[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRIOS DEMETRIADES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,

Respondents.

(*Case No.* 160/70).

Income Tax—Business—Meaning of—Letting by applicant's wife of her shops and flats—Does not constitute carrying on of a business for the purpose of income tax—Earned income—Income derived from such letting is not earned income within section 22 (1) *of the Income Tax Laws,* 1961–1969.

Income Tax—Wife's income—Is in the fullest degree her separate property and in no sense that of her husband—Taxing husband on the combined total of his and his wife's unearned income derived from letting of shops and flats—Contravenes Articles 24.1 *and* 28 *of the Constitution.*

Constitutional Law—Constitutionality of legislation—Judicial control of the constitutionality of legislative enactments—General principles applicable.

Constitutional Law—Fiscal equality—Equality of treatment and discrimination—Articles 24.1 *and* 28 *of the Constitution—Section* 22 (2) *of the Income Tax Laws* 1961–1969 *and all other similar income tax enactments between* 1961–1969 *unconstitutional as being contrary to the aforesaid articles of the Constitution.*

Income Tax Laws 1961–1969—*Section* 22 (2) *unconstitutional.*

Equality—Principle of equality—Article 28 *of the Constitution—Taxing husband on the combined total of his and his wife's unearned income—Contravenes the principle of equality safeguarded by aforesaid article and results in a discriminatory treatment.*

Fiscal Equality—Article 24.1 of the Constitution.

Judicial Precedent—Doctrine of—Applicability in Cyprus—Judgments of former Supreme Constitutiona Court—Whether binding on individual Judges of the present Supreme Court in the exercise of their original jurisdiction—Second leg of the decision in Mikrommatis *and* The Republic, (1961) 2 *R.S.C.C.* 125, *not followed.*

Business—Meaning of, for purposes of income tax.

Earned Income—Wife's earned and unearned income—Sections 22 (1) *and* (2) *of the Income Tax Laws,* 1961–1969.

This recourse was directed against the decision of the respondent Commissioner of Income Tax to assess the applicant a tax which was computed on the combined total of his and his wife's income having treated the aggregate amount as the applicant's income.

The Commissioner took the said decision by relying on section 22 of the Income Tax Laws, 1961–1969 which reads as follows.

> "22 (1) The earned income of a married woman living with her husband shall, for the purposes of this Law, be assessed separately on her.
>
> (2) Any income other than the earned income derived by a married woman living with her husband shall for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband.
>
> ..... ".

Counsel for the applicant contended as follows:

(a) That because the earned income of the wife of the applicant is derived from the letting of shops and flats, the Commissioner misdirected himself as to the law once such income is within s. 22 (1) of the Income Tax Laws, 1961–1969 which were enacted because of the decision in *Mikrommatis* and *The Republic,* 2 R.S.C.C. 125.

(b) That the income derived by the wife from the exercise of a business safeguarded by Article 25 of the Constitution ought not to have been assessed or added to

the income of the applicant (husband), but assessed separately on her.

Regarding point (a) above counsel for the applicant submitted that the letting of shops and flats is deemed to be the carrying on of a business within the provisions of sub-section 7 (d) of section 12 of the Income Tax (Foreign Persons) Law, 1961 (Law 58/61) where for the purposes of this sub-section the word " 'business' shall include the letting of premises".

Regarding point (b) counsel submitted that the second leg of the decision in the *Mikrommatis* case (*supra*) which deals with " income from property" was wrongly decided and that it should be reconsidered, so that the income of spouses should be separately taxed whatever the source of such income might be.

Counsel further submitted (a) that section 22 (2) of the Income Tax Laws, 1961–1969 is unconstitutional as being contrary to Article 24 of the Constitution because a discrimination results between married men who enjoy their income to a lesser extent depending on the wife's income over which they have no legal right and (b) that a discrimination results between married men whose wives derive income from their " labour" on the one hand and those wives who derive income from their property on the other hand contrary to Article 28 of the Constitution. Similarly, a discrimination results between married persons whose wives derive income from property and unmarried persons.

Counsel for the respondent contended (a) that the Commissioner rightly added the income of the wife to that of the applicant—being an income other than earned income—because that income is derived through the exercise of the right to possess property under Article 23 of the Constitution; (b) that such income derived from rents is not income out of business; and (c) section 22 (2) of the Income Tax Laws, 1961–1969 is not unconstitutional unless the Court is persuaded beyond reasonable doubt and the onus remains on the applicant alleging unconstitutionality.

Held, (I) With regard to point (a):

(1) The wife of the applicant is not carrying on a business by letting 6 shops and 2 flats, because in doing so it does not take or occupy her time, attention and her labour for the purpose of profit.

(2) The Commissioner has not misdirected himself as to the law, because her income does not fall within section 22 (1) and all other relevant sections of the previous laws, once such income is derived from income from property, and is, therefore, an earned income (see section 22 (2)) and not income from her own labour as laid down in *Mikrommatis* case.

(3) For these reasons and because the production of the income does not need personal effort, but is derived through the exercise of the right to possess property under Article 23 of the Constitution, I would affirm the decision of the Commissioner and dismiss the contention of counsel on this point.

Held, (II) With regard to point (b) viz. the question of constitutionality of s. 22 (2):

(1) In law and in fact the wife's income whether it is income derived through her labour or income derived from property, is in the fullest degree her separate property and in no sense that of her husband.

(2) Any attempt by the Commissioner to measure the tax on one person's property, income or means by reference to the income of another is contrary to Article 24.1 of the Constitution which establishes the principle of fiscal equality whereby every person is bound to contribute according to his means towards the public burdens. (See, also, *Hoeper* v. *Tax Commission of Wisconsin,* 76 Law. Ed. U.S. 248).

(3) Once the income of the applicant's wife is not in fact the taxpayer's income, cannot be made such by calling it income; and that it is incorrect to say that section 22 (2) retains or re-establishes an incident of the marriage relation.

(4) The addition of the unearned income of the wife to that of the applicant brings about the inequality safeguarded by Article 28 and results in a discriminatory treatment between married men who enjoy their income to a lesser extent depending on the wife's income over which, they have no legal right. Similarly, a discrimination results between married men whose wives derive income from their labour on the one hand and those whose wives derive income from their property on the other hand.

(5) I would, therefore, uphold counsel's contention and declare that the Income Tax enactments between 1961–1969,

are unconstitutional beyond reasonable doubt and as a result I find that the decision of the respondent is *null* and *void* and of no effect whatsoever because the wife of the applicant ought to have been taxed separately whether the income is derived through the exercise of her labour or through income from property.

Held, (*III*) *With regard to the submission concerning the Mikrommatis* case:

(1) As it is difficult to discern with certainty the facts in issue in the *Mikrommatis* case, in order to extract the *ratio decidenti* and as it is not clear whether the facts of that case made it necessary for the Court to decide whether the unearned income of a wife derived from a source other than her labour should be added to that of the husband for income tax purposes, I find myself unable to follow the "second leg" of the said decision and I feel free to depart from it because I am not bound by such decision once it appears to me the right thing to do so. (See, also, *Constantinides* v. *The Republic* (1969) 3 C.L.R. 523, at p. 553).

(2) The said decision (*viz.* the second leg) should not be followed for one more reason. Before the merger of the Supreme Constitutional Court and the High Court, the Constitutional Court was trying and determining cases of administrative law, under Article 146 of the Constitution, at first instance, and in that way its jurisdiction is similar to that exercised by a single Judge of the present Supreme Court trying a case of administrative law under Law No. 33 of 1964.

(3) The doctrine of precedent in its various manifestations, operates so as to bind Courts in the lower line of the ladder of hierarchy of Courts. (See *Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801 at pp. 809–810). And it is for this reason that judgments of one High Court Judge in England are not binding on another Judge of the High Court, but are merely of persuasive authority. These reasons apply with equal force to judgments of the then Supreme Constitutional Court of Cyprus which have only persuasive authority on another Judge of this Court.

Sub judice decision annulled.

Cases referred to:

In Re-Tax Collection Law 31 *of* 1962 and *HjiKyriakos and Sons Ltd.*, 5 R.S.C.C. 22 at p. 29;

Kyriakides and *The Republic*, 4 R.S.C.C. 109;

Lyssiotou and *The Republic*, 5 R.S.C.C. 19;

Mikrommatis and *The Republic*, 2 R.S.C.C. 125;

Derry v. *Commissioner of Inland Revenue*, 13 T.C. 30 at p. 36;

Nugent-Head v. *Jacob* (*Inspector of Taxes*), 30 T.C. 83;

Lady Miller v. *Commissioner of Inland Revenue*, 15 T.C. 25, at p 49;

Currie v. *Commissioners of Inland Revenue*, 12 T.C. 245 at p. 246;

Inland Revenue Commissioners v. *Maxse*, 12 T.C. 41 at p. 61;

Erichsen v. *Last* [1881-82] 8 Q.B.D. 414 at p. 420;

Smith v. *Anderson* [1880] 15 Ch. D. 247 at pp. 258-259;

Stuchbery & Son v. *General Accident Fire & Life Assurance Corp. Ltd.* [1949] 1 All E.R. 1026;

East v. *Watson*, 43 T.C. 472;

Leitch v. *Emmott* (*Inspector of Taxes*) [1929] 14 T.C. 633 at p. 643;

Re Cameron (*deceased*) [1965] 3 All E.R. 474;

Murphy v. *Ingram* [1973] 2 All E.R. 523;

In re Ward, Harrison v. *Ward* [1922] 1 Ch. D. 517, at p. 520;

Albert A. Hoeper v. *Tax Commission of Wisconsin*, 76 Law. Ed. U.S. 248;

Calder v. *Bull*, 3 Dall. 386, 399 (1798);

Ogden v. *Saunders*, 12 Wheat. 212 (1827);

Alabama State Federation of Labour v. *McAdory*, 325 U.S. 450 (1945);

Board for Registration of Architects and Civil Engineers v. *Kyriakides* (1966) 3 C.L.R. 640;

Attorney-General v. *Ibrahim*, 1964 C.L.R. 195;

Chimonides v. *Manglis* (1967) 1 C.L.R. 125;

Ansor Corporation v. *Republic* (1969) 3 C.L.R. 325, at pp. 338–339;

United States v. *C.I.O.*, 335 U.S. 106 (1948);

Miller v. *United States*, 11 Wall. 268 (1871);

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1935); (80 Law. Ed. 688);

Burdon v. *United States*, 196 U.S. 283, 295, 49 Law. Ed. 482, 485, 25 S. Ct. 243;

Liverpool, N.Y. & P.S.S. Co. v. *Emmigration Comrs.* 113 U.S. 33; 28 Law. Ed. 899 5 S. Ct. 382;

Pavlides v. *Republic* (1967) 3 C.L.R. 217 at p. 230;

Royster Guano Co. v. *Commonwealth of Virginia*, 64 Law. Ed. 989;

Norton v. *Shelby County*, 30 Law. Ed. 178;

Chicot County Drainage District v. *Baxter State Bank*, 84 Law. Ed. 329;

Papageorghiou v. *Komodromou* (1963) 2 C.L.R. 221;

Constantinides v. *The Republic* (1967) 3 C.L.R. 483, at p. 492;

Loizides and *The Republic*, 1 R.S.C.C. 107;

Conway v. *Rimmer* [1967] 2 All E.R. 1260 at p. 1263;

Constantinides v. *Republic* (C.A.) (1969) 3 C.L.R. 523, at pp. 534–535, 553;

Cassell & Co. Ltd. v. *Broome* [1972] 1 All E.R. 801 at p. 836;

Flower v. *Ebbw Vale Steel, Iron & Coal Co. Ltd.* [1934] 2 K.B. 132 at p. 154.

Decision of the Greek Council of State No. 2974/71:

Recourse.

Recourse against the validity of the income tax assessments raised on applicant for the years of assessment 1961–1968.

A. Triantafyllides, for the applicant.

A. Evangelou, Counsel of the Republic, for the respondents.

Cur. adv. vult.

The following judgment* was delivered by:-

HADJIANASTASSIOU, J.: Our Constitution in Article 24.1 establishes the principle of fiscal equality whereby every person is bound to contribute according to his means towards the public burdens.

Thus on the basis of this constitutional provision (as observed by Svolos—Vlahos, the Constitution of Greece vol. 1 p. 223 on a similar provision of the Greek Constitution) " it is imperative that in each case the appropriate authority should proceed with the ascertainment of the 'taxable capacity' (Capacité fiscale) of each tax payer and on the basis of such ascertainment alone, any difference in the charging of the tax payers, by assessing their different financial position, does not constitute a contravention but a realization of the principle of equality".

And in order to ascertain such " taxable capacity" there should be used objective criteria. One such criterion is mentioned in paragraph 4 of the same Article 24 whereby it is provided that " no tax, duty or rate of any kind whatsoever other than customs duties shall be of a destructive or prohibitive nature" but this is not the only criterion.

The endurance of each person to taxation will be judged in accordance with his income and his lawful obligations. The determination of every person's income is not an easy matter because such income does not consist of the gross income of each one but there should be deducted therefrom various amounts for the production thereof and which are also necessary for the payment of the lawful obligations of the tax payer. Cf. In *Re-Tax Collection Law* 31 *of* 1962 *and HjiKyriakos and Sons Ltd.*, 5 R.S.C.C. 22 at p. 29 E – G.

In accordance with the provisions of s.5 of the Income Tax Laws 1961–1969 (the charging section) " tax shall, subject to the provisions of this law, be payable at the rate or rates specified hereafter for each year of assessment upon the income of any person accruing in, derived from, or received in the Republic in respect of

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade,

* An appeal has been lodged against this judgment. The appeal has been heard and judgment thereon was delivered on 8.9.1977.

business, profession or vocation may have been carried on or exercised;

.....

(d) any dividend, interest or discount; and

.....

(f) any rent..... or other profit arising from property, including the value of the benefit derived from any additions or alterations or both made to structures, buildings or works at the expense of the tenant in case such additions or alterations or both shall upon the termination of the tenancy become the property of the owner".

Because the Commissioner of Income Tax assessed against the tax payer, the applicant, a tax computed on the combined total of his and his wife's income, treating the aggregate amount as his income, he wrote on March 6, 1970, (*exhibit* 2) complaining to the Commissioner in these terms:-

" I refer to the assessments of Income Tax for the years 1966, 1967 and 1968, and I hereby give you notice of objection as follows:-

1. The amounts of income in each assessment as assessed by you is excessive and unfounded.

2. The amount of tax imposed on me is excessive.

3. The assessments complained of are wrong in principle because you have added the income of my wife on to that of myself.

My wife's income consists of rents derived from immovable property built and or developed by my wife who, in that respect, undertook an enterprise of her own.

Particulars :-

A. *Six shops at Kimon Coast, Kyrenia*:-

They were build,

(i) through my wife's surrendering other property in favour of her father who in return advanced to her the sum of £1005, and

(ii) by my advancing to her the sum of £1263 which sum was later returned to me.

B. *Two flats at Themistocles Street, Kyrenia*:–

They were built,

(i) through the proceeds of dividends received from the Catsellis Hotel, Ltd.,

(ii) from rents received by my wife,

(iii) with money borrowed from the Bank of Cyprus Ltd.

None of the above, that is to say A and B formed part of my wife's dowry. Her only dowry was her house at Kyrenia.

On the basis of the above I submit as follows:–

(a) The income of my wife should be considered as having been derived through the exercise of her right guaranteed under Article 25 of the Constitution, *i.e.*, through trade or business, or

(b) if the above submission is not correct then the relevant enactment providing for the separation of the wife's income derived from profession, trade or business as distinct from income from other sources is unconstitutional, contrary to Articles 24 and 28 of the Constitution. In this respect Mikrommatis case (2 R.S.C.C., page 125) should be considered so that the wife's income from whatever source should be separately taxed".

On April 4, 1970, the Commissioner in reply (*exhibit* 3) said:–

"I refer to the interviews you had with officials of this Department and to your claim that your wife's rents and other income are not assessable on you but on her, and to inform you that I have decided to determine your outstanding objections for the years of assessment 1961–1968, as per attached Notices of Tax Payable. My decision is based on the contents of section 22 (2) of the Income Tax

Laws, 1961 to 1969, and sections 13 (3) and 20 (5) of the Taxes (Quantifying and Recovery) Law 53/1963 as amended.

2. As you failed to submit Income Tax Returns for all these years, I had no alternative but to determine your assessments according to the best of my judgment.

3. If you feel aggrieved (and since you expressed the wish to fight your point in the High Court), your attention is drawn to section 21 of the Taxes (Quantifying and Recovery) Law 53/1963 as amended".

On June 5, 1970, the applicant who is a member of the judicial service, feeling aggrieved because of the determination of his objections for the years of assessment 1961–1968, filed the present recourse under Articles 146, 24 and 25 of the Constitution seeking the following relief:–

" (a) Declaration that assessment Nos. G38/AD/62/EX, G488/AD/67/62/4, G489/AD/69/63/4, G490/AD/67/64/4, G491/AD/67/65/4, G923/AD/70/66, G924/AD/70/67, G3492/68/69 are *null* and *void* and of no effect whatsoever.

(b) Declaration that the decision of the respondents to *impose on applicant income tax and/or additional income* tax as follows:–

Years of Assessment	Income Tax
1961	246.465 mils
1962	313.930 mils
1963	301.540 mils
1964	321.030 mils
1965	325.780 mils
1966	345.030 mils
1967	365.030 mils
1968	460.985 mils

or any other income tax or at all is *null* and *void* and of no effect whatsoever".

On June 19, 1970, the respondents opposed the application, stating that the recourse is against the assessments for the years of assessment 1961 (1960) up to and including 1968 (1967), which are raised and determined as per Schedule 'A' (which

gives details of income declared, assessments raised and determined as well as the tax paid and tax payable). The opposition is based on the following grounds of law:-

"(i) That the assessments complained of were properly and lawfully raised under the following provisions after all relevant facts and circumstances were taken into consideration.

Year of Assessment	*Law under which the assessments were raised.*
1961 (60)	Sections 4 (1) (f), 18 (1) (2) and 27 (3) of the Greek Communal Law, No. 16/61 as amended by Law No. 8/62.
1962 (61)	
1963 (62)	
1964 (63)	Sections 3, 13 (3), 23 and 50 (4) of the Taxes (Quantifying and Recovery) Law No. 53/63.
1965 (64)	
1966 (65)	Sections 3, 13 (3), 23 and 50 (4) of the Taxes (Quantifying and Recovery) Law No. 53/63 as amended by Law No. 61/69.
1967 (66)	
1968 (67)	

(ii) That the determination of the objections was properly and lawfully made under section 20 (5) of the Taxes (Quantifying and Recovery) Law No. 53/63 as amended by Law 61/69, after all relevant facts and circumstances were taken into consideration.

(iii) That the decision of the respondents to add on applicant's income, his wife's income from rents was properly and lawfully taken under section 18 (1) and (2) of the Greek Communal Law No. 16/61 as amended by Law No. 8/62, section 21 (1) and (2) of the Greek Communal Law No. 18/62, section 21 (1) and (2) of the Greek Communal Laws Nos. 9/63, 7/64 and 2/65 and section 21 (1) and (2) of the Income Tax Law No. 58/61 as amended by Laws No. 4/63 and 21/66 after all relevant facts and circumstances were taken into consideration".

On June 20, 1970, counsel for the applicant filed further grounds of law (see blues 6 & 7).

On November 26, 1970, counsel on behalf of the respondents, before the opening address of counsel for the applicant, admitted that the assessment raised on the applicant for the year

1961, (year of assessment 1960) was wrongly made by the Commissioner because the assessment was made in the year 1962 under the provisions of the Greek Communal Law 16/61 (as amended by law 8/62) when there was no provision under the law enabling the Commissioner to raise such an assessment within a period of 6 years once he has not raised that assessment during the year in question. Counsel went on to state that though such assessments were made under Law 53/63, (which is a Quantifying and Recovery Law) yet this law was enacted in 1963.

Having heard the argument of counsel, in my view there is no doubt that counsel has followed a very fair and correct way in presenting his point in favour of the tax payer. If authority is needed, *Kyriakides* and *The Republic* (1963) 4 R.S.C.C. 109 provides the correct answer. This case was adopted and followed in *Lyssiotou* and *The Republic*, 5 R.S.C.C. 19. In the light of these judicial pronouncements, the assessment raised for the year 1961 is not recoverable, and once it is withdrawn is declared *null* and *void* and is, therefore, struck out.

I find it necessary to deal with the relevant legislation concerning the present case and to state that the Income Tax (Foreign Persons) Law, 1961 (Law 58/61) as amended by Law 4/63 did not originally apply to members of the Greek and Turkish communities, as such communities were liable to personal tax levied under respective communal laws, *viz.*, Laws 18/62 and 9/63 in respect of a particular year of assessment upon the chargeable income of a member of the Greek Community. The Income Tax (Foreign Persons) Amendment Law, 1966 (Law 21/66) amended the existing income tax (foreign persons) legislation to make them applicable to members of the aforesaid communities, by the deletion, *inter alia*, of the words "foreign persons" from the context of the aforesaid legislation, and as a result, we now have the Income Tax Laws, 1961–1969.

There is no doubt that before the decision of *Mikrommatis* and *The Republic*, referred to in the letter of the applicant, the Commissioner used to assess against the husband a tax computed on the combined total of his and his wife's incomes, treating the aggregate as the husband's income following the position in England, which was thus justified by Lord Sands in *Derry* v. *The Commissioner of Inland Revenue*, 13 T.C. 30 at p. 36:-

"*Lord Sands.*- Under No. 16 of the General Rules applicable to all the Schedules of the Income Tax Act, 1918, the separate income of a married woman is made assessable to Income Tax. By the first proviso it is directed that in the case of a married woman living with her husband her separate income shall be assessed and charged in the name of her husband as if it were part of his income. In other words, the Statute treats the income of a wife in ordinary circumstances as if it were part of the income of her husband. The reasons which suggested discrimination in the case of a wife not living with her husband are, I think, obvious. In the case of spouses living together there are reasons of convenience and, in the view of the Legislature, of fiscal expediency in treating the income as joint, and the arrangement may be justified by the consideration that in the normal case it really is in effect joint, the spouses being as one person with common interests and responsibilities. But this consideration does not apply to the case where they are separated, and in that case it might be unjust and unreasonable to treat the income of the two as if it were really joint and make the husband assessable in respect of the joint income".

See also *Nugent-Head* v. *Jacob* (*Inspector of Taxes*), 30 T.C. 83.

I should have added that in such cases the husband was always given by the law certain relief regarding a wife living with him. It is interesting to note that some years later, the Lord President (Clyde) dealing with income arising from the ownership of lands under the Income Tax Act, 1918, had this to say in *Lady Miller* v. *Commissioner of Inland Revenue*, 15 T.C. 25, at p. 49.

"It is a fundamental and, I think, a fatal objection to this argument that it seeks to add, for the purposes of the Income Tax Act, 1918, to the actual income which the tax-payer puts, or could (if he pleases) put, into his pocket a fictional or supposititious income, which does not reach, and could not possibly reach, that destination. The Income Tax Act nowhere defines 'income', and it follows that this word—which limits and controls the scope of the entire Income Tax system—must be interpreted in its plain and ordinary meaning. If that be done, fictional or supposititious contributions to the taxpayer's income must

be ruled out of consideration. For it is not to be inferred, without clear words for the purpose, that a taxing Act which selects the taxpayer's income as the measure of his liability includes in that measure anything more, or other, than the income actually received or receivable by him—least of all income which is only attributed to him by a fiction. The Courts, including particularly the Court of last resort, have so far uniformly endeavoured to construe the word 'income' consistently with those principles. One of the most recent examples is to be found in the case of *Brown* v. *National Provident Institution*, 8 T.C. 57, [1921] 2 A.C. 222. It is nothing to the point that the Act provides in most of the Schedules more or less artificial modes of estimating the amount of the taxpayer's income, once it is ascertained that he did receive such income. Nor is it anything to the point under which of the Schedules the taxpayer may be liable to be assessed. For the tax under Schedule A is just as much a tax on income as the tax under any other Schedule (*London County Council* v. *Attorney-General*, 4 T.C. 265, at pp. 293-4 and 301, [1901] A.C. see especially pp. 35-36 and 45). It is perhaps not irrelevant to bear in mind that claims for exemption and abatement, based on a disclosure of the taxpayer's total income from all sources, have been a feature of the Income Tax system for three quarters of a century at least; and, if the argument of the Inland Revenue is well founded, the Income Tax Acts must be credited with having all along contained the design of artificially loading the income of a claimant (entitled similarly with the appellant to the right or privilege of personal residence in a dwelling-house) with the same fictional or supposititious contribution as is alleged by the Inland Revenue in the present case to arise to the appellant's income. The disclosure of the taxpayer's total income from all sources is the same whether the object of the disclosure be to ascertain whether it falls within the limits of exemption from Income Tax or within the limits of liability to super-tax".

Before dealing with the submissions of counsel, I think, it is constructive to state that under the provisions of the Income Tax (Foreign Persons) Law, 1961, (Law 58/61) s.2 defines "earned income" as income derived from any trade, business, profession, vocation, employment, pension or annuity, if such pension or annuity is granted on account or in respect of employ-

ment; s. 20 of the same law, deals with deduction in respect of wife or wife's income, and " in ascertaining the chargeable income of any individual who is married and whose wife lives with him, a deduction of £50 shall be allowed in respect of his wife. Provided that if the wife derived income from any annuity not granted in respect of past services, or, from the letting of buildings, which has been included in his own income, there shall be allowed a further deduction equal to the amount of such income of the wife but in no case exceeding £100"; and under s. 21 (1) (which deals with wife's income), " the income of a married woman living with her husband, shall for the purposes of this law, be deemed to be the income of the husband and shall be charged in the name of the husband....." and in subsection (2) one reads that " for the purposes of subsection (1) of this section, the expression ' income of a married woman' shall include any income other than income derived by a married woman from the exercise of the right safeguarded under Article 25 of the Constitution".

It appears that the authority of the Commissioner in ascertaining the chargeable income of the applicant is found in the provisions of Law No. 60/69 and under s.15 of the said law ss. 20 & 21 of the principal law are hereby repealed and the following sections substituted therefor:

> " 22–(1) The earned income of a married woman living with her husband shall, for the purposes of this Law, be assessed separately on her.
>
> (2) Any income other than earned income *derived by a married woman* living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:
>
> Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife charged in the name of the husband bears to the total income of the husband and wife charged on the husband notwithstanding that assessment has not been made upon her".

And in sub–section (3):–

> " Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own

name in respect of income received in her own right but chargeable on her husband where the husband is absent from the Republic".

What is said by counsel for the applicant here is two-fold. His first point is (a) that because the earned income of the wife of the applicant is derived from the letting of shops and flats, the Commissioner misdirected himself as to the law once such income is within the aforesaid s.22(1) of the Income Tax Laws, 1961–1969 (and other earlier similar sections) which were enacted because of the decision in *Mikrommatis* case; and (b) that her income derived from the exercise of a business safeguarded by Article 25 of the Constitution ought not to have been assessed or added to the income of the applicant, but assessed separately on her.

On the contrary, counsel for the respondents contended (a) that the Commissioner rightly added the income of the wife to that of the applicant,—being an income other than earned income—because that income is derived through the exercise of the right to possess property under Article 23, and not through her right safeguarded by Article 25; and (b) that such income derived from rents is not income out of business, and one finds further support because the rents are chargeable under s. 5 (1) (f) of the relevant law, and not under the aforesaid charging section where a distinction is made between income derived from business, profession, vocation..... and income from rents.

I think there is no doubt that if the Commissioner had assessed separately the income of the wife, the applicant would have been taxed with a lesser amount, and I find myself in agreement with both counsel that it is necessary to see whether the present case comes within the decision of *Mikrommatis* (*supra*) *i.e.* whether the income derived from the letting of flats comes within the wording of " income from her own labour". I, therefore, turn to the case of *Argiris Mikrommatis* and *The Republic* (*Minister of Finance and Another*) (1961) 2 R.S.C.C. 125, and the headnote reads:-

" The applicant is a farmer residing at Astromeritis, who, on the 2nd March, 1961, after some correspondence with, and meetings at, the Income Tax Office, was informed that the income tax payable by him in respect of the years 1954 to 1960, both inclusive, amounted to £74 odd.

It is the allegation of the applicant that the assessment of his income and the resulting tax were made arbitrarily as, during those years, he did not earn any taxable income.

The applicant subsequently alleged, by leave of the Court, that section 19 of the Income Tax Law, Cap. 323, was unconstitutional as contravening Articles 6, 24 & 28 of the Constitution".

Pausing here for a moment, I would like to make this observation, that I have called for the original file of the aforesaid Case No. 28/61, and, unfortunately, I was unable to find any further facts regarding the question whether or not the wife of *Mikrommatis* had any kind of income and that such income was added to the income of her husband under the relevant legislation at the time. Subject to this observation, I revert again to Mikrommatis, and it appears that the Court before delivering its interim decision holding that s. 19 of the Income Tax Law, Cap. 323 is unconstitutional in so far as it applies to the income of a wife derived from her own labour, heard argument from both counsel. Counsel for the applicant submitted that that section was contrary to Articles 6 and 28 of the Constitution as being discriminatory between the sexes and between married and unmarried persons as well as contrary to Article 24 *inasmuch as the application of s. 19 resulted in the wife* and husband concerned being taxed not " according to his or her own means", but according to the combined means of both. On the contrary, counsel for the respondents argued that that section was constitutional because when a married couple were living together, their respective incomes constituted one financial unit and it was, therefore, proper to tax such incomes as one unit and that such a course was not discriminatory.

The Court, after dealing with Article 28 which deals with equality before the law, safeguarded under that Article, and after stating that the term " equal before the law" does not convey the notion of exact arithmetical equality but that it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things, said at pp. 131–132:–

" It follows, therefore, bearing in mind the intrinsic nature of the status of marriage and the relationship it creates between spouses, that reasonable distinctions in taxation legislation between married and unmarried persons do not

in principle offend against paragraph 1 or 2 of Article 28 and against paragraph 1 of Article 24.

The Court has examined section 19 of Cap. 323 in the whole context of Cap. 323 (including provisions such as allowance in respect of children and increased taxation on the income of unmarried persons) as well as against the background of the status of marriage as existing in Cyprus at present and it has come to the conclusion that, although the application of section 19 of Cap. 323 may result in the making of a reasonable distinction between married and unmarried persons, it does not discriminate against married persons, as such, and it is not, therefore, unconstitutional on such ground.

Coming now to the question whether the application of section 19 of Cap. 323 involves any discrimination on the ground of sex.

There is no doubt that a married woman whose income is added to that of her husband and is thereby taxed to a greater extent than if it were to be taxed separately, enjoys the income from her property or from her own labour to a lesser degree than any married man taxed separately in respect of similar income.

In the opinion of the Court the reason for such a differentiation between a married woman and any married man regarding income from property, as results from the application of section 19 of Cap. 323, is to be found in the community of life existing between spouses. The said community of life justifies treating the spouses, when living together, as one financial unit in this connection. Such differentiation, therefore, is nothing more than the making by taxation legislation of a reasonable distinction based on the intrinsic nature of the marriage and does not amount to a discrimination on the ground of sex.

In the case, however, of a married woman not being able, through the application of section 19 of Cap. 323, to enjoy, to the same extent as any married man, the income from her own labour, the position is quite different. In such a case a married woman is placed in a disadvantageous position vis-a-vis any married man in the same profession, occupation, trade or business. Such a differentiation is not a reasonable distinction based on the intrinsic nature

of the marriage nor is it otherwise justified. It, therefore, amounts to a discrimination on the ground of sex contrary to Article 28".

Finally, the Court went on:

"In this judgment the Court has used the expression 'income from her own labour' as meaning income derived from the exercise of the right safeguarded by Article 25 of the Constitution and 'income from property' as meaning income from all other sources".

Thus, it appears to me that the Court must have had some further facts before it regarding the question raised by me earlier, *i.e.* whether the wife of the applicant had income from her own labour or from property which was added to that of her husband. I repeat, unfortunately, that it was not possible to trace those facts. Be that as it may, the question posed is whether the income derived from the letting of buildings is within the first leg of the principle expounded in *Mikrommatis* or whether it is income from property only.

In view of the concluding words of the Court in its judgment, and particularly because the expression "income from her own labour" has been defined by Court, I think I must turn to Article 25 of the Constitution which safeguards to everyone the right to practise any profession or to carry on any occupation, trade or business. Although no definition appears in the said Article regarding those words, counsel on behalf of the applicant has invited the Court to accept the view, to which counsel on behalf of the respondents took exception, that the letting of shops and flats is deemed to be the carrying on of a business within the provisions of subsection 7 (d) of s. 12 of Law 58/61, where for the purposes of this subsection the word "business" shall include the letting of buildings.

I think the short answer to this is that I find myself unable to agree with counsel on this issue because I do not think that I can derive any help in answering what is the meaning of business from the wording of this sub-section; and if one reads the whole of section 12, which deals with deductions and additions on account of property used in trade etc., it is clear that the purpose of that section is to allow those deductions regarding buildings owned by a person engaged in a trade, business etc. for the benefit of such trade... vocation or employment, and was not intended to define what is a business, parti-

cularly so when the income derived from the letting of buildings appears in the charging section, as I have said earlier in this judgment, in s. 5 (1) under (f) and not under (a) which deals with gains or profits from any trade, business, etc. etc.

As I said earlier, in the absence of any definition regarding the term " business", I think I can turn for guidance to cases decided by the Courts in England under the Income Tax Acts and I think that it is necessary at this stage to state that our legislation regarding the Income Tax Laws was modelled on the lines of the English Income Tax Acts.

In England the question whether a person carries on a trade or a profession is one of fact to be determined by the Commissioners before whom the question comes on appeal, and where there is evidence to support their finding and they have not acted on a wrong principle, the Court has no jurisdiction to interfere with their finding (*Currie* v. *Commissioners of Inland Revenue*), 12 T.C. 245 at p. 246). The Income Tax Acts, as I said earlier, do not contain any definition of profession, and, although the following definition is not necessarily exhaustive, it may be useful as a guide. A profession involves the idea of an occupation requiring either purely intellectual skill or, if in manual skill, as in painting and sculpture or surgery, skill controlled by the intellectual skill of the operator as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of the commodities. (*Inland Revenue Commissioners* v. *Maxse*, 12 T.C. 41 at p. 61 per Scrutton L.J.). A person carries on trade or business when he habitually does and contracts to do a thing capable of producing profit.

In *Erichsen* v. *Last* [1881–82] 8 Q.B.D. 414 Cotton L.J. said at p. 420:–

> " In this case the trade or business which the company carry on is that of collecting messages for transmission to various parts of the world, and although the company have their principal place of business, and I will assume their management, at Copenhagen, still, in my opinion, they carry on or exercise their trade or business within the United Kingdom. With reference to the argument which was much pressed upon us by Mr. Bremner, that a company does not carry on its business except where its place of management is, I wish to say that, however true that

may be as regards the meaning of the words 'carry on, or exercise business' in some Acts of Parliament, it is not the true interpretation of those words in this Act of Parliament, where the object is not to see where a company is to be sued; but what duty on profits it is to pay in this country. Then as to the question on what profit the company are to pay? The question is, what profit they make by the business carried on here which is contracting to send messages to various parts of the world".

In *Smith* v. *Anderson* [1880] 15 Ch. D. 247, Jessel M. R. dealing with the question when a person carries on a business, said at pp. 258–259:–

> " ..... anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification. Then, ' Business' is a particular occupation, as agriculture, trade, mechanics, art, or profession, and when used in connection with particular employments it admits of the plural that is, businesses".

Later on he said:–

> " In addition to the two dictionaries I have also looked at the case of *Harris* v. *Amery*, Law Rep. 1 C.P. 148, in which forty-six people hired some land to carry on a farm, that is, they carried on the farm between them. A single man carrying on a farm may farm his own land, but he is carrying on a business".

Cf. *Stuchbery & Son* v. *General Accident Fire & Life Assurance Corp. Ltd.* [1949] 1 All E.R. 1026; *East* v. *Watson*, 43 T.C. 472; and also the Decision of the Greek Council of State No. 2974/71 in which the Council decided that the letting of buildings does not constitute an exercise of carrying on a business for the purposes of income tax, which is reported in Cyprus Law Tribune vol. 2-3 dated March–April 1973 at pp. 74–75.

Having heard full argument on behalf of the applicant and the respondents, and applying these principles to the facts of the present case, one, with respect, can hardly find any difficulty in reaching the conclusion that the wife of the applicant is not carrying on a business by letting 6 shops and 2 flats in Kyrenia because in doing so, it does not take or occupy her time, attention and her labour for the purpose of profit.

In the light of the above statement, I find that the Commissioner did not misdirect himself as to the law, because, I repeat, her income does not fall within s. 22 (1) of the Income Tax Laws, 1961–1969 and all other relevant sections of the previous laws, once such income is derived from income from property, and is, therefore, an income other than earned income (see s. 22 (2)) and not income from her own labour as laid down in *Mikrommatis supra.*

For these reasons, and because the production of the income does not need personal effort but is derived through the exercise of the right to possess property under Article 23, I find myself in agreement with counsel for the respondents and, therefore, I would affirm the decision of the Commissioner, and dismiss this contention of counsel for the applicant on this point.

Before dealing with the second point of counsel for the applicant, I would like to point out that in reading both the new subsection 2 of s. 22 of the Income Tax Laws, 1961-69, "any income other than earned income derived by a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband", and its proviso, one inevitably in construing the said provisions and particularly the words used " shall be deemed to be the income of the husband", would reach the view that it does not follow that the income of the wife would belong to the husband, but it continues to remain her income and, therefore, her own property.

That this is so one finds further support in Halsbury's Laws of England, 3rd ed., vol. 20 at p. 381 paragraph 693, where it is observed that "The effect of the general rule is to make the husband the channel through which the collection of tax in respect of his wife's income is effected; *but her income remains her property* (the underlining is mine) and on the death of her husband usually is assessable personally in respect of it".

In *Leitch* v. *Emmott* (*Inspector of Taxes*) [1929] 14 T.C. 633 at p. 643, Lawrence L.J. had this to say:-

> " It is clear, to my mind, therefore, that the married woman is charged to tax in respect of her income for the year of assessment, to be measured by the income from the same investments received by her in the preceding year, thus shewing that the income for the purpose of the charge and of the measure of the tax is treated as her income. The

proviso does not alter the character of the income charged to tax or the measure of the tax, but merely provides, with the object of facilitating the collection of the tax, that the assessment and charge shall be made in the name of the husband and for that purpose the wife's income shall be treated as the income of the husband. This provision does not, in my opinion, operate to convert the income of the wife into income of the husband further than is necessary for the purpose of collecting the tax; with the result that it affords no valid ground for the contention that there was no income arising from the wife's investments in the year preceding the year of assessment within the meaning of Rule 2 of Case III".

The reasoning behind this case was approved and followed in the case of *Re Cameron (deceased)* [1965] 3 All E.R. at p. 474; and distinguished in *Murphy* v. *Ingram* [1973] 2 All E.R. 523.

The foregoing general rule does not operate to give the husband a right of indemnity against his wife's estate in regard to the tax charged on him in respect of her income. Cf. the Laws of England op cit, pp. 381, 382.

In *re Ward Harrison* v. *Ward* [1922] 1 Ch. D. 517, Peterson, J., dealing with the income of the wife living with her husband, had this to say at p. 520:-

> " The result, therefore, in my view, is that the liability to tax in the case of a married woman living with her husband is thrown upon the husband and not upon the wife".

In the light of these judicial pronouncements, it follows that the property of the income belongs to the wife and that the husband in no case is enabled to charge or to ask from his wife the part of the tax which he paid because her income was added on to his own.

With this in mind, I propose dealing with the second point aken by counsel for the applicant, which is that *Mikrommatis* case should be reconsidered so that the income of spouses should be separately taxed whatever the source of such income might be. Furthermore, counsel contended (a) that s. 22 (2) of the Income Tax Laws, 1961–1969 is unconstitutional as being contrary to Article 24 of the Constitution, (as is also every similar section in all income ax enactments from 1961–1969),

because a discrimination results between married men who enjoy their income to a lesser extent depending on the wife's income over which they have no legal right; and (b) that a discrimination results between married men whose wives derive income from their "labour" on the one hand and those wives who derive income from their property on the other hand contrary to Article 28 of the Constitution. Similarly, a discrimination results between married persons whose wives derive income from property and unmarried persons. He relies on the authority of *Albert A. Hoeper* v. *Tax Commission of Wisconsin*, 76 Law. Ed. U.S. p. 248. On the contrary, counsel for the respondents contended that .. 22 (2) of Laws 1961–1969 is not unconstitutional unless the Court is persuaded beyond reasonable doubt and the onus remains on the applicant alleging unconstitutionality.

Regarding the question of unconstitutionality of s. 22 (2) of the Income Tax Laws, 1961–69, I think I must reiterate what has been said in a number of cases, that "a rule of precautionary nature is that no act of legislation will be declared void except in a very clear case, or unless the act is unconstitutional beyond all reasonable doubt". (*Calder* v. *Bull*, 3 Dall. 386, 399 (1798)). Sometimes this rule is expressed in another way, in the formula that an act of Congress or a State Legislature is presumed to be constitutional until proved otherwise 'beyond all reasonable doubt'; *Ogden* v. *Saunders*, 12 Wheat. 212 (1827); and other cases ending with Alabama State *Federation of Labour* v. *McAdory*, 325 U.S. 450 (1945); these cases were adopted and followed in the *Board for Registration of Architects and Civil Engineers* v. *Christodoulos Kyriakides* (1966) 3 C.L.R. 640. Also, *The Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195; *Constantinos Chimonides* v. *Evanthia K. Manglis* (1967) 1 C.L.R. p. 125; and *Ansor Corporation* v. *The Republic* (1969) 3 C.L.R. 325, at pp. 338–339.

Furthermore, it has been said that it is a cardinal principle that if at all possible the Courts will construe the statute so as to bring it within the law of the Constitution; *United States* v. *C.I.O.*, 335 U.S. 106 (1948); *Miller* v. *United States*, 11 Wall. 268 (1871); and that the judicial power does not extend to the determination of abstract questions. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1935); (80 Law. Ed. 688). "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the

case"; *Burton* v. *United States*, 196 U.S. 283, 295, 49 Law. Ed. 482, 485, 25 S. Ct. 243. 'The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied': *Liverpool, N.Y. & P.S.S. Co.* v. *Emigration Comrs.* 113 U.S. 33; 28 Law. Ed. 899, 5 S. Ct. 382.

In the case of *Hoeper* v. *Tax Commission of Wisconsin*, U.S. Supreme Court Reports, 76 Law. Ed. U.S. 248, a case which is on all fours with the present case, the facts are these:- The appellant married in the year 1927. Subsequent to his marriage he was in receipt of income taxable to him under the income tax statute of the state, and particularly s. 71.05 (2) (d) and s. 71.09 4 (c). Under the first section, in effect, the income of the wife shall be added to that of the husband and the taxes levied shall be payable by the husband, but if not paid by him may be enforced against any person whose income is included within the tax computation; and under the second section, although married persons living together as husband and wife were given the right to make separate returns or join in a single joint return, again in either case the tax should be computed on the combined average taxable income of both. The wife of the appellant during the same period received taxable income, composed of a salary, interest and dividends and a share of the profits of a partnership with which her husband had no connection. The assessor of income assessed against the appellant a tax computed on the combined total of his and his wife's income as shown by separate returns, treating the aggregate as the husband's income. The amount was ascertained and assessed and exceeded the sum of the taxes which would have been due had their taxable incomes been separately assessed. Appellant paid the tax and instituted proceedings to recover so much of the tax which was in excess of the tax computed on his own separate income. He ascertained that the statute as applied to him violated the 14th Amendment. The Supreme Court of Wisconsin overruled this contention and confirmed the judgment for the appellees.

The question before the Supreme Court of the United States was whether the state law, as interpreted and applied, deprives the tax payer of due process and of the equal protection of the law. The appellant says that what the State has done is to assess and collect from him a tax, based in part upon the income received by his wife and that such exaction is arbitrary and

discriminatory, and consequently, violative of the constitutional guarantees. On the contrary, the Attorney-General submitted on behalf of the appellees that practical considerations upon which legislature may well have relied are sufficient to sustain the law in question; and that under Wisconsin laws the husband still has substantial pecuniary advantages from the property and income of the wife which are not possessed by other persons; and the fact that evasion of just income taxation (higher rates for higher incomes) would be easier if the incomes of husband and wife were not combined and tax assessed on this basis is a further consideration supporting the law.

The appeal was allowed by majority and I propose starting to read first from the dissenting judgment delivered by Mr. Justice Holmes with which Mr. Justice Brandies and Mr. Justice Stone concurred in that opinion. There is no doubt that Mr. Justice Holmes echoed in his dissenting judgment almost the same line of thinking as that taken by Lord Sands in *Derry's* case (*supra*) and had this, *inter alia*, to say at p. 253:–,

> " The statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that one, the husband; and that as the husband took the wife's chattels he was liable for her debts. They form a system which echoes of different moments none of which is entitled to prevail over the other. The emphasis in other sections on separation of interests cannot make us deaf to the assumption in the sections quoted of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source. So far as the Constitution of the United States is concerned the legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property and shall or shall not be liable for his wife's debts it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. Taxation may consider not only command over but actual enjoyment of the property taxed".

Later on, he had this to say at pp. 253–254:–

> " The statute is justified also by its tendency to prevent tax evasion. No doubt, if, as was held in *Schlesinger* v. *Wis-*

consin, 270 U.S. 230, 70 Law. Ed. 557, 43 A.L.R. 1224, 46 S. Ct. 260, with regard to the measure then before the Court, there was no reasonable relation between the law and the evil, the statute could not be upheld. But the fact that it might reach innocent people does not condemn it. It has been decided too often to be open to question that administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class".

I now turn to the judgment of the majority delivered by Mr. Justice Roberts who, after dealing with the status of women, that they have the same rights as men in the exercise of sufferage, freedom of contract, choice of residence etc., in reversing the judgment of the Supreme Court of Wisconsin, had this to say at pp. 251–252:–

" Since, then in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in *Knowlton* v. *Moore*, 178 U.S. 41, 77, 44 Law. Ed. 969, 984, 20 S. Ct. 747, is apposite:

> ' It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems'.

We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the tax-payer's income cannot be made such by calling it income. (Compare *Nichols* v. *Coolidge*, 274 U.S. 531, 540, 71 Law. Ed. 1184, 1192, 52 A.L.R. 1081, 47 S. Ct. 710).

It is incorrect to say that the provision of the Wisconsin income tax statute retains or re-establishes what was formerly an incident of the marriage relation. Wisconsin has not made the property of the wife that of her husband nor has it made the income from her property the income of her husband. Nor has it established joint ownership. The effort to tax B for A's property or income does not make B the owner of that property or income, and whether the state has power to effect such a change of ownership in a particular case is wholly irrelevant when no such effort has been made. Under the law of Wisconsin the income of the wife does not at any moment or to any extent become the property of the husband. He never has any title to it, or controls any part of it. That income remains hers until the tax is paid, and what is left continues to be hers after that payment. The state merely levies a tax upon it. What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes.

The Court below assigned two reasons which it thought removed the Constitutional objections to the application of the statute in the instant case. It cited and followed the Income Tax Cases, 148 Wis. 456, L.R.A. 1915B, 569, 134 N.W. 673, 135 N.W. 164, Ann. Cas. 1930A, 1147. Where the statute here in question was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this Court in *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 70 Law. Ed. 557, 43 A.L.R. 1224, 46 S. Ct. 260, was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision. To this we cannot agree. In the Schlesinger Case this Court held invalid a statute which, for purposes of inheritance tax, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death.

To the argument of the necessity for such classification to prevent frauds and evasions, it was answered:

> ' That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the

federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever'.

The claimed necessity cannot justify the otherwise unconstitutional exaction.

The second reason assigned as a justification for the imposition of the tax is that it is a regulation of marriage. It is said that the marital relation has always been a matter of concern to the state, and has properly been the subject of legislation which classified it as a distinct subject of regulation. It is suggested that a difference of treatment of married as compared with single persons in the amount of tax imposed may be due to the greater and different privileges enjoyed by the former, and, if so, the discrimination would have a reasonable basis, and constitute permissible classification. This view overlooks several important considerations. In the first place, as is pointed out above, the state has, except in its purely social aspects, taken from the marriage status all the elements which differentiate it from that of the single person. In property, business and economic relations they are the same. It can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax.

Again, it is clear that the law is a revenue measure, and not one imposing regulatory taxes. It levies a tax on 'every person residing within the state' and defines the word 'person' as including 'natural persons, fiduciaries and corporations', and 'corporations' as including 'corporations, joint stock companies, associations or common law trusts'. It lays graduated taxes on the incomes of natural persons and corporations at different rates. It is comprehensive in its provisions regarding gross income and allowable deductions and exemptions, and is in most respects the analogue of the federal income tax acts in force since 1916. It is obvious that the act does not purport to regulate the status or relationships of any person, natural or artificial. Arbitrary and discriminatory provisions contained in it cannot be justified by calling them special regulations of the persons or relationships which are the

object of the discrimination. The present case does not fall within the principle that where the legislature, in prohibiting a traffic or transaction as being against the policy of the state, makes a classification, reasonable in itself, its power so to do is not to be denied simply because some innocent article comes within the prescribed class. *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 204, 57 Law. Ed. 184, 188, 33 S. Ct. 44. Taxing one person for the property of another is a different matter. There is no room for the suggestion that qua the appellant and those similarly situated the act is a reasonable regulation, rather than a tax law.

Neither of the reasons advanced in support of the validity of the statute as applied to the appellant justifies the resulting discrimination. The exaction is arbitrary and is a denial of due process".

Whilst on this point, I must also refer to the case decided by the German Federal Constitutional Court on December 12, 1957, and published in the Yearbook on Human Rights for 1957, under the heading " Equal Treatment in General". Counsel who relied on this case promised to try and translate the whole judgment, but unfortunately, although the case in hand was reopened in order to have the benefit of that German decision, on April 20, 1973, I have heard further argument without the translation of the case being available. In that case the joint assessment of married couples, which up to then had been legal and customary, had been declared by the Court on the 21st February, 1957, to be unconstitutional. Be that as it may, the report reads at p. 92:-

" The Federal Constitutional Court ruled on the 12th December, 1957 (BV ref. GE7/194) 'that no person could demand the adjustment of a tax assessment which had become final before the 21st February, 1957, on the ground of the principle of equality'. It was held by the Federal Constitutional Court 'that this involved violation of the Basic Law, since the certainty of the law and justice were equally essential features of the rule of law' and that 'the legislator was at liberty to decide to which of these two principles he wished to give preference; inequality thereby created did not offend against the principle of equality' ".

See also *Byron Pavlides* v. *The Republic* (*Commissioner of Income Tax and Another*) (1967) 3 C.L.R. 217 at p. 230, where the

reasoning behind that case was adopted and followed by this Court.

In *Royster Guano Co.* v. *Commonwealth of Virginia* (64 Law. Ed. 989), relied upon by counsel for the respondent, Mr. Justice Pitney had this to say at pp. 990–991:–

> "It is unnecessary to say that 'equal protection of the laws' required by the 14th Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this Court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy ..... Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory".

Having heard full argument on the question of the unconstitutionality of sub-s. 2 of s. 22 of the Income Tax Laws, 1961–69 by both counsel—to whom I am indeed indebted for their valuable work—and in the light of the impressive array of the authorities quoted, I have tried to draw on the wisdom of the American Judges who after careful deliberation in each case have formulated principles which I have adopted and followed as I am in agreement with the reasoning behind them, particularly so with the leading authority of *Hoeper* v. *The Tax Commission* (*supra*), which is on all fours with the facts of the present case. With this in mind and fully aware that the Court should not decide questions of a constitutional nature unless absolutely necessary to a decision of the case (*Burton* v. *United States* (*supra*)), I find myself in agreement with counsel for the applicant—this was not disputed—that in law and in fact the wife's income whether it is income derived through her labour or income derived from property, is n the fullest degree her separate property and in no sense that of her husband. The question, therefore, posed is whether the Commissioner has power by an income tax law to measure a husband's tax, not by his own income or means, but by that of his wife. I have

no doubt at all that in the light of *Hoeper's* decision and the observations I have made earlier in this judgment regarding paragraph 1 of Article 24, that any attempt by the Commissioner to measure the tax on one person's property, income or means by a reference to the income of another is contrary to paragraph 1 of Article 24 of our Constitution which establishes the principle of fiscal equality whereby every person is bound to contribute according to his means towards the public burdens. Furthermore, once the income of the applicant's wife is not in fact the taxpayer's income, cannot in my view be made such by calling it income; and that it is incorrect to say that subsection 2 of s. 22 retains or re-establishes an incident of the marriage relation or based on the intrinsic nature of the marriage which has been rejected in *Mikronmatis* case (*supra*) regarding income derived through a wife's labour. Under our law, I repeat once again, the income of the wife does not become the property of the husband because he never has any title to it or controls any part of it. That income remains hers and what the law does is to tax as a joint income that which under the law of Cyprus is owned separately and thus to secure higher tax than would be the sum of the taxes on the separate incomes.

For the reasons advanced, I have reached the view that the addition of the unearned income of the wife to that of the applicant brings about the inequality safeguarded by Article 28 and results in a discriminatory treatment between married men who enjoy their income to a lesser extent depending on the wife's income over which, as I said earlier, they have no legal right. Similarly, a discrimination results between married men whose wives derive income from their labour on the one hand and those whose wives derive income from their property on the other hand. In my opinion, therefore, subsection 2 of s. 22 and all other similar income tax enactments between 1961-1969, as applied to the applicant, do not justify such differentiation based on the intrinsic nature of marriage, because a married man is placed in a disadvantageous position vis-a-vis any other man with the same profession, occupation, trade or business whose wife earns an income through her labour, once such differentiation is not a reasonable distinction based on the intrinsic nature of the marriage, nor is it otherwise justified, because the exaction of tax is arbitrary. Moreover once our law is a revenue measure and not one imposing regulatory taxes—I think that I can do no better than quote the words of Mr. Justice Roberts in *Hoeper's* case, that " It is obvious

that the act does not purport to regulate the status or relationships of any person, natural or artificial. Arbitrary and discriminatory provisions contained in it cannot be justified by calling them special regulations of the persons or relationships which are the object of the discrimination". Those words seem to me to apply also to the case in hand. I would, therefore, uphold counsel's contention and declare that the enactments between 1961–1969, are unconstitutional beyond reasonable doubt and as a result I find that the decision of the respondents is *null* and *void* and of no effect whatsoever because the wife of the applicant ought to have been taxed separately whether the income is derived through the exercise of her labour or through income from property.

Needless to add that in examining the constitutionality of laws the Court does not annul the law found by it to be unconstitutional, but confines itself to not applying it in the particular case which is under consideration by the Court. The decision is effective in respect of the case in question only; no right can be derived therefrom by a third party. The law, however, remains in force and not even the Council of State is competent to annul the law. (See Kyriakopoulos on the Greek Administrative Law, 4th ed. vol. 1 at p. 108). See also Article 144.3 of our Constitution. Cf. *Norton* v. *Shelby County*, 30 Law. Ed. 178; also *Chicot County Drainage District* v. *Baxter State Bank*, 84 Law. Ed. 329.

Finally, the further question posed is whether in the circumstances of this case *Mikrommatis*' case should be reconsidered, as counsel on behalf of the applicant claimed, because it was wrongly decided in so far as it deals with the second leg of the judgment, *i.e.* " income from property".

I think I ought to add that in Cyprus judicial precedent may properly be regarded as a source of law, and the binding effect we attach to precedent is inherited from the English judicial system and the Courts are bound to follow the *ratio decidendi* of decided cases. In European systems, however, a law report is generally only persuasive and not authoritative. In Cyprus, the decisions of the Supreme Court are binding on inferior Courts and as at present advised, the Supreme Court of Cyprus sitting on appeal can change its mind and not follow precedent already laid down by it in a previous case if it is of opinion that the previous precedent was wrong. (*Papageorghiou* v. *Komodromou* (1963) 2 C.L.R. 221, particularly Vassiliades, J.,

(as he then was) in his dissenting judgment refused to follow a previous judicial precedent relating to adverse possession of immovable property).

In *Constantinides* v. *The Republic* (1967) 3 C.L.R. 483, Triantafyllides, J. (as he then was) felt free to depart from precedent when dealing with the case of *Loizides* and *The Republic*, 1 R.S.C.C. 107, quite rightly in my view, because the process of judicial review of administrative acts under Article 146 is closely related with the continental countries, whose reports, as I have said earlier, have persuasive force only. Triantafyllides, J. had this to say at p. 492:-

> " But I have, in this Case, considered the validity of the relevant reasoning in the *Loizides* case independently of my past participation in its determination. My sole purpose was to decide correctly the present Case, irrespective of past views, but, of course, with due regard to the principle that precedent should not be disturbed unless there are good reasons for doing so. I have, in the end, reached the conclusion that the *Loizides* case was correctly decided".

In *Conway* v. *Rimmer* [1967] 2 All E.R. 1260, Lord Denning, sitting on the Court of Appeal and delivering a dissenting judgment said regarding precedent at p. 1263:-

> " The doctrine of precedent has been transformed by the recent statement of Lord Gardiner L.C.* This is the very case in which to throw off the fetters..... when we find that the Supreme Courts of those countries (meaning all Commonwealth countries) after careful deliberation, declined to follow the House of Lords—because they are satisfied that it was wrong—that is excellent reason for the House to think again".

In *Constantinides* v. *The Republic* (1969) 3 C.L.R. 523, Vassiliades, P., dealing with *Loizides* case (*supra*) regarding the adaptations made in that case, had this to say at pp. 534-535:-

> " This is the part of the judgment I find myself unable to adopt or to follow. As it may seem from the order made, the nature of the scheme and in particular the condition regarding the country where the public officers' children had to receive the assisted education was not one of the

* [1966] 3 All E.R. 77.

issues which had to be decided in that case; nor was the constitutionality of the scheme put into question".

Later on he said:-

" Going beyond that matter, the Court stated their opinion as to adopting a certain part of the scheme to the spirit and the 'general framework' of the Constitution. But such adaptation was not 'necessary' in my opinion, for the determination of the *Loizides* case where the scheme did not fall to be applied. Apart of the fact (Vassiliades, P. goes on) that such an obiter dictum cannot be considered as a decision constituting a precedent, looking at it in the light of developments since that time (May 1961) I take the view that it went too far; and it must now be adjusted".

In the same case, being a member also of the Court and dealing with the question of precedent, I had this to say at p. 553:-

" I regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases, because it provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Nevertheless I also recognize that too rigid adherence to precedent may lead to injustice in this particular case, and also unduly restrict the proper development of the law. I propose, therefore, to depart from the previous decision of the Supreme Constitutional Court, because it appears to me the right thing to do. Indeed, I am further of the view that the Supreme Court of Cyprus should not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the Constitutional Law, the Law of the land, or for any other good reason which appears to the Court right to do so".

Before turning to examine *Mikrommatis* case, it is necessary to add that although that case (being a single judgment) has decided an important question of law, nevertheless, in trying to apply the said decision to the case in hand, I found it difficult because of certain sentences and phrases used, and particularly so because of the framing at the end of the judgment of the definition of " income from her own labour" and " income from property". There is no doubt that in every case it is the

function of every judge to enunciate principles, and much that he says is intended to be illustrative or explanatory, and not to be definitive. Of course, when there are two or more speeches they must be read together and it is generally much easier to see what are the principles involved and what are merely illustrations of it. See the observations of Lord Reid in *Cassel & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801 at p. 836.

With this in mind and for the reasons I have already given, I turn now to *Mikrommatis case*, and would make one preliminary observation about it, that it is difficult to discern with certainty the facts in issue, in order to extract the *ratio decidendi*, *i.e.* that part of the judgment the reasoning of which is essential for the determination of the facts in issue. As I have said earlier, it is not clear whether the facts of that case made it necessary for the Court to decide whether the unearned income of a wife derived from a source other than her labour should be added to that of a husband for income tax purposes. If this was not necessary in my view, then the views expressed by the Court on that matter were obiter and no question of a binding precedent can arise. " It is of course perfectly familiar doctrine that obiter dicta, though they may have great weight as such, are not conclusive authority. Obiter dicta in this context means what the words literally signify—namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case, and the reasons for the decision". (*Flower* v. *Ebbw Vale Steel, Iron & Coal Co. Ltd.* [1934] 2 K.B. 132 per Talbot J. at p. 154.

On the other hand, if the reasons given by the Court in *Mikrommatis* case—covering what has been described by me as the " second leg" of the decision—are part of the principles involved and not merely illustrations, then with respect, after careful consideration, I find myself unable to agree with counsel for the respondents that that decision is the law of the land, though it might well be to the interest of fiscus that it should be so.

It seems to me, therefore, that for the reasons I have given earlier, that I find myself unable to follow that doctrine and I feel free to depart from it because I am not bound by the said decision of the Court in *Mikrommatis* case once it appears to me the right thing to do so. There is, however, one more

reason why the decision of the Supreme Constitutional Court (always speaking about the second leg of that decision) should not be followed because before the merger of the Constitutional Court and the High Court, the Constitutional Court was trying and determining cases of administrative law, under Article 146 of the Constitution, at first instance, and in that way its jurisdiction is similar to that exercised by a single judge of the present Supreme Court trying a case of administrative law under the provisions of Law 33/64. The doctrine of precedent in its various manifestations, operates so as to bind Courts in the lower line of the ladder of hierarchy of Courts. (See the judgment of Lord Hailsham, L.C. in *Cassell & Co. Ltd.* v. *Broome*, (1972) 1 All E.R. 801 at p. 809-910). Thus, it appears that it is for this reason that judgments of one High Court Judge in England are not binding on another judge of the High Court, but are merely of persuasive authority. As I have tried to show earlier in this judgment, speaking about precedent, these reasons apply with equal force to judgments of the then Supreme Constitutional Court of Cyprus, which have only persuasive authority on another judge of this Court.

However, even if the doctrine of precedent was to be interpreted in a different way, making judgments of the then Supreme Constitutional Court binding on individual judges of the present Supreme Court in the exercise of their original jurisdiction, then for the reasons given in *Constantinides* case by Mr. Justice Triantafyllides and on appeal by other judges, I would likewise, with respect, depart from the reasoning in *Mikrommatis* case, because the doctrine is plainly outside the provisions of Articles 24 and 28 of the Constitution.

In the last resort, therefore, the doctrine of judicial precedent must have but a limited application to cases of applying fundamental provisions of the Constitution to changing social needs and conditions because the Court in interpreting and applying those provisions of the Constitution has to adopt a most liberal approach, and should at all times remain the most renowned defender of the civil rights and principles of the citizen. And the case before me must, therefore, be considered and decided in the light of our whole experience, and not merely in that of what was said in *Mikrommatis* case thirteen years ago.

I think, therefore, it is constructive to quote the words of the eminent American judge, Justice Holmes, who made these

pronouncements in interpreting the Constitution of the United States of America:-

> " ..... The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions ..... Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth". (*Gompers* v. *United States*, 233 U.S. 604, 610).

> " ..... When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago". (*Missouri* v. *Holland*, 252 U.S., 416, 433).

Thus, the history of interpretation and application of the 14th Amendment of the United States Constitution illustrates this position very forcibly indeed, that the Court is free to depart from a precedent.

For the reasons I have tried to advance and at the end of it all, I find myself constrained to hold that s. 22 (2) of the Income Tax Laws, 1961–1969, and all other similar earlier tax provisions, are unconstitutional and I would, therefore, declare that the decision of the Commissioner is *null* and *void* and of no effect whatsoever regarding the years of assessment 1961–1968. Regarding the question of costs, in these circumstances, and because this case involves a constitutional question of importance, I have decided not to make an order for costs.

Sub judice decision annulled; no order as to costs.