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suggests that that part of the section was intended to enable the landlord to assist in installing in trade his close relations. The rule of construction followed by Denning L. J. in *Henry* v. *Taylor* (1954) (1 Q. B. p. 513) may properly be adopted: "Where there is a fair choice between a literal interpretation and a reasonable interpretation, we should always choose the reasonable interpretation". This does not mean, however, that a landlord is precluded from putting forward a genuine claim for converting into residence business premises under any other sub-section of the same law; in a proper case he might do so under section 18 (1) (l) or 18 (1) (m) of the law.

HALLINAN, C. J.: I concur.

[HALLINAN, C. J. and ZEKIA, J.]
(May 12, 1956)

1956
May 12

IN THE MATTER OF SEC. 39 OF THE INCOME TAX LAW.
and
IN THE MATTER OF MINOS GEORGHIADES
and
THE COMMISSIONER OF INCOME TAX

IN THE MATTER OF SECTION 39 OF THE INCOME TAX LAW, CAP 297

And

IN THE MATTER OF MINOS GEORGHIADES of Nicosia,
Appellant,

And

THE COMMISSIONER OF INCOME TAX of Nicosia,
Applicant.

(Case Stated No. 102)

Income Tax—Onus of proof in appeal under sec. 50 (1) of Income Tax Law, Cap. 297—"Profits" within the meaning of section 50 (1).

A Company was formed in 1946 principally for the purpose of taking over the shares and immovable property of Minos Georghiades and his father. One of the immovable properties in 1951 was sold for £13,000 which was £10,756 over the value of the property as shown in the company's books. This sum of £10,756 was transferred to the company's capital reserve account. The Commissioner of Income Tax being of opinion that this sum represented profits which could be distributed without detriment to the company's existing business treated such undistributed profits as distributed and assessed the shareholders accordingly under section 50 (1) of the Income Tax Law, Cap. 297.

The company between 1947 and 1950 incurred a bank overdraft for the sum of £14,000 which was chiefly caused by expenditure on additions to the company's buildings, the purchase of shares in the Nicosia Electric Company, and an advance or loan to the estate of Christos Georghiades to finance the payment of estate duty. The £13,000 realized from the sale of the immovable property was utilized to reduce the Bank overdraft. Apart from these transactions already mentioned the company did not acquire or sell any other immovable property.

Minos Georghiades appealed to the District Court against the assessment and that Court made two findings: First, that in an appeal under section 50 (1) the onus of proof is not on the Commissioner to satisfy the Court that the assessment was justified but on the appellant to show that the assessment complained of was excessive or ought not to be made at all; and, secondly, that an assessment under section 50 (1) must be made on undistributed profits from any trade, business, profession or vocation within the meaning of section 5 of the Income Tax Law; and that since the capital profits in the present case were not profits within the meaning of section 5, they could not be treated as undistributed profits under section 50 (1).

Upon appeal, the judgment of the District Court was upheld on both grounds.

(1) The provisions of section 50 of the Income Tax Law by incorporating section 39 (4) provide that the onus of proof is on the taxpayer.

Fattorini v. *The Inland Revenue Commissioner* (1942) A.C. 643, distinguished.

(2) "Profits" within the meaning of section 50 (1) must be profits chargeable to income tax and the profits in this case are not so chargeable. Scope and object of section 245 of the Income Tax Act, 1952 of the United Kingdom compared.

Commissioner of Inland Revenue v. *The Trustees of Joseph Reid* (deceased) 30 Tax Cases, 431, distinguished.

(3) On the facts the Commissioner of Income Tax was not justified in finding that the £10,756 could be distributed without detriment to the company's business and that the failure to distribute was no evasion of tax.

Case Stated from the decision of the District Court of Nicosia (Income Tax Appeals Nos. 2—5/56).

R. Stavrakis for the applicant.

M. A. Triantafyllides with *N. Rolandis* for the respondent.

The judgment of the Court was delivered by:

HALLINAN, C. J.: The facts in this case are very carefully summarized in the Case Stated. A company was formed in 1946 principally for the purpose of taking over the shares and immovable property of Minos Georghiades and his father. One of the immovable properties in 1951 was sold for £13,000 which was £10,756 over the value of the property as shown in the company's books. This sum of £10,756 was transferred to the company's capital reserve account. The Commissioner of Income Tax being of opinion that this sum represented profits which could be distributed without detriment to

the company's existing business treated such undistributed profits as distributed and assessed the shareholders accordingly under section 50 (1) of the Income Tax Law, Cap. 297.

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Minos Georghiades appealed to the District Court against this assessment and that Court made two findings: First, that in an appeal under section 50 (1) the onus of proof is not on the Commissioner to satisfy the Court that the assessment was justified but on the appellant to show that the assessment complained of was excessive or ought not to be made at all; and, secondly, that an assessment under section 50 (1) must be made on undistributed profits from any trade, business, profession or vocation within the meaning of section 5 of the Income Tax Law; and that since the capital profits in the present case were not profits within the meaning of section 5, they could not be treated as undistributed profits under section 50 (1).

The learned District Judge therefore decided that even though the burden of proof was on the tax payer, nevertheless the tax payer's appeal must succeed and the assessment on the sum of £10,756 be discharged. The Commissioner of Inland Revenue has appealed against the finding that there were no undistributed profits which should be distributed; and, from an abundance of caution, the tax payer has cross-appealed on the issue as to the onus of proof.

In deciding the issue as to the onus of proof one need not go further than the provisions of section 50 itself. In sub-section (1) the Commissioner in the exercise of a discretion conferred by that sub-section can treat certain "undistributed profits as distributed and the person concerned shall be assessed accordingly." Sub-section 4 of the same section provides that "nothing in this section shall prevent the decision of the Commissioner in the exercise of any discretion given to him by this section from being questioned in an appeal against an assessment in accordance with section 39 of this Law." Section 39 (relating to appeals against assessment) contains the following sub-section: "(4) The onus of proving that the assessment complained of is excessive shall be on the appellant."

In the District Court the tax payer relied on the case of *Thomas Fattorini* v. *The Inland Revenue Commissioner* (1942) A.C. 643. The House of Lords in Fattorini's case decided that, under section 21 of the Finance Act, 1922 (now section 245 of the Income Tax Act, 1952), the onus of proof was on the Commissioner of Inland Revenue. The learned District Judge rightly, in our opinion, distinguished that case from the present one and considered that Fattorini's case was decided on the ground that section 21 of the Act of 1922 was penal in nature; whereas section 50 (1) is not penal. In this Court the tax payer relied on *Dixon and Grant Ltd. and another* v. *The Inland Revenue Commissioner,* 1947 (1) A.E.R., 723. That was a case decided under section 35 of the Finance Act of 1941 which provides that where the main purpose of any transaction was the avoidance of liability to excess profits tax, the Commissioners of Inland Revenue can make such an assessment as they consider appropriate. Sub-section (3) of section 35 of the Act of 1941 gave a right of appeal to the Special Commissioners but the provision giving the right of appeal contained no reference directly or indirectly to putting the burden of proof on the tax payer. True, the provisions of section 35 were not penal but, in our view, Dixon and Grant's case can be distinguished from the present one by the fact that section 35 of the Act of 1941 did not directly or by reference to any other enactment provide that upon appeal the onus of proof should be on the tax payer.

We consider that the District Judge was right in holding that where the Commissioner under section 50 (1) treats the undistributed profits as distributed, and the tax payer appeals, the onus of proof on the hearing of such appeal is on the tax payer.

In our view the District Judge has also correctly decided the second point in this appeal when he held that the £10,756, the subject-matter of the appeal, were not profits in the meaning of that word as used in section 50 (1) and, therefore, there were no undistributed profits to distribute. It would appear that there has been some confusion in the mind of the Commissioner of Income Tax with regard to the object and scope of section 50 (1). The corresponding provision in English Income Tax Law is now section 245 of the Income Tax Act, 1952, the opening words of which section are: "With a view to preventing the avoidance of payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed it is hereby enacted. . . ." In explaining this provision Simon's Income Tax, Vol. 3, paragraph 738, has this to say: "Generally speaking, surtax is charged only on individuals, not on companies or other bodies corporate. Various devices have been adopted from time to time to enable the individual to avoid surtax on his real total income or on

a portion of it and one method involved the formation of what is popularly called a "one-man company". The individual transferred his assets in exchange for shares, to a limited company, specially registered for the purpose, which thereafter received the income from the assets concerned. The individual's total income for tax purposes was then limited to the amount of the dividends distributed to him as practically the only shareholder, which distribution was in his own control. The balance of the income, which was not so distributed, remained with the company to form, in effect, a fund of savings accumulated from income which had not immediately attracted surtax." Now the object of our section 50 (1) is the same. There is no mention of surtax because instead of surtax in this Colony we have a scale of income tax where the rate rises with the income. A company in Cyprus pays income tax at the rate of 7/4½cp in every pound of chargeable income, whereas the tax on the upper parts of the income of rich individuals is very much higher; for example, every pound in excess of £6,000 carries a tax of 15/-. In the English section 245, mention is only made of surtax not income tax, because a direction of the Commissioners treating undistributed income as distributed among members of a company, presupposes that the direction relates to income of the company already chargeable to tax. Konstam, 12th Edition, at paragraph 282 states that "any body of persons liable to tax is charged on the full amount of its profits before any dividend is made...." and at paragraph 108 states: "If a company makes profits, it is taxable upon them whether it distributes them in dividends or carries them to reserve....". In the same way in our view the profits mentioned in our section 50 (1) must be profits of the company upon which income tax has been charged or is chargeable but which would be chargeable at a higher rate if distributed as dividend to shareholders of the company. It is clear, therefore, that as in the English section the expression "income of the company" means income upon which the company has paid or should pay tax, so the word "profits" in our section is income of the company upon which the company has paid or should pay tax. In our view the £10,756 could only be considered undistributed profits if they could be chargeable to tax at 7/4½cp in the pound; it is only then that the question of this sum being distributed and chargeable to tax at a higher rate could arise. The fact that the Commissioner has not taxed these profits in the hands of the company certainly suggests that they are not taxable at all.

Counsel for the Commissioner has relied on the *Commissioners of Inland Revenue* v. *The Trustees of Joseph Reid* (deceased), 30 Tax Cases, 431. In that case the Trustees had shares in a South African trading company. The company sold certain premises which it occupied for the purpose of its trade at a profit out of which it

declared and paid a dividend of 20% payable from capital profits. The dividend was received by the Trustees without deduction of income tax. It was held by the House of Lords that this dividend was income arising from possessions out of the U.K. and therefore chargeable to tax under case 5 of Schedule D. (now section 123 of the Act of 1952). Generally speaking accretions to capital by the sale of premises or capital assets are not considered annual profits or gains unless it is part of trading transactions of the company to buy and sell capital assets of this kind. But the House of Lords in Reid's case had not to consider whether the profit that the South African trading company had made by selling the premises was or was not an annual profit or gain or was income of the company. This is clear from the following passage taken from the judgment of Lord Simonds at p. 440:

> "I would remind Your Lordships of the observation of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co. Ltd.* (1923) A.C. 744, at page 770, that in regard to the income arising from foreign possessions. 'The officers of the Crown do not know and do not care what is the character of the sources from which the money comes.' I must not be taken as suggesting any inaccuracy or insufficiency in the information which has in this case been furnished by the South African company, but it is obvious that, as a general rule, the Inland Revenue authorities cannot have the same facilities for investigating the affairs of a foreign company and checking its statement that a dividend is paid out of "capital profits". They must work upon a broader basis, and I cannot imagine a safer or better one, where the question is as to income arising from a foreign possession, than to ask whether the corpus of the asset remains intact in the hands of the taxpayer. That question can, in the case of the shares here in question, only be answered in the affirmative. The shares the respondents held before the distribution of dividend they still hold intact. The dividend they received was income arising out of those shares."

The sole question in Reid's case was whether the dividend which the South African company paid was income for the trustees arising from possessions out of the United Kingdom. The answer of course was that the dividends were such income. In the present case the Court must decide whether the £10,756 was a profit of the company and chargeable to company income tax before such profits can be considered as undistributed profits that could be distributed without detriment to the company's existing business. We agree with the learned District Judge that the £10,756 could only be treated as profit of the company if it fell within the meaning of that word as used in section 5 (1) (a) of the Income Tax Law;

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IN THE MATTER OF SEC. 39 OF THE INCOME TAX LAW,
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IN THE MATTER OF MINOS GEORGHIADES
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since the company was not trading in buying and selling premises, and the sale of the premises for £13,000 was an isolated transaction, it was not therefore a profit from trade or business which could be assessed as income of the company under section 5 (1) (a).

Quite apart from the legal point as to the meaning of the word "profits", it is difficult to see how the £10,756 could be distributed as dividends without detriment to the company's business or why the failure to so distribute it was an evasion of tax. The difference between the book value of the premises and their value when sold to reduce a bank overdraft is not the sort of wind-fall that a company, prudently administered, would distribute to shareholders.

In our opinion the District Judge's decisions both on the issue as to the onus of proof and on the construction of the expression "profits" in section 50 (1) are correct. The tax payer is entitled to the costs of the appeal; no order as to costs is made on the cross-appeal.

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May 30

EZEKIAS PAPA IOANNOU AND OTHERS
v.
THE SUPERINTENDENT OF PRISONS

[HALLINAN, C. J. and ZANNETIDES, J.]

(May 30, 1956)

EZEKIAS PAPA IOANNOU AND OTHERS, *Appellants*,

v.

THE SUPERINTENDENT OF PRISONS, *Respondent*.

(Civil Appeals Nos. 4173, 4174, 4175 and 4176).

Habeas corpus—Emergency Powers (Public Safety and Order) Regulations, 1955, Regulation 6 — Detention Orders — Powers of Administrative Secretary to sign order—Place of detention not specified in order—Instructions issued after orders—Reasons for orders stated in the alternative—Burden of proving that Governor had not applied his mind to each case — Application for detainees to give oral evidence — Application to call Governor for cross-examination on his affidavit.

Applicants were detained under a Detention Order made by the Governor and signed by the Administrative Secretary under Regulation 6 of the Emergency Powers (Public Safety and Order) Regulations, 1955. The applicants applied for a *habeas corpus* on four principal grounds:

First, the order should have been signed by the Governor, not by the Administrative Secretary;

Secondly, the place of detention should have been specified in the order and instructions as to the treatment of detainees should have been issued before the order was made;

Thirdly, the order was bad because the Governor had