1985 July 27

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

GEORGHIOS M. PITSIAKKOS,

Applicant,

v.

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

Respondents.

(Case No. 281/80).

Income Tax—Whether profit derived from sales of building sites into which the applicant divided land gifted to him by his father can be treated as taxable income—Principles applicable—As a general rule the proceeds of isolated transactions by ordinary landowners are not treated as profits from trading, unless the landowner himself is a land developer.

Service of notices by the Commissioner of Income Tax—Registered letter containing notices of additional assessment returned unclaimed—When notice deemed as served—Section 42 of the Taxes Quantifying and Recovery Law 53/1963 as amended by Law 61/1969—Raises a presumption of law that the Notice has been served—Necessary prerequisites of the application of the section—Relevant registered letter should be correctly addressed.

Constitutional Law—Article 146.3 of the Constitution—It is, to say the least, doubtful whether constructive knowledge or presumption of knowledge under the aforesaid section 42 satisfy the requirement of Article 146.3 of the Constitution, when the registered letter has not been in fact received—Effect of sections 21(1) and 20(5) of Law 4/1978.

On 21.5.1962 applicant's father transferred to the ap-

plicant by way of gift a piece of land at Eylentzia, with a house built on it, where the applicant lived with his family. In 1969 the applicant divided the said land into eigh'een building sites in addition to a piece of land on which the house stood and on various dates between 1969-1976 he sold ten of these building sites.

When respondent 2 came to know of these transactions he decided to treat the profit realised from them as taxable income and as a result he raised revised assessments on the applicant for the years of assessment 1972-1975 in which the profit from the sale of the said sites during the period 1971-1975 was included.

Consequently respondent 2 addressed on 9.2.1977 to the applicant a letter by registered post containing his above decision and notices of tax payable. This letter which was allegedly sent to the residential address of the applicant was returned by the post-office as unclaimed. Respondent 2 remailed it on 25.5.1977 to the business address of the applicant but was again returned as unclaimed. The officer in charge of the applicant's file made a note in it that the letter should be considered as properly served. This note was made on the basis of section 42* of the Taxes Quantifying and Recovery Law, 1963 (Law 53/1963) as amended by Law 61/1969.

Applicant contents that he came to know about these assessments for the first time on 20.5.1980. Applicant objected against these assessments by letter of his counsel dated 27.5.1980.

In the meantime additional assessments were also raised on the applicant for the period 1976-1979, of which he was informed by letter of respondent 2 dated 15.5.1980. An objection to these assessments was filed by the applicant through his lawyer on the 9.6.1980. After an abortive meeting on the 13.6.1980, respondent 2 determined the said two objections and communicated his decision to the applicant by letter dated 16.6.1980. This is the decision impugned by the present recourse.

By the above letter dated 16.6.1980 applicant was in-

* This section is quoted at p. 1713 post.

formed that his first objection dated 27.5.1980 could not be accepted because it was not filed within the time limit provided by section 20(1) of the Assessment and Collection of Taxes Laws 1978 to 1979; with regard to his second objection applicant was informed that respondent 2 decided to maintain the additional assessments for the years of assessment 1976, 1977, 1978, 1979/78 and 1979. (The dispute as to 1977 was later settled).

The applicant has stated in his declarations his occupation to be that of an "Estate Agent" or "Land Registry Office Business".

The following are the matters in issue in the present recourse: 1) Whether it was reasonably open to respondent 2 to treat as taxable income the profits realised from the sale of the building sites in question. 2) Whether it was reasonably open to respondent 2 to refuse to accept the out of time objection of the applicant dated 27.5.1980 and 3) Whether the applicant should pay interest on the tax payable with regard to the years of assessment 1972-1975 as from the 1st December of each year of assessment on the ground of his own unreasonable delay.

Held, annulling the sub judice decision:

(1) *As to question (1) above,* The question is one of mixed law and fact and the Court will not interfere with the finding of the Commissioner, if it was reasonably open to him to find, as he did. The attitude of the Courts, both in Cyprus and in England, where the relevant legislative provision is the same, has been not to treat, as a general rule, isolated transactions by ordinary landowners as profits from trading, unless the landowner himself is a land developer. Knowledge of the market by the landowner may also be taken into consideration in proper cases. Every case, however, must be decided on its own facts and circumstances.

The applicant was not a land developer and had no other transactions in land. Being an estate agent does not make him a developer in land. This case should be treated as a case of enhancing the value and realising his interest in land. The fact that the proceeds of sale were not used in any other kind of investment in land should also be

borne in mind. Bearing in mind the circumstances of this case, especially the facts that the property was gifted to the applicant by his father as well as the fact that there were no other purchases and sales on his part, a finding of trading in land on the part of the Commissioner was not warranted. The profits from the sales should not have been treated as taxable income.

(2) *As to question (2) above,* The objection was made on the 27th May, 1980. The law applicable is The Assessment and Collection of Taxes Law, 1978, (No. 4/78), section 20(1) of which provides that any person who disputes an assessment made upon him may object against such assessment by a notice in writing to be given not later than the end of the month following the month in which notice of the assessment in question was given to such person. It is also provided in the proviso to the section that where the Commissioner is satisfied that by reason of being absent abroad, sickness or other reasonable cause the person disputing the assessment was prevented from giving the notice of objection within the prescribed time limit, he may grant a reasonable, under the circumstances, extension of time.

In the present case it is not in dispute that the applicant did not in fact receive the notices of assessments in question. And it is for consideration whether in view of the provisions of s. 42 of the Taxes Quantifying and Recovery Law, 1963 (Law 53/1963) as amended by Law 61 of 1969, applicable at the relevant time, which makes provision for the service of notices by the Commissioner, the assessments in dispute must be deemed to have been duly served on the applicant.

In the context of the statute it is reasonable to construe section 42 as meaning that once there is compliance with its provisions relating to posting i.e. once it is established that the letter was correctly addressed and sent by registered post to the addressee's private or business address, it is deemed to have been served.

Section 42 raises a presumption of law which cannot be rebutted by showing that in fact the notice has not been received. The service of a notice under s. 42 is proved if

the letter containing the notice is sent (a) by registered post, (b) it is correctly addressed to either the addressee's business or private address and, in view of the practice of the postal authorities in Cyprus as disclosed by the evidence, (c) the register slip notifying the addressee that the letter awaits collection at the post office is left at his address.

In this case a vital ingredient was missing. There is no evidence that the envelope was correctly addressed. Service has not been satisfactorily established. The decision, therefore, to reject the objection dated 27.5.80 as being out of time was based on a wrong exercise of discretion.

There is another aspect concerning question (2) above that merits consideration, namely that the provisions of section 20(1) of The Assessment and Collection of Taxes Laws 1978-1979 and the provisions of section 42 of Law 53/1963 as amended by Law 61/1969 cannot supercede the provisions of Article 146.3 of the Constitution. If applicant had filed a recourse within 75 days as from the day the disputed assessment had come to his knowledge, such recourse could not reasonably be said to have been out of time. But applicant could not file such a recourse because under the provisions of section 21(1) of Law 4/1978 an objection to the assessment is a necessary intermediate step in the process leading up to the filing of the recourse. And once such objection was filed the applicant could only file a recourse in case of failure to reach agreement with the Commissioner and after determination by the latter of the amount of tax payable as in section 20(5) of the said law provided. So in the circumstances of the present case the applicant could only file a recourse against the assessments within 75 days from the determination of his objections by the letter dated 16.6.1980.

It is, to say the least, doubtful whether constructive knowledge or presumption of knowledge under the said section 42 could satisfy the requirements of Article 146.3 of the Constitution where it is an undisputed fact that the letter did not come to the knowledge of the applicant.

The issue, therefore, should in any event be decided in favour of the applicant; for otherwise the provisions of Article 146.3 of the Constitution would be defeated.

(3) *As to question (3) above,* As it has already been found that the recourse in so far as the assessments of the years 1972-1975 should be allowed, the reasonable conclusion is that the delay was not due to the unreasonable omission on the part of the applicant; however, as the assessments were additional assessments in order to tax the profits from the sales in question, which were found not to be taxable, no question of interest arises.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

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

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

Georghiades v. *The Republic* (1982) 3 C.L.R. 569;

Philippou v. *The Republic* (1983) 3 C.L.R. 1386;

HjiEraclis and Another v. *The Republic* (1984) 3 C.L.R. 604;

Amani Enterprises v. *The Republic* (1985) 3 C.L.R. 198;

Taylor v. *Good* [1974] 1 W.L.R. 556;

Rand v. *Alberni Land Co. Ltd.* [1920] T. C. 629;

Rex v. *The Westminster Unions Assessment Committee, Ex Parte Woodward and Sons* [1917] 1 K. B. 832;

Sandland v. *Neale* [1956] 1 Q. B. 241;

Nash v. *Ryan Plant* [1978] 1 All E. R. 492;

Brimnes [1974] 3 All E. R. 88;

Katsiantonis v. *Frantzeskou* (1981) 1 C.L.R. 566;

Charalambos Pissas (No. 1) v. *E.A.C.* (1966) 3 C.L.R. 634;

Bakkaliaou v. *The Municipality of Famagusta* (1969) 3 C.L.R. 19;

Petrolina Ltd. v. *The Municipal Committee of Famagusta* (1971) 3 C.L.R. 420;

Decision of the Greek Council of State No. 1324/55.

Recourse.

Recourse against the decision of the respondents whereby profit arising from the sale by applicant of building sites into which land gifted to him by his father had been subdivided was considered as taxable income and also against the decision not to accept an out of time objection against the assessments raised on applicants for the years 1972-1975.

L. Sarris, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

L. Loizou J. read the following judgment. This recourse is directed against the decision of the Commissioner of Income Tax contained in his letter to the applicant dated 16th June, 1980, by which profit arising from the sale by the applicant of building sites into which land gifted to him by his father had been sub-divided was considered as taxable income and also against the decision not to accept an out of time objection against the assessments raised on the applicant in January, 1977, for the years of assessment 1972(71) to 1975(74).

The applicant lives at Eylendjia. He is an advocate's clerk and runs an office dealing with Land Registry Office business.

On 21st May, 1962, his father transferred to him by way of gift a piece of land at Eylendjia, with a house built on it where the applicant lived with his family. In 1969 the applicant divided this land into eighteen building sites in addition to a piece of land on which the house stood, and on various dates between 1969 and 1976 he sold ten of those building sites.

When respondent No. 2 came to know about the above transactions, he decided to treat the profit realized from

them as taxable income and as a result he raised revised assessments on the applicant for the years of assessment 1972-1975, in which he included the profit realized from the sale of the building sites during the period between 1971-1974. Consequently respondent No. 2 (the Commissioner) addressed, on the 9th February, 1977, a letter to the applicant by registered post, containing the said decision of the respondent as well as notices of tax payable. This letter, which was allegedly sent to the residential address of the applicant was returned by the post-office as unclaimed and the respondent re-mailed it, on the 25th May, 1977 to the business address of the applicant but was again returned as unclaimed. The officer in charge of the section then made a note in the file of the applicant that the letter should be considered as properly served.

It is the contention of the applicant that he came to know about these assessments for the first time after the 20th May, 1980, when he was served with a summons to appear before the District Court and give reasons why a writ of sale of part of his property should not be issued for the payment of the income tax due by him.

Applicant then visited the Income Tax Office together with his lawyer and was informed about the letter of the 9th February, 1977 and that it had been forwarded to him and was returned as unclaimed. Thereupon applicant objected against those assessments by letter of his counsel dated 27th May, 1980, and requested their revision.

In the meantime additional assessments were also raised on the applicant for the years of assessment 1976-1979, of which he was informed by letter of the respondent dated 15th May, 1980. An objection to these assessments was also filed by applicant's lawyer on the 9th June, 1980. On the 13th June, 1980 the applicant visited, together with his lawyer, the office of the respondent to discuss the question of the taxability of the profits realized from the said sales and as no agreement was reached the respondent determined the two objections and communicated to the applicant his decision by letter dated 16th June, 1980 (exhibit 4). The applicant was informed, by the above letter, that his objection in respect of the years of assessment 1972, 1973, 1974 and 1975 were not accepted because they were not

filed within the time limit provided by s. 20(1) of the Assessment and Collection of Taxes Laws 1978 to 1979. With regard to the remaining assessments, that is in respect of the years of assessment 1976, 1977, 1978, 1979/78 and 1979, applicant was informed that the respondent decided to maintain them.

As a result the applicant filed the present recourse.

As stated by both counsel the objection of the applicant with regard to the year of assessment 1977 (year of income 1976) was settled and is not, therefore, the subject of this recourse.

The matters in issue are first whether it was resonably open to the respondent to refuse to accept the out of time objection of the applicant for the years of assessment 1972-1975 and in this respect whether the letter of the respondents dated 9th February, 1977 must be deemed to have been properly served on the applicant, and secondly whether it was reasonably open to the respondent to treat the profits realized from the sale of the building sites in question as taxable. Also, in issue is the question of the imposition of interest on the amount of tax payable by the applicant with regard to the years of assessment 1972-1975 as from the 1st December of each year of assessment on the ground of his own unreasonable delay.

With regard to the second issue counsel for applicant argued that profit made from the realization of the corpus of a gift is not taxable and that for the purposes of "trading" the element of "bying" is necessary which is absent in the present case. That the profit must be derived from the exercise of a trade or an adventure or concern in the nature of trade and applicant never exercised such a trade.

Counsel for the respondent argued that in deciding the issue in question regard must be had to the supplementary work done by the applicant in connection with the property and the factor of business knowledge on his part and that by dividing and then selling he had embarked in trading in land or at least in an adventure in the nature of trading. That the applicant is in an analogous situation as that of a land developer and there has been supervening trad-

ing on his part since the time he acquired the property in question as a gift from his father.

The matter of the taxability of profits arising from the sale of land has been considered by the Court in a number of cases. The first case is the case of *Agrotis* v. *The Commissioner of Income Tax,* 22 C.L.R., 27, where a private company was formed to which the applicant and his wife transferred 79 building sites thus maintaining the unity of the estate. Over a period of seven years the company sold many of these plots at a reasonable profit and purchased a site in Nicosia where it built flats for lease. The Commissioner considered the sales of the building sites to be trading operations but the District Court held that they were not trading operations. The Supreme Court upheld the judgment of the District Court but added that if the District Court had decided the matter the other way round the Supreme Court would not have disturbed such decision.

The above case was considered and followed in several cases such as *Droushiotis* v. *The Republic* (1967) 3 C.L.R. 15; *Georghiades* v. *The Republic* (1982) 3 C.L.R. 569; *Philippou* v. *The Republic (1983)* 3 C.L.R. 1386; *HjiEraclis and Another* v. *The Republic* (1984) 3 C.L.R. 604; *Amani Enterprises* v. *The Republic (1985) 3* C.L.R. 198.

I have considered all the above cases as well as those referred to by both counsel. All the authorities point to the conclusion that the question is one of mixed law and fact and also that the Court will not interfere with the finding of the Commissioner if it was reasonably open to him to find as he did. The attitude of the Courts, both in Cyprus and in England, where the relevant legislative provision is the same, has been not to treat, as a general rule, isolated transactions by ordinary landowners as profits from trading, unless the owner himself is a land developer. Knowledge of the market by the landowner may also be taken into consideration in proper cases (see *HadjiEraclis and Another* v. *The Republic* (supra) at p. 615). Every case, however, must be decided on its own facts and circumstances.

In the case of *Taylor* v. *Good* [1974] 1 W.L.R. 556, the

taxpayer, a retail grocer and news agent, bought a house with grounds at a public auction for £5,100. At the time of the purchase there was a possibility that he and his family might live there. Since however this plan did not materialize, four years later he obtained an outline planning permission to develop the site by the demolition of the house and the erection of ninety houses, and sold the property to a firm of developers for £54,500.- Having been assessed to income tax in respect of his profits from the sale and as his appeal to the special Commissioners was dismissed he appealed to the High Court, which found that although there had not been initial trading at the time of the purchase, there was sufficient evidence to support the Commissioners' findings of supervening trading and dismissed the appeal. On appeal by the taxpayer, the Court of Appeal held, allowing the appeal, that where a taxpayer, not being a property developer, bought property with no initial intention of selling it for profit but later took steps to enhance its value, as by obtaining planning permission for development, and afterwards sold it for development, those activities did not amount to an adventure or concern in the nature of trade, assessable to income tax.

Russel L.J., in delivering the judgment of the Court said at pp. 559-560:

> "I refer first to some cases cited to us. The first is *Hudson's Bay Co. Ltd.* v. *Stevens* [1909] 5 T.C. 424 in this Court. The details do not matter. The importance of the case lies in the facts that, in accepting the finding that there was there no trade of buying and selling land, it was stated that the case was no different in substance from the case of a landowner minded to sell, or sell from time to time, inherited land for building purposes at a profit: it was equivalent, it was said, to dealing with land merely as owner: the fact that a landowner lays out part of his estate with roads and sewers for sale in building lots does not constitute a trade, nor the fact that he may have expended money in getting the property up for sale: it was no different, it was said, in substance from an ordinary landowner who sells parts of an estate which

he acquired by purchase. My references are to pp. 436, 438 and 440 of that report.

In *Rand* v. *Alberni Land Co. Ltd.* [1920] 7 T. C. 629, before Rowlatt, J., the same principle, it appears to me, was followed. It was a case in which lands were owned in the ordinary sense (that is to say, not acquired with a view to sale) by a number of people who set up a company purely as machinery to realise their interests in the land—to turn land into money. The company expended money in clearing the land and forming roads, and even in procuring a railway company to bring a line to open up the area. This was only a course, it was said, of enhancing the value of the land and not of trading: see in particular pp. 638, 639 of the report.

All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development.

It does not seem to me that this decision contradicts in any way the basis of the earlier decisions. If you find a period in which there are purchases and sales, it is not difficult to find a trade of dealing in land, whatever may have been the original motive or purpose of acquisition. But here we have, we must assume, no purchase at all with an eye on realisation.

If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or bought for investment only, have been brought into the stock in-trade of that trade. To such circumstances I would relate the dicta relied upon in the other three cases referred to by Megarry J. But where, as here,

there is no question at all of absorption into a trade of dealing in land of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law."

In the present case, the applicant has stated in his declarations, his occupation to be that of an "Estate Agent" or "Land Registry Office business" and in the statement of agreed facts signed and filed by both counsel that applicant was an advocate's clerk. It also transpires from the evidence that he was carrying out transactions at the Lands Registry Office. This, however, does not, in my view, mean that the applicant had any dealings in land or land development. It has not been shown that he was ever engaged with any dealings in land in the nature of either a purchase or sale.

In the light of the above authorities and bearing in mind the circumstances of the case, especially the fact that the property was gifted to the applicant by his father, as well as the fact that there were no other purchases and sales on his part, I think that a finding of trading in land on the part of the Commissioner was not warranted. The applicant was not himself a developer and had no other transactions in land. Being an estate agent does not make him a developer as well. This should be treated as a case of enhancing the value and realising his interest in land. The fact that he has not used the proceeds in any other kind of investment in land should also be borne in mind.

I, therefore, find that the profits of the applicant from the realization of his property should not have been treated as taxable income.

I now turn to consider the next point that of the refusal to accept the out of time objection of the applicant for the years of assessment 1972-1975.

The objection was made on the 27th May, 1980. The law applicable is The Assessment and Collection of Taxes Law, 1978, (No. 4/78) section 20(1) of which provides that any person who disputes an assessment made upon him may object against such assessment by a notice in writing to be given not later than the end of the month following the month in which notice of the assessment in question was given to such person. It is also provided in the proviso to the section that where the Commissioner is satisfied that by reason of being absent abroad, sickness or other reasonable cause the person disputing the assessment was prevented from giving the notice of objection within the prescribed time limit he may grant a reasonable, under the circumstances, extension of time.

In the present case it is not in dispute that the applicant did not in fact receive the notices of assessments in question. And it is for consideration whether in view of the provisions of s. 42 of the Taxes Quantifying and Recovery Law, 1963 (Law 53 of 1963) as amended by Law 61 of 1969, applicable at the relevant time, which makes provision for the service of notices by the Commissioner, the assessments in dispute must be deemed to have been duly served on the applicant.

The above section, which is similar to s. 50 of Law 4 of 1978, reads as follows:

> "42. Notices are served on a person either by personal service or by registered letter sent to his last known business or private address; in the latter case the notices will be deemed to have been served, in the case of persons residing within the Republic not later than the seventh day from which the letter was mailed.... Such service is sufficiently proved upon proof that the letter containing the notice was correctly addressed and properly mailed."

It is clear that the note made in applicant's file after the letter had been returned for the second time as unclaimed that it should be considered as properly served—and was so considered thereafter—was on the basis of the above section.

With regard to the issue of service the applicant gave

evidence on oath in support of his case and the respondents also called two witnesses. The first of these witnesses, Mr. Andreas Karvounis, was the officer in charge of the section dealing with registered letters at the District Post-Office at Prodromos Street, Nicosia, where he had been posted several years after the year 1977 when the letter containing the assesments was allegedly mailed to the applicant by registered post. The second witness for the respondents, Mr. Georghios Panayiotou is a Principal Assessor in charge of Division 4 which deals with the taxation of self-employed persons and had been holding this post since August, 1982, i.e. some years after the relevant, for the purposes of the posting of the letter, time but who had in his possession applicant's file.

The applicant stated in evidence that he first came to know of the assessments in question when criminal proceedings were instituted against him after the 20th May, 1980. He also stated that because of confusion with regard to his mail in the past when letters addressed to him were delivered to other persons with the same surname residing in the same street and vice versa, he had written to the Income Tax Office on the 7th March, 1974, requesting them to address his letters to his business address and produced the copy of such letter and that he also forwarded to them another letter to the same effect on the 28th November, 1978, which is after the letter containing the assessments was returned unclaimed.

It was denied on behalf of the respondents that they had ever received the first of these letters i.e. the letter of the 7th March, 1974, and it was put to him that the original of that letter was never forwarded to them.

The evidence of Mr. Karvounis was confined to explaining generally the procedure followed when registered letters are forwarded and particularly in the case of the Income Tax Office. The letters, he explained, are prepared by the Income Tax Office and entered in a special book supplied to them by the post-office so as to avoid duplication of work. The book together with the letters are then delivered to the post-office which in its turn stamps and returns the book, forwards the register slips to the addressees and keeps the letters. After the lapse of fourteen days, if a letter is

not collected, the post-office sends a reminder and if in another sixteen days they are not collected again they are returned to the Income Tax Office with the necessary explanation. The witness was not in a position to say anything as to the letters forwarded in the past because the records are destroyed after the expiration of one year.

The second witness called by the respondents, Mr. Panayiotou, stated in evidence that, as far as he could see from the file of the applicant the letter of the 9th February, 1977, containing the assessments was forwarded to the applicant by registered post on the same day and the registration slip bore No. 10D/1D but the letter was returned by the post-office as unclaimed and on the 27th May, 1977, it was forwarded to him to his business address at No. 19 Aetolon Street with the same result. But the witness could not say if the letter was sent by registered post on the second occasion. Anyhow when the letter was returned on the second occasion, he said, the officer in charge of the section made a note in the file "consider as properly served" and signed it.

But the envelopes in which the assessments were forwarded and were returned unclaimed had not been kept and were not in the file of the applicant. The witness further stated that as it appears from the file on at least two other occasions on the 13th March, 1976 and the 23rd February, 1977, letters containing assessments and forwarded to the applicant at his home address were returned unclaimed. And also that the applicant had visited the Income Tax Office in relation to his affairs on the 6th March, 1978 and on the 12th November, 1979, but they did not serve the letter in question on him then personally because, as he said, they only effect personal service in exceptional cases when there is good reason for such course as for instance when the taxpayer is about to leave the Republic or when he is present at the office. The witness did not say why the applicant was not served personally on either of the two occasions that he visited the Income Tax Office but I assume that this may be because, as a result of the note made in his file, they considered that the letter had already been duly served.

As stated earlier on the evidence of this witness was

based on the information in the file and not on personal knowledge as he was not holding this post at the relevant time.

I now revert to s. 42 quoted above.

Considered per se in the context of the statute it is reasonable to construe it as meaning that once there is compliance with its provisions relating to posting i.e. once it is established that the letter was correctly addressed and sent by registered post to the addressee's private or business address it is deemed to have been served.

In the case of *Rex* v. *The Westminster Unions Assessment Committee, Ex Parte Woodward & Sons* [1917] 1 K. B. 832 the Court had to deal with the provisions of s. 65 of the Valuation (Metropolis) Act, 1869, which related to the service of orders and notices and the latter part of which provided:

> "They may also be served and sent by post, by a prepaid letter, addressed to such person, or to the office of such body or to their clerk and, if sent by post, shall be deemed to have been served and received respectively at the time when the letter containing the same could be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and pre-paid and put into the post."

It was held by Viscount Reading, C. J. and Lush, J., that delivery to the post-office of a letter containing a notice properly addressed and prepaid as directed by s. 65 raises a presumption that the notice has been received by the addressee; that this is not merely a presumption of fact until the contrary is shown, but is a presumption of law which cannot be rebutted by showing that in fact the notice had not been received. And by Ridley, J., that s.65 provides a statutory method of giving notice, and that when a notice has been sent as directed it is not necessary to show that the addressee has received it.

Viscount Reading in the course of his judgment had this to say (at p. 838):

> "On a consideration of this statute I have come to the conclusion that once there has been proved the sending by post of a prepaid letter properly addressed containing a notice the assessment committee have proved all that it is necessary, and that there is an end to any question of service."

In *Sandland* v. *Neale* [1956] 1 Q. B. 241 a case relating to the service of notice for intended prosecution under s.21 of the Road Traffic Act 1930, the Court considered the meaning and effect of a similar provision contained in the section which provides:

> "Where a person is prosecuted for an offence under any of the provisions of this part of this Act relating ..... the reckless or dangerous driving ..... he shall not be convicted unless either -
>
> (a) . . . . . .
>
> (b) . . . . . .
>
> (c) Within ..... fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him.....".

It was held by the majority of the Court of Appeal that whether the defendant received the notice within fourteen days was immaterial since it was the sending and not the receipt of the notice which was decisive, and provided the police acted reasonably .... the requirements of s. 21 were complied with.

The above case was applied in *Nash* v. *Ryan Plant* [1978] 1 All E. R. 492.

Useful reference in this respect may also be made to a more recent case that of *Brimnes* [1974] 3 All E. R. 88 which was referred to and quoted at length in *Katsiantonis* v. *Frantzeskou* (1981) 1 C.L.R. 566.

The conclusion to be drawn from the above authorities is briefly this:

That the service of a notice under s. 42 is proved if the letter containing the notice is sent (a) by registered post, (b) it is correctly addressed to either the addressee's business or private address and, in view of the practice of the postal authorities in Cyprus as disclosed by the evidence, (c) the register slip notifying the addressee that the letter awaits collection at the post office is left at his address.

Reverting to the evidence adduced it seems to me that an essential ingredient is missing. There is no evidence that the envelope containing the assessments was correctly addressed. The second witness for the respondents, Mr. Panayiotou, who as stated earlier on, had no personal knowledge of this matter, would only have been able to give such evidence if the envelope or envelopes containing the assessments had been kept in the file because they were the only means by which this witness would be in a position to positively know and establish this fact. But they were not so kept and they could not be traced; and no other witness who might have personal knowlege was called to testify as to this issue. And if the envelope was not correctly addressed so must also have been the register slip with the result that the applicant would have no notice that the letter awaited for collection at the post-office. In view of this it becomes, to say the least, doubtful if this ingredient that goes to the proof of the service has been satisfied and, as there has been no suggestion or indication that when the Commissioner was taking the sub judice decision had any other material before him apart from the file of the applicant I am bound to resolve such issue in favour of the subject and hold that service has not been satisfactorily established and that, therefore, the decision to reject the objection was based on a wrong exercise of discretion.

In the light of the above the recourse must also succeed on this issue.

But having dealt with this issue I must say that it seems to me that there is another aspect of the case relating to this issue that merits consideration. The Commissioner, as expressly stated in his decision, refused to accept appli-

cant's objection on the basis of s. 20(1) of the Assessment and Collection of Taxes Laws 1978-1979 but necessarily so, also on those of s. 42 of Law 53 of 1963, as amended by Law 61 of 1969 which provides for the service of notices and which is quoted earlier on in this judgment.

But the provisions of these sections cannot supercede those of Article 146 of the Constitution and more particularly of paragraph 3 thereof which provides:

> "3. Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse."

In *Charalambos Pissas (No. 1)* v. *E.A.C.* (1966) 3 C.L.R. 634, a case of compulsory acquisition of property where both the notice and order of acquisition did not mention the name of the applicant, although the Court found that such publication might have been a good publication for the purposes of the relevant Law (Law 15 of 1962) it held that it was not a proper notice sufficient to set in motion the time prescribed by paragraph 3 of Article 146 of the Constitution in as much as the applicant did not actually come to know of the compulsory acquisition in question until he was served with notice that a reference was filed in the District Court for the determination of the compensation payable to him in respect of the acquisition and that, therefore, the time began to run, for the purposes of Article 146.3, as from such date.

In *Bakkaliaou* v. *The Municipality of Famagusta* (1969) 3 C.L.R. 19, also a compulsory acquisition of property case, the Full Bench of this Court had to deal with a similar issue. In this case the respondents caused to be published a notice of acquisition under the provisions of the Compulsory Acquisition of Property Law, 1962. Thereafter (presumably in view of the judgment in the *Pissas* case (supra)) they informed personally the owner, appellant in the case, of the intended compulsory acquisition of her property and invited her, in case she had any objection for the intended action, to submit her reasons for such objection within fifteen days. This she did stating the reasons for objecting to

the proposed acquisition and making at the same time a proposal for an arrangement under which, in her view, the public purpose would be served, while at the same time part of her property would be saved for her. The respondents never replied to this letter but instead, some months later, they caused an acquisition order in respect of appellant's property to be published in the Gazette. The appellant did not come to know of the order until about eight months later when she was served with a notice of proceedings taken by the respondents for the determination of the compensation payable in respect of her property, compulsorily acquired by the publication of the order and as a result she filed a recourse challenging the validity of such acquisition. The recourse was filed some ten months after the publication of the order but within seventy-five days from the date she came to know of the order.

The Full Bench, reversing the first instance judgment, held, that in the circumstances the publication of the acquisition order was not sufficient for the purposes of setting in motion the provisions of Article 146.3; and that the period of seventy-five days provided thereunder did not begin to run until the true position came to the knowledge of the appellant by the service upon her of the notice of the proceedings for determination of the compensation.

Applying the above to the facts of the present case if the applicant had filed a recourse within seventy-five days from the time the disputed assessments had actually come to his knowledge, after he was served with the summons, such recourse could not reasonably be said to have been out of time.

But the applicant could not so file a recourse because under the provisions of s. 21(1) of Law 4/78 an objection to the assessment is a necessary intermediate step in the process leading up to the filing of the recourse. (See, *Petrolina Ltd.* v. *The Municipal Committee of Famagusta* (1971) 3 C.L.R. 420 at 425). And once he made such objection he could only file a recourse in case of failure to reach an agreement with the Commissioner and after determination by the latter of the amount of tax payable as in sub-section (5) of s. 20 provided.

So, in the circumstances of this case, the applicant in effect could only file a recourse against the assessments within seventy-five days from the date the decision of the Commissioner contained in the letter of the 16th June, 1980, was communicated to him. The Commissioner, however, refused to accept applicant's objection with regard to the years of assessment 1972-1975 on the ground that it was not made within the time prescribed by s. 21. But the Commissioner could only come to the conclusion that the objection was out of time under the above section by relying on the provisions of s. 42 of Law 53/63 as amended by Law 61/69.

I have already held that in the present case not all the ingredients necessary for the notice to be "deemed to have been served" have been satisfactorily proved.

But, nevertheless, it is, to say the least, doubtful whether even in cases where all the ingredients of the section are ostensibly satisfied, constructive notice or presumption of knowledge—because this is what it amounts to—can be said to satisfy the provisions of Article 146.3 where, as in the present case, it is an undisputed fact that the letter did not come to the knowledge of the applicant.

It is in this respect that I think that the *Pissas* and *Bakkaliaou* cases (supra) are, by analogy, relevant to this issue.

It is interesting to note that in Greece it has been established by Case Law as a general principle that in case of an application for annulment actual service must be proved and that communication by post is not sufficient proof of service unless receipt by the addressee is also proved. In Conclusions from the Case Law of the Greek Council of State 1929-1959 at p. 252 it is stated as follows:

«Ἡ κοινοποίησις δέον νὰ ἀποδεικνύηται ὡς λαβοῦσα πράγματι χώραν. Ἀποδεικτικὸν κοινοποιήσεως μὴ συνταγὲν ὑπὸ δημοσίου ὀργάνου δὲν λαμβάνεται ὑπ' ὄψιν διὰ τὴν κρίσιν περὶ ἐμπροθέσμου ἀσκήσεως τῆς αἰτήσεως ἀκυρώσεως. Δὲν ἀποτελεῖ δὲ πλήρη ἀπόδειξιν κοινοποιήσεως τὸ ὅτι ἡ πρᾶξις φέρεται διεκπεραιωθεῖσα διὰ παραδόσεως εἰς τὸ Ταχυδρομεῖον, ἐφ' ὅσον δὲν ἀποδεικνύεται καὶ ἡ περιέλευσις αὐτῆς εἰς τὸν

πρὸς ὃν ἡ κοινοποίησις καὶ δὴ ἀπὸ βεβαίας χρονολογίας, ἔστω καὶ ἂν ἔτι βεβαιοῦται ἡ παραλαβὴ τοῦ σχετικοῦ ἐγγράφου ὡς συστημένου ὑπὸ τῆς ταχυδρομικῆς ὑπηρεσίας».

("Communication must be proved as having actually taken place. A document of communication not drawn up by a public organ is not taken into account in considering the time limit for filing the application for annulment. The fact that the act seems to have been dispatched by delivery to the post-office does not constitute absolute evidence of communication if it is not also proved that it has reached the person to whom the communication purports to be made and especially from an ascertained date even if the receipt of the relevant document as registered by the postal services is affirmed.)

See, in this respect Case No. 1324(55) of the Greek Council of State.

In the light of all the above and the circumstances of this case I would, in any case, have decided this issue in favour of the applicant because, in my view, to do otherwise would mean that the provisions of Article 146.3 would be defeated.

But, having said this, I must also add that the position would have been different if it were satisfactorily proved that the register slip had come to the knowledge of the applicant and he had deliberately abstained from collecting the letter because it would then mean that he had access to the information and the means of knowledge and had by his deliberate act avoided to obtain it.

Before concluding I shall deal briefly with another point that has been raised in this recourse, that of the interest payable upon the amount of tax payable by the applicant. Interest was imposed on the applicant at the rate of 6% and 9% on the ground that the delay in raising the assessments in question was due to his deliberate omission. Counsel for applicant argued that no question of deliberate omission arises in this case but only the legal point whether the profit made as above is taxable. Counsel for the

respondent conceded at the end of his address that there is no question of deliberate omission with regard to the years of assessment 1976-1979, in which case the interest should be in accordance with s. 42(1) of the Assessment and Collection of Taxes Laws, 1978 to 1979.

In the case of the years of assessment 1972-1975, counsel for the respondent also conceded that if it is found that the respondent was wrong in refusing to accept the out of time objection of the applicant, then, the interest payable in respect of those years should be that provided for by ss. 41(1) and 42(2) of the above Laws.

In view of the above it would appear that the only dispute is with regard to the years of assessment 1972-1975. Having already found that the recourse with regard to these years should be allowed the reasonable conclusion is that the delay was not due to the unreasonable omission on the part of the applicant. But, in any event, those assessments were additional assessments raised on the applicant in order to tax the profits from the sales in question and since I have already found that such profits were not taxable, it seems to me that no question of interest arises.

In the result this recourse is allowed and the sub judice decisions are hereby annulled. There will be no order as to costs.

Sub judice decisions annulled. No order as to costs.