

[TRIANTAFYLLOIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

THEOPHILACTOS MAVROMATIS, (No. 2),
Applicant,

— and —

THE REPUBLIC OF CYPRUS, THROUGH
1. THE DIRECTOR OF INLAND REVENUE,
2. THE MINISTRY OF FINANCE,

Respondents.

(Case No. 14/65).

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Income Tax—Demand by the Director of Inland Revenue under the proviso to section 31(2) of the Taxes (Quantifying and Recovery) Law, 1963 (Law No. 53 of 1963) for payment by the tax-payer of income tax on the undisputed part of his taxable income—Such demand is an executory act, and not a mere act of execution—Therefore, it can be made the subject of a recourse under Article 146 of the Constitution—The phrase “Not in dispute” in the said proviso to section 31(2)—Meaning—It means “not in dispute by way of objection or recourse, as the case may be”.

Administrative Law—Recourse under Article 146 of the Constitution—Not entertainable when the acts complained of are mere acts of execution as distinct from executory acts—Demands by the Director of Inland Revenue under the proviso to section 31(2) of Law No. 53 of 1963 (supra)—They are executory acts—Because they involve the reversal against the tax-payer of the legal situation created in his favour by the main part of that subsection (2)—See, also, under Income Tax, above.

In this case the applicant complains against demands made on the 8th January, 1965, by the respondent Director of Inland Revenue, requiring him to pay by the 30th January, 1965, the income tax due on the alleged undisputed part of his taxable income in respect of the years of assessment 1952-1960. Subsequently the disputed demands were restricted to the years of assessment 1952-1955. It is common ground that the sub-judice demands of the 8th January, 1965, were made after recourse No.

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129/64 had been filed by applicant on the 2nd November, 1964, against the assessments for the years of assessment concerned.

During the hearing of this case counsel for the respondent took the preliminary objection that the present recourse cannot be entertained under Article 146 of the Constitution, because the aforesaid demands are only acts of execution and not executory acts.

Section 31(2) of the Taxes (Quantifying and Recovery) Law, 1963 (Law No. 53 of 1963) provides:

“(2) Collection of tax shall in cases where notice of an objection has been given, or a recourse made to the Supreme Constitutional Court, (now to the Supreme Court)—remain in abeyance until such objection or recourse is determined:

—
“*Provided that the Director may in any such case enforce payment of any portion of the tax which is not disputed*”.

Held, (1) as to the preliminary objection whether or not this recourse is entertainable:

(a) In my view, action taken by the Director under the proviso to sub-section (2) (*supra*) is of an executory nature, and not a mere act of execution, because it involves the reversal against the tax-payer of the legal situation created in his favour by the main part of the aforesaid sub-section (2) (*supra*); and this takes place not automatically, but after the exercise of a discretion by the Director in the particular circumstances of each specific case.

(b) Therefore the preliminary objection taken by counsel for the respondent, as above, fails.

(2) *As to the substance of the case:*

(a) The expression “not in dispute” in the proviso to sub-section (2) of section 31 of Law No. 53 of 1963 (*supra*) means “not in dispute” by way of objection or recourse as the case may be.

(b) Looking at the application in the recourse No. 129/64 filed in November 1964, (*supra*), there can be no doubt that the tax claimed under the assessments in respect of the years of assessment 1952-1955 was—on

certain grounds relied upon by the applicant in such recourse—in dispute to the whole extent of such assessments.

(c) Therefore the prerequisites of resort to the proviso to section 31(2) (*supra*) were not satisfied.

(d) In the result such demands which were made by the Director under the aforesaid proviso are contrary to law and have to be annulled.

Sub-judice demands of the Director of Inland Revenue declared null and void. Order for costs in favour of the applicants.

Recourse.

Recourse against demands made by Respondent 1, the Director of Inland Revenue, requiring applicant to pay by the 30th January, 1965, the income tax due by him on the undisputed part of his taxable income in respect of the years of assessment 1952-1960.

M. Houry with St. G. McBride, for the Applicant.

L. Loucaides, Counsel of the Republic, with Chr. Paschalides, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:—

TRIANTAFYLIDIS, J.: In this case the Applicant complains against demands made by the Respondent Director of Inland Revenue, requiring him to pay by the 30th January, 1965, the income tax due on the undisputed part of his taxable income in respect of the years of assessment 1952-1960.

Such demands were all made in writing on the 8th January 1965, and they are *exhibits* 4-12 in these proceedings.

During the hearing of this Case counsel for Respondents took the preliminary objection that this recourse could not be entertained under Article 146 because the said demands are only acts of execution and not executory acts. It is, therefore, necessary to deal with this issue, first:—

The Director of Inland Revenue has acted in this Case

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under the proviso to subsection (2) of section 31 of the Taxes (Quantifying and Recovery) Law, 1963 (Law 53/63) which reads as follows:—

“(2) Collection of tax shall in cases where notice of an objection has been given, or a recourse made to the Supreme Constitutional Court, remain in abeyance until such objection or recourse is determined:

Provided that the Director may in any such case enforce payment of any portion of the tax which is not in dispute”.

So, though ordinarily, on the basis of the general principles of Administrative Law, the mere filing of a recourse by a taxpayer would not have the result of suspending the effect of the administrative act or decision imposing taxation on him and against which he complains, express provision to the contrary has been made by subsection (2) of section 31.

Thus, in my view, action taken by the Director under the proviso to subsection (2) is of an executory nature, and not a mere act of execution, because it involves the reversal against a taxpayer of the legal situation created in his favour by the main part of such subsection (2); and this takes place not automatically, but after the exercise of a discretion by the Director in the particular circumstances of each specific case.

I find, therefore, that the preliminary objection taken by Counsel for Respondent, as above, cannot succeed.

Coming now to the substance of this Case:—

Counsel for Applicant has made it clear that he no longer objects to the payment of the tax demanded in relation to the undisputed part of Applicant's income in the years of assessment 1957-1960 and, therefore, this recourse must be deemed to have been abandoned to that extent; it is dismissed accordingly to the same extent.

Counsel for Respondent on the other hand has stated that no income tax is claimed at all, any longer, from Applicant in respect of the year of assessment 1956. Thus, in effect, the demand made in respect of such year by the Director of Inland Revenue, *exhibit 12*, has to be deemed to have been accordingly revoked, and consequently the subject-matter of this recourse is to that extent to be regarded as having been abated.

Regarding the demands for the remaining years of assessment, i.e. 1952-1955 (*exhibits 4-6 and 11*), counsel for the parties appear to have approached this Case merely on the basis of whether or not there exist in respect of such years of assessment valid assessments on the strength of which collection of tax is possible.

Having duly considered the matter, I am of the opinion that this is not really the correct approach to the *sub judice* issue.

We must not lose sight of the fact that we are concerned here only with demands for payment of income tax "not in dispute", in the sense of subsection (2) of section 31 of Law 53/63.

I read the expression "not in dispute" to mean "not in dispute by way of objection or recourse, as the case may be".

It is clear that the *sub judice* demands were made on the 8th January, 1965, after recourse 129/64 had been filed on the 2nd November, 1964, by Applicant against the assessments for the years of assessment concerned, and, therefore, we must look at the file of proceedings of such recourse in order to discover whether the income tax, payment of which was asked for by such demands, was "not in dispute" by such recourse, when the demands in question were made.

Looking at the Application in recourse 129/64, there can be no doubt that the tax claimed under the assessments in respect of the years of assessment 1952-1955 was—on the basis of certain of the grounds relied upon by Applicant in such recourse—in dispute *to the whole* extent of such assessments, and, therefore, in my opinion, the prerequisites of resort to the proviso to section 31(2) were not satisfied, so as to entitle the Director of Inland Revenue to demand payment of tax "not in dispute" in respect of the years of assessment 1952-1955, while recourse 129/64 was still pending.

As a result such demands (*exhibits 4-6 and 11*) were made contrary to law and have to be annulled; it is, therefore, so declared accordingly.

Regarding costs I think that Applicant is entitled to part thereof, which I assess at £15.—

Sub judice demands of the Director of Inland Revenue declared null and void. Order for costs as aforesaid.

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