1983 February 26

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOULIA MANGLI,

Applicant,

v.

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

Respondents.

(*Case No.* 149/82).

Income Tax—Investment income—Permanent resident of this country deriving income from her shares in a limited liability company in Greece which she did not remit to this Country—Trade and business of the company carried out by administrators acting for the company and not for the members thereof—Applicant not using any of her time, attention or labour for the purpose of the production of the profits realised by the company—And deriving the income simply and solely because of her capital contribution in the company—Said income an investment income and subject to income tax—Section 5(2)(c)(i) *of the Income Tax Laws.*

Double Taxation Relief (Taxes on Income) (Greece–Order 1968)—*Provisions of Article* 9 *permissive.*

The applicant, a permanent resident of this country, was the owner of shares in "Metalco (Ἑλλάς) Ἑταιρεία Περιωρισμένης Εὐθύνης" (hereinafter referred to as "Ε.Π.Ε."), a body corporate in Greece. She derived income from her shares in "Ε.Π.Ε." that was not remitted to this country. The Commissioner of Income Tax characterized this income as investment income and imposed income tax and levied special contribution under the relevant legislation. The applicant objected thereto and the Commissioner decided to reject the objections raised against such assessments; hence this recourse.

*On the sole question whether the income derived by applicant was a trading income or investment income:**

Held, that in considering whether a person carries on a trade or business it seems to be essential to discover what exactly it is that the person does; that since the applicant was and is the owner of shares in "E.Π.Ε."; that since the trade and business of "E.Π.Ε." were carried out by administrators acting for "E.Π.Ε." and not for the members thereof; that since the applicant did not use any of her time, attention or labour for the purpose of the production of the profits realized by "E.Π.Ε.", she derived this income simply and solely because of her capital contribution in "E.Π.Ε."; and that, therefore, it was not only reasonably open to the Commissioner to find that the said income was investment income but, indeed, that was the only conclusion to which he could arrive; accordingly the recourse should fail.

Held, further, that the provisions of Article 9 of the Double Taxation Relief (Taxes on Income), (Greece-Order 1968), (see Not. No. 289 of the Official Gazette of the Republic, 1968, Supplement No. 3, p. 351), are only permissive and the submission of counsel for the respondents that the sub-judice decision finds support in the said Article is untenable.

Application dismissed.

Cases referred to:

Coussoumides v. Republic (1966) 3 C.L.R. 1 at p. 18;

Georghiades v. Republic (1982) 3 C.L.R. 659 at p. 669;

Edwards (H.M. Inspector of Taxes) v. Bairstow and Harrison [1955] 3 All E.R. 48 at p. 54, 57;

Pikis v. Republic (1965) 3 C.L.R. 131 at p. 149;

National Association of Local Government Officers v. Bolton Corporation [1942] 2 All E.R. 425;

Barry (Inspector of Taxes) v. Cordy [1946] 2 All E.R. 396;

Ransom (Inspector of Taxes) v. Higgs [1974] 3 All E.R. 949 at p. 960;

---

* Investment income is defined as follows by section 2 of Law 60/69:
" 'Investment income' means any income which is not earned income"; and under section 5(2)(c)(i) of the Law "the whole of the investment income arising outside the Republic shall be deemed to be income derived from the Republic whether or not remitted to the Republic".

Mikrommatis v. Republic, 2 R.S.C.C. 125 at p. 132;
Republic v. Demetriades (1977) 3 C.L.R. 213 at p. 291;
Smith v. Anderson [1880] 15 Ch. D. 247 at p. 285;
Rolls v. Miller [1884] 27 Ch. D. 71 at p. 88;
Vita-Ora Co. Ltd. v. Republic (1973) 3 C.L.R. 273 at p. 280.

Recourse.

Recourse against the validity of the income tax assessment raised on applicant for the years of assessment, 1975-1976.

G. Triantafyllides, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant is a permanent resident of this country. She is the owner of shares in "Metalco (Ἑλλάς) Ἑταιρεία Περιωρισμένης Εὐθύνης" (hereinafter referred to as "E.Π.E.", a body corporate in Greece. She derived income from her shares in "E.Π.E." that was not remitted to this country. The Commissioner of Income Tax characterized this income as investment income and imposed income tax and levied special contribution under the relevant legislation. The applicant objected thereto and the Commissioner decided to reject the objections raised against such assessments and he communicated his such decision by letter dated 11.1.82 (exhibit No.1).

The applicant by this recourse seeks —

(a) Declaration that Assessment No. 01703764/76/82/01/030 is null and void and of no effect whatsoever and/or the decision to impose income tax on applicant amounting to £440.- for the year 1975 and £731.- for the year 1976 or any other sum or at all, is null and void and of no effect whatsoever;

(b) Declaration that Assessment No. 01703764/76/82/01/030 is null and void and of no effect whatsoever and/or the decision to impose special contribution on applicant amounting to £110.- for 4/74, £183.- for 1/75, £183.- for 2/75, £183.- for 3/75 and £182.- for 4/75 or any other sum or at all, is null and void and of no effect whatsoever.

The sub judice assessments are for income tax for the years of assessment 1975-76 and were raised under subsections (1) and (2) of s.5 and s.6 of the Income Tax Laws, 1961-1975 and 1976, respectively, and ss. 3, 13(2)(b) and 23(1) of the Taxes (Quantifying and Recovery) Law No. 53 of 1963 as amended by Law No. 61 of 1969, repealed and substituted by the Assessment and Collection of Taxes Laws 1978-79. The special contribution for the quarters ended 31.12.74, 31.3.75, 30.6.75, 30.9.75 and 31.12.75 were levied under ss. 3 and 6 of the Special Contribution (Temporary Provisions) Law No. 55 of 1974 as amended by Law No. 43 of 1975, Law No. 67 of 1975, Law No. 15 of 1976 as amended by Law No. 22 of 1977 and ss. 6 and 10(3) of the Special Contribution (Temporary Provisions) Law No. 34 of 1978 as amended by Law No. 29 of 1979 and Law No. 12 of 1980 and ss. 3, 13(2)(b) and 23(1) of the Assessment and Collection of Taxes Laws, 1978 to 1979.

A single question poses for determination in this case: Is the income in question trading income or investment income?

The applicant contends that this is trading income whereas the respondent Commissioner decided, and it was argued on his behalf in these proceedings, that it is investment income.

The approach of the Court in tax cases is no different in respect of any other administrative decision liable to review under Art. 146. The initial burden of proof to satisfy the Court that it should interfere with the subject-matter of a recourse lies on the applicant. (*Coussoumides v. The Republic*, (1966) 3 C.L.R. 1, at p. 18; *Georghiades v. The Republic*, (1982) 3 C.L.R. 659, at p.669).

In *Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison*, [1955] 3 All E.R. 48, Lord Radcliffe said about the powers of the Court the following at p.57:-

> "When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting

judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when, in cases such as these, many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur".

Our Supreme Court has no jurisdiction to go into the merits of the taxation. Its power is limited to the scrutiny of the legality of the action, and to ascertain whether the Administration has exceeded the outer limits of its powers. Provided they confine their action within the ambit of their power, an organ of public administration remains the arbiter of the decision necessary to give effect to the law; and so long as they make a correct assessment of the factual background and act in accordance with the notions of sound administration, their decision will not be faulted. In the end, the Courts must sustain their decision if it was reasonably open to them. (*Georghiades v. The Republic* (supra); *Pikis v. The Republic*, (1965) 3 C.L.R. 131, 149).

The facts of this case are plain and uncontested. The applicant is a shareholder in "E.Π.E.". "E.Π.E." is registered in Greece under the Greek Law No. 3190 of 1955 – "Νόμος Περὶ Ἑταιρειῶν Περιωρισμένης Εὐθύνης". "E.Π.E." is not identical to any of the corporations known in our legal system. This institution was introduced in Greece from other continental countries where it is widespread, as it was found to be

more helpful to small businesses. "E.Π.E." is a trading legal entity. The capital thereof is divided into "μερίδας συμμετοχῆς" and there may exist further "ἑταιρικὰ μερίδια" of each member. The duration of this company is fixed in the Articles of Association ("Ἑταιρικόν Ἔγγραφον") but its life can be extended by decision of the General Meeting of its members. It is a company of limited liability and the liability of the members is limited to the capital of their shares. It does not issue, however, certificates of shares which can be transferred in the way the shares of a public limited company are transferred in Cyprus under our system of law; only a receipt, not bearing the character of a share, ("ἀπόδειξις μὴ φέρουσα χαρακτῆρα ἀξιογράφου"), is issued for the whole participation ("μερίδα συμμετοχῆς") of a member– (section 27).

The affairs of the company may be administered by one or more members or by administrators appointed for the purpose, who represent the company and act in its name for the objects of the company - (see sections 17 and 18 of Law No. 3190 of 1955). Learned counsel for the applicant stated that the affairs of this particular "E.Π.E." are, indeed, administered by administrators.

The profits of "E.Π.E." are distributed, unless otherwise provided in the Articles of Association ("Καταστατικόν") amongst its members according to the contribution in capital of each one of them when (a) there are profits in the Balance-Sheet of the year, (b) after approval of the Balance-Sheet by the General Meeting, and, (c) a decision of the General Meeting of the members for the distribution of the profits. All the profits are distributed after the deduction of any amount for reserves.

Under the Companies Law, as known to this country, a shareholder is entitled to dividend only if and when such dividend is declared and not earlier. Furthermore, an amount distributed as dividends is not necessarily the total amount of the profits of a company in a given year. The profits of a company under the Greek Tax Law are not taxed; only the profits accruing to each member thereof are taxable in his name. This, however, is a special provision of the Tax Laws of Greece.

The "Ε.Π.Ε." in question deals with the maintenance and repair of ships and other industrial machinery.

Section 5(2)(c)(i) of the Income Tax Law reads:-

"Τὸ σύνολον τοῦ ἐκτὸς τῆς Δημοκρατίας προκύπτοντος εἰσοδήματος ἐξ ἐπενδύσεως θὰ λογίζηται ὡς εἰσόδημα κτηθὲν ἐν τῇ Δημοκρατίᾳ, εἴτε τοῦτο μετεφέρθη εἰς τὴν Δημοκρατίαν εἴτε μή".

("The whole of the investment income arising outside the Republic shall be deemed to be income derived from the Republic whether or not remitted to the Republic").

"Investment income" is defined in Law 60/69, s.2, as follows:-

" 'Εἰσόδημα ἐξ ἐπενδύσεως' σημαίνει οἱονδήποτε εἰσόδημα τὸ ὁποῖον δὲν εἶναι κερδαινόμενον εἰσόδημα".

("'Investment income' means any income which is not earned income").

"Earned income" ("κερδαινόμενον εἰσόδημα") is defined in s.2 of Law 58/61 as follows:-

" 'Κερδαινόμενον εἰσόδημα' σημαίνει πᾶν εἰσόδημα κτώμενον ἐξ οἱασδήποτε ἐμπορικῆς ἢ βιομηχανικῆς ἐπιχειρήσεως, ἐκ τῆς ἀσκήσεως ἐπιτηδεύματος ἢ βιοτεχνίας τινός, ἐξ ἐλευθέρου ἢ ἄλλου τινὸς ἐπαγγέλματος, ἐκ μισθωτῶν ὑπηρεσιῶν, συντάξεων ἢ ἄλλων ἐτησίων προσόδων καταβαλλομένων λόγῳ ἢ ἀναφορικῶς πρὸς παρωχημένας μισθωτὰς ὑπηρεσίας".

("'Earned income' means all income derived from trading or industrial enterprise, from the carrying on of any business or handicraft, from any professional or other occupation, from salaried services, pensions or other yearly emoluments granted because of, or in respect of, rendered salaried services").

The subsequent legislation did not amend in any way the definition of "earned income" in Law 58/61.

The definition of "earned income" given in the Income Tax Law, English version, is not an exact word by word translation of the Greek original text of such definition, as it reads as follows:-

"'Earned income' means 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 employment".

For the purposes of this case the discrepancy between the Greek original text of the definition and the English version thereof is not of any significance.

"'Εμπορική ἐπιχείρησις' περιλαμβάνει καὶ πᾶσαν βιομηχανίαν ἤ οἱανδήποτε ἑτέραν ἐπιχείρησιν ἐνέχουσαν τὸν χαρακτῆρα ἐμπορίας.

The English version thereof, as given in the translation, is:-

"The expression 'trade' shall include every manufacture or adventure or concern in the nature of a trade".

Learned counsel for the applicant submitted that the income of the sub judice assessments was derived from the exercise of trade or business as a result of her membership in "Ε.Π.Ε.".

The income tax legislation in this country followed the model of Income Tax Ordinance, Appendix "A" to the Report of the Inter-Departmental Committee on Income Tax in the Colonies not Possessing Responsible Government, presented to the Parliament of the United Kingdom in December, 1922 — (see Cmd. 1788).

Lord Wright in *National Association of Local Government Officers v. Bolton Corporation,* [1942] 2 All E.R. 425, in discussing the meaning of the word "trade" in the Industrial Courts Act, 1919, said:-

"Indeed, 'trade' is not only in the etymological or dictionary sense, but in legal usage, a term of the widest scope. It is connected originally with the word 'tread' and indicates a way of life or an occupation. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate; it may also mean a skilled craft. It is true that it is often used in contrast with a profession. A professional worker would not ordinarily be called a tradesman. But the word 'trade' is used in the widest application in connection with 'trade unions'."

Section 237 of the Income Tax Act, 1918, defined 'trade'

as including trade, manufacture, adventure or concern in the nature of trade. The same definition was introduced in the Income and Corporation Taxes Act, 1970, s.526 (5), and Taxes Management Act, 1970, s.118(1).

This definition was judicially considered in *Barry (Inspector of Taxes) v. Cordy,* [1946] 2 All E.R. 396, where it was held that:-

> "'Trade' is a word of very wide import; the word 'trade' must be used in its ordinary dictionary sense and the other words of the definition must necessarily be intended to enlarge the statutory scope to be given to the word 'trade'. Whether the word 'adventure' is intended to be read like the word 'manufacture' as equally independent of the opening word 'trade' or like the word 'concern' as qualified by the attribute 'in the nature of trade' does not, we think, matter in this appeal, though we incline to think it should be read as independent".

In *Edwards (Inspector of Taxes) v. Bairstow & Another,* (supra), at p.54, Viscount Simonds said:-

> "To say that a transaction is, or is not, an adventure in the nature of trade is to say that it has, or has not, the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder; a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction".

In *Ransom (Inspector of Taxes)* v. *Higgs,* [1974] 3 All E.R. 949, it was held that although the categories of trade were not closed, the word "trade" was used in the 1952 Act to denote operations of a commercial character by which the trader provided to customers for reward some kind of goods or services. Although certain activities might constitute "trading" even though some of the indicia of trade were absent, it did not

follow that any activity which yielded an advantage, however indirect, constituted an "adventure in the nature of trade". It followed that Mr. Higgs had not engaged in trade or an adventure in the nature of trade since he had not dealt with anyone, nor had he been engaged in any buying or selling activity or the provision of services. The fact that he had procured other persons or companies to engage in trading activities did not mean that he himself had been trading.

Lord Morris of Borth-y-Gest said at p. 960:-

> "To be engaged in trade or in an adventure in the nature of trade surely a person must do something and if trading he must trade with someone".

In *Mikrommatis* v. *The Republic*, 2 R.S.C.C. 125, at p. 132, the expression "income from her own labour" was used 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.

Article 25.1 of the Constitution reads:-

> "Every person has the right to practise any profession or to carry on any occupation, trade or business".

Triantafyllides, P., in *The Republic* v. *Demetrios Demetriades*, (1977) 3 C.L.R. 213, said at p. 291, referring to the definition of "earned income" in s.2 of Law 58/61:-

> "A perusal of all the foregoing definitions of 'earned income' in Law 58/61 leads, without much difficulty, to the conclusion that, however wide such definition may be deemed to be, it cannot be as wide as the expression 'income derived..... from the exercise of the right safeguarded under Article 25 of the Constitution' ".

In Jowitt's Dictionary of English Law, 1959, p. 294, it is stated that "business" is a wider term than "trade".

In *Smith* v. *Anderson*, [1880] 15 Ch. D. 247, Jessel, M.R., at p. 258 said:-

> "That is to say, 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".

In *Rolls* v. *Miller*, [1884] 27 Ch. D. 71, Lindley, L.J., said at p. 88:-

"When we look into the dictionaries as to the meaning of the word 'business', I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary".

The aforesaid judicial pronouncements on the meaning of "business" were adopted by Triantafyllides, P., in *Demetriades* case.

Relevant to the question for determination in this case is the pronouncement of Triantafyllides, P., in *Vita-Ora Co. Ltd.* v. *The Republic*, (1973) 3 C.L.R. 273, at p. 280, that interest, dividends and rents are profits derived from sources not involving productive effort.

Learned counsel for the applicant submitted that a member of "E.Π.E." is the same as a partner and that the applicant is in substance and effect a sleeping partner.

I compared "partnership" with "E.Π.E." and I find no way to agree with such submission. A member of "E.Π.E." in Greece and in the Continent is not considered as a trader, though "E.Π.E." is by law a trading company, unless such member exercises trade or business himself, i.e. when his participation in "E.Π.E." is his habitual occupation and he takes active part in the carrying on of the business of "E.Π.E."—(*M. Mumuri—Company of Limited Liability*—2nd edition, (1960) p. 71; *Levanti*—"Περὶ Ἑταιρειῶν Περιωρισμένης Εὐθύνης"—2nd edition, (1972), p. 11).

The cases referred to serve only as a guidance in the determination of the issue raised. The applicant was and is the

owner of shares in "E.Π.E.". The trade and business of "E.Π.E." were carried out by administrators acting for E.Π.E." and not for the members thereof. In considering whether a person carries on a trade or business, it seems to me to be essential to discover and to examine what exactly it is that the person does. The applicant did not use any of her time, attention or labour for the purpose of the production of the profits realized by "E.Π.E.". The applicant derived this income simply and solely because of her capital contribution in "E.Π.E.".

In view of the aforesaid it was not only reasonably open to the Commissioner to find that the said income was investment income but, indeed, that was the only conclusion to which he could arrive.

The provisions of Article 9 of the *Double Taxation Relief (Taxes on Income)*, (Greece—Order 1968), (see Not. No. 289 of the Official Gazette of the Republic, 1968, Supplement No. 3, p. 351), are only permissive and the submission of counsel for the respondents that the sub judice decision finds support in the said Article is untenable.

In the result this recourse fails. It is dismissed but due to the novelty of the point I make no order as to costs.

Recourse dismissed. No order as to costs.