclusion that Mrs. Savva was not conversant with the company's business when she was never questioned about the company's business at all.

In view of the above, I have reached the conclusion that the respondent Commissioner in reaching his decision, failed to conduct a proper inquiry into the matter.

It is a well-established principle of administrative law that failure by an administrative organ to make a due and/or proper inquiry is a ground for annulment and this ground has been repeatedly reiterated by this Court as sufficient by itself to cause an annulment of the administrative act concerned. (See, inter alia, *Hadjipaschali v. The Republic*, (1980) 3 C.L.R. 101; *Antoniou v. The Republic*, (1978) 3 C.L.R. 308; *Tourpeki v. The Republic* (1973) 3 C.L.R. 592; *Ioannides v. The Republic*, (1972) 3 C.L.R. 318).

It was further held in the case of *Aristidou v. The Republic*, (1983) 3 C.L.R. 1332 that the presumption that an administrative decision is reached after a correct ascertainment of relevant facts can be rebutted if a litigant succeeds in establishing that there exists at least a probability that a misconception has led to the taking of the decision complained of.

In the present case, I am satisfied that there exists a quite reasonable probability that a factual misconception has led to the taking of the sub judice decision, and for this reason, too, it should be annulled.

The respondent Commissioner has to re-examine now the assessments under consideration and decide afresh on them in the light of this judgment.

For all the above reasons, the recourse suceeds, and the sub judice decision is annulled with costs in favour of the applicants to be assessed by the Registrar.

Sub judice decision annulled with costs in favour of applicants.