

1982 May 29

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION
THE CYPRUS TELECOMMUNICATIONS AUTHORITY,
Applicant.

v.

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

(Case No. 43/81).

Recourse under Article 146 of the Constitution—Powers of the Court thereunder those defined in paragraph 4 of such Article—Recourse against income tax assessment—Applicant confining his address only on the legal issue—And withdrawing, for the time being, part relating to factual issue—Such course not possible—Because proper exercise of powers of the Court under Article 146.A presupposes that applicant should place before the Court all grounds of law and fact on which he alleges that subject-matter of the recourse should be annulled. 5

This recourse was directed against the validity of the decision of the respondent to require applicant to pay income tax in respect of the year of assessment 1978. 10

Though Counsel for the applicant has, initially, filed a written address at the end of which it was stated that the aforesaid assessment was arbitrary and misconceived and it was added that this will become evident when the relevant accounts of the applicant were produced, subsequently, however, he withdrew, for the time being, that part of his written address by which it was contended that the assessment concerned was arbitrary and misconceived and stated that he was confining his written address to only the legal issues which have been expounded therein. 15 20

5 *Held*, that the powers of this Court, in dealing with a recourse
 under Article 146 of the Constitution, are those which are clearly
 defined in paragraph 4* of such Article; that the proceedings
 in a recourse cannot be transformed even with the consent, or
 at the request, of counsel into an action for a declaration
 regarding the legal rights of the parties irrespective of whether
 or not the determination of such rights is really essential for the
 exercise of the powers of this Court under Article 146.4 of the
 10 Constitution; that as a recourse under Article 146 is not deter-
 mined on the basis of the adversary procedural system applicable
 to civil cases, which does leave to the parties quite a lot of control
 over the course of the proceedings, but it is determined on the
 basis of the inquisitorial procedural system which vests full
 control of the process in the administrative judge, the proper
 15 exercise of the powers of this Court under Article 146.4 of the
 Constitution presupposes that in every recourse the applicant
 should place before the Court all the grounds of law and of fact
 on which he alleges that the subject-matter of the recourse should
 be annulled; that it is, therefore, directed that Counsel for the
 20 applicant should file in Court and deliver to Counsel for the
 respondents copies of the aforementioned accounts and then,
 subject to any directions that may have to be given by the Court
 in the light of the contents of such accounts, the hearing of this
 case will continue.

25 *Order accordingly.*

Cases referred to:

Republic v. Georghiades (1972) 3 C.L.R. 594.

Recourse.

30 Recourse against the decision of the respondents to require
 the applicant to pay income tax in respect of the year of assess-
 ment 1978.

A. HadjiIoannou with C. HadjiIoannou, for the applicant.

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

35 *Cur. adv. vult.*

TRIANAFYLLIDES P. read the following interim decision. By
 means of the present recourse under Article 146 of the

* Article 146.4 is quoted at p. 1353 post.

Constitution the applicant Cyprus Telecommunications Authority is seeking the annulment of the decision of the respondent Commissioner of Income Tax to require the applicant to pay income tax in respect of the year of assessment 1978.

The relevant decision is set out in a letter dated January 10, 1981, and is embodied, also, in a consequentially raised income tax assessment. 5

The grounds on which the applicant bases its recourse may be summarized as follows: First, that the applicant is a public corporation exercising a function of Government as an agent of the Government of the Republic and is not, therefore, liable to pay income tax; secondly, that the applicant is not a person within the ambit of section 2 and section 5(1) of the income tax legislation; thirdly, that the applicant does not carry a trade within the meaning of the said section 5(1), especially as the applicant is precluded by section 19 of the Telecommunications Law, Cap. 302, from making a profit in the sense of such section 5(1); and, fourthly, that the applicant did not make a profit as is alleged by the respondent Commissioner of Income Tax and, therefore, the assessment in question is factually wrong. 10 15 20

Counsel for the applicant has, initially, filed a written address at the end of which it is stated that the aforesaid assessment is arbitrary and misconceived and it is added that this will become evident when the relevant accounts of the applicant are produced. Subsequently, however, counsel for the applicant withdrew, for the time being, that part of his written address by which it was contended that the assessment concerned is arbitrary and misconceived and stated that he is confining his written address to only the legal issues which have been expounded therein. 25 30

Thereafter the remaining written addresses of counsel for the parties did not deal at all with the question of the allegation of counsel for the applicant that the assessment concerned is factually wrong. 35

The aforesaid allegation of counsel for the applicant, though it was withdrawn for the time being from his written address, was not withdrawn, also, as one of the grounds set out in the

Application in support of the present recourse of the applicant; and, so, the applicant remains free to revert to such allegation at a later stage of the proceedings in this case.

5 Thus, there has arisen a situation in which this Court is, in effect, called upon by the parties to this case to pronounce on issues of law which if the income tax assessment in question is, eventually, found to be factually wrong do not have to be decided at all on this particular occasion.

10 In my opinion the powers of this Court, in dealing with a recourse under Article 146 of the Constitution, are those which are clearly defined in paragraph (4) of such Article, which reads as follows:

- “4. Upon such a recourse the Court may, by its decision—
- 15 (a) confirm, either in whole or in part, such decision or act or omission; or
- (b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or
- 20 (c) declare that such omission, either in whole or in part ought not to have been made and that whatever has been omitted should have been performed”.

25 The proceedings in a recourse cannot be transformed even with the consent, or at the request, of counsel into an action for a declaration regarding the legal rights of the parties irrespective of whether or not the determination of such rights is really essential for the exercise of the powers of this Court under Article 146.4 of the Constitution.

30 It must not be lost sight of that a recourse under Article 146 is not determined on the basis of the adversary procedural system applicable to civil cases, which does leave to the parties quite a lot of control over the course of the proceedings, but it is determined on the basis of the inquisitorial procedural system which vests full control of the process in the administrative judge; and, thus, in my view, the proper exercise of the powers of this Court under Article 146.4 of the

35 Constitution presupposes that in every recourse the applicant should place before the Court all the grounds of law and of fact on which he alleges that the subject-matter of the recourse

should be annulled and leave it to the Court to decide which issue or issues need to be determined in relation to the outcome of the recourse, and of which issue or issues the determination has become superfluous in view of such outcome (see, in this respect, inter alia, *The Republic v. Georghiades*, (1972) 3 C.L.R. 594). 5

Moreover, the present case is not a case in which any one of the legal issues which have been raised by counsel for the applicant can be decided now in the abstract in a manner in which it could result in the final determination of this case, because at the present stage of the proceedings the possibility cannot be safely excluded that the relevant accounts of the applicant, which were to be produced by counsel for the applicant in support of his assertion that the sub judice assessment is arbitrary and misconceived, will not, when produced, reveal factors which may somehow affect the footing and the framework on the basis of which the legal issues which have been raised by counsel for the applicant are to be finally determined. 10 15

I, therefore, direct that counsel for the applicant should file in Court and deliver to counsel for the respondents copies of the aforementioned accounts and then, subject to any directions that may have to be given by the Court in the light of the contents of such accounts, the hearing of this case will continue. 20

Order accordingly. 25