

1988 March 18

[TRIANTAFYLLIDES, P., DEMETRIADES, LORIS,
STYLIANIDES & KOURRIS, JJ.]

THE COMMISSIONER OF INCOME TAX,
THROUGH THE MINISTRY OF FINANCE,

Appellant - Respondent,

v.

ERICH HUEBENER,

Respondent.

(Revisional Jurisdiction Appeal No. 451).

Taxation—Income tax—Exemptions—The Income Tax Laws, section 32—
Income earned by a person not ordinarily resident in Cyprus from the exer-
cise of a profession or vocation—Does not include salary from a contract of
employment—The question whether the income is derived from the exer-
cise of a profession or vocation is a question of fact.*

5

The respondent is an engineer in the beer production technology. It is undisputed that he is not ordinarily resident in Cyprus. He was engaged by KEO wine and beer manufacturers to advise them on the management and maintenance of their plant. The evidence showed that the respondent had been engaged for a limited period in consideration of a lump sum, but on respondent's request KEO used to pay him £1,000 per month plus £150 per month rent allowance. The question is whether the respondent was entitled as regards his said emoluments to the exemption of section 32* of the Income Tax Laws which applies, inter alia, in respect of "gross income of an individual not ordinarily resident in Cyprus from the exercise in the Republic of any profession or vocation". The trial Judge held that the earner is entitled to the relief, if he is a professional, irrespective of whether he is paid for services rendered or a salary in virtue of a contract of employment.

10

15

Hence this appeal by the Commissioner from the annulling decision of the trial Judge.

20

Held, dismissing the appeal:

* Quoted at p. 573 post.

(1) This Court cannot agree with the trial Judge that section 32 applies to persons engaged in a profession irrespective of the basis upon which they are remunerated. If a professional person is engaged by another in circumstances establishing the relationship of employer and employee and he is paid a salary then he cannot possibly enjoy the benefit of s. 32 of the Law. 5

(2) The question whether a person is carrying on a profession and derives his income from the exercise of his profession is a question of fact.

(3) The facts of this case do not establish the relationship of employer - employee. 10

Appeal dismissed with costs.

Cases referred to:

Papadopoulos v. The Republic (1968) 3 C.L.R. 662;

Cyprus Cement Co. Ltd. v. The Republic (1974) 3 C.L.R. 304;

Davies v. Braithwite [1931] 2 K.B. 628; 15

Fall v. Hitchen [973] 1 W.L.R. 286.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Pikis, J.) given on the 21st February, 1985 (Revisional Jurisdiction Case No. 458/82)* whereby the income tax assessment raised on the respondent for the years 1980 and 1981 was annulled. 20

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

K. Chrysostomides, for the respondent. 25

Cur. adv. vult.

* (Reported in (1985) 3 C.L.R. 63).

TRIANTAFYLLIDES P.: The Judgment of the Court will be delivered by Mr. Justice Kourris.

5 KOURRIS J: This is an appeal by the Commissioner of Income Tax against the Judgment of one of the Judges of the Supreme Court sitting in the first instance, whereby he annulled the decision of the appellant Commissioner with regard to the income tax assessments relating to the income of the respondent for the years 1980-1981.

10 The facts of the case which are not disputed, appear in the Judgment of the trial Judge and are as follows:

15 "The applicant is an engineer in the beer production technology, an expert in the field, as counsel for the respondent acknowledged. On the recommendation of the Chairman, manufacturers of the sterilization plant imported by KEO wine and beer manufacturesrs, he was employed by the latter to advise on the management and maintenance of the plant, as well as help in the training of personnel in its use. His employment lasted for about two years; he was paid a monthly salary of £1,000 plus rent allowance of £150 per month. His wife stayed behind in Germany and looked after the family home, 20 visiting Cyprus occasionally to see her husband. At the end of his employment with KEO, he joined his family in Germany. It is an incontrovertible fact that applicant's stay in Cyprus was meant from the beginning to be of limited duration; it ended when his employment by KEO came to an end."

25 The Commissioner of Income Tax taxed the earnings of the respondent for the years 1980 and 1981 under s.5(1)(b) of the Income Tax Law as emoluments derived from a contract of employment and he denied him the benefit of section 32 by his letter of 30 14.8.82, which reads as follows:

35 "(a) Section 32 of the law is not applicable in your case as during the abovementioned years you were resident in the Republic. You had a place of abode in Cyprus and you stayed here for a period of more than 6 months in each income year. In the circumstances, your income is liable to be taxed as per scale of Rates in the Second Schedule of the Law."

The trial Judge found that the Commissioner misconceived the effect of s. 32 and treated its application as dependent on the provisions of s. 8(u)(i), exempting from taxation non-residents temporarily in Cyprus, provided their stay does not exceed 183 days. Counsel for the appellant realized this error as well as the confusion under which the Commissioner laboured in his appreciation of the concept of ordinary residents, as encountered in s. 32. But counsel for the appellant invited the Court to sustain the decision on proper application of the law to the facts of the case otherwise undisputed. Relying on the proposition that administrative action is sustainable irrespective of the unsoundness of the reasons given in support of it, if on proper application of the law the Decision can be upheld.

(*Miltiades Papadopoulos v. The Republic*, (1968) 3 C.L.R. 662; *Cyprus Cement Co. Ltd. v. The Republic*, (1974) 3 C.L.R. 304.

Counsel for the appellant submitted before the trial Judge that though applicant may not be ordinarily resident in Cyprus, he cannot enjoy the benefit of the provisions of s.32 of the law, because he was employed as a salaried person and derived his income during employment and not from his profession or vocation.

The trial Judge, after considering this submission decided against it and held that a person exercising an independent or other profession or vocation (ioudipote eleftheriou i allou epangelmatos) is, unlike income earners residents of the country taxable at a flat rate of 10 per cent on his gross income. He said, on any definition of the word "epangelma", it includes professional persons engaged in a professional vocation irrespective of the basis upon which they are remunerated. He held that application of s. 32 is not dependent on the contractual basis of the services rendered but on the quality of the services and if of a professional kind the earner is entitled to the benefits of s. 32, provided he is not ordinarily resident in the Republic.

It is against this finding that the Commissioner is complaining and this appeal, therefore, turns on the interpretation of s.32 of the law.

Section 32 reads as follows:

5 "The gross income derived by any individual not ordinarily
resident in the Republic from the exercise in the Republic of
any profession or vocation, the remuneration of public enter-
tainers not ordinarily resident in the Republic, and the gross
10 receipts of any theatrical, musical or other group of public en-
tertainers from abroad derived from performances in the Re-
public (whether such performances are conducted for the joint
account of all or some of the members of the group or not)
shall be charged to tax at the rate of 100 mils in the pound."

15 Counsel for the appellant submitted that s.32 of the law is con-
fined only to individuals, not ordinarily resident in Cyprus, who
derive their income from the exercise of a profession or vocation,
but does not apply to individuals who derive their income from
employment except public entertainers.

20 He argued that s.32 applies to individuals who derive their in-
come from the exercise of a profession or vocation but it does not
apply to individuals who derive income from employment, in
other words, it does not apply to salaried persons, except in the
case of public entertainers. Persons who derive their income from
employment are taxable under s.5(1)(b) unless they are entitled to
25 the exemption under s.8(u)(i) of the Law which is the section that
applies to people who are not residents of Cyprus and they work
for less than 8 months.

30 He contended that the trial Court failed to draw the distinction
between the sources of income, in other words between income
derived from a profession or vocation and income derived from
employment. An individual, he said, who derives his income
from employment as in the present case is taxed under s.5(1)(b)
of the law and he does not enjoy the benefit of s.32 of the law.

Counsel for the respondent contended that applicant is admittedly not ordinarily resident in Cyprus, is exercising a profession, and irrespective of whether he is under a contract of service or a contract for services, he is qualified to enjoy the provisions of s.32 of the law. He went on to say that if we do not uphold the trial Court on this finding then the respondent is again entitled to be taxed under s.32 of the law because on the facts of the present case he rendered his services under a contract for services in which case there is no relationship of employer and employee, and not under a contract for service. He supported his argument relying on the cases of *Davies v. Braithwite* [1931] 2 K.B. 628 and *Fall v. Hitchen* [1973] 1 W.L.R. 286. 5 10

He submitted that there is no finding as to the nature of the relationship between KEO and the respondent, the word "employment" used by the learned trial Judge in stating the facts is a descriptive word and refers not only to a contract of service but also to contracts for services. He said that the uncontradicted evidence shows clearly that he was exercising an independent profession despite the fact that he was paid on a monthly salary basis. 15

It appears from the wording of s.32 that there are three instances where it is applicable: 20

(a) to persons not ordinarily resident in the Republic who derive their income from the exercise in the Republic of any profession or vocation;

(b) to the remuneration of public entertainers not ordinarily resident in the Republic; and 25

(c) to the gross receipts of any theatrical, musical or other group of public entertainers from abroad, derived from performances in the Republic.

In the present case we are concerned with (a) above and the question whether a person is carrying on a profession and derives his income from the exercise of his profession is a question of fact. 30

Counsel for the appellant laid stress on the fact that the learned trial Judge in stating the facts said that the appellant was employed by KEO establishing, therefore, the relationship of respondent and KEO as one of employer and employee.

5 We do not think that the learned trial Judge in using the words "employed" and "employment" that he decided that the relationship of employer and employee existed between the respondent and KEO, because, he reached the conclusion that s.32 applies to
10 persons engaged in a profession or vocation, irrespective of the basis upon which they are remunerated, provided that they are not ordinarily resident in the Republic.

We propose to use the neutral word "engaged" and "engagement" in order to examine the nature of the engagement of the respondent by KEO. According to the evidence of the only witness,
15 Angelides, the respondent was engaged to advise on the management and maintenance of the sterilization plant of KEO on the recommendation of the manufacturers of the plant imported by KEO. The agreement was to receive a lump sum for his engagement but on his request KEO used to pay him £1,000 per month. KEO
20 also paid to him a rent allowance of £150 per month.

We are not in agreement with the learned trial Judge that the interpretation given by s. 32 as applying to persons engaged in a profession irrespective of the basis upon which they are remunerated. We think that if a professional person is engaged by another
25 in circumstances establishing the relationship of employer and employee and he is paid a salary then he cannot possibly enjoy the benefit of s. 32 of the law.

The circumstances of the present case, where the respondent was engaged to advise on the management and maintenance of the sterilization plant on the recommendation of the manufacturers of the plant on the payment of a fixed amount, cannot possibly establish the relationship of employer and employee so as to be
30 taxed under s 5(1) (b) of the law. We hold that he is qualified to be taxed under s. 32 of the law and it makes no difference if KEO

when filling the form for income tax purposes had declared him as an "employee" because this statement is not binding on the respondent.

In view of the above, the appeal is dismissed with costs.

Appeal dismissed with costs. 5