

1979 April 6

[TRIANTAFYLIDIS, P., STAVRINIDES, L. LOIZOU,
HADJIANASTASSIOU, MALACHTOS, JJ.]

THE CYPRUS CEMENT COMPANY LIMITED,

Appellant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF THE DEPARTMENT OF
INLAND REVENUE OF THE MINISTRY OF
FINANCE AS COMMISSIONER OF STAMP DUTY,

Respondent.

(Revisional Jurisdiction Appeal No. 146).

Stamp duty—Loan to company—Secured by mortgage upon its immovable properties—Documents embodying agreements for the loan dutiable under item 12(e) of the First Schedule to the Stamp Law, 1963 (Law 19/63 as amended by Law 38/72)—
5 *Agreement with no provision for mortgage of immovable property but only provision for entering into another mortgage agreement dutiable under item 3(A) of the said First Schedule—Stamp duty regarding interest and “commitment charge” excluded—Even*
10 *if agreements come within ambit of both item 12(e) and item 3(A) as contracts, stamp duty in respect of them ought to have been charged under item 12(e) in view of section 7 of Law 19/63.*

Administrative Law—Recourse for annulment—Not possible for position of an applicant, who has made such a recourse, to be worsened through the outcome of such recourse. —

15 The appellant company concluded three agreements with, respectively, the International Finance Corporation, the National Bank of Greece and the Bank of Cyprus Limited, in relation to a loan of C£2,700,000, which was to be advanced, in equal shares, by these three banking institutions, to the appellant.

20 It was a condition precedent in all the three agreements that before the appellant would be entitled to withdraw any sum as part of such loan it ought, *inter alia*, to secure the loan by means

of mortgages; and all the three agreements in question were made parts of declarations of mortgages under section 21 of the Immovable Property (Transfer and Mortgage) Law, 1965 (Law 9/65).

The respondent Commissioner decided that in respect of the agreements between the appellant and the National Bank of Greece and the Bank of Cyprus Limited, the stamp duty payable ought to be charged in accordance with item 12(e) in the First Schedule to the Stamp Law, 1963 (Law 19/63), as amended, in particular, by means of the Stamp (Amendment) Law, 1972 (Law 38/72); and in relation to the agreement between the appellant and the International Finance Corporation, the respondent Commissioner decided that the stamp duty payable in respect of it ought to be charged under item 3(A) of the said First Schedule because in this agreement there was no provision for mortgage of immovable property but merely a provision for entering into another mortgage agreement.

The respondent Commissioner, in calculating the stamp duty payable, as aforesaid, took into account not only the amount of the loan secured by means of each agreement but, also, the value of the "commitment charge", as well as the interest payable under each agreement.

Upon a recourse against the above decision of the Commissioner the trial Judge reached the conclusion, in relation to all the said three agreements, that the respondent Commissioner was not entitled to take into account, in calculating the stamp duty payable in respect thereof, either the "commitment charge" or the interest; but, he upheld the decision of the Commissioner that the stamp duty ought to be charged under item 12(e) of the aforementioned First Schedule to the Stamp Law; and that this was so not only in respect of the agreements with the National Bank of Greece and the Bank of Cyprus Limited, but, also, on a proper application of the law, this should be so in respect of the agreement with the International Finance Corporation, in relation to which the Commissioner had mistakenly decided that the duty should be charged under item 3(A) of the First Schedule to the Stamp Law. The trial Judge treated this mistake as amounting, only, to wrong legal reasoning, which did not entail the annulment of this relevant decision of the Commissioner inasmuch as there was other legal support for his decision,

namely item 12(e), in accordance with which such decision would be modified.

On the appeal of the company:

5 *Held*, (1) that the trial Judge has correctly held that the two agreements with the National Bank of Greece and the Bank of Cyprus Limited, respectively, were agreements creating a charge by a company, in the sense of item 12(e) in the First Schedule; that these agreements rendered the mortgages charges created by the appellant company and it cannot be accepted that the
10 charges were created merely by the respective declarations of mortgage, which were secondary documents and were rightly stamped as such under the provisions of section 5(1) of Law 19/63.

15 (2) That even if this Court would take the view that the said two agreements come within the ambit of both item 12(e) and item 3(A) as contracts, again the stamp duty in respect of them ought to have been charged under item 12(e) in view of the provisions of section 7 of Law 19/63 which provides that "instruments so framed, as to come within two or more of the descriptions in the
20 First Schedule shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties"; and that, therefore, this appeal, in so far as it relates to that part of the judgment of the trial Judge by means of which it was found that the stamp duty, in respect of the agreements with the
25 National Bank of Greece and the Bank of Cyprus Limited, had to be charged under item 12(3), but that, in calculating such duty, there ought not to have been taken into account the "commitment charge" and the interest, must be dismissed.

30 (3) That the course adopted by the respondent Commissioner in distinguishing the agreement with the International Finance Corporation from the two other agreements and deciding to charge in relation to it the stamp duty under item 3(A) was reasonably open to him on a proper application of the relevant legislation and on a correct construction of such agreement;
35 and that, therefore, this was not a case in which the legal reasoning for the relevant *sub judice* decision of the respondent Commissioner was wrong.

Held, further, that even if this Court were to agree that such reasoning was wrong, this is not a case in which it was permissible

to treat the stamp duty, in relation to the agreement concerned, as being chargeable under item 12(e), instead of under item 3(A): Because such a course, on a proper calculation of the respectively payable stamp duty under the above two items, would have as a consequence the worsening, as a result of the *outcome of a recourse under Article 146 of the Constitution*, of the position of the person making the recourse, namely of the appellant company and it is well established in Administrative Law that, generally, and particularly in relation to taxation matters, it is not possible for the position of an applicant who has made a recourse to be worsened through the outcome of the recourse; that, therefore, in such a case, the approach that the *sub judice* decision can be supported on other legal reasoning cannot be adopted; that, in other words, there cannot be, in such a case, *reformatio in pejus* to the detriment of an applicant; and that, accordingly, this appeal, in so far as it relates to the stamp duty charged in respect of the agreement of the appellant company with the International Finance Corporation, must be allowed

Appeal partly allowed. 20

Cases referred to:

Papadopoulos v. The Republic (1968) 3 C.L.R. 662 at p. 674

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 31st May, 1974 (Revisional Jurisdiction Case No. 29/73) whereby applicant's recourse against decisions of the respondent Commissioner of Stamp Duty in respect of stamp duty payable in relation to three written agreements was partly dismissed. 25

P. Cacoyiannis, for the appellant. 30

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

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. This is an appeal against the first instance decision* of a Judge of this Court by means of which there was partly dismissed a recourse of the appellant company against decisions of the respondent Commissioner of Stamp Duty in respect of the stamp duty payable in relation to three written agreements. 35

* Reported in (1974) 3 C.L.R. 304.

The said agreements were concluded between the appellant company and, respectively, the International Finance Corporation, the National Bank of Greece and the Bank of Cyprus Limited, in relation to a loan of C£2,700,000, which was to be advanced, in equal shares, by the aforesaid three banking institutions, to the appellant.

It was a condition precedent in all the aforementioned agreements that before the appellant would be entitled to withdraw any sum as part of such loan it ought, *inter alia*, to secure the loan by means of mortgages; and, as a matter of fact, all the three agreements in question were made parts of declarations of mortgages under section 21 of the Immovable Property (Transfer and Mortgage) Law, 1965 (Law 9/65).

The respondent Commissioner decided that in respect of two out of the said agreements, namely those between the appellant and the National Bank of Greece and the Bank of Cyprus Limited, the stamp duty payable ought to be charged in accordance with item 12(e) in the First Schedule to the Stamp Law, 1963 (Law 19/63), as amended, in particular, by means of the Stamp (Amendment) Law, 1972 (Law 38/72).

In relation, however, to the third agreement, namely that between the appellant and the International Finance Corporation, the respondent Commissioner decided that the stamp duty payable in respect of it ought to be charged under item 3(A) of the said First Schedule.

The respondent Commissioner, in calculating the stamp duty payable, as aforesaid, took into account not only the amount of the loan secured by means of each agreement but, also, the value of the "commitment charge", as well as the interest payable under each agreement.

The learned trial Judge reached the conclusion, in relation to all the said three agreements, that the respondent Commissioner was not entitled to take into account, in calculating the stamp duty payable in respect thereof, either the "commitment charge" or the interest; but, he upheld the decision of the Commissioner that the stamp duty ought to be charged under item 12(e) of the aforementioned First Schedule to the Stamp Law; and he went on to find that this was so not only in respect of the agreements with the National Bank of Greece and the Bank of Cyprus Limited, as it was decided by the respondent Commissioner, but,

also, that, on a proper application of the law, this should be so in respect of the agreement with the International Finance Corporation, in relation to which the Commissioner had decided that the duty should be charged under item 3(A) of the First Schedule to the Stamp Law.

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Counsel for the appellant has argued in this appeal that the stamp duty in respect of all three agreements concerned ought to be charged under item 3(A) of the First Schedule. He submitted that the said agreements were documents embodying each an agreement for a fixed sum and as they were not otherwise chargeable it followed that the stamp duty could only have been charged under the said item 3(A); he submitted, too, in any event, that they could not have been treated as instruments creating a charge by a company in the sense of item 12(e) of the First Schedule.

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We are of the view that the learned trial Judge has correctly held that the two agreements with the National Bank of Greece and the Bank of Cyprus Limited, respectively, were agreements creating a charge by a company, in the sense of item 12(e) in the First Schedule. In our opinion these agreements rendered the mortgages charges created by the appellant company and we cannot accept that the charges were created merely by the respective declarations of mortgage, which were secondary documents and were rightly stamped as such under the provisions of section 5(1) of Law 19/63.

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Moreover, even if we would take the view that the said two agreements come within the ambit of both item 12(e) and item 3(A) as contracts again the stamp duty in respect of them ought to have been charged under item 12(e) in view of the provisions of section 7 of Law 19/63 which provides that "instruments so framed, as to come within two or more of the descriptions in the First Schedule shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties".

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We have, therefore, decided to dismiss this appeal in so far as it relates to that part of the judgment of the trial Judge by means of which it was found that the stamp duty, in respect of the aforesaid two agreements, namely with the National Bank of Greece and the Bank of Cyprus Limited, had to be charged under item 12(e), but that, in calculating such duty, there ought not

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to have been taken into account the “commitment charge” and the interest.

In relation, however, to the agreement between the appellant company and the International Finance Corporation, the trial
5 Judge, after finding that the amount of stamp duty charged in respect of it, namely C£2,408.400 mils, should be reduced by C£255, which represented duty relating to new shares in respect of which no stamp duty was chargeable, upheld a submission of
10 counsel for the respondent Commissioner that the duty, in respect of such agreement, was mistakenly charged under item 3(A), and found that, on a proper application of the relevant legislation, it should have been charged under item 12(e); and he proceeded to treat this mistake, on the part of the respondent
15 Commissioner, as amounting, only, to wrong legal reasoning, which did not entail the annulment of the relevant decision of the Commissioner inasmuch as there was other legal support for his decision, namely item 12(e), in accordance with which such decision would be modified.

In deciding to adopt the above course the trial Judge referred
20 to *Papadopoulos v. The Republic*, (1968) 3 C.L.R. 662, where (at p. 674) it was held that “wrong legal reasoning does not lead to annulment if the decision can have other legal support”.

The trial Judge observed in his judgment that if the stamp
25 duty, in respect of the agreement in question, namely the agreement with the International Finance Corporation, was charged under item 12(e), the amount payable would be less than that which was charged in relation to such agreement under item 3(A).

During, however, the hearing of this appeal before us it
30 transpired that if the duty in respect of the said agreement is correctly calculated under items 3(A) and 12(e), respectively, without taking into account the aforementioned amount of C£255 and without taking into consideration the “commitment charge” and interest—(having been correctly found by the trial
35 Judge that these factors could not have been lawfully taken into consideration)—then the duty in relation to the agreement in question would be C£1,860 if charged under item 12(e) and C£1,371 if charged under item 3(A); in other words, the position of the appellant company would be worsened if, on the basis of
40 a lawful and correct calculation, the stamp duty, in respect of the

said agreement is to be charged under item 12(e), instead of under item 3(A).

In the first place, we are of the opinion that the course adopted by the respondent Commissioner in distinguishing this agreement from the two other agreements—namely the agreements with the National Bank of Greece and with the Bank of Cyprus Limited—and deciding to charge in relation to it the stamp duty under item 3(A) was reasonably open to him on a proper application of the relevant legislation and on a correct construction of such agreement (see, in this respect, the reasons stated in paragraph 2 of his letter to counsel for the appellant, dated January 11, 1973, *exhibit 4*). So, we do not think that it could be said that this is a case in which the legal reasoning for the relevant *sub judice* decision of the respondent Commissioner is wrong.

Even if, however, we were to agree that such reasoning is wrong, this is not a case in which it was permissible to treat the stamp duty, in relation to the agreement concerned, as being chargeable under item 12(e), instead of under item 3(A): Because such a course, on a proper calculation of the respectively payable stamp duty under the above two items, would have as a consequence the worsening, as a result of the outcome of a recourse under Article 146 of the Constitution, of the position of the person making the recourse, namely of the appellant company; and it is well established in Administrative Law that, generally, and particularly in relation to taxation matters, it is not possible for the position of an applicant who has made a recourse to be worsened through the outcome of the recourse and that, therefore, in such a case, the approach that the *sub judice* decision can be supported on other legal reasoning cannot be adopted; in other words, there cannot be, in such a case, *reformatio in pejus* to the detriment of an applicant (see, in this respect, *inter alia*, Conclusions from the Case-Law of the Council of State in Greece, 1929–1959, p. 219, Kyriacopoulos on Greek Administrative Law, 4th ed., vol. C, p. 51, and Dendias on Administrative Law, 2nd ed. (1965), vol. C, pp. 112–114).

We, therefore, have decided to allow this appeal in so far as it relates to the stamp duty charged in respect of the agreement of the appellant company with the International Finance Corporation and such duty has, consequently, to be calculated under

item 3(A) of the First Schedule to Law 19/63, without taking into account the "commitment charge" or the interest and without, also, charging C£255 stamp duty in respect of new shares.

5 In the result, this appeal succeeds in part and is dismissed in part as stated above.

Taking all relevant considerations into account we have decided to make no order as to its costs.

Appeal partly allowed. No order as to costs.