1960
Jan. 28,
March 19

COMMISSIONER OF INCOME TAX
v.
SHAKIR SOYKAL AND OTHERS

[ZEKIA, J. and ZANNETIDES, J.]

IN THE MATTER OF SECTION 43 OF THE INCOME TAX LAW, 1959.

AND

IN THE MATTER OF SHAKIR SOYKAL AND OTHERS,
Respondents,

AND

IN THE MATTER OF THE COMMISSIONER OF INCOME TAX.
Applicant.

(*Case Stated No.* 135).

Income Tax—Teachers—In the permanent staff of teachers in Turkey—Sent to Cyprus to serve here—Salaries paid in Turkey—Monthly allowances—In the nature of food and lodging allowances—Or subsistence allowances—Paid in Cyprus—Whether they are outgoings or expenses wholly and exclusively incurred in the productions of the income—The Income Tax Law, Cap. 323 (1959 *edn.*) *section* 10—*Or liable to income tax under section* 5(1) (b) *of the same law.*

Practice—Income Tax Appeals—The Income Tax Law etc., section 43—*Joinder of several persons aggrieved by separate assessments in one appeal—Not permissible—Correct procedure would be by way of consolidation—The Income Tax (Appeals against Assessments) Rules of Court,* 1952, *r.* 7—*The Civil Procedure Rules,* 0.35, *r.* 28—*Order* 13, *rule* 4 *of the Civil Procedure Rules has no application in the matter.*

Each of the fourteen respondents-teachers was assessed by the Commissioner of Income Tax in respect of his monthly subsistence allowances under section 5 (1) (b) of the Income Tax Law, Cap. 323 (1959 edn.). Joining in one appeal, the teachers appealed under section 43 against those assessments to the District Court of Famagusta. The learned Judge, holding that the joinder was in accordance with the Civil Procedure Rules, 0.13, r. 4, allowed the appeal and set aside the assessments on the ground that the monthly allowances under consideration were expenses wholly incurred in the production of the income within the meaning of section 10 of the Income Tax Law. The Commissioner of Income Tax appealed by way of case stated against the decision. The facts sufficiently appear in the judgment of the Court.

Held : (1) The allowances received by the respondents teachers are in the nature of food and lodging allowances and may correctly be described as subsistence allowances ; as such they are liable to taxation pursuant to section 5 (1) (b) of the Income Tax Law. (note : para. (b) is set out in the judgment, *post*).

Evans v. Richardson, 37 Tax Cases 181, *followed.*

(2) The joinder of several persons aggrieved by separate assessments made on them by the Commissioner of Income Tax in one appeal to the District Court under section 43 of the Income Tax Law, is not permissible. The correct procedure would be by way of consolidation of appeals under the Civil Procedure Rules 0.35, r. 28.

Decision of the District Court reversed.

Cases referred to:

Evans v. Richardson, 37 Tax Cases, 181;

Lomax v. Newton, 34 Tax Cases, 558;

Sanderson v. Durbidge, 36 Tax Cases, 239.

Case Stated.

Case stated by the District Court of Famagusta (Ekrem, D.J.), (Income Tax Appeal No. 4/59), on the application of the Commissioner of Income Tax on the points whether the monthly allowances paid to the appellants (now respondents) are liable to income tax under section 5(1)(b) of the Income Tax Law, and whether the joinder of the 14 appellants (now respondents) in one appeal to the District Court of Famagusta against the assessment under consideration was properly made.

M. S. Faiz, Junior Crown Counsel for the appellant.

A. M. Chiftchioglou for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was delivered by:

ZEKIA, J.: Two points of law have been reserved for the opinion of this Court by the District Court of Famagusta, relative to its decision in an Income Tax appeal made against the assessment of the Commissioner of Income Tax under section 43 of the Income Tax Law, 1959.

The facts can be briefly stated as follows: All the 14 respondents are school teachers belonging to the teaching staff of Namik Kemal Lycée, Famagusta. They come from Turkey and are enrolled in the permanent staff of teachers of Turkey. They have been sent to Cyprus by the Turkish Government to serve as schoolmasters in the said Lycée for a period of two years extensible for a further period. Their salaries and other allowances are fully met by the said Government. Payment of their salaries is effected in Turkey. They are paid in Cyprus during their sojourn here a monthly allowance varying with the cost of living prevailing from time to time. Paragraph 14 of the statement of the case reads:

" The alleged subsistence allowance is paid as long as the appellants' term of office in Cyprus continues, irrespective of any holidays which, at their total discretion, they may have in Turkey ".

The District Judge having heard the appeal ruled that: (a) by virtue of section 10 of the Income Tax Law, 1959, the monthly allowances received by the respondents were in the nature of expenses wholly and exclusively incurred in the production of their income and therefore not taxable ; (b) that the joinder of the cases of 14 persons for the purpose of making and hearing of their appeal under section 43 of the Income Tax Law, 1959, against the assessment of the Commissioner was properly made under Order 13 rule 4 of the Civil Procedure Rules.

From the facts stated it is clear that the allowances received by the respondents teachers are in the nature of food and lodging allowances and may correctly be described as subsistence allowances : as such, they are liable to taxation by section 5 (1) (b) of the Income Tax Law, 1959. This subsection reads as follows:

" Tax shall..... be payable ..... in respect of.. .(b) gains or profits from any employment including the estimated annual value of any quarters or board or residence or any other allowance granted in respect of employment whether in money or otherwise ".

The learned Judge was obviously wrong in law in considering such allowances as expenses wholly and exclusively incurred by recipients in the production of their income. In *Evans* v. *Richardson* reported in 37 Tax Cases (1957) at page 181 the facts are very much similar to the facts of this case and even more strongly in favour of the tax-payer. There, the allowance was wholly expended on necessary food and accommodation during the period of the course and was exclusively expended in payment of lodging. Wynn-Parry, J., after referring to a number of cases, quotes the words of Lord Skerrington from his judgment in the case of *Ferguson* v. *Noble*, 7 Tax Cases at page 1766, as follows:

" The allowance in this case was merely a contribution towards the officer's expenses, in other words, pecuniary relief given to him, in other words, an addition to his emoluments. On that basis the allowance is rightly to be recorded as income ".

Wynn-Parry, J., having found that the allowance was chargeable income, proceeded to consider whether such allowance is a deductible allowance from the chargeable income of the tax-payer under the relevant section of the Income Tax Act which is almost identical with section 10 (1) of our Income Tax Law, 1959. Having gone into the authorities

he found that such and similar allowances could not be considered as being exclusively and necessarily spent in the performance of the tax payer's official duty and followed the cases of *Lomax* v. *Newton*, 34 Tax Cases, 558, and *Sanderson* v. *Durbidge*, 36 Tax Cases, 239.

We come now to the second point regarding the joinder of several persons aggrieved by the assessment made upon them by the Commissioner of Income Tax who appear to the Court by virtue of section 43 (1) of the Income Tax Law, 1959. This is clearly a misjoinder and wrong in law. Rule 7 of the Income Tax (Appeals against Assessments) Rules of Court, 1952, is relevant to the point and reads:

> "The procedure to be followed at the hearing of an appeal under the Law shall be, as nearly as possible, the same as the procedure followed in the hearing of a civil appeal ; and the rules relating to the civil proceedings shall apply to any matter arising out of a proceeding under the law or rules for which provision is not made therein ".

The Rules of 1952 are kept alive by the saving clause in section 77 of the Income Tax Law, 1959. Order 13 rule 4 of the Civil Procedure Rules has no application to the appeals made against the assessment of the Commissioner of Income Tax to a District Court. The rule applicable is rule 28 of Order 35 of the Civil Procedure Rules which reads : "The Court of Appeal or a Judge thereof may by order consolidate appeals at any stage if it appears convenient that they should be heard together". This rule is clearly applicable to the present case. It seems to us therefore that when persons aggrieved are taxed separately by the Commissioner of the Income Tax and wish to appeal against the assessment, they have to file their appeal separately and, having done so, they would be entitled to seek an order of the Court for the consolidation of their appeals ; and the Court, or a Judge thereof, if it considers that appellants' cases can conveniently be heard together could make such order. The appellants unless jointly taxed we do not think that they are as of right entitled to file and prosecute their appeals jointly.

The decision of the District Court on both points is hereby reversed.

Appeal allowed.
Decision of the District Court reversed.