1986 December 30

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

FAUNUS INVESTMENT COMPANY LIMITED,

Applicants,

v.

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

Respondents.

(Case No. 482/85).

Income tax—The Bilateral Agreement between Greece and Cyprus for the avoidance of double taxation—Article 21.4 —Tax paid in Greece in respect of dividends received by applicants from a Greek company—Amount of tax goes to reduce or, in case of excess, extinguish tax payable in Cyprus for the same income.*

The applicants are an offshore company, liable, as such, to a reduced rate of income tax. In the years 1980 and 1981 their income from dividends deriving from their shareholding in a Greek company, taxed at 25% in Greece, was, also, taxed in Cyprus as well, after deduction of the amount of the tax paid in Greece from their chargeable income.

As a result the applicants filed the present recourse, maintaining that in accordance with the correct interpre-

* Published in Supplement 3 of the Official Gazette on 10.6.88 under Not 651

tation of Article 21.4* of the Bilateral Agreement between Greece and Cyprus for the avoidance of double taxation, the amount of tax paid in Greece goes to reduce and, in a case of excess, to extinguish tax payable for the same income in Cyprus.

Held, annulling the sub judice decision: (1) The said bilateral agreement concluded by the Council of Ministers acquired the force of law on publication in the official Gazette; it overrided any provisions of the income tax legislation to the extent it conflicted with any of them (Article 169.3 of the Constitution). Article 21.4 of the agreement modifies s. 28A (i) of the Income Tax Laws, as amended by s. 4 of Law 15/77. The controversy between the parties concerns the effect of such modification.

(2) The intention of the makers of the agreement, as may be gathered from the text of Article 21.4, supports the interpretation suggested by the applicants. The concluding part of Article 21.4 confirms in language clearer than that employed earlier on that the object is to afford relief against double taxation of income earned in Greece. This interpretation is consonant with the general object of the agreement expressed in its preamble, namely to avoid double taxation. The interpretation suggested by the Commissioner amounts to double taxation of the same income or part of it.

Sub judice decision annulled.
No order as to costs.

Recourse.

Recourse against the income tax assessment raised on applicants for the years 1980 - 1981 whereby the Commissioner of Income Tax taxed applicants' income deriving from dividends in Greece after deducting the tax paid from the chargeable income of applicants.

G. Triantafyllides, for the applicants.

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

Cur. adv. vult.

* Quoted at pp. 2552-2553 post.

PIKIS J. read the following judgment. The interpretation of Article 21, para. 4 in particular, of a bilateral agreement between Greece and Cyprus, for the avoidance of double taxation, is at the centre of the controversy of the parties. The Commissioner maintains that the tax paid in Greece on the income of a Cyprus company, is deductible from chargeable income, for purposes of income tax, in Cyprus; whereas the tax-payer, an offshore company, contends such tax paid in Greece goes to reduce and, in case of excess, to extinguish tax payable for the same income in Cyprus. Acting on the understanding of the agreement indicated above, the Commissioner taxed the income of the applicants deriving from dividends earned in Greece after deducting the tax paid from the chargeable income of the applicants and taxed them accordingly for the years 1980 - 1981.

Counsel for the Republic exemplified the application of the agreement by the following example:

Income of £100 deriving from dividends paid by a Greek company taxed in Greece at 25%, as allowed under the bilateral agreement (Article 9), would be liable to taxation in Cyprus as well after deduction of the tax paid in Greece, leaving an income of £75 subject to tax in Cyprus.

In the hypothetical case instanced above, according to counsel for the applicants they would not be liable to pay any tax in Cyprus because the amount of £25 paid in Greece would be deductible not from their chargeable income but from the tax to which they would be liable in Cyprus for the same amount, namely £4.25. It is upon this premise they challenged the sub judice decision.

Counsel agree, rightly in my view, that the bilateral agreement concluded by the Council of Ministers acquired the force of law on publication in the official gazette[1]; moreover, it overrided any provisions of the income tax legislation to the extent it conflicted with any of them in view of the provisions of Article 169.3; the element of mutuality being satisfied by adherence to the provisions of the agreement by both signatories.

[1] (Supplement 3 — 10th May, 1968 — No 651).

The applicants, as earlier stated, are an offshore company. As such they are liable to a reduced rate of income tax amounting to 10% of the liabilities to tax of onshore companies, that is, 4.25% [1]. In the years 1980 and 1981 their income from dividends deriving from their shareholding in a Greek company, taxed at 25% in Greece, was taxed in Cyprus as well, after deduction of the tax paid in Greece. In effect tax paid in Greece went to reduce their chargeable income in Cyprus.

In its introductory provisions Article 21 proclaims that the tax legislation of the two countries will continue in force and provide the yardstick for the taxation of income except to the extent that a contrary provision is expressly made in the agreement (Article 21.1). Counsel agree that para. 4 of the same article modifies the provisions of s. 28A(i) but disagree as to the nature and effect of the modification. It is useful to reproduce Article 21.4, no less because it illustrates the difficulty with which the Court is confronted in interpreting it.

«21.4: Τηρουμένων των διατάξεων της φορολογικής νομοθεσίας της Κύπρου, εν σχέσει με την παρεχομένην έκπτωσιν υπό μορφήν πιστώσεως έναντι του Κυπριακού φόρου του καταβλητέου εις εδάφη εκτός της Κύπρου φόρου, ο Ελληνικός φόρος ο καταβλητέος συμφώνως προς την φορολογικήν νομοθεσίαν της Ελλάδος, είτε αμέσως είτε εμμέσως διά παρακρατήσεως, εν σχέσει προς εισόδημα προερχόμενον εκ πηγών εντός της Ελλάδος, θα παρέχηται ως πίστωσις έναντι του Κυπριακού φόρου του καταβλητέου επί του εισοδήματος τούτου.....»

English Translation:

"Subject to the provisions of the income tax legislation of Cyprus, in relation to the relief allowed in the form of credit against Cyprus tax respecting tax paid in countries outside Cyprus, tax paid in Greece in accordance with Greek legislation, either directly or indirectly, by withholding payment of income, in re-

[1] (See section 28A(i) of Income Tax Laws, as amended by s. 4 — Law 15/77).

lation to income deriving from sources within Greece, it will be granted as a credit against Cyprus tax to which such income is liable to."

The intention of the makers of the agreement, as may be gathered from the complicated and highly charged text of para. 4, appears to me to support the interpretation suggested by applicants. Evidently, the object is to afford relief against double taxation of income earned in Greece. The relief allowed is in the form of credit. Tax paid in Greece is treated as a credit against liability to tax in Cyprus going to reduce or extinguish, as the case may be, liability to tax for the same income in Cyprus. The concluding part of para. 4 confirms this object in language clearer than that employed earlier on. Further, this interpretation is consonant with the general object of the agreement expressed in the preamble to it, namely, to avoid the double taxation of income. Inasmuch as article 9 specifically allows the taxation of income deriving from dividends accruing from the ownership of shares in a Greek company, Artice 21.4, as above interpreted, conforms to the scheme of relief against double taxation. Had we adopted the interpretation favoured by the Commissioner, the same income would be taxed twice or part of it, independently of the amount of tax paid in Greece. Whereas the ultimate object of para. 4 of Article 21 appears to be to allow taxation of income earned by a Cyprus company in Greece at the maximum rate provided in either of the two countries and no more.

In the result the recourse succeeds. The sub judice decision is declared null and void pursuant to the provisions of Article 146.4 (b) of the Constitution. And I order accordingly. There shall be no order as to costs.

Sub judice decision annulled.
No order as to costs.