1986 February 25

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MANOLIS K. STAMATIOU,

Applicant.

v.

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

Respondent.

(Case No. 36/81).

The Income Tax Laws, 1961-1981, ss. 5(1), 8 and 28B—Aliens —They are liable to income tax—Special rates for aliens within the classes specified in s. 28B—The Merchant Shipping (Taxing Provisions) Law 47/63 as amended by Laws 34/65 and 16/82, s. 3.

The Assessment and Collection of Taxes Law 4/78, ss. 46, 47 and 48—The liability of an employer to pay the income tax of his empoyees arises only in cases where an employee's income tax "has been deducted" from his emoluments.

Income Tax—Agreement between an employee and his employer that the employee's income tax liabilities would be met by the employer—Such agreement not binding on the Commissioner—The liability is personal and the tax-payer cannot be absolved from such liability.

Treaty of Establishment—Annex D, s. 4(1)(a).

The applicant during the material time derived his income from two sources, namely from emoluments as an employee of the Sol Maritime Services Ltd. on board the Ferry-Boat Sol Phryne and from a business of livestock breeding.

At a meeting between the applicant, his accountant and an official of the income tax office it was agreed that as the applicant did not keep any books or records in relation to his business of breeding, no losses or profits from such business would be taken into consideration for computing his income tax liability for the material time, i.e. the years of assessment 1977, 1978 and 1979. At the same meeting the applicant as regards his emoluments from his said employer he alleged of an agreement between him and his employers that his income tax liabilities would be met by his employers.

The sub judice assessments brought into taxation only the emoluments received by the applicant during the said years. It should be noted that the applicant is a British subject and a holder of a British Passport. He may, however, obtain a Cypriot Passport, by virtue of s. 4(1)(a) of Annex "D" to the Treaty of Establishment.

The applicant's complaints are the following, namely:

(a) That as an alien his emoluments were not subject to income tax, but if they were, they are subject to s. 28B of the Income Tax Laws (1961-1981), (b) That the tax claimed from him was the responsibility of his said employers, (c) That since the respondent tried to recover from his employers the tax due which had been collected from their employees, he had no right to try and recover it from the applicant, and (d) That the respondent failed to considered the losses from his breeding business.

Held, dismissing the recourse (A) (1) Even aliens are liable to income tax (Section 5 (1) of the Income Tax Laws, 1961-1981).

(2) Section 28B of the said laws provides that special rates are applicable in cases of aliens whose emoluments from rendering salaried services outside the Republic are received in the Republic; and also from rendering salaried services in the Republic to a company whose profits are exempt from tax.

(3) The case of the applicants is not covered by s. 28B because in the first place he does not belong to that class

of aliens referred to therein and secondly, though the profits of his employers may be exempt from tax (s.3 of Law 47/63 as amended by Laws 34/65 and 16/82), the exemption relating to the emoluments of crew members were introduced by s. 2(c) of Law 16/82 which is not applicable to the present case as it came into operation after the years of assessment in question

(4) As regards the status of the applicant according to his own evidence he may obtain a Cypriot Passport by virtue of s. 4(1)(a) of Annex D to the Treaty of Establishment. Moreover he has a Cypriot wife with whom he lives and their two children in Limassol since 1973. It follows that his presence in Cyprus is not a temporary one. He is "ordinarily resident" in Cyprus.

(B) Even if the alleged agreement between the applicant and his employers exists, the respondent, not being a party thereto, is not bound by it. The existence of such agreement does not absolve the applicant from his tax liability, because such liability is personal to the tax payer-employee. This is evident from the Income Tax Law, The Assessment and Collection of Taxes Law 4/78 and the *Income Tax Deduction of Emoluments* Rules, 1964-1973, rule 11(2).

(C) Sections 46, 47 and 48 of Law 4/78, though they impose a liability on an employer to pay, nevertheless such liability arises in cases where the employee's income tax "has been deducted" from his emoluments. Since no such deductions were made in this case any amount due by applicant's employer to the Tax Office cannot include the income tax of the applicant.

(D) Since it had been agreed that neither the profits nor the losses of the breeding business were to be taken into consideration in assessing applicant's income and tax due, the respondent rightly did not take them into consideration.

Recourse dismissed.
No order as to costs.

Cases referred to:

Re Young, 1 T.C. 57;

Hartland v. *Diggines (H.M. Inspector of Taxes)* [1924] 10 Tax Cases 251.

Wilkins v. *Rogerson* [1961] 1 All E.R. 358.

Recourse.

Recourse against the income tax assessment raised on applicant for the years 1977-1979.

A. Neocleous, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment. By the present recourse the applicant applies for a declaration of the Court that the decision of the respondent dated 17th November 1980, in respect of the income tax imposed on him for the years of assessment 1977, 1978, and 1979 is arbitrary and is wholly or partly null and void and of no legal effect whatsoever.

The applicant during the years of assessment 1977 to 1979 inclusive derived his income from two sources, from emoluments being employed as an inspector by the Sol Maritime Services Ltd., on board the ferry-boat Sol Phryne for the period from February 1977 to July 1979 and from a business of livestock breeding.

On the 14th November 1980, at the request of the applicant a meeting took place between the applicant, his accountant and an official of the Income Tax office at which his objections to the assessment of his income tax were submitted and discussed. Primarily he alleged of an agreement between him and his ex-employers to the effect that his income tax liabilities would be met by his said employers. Secondly he claimed that no proper books or records had been kept in respect of his farm business, it therefore being impossible to submit proper returns, in view

of which it was agreed that since his "accounts" could not form a basis for taxation, no profits or losses from the animal breeding business would be taken into consideration for the computation of his income tax liability for the years in question.

In the circumstances, the respondent Commissioner determined the assessments raised on the applicant for the years 1977 to 1979 bringing into taxation only the emoluments received by the applicant. Accordingly notices of tax payable were sent to the applicant on the 17th November 1980, against which the present recourse was filed.

Relevant also are the following facts: The applicant who was born in Limassol on the 17th November 1939 is a British subject and the holder of British passport No. CO 42012, but according to a statement from the Immigration Department of the Ministry of Interior, he may obtain a Cypriot passport, by virtue of section 4(1)(a) of Annex "D" to the Treaty of Establishment.

The main argument of the applicant as against the said assessments are as follows:

The first one is that being himself an alien, his emoluments were not subject to income tax, but even if they were, such would be subject to Section 28 B of the Income Tax Laws 1961-1981.

It is an accepted fact that he holds a foreign passport but this does not automatically absolve him from liability to pay tax, because even aliens do pay income tax.

Section 5(1) of the Income Tax Law, provides inter alia that:

> "Tax shall .... be payable .... upon the income of any person accruing in, derived from, or received in the Republic in respect of -
>
> (a) ....
>
> (b) gains or profits from any office or employment, irrespective of whether the person employed is serving in Cyprus or elsewhere ...."

It is clear that, in accordance with this section, the obligation to pay tax rests on all persons subject of course to the exceptions which are set out in section 8 of the Law and aliens are not within those excluded. In fact the case of certain aliens is, as indeed claimed, governed by section 28 B of the Law, which provides that special rates are applicable in cases of aliens whose emoluments from rendering salaried services outside the Republic are received in the Republic; and also from rendering salaried services in the Republic to a company whose profits are exempt from tax.

The case of the applicant, assuming he is an alien cannot be covered by the aforesaid section, in the first place because, as I shall explain below, though he is for the purposes of those proceedings an alien, he does not belong to that class of aliens referred to in the aforesaid section 28 B: secondly, though the profits of his employers may be exempt from tax, in accordance with section 3 of the Merchant Shipping (Taxing Provisions) Law 1963 (Law No. 47 of 1963) as amended by Laws No. 34 of 1965, and 16 of 1982, the specific provisions exempting the emoluments of crew members etc., were first introduced by section 2(c) of Law No. 16 of 1982, which was published and came into operation on the 9th April 1982, and though it may have an overriding effect to section 28 B which was enacted by means of the Income Tax Law 1977, Law No. 15 of 1977 (which came into operation on the 1st January 1977), it nevertheless is not applicable to the case of the applicant because its provisions came into force after the years of assessment under examination.

Section 3 of Law No. 47 of 1963 as amended provides:

> "3. Notwithstanding any provision contained in the Income Tax Law or in any other Law amending or substituted for the same, for a period of ten years from the date of the coming of this Law into operation no tax shall be charged, levied or collected -
>
> (a) (b) . .
>
> (c) upon the profits or other benefits, in respect of

paid services rendered, granted to the master, officers and other members of the crew of a Cyprus ship."

Furthermore the aforesaid section because its provisions do not automatically apply without specific proof or evidence that in this instance his employers are exempt from tax, as he alleges, and since the burden was upon him to substantiate his allegations which he did not do, such must clearly fail.

What now falls for consideration is what his status is According to his own evidence he may obtain a Cypriot passport by virtue of section 4(1)(a) of Annex "D" to the Treaty of Establishment. Moreover, there is evidence which has not been disputed by him that he has a Cypriot wife with whom he lives and their two children in Limassol since 1973. This fact shows without doubt that his presence in Cyprus is by no means of a temporary nature but should be considered for all intents and purposes as permanent. He is, to use the phrase, "ordinarily resident". In Pinson on Revenue Law (10th Ed.) at p. 166 it is stated that the concept of ordinary residence resembles domicile more than residence. Relevant is also the case of In ***Re Young***, 1 T. C. 57 where a master mariner was found to be resident in the United Kingdom where his wife and children lived and with whom he lived when he was not at sea, despite the fact that the greater part of his income was earned upon the high seas and he spent the greatest part of the year at sea.

In the present case the applicant has not established that he falls within that class of aliens whose emoluments are exempt from tax, this argument must therefore fail.

The second contention is that the tax claimed from him was the responsibility of his ex-employers with whom he had entered into an agreement that his emoluments would be free of tax and that any income tax due would be paid by them.

As regards this agreement which the applicant alleges to exist between him and his employers, even if such exists, as rightly contended by the respondent, not being a party

to it he is therefore not bound. In fact the only instance the applicant may invoke such agreement would be for the purposes of proceeding against his employers for breach of contract in order to recover any amount paid by him as income tax. The existence of such agreement does not absolve him from the liability to pay income tax, because such liability is personal to the tax payer-employee, which is evident by going through the provisions of both the Income Tax Laws and the Assessment and Collection of Taxes Law, 1978, (Law No. 4 of 1978); also the Income Tax Deduction of Emoluments Rules 1964 - 1973, Rule 11(2), by virtue of which the employee is liable to pay the difference in tax, in cases when his employer fails to deduct the correct amount of tax.

Relevant is also what was stated by Pollock M.R in the case of *Hartland* v. *Diggines (H.M. Inspector of Taxes)* [1924] 10 Tax Cas. 251 at p. 252, where the appellant was employed by a Company which paid the income tax in respect of his salary and it was held by the Court of Appeal that such income tax paid by the company was an emolument which accrued to him by virtue of his office under the company and was thus rightly included in the assessment made upon him:

> "It is said by the Crown, therefore, that Mr. Hartland is liable to be assessed in respect not only of his salary or profits whatsoever, but also of perquisites and profits that arise from fees or other emoluments. It seems to me that the words are so wide that they include the sum which is in question in the present case, namely, the sum which has been paid by the Company to the Revenue to discharge Mr. Hartland's liability to Income Tax."

And further down at p. 256:

> "So we come back to this position, that Mr. Hartland is responsible to the Revenue to pay the tax in respect of his emoluments and salary and perquisites which he receives; and in effect what he has received he has received as stated in the *Ashton* [1904] 2 Ch. D.

621 and in the other cases—he has received a certain amount of money into his hands and he has received an indemnity against any liability to pay any part of it to the Revenue. In effect, therefore, what he has received is the moneys paid into his hands, plus that immunity; and, as Lord Atkinson puts it, one has to look at the substance of the matter; it cannot be said that by any arrangement, or even by any want of arrangement, the position of the Revenue can be prejudicially affected. The substance of the matter is that the salary paid to Mr. Hartland is not all he has received. He has received money's worth to the extent of the sum which has been paid in respect of that salary to the Revenue."

The case of *Hartland* v. *Diggines* (supra) was considered with approval in the case of *Wilkins* v. *Rogerson* [1961] 1 All E.R. 358 at p. 361 where it was stated by Lord Evershed M.R. in the Court of Appeal:

"If I have incurred a debt-e.g., my debt due for income tax comparable to that in *Hartland* v. *Diggines*—and my employer chooses to discharge that debt from me, then it is no doubt true that what I have received in money or money's worth is the equivalent of the debt; and the sum of money is, therefore, properly brought within the scope of the charge. But as I think in this case, and in accordance with the argument of counsel for the taxpayer, what the taxpayer got—what the company intended to give him, what the letters to him, and Montague Burton, Ltd. said would be done, and was done—was a present of a suit. Until he got it, he got nothing: and when he got it, the thing which came in (which was his income expressed in money's worth) was the value of the suit."

This argument also fails.

The applicant also argued that since the respondent sought to recover from his employers the income tax due which had been collected from their employees, he had no right to try to recover from the applicant.

In the first place as stated by the respondent which is

not disputed, the criminal case instituted against his employers was finally withdrawn without securing payment of the amounts due, the liability therefore as regards the income tax due in respect of the applicant's emoluments has not been discharged.

The argument of the applicant is that the amounts which his employers were required to pay were so payable by virtue of Sections 46, 47 and 48 of Law No. 4 of 1978 (as amended). But such sections though they impose a liability on an employer to pay, nevertheless such liability arises in cases where the employers' income tax "has been deducted" from his emoluments by the employer. Therefore in the present case since no deductions were made in respect of the applicant's emoluments, any amounts due by the employer to the Income Tax Office would not include the income tax due by the applicant, which thus remains his responsibility to pay.

Finally as regards his last argument, that the respondent failed to consider the accounts in respect of his farm and in particular its losses, as already stated above, since it had been agreed by the Income Tax Office and the applicant, in view of the latter's failure to keep proper records and accounts that neither the profits nor the losses of such business were to be taken into consideration in assessing his income and tax due, the respondent rightly did not take them into consideration.

In the circumstances I should say that the sub judice decision was reasonably open to the respondent and was properly and correctly reached in accordance with the laws and regulations in force.

For all the reasons stated above this recourse fails and is hereby dismissed, with no order as to costs.

Recourse dismissed.
No order as to costs.