[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VASSOS ESTATE LIMITED,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
1. MINISTRY OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,
3. THE ATTORNEY-GENERAL AS SUCCESSOR TO THE CREEK COMMUNAL CHAMBER,

Respondents.

(*Case No.* 10/68).

Income Tax—Land investment company—Purchase of a building site for a specific purpose which failed—Namely for building on the said site offices and warehouses to be let to a sister company—Resale of the site in question at a profit—Isolated transaction—In the circumstances of this case profit so realised held not to be a profit or gain within the provisions of section 5(1)(*a*) *and* (θ) *of the Greek Communal Laws* 18/62 *and* 9/63—*But a capital accretion not assessable to income tax.*

Land—Purchase and resale of land with profit—Whether profit assessable to income tax—See above.

Investment—Land investment concern—Purchase and resale of land with profit—Whether such profit taxable—See above.

Capital accretion—As distinct from gain or profit from trade—See above.

Purchase and resale of land with profit—See above.

The question in this recourse, under Article 146 of the Constitution, is whether a surplus of £3,192, being the difference between the price at which the Applicant Company sold a building site in 1960 and the price at which they had bought it in 1957, can be regarded as a profit or gain assessable to income tax under section 5(1)(a) or (θ) of the Greek Communal Laws 18/62 and 9/63, or whether such surplus is merely the

realisation of an investment i.e. a capital accretion not liable to income tax.

The facts are shortly as follows: The Applicant Company, incorporated in 1955, is a land investment concern, although purchase and selling of land with a view to making profit is included in the company's objects. In fact, the sale of land involved in this case is the only sale of land effected by the Company since its incorporation its other activities consisting in a considerable volume of land investment transactions.

In 1957 the Company acquired a building site under plot 284 on Nelson street at Nicosia for the sum of £2,808. It was intended to build thereon offices and stores with the object of letting them to a sister Company; but owing to the inter-communal troubles in 1958 the Company was forced to postpone its plans. Ultimately in 1960 an agreement was reached whereby the Company sold to Gallagher Estate Ltd. the said plot 284 for the sum of £6,000 and the latter sold to the Applicant Company another building site in the vicinity on Tennyson street, plot 295 for the sum of £3,000. The respective transfers were effected in January 1961, plot 284 having been transferred to the U.S. Embassy at the request of the said buyers Gallagher Estate Ltd. The Respondent Commissioner of Income Tax, taking the view that the surplus of £3,192 realised from the disposal of plot 284 as aforesaid (that surplus being the difference between the price of £2,808 at which the Company bought the site in question in 1957 and the price of £6,000 at which they sold it in 1960), is a profit assessable to income tax under section 5 of Law 18/62, raised under section 5 (1)(a)(θ) the assessments challenged by the present recourse.

Section 5(1)(a) of the said Law provides that income tax shall be charged in respect of gains or profits from any trade, business, profession or vocation for whatever period of time such trade etc. may have been carried on or exercised. On the other hand section 5(1)(θ) of the same Law provides that the tax is charged for any annual profit or gain not falling in the foregoing paragraphs. Cf. Case VI of Schedule D of the English Income Tax Act, 1952. Section 5(2)(d) of our Law 18/62 defines "trade" as follows: "'Trade' shall include every manufacture or adventure or concern in the nature of trade."

It was contended by the Applicants that the sale in 1960 of the building site plot 284 in question was neither an operation in the course of carrying on of trade nor a concern or adventure in the nature of trade, being merely an isolated transaction of purchase and resale of property; and consequently, the said surplus of £3,192 arising therefrom was not a profit or gain in the nature of revenue or income but was an accretion to capital, and was therefore not subject to income tax under the charging section 5 of the Law (*supra*).

On the other hand, it was contended by counsel for the Respondents that as the purchase and sale of land were included in the objects of the Company the profit of £3,192 realised on the said sale in 1960 of plot 284 was a profit or gain in the course of the carrying on of a trade within the provisions of section 5(1)(a) of the Law (*supra*); alternatively even if the Court would reach the conclusion that section 5(1)(a) could not be applied in this case, then section 5(1)(θ) "could be invoked to tax profits or gains which do not arise from general business or vocation but from transactions which have the characteristics of a particular business". It was however conceded by counsel for the Respondents that should the Court reach the conclusion that the aforesaid surplus of £3,192 was not something in the nature of revenue or income as distinct from capital then such surplus would represent a capital accretion which could not form the object of an assessment under either of the aforementioned paragraphs (a) or (θ) of sub-section (1) of section 5 of the Law (*supra*).

In annulling the assessments complained of, the Court –

Held, (1). Whether or not a trade is being carried on is a mixed question of fact and law; and there is no single infallible test for settling the vexed question whether a receipt of money is of an income or capital nature. Each case must depend on its particular facts and what may have weight in one set of circumstances may have little weight in another. One has to look to all the relevant circumstances and reach a conclusion according to their general tenor and combined effect.

(2) The state of affairs of the Company since its inception leaves no doubt in my mind that the acquisition in 1957 of plot 284 was not made with a view to resale at a profit; furthermore it is clear from the activities of the Company that its object was not to hold and nurse the investments it held and to sell them at a profit when convenient occasion arose.

In the present case plot 284 was bought by the Company for a specific purpose in order to erect offices to be leased to the sister company Vassos Eliades Ltd; but owing to the inter-communal troubles, the company was forced to postpone its plans. Until the sale of this plot in 1960—this being an isolated transaction—there was no course of dealings with the sale of lands.

(3)(a) After considering all relevant circumstances I have reached the conclusion that the surplus of £3,192 realised from the said sale in 1960 of plot 284 was the realisation of an investment and that the enhanced price was not profit in the sense of section 5(1)(a) of the Greek Communal Laws 18/62 and 9/63 (*supra*) because, such profit or gain was not made in an adventure in the nature of trade.

(b) I am, therefore, of the view that the Commissioner acted under some misconception of the law. I would consequently reverse his decision that the profit made in this case by the Company was a trading profit liable to income tax, and declare that it is contrary to law and therefore *null* and *void* and of no effect whatsoever.

(4) As it appears to me that the Company's profit did not constitute "annual profit or gain" within the sweeping section of our law but was a profit in the nature of a capital gain and not income, it follows that it cannot form the object of an assessment under section 5(1)(θ) either.

Sub judice decision annulled.

Cases referred to:

Ryall v. *Hoare, and Honeywill* (1923) 8 T.C.521 at p. 525;

Cooper v. *Stubbs* (1925) 10 T.C. 29;

Wilcock v. *Pinto and Co.* [1925] 1 K.B. 30;

Bomford v. *Osborne* [1942] A.C.14;

Edwards (*Inspector of Taxes*) v. *Bairstow and Another* [1956] A.C.14, at p.35 per Lord Radcliffe;

Californian Copper Syndicate (*Limited and Reduced*) v. *Harris* (*Surveyor of Taxes*) 5 T.C. 159;

Commissioner of Taxes v. *Melbourne Trust, Ltd.* [1914] A.C. 1001 P.C.;

Ducker v. *Rees Roturbo Development Syndicate Ltd.* [1928] A.C. 132 at p. 140 per Lord Buckmaster;

The Commissioners of Inland Revenue v. *Livingston and Others,* 11 T.C. 538 at p. 542 per Lord President Clyde;

Tebrau (Johore) Rubber Syndicate, Ltd. v. *Farmer,* 5 T.C. 658 at p. 664 per Lord Salvesen;

Leeming v. *Jones* [1930] 1 K.B. 279 at pp. 292, 300, 301, per Lord Hanworth M.R.; and at p. 302 per Lawrence L.J.;

Jones v. *Leeming* [1930] A.C. 415.

Recourse.

Recourse against the decision of Respondent 2 to the effect that a profit realised from the disposal of a building site was taxable.

G. Polyviou, for the Applicant.

Chr. Paschalides, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:

HADJIANASTASSIOU, J.: This Case is one of those in which the question is whether the difference between the price for which a plot of land is sold and the price at which it was bought, it being an isolated transaction, can be regarded as an annual profit or gain taxable to income tax.

The agreed facts in brief, are as follows:

The Applicant Company, was incorporated under the Companies Law Cap. 113 on January 24, 1955, with (*inter alia*) the following objects:

" 3(a) To purchase the lands, properties, messuages and premises from Vassos Eliades, of Nicosia, situate at Tapak Hane Quarter of the Town of Nicosia and described in title deeds Nos. 194 and 195, both dated 21st August, 1952, with all additions and structures erected or which

are in the course of being erected therein, and to purchase take on lease or otherwise acquire any other lands, properties, messuages and, premises in any part of Cyprus and to hold or to sell, let, exchange, alineate, mortgage, charge or otherwise deal with all or any of such lands, properties messuages, premises or tenements.

(b) To construct, erect and maintain, either by the Company or other parties, sewers, roads, waterworks, buildings, houses, flats, shops and all other works, erections and things of any description whatsoever, either upon the lands acquired by the Company or upon other lands and generally, to alter or improve the lands and other property of the Company.

(c) To carry on any other trade or business which can, in the opinion of the Board of Directors, be advantageously carried on by the Company in connection with or as ancillary to any of the above business or the general business of the Company.

.....

(n) To establish or promote or concur in establishing or promoting any other company whose objects shall include the acquisition and taking over of all or any of the assets and liabilities of this Company or the promotion of which shall be in any manner calculated to advance directly or indirectly the objects or interests of this Company and to acquire and hold or dispose of shares, stock or securities of and guarantee the payment of the dividends interest or capital of any shares, stock or securities issued by or any other obligations of any such company.

.....

(v) To do all such other things as are incidental or conducive to the above objects or any of them".

It would be observed that these extracts show, putting it shortly, that the Company had power to acquire land and to hold land acquired as investments, and further that the Company had power to carry on the business of a property Company, that is, dealing in land by purchasing and selling with a view to making profit.

On April 14, 1955, the Applicant Company acquired from their promoter Mr. V. Eliades, the site of Tapak Hane Quarter on which a block of shops and flats was in the course of construction; the Company completed the construction of the buildings on December 31, 1955; and those shops and flats have since been let to other persons. The money invested in this acquisition was £30,207.-.

In 1957 the Applicant Company acquired from the Gallagher Estate a corner building site plot 284 on Nelson Street at Arab Ahmet Quarter, Nicosia, near the Nicosia Club premises, for the sum of £2,808; and it was intended on this plot to build new offices and stores for letting them to the sister Company Vassos Eliades Ltd. This plot appears and is delineated in red on a plan before the Court (marked *exhibit A*).

In 1958 the Applicant Company acquired a garden at Limassol town for the sum of £8,351.500 mils; they started erecting in 1959 a block of shops and flats. The construction was completed in 1960 and the buildings have been let to various people. The total cost of this investment was £41,161.

In 1960, the Directors of the Gallagher Estate Ltd., who entered into negotiations with the American Embassy for the purpose of selling them a number of building sites, adjacent to plot 284, approached the Applicants with a view of selling to the American Embassy in Cyprus plot 284; and offered to the Company plot 295 abutting on Tennyson Road (delineated in blue on the plan) in exchange plus a substantial amount in cash to compensate them for the estimated automatic increase in the value of their plot. Plot 295 was abutting on a street less important than Nelson Street; there was a well on this plot which according to Gallagher Estate Ltd.; would have remained the property of the sellers. As a result of these negotiations an agreement was reached on July 18, 1960, whereby it was agreed with the Applicant Company to transfer to Gallagher Estate Ltd., or to any other person they would nominate plot 284 for the sum of £6,000 and that Gallagher Estate Ltd., should transfer to the Applicants plot 295 for the sum of £3,000.— Finally plot 284 as well as a number of other plots five in all forming a complete piece of land surrounded by roads on all sides, were transferred by the Gallagher Estate Ltd., to the American Embassy in January, 1961, and to the Applicant Company plot 295.

In 1962, the Applicant Company, bought another site at Famagusta town, for the sum of £3,432 and embarked upon the construction of a block of flats and shops. The construction was completed in 1963 at a cost of £22,638 and all the flats and shops were again let to various people.

In 1965 the Applicant Company acquired 4 new sites at Ayios Dhometios, opposite the Coca Cola Plant, for the sum of £13,520 and have prepared plans for the erection of new offices and stores for the sister Company Vassos Eliades Ltd.; because owing to the prevailing political events in Cyprus at that time the Board of Directors have decided not to build new offices and stores on plot 295.

On July 24, 1967, the Commissioner of Income Tax, wrote to the Accountants of the Applicant Company, and in his letter he states:

"Gentlemen,

Vassos Estate Ltd.

I have the honour to refer to the accounts submitted for the above company for the years 1955 to 1965 inclusive, and to your letter dated 16th March, 1964, as well as to Mr. Ph. Ionides letter dated 22nd March, 1967, and to inform you that on the basis of the particulars and information provided therein your computation was agreed for the years 1955, 1956, 1959, 1960, 1964 and 1965.

2. Your computation for the years 1957, 1958, 1961 and 1962 and 1963 will be amended as follows:

.....

1961

Loss per computation	85
Less: Profit on sale of Plot No. 284 (After considering all the relevant facts of the case it has been decided to treat this profit as trading profit liable to income tax).	3,192
Adjusted Income	£3,107

.....

3. Determination of your objections for the years 1955 to 1960 inclusive and assessments for the years 1961 to 1965 inclusive will be sent to your client in due course".

There is no doubt that the Applicant Company by building on lands which has acquired they became fixed capital assets of the Company; and because of the letting of the shops and flats rents were received by the Company which were duly shown in its accounts for tax purposes. Furthermore it appears that the Company had no income from any other sources.

On August 8, 1967, Mr. Phanos Ionides, the taxation consultant of the Applicant Company, replied to the Commissioner of Income Tax, objecting against the assessments and his letter is in these terms:-

"....

2. The objection is based on the following grounds:

(a) The profit of £3,192 made by the Company from the disposal in January, 1961, of a building site on Nelson Street, Nicosia, to the U.S. Embassy is not a profit made from an operation effected in the course of carrying on of a trade by the Company. It is a casual profit which represents the automatic increase in the value of the site from the time it was purchased by the Company (in 1957) to the time it was sold (January 1961).

(b) ....

(c) This is the only sale of immovable property which the Company has had since its incorporation in January 1955. What the Company has done as a matter of fact was to exchange its site for another site in the same area but at a relatively longer distance from the Turkish Quarter and be paid the automatic increase of its value over and above the cost of acquisition.

(d) The property sold was not held as stock-in-trade by the Company but as a capital asset. Your office has so treated all other sites acquired by the Company in various towns with the object of expanding its business and it is ununderstandable why in this isolated transaction it is sought to deem the site sold as stock-in-trade held and disposed by the Company.

....

3. The facts relating to the acquisition and disposal of

the site in question are set out in para. 3 of my letter to you of the 22nd March, 1967. This case is on all fours with the *Limassol Land Investment Company v. The Commissioner of Income Tax* (1957) *and unless one proves that the sale by the Company of the site was effected in the course of carrying on of a trade*, the profit made cannot be taxed. In this connection you are referred to the decision in the *Glasgow Heritable Trust; Ltd. v. Commissioners of Inland Revenue* (35 T.C. p. 196)".

Pausing there for a moment I would like to observe that the Inland Revenue treated the Company as an investment Company and quite rightly so, because from the time of its existence the Company was in fact not dealing in property in the sense of purchasing properties developing them and turning them over. I would however add, that such action on the part of the Commissioner is not an irrevocable action, and if circumstances change, or if events show that the basis of treating the Company as an investment Company proves to be the wrong basis, the Commissioner is free to revise the position.

On December 11, 1967, the Commissioner wrote to the Applicant Company, and in his letter he says:

"Gentlemen,

I have the honour to refer to Mr. Phanos Ionides' letter, dated 8th August, 1967, objecting on your behalf against the assessment raised on you in respect of the years of assessment 1962 and 1963 (years of income 1961 and 1962) and to inform you that I have given further consideration to the question of the surplus realised from the disposal of building site, Plot No. 284, in 1961, and I am still of the opinion that this surplus of £3,192 is a profit taxable under section 5 of the Greek Communal Law No. 18 of 1962.

2. In the circumstances, I have decided to determine your objection by maintaining the original assessments in full and I am enclosing notices of tax payable.

3. If you are aggrieved by my above decision you may make a recourse to the Supreme Court within the period specified in paragraph 4 of the notices".

It would be observed, that from the notices of tax payable (*exhibit* 3), the Applicant Company was assessed to income tax on the amount of £3,107, to pay the sum of £1,320.575 mils tax.

The Applicant Company, feeling aggrieved with the decision of the Commissioner, filed a recourse dated January 17, 1968, claiming, *inter alia*, for the following relief:

"(a) A Declaration that the decision of the Respondents and/or of the 2nd Respondent to the effect that the profit of £3,192 derived by the Applicants in 1961 from the transfer to the American Embassy of a building site (Plot No. 284) in Nelson Street, Nicosia, belonging to the Applicants, is liable to income tax is *null* and *void* and of no effect whatsoever.

(b) A Declaration that Assessment No. 1297/AD/67/62B raised on the Applicants in respect of the year of Assessment 1962(61) assessing to income tax an amount of £3,107 balance of the profit of £3,192 realised from the sale of a building site referred to above is *null* and *void* and of no legal effect whatsoever".

The Opposition, filed by counsel of the Respondent, on January 26, 1968, is on the following grounds:

"1 That the assessments for the years of assessment 1962 and 1963 complained of were properly and lawfully made under sections 5(1)(a) & 5(1)(a) of Greek Communal Laws, 18/1962 and 9/1963 respectively.

2. That in the alternative and without prejudice to para. 1, the assessments for the years of assessment 1962 and 1963 were made under sections 5(1)(θ) and 5(1)(θ) of Greek Communal Laws 18/1962 and 9/1963 respectively.

3. The Commissioner of Income Tax properly decided that the profit from the sale of land (of plot No. 284) by the Applicant estate company was a trading profit.

4. In any event the transaction entered into by the Applicants which had the result of profit, was entered into and concluded by the Applicant with a view to producing income".

On April 29, 1968, the date of hearing, counsel for the Respondents, made this statement:

"The facts are agreed as pleaded by Mr. Polyviou, with the following qualification regarding para. 5. With regard to the fees paid in respect of plot 284 these fees were treated by the Revenue authorites as part of the cost of the building site in computing the profit derived from the disposal of the said plot.

As the facts have been agreed today we seek time to reconsider what will be the legal position".

I think, it is constructive to deal first with certain sections of the Greek Communal Law 1962, before dealing with the submissions made by both counsel.

Section 5(1)(a) of the Law is well known as the charging section. It provides that income tax shall be charged in respect of 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. This, which is the governing section of the Law needs no comment beyond that which has often been made before, viz., that the tax is an income tax and charged on income as distinct from capital.

Section 5(1)(θ) of the same Law provides that the tax is charged for any annual profit or gain not falling in the foregoing paragraphs. This section corresponds to Case VI of Schedule D of the English Income Tax Act, 1952.

Now the definition of "trade" in the Law, section 5(2)(d) is this:

"Trade shall include every manufacture or adventure or concern in the nature of trade".

I would like to begin by saying that the cost of purchasing an asset—and the same may be said of the proceeds of its realisation—may be of a capital or a revenue nature according to the circumstances of the particular taxpayer. In the case of a transaction in land the question of the nature of the monetary consideration involved merges into the question whether or not, a trade in buying and selling land is being carried on.

Counsel for the Applicant Company, relying mainly on the authority of *Leeming* v. *Jones* [1930] 1 K.B.D. 279, has contended:

(a) that the company is a land investment company and that the sum in respect of which the assessments had been made was not a profit or gain made in the course of the carrying on of a concern in the nature of trade;

(b) that the said profit was a casual profit or gain representing the automatic increase in the value of land from the date of purchase to the date of transfer in 1961;

(c) that the said building site was not held as stock-in-trade by the Applicant Company, but, as a capital asset;

(d) that the Respondents have failed to take into consideration that the transfer effected by the Applicant company was an 'isolated transaction' as well as the special circumstances, and have drawn wrong inferences from the facts and evidence laid before them by the Applicants.

It was contended on behalf of the Respondents:

(a) that as the purchase and selling of land was included in the objects of the Applicant Company the profit or gain realised on the sale of the building site was a profit or gain in the course of the carrying on of a trade within the provisions of section 5(1)(a) of the Greek Communal Law 1962;

(b) that in the alternative, even if the Court would reach the conclusion that section 5(1)(a) of the law could not be applied in this case, then, he submitted that section 5(1)(θ) could be invoked to tax profits or gains which do not arise from general business or vocation, but, from transactions which have the characteristics of a particular business.

He relied on the authority of *Ryall* v. *Hoare, and Honeywill* (1923) 8 T.C. 521 at page 525; and *Cooper* v. *Stubbs* (1925) 10 T.C. 29. I must however add, that counsel has conceded that, if the Court would reach the view that the amount of £6,000 the selling price of plot 284, represented an appreciation

in value, then it became an accretion to capital and fell outside the ambit of section 5(1)(θ) of the said Law.

Now whether or not a trade is being carried on, is a mixed question of fact on the one hand and of law on the other. It is for the Appeal Commissioners to consider whether there is a trade or the exercise of a trade by considering a number of business facts. See *Wilcock* v. *Pinto & Company* [1925] 1 K.B. 30. But a question of law is also involved, in as much as failure by the Commissioner to appreciate the nature of facts submitted in relation to a trade may render their decision invalid in law. See *Bomford* v. *Osborne* [1942] A.C. 14. In a given case the Commissioners must, therefore, deduce conclusions from the facts proved or admitted before them, and these are conclusions of fact but the question whether there was any evidence to justify those conclusions is one of law, on which the aggrieved party can appeal to the Court.

Lord Radcliffe, in his speech in *Edwards (Inspector of Taxes)* v. *Bairstow and Another* [1956] A.C. 14, at p. 35, formulated the principles which the Court should follow in reviewing a determination of the Commissioners. He said:-

> "I think that the true position of the Court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. 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 upon 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, that 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".

I am indeed indebted to both counsel with the way they have presented their case and who cited many cases. But after having had the occasion to peruse them, I do not propose to review all the authorities. They set up no conclusive test of general applicability and it is fruitless to argue from the facts of one instance to the differing facts of another. There is, so far as I am aware, no single, infallible test for settling the vexed question whether a receipt of money is of an income or of capital nature. Each case must depend on its particular facts and what may have weight in one set of circumstances may have little weight in another. One has to look to all the relevant circumstances and reach a conclusion according to their general tenor and combined effect.

I propose dealing first with the case of *Californian Copper Syndicate (Limited And Reduced)* v. *Harris (Surveyor of Taxes)* 5 T.C. 159: According to the headnote in this case the Company formed for the purpose, *inter alia*, of acquiring and reselling mining property; after acquiring and working various property, it resells the whole to a second Company, receiving payment in fully paid shares of the latter Company.

Held, that the difference between the purchase price and the value of the shares for which the property was exchanged is a profit assessable to Income Tax.

Lord Justice Clerk had this to say at pp. 165–166:–

"It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains

a greater price for it than he originally acquired it at; the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?"

The principle was approved in the case of *Commissioner of Taxes* v. *Melbourne Trust Limited*, [1914] A.C. p. 1001. Lord Dunedin in his judgment in the Privy Council said at page 1010:

"..... Their Lordships think that the principle is correctly stated in the Scottish case quoted *California Copper Syndicate* v. *Harris*, 5 T.C. p. 159. 'It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable here what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business' ".

The same principle was again approved and followed in

the House of Lords in the case of *Ducker* v. *Rees Roturbo Development Syndicate, Ltd.* [1928] A.C. p. 132. Lord Buckmaster had this to say at p. 140:

> "..... My Lords, I think it is undersirable in these cases to attempt to repeat in different words a rule or principle which has already been found applicable and has received judicial approval, and I find that in the case of *The Californian Copper Syndicate* v. *Harris* 5 T.C. p. 159 it is declared that in considering a matter similar to the present the test to be applied is whether the amount in dispute was 'a gain made in an operation of business in carrying out a scheme for profit-making'. That principle was approved in a judgment of the Privy Council in the case of *Commissioner of Taxes* v. *Melbourne Trust* [1914] A.C. 1001, and it is, I think, the right principle to apply".

In *The Commissioners of Inland Revenue* v. *Livingston and Others*, 11 T.C. 538, the headnote is as follows:-

> "On the 10th September, 1924, the Respondents, a ship repairer, a blacksmith and a fish salesman's employee, purchased as a joint venture a cargo vessel with a view to converting it into a steam-drifter and selling it. They were not connected in business and they had never previously bought a ship.
>
> Extensive repairs and alterations to the ship were carried out by the orders of the Respondents the first two of them being employed thereon in their ordinary capacity and at the ordinary trade rates, and on the 31st December, 1934, the Respondents sold the vessel at a profit.
>
> Held, that the Respondents were assessable to Income Tax under Case I of Schedule D in respect of the profit arising on the transaction".

Lord President Clyde had this to say in his judgment at p. 542:

> "..... I think the profits of an isolated venture, such as that in which the Respondents engaged, may be taxable under Schedule D provided the venture is 'in the nature of trade'. I say 'may be', because in my view regard must be had to the character and circumstances of the particular venture. If the venture was one consis-

ting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made".

In *Tebrau (Johore) Rubber Syndicate, Ltd.*, v. *Farmer* 5 T.C. p. 658, the headnote is as follows:- "Company formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees. Power was taken in the Memorandum of Association to sell the property and such a sale was contemplated in the prospectus issued at the inception of the Company. Two estates were purchased, but the original capital being insufficient to develop them the whole of the undertaking was sold to a second company for a consideration (mainly in shares of the second company) in excess of the capital expended. At the date of the sale a considerable acreage had been planted, but no rubber had yet been produced or sold.

Held, that the profit on the sale was not a profit assessable to Income Tax but was an appreciation of capital. *Californian Copper Syndicate* v. *Harris* 5 T.C. 159, distinguished."

Lord Salvesen after distinguishing in his judgment the case of *Californian Copper Syndicate* (*supra*) said at p. 664:-

"In this case I am of opinion that the determination of the Commissioners is wrong. I am unable to distinguish the position of the Appellants from that of a person who acquires a property by way of investment and who realises

it afterwards at a profit. It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income tax but results from an appreciation of his capital. No doubt if it is part of his business to deal in land or investments, any profits which in the course of that business he realises form part of his income; but the mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realised a profit on his purchase does not make that profit liable to assessment. Here the Appellant Company was formed primarily to acquire and develop a certain estate mentioned in the Memorandum and any other estates suitable for the cultivation of rubber; and to carry on the business of developing and cultivating the said estates.

No doubt power was also taken to sell any part of the undertaking and property of the Company; and I assume that the promoters of the Syndicate had in view from the first that it might become expedient to do so; but I am unable to infer from this fact, taken along with the ultimate sale of the entire assets to a new company, that it was part of the trade of the Syndicate to purchase and sell lands.

The fallacy of the view taken by the Commissioners is further apparent from the fact that the profit which ultimately results from an appreciation of value is not necessarily referable to the particular year in which it is realised.

In the case before us it is no doubt true that the Syndicate only existed a little more than a year; but that does not in the least affect the question whether the profits were made by way of annual income or resulted from appreciation of capital. Suppose the Company had been in existence for ten years before it sold its whole property at a profit, how could it be said that the profit so made was income of the last year in which it existed?

The only difficulty arises from the decision in *The Californian Copper Syndicate* 5 T.C. 159. The facts in that case were not unlike those which occur here; but the grounds of the decision appear to me not to be applicable.

Lord Trayner said: 'I am satisfied the Appellant company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the Company but solely with the view and purpose of re-selling the same at a profit'. I do not think a like inference can be drawn in the present case. The Prospectus shows that while it was in contemplation that, on the estate being sufficiently developed, the Syndicate might sell it as a going concern; it would be for the shareholders to determine whether that course should be adopted or whether the estate should be held and worked by the Syndicate. There would have been ample capital for that purpose if only the Tebrau Estate has been acquired, and no inference can be drawn from the fact that another estate was subsequently purchased, the price of which taken along with the amount spent on development, substantially exhausted the assets at the disposal of Syndicate. In any event I cannot find sufficient evidence from this single transaction, which at the same time brought the Syndicate to an end, that the profits so made are to be treated as income or gains made by trade, and I should hesitate to extend the decision in the *Californian Copper Syndicate* beyond facts of that case. The other case to which we were referred of the *Scottish Investment Trust Limited* 3 T.C., 231 has no application, because it was part of the ordinary business of the Company to make profits by the purchase and sale of investments and accordingly the profits made in any particular year were assessable for income tax, in whatever way the Company choose to treat these profits in their books. The present case appears to me to fall within the principles enunciated in the *Assets Company* 3 T.C., 542 and in the *Stevens* v. *The Hudson Bay Company*, 5 T.C., 424, in both of which the profits realised by the sale of the Company's assets were not treated as income for the purpose of income tax. I am accordingly of opinion that we should reverse the determination of the Commissioners".

I shall now deal with the case of *Leeming* v. *Jones* (*supra*), relied upon by counsel for the Applicants. The headnote is to this effect:

"The respondent joined with three other persons in obtaining an option to purchase a rubber estate in the

Malay Peninsula. The estate was not large enough for re-sale to a public company to be formed to work it, and they accordingly acquired a further option to purchase an additional estate. Ultimately the two estates were sold to a company at a profit of 3000 l. of which, after deduction of expenses, the respondent's share was 623 l. 10s. The respondent having been assessed to income tax on this sum appealed. The Commissioners found that the respondent acquired the property or interest in the property with the sole object of turning it over again at a profit, and that he at no time had any intention of holding the property or interest as an investment. They subsequently found, on the case being referred back to them, that the transaction in question was not a concern in the nature of trade:-

Held (affirming the decision of Rowlatt J.), that having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade, and to its being merely an isolated transaction of purchase and resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, and were therefore not subject to tax under Case VI of Sch. D of the Income Tax Act, 1918.

Pearn v. *Miller* (1927) 11 Tax Cas. 610 approved.

Cooper v. *Stubbs* [1925] 2 K.B. 753 distinguished".

Lord Hanworth M.R. had this to say in his judgment at p. 292:-

"..... The matter then came before Rowlatt J. again on January 15 of this year, and he held that in as much as it had now been definitely found that there was not a trade or adventure in the nature of trade, the case could not fall under Case I. of Sch. D, and he held that the Commissioners in imposing a tax at all, as they had done, upon this assessment of 603 l. 10s. must have imposed a tax upon what could only be an accretion of capital value, for they had not once, but twice considered the matter, and in their second judgment made it abundantly plain that there was no trading and no adventure in the nature of trade. What, then, could this operation be except the buying of a property and the selling of it and an accretion of capital? Now Rowlatt J., and I think

this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, 'of organising the speculation, of maturing the property', and the diligence in discovering a second property to add to the first, 'the disposing of the property', there ought to be and there must be a finding that it was an adventure in the nature of trade; but Rowlatt J. refrained from so doing, and I think he was right, for however strongly one may feel as to the facts, the facts are for the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could be only one conclusion. The Commissioners are far better Judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final Case negatived anything in the nature of an adventure or trade".

I would like to add that I shall have the occasion to quote a further extract from this judgment, when I shall be dealing with the submission of counsel for the Respondents with regard to the effect of the provisions of section 5 (1)(θ) of our law.

Lawrence L.J., delivering a separate judgment in the same case, had this to say at p. 302:-

" It seems to me that in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property".

This passage was cited with approval on appeal in the House of Lords, in the case *Jones* v. *Leeming* [1930] A.C. 415.

Having in my mind the principle formulated in the cases of *Californian Copper Cyndicate*, and *Livingston* (*supra*), the conclusion that remains is whether the surplus realised from the sale of plot 284 is profits.

In my view, from the state of affairs of the company since its inception, it leaves no doubt in my mind that the acquisition of plot 284 was not made with a view to re-sale at a profit; furthermore it is clear from the activities of the company that its object was not to hold and nurse the investments it held and to sell them at a profit when convenient occasion occurred.

In the present case plot 284 was acquired by the Company, for a specific purpose in order to erect its offices; but owing to the intercommunal troubles, the company was forced to postpone its plans. Until the sale of this plot—this being an isolated transaction—there was no course of dealings with the sale of lands.

After looking to all the relevant circumstances, and having reviewed the determination of the Commissioner, I have reached the conclusion that the surplus realised was the realisation of an investment and that the enhanced price was not profit in the sense of section 5(1)(a) of the Greek Communal Law 1962 and Law 9/1963, because the profits were not made in an adventure in the nature of trade. In the light of my finding, I am of the view that the Commissioner was acting under some misconception of the law and that this has been responsible for his determination. I would, therefore, reverse his decision that the profits made by the company was a trading profit liable to income tax, because from the evidence the true and only reasonable conclusion contradicts the determination of the Commissioner.

For the reasons I have advanced, I would accept the submission of counsel for the Applicants that the decision of the Commissioner is contrary to law and therefore, *null* and *void* and of no effect whatsoever.

I shall now deal with the question of law raised in para. 2 of the opposition. Counsel for the Respondents has contended that the company's profit did constitute "annual profit or gain" falling within the provisions of section 5(1)(θ), because he argued that anyone by comparing the value of plot 295 sold in 1961, to plot 284, could not have reasonably reached the conclusion that the latter plot of land had appreciated in value up to the full amount of £6,000.

I must confess that during the hearing, the argument of counsel appeared to me an attractive proposition. Having had the occasion, however, to consider the facts more fully and particularly, the position and the street where plot 295 is placed—as compared to plot 284—as well as the reservations of the sellers of their right to draw water from the well in that plot, I have reached the conclusion that a comparison between the two plots cannot be under these circumstances realistic. It is not in dispute that because of the special features attached

to plot 284 this plot had acquired a much bigger value than plot 295. What counsel here is challenging is the extent of this appreciation.

With due respect to counsel's argument, anyone following the state of affairs with regard to the values paid for real property in Cyprus, will realise especially when it had become known that the American Embassy was interested to acquire plot 284—and not forgetting that they have already purchased other lands near this plot—that it was inevitable that the price of this plot would soar up.

Having considered the unique position of this plot as well as the fact that the American Embassy needed it so much in order to complete a number of buildings required for the erection of a building of the American Embassy, I have reached the conclusion from these facts that the amount of £6,000 represented a true appreciation of capital.

Lord Hanworth dealing with this very point in the case of *Leeming* v. *Jones* (*supra*), and after reviewing all the authorities including the two cases, relied upon by counsel for the Respondents, had this to say at pp. 300–301:–

> "In my view a close examination of all these cases brings us to this point, that although it is quite unnecessary to lay down any rigid rule which is to circumscribe Case VI. in contradistinction to Case I., and although you may have cases which fall properly within Sch. D. and in respect of which Case VI. may be usefully applied, yet if you are to apply Case VI. it must be in respect of something to which Sch. D applies: it must be something in the nature of profits or gains in contradistinction to capital, and I think that the words which are used by Atkin L.J. in *Cooper* v. *Stubbs* [1925] 2 K.B. 753, to which I have already referred, are of assistance here, for he made it plain that he regarded Case VI as applicable to something which was in the nature of revenue or income as opposed to capital. I do not desire to go further than that, which seems to be sufficient for this case. It appears to me, therefore, that in the present case, in which we have anything in the nature of trade negatived, and in which the Commissioners have applied themselves to the fact that there were two properties purchased, and yet negative trade, we can hold and only hold that they meant to say

that this was a matter on which there had been a capital accretion and that that capital accretion whatever else might fall within Case VI., does not fall within Case VI., and is not taxable for the reason that it is not a source, and by reason of the interpretation given by Atkin L.J. in *Cooper* v. *Stubbs* [1925] 2 K.B. 753, and the summary of it to which I have referred given by Rowlatt J. in *Ryall* v. *Hoare* [1923] 2 K.B. 447, it appears to me that this single profit of 603 l. 10s. cannot form the subject of an assessment..."

As it appears to me that the company's profit did not constitute "annual profit or gain" within the sweeping up section of our law, because, the profit was in the nature of a capital gain and not income, it cannot form the subject of an assessment under section 5(1)(θ) either.

I would, therefore, dismiss this contention of counsel.

Mr. Polyviou: We are not asking for costs.

Court: No order as to costs.

Sub judice decision annulled; *no order as to costs.*