IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

RALLIS MAKRIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF FINANCE,

Respondent.

(*Case No.* 202/65).

Income Tax—Assessments—Sale of land—Gains resulting from the difference between the cost and the proceeds of the sale of two building-sites—Whether such difference amounts to a taxable income—The Income Tax Law, Cap. 323, *section* 5 (1) (*a*)*—In the present case the Court did not interfere because it was found that, both factually and legally, it was reasonably and properly open to the Director of Inland Revenue to treat such gains as taxable—The taxpayer-Applicant failed to discharge the initial burden which lies on any Applicant in a recourse under Article* 146 *of the Constitution—To satisfy the Court that it should interfere with the* sub judice *decision—The issue involved is an issue of mixed fact and law.*

Administrative Law—Recourse under Article 146 *of the Constitution—Onus of proof—The initial burden lies on the Applicant to satisfy the Court that it should interfere with the* sub judice *decision—See, also, above.*

In this recourse under Article 146 of the Constitution the Applicant is challenging the validity of two decisions of the Director of the Inland Revenue Department, who comes under the Ministry of Finance, whereby the Applicant's objections against income tax assessments in respect of the years of assessment 1957 and 1958, respectively, were refused. The aforesaid decisions are challenged to the extent only to which they have treated as taxable income of the Applicant, in respect of the said years, gains resulting from the difference between the cost and the proceeds of the sale of two building-sites in Nicosia.

In 1954 the Applicant came across an area of land which was for sale. As he, himself, did not require the whole of it, but only part of it, and the owner wanted to sell the whole of it, the Applicant approached two other persons, well-known dealers in land, G. Lordos and his brother P. Lordos and proposed to them that they, all three, would buy the land together, in equal shares; they agreed and, thus, the area was purchased jointly by the Applicant and the two aforesaid Lordos brothers. It was decided to divide the area into building-sites, each co-owner receiving an equal share thereof.

Two of such building-sites were soon afterwards sold in order to cover the expenses of the division of the area into building-sites. The one site was sold in 1956 and the second in 1957. It is common ground that the difference between the cost and the proceeds of the sale of the aforesaid two building sites resulted in gains to the Applicant amounting to £210 in respect of the 1956 sale, and to £650 in respect of the 1957 sale. Such gains were considered by the *sub judice* decisions to be part of the Applicant's taxable income in relation to the years of assessment 1957 and 1958, respectively.

The Court in dismissing the recourse:

Held, (1) (*a*) The question which has to be decided is whether the gains made out of the difference between the cost and the proceeds of the sale of the two building-sites, were rightly treated as part of the taxable income of the Applicant, as constituting gains or profits from trading in land within the Income Tax Law, Cap. 323, section 5 (1) (*a*) (*Note*: these statutory provisions are set out in full in the judgment of the court, *post*).

(*b*) Some of the principles relevant to the determination of an issue of mixed law and fact, such as the one arising in the present case, have been set out recently in the Judgment of this Court in *Droussiotis and The Republic* (reported in this Part at p. 15 *ante*), and need not be repeated herein.

(*c*) It suffices to say that gains made out of the sale of land are taxable if made in an operation of business while carrying out a scheme for profit-making, but they are not taxable if made as a result of realising an investment, which has enhanced in value.

(2) It is well settled that in a recourse under Article 146 of

the Constitution against an assessment, the Court will not interfere with the *sub judice* decision of the income tax authorities if it is of the opinion that such decision was reasonably and properly open to them on the basis of the correct facts and in the light of the correct application of the relevant legislation and principles of law (see *Clift and The Republic* (1965) 3 C.L.R. 285; *Christides and The Republic* (1966) 3 C.L.R. 732); furthermore, the initial burden of proof, to satisfy the Court that it should interfere with a *sub judice* decision, lies on the Applicant (see *Coussoumides and The Republic* (1966) 3 C.L.R. 1).

(3) In the present case we are concerned with gains made out of the sale of two building-sites which were sold for the purposes of meeting expenses involved in the development, through division into building-sites, of the area of land which was purchased jointly by the Applicant and the two Lordos brothers; the said brothers are well known dealers in land. Such development was, apparently, set in motion very soon after the purchase of the said area. This is not an instance in which land bought years ago, as an investment, was being developed, through being divided into building-sites, in order to render the realisation of the investment as profitable as possible.

(4) The Applicant himself is not, by profession, a dealer in land; and it may well be that he did not intend to re-sell for immediate profit his eventual share of the sides; but the fact remains that when the two said sites were sold, with a view to Applicant meeting expenses which resulted from the division of the area purchased as aforesaid by him and the Lordos brothers, he was making a profit out of a deal in land, which has been purchased and was being straightaway developed.

(5) In the circumstances, I am of the view that the Applicant has not discharged the burden of satisfying the Court that it should interfere with the *sub judice* decisions; and I am of the opinion that it was reasonably and properly open to the Director of Inland Revenue, both factually and legally, to treat the relevant gains of the Applicant as taxable income.

(6) Before concluding I would like to observe that this recourse does not decide also the nature of any gains to be made in future, by the Applicant, out of the sale of the building-sites which constitute his share in the area of land in question.

This recourse fails and is dismissed accordingly. No order as to costs.

Cases referred to:

Droussiotis and The Republic, reported in this Part at p 15 ante;

Clift and The Republic (1965) 3 C.L.R. 285;

Christides and The Republic (1966) 3 C.L.R. 732;

Coussoumides and The Republic (1966) 3 C.L.R. 1;

The Commissioners of Inland Revenue v. *Livingstone* 11 Tax Cases 538;

Pearn v. *Miller* 11 Tax Cases 610;

Cape Brandy Syndicate v. *The Commissioners of Inland Revenue*, 12 Tax Cases 358;

J. & R. O'Kane & Co. v. *The Commissioners of Inland Revenue*, 12 Tax Cases 303;

Leeming v. *Jones* 15 Tax Cases 333;

Reynold's Executors v. *Bennett*, 25 Tax Cases 401.

Recourse.

Recourse against the validity of two decisions of the Director of Inland Revenue Department dated the 31.7.65 by means of which the objection of the Applicant against Income tax assessments in respect of the years of assessment 1957 and 1958 were determined.

X. Clerides, for the Applicant.

M. Spanos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:

TRIANTAFYLLIDES, J.: In this recourse the Applicant challenges the validity of two decisions of the Director of the Inland Revenue Department, who comes under the Respondent Ministry of Finance; such decisions are dated the 31st July, 1965 and by means of them the objections of the Applicant against income tax assessments in respect of the years of assessment 1957 and 1958 were determined.

The aforesaid decisions are challenged by Applicant only to the extent to which they have treated as taxable income of the Applicant, in respect of the said years, gains resulting from the difference between the cost and the proceeds of the sale of two building-sites in Nicosia.

This recourse was filed on the 14th October, 1965, and it was heard before a Judge of this Court on the 9th May, 1966, when Judgment was reserved sine die.

In view of the fact that the learned trial Judge has been absent from the Court since early June, 1966, it was agreed between counsel for the parties, on the 14th November, 1966, that another Judge of this Court would consider this Case and give Judgment on the basis of the record thereof; so I have proceeded to consider the Case and I am now ready to deliver Judgment in it.

Had I reached the view, in studying the Case, that it would be more to the interests of justice for this Case to be re-heard before me, before my delivering Judgment herein, I would not have hesitated to direct a re-hearing, notwithstanding the aforesaid agreement of counsel; but I am satisfied in my own mind that, in the light of the particular nature of the present Case, such a re-hearing, with the consequent delay and expense, is not required in the interests of justice.

The relevant events are shortly as follows:

In 1954 the Applicant came across an area of land which was up for sale. As he, himself, did not require the whole of it, but only part of it, and the owner wanted to sell the whole of it, the Applicant approached two other persons, George Lordos and his brother Paraskevas Lordos, and proposed to them that they, all three, would buy it together, in equal shares; they agreed, and thus the area was purchased jointly by the Applicant and the two Lordos brothers.

It was decided to divide the area into building-sites, each co-owner receiving an equal share thereof.

Two of the building-sites were sold soon afterwards in order to cover the expenses of the division of the area into building-sites. One such building-site was sold to a certain Goerge HadjiKyriacos in 1956 (and this transaction is relevant to the assessment for the year of assessment 1957) and another

building–site was sold to a certain George Sarris in 1957 (and this transaction is relevant to the assessment for the year of assessment 1957). In the first case the sale was made by Applicant only, in the second case by Applicant and his co–owners jointly.

The building–site sold in 1956 was sold for £850 and the building–site sold in 1957 was sold for £1290. The total cost of each building–site was calculated at £640, and, thus, a gain of £210 was realized out of the 1956 sale, and a gain of £650 out of the 1957 sale. The gains thus resulting to Applicant were considered, by means of the *sub judice* decisions, as part of the taxable income of the Applicant, in relation to the years of assessment 1957 and 1958 respectively.

The substantive provision of law, applicable to the present matter (in view of the provisions of the Taxes (Quantifying and Recovery) Law, 1963, Law 53/63) is section 5 (1) (a) of the Income Tax Law (Cap. 323) which reads as follows:

> "5. (1) Tax shall, subject to the provisions of this Law, be payable at the rate or rates specified hereafter for the year of assessment commencing the 1st day of January, 1941, and for each subsequent year of assessment upon the income of any person accruing in, derived from, or received in the Colony" – now the Republic – "in respect of –
>
> (a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;"

The question, therefore, which has to be decided is whether the gains made out of the difference between the cost and the proceeds of the sale of the two building–sites, were rightly treated as part of the taxable income of Applicant, as constituting gains or profits from trading in land within the meaning of sub–section (1) (a) of section 5, above.

Some of the principles relevant to the determination of an issue of mixed law and fact, such as the one arising in the present Case, have been set out, recently, in the Judgment of this Court in *Droussiotis and The Republic* (Case 255/65, decided on the 14th January, 1967, and not reported yet)* and need not be repeated herein. It suffices to say that gains

*Reported in this part at p. 15 ante.

made out of the sale of land are taxable if made in an operation of business while carrying out a scheme for profit-making, but they are not taxable if made as a result of realising an investment, which has enhanced in value.

Counsel for the parties have referred the Court to a number of English cases, as supporting their respective submissions (*inter alia, The Commissioners of Inland Revenue* v. *Livingstone* 11 Tax Cases, p. 538; *Pearn* v. *Miller*, 11 Tax Cases, p. 610; *Cape Brandy Syndicate* v. *The Commissioners of Inland Revenue*, 12 Tax Cases, p. 358; *J. & R. O'Kane & Co.* v. *The Commissioners of Inland Revenue*, 12 Tax Cases p. 303; *Leeming* v. *Jones*, 15 Tax Cases p. 333; *Reynold's Executors* v. *Bennett*, 25 Tax Cases p. 401). Though I have duly borne in mind the principles expounded therein I did not find it necessary to deal specifically, in this Judgment, with anyone of such cases; they are all of them instances of the application of the relevant legislation and principles to particular sets of circumstances and no real assistance can be derived from their outcome in resolving the issue which has arisen in the present Case on the basis of its own particular set of circumstances.

It is well settled (see, also, *Clift and The Republic*, (1965) 3 C.L.R. 285, *Christides and The Republic*, (1966) 3 C.L.R.732) that, in a recourse against an assessment under Article 146 of the Constitution, the Court will not interfere with the *sub judice* decision of the income tax authorities if it is of the opinion that such decision was reasonably and properly open to them on the basis of the correct facts and in the light of the correct application of the relevant legislation and principles of law; furthermore, the initial burden of proof, to satisfy the Court that it should interfere with a *sub judice* decision, lies on an Applicant (see *Coussoumides and The Republic*, (1966) 3 C.L.R. 1).

In the present Case we are concerned with gains made out of the sale of two building-sites which were sold for the purpose of meeting expenses involved in the development, through division into building-sites, of the area of land which was purchased jointly by the Applicant and the two Lordos brothers; the said brothers are, as already stated, well-known dealers in land. Such development was, apparently, set in motion very soon after the area concerned had been purchased; this is not an instance in which land bought years ago, as an investment, was being developed, through being divided into

building-sites, in order to render the realisation of the investment as profitable as possible.

The Applicant himself is not, by profession, a dealer in land; and it may well be that he did not intend to re-sell for immediate profit his eventual share of the building-sites; but the fact remains that when the two building-sites in question were sold, with a view to Applicant meeting expenses which resulted from the division of the area purchased by him and the Lordos brothers, he was making a profit out of a deal in land, which has been purchased and was being straightaway developed.

In the circumstances I am of the view that the Applicant has not discharged the burden of satisfying the Court that it should interfere with the *sub judice* decisions; I am of the opinion that it was reasonably and properly open to the Director of Inland Revenue, both factually and legally, to treat the relevant gains of the Applicant as taxable income.

This recourse, therefore, fails and is dismissed accordingly.

Bofore concluding I would like to observe that this recourse does not decide also the nature of any gains to be made in future, by the Applicant, out of the sale of the building-sites which constitute his share out of the area of land in question. He has testified that it was not his intention to trade by re-selling them, but to keep them as an investment. Whether or not, when he comes to sell any of them, his gains will be again taxable, or will have to be treated as gains made through the realisation of investment, is a matter which is not to be deemed as having been settled by this Judgment; it will have to be decided in the light of all relevant circumstances at the proper time.

Regarding costs I have decided to make no order as to costs, because I think that this is a Case in which the Applicant was properly entitled to come to this Court in order to have the matter determined judicially.

Application dismissed.
No order as to costs.