1983 April 23

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MELIK MELIKIAN & CO. LTD.,

Applicant.

v.

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

Respondent.

(*Case No.* 236/81).

Income Tax—Capital allowances—"Plant and Machinery"—"Private motor vehicles"—Used for the carriage of goods—Reasonably open to the respondent Commissioner not to treat them as "plant and machinery" entitling applicant to capital allowances—Section 2 of the Income Tax (Amendment) Law, 1979 (*Law* 8/79)—*Regulation* 17(7)(*v*) *of the Motor Vehicles and Road Traffic Regulations,* 1973 *to* 1978.

Constitutional Law—Constitutionality of legislation—Taxation legislation—Retrospective taxation—Article 24.3 *of the Constitution—Not retrospective taxation to tax in any year a person on the basis of his income in that particular year by means of legislation enacted during that same year—Section* 2 *of the Income Tax (Amendment) Law,* 1979 (*Law* 8/79) *not applied retrospectively in a manner inconsistent with the above Article* 24.3.

The applicant company challenged the validity of income tax assessments in respect of its income for the years of assessment 1979 and 1980 as being erroneous because the respondent Commissioner in computing its taxable income wrongly disallowed capital allowances in respect of the cost of two vehicles of the station-waggon type, which were purchased by the applicant in 1978 and 1979, respectively. The sub judice refusal* was based

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* Its whole text is quoted at p. 1327 post.

on the ground that "motor-vehicles falling under the term 'Private motor-vehicle', in sub-paragraph (v) of paragraph (7) of regulation 18, of the Motor Vehicles and Traffic Regulations 1957-1967 and 1973 shall not be deemed plant and machinery and in consequence do not rank for capital allowances".

Counsel for the applicant contended:

(a) That the respondent Commissioner misapplied section 2* of the Income Tax (Amendment) Law, 1979 (Law 8/79). Counsel submitted in this respect that as the station-waggons in question were used by the applicant for the carriage of goods they should have been treated as goods vehicles and that their suitability for carrying passengers as well should not have been taken into account for income tax purposes.

(b) That the application by the respondent of the provisions of Law 8/79 (which was enacted on 26th January 1979 with effect as from 1st January 1978) in respect of the income tax liability of the applicant for the year of assessment 1979 (year of income 1978) amounted to retrospective taxation contrary to the provisions of Article 24.3 of the Constitution.

Held, (1) that on the basis of the material before this Court, including the relevant legislative provisions and the essential nature of the two station-waggons concerned, it was reasonably and lawfully open to the respondent Commissioner of Income Tax to treat them, irrespective of their use, as not being either light or heavy goods vehicles but as being private motor vehicles which, under the specific legislative provision, could not be treated "plant and machinery" entitling the applicant to capital allowances; that the mere fact that the applicant may have been using the station-waggons in question either primarily or even exclusively for the carriage of goods cannot render such station-waggons "plant and machinery" in the sense of the legislative provision concerned, just as a private saloon type motor car

* Section 2 provides as follows:

"For the purposes of this sub-section a private motor vehicle other than a goods vehicle within the meaning of sub-paragraph (v) of paragraph (7) of regulation 17 of the Motor Vehicles and Road Traffic Regulations 1973 to 1978, shall not be deemed to be within the meaning of the term 'plant and machinery' ".

cannot be treated as "plant and machinery" even if it is solely used for the carrying of goods; accordingly contention (a) should fail.

(2) That it is not retrospective taxation to tax in any year a person on the basis of his income in that particular year, by means of legislation enacted during that same year, because tax on income is imposed on an annual basis and, therefore, the relevant legislation may be enacted at any time during the currency of the year concerned; and that, therefore, it cannot be said that in the present instance Law 8/79 was applied retrospectively in a manner inconsistent with Article 24.3 of the Constitution, since it was duly in force as from the year of assessment 1979, when one of the two sub judice, in the present case, assessments—that for the year of assessment 1979—was raised; accordingly contention (b) should, also, fail.

Held, further, that even assuming that Law 8/79 could not be constitutionally applied in respect of the year of assessment 1979 again the income tax assessment for that year would have to be upheld as the relevant regislative provision, prior to its amendment by Law 8/79, would equally lawfully and reasonably entitle the respondent Commissioner of Income Tax not to treat the station-waggon purchased by the applicant in 1978 as plant and machinery, but as a private motor vehicle for the carrying of passengers, in relation to which no capital allowance could be granted to the applicant.

Application dismissed.

Cases referred to:

In re HjiKyriacos and Sons Ltd., 5 R.S.C.C. 22 at pp. 29, 30;

K.E.O. Ltd. v. *Republic* (1982) 3 C.L.R. 141 at pp. 147, 148.

Recourse.

Recourse against the income tax assessments raised on applicant for the years of assessment 1979 and 1980.

L. Papaphilippou with *Ph. Valiantis*, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By means of the present recourse the applicant company seeks a declaration that the income tax assessments in respect of its income for the

years of assessment 1979 and 1980 (years of income 1978 and 1979) are null and void and of no effect whatsoever. The said assessments were raised on 4th May 1981.

The applicant at all material times was carrying on the business of a distributor of certain cigarette products manufactured in Cyprus.

The applicant challenges the said assessments as being erroneous because the respondent Commissioner of Income Tax in computing the taxable income of the applicant has disallowed, allegedly wrongly, capital allowances in respect of the cost of two vehicles of the station-waggon type, which were purchased by the applicant in 1978 and 1979, respectively.

The grounds on which such refusal was based appear in a letter of the respondent dated 18th April 1981 and are as follows:

"(a) The law clearly provides that motor-vehicles falling under the term 'Private motor-vehicle', in sub-paragraph (v) of paragraph (7) of regulation 18, of the Motor Vehicle and Traffic Regulations 1957-1967 and 1973 shall not be deemed plant and machinery and in consequence do not rank for capital allowances.

(b) As regards paragraph 'c' of your letter of 23rd March 1981 that the Law No. 8 of 1979 which was enacted on 26th January 1979 does not apply to motor-vehicles purchased prior to its enactment, I do not agree with you. This Law came into operation on 1st January 1978 and refers to private motor-vehicles purchased prior and after this date".

It has been contended by counsel for the applicant that the respondent Commissioner has, by means of the approach adopted in the aforequoted letter, misapplied the following provision which was introduced into our income tax legislation (at the end of section 12(1) thereof) by section 2 of the Income Tax (Amendment) Law, 1979 (Law 8/79):

"Διά τούς σκοπούς τοῦ παρόντος ἐδαφίου ἰδιωτικόν μηχανοκίνητον ὄχημα ἄλλον ἤ φορτηγόν μηχανοκίνητον ὄχημα ὑπό τήν ἔννοιαν τῆς ὑποπαραγράφου (v) τῆς παραγράφου (7) τοῦ Κανονισμοῦ 17 τῶν περί Μηχανοκινήτων Ὀχημάτων

καὶ Τροχαίας Κινήσεως Κανονισμῶν τοῦ 1973 ἕως 1978 δὲν λογίζεται ὡς ἐμπίπτον ἐντὸς τοῦ ὅρου 'ἐγκαταστάσεις καὶ μηχανήματα' ".

("For the purposes of this sub-section a private motor vehicle other than a goods vehicle within the meaning of sub-paragraph (v) of paragraph (7) of regulation 17 of the Motor Vehicles and Road Traffic Regulations 1973 to 1978, shall not be deemed to be within the meaning of the term 'plant and machinery' ".

Regulation 17(7)(v) of the Motor Vehicles and Road Traffic Regulations, which is referred to in the above provision, was enacted as part of the Motor Vehicles and Road Traffic Regulations 1973 (see No. 159 in the Third Supplement, Part I, to the Official Gazette) and distinguishes a private motor vehicle from a goods motor vehicle; and the definition of a goods motor vehicle is to be found in regulation 2 of the same Regulations and is to the effect that such a vehicle is one which is constructed or adapted to be used for the carrying of goods and includes both light and heavy goods vehicles.

Counsel for the applicant has submitted that as the station-waggons in question are used by the applicant for the carriage of goods they should have been treated as goods vehicles and that their suitability for carrying passengers as well should not have been taken into account for income tax purposes. He appears to have based this submission on, mainly, the fact that in the text of a translation into English of a relevant legislative provision (which was prepared by the Government) the phrase "ἰδιωτικὸν ἐπιβατικὸν μηχανοκίνητον ὄχημα" was somewhat incorrectly stated as "a private motor vehicle used for the carrying of passengers" and he has argued that the station-waggons in question are not "used" for carrying passengers, but they are "used" for carrying goods and, therefore, they should be treated as goods vehicles, in respect of which capital allowances should be granted for income tax purposes.

On the basis of the material before me, including the relevant legislative provisions and the essential nature of the two station-waggons concerned, I am of the opinion that it was reasonably and lawfully open to the respondent Commissioner of Income Tax to treat them, irrespective of their use, as not being either

light or heavy goods vehicles but as being private motor vehicles which, under the already referred to in this judgment specific legislative provision, could not be treated "plant and machinery" entitling the applicant to capital allowances.

The mere fact that the applicant may have been using the station-waggons in question either primarily or even exclusively for the carriage of goods cannot render such station-waggons "plant and machinery" in the sense of the legislative provision concerned, just as a private saloon type motor car cannot be treated as "plant and machinery" even if it is solely used for the carrying of goods.

It has been contended, too, by counsel for the applicant that the application by the respondent of the provisions of Law 8/79 (which was enacted on 26th January 1979 with effect as from 1st January 1978) in respect of the income tax liability of the applicant for the year of assessment 1979 (year of income 1978) amounted to retrospective taxation contrary to the provisions of Article 24.3 of the Constitution.

I cannot accept as correct the above contention; and useful reference may be made in this connection to *In re Hji Kyriakos and Sons Ltd.*, 5 R.S.C.C. 22, 29, 30, where there are stated the following:

> "Concerning submission (b) above, the Court has come to the conclusion that no question of retrospectivity, contrary to paragraph 3 of Article 24, arises. As it is also apparent from the provisions of section 3(1) of Law 16/61 and clause 4 of the Annex to such Law the personal tax imposed under the said Law is a tax imposed during the currency of a particular year, i.e. 1961, in respect of expenditure in the Communal Chamber budget, as under Article 88.1 provided, for that very same year. It is not retrospective taxation to tax in any year a person on the basis of his income in that particular year, by means of legislation enacted during that same year, because tax on income is imposed on an annual basis and, therefore, the relevant legislation may be enacted at any time during the currency of the year concerned. The mere fact that, under clause 5 of the Annex to Law 16/61, (the text of which is set out hereinafter) the tax in question is charged, as far

as income from sources other than emoluments is concerned, on the taxable income derived in the year immediately preceding the year of assessment, does not render such tax a retrospective taxation on the income of the preceding year, i.e. 1960; it still remains a tax imposed, in all respects, on the basis of the income in 1961, the year of assessment, and simply because the taxable income in 1961, from sources other than emoluments, is not readily ascertainable in the year of assessment, such income is computed, subject always to the application of the appropriate legal principles, on the basis of the taxable income from the said sources in 1960".

Also, in *KEO Ltd.* v. *The Republic*, (1982) 3 C.L.R. 141, Mr. Justice L. Loizou said (at pp. 147, 148):

"In the present case we are dealing with taxation legislation and the relevant section aims at granting relief from taxation under certain circumstances and the only dispute relates to the date of the commencement of the operation of the section in question and, consequently, the time as from when the taxpayer is entitled to the relief. It is, therefore, in my view, pertinent and necessary to look at the section under the provisions of which taxation is assessed. This is section 6 of the Income Tax Laws 1961 to 1975 the relevant part of which reads as follows:

'6. Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment'.

It is clear from the above that in respect of the assessment of income tax there is taken into consideration the chargeable income of the year immediately preceding the year of assessment.

Bearing in mind that section 6(d) of Law 37 of 1975 expressly provides that ... 'such expenditure shall be deducted from the chargeable income of the business' and that by section 9 of the same law the said section comes into operation 'as from the year of assessment commencing on the 1st January, 1975' it is, in my view, not unreasonable to construe the section as meaning that

both the income and that deductions envisaged in the section in question relate to the year immediately preceding the year of assessment i.e. the year of income 1974".

In the light of the above dicta I am of the opinion that it cannot be said that in the present instance Law 8/79 was applied retrospectively in a manner inconsistent with Article 24.3 of the Constitution, since it was duly in force as from the year of assessment 1979, when one of the two sub judice, in the present case, assessments—that for the year of assessment 1979—was raised.

But even assuming that Law 8/79 could not be constitutionally applied in respect of the year of assessment 1979 again I would have to uphold the income tax assessment for that year as the relevant legislative provision, prior to its amendment by Law 8/79, would equally lawfully and reasonably entitle the respondent Commissioner of Income Tax not to treat the station-waggon purchased by the applicant in 1978 as plant and machinery, but as a private motor vehicle for the carrying of passengers, in relation to which no capital allowance could be granted to the applicant.

In the light of all the foregoing this recourse cannot succeed and it is dismissed; but I do not propose to make any order as to its costs.

Recourse dismissed with no order as to costs.