1980 October 8

[A. Loizou, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LILIAN GEORGHIADES,

Applicant,

v.

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

Respondents.

(*Case No.* 186/76).

Income Tax—Assessments—Conduct of tax-payer—Dealings in land—Buying jointly land with land dealers and sale at a profit—Purchase and resale at a profit of undeveloped and non-income producing property—Receiving damages arising from breach of contract to purchase land—Rightly found to be acts in the nature of trading in land and as such taxable.

Income tax—Assessments—Additional assessments—When open to the respondent Commissioner—Section 23 *of the Taxes (Quantifying and Recovery) Law,* 1963 (*Law* 53/63 *as amended by Law* 61/69).

Income tax—Assessments—Interest—When is interest payable—Tax payer's wilful default or fraud—Section 34 *of the Taxes (Quantifying and Recovery) Law,* 1963 (*Law* 53/63 *as amended by section* 16 *of Law* 61/69).

The applicant, who has been provided by her father with substantial dowry, has had income from her own property and from employment as a nurse-in-charge of her husband's clinic. In 1966 or 1967 she sold a building site at Famagusta, which had been bought for her by her father, and part of the proceeds from its sale was invested by her in the acquisition of other movables in Limassol and part towards meeting the cost of their residence and clinic in Limassol. In 1965 and 1966

she purchased two contiguous plots of land at Ay. Athanassios village for the total price of £260. In 1965 and 1966 she entered into contracts for the purchase, by instalments, of two pieces of land from Gedeon Procopiou of Limassol at the total price of £6000.—. When Procopiou refused to transfer the pieces of land in question in her name she brought an action against him and on the 14.12.1970 an amount of £25,000 was, by consent, awarded to her as damages, which were paid to her in two equal instalments in 1970 and 1971.

In 1968 she sold the two pieces of land at Ay. Athanassios for £1,950 and in the same year she entered into a contract with a certain Anastassiou for the purchase of two building sites at Ay. Phylaxis for £2,000. The sale price was paid in 1968 but the vendors refused to transfer the sites in question in her name and action was brought against them for breach of contract. Judgment for £3,730 damages was given in her favour on 30.11.1971 and this amount was paid to her in 1972. In the returns of her income for the years of assessment 1971–73 applicant declared only her salary received from her husband, but when the respondent Commissioner received information that she had been dealing in land he decided to raise additional assessments on her whereby he took into consideration the amount of damages she had received from Procopiou and Anastassiou and, moreover, he demanded 6% interest as from the 1st day of December of the year to which the assessments related. Hence this recourse.

In raising the *sub judice* additional assessments the respondent Commissioner arrived at the conclusion that the applicant's dealings in land were an act in the nature of trading in land because (a) the purchase of the two plots at Ayios Athanassios and their resale in toto in 1968 indicated the motive of profit making and the plots, were, therefore, considered to be trading stock; (b) because the purchase of land from Procopiou on credit payable by instalments was another evidence of her intention that the purchase was with a view to resell at a profit; and (c) because the applicant's intention of trading in land was further evidenced by her association with established dealers in land to purchase immovable property jointly.

Moreover regarding the damages which she received from Procopiou and Anastassiou, the Commissioner was of opinion

that they were received in ordinary course of trading (business) and were not compensation for not carrying on her business.

Held, (1) that the conduct of a party and statements made by him at different times and for different occasions were matters to be legitimately taken into consideration by the respondent Commissioner in deciding objectively the nature of the transaction in issue; that buying jointly land with land dealers is a factor to be taken into consideration in determining whether a transaction was a trading one and the profit made by the sale of property was part of the taxable income of the tax-payer as constituting gains or profit from trading in land; that the purchase of undeveloped and non-income producing property was a factor that could be legitimately taken into consideration in deciding the nature of the transaction; that the damages received from Procopiou and Anastassiou were rightly treated as received in the ordinary course of trading in order to adjust the relation between herself and the sellers; that, factually and legally, the respondent Commissioner could treat the relevant gains as taxable income; and that the applicant has not discharged the burden of satisfying this Court that it should interfere with the *sub judice* decision which was reasonably open to the Commissioner.

(2) *On the question whether the respondent Commissioner could raise the additional assessments*: That it is open to the respondent Commissioner when it appears to him that any person on whom tax has been imposed has been assessed at a less amount than that which ought to have been assessed, to assess, within a specified period, such person at such an amount of, or additional amount of tax as was imposed and which ought to have been assessed and recovered and so raise an additional assessment on the tax-payer undercharged; that this power can be exercised when the respondent Commissioner finds out that there was income chargeable to tax which had been omitted from any previous assessment because of a deliberate or accidental omission on the part of the tax-payer to declare such income; that it cannot be said that the income was omitted from any previous assessment with the sanction of the respondent because he would have no power to sanction such an omission, and it makes no difference and the tax-payer is not exonerated from his full liability to tax irrespective of whether same was deliberate or accidental; and that, accordingly, the respondent

Commissioner could raise the additional assessments (see section 23 of the Taxes (Quantifying and Recovery) Law, 1963 (Law 53/1963 as amended by Law 61/69).

(3) *On the question whether interest was recoverable on the tax assessed on the applicant and if so as from which date*: That the respondent Commissioner could not treat this case as falling within section 34(2) of Law 53/63, which provides that when the delay in making an assessment is due to a taxpayer's wilful default or fraud interest shall be payable, because fraud could not be invoked in any event in the circumstances; that this was a case that might normally come within the ambit of sub-section 1 of the aforesaid section, which prescribed in general the time as from which the interest is payable when there is neither wilful default nor fraud; that considering, however, all the circumstances pertaining to the delay, including the re-examination by the respondent Commissioner of the whole case after another recourse was filed and in consideration of which undertaking same was withdrawn, this Court has come to the conclusion that it should exercise the powers given to it by subsection 3 of this section and determine that in view in particular of the antecedents of these proceedings and the legal issues involved herein, the taxes in question should be treated as due as from today.

Sub judice decisions confirmed in part; and annulled as to the part relating to payment of interest. No order as to costs.

Cases referred to:

Johnston (Inspector of Taxes) v. *Health* [1970] 1 W.L.R. 1567;

Drousiotis v. *Republic* (1967) 3 C.L.R. 15;

O'Kane and Co. v. *Commissioner of Inland Revenue*, 12 Tax Cases 303;

Savvas M. Agrotis Ltd. v. *The Commissioner of Income Tax*, 22 C.L.R. 27;

Makrides v. *Republic* (1967) 3 C.L.R. 147;

Vassos Estates Ltd., v. *The Commissioner of Income Tax* (1969) 3 C.L.R. 58 at p. 60;

Clift v. *Republic* (1965) 3 C.L.R. 285;

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

Inland Revenue Commissioners v. *Newcastle Breweries Ltd.* [1927] 12 T.C. 927;

Republic v. *Frangos* (1965) 3 C.L.R. 641 at p. 655;

Solomonides v. *Republic* (1968) 3 C.L.R. 103;

Williams v. *Trustee of W.W. Grundy* [1934] 1 K.B. 524;

Commercial Structures Ltd. v. *Briggs*, 30 Tax Cases, 477.

Recourse.

Recourse against the validity of the income tax assessments raised on applicant for the years of assessment 1971, 1972 and 1974.

A. Triantafyllides, for the applicant.

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

Cur. adv. vult.

A. Loizou J. read the following judgment. By the present recourse the applicant seeks:

(a) Declaration of the Court that assessments Nos. 440/AD/76/71, 441/AD/76/72 and 442/AD/76/73 are null and void and of no effect whatsoever and/or the decision of the respondents to impose additional income tax on the applicant for the years of assessments 1971, 1972 and 1974, amounting to £7,733.700 mils or any other sum or at all, is null and void and of no effect whatsoever.

(b) Declaration that the decision of the respondents to demand or impose interest at 6% from the 1st December, 1971 on £2,332.200 mils, from 1st December, 1972, on £5,278.200 mils and from 1st December, 1973, on £123.300 mils, is null and void and of no effect whatsoever.

(c) Costs.

In an effort to have an argument of the legal aspects of the case upon agreed facts, a document (Appendix 'B') was prepared and submitted to the respondent Commissioner of Income-Tax on behalf of the applicant. Attached thereto was also a statement of the grounds of Law relied upon by her (Appendix 'C'). They read as follows:-

"*Appendix 'B'*

1. Applicant is the wife of Dr. Antis Georghiades, an ear and nose specialist exercising his profession in Limassol.

2. She has been provided by her father, Mr. Petros Pantzaris of Nicosia, a merchant in textiles, with substantial dowry and has had income from her own property and from employment as nurse-in-charge of her husband's clinic.

3. Applicant soon after her marriage in 1956 proceeded abroad with her husband and they stayed away from Cyprus up to 1960 when her husband returned to Cyprus to exercise his profession.

4. In 1958 and whilst she was abroad with her husband, her father purchased for her for £2,200.—site at Famagusta, on which it was intended to erect a residence and a clinic for her husband who came from Famagusta.

5. When they returned from abroad in 1960 her husband started exercising his profession in Famagusta but some six months later he moved to Limassol where he has established and where he has since been exercising his profession. Husband acquired immovable property in Limassol and they have built thereon a residence and a clinic. The building site at Famagusta bought for her by her father in 1958 was sold some time in 1966 or 1967 for £3,000.—and part of the proceeds from its sale was invested by her in the acquisition of other immovable property in Limassol and part towards meeting the cost of their residence and clinic in Limassol.

6. In 1965 Applicant agreed to purchase for investment purposes two contiguous plots of land at Ay. Athanasios village from a certain Ourania Katsouri but as she could not spare the whole of the purchase price (some £250), one of the clinic's nurses by the name Anthoulla agreed to purchase for her the one piece and transfer it to her at the price she would acquire it when the applicant could save money to pay the nurse that price. Accordingly, applicant acquired in 1965 for £156.—plot 177 of an area of 4 donums, and in 1966 she had the other plot No. 178, of an area of 2 donums, already registered

in the name of nurse Anthoulla, transferred to her for £104.

7. On 30.7.1965 applicant entered into a contract for the purchase from Gedeon Procopiou of Limassol of a piece of land (consisting of two contiguous plots, Nos. 86 and 87) at Ay. Phylaxis of an area of 4 donums and 1 evlek for £2,500. On 5.1.66 she entered again into another contract for the purchase from the same person of a piece of land, viz. plot No. 88, of an area of 5 donums and 2 evleks, adjacent to that purchased under the contract dated 30.7.65, for £3,500.—and over the period from 30.7.65 to the end of 1967 she made to Mr. Gedeon Procopiou payments totalling £5,000 against the agreed purchase price of £6,000. The properties purchased were then outside the Water Supply Area of Limassol town and outside the approved town planning of Limassol town area. In 1967 Mr. Gedeon refused to transfer the property purchased to her name for the reason that its value had risen in the meantime very considerably owing to the construction in that area of the NAAFI CANTEEN and the British Hospital, and the applicant had to institute legal proceedings for breach of contract. The action brought against Gedeon was settled on 14.12.70, the vendor having agreed to pay her a compensation of £25,000 (including the £5,000 already paid to him by applicant) for the abrogation of her rights under the aforesaid two contracts of sale. Mr. Gedeon paid her £12,500 in 1970 and another £12,500 in 1971.

8. In 1967 after it had become evident that Mr. Gedeon Procopiou would not transfer to the applicant the property purchased from him, applicant purchased by a contract of sale from Mrs. Maria Karapatea another piece of land at Ay. Athanasios for £3,120.—and paid the sale price as follows:-

1967	£ 500
1968	£1,000
1969	£1,620
	£3,120

9. (i) In 1968 she sold the two pieces of land at Ay. Athanasios which she acquired in 1965 and 1966 because she thought they were not a good investment, for £1,950.—and on 8.5.68 she entered into a contract for the purchase from Mr. A. K. Anastasiou and another of 2 building sites at Ay. Phylaxis for £2,000 on which she and her husband intended to build two houses for their two daughters.

(ii) The sale price of £2,000 was paid in 1968 but the vendors refused eventually to transfer the two building sites to her name and an action was brought by her against the vendors for breach of contract. Judgment was given in her favour on 30.11.71 and she was awarded a compensation of £3,730.—including the £2,000.—paid by her for the purchase of the building sites. The compensation of £3,730.—was paid to her in 1972.

10. On 19.12.68 she purchased from Ioannis Th. Papaioannou the 1/3rd share of a piece of land at K. Polemidhia for £13,766.—The other 2/3rd shares were purchased by Mrs. Revecca Savvides and Mr. Kyriacos A. Apostolou. In 1973 she and her co-proprietors were offered a substantial profit to sell the whole property but the applicant refused to sell her share and the transaction failed. The applicant in 1975 applied to the L.R.O. for division of the property held jointly. The property was divided into 3 plots and she was allotted plot 18/2 of LIX.1 for which a new Registration (No. 49176) was issued in her name on 20.3.75.

11. On 19.12.70 applicant entered into another contract for the purchase from Solon and Christos Lambrou of a piece of land at Pyrgos Locality at a distance of 9 miles from Limassol, for £17,000.—against which she paid £3,500.—in 1970, £2,800 in 1971 and £1,700 in 1973, out of the compensation she received from Gedeon Procopiou. She still owes a sum of £9,000.—against the purchase price.

12. Except for the sale of the building site at Famagusta in 1966 or 1967 which was bought for her by her father in 1958 and the sale in 1968 of the land at Ay. Athanasios

acquired in 1965 and 1966 which the applicant thought it was not a good investment, no other sale of immovable property was made by applicant from 1958–1972.

13. The applicant did not take any steps to develop the land at Ay. Athanasios which she sold in 1968 for £1,950.— nor did she do anything calculated to increase its value or render it marketable in any way.

14. The respondent raised in 1972 Assessment No. 1324/AD/72(71) whereby he assessed applicant in respect of the year of assessment 1971(70) on a part (£6,900.—) of the compensation (£25,000) she received from Mr. Gedeon Procopiou in 1970. He also raised in 1973 Assessment No. 745/AD/73(72) whereby he assessed applicant in respect of the year of Assessment 1972(71) on the balance (£12,500) of the compensation she received from the same person in 1971. On 22.6.1974 he raised on her Assessment No. 786/AD/74(73) whereby he assessed her to income tax in respect of the year of Assessment 1973(72) on the whole of the compensation (£1,730) received in 1972 from Mr. A. K. Anastasiou and another.

15. Objections were filed against the aforesaid assessments and on 11.7.73 Applicant addressed a letter to the Respondent stating the facts pertaining to the receipt of compensation for breach of contract by Mr. Gedeon Procopiou.

16. On 19.10.74 the Respondent determined the objection by maintaining in full the assessments made and sent Notices of Tax Payable to the Applicant.

17. Thereafter Applicant requested Mr. Phanos Ionides, Taxation Consultant, to make a last minute attempt to save her of the expenses for filing a recourse. Mr. Ionides after establishing the facts of the case addressed on 7.12.74 a letter to the Commissioner of Income Tax (copy enclosed) and discussed with him the case. A few days thereafter at a meeting arranged for the 21st December, 1974, at the request of the Applicant, and held at the Respondent's Office, the latter informed the applicant and Mr. Ionides that as there had been a determination of the objections he was not prepared to disturb the assessments unless the Supreme Court ordered

him to do so in a judgment issued in a recourse to be filed by applicant".

"*Appendix 'C'*

Statement of the Grounds of Law on which it is contended that the compensation received by Mrs. Georghiades in respect of the breach of the three contracts for purchase of immovable property for investment purposes is not profit from the exercise of trade in land.

(a) Immovable property in Cyprus is a recognised, if not the sole, means of investment in Cyprus.

(b) Purchase of immovable property for the purposes of investment does not constitute trading in land.

(c) In not a single case of acquisition of land property has there been any indication that the intention of Mrs. Georghiades in acquiring the particular property was for the purpose of using it as trading stock.

(d) Mrs. Georghiades did not take any steps to develop or render marketable in any way the two pieces of land at Ay. Athanasios which she purchased in 1965 and 1966. She sold them in the same state as they were at the time she acquired them.

(e) Neither the frequency of the sales of immovable property effected by Mrs. Georghiades nor the period over which she held the property sold in her possession prior to sale justify the conclusion reached by the Commissioner of Income Tax that Mrs. Georghiades exercised the trade of a dealer in land.

(f) The two isolated sales of immovable property which Mrs. Georghiades has effected over a period of 15 years from 1958—1972 cannot be deemed to amount to the exercise by her of a trade in land for:

(i) the sale in 1966 or 1967 of the building site at Famagusta which was purchased for her by her father in 1958 with the intention of building a residence and a clinic thereon is in reality realisa-

tion of the corpus of the gift or of a capital asset not giving rise to taxable income;

(ii) the sale in 1968 by Mrs. Georghiades of the two pieces of land at Ay. Athanasios which she acquired in 1965 and 1966 was a mere change of investment, not a transaction in the course of exercising a trade in land.

(g) The Commissioner of Income Tax has failed to state the date as from which Mrs. Georghiades should be deemed a dealer in land.

(h) Purchase of immovable property as an investment is not a trade. Mere realisation of capital assets is not a trade either.

(i) The compensation Mrs. Georghiades received from Gedeon Procopiou and Anastasiou did not emanate from the sale of the properties which she agreed to purchase as an investment but from the refusal of the vendors to transfer to her the properties purchased under contracts of sale.

(j) Trade consists of: (i) purchases, and (ii) sales. In the case of the compensation received by Mrs. Georghiades there has been a purchase for investment purposes but no sale for the compensation was awarded to her in respect of the abrogation of her rights under the contract.

(k) The fact that her husband is deemed by the Commissioner of Income Tax to be a dealer in land cannot render Mrs. Georghiades a dealer in land also.

(l) The fact that Mrs. Georghiades has used the notional sub-division into building sites of the property she agreed to purchase from Mr. Gedeon Procopiou as a yardstick to compute the compensation to which she became entitled by reason of the refusal of Mr. Procopiou to transfer to her the properties purchased is not a factor which can in law render Mrs. Georghiades a dealer in land.

(m) Mrs. Georghiades has not effected any sale of land at Pyrgos acquired jointly with another two persons

whom the Income Tax Office deems as dealers in land. In fact she has taken steps to terminate such joint ownership as she has submitted an application to the L.R.O. for the division of the property held jointly into 3 pieces and she has now obtained registration as sole owner of one of the three pieces into which the land was sub-divided".

The respondent Commissioner then wrote to Mr. Phanos Ionides, the income-tax consultant of the applicant, a letter dated 8th April, 1976, (Appendix 'D') where it was stated that as far as facts concerning the purchase, method of payment, sale or compensations received in respect of immovable properties, the respondent Commissioner agreed. He went on, however, and said the following:

"..... I do not agree to the fact that because Mrs. Georghiades had not enough means, she could not purchase both plots Nos. 177 & 178 at the same time as mentioned in para. 6 of your statement. Mrs. Georghiades had a credit balance of £2,230.350 mils with her husband as at 31.12.1963 and the purchase price of plot No. 177 amounting to £156 paid out of this account. I suggest that Mrs. Georghiades could easily spare another £100 to purchase plot No. 178. Moreover in 1965 funds of £1,000.- were used out of the above-mentioned account with her husband for the purchase of other immovable property.

Plot No. 178 of 2 donums as against 4 donums of plot No. 177, was purchased by certain Anthoulla A. Sophocleous on 9.11.64 for £104 and sold to taxpayer for £104 on 13.4.66 which appears to have been the market value as at the date of sale.

To finance the purchase of the 1/3rd share of a piece of land at K. Polemidhia (Reg. No. 24555) on 17.12.68 Mrs. Georghiades borrowed from her father £3,000 and £9,167 from a certain Ermoulla V. Pitsillidou.

STATEMENT OF GROUNDS OF LAW on which it is contended that Mrs. Georghiades' dealings in land are an act in the nature of trading in land.

(a) Although immovable property in Cyprus is a reco-

gnized means of investment yet it is an established fact, beyond doubt that in Cyprus, where there is great speculation in land, dealings in immovable property were means of quick and easy way of making a profit thus constituting trading in land.

(b) Mrs. Georghiades in acquiring the two plots of land at Ay. Athanasios in 1965 and 1966 and their resale in toto in a short period in 1968 indicated the motive of profit making, therefore the plots are considered to be trading stock.

The purchase of the second plot in 1966 improved the situation and marketability of the plots.

(c) The purchase of land in particular from Tryfon G. Procopiou, and Ioannis Th. Papaioannou on credit payable by instalments is another evidence of Mr. Georghiades' intention that the purchase was with a view to resell at a profit. The plots of land purchased did not yield any income from which the purchase money would be payable, but she foresaw that the plots of land purchased would be sold at a short time and at a profit thus enabling her to recover the purchase money and to realise a profit.

(d) The intention of Mrs. Georghiades in acquiring property for the purpose of using it as trading stock is evidenced by the statement made by her, in the action brought against Tryfon G. Procopiou for refusing to transfer the land purchased from him, that she had directed and plans had been prepared for the division of the said land into 20 building sites.

(e) Although the sale of the building site at Famagusta in 1966 is considered realisation of the corpus of the gift or of a capital asset not giving rise to taxable income, yet the repurchase of immovable property in Limassol, with the proceeds of the sale and in areas where there was great speculation, showed Mrs. Georghiades' intention of trading in land and profit seeking motive.

(f) The compensations Mrs. Georghiades received from Tryfon G. Procopiou and Anastassiou were received

in ordinary course of trading (business) and were not compensation for not carrying on her business. They were sums paid in ordinary course in order to adjust the relation between the vendor and the vendee. Mrs. Georghiades upon receiving the compensation moneys immediately used them to buy immovable property in great speculative areas of Limassol.

Further there is over abundance of authority that it is immaterial whether the sum received is as a result of a compulsory sale. If the asset realised is a trading asset as in the present case, then the receipt is a trading receipt.

(g) Mrs. Georghiades intention of trading in land is further evidenced by her association with established dealers in land to purchase immovable property jointly.

In the circumstances and having carefully considered the points raised in your above-mentioned letter, I have arrived at the conclusion that the profit and/or compensation received by Mrs. Georghiades attracts liability to tax and therefore the assessments sent to her under cover of my letter dated 19th October, 1974 cannot be disturbed".

There preceded the present recourse, Recourse No. 399/74 as against the income tax assessment on the applicant for the years of Assessment 1971-73.

Among the grounds invoked therein for the annulment of those assessments were that same were not duly reasoned and that material facts were not taken into consideration. The respondents then agreed to the annulment of the assessments and the reconsideration of the subject-matter of that recourse and to the issue of new assessments upon the applicant submitting to them full statements of the facts on which she relied, and the legal grounds in support of her case. It was in those circumstances that the statement of facts and grounds of law, Appendices "B"—"C", were prepared by Mr. Ionides, the tax consultant of the applicant. After Appendix "C" was sent to Mr. Ionides, the respondent Commissioner wrote to the applicant on the 8th May, 1976, Appendix "E" in which he made reference to the contents of his letter of the 8th April, 1976, and informed

her of his decision as to the extent her income was liable to tax and that he reissued assessments on her for the years 1971–1973.

The applicant on the 20th May, 1976, objected once more to the reissued assessments and as no agreement could be reached, the respondent Commissioner of Income-Tax determined same and communicated his decision to the applicant by his letter, dated the 28th May, 1976, and attached thereto the relevant notices of tax payable. As against this determination made under section 20(5) of the Taxes (Quantifying and Recovery) Law 1963, Law No. 53 of 1963, as amended by Law No. 61 of 1969, the applicant filed the present recourse.

In addition to the facts to be found in the two Appendices already set out in this judgment, the applicant herself gave evidence from which the following may be highlighted.

With regard to the two pieces bought by her and her nurse Anthoulla from Ourania Katsara, she said that she bought it as Ourania wanted to sell some plots from her property in order to get married and she bought later the plot purchased by Anthoulla as the latter wanted to sell it because she could not build her own house thereon, there being no streets, no water and no electricity supply in the area and she did buy these two plots as she always liked investing in land. She agreed to the facts as set out in paras. 7(b) and (c) of the Opposition with regard to the instalments and the payments which are as follows:

".....

(a) On 30th July, 1965, Applicant entered into contract for the purchase from certain Tryfon G. Procopiou of Limassol land of an area of 4 donums and 1 evlek Plot No. 86 and 87 at Ayia Phylaxis for £2,500. The terms of payment per contract were as follows:

Payments per contract		*Actual payments*	
On 30.7.65 —	£1,000	On 30. 7.65 —	£1,000
On 1.5.66 —	500	On 9. 1.66 —	90
On 1.5.67 —	500	On 7. 2.66 —	116
On 1.5.68 —	500	On 3. 4.66 —	197
		On 28. 4.66 —	381
	£2,500	On 18.11.66 —	77
		On 7. 1.67 —	250
		On 3. 5.67 —	45
			£2,156

Note: The payments include interest at 6%.

All instalments were paid with the exception of the last instalment.

(c) On 5th January, 1966, Applicant entered into contract for the purchase from Tryfon G. Procopiou of Limassol, land of an area of 5 donums and 2 evleks plot No. 88 at Ayia Phylaxis for £3,500.— The terms of payment per contract were:

Payments per contract	*Actual payments*
On 5. 1.66 — £1,000	On 5.1.66 — £1,000
On 1. 5.66 — 500	On 28.4.66 — 500
On 1.11.66 — 1,000	On 2.7.66 — 500
On 1. 5.67 — 500	On 23.9.66 — 500
On 1.11.67 — 500	On 7.1.67 — 500
	On 19.1.67 — 250
£3,500	£3,250

Note: The payments include interest at 6%.

All instalments were paid with the exception of the last instalment.

The purchase of plot No. 88 adjacent to plots Nos. 86 and 87 improved the marketability of the plots for development purposes.

In November 1968, Applicant brought action against Tryfon G. Procopiou, vendor of the plots Nos. 86, 87 and 88 (para. (b) and (c)) for refusing to transfer the plots to her name and claiming that she had directed and plans had been prepared for the division of the said land into 20 building sites.

This claim of Applicant is an evidence of her intention that the said plots were required for purposes of using it as stock-in-trade.

On 14th December, 1970, the Court awarded the payment, by the vendor Tryfon G. Procopiou, the sum of £25,000 including £5,000 paid by Applicant against the contracted purchase price. The vendor

paid £12,500 in 1970 and £12,500 in 1971. The net profit realised in each year is computed as follows:

1970		
Amount received from vendor		£12,500
Less: Payments against purchase price	£5,000	
Legal costs	600	5,600
Net taxable profit		£ 6,900
1971		
Whole amount received from vendor representing profit realised		£12,500".

I took this admission of the plaintiff as not going to the extent of accepting the allegation contained in the aforesaid quotation that "this claim of applicant is an evidence of her intention that the said plots were required for purposes of using it as stock-in-trade". It was further stated by her that when she bought plots 86 and 87, hereinabove referred to, there was neither electricity nor water supply in the area. She acted in the action against Procopiou on legal advice and claimed damages as she could not claim specific performance and the settlement was declared in Court on the 14th December, 1970. She further stated that by 1967 there were changes in the area, water and electricity supply were in the process of being installed and there were indications that the NAAFI would be erected or were about to be erected in the area and that was probably one of the reasons that Procopiou refused to transfer the property.

With regard to the allegation in the pleadings prepared by her advocate to the effect that she had prepared plans for separation of the land into 20 building sites, she said that she never had plans for such division, hence she did not claim therein for the cost of such plans. She merely wanted to show that in the meantime the area was not just a field as she had originally bought it but it was ripe for development into building sites and the area was big enough to permit divisioning into building sites.

With regard to the purchase of the piece of land in 1967 from Maria Karapatea, she said that she bought it after she had an

intimation from Procopiou of his intention not to transfer the property bought from him. This property was sold in 1974 but we are not concerned with that year of assessment in this case. She further stated that in 1968 she sold just by chance the two pieces of land at Ayios Athanasios which she had bought from Ourania Katsara not as an investment but in order to help her and her nurse Anthoulla. She was approached by two men together with the brother of Ourania who she thought was an estate agent and after her persuasion she sold them for £1,950.— to the two men who used the property to plant peartrees in it. With that money she entered into a contract with Mr. Anastasiou and bought the two building sites at Ayia Phylaxis for £2,000.— for her two daughters, and then as the latter could not transfer to her the two building sites she brought an action against him and the case was settled in Court for £3,840.—including the £2,000.—paid to him.

With regard to the property bought on the 17th December, 1968, jointly with Mrs. Rebecca Savvides and Mr. Kyriacos Apostolides, who is a building contractor and a land dealer, she said that in 1975 she applied for the division of this property into three parts as one of the co-owners wanted to sell his share and she would keep hers having bought same as an investment for her children.

With regard to the borrowing of the sum of £9,167.—from Ermoulla Pitsillidou in order to finance the purchase of the one third of the aforesaid property, she said that the vendor, the father of Ermoulla, asked that in order to transfer the property to her she should mortgage same for that amount to Ermoulla who was the rightful owner thereof.

In cross-examination counsel for the respondent put to her matters relating to her financial position, the cash she had available at given times for the purchase of immovable property, her declared income at the material years, all tending to show that the applicant was purchasing land and undertaking obligations to pay instalments far more than her income. It was also pointed to her that she was borrowing money for the purpose of financing such purchases with the exception of the plot bought from Ourania when she had ample funds to buy both plots.

It may be briefly mentioned that from the records of the income tax her declared salary was £300.—for 1963, £330.—

for 1964, £360.—for 1965 and for 1963 her income from rents was £310.—after deducting repairs, in 1964 was £467.—and in 1965 £460.—and that in 1966 the rent was £470.—and in 1967 £558. In 1967 the applicant and her husband were in debt for an amount of £2,500.—and yet in 1965—1967 she had to pay instalments only for the plot purchased from Procopiou for an amount of £7,000.—and that she further had instalments to pay in 1966 and 1967 for the properties purchased from Karapatea amounting to £3,000.

This situation has been brought up by counsel for the respondent as the inability of a tax-payer to finance a purchase is one of the factors to be weighed together with other factors in deciding the nature of a transaction. Support for this proposition may be found in the case of *Johnston (Inspector of Taxes)* v. *Heath* [1970] 1 W.L.R. p. 1567. In relation to the evidence adduced and its significance reference may be made to the case of *Drousiotis and The Republic* (1967) 3 C.L.R. p. 15, where by reference to the case of *O'Kane and Co.*, v. *The Commissioner of Inland Revenue*, 12 Tax Cases 303, it was stated that the nature of a transaction must be examined objectively and that the intention of a tax-payer cannot be considered as determining what it is that his act amounts to. Whilst on the other hand such intention at the material time constitutes one of the relevant factors which have to be weighed in arriving safely at the correct valuation of the position.

Whilst on this point reference must be made to the allegations of the applicant in the pleadings of Action No. 2676/68 instituted by her in the District Court of Limassol against Tryphon G. Procopiou for damages for breach of contract of sale of land to the effect that she had prepared plans and that together with an adjoining plot that land would be separated into 20 building sites. That action was settled for C£25,000.—damages, including the C£5,000.—down payment. It was argued on behalf of the respondent that this allegation in the pleadings was a matter that could be taken into consideration in deciding the credibility of the applicant inasmuch as she could not be allowed to make conflicting allegations depending on how much it served her interest at a particular time.

No doubt the conduct of a party and statements made by him at different times and for different occasions are most

relevant on the issue of the credibility of such a litigant, especially so when such a person, as a result of such statements, succeeds in receiving an immense amount of compensation; such fact cannot be ignored in deciding his credibility on another occasion when that person finds that a different statement will be to its interest on this subsequent occasion. And these were matters to be legitimately taken into consideration by the respondent Commissioner in deciding objectively the nature of the transactions in issue in a particular case.

The legal position and the test to be used in determining an issue as the one with which we are concerned has been extensively dealt with in a number of Cyprus cases by reference also to the English authorities on the subject. In order to mention some reference may be made to the cases of *Savvas M. Agrotis Ltd.* v. *The Commissioner of Income Tax*, 22 C.L.R. 27; the case of *Yiannakis S. Droussiotis* v. *The Republic* (1967) 3 C.L.R. 15; *Rallis Makrides* v. *The Republic* (1967) 3 C.L.R. 147, in which the question of buying jointly with land dealers was considered as a factor to be taken into consideration in determining whether a transaction was a trading one and the profit made by the sale of property was part of the taxable income of the tax-payer as constituting gains or profit from trading in land or it was a realization of an investment which had enhanced in value. Also reference may be made to the case of *Vassos Estates Ltd.* v. *The Commissioner of Income Tax* (1969) 3 C.L.R., 58, at p. 60, where an extensive review of the authorities is also made.

The conclusion to be reached is that each case must be considered according to its facts and the question to be answered is whether the profit that has been made is a mere enhancement of value by realising a security or is it gain made from an operation or business for carrying out a scheme for profit making. The whole issue is a mixed question of fact and law and it is well settled that it is for the respondent Commissioner to deduce the conclusions from the facts proved or admitted before him and these are conclusions of fact and that 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. In the case of *Rallis Makrides* (*supra*) and by reference to the cases of *Clift v. The Republic* (1965) 3 C.L.R. 385, and *Christides v. The Republic* (1966) 3 C.L.R. 732, it was stated at p. 153 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* v. *The Republic* (1966) 3 C.L.R. 1)".

In the present case I am of the view that the applicant has not discharged the burden of satisfying me that I should interfere with the *sub judice* decision which was reasonably and properly open to the respondent Commissioner. Factually and legally he could treat the relevant gains of the applicant as taxable income.

There was a state of facts before him that could lead to that conclusion in Law. The factors which the respondent Commissioner considered in determining the quality of the various receipts appear in the statement of grounds of law which have been earlier set out in this judgment and on which he concluded that the applicant's dealings were acts in the nature of trading in land. It is common ground that immovable property in Cyprus is a recognised means of investment, yet the respondent Commissioner pointed out, and rightly so, that there exists a great speculation in land and that dealings in immovable property have been means of quick and easy way of making a profit.

In his view the purchase of the two plots of land at Ayios Athanasios in 1965 and 1966—in fact the purchase of the second plot improved the situation and marketability of both—and their resale in a short period indicated, a motive of profit making. Also the purchase of land on credit which did not yield any income from which the purchase money would be payable, was another indication of the applicant's intention that the purchase was with a view to resell at a profit in a short time.

This is not devoid of authority. The purchase of undeveloped and non-income producing property has been considered in the case of *Johnston* (*supra*) as a factor that could be legitimately taken into consideration in deciding the nature of a transaction. Also the applicant's intention to acquire property for the purpose

of using it as trading stock was also thought as being evidenced by her statements in the action against Tryphon G. Procopiou to the effect that she directed and plans had been prepared for the division of the said plot into 20 building sites. I have already dealt with the significance that could be given to such statements. Furthermore, though the sale of the building site in Famagusta in 1966 was considered a realization of the corpus of the gift or of a capital asset not giving rise to taxable income, yet the re-purchase of the immovable property in Limassol with the proceeds of the sale and in areas where there was great speculation, showed the applicant's intention in trading in land and profits thinking motive.

The compensation received was rightly considered as sums paid from Procopiou and Anastassiou and were rightly treated as received in the ordinary course of trading in order to adjust the relation between herself and the sellers. This is also supported by the fact that upon receiving the compensation money, she immediately used them to buy immovable property in great speculative areas of Limassol. Reference in this respect may be made to the *Inland Revenue Commissioners* v. *Newcastle Breweries Ltd.* [1927] 12 T.C. 927, where it was said that once it is found that the asset realized is a trading asset, the amout received for the breach is income attracting liability to tax (see also Halsbury's Laws of England, 4th Ed., V. 23, p. 22, para. 15). Purchasing jointly with established dealers in land was also another factor which could legitimately be taken into consideration as indicative of the applicant's intention of trading in land. On this point see *Rallis Makrides* v. *The Republic* (1967) 3 C.L.R. p. 147 at p. 153.

On the totality of the circumstances of the case I find that the only reasonable conclusion to be drawn on was the one drawn by the respondent Commissioner and there is nothing justifying me to interfere with such conclusion.

The next point raised by counsel for the applicant is that the respondent Commissioner could not raise these additional assessments on the ground that the necessary factual and legal prerequisites did not exist.

The facts relevant to this issue are that the applicant in the returns for the income she submitted for the years of assessment

1971-1973, declared only her salary received from her husband and it was when the respondent Commissioner received information that she had been dealing in land that he decided to raise these additional assessments which, after going through the procedures of re-examination and determination of the objections made, are the subject of this recourse.

The relevant section empowering the respondent Commissioner to rectify omissions and undercharges is section 23 of the Taxes (Quantifying and Recovery) Law 1963, (Law No. 53 of 1963), as amended by Law No. 61 of 1969. It reads as follows:

"(1) Where it appears to the Director that any person on whom tax has been imposed under any law, including a Communal Chamber law imposing a personal tax in the form of income tax, enacted either before or after the coming into force of this Law, has not been assessed or has been assessed at a less amount than that which ought to have been assessed, the Director may, within the year of assessment or within six years of the expiration thereof, assess such person at such an amount of tax or additional amount of tax as was imposed, and ought to have been assessed and recovered, under the provisions of the law imposing the tax and the provisions of this Law shall apply to such assessment and to the tax assessed thereunder:

Provided that in making any such assessment the Director shall allow such deductions as the law applicable to the respective year of assessment provides and the tax payable on any such assessment shall be at the rates provided in the law applicable to the respective year of assessment.

(2) Where a person has been guilty of fraud or wilful default, the time limit of six years mentioned in sub-section (1) shall be increased to twelve years. In such case the Director shall have power to make assessments for any year not earlier than the year of assessment 1963".

It is clear from its wording that it is open to the Director, when it appears to him that any person on whom tax has been imposed has been assessed at a less amount than that which ought to have been assessed, to assess, within a specified period, such person at such an amount of, or additional amount of tax as was imposed and which ought to have been assessed and

recovered, and so raise an additional assessment on the tax-payer undercharged. This power can be exercised when the Director of the Department of Inland Revenue finds out that there was income chargeable to tax which had been omitted from any previous assessment because of a deliberate or accidental omission on the part of the tax-payer to declare such income and it cannot be said that the income was omitted from any previous assessment with the sanction of the Director of the Department because he would have no power to sanction such an omission, and it makes no difference and the tax-payer is not exonerated from his full liability to tax irrespective of whether same was deliberate or accidental.

This section and in particular subsection (1) thereto, came under judicial consideration in the case of *The Republic* v. *Frangos* (1965) 3 C.L.R., p. 641, at p. 655, as well as in the case of *Solomonides* v. *The Republic* (1968) 3 C.L.R., p. 103, and reference is made therein to a number of English authorities which include that of *Williams* v. *Trustee of W.W. Grundy* [1934] 1 K.B. 524, and *Commercial Structures Ltd.* v. *Briggs*, 30 Tax Cases, p. 477.

It is clear, therefore, that on the true construction of the section with the aforesaid authorities, these assessments could legally be raised on the applicant.

Finally what remains to consider is the question whether interest is recoverable on the tax assessed on the applicant and if so as from which date. On the three subject assessments, the respondent Commissioner demands 6% interest as from the 1st day of December of the year to which the assessment relates, that is, though the assessments were made in 1976, the interest claimed goes back to the 1st day of December, 1971, 1972 and 1973, respectively. The provision relevant to the charging of interest is section 34 of the Taxes (Quantifying and Recovery) Law 1963, as amended by section 16 of Law No. 61 of 1969. It reads as follows:

> "(1) If any tax is not paid by the dates prescribed in section 33 above, it shall be recoverable with interest, from the date when the tax is due, at the rate of six per centum per annum.
>
> (2) Where the delay in making an assessment is due to a

taxpayer's wilful default or fraud, interest at the rate of six per centum per annum shall be payable from the 1st day of December of the year to which the assessment relates, irrespectively of the year in which such assessment was actually made.

(3) The Court shall also have power, where on any recourse it should determine that a particular tax is due, to adjudge interest on such amount at the rate of six per centum per annum from the date on which such tax becomes payable.

(4) Interest shall not be payable under this section unless the total amount of interest due exceeds five pounds.

(5) The provisions of this Law relating to the collection and recovery of tax shall apply to the collection and recovery of the interest mentioned in sub-sections (1) and (2).

(6) The Director may proceed to enforce payment under the law for the time being in force in the Republic relating to the collection of taxes or as provided in section 40 of this Law.

(7) The provisions of this section shall apply to taxes in respect of the year of assessment 1969 and subsequent years of assessment".

It appears that the respondent Commissioner treated the present case as falling within subsection 2 of the aforesaid section, concluding apparently, though he does not say so, that the delay in making the assessment was due to the taxpayer's wilful default as I cannot think as to how he could invoke fraud in any event in the circumstances. I do not agree with this approach.

In my view this was a case that might normally come within the ambit of subsection 1 of the aforesaid section, which prescribes in general the time as from which the interest is payable when there is neither wilful default nor fraud. Considering, however, all the circumstances pertaining to the delay, including the re-examination by the respondent Commissioner of the whole case after the first recourse was filed and in consideration of which undertaking same was withdrawn, I have come to the conclusion that I should exercise the powers given to me by

subsection 3 of this section and determine that in view in particular of the antecedents of these proceedings and the legal issues involved herein, the taxes in question should be treated as due as from to-day and I hereby adjudge interest on such amount at the rate of 6 per centum per annum therefrom when the taxes in question become payable.

It may be pointed out here that Law 15 of 1963 has been repealed by the Assessment and Collection of Taxes Law 1978 (Law No. 4 of 1978) as amended by Laws No. 23 of 1978 and No. 41 of 1979 but this change in the law does not affect the case in hand as the subject assessments were made before the 1st January, 1978, when the new law came into force and there is also the necessary saving provision for the purpose.

In the result the *sub judice* decisions are confirmed in part and declared null and void as to the part relating to the payment of interest in respect of which I have made also a direction under subsection 3 of section 34 of the Law. In the circumstances, however, there will be no order as to costs.

Sub judice decisions partly annulled.
No order as to costs.