1986 August 20

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VARNAVAS I. VARNAVIDES AND OTHERS.

Applicants,

v.

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

Respondents.

(Cases Nos. 390/74 and 392/74).

Immovable property—Transfer of Land—Declarations of transfer filed with the D.L.O.—Their contents are deemed to be true—The Land Transfer Amendment Law 19/1890, section 4 and 7 (now sections 5 and 58 respectively of Cap. 228).

Contract Law—Consideration—Adequacy—The consideration does not have to be adequate—Court cannot inquire into the adequacy of the consideration.

Income Tax—Additional assessment—Powers of the Commissioner—The Taxes (Quantifying and Recovery) Law 53/63—Section 23(1) as amended by s.10 of Law 61/69—Additional assessment raised in June 1974 for the years 1969 and 1973 on applicant in case 390/74, and in July 1974 for the years 1969, 1972 and 1973 on applicant in case 392/74—Full facts came to light in May 1974—Commissioner entitled to raise such assessments.

Income Tax—Sale of land—Taxability of profits therefrom—Depends on the circumstances of each case—Judicial control—It is for the Commissioner to find the facts—This Court will not interfere, if the finding could be reasonably reached—Conclusion that sellers are traders

in land—This Court will not interfere, if such conclusion was reasonably open to the Commissioner.

Income Tax—Notional profits—As regards traders there is an exception to the principle that one cannot be taxed on the profits one might have made, but only on the profits he made—Trader in land gifting building sites to his daughters and grandchildren—Notional profits arising therefrom were correctly considered as taxable.

The applicants in the above recourses are two of the three sons of the late Yiannis HjiVarnava, who died in 1952. In 1947 the deceased transferred to his said three sons in equal undivided shares two pieces of land at Ay. Omoloyitae Quarter, Nicosia, for the amounts of £800 and £700 respectively. As stated on the relevant title deeds the applicants acquired the aforesaid properties (1/3rd share each) by way of sale from their father.

In 1950 the applicants and their said brother joined with the owners of adjoining plots of land, namely the heirs of the late HjiKyriacos Savva, for the sub division of the said lands into building sites. The application was not successful, but a new application for such sub-division filed by the same persons was successful and as a result a sub-division was carried out. As a result the property of the three brothers was sub-divided into 48 building sites plus a small triangular piece of land of an area of 440 sq. ft. and a piece of land (Plot 334) of an area of one donum, 1 evlek and 1944 sq. ft.

In 1963 the owners of adjacement plots C.16 and C.17 made a joint application with the three brothers for sub-division of plots C.16, C.17 and C.334. The application was successful.

The final result was that through sub division of the two pieces of land, which had been transferred to them in 1947 as aforesaid, the three brothers were eventually registered as the joint owners (1/3rd share each) in 51 approved building sites plus a strip of land.

Between the years 1956 to 1972 the three brothers

sold 17 jointly owned building sites at a total price of £94,200. Meanwhile in 1968 they divided 33 sites amongst themselves and upon such division each of them was registered as the sole owner of eleven building sites. The remaining site was transferred by way of gift to one of the daughters of applicant in recourse 390/74.

In 1970 applicant in recourse 390/74 sold two of his said eleven sites for the total price of £17,000. Between the years 1968 and 1972 he gifted the remaining nine sites to his daughters and their children.

On 20.6.74 the respondent Commissioner raised additional assessments for the years 1969, 1973 to the amount of about £64,986 on the applicant in recourse 390/74. The applicant objected, but as his objection was dismissed, he filed the said recourse.

On 9.7.74 the respondent Commissioner raised additional assessments to the total amount of £7,790.810 for the years 1969, 1972, 1973 on the applicant in recourse 392/74. The applicant objected and, when his objection was dismissed, he filed the said recourse.

In support of the above recourses the applicants alleged inter alia that: (a) The two pieces of land were gifted to them by their father, but in order to avoid payment of estate duty, the transfer was declared to be by way of sale, (b) The sums of £800 and £700 in no way represent the true value of the lands at the time of their transfer and that this is a clear indication that the sales were ficticious, (c) They joined with the owners of adjacent properties in order to effect the sub-division, not at their own initiative, but at the initiative of the other parties (b) That the fact that such property was kept for several years and was being cultivated before its division, it is almost conclusive evidence that it had been acquired as an investment and not for trade (c) In any event the Commissioner was wrong in assessing on the applicant in recourse 390/74 a notional profit arising out of the gift of the nine building sites to his daughters and grandchildren.

It should be noted that the applicants had never declared any losses or profits in respect of the alleged

cultivation and that they did not adduce any evidence to establish such a fact.

Held, dismissing the recourses: (1) The transfer of the two pieces of land by applicants' father to his sons was declared to be by way of sale. The relevant formalities for the transfer were complied with. This Court cannot go behind what was stated in the Official documents at the land Registry which in law are deemed to be true (Sections 4 and 7 of Law 19/1890, now sections 5 and 58 respectively of Cap. 228).

(2) It is a well accepted principle of contract law that the consideration given does not have to be adequate nor can such adequacy be questioned by the Courts.

(3) In the light of the fact that the full facts came into light in May 1974 until when it was believed that the two pieces of land had been inherited by the applicants from their father and of the provisions of s.23(1) of Law 53/63 as amended by s. 10 of Law 61/69, the respondent Commissioner was perfectly entitled to raise the additional assessments provided that the profits realised by the applicants are taxable.

(4) The taxability of profits from the sale of land must be decided in the light of the particular circumstances of each case. It is for the Commissioner to find the facts and this Court cannot interfere with his findings if they could reasonably be reached. Moreover, this Court will not interfere if it was reasonably open to the Commissioner to reach the conclusion that the applicants were traders in land. In the light of the facts the sub judice decisions were reasonably open to the Commissioner.

(5) Though it is a fundamental principle of Income Tax Law that a man cannot be taxed on profits that he might have made, but has not made, in the case of a trader there is an exception to this rule. In the light of the authorities and the facts of this case the Commissioner rightly considered that the applicants were liable to be assessed on notional profits.

Recourse dismissed.
No order as to costs.

Cases referred to:

Constanne Estates Ltd. v. *The Republic* (1982) 3 C.L.R. 859;

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

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

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

Pilkington v. *Randal,* 42 T.C. 662;

Alabama Coal, Iron Land and Colonization Co. Ltd. v. *Mylam,* 11 T.C. 232;

HjiEraclis v. *The Commissioner of Income Tax* (1984) 3 C.L.R. 604;

Lilian Georghiades v. *The Republic* (1980) 3 C.L.R. 525;

Sharkey v. *Wernher* [1956] A.C. 58;

Mason v. *Inner* [1967] 1 Ch. 1079;

Petrotim Securities Ltd. v. *Ayres,* 41 T.C. 389;

Skinner v. *Berry Head Lands Ltd.* [1970] 1 W.L.R. 1441.

Recourses.

Recourses against the additional income tax assessments raised on applicants for the years 1968-1972.

G. Polyviou with *A. Triantafyllides,* for the applicants.

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

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourses which have been heard together as they present common factual and legal issues the applicants claim a declaration that the additional assessments raised upon them are null and void and of no legal effect whatsoever

and/or the decision of respondents to impose upon the applicants additional assessments for the years of assessment 1968-1972 is null and void and of no legal effect whatsoever.

The main facts which are not in dispute are as follows:

The applicants who are brothers are the sons of the late Yiannis HjiVarnava, a landowner and farmer from Strovolos who died in 1952 at the age of 90 years. The said HjiVarnavas also had 3 daughters and a third son, Nicos Varnava, now deceased who filed recourse No. 391/74 which was originally heard together with the present recourses but was dismissed as withdrawn on 17.8.83.

The three daughters married long before 1947 and the deceased father provided them with residence and other items of dowry and also tranferred to them by way of gift lands and other immovable property owned by him. In so far as his three sons were concerned, he transferred to them immovable property by way of gift and provided also capital for them to establish them in business.

In 1947 the applicants' father transferred to his three sons two pieces of land at Ay. Omologitae Quarter, Nicosia, at the junction of Grivas Dighenis Avenue,, Santa Roza Street and Passiades Street, of a total area of 30 donums and 1482 sq. ft., viz. plots C. 7 and C. 15, registered in his name under Registration Nos. C.8 and C. 16, respectively, of Ay. Omologitae Quarter, Nicosia, for the amounts of £800 and £700 respectively. The said transfers were accordingly registered at the Land Registry Office on the 12.3.47 in the names of the three brothers, 1/3rd share each, and as stated on the relevant title deeds the applicants acquired the aforesaid properties by way of sale from their father.

In 1956 the applicants applied for a division of their property into building sites jointly with the owners of the adjacent property, the heirs of a certain HjiKyriacos Savva, in order that, as claimed, a more advantageous sub-division be obtained. Indeed their property was sub-divided into 48 building sites plus a triangular piece of land (plot

C. 332) of an area of 440 sq. ft. and a piece of land (plot C. 334) of an area of 1 donum and 1 evlek and 1944 sq. ft. The piece of land under plot C. 334 had to be left as land as it could not fit in with the approved lay-out plan.

In 1963 the owners of adjacent plots C. 16 and C. 17 made a joint application with the three brothers for sub-division of plots Nos. C. 16, C. 17 and C. 334 and upon completion of the sub-division the three brothers got in their shares 3 building sites, under plots C. 664, C. 665 and C.666, which were thereupon registered in their joint names (1/3rd share each). The two building sites under plots C. 337 and C. 338 were in 1959 sub-divided into the new building sites under plots C. 583 and C. 584.

The final result was that through the sub-division of the two plots originally transferred in 1947 by their father to the applicants the three brothers were eventually registered as the joint owners (1/3rd share each) in 31 approved building sites out of the original plot C. 7 and in another 20 approved building sites plus a strip of land out of the original plot C. 15.

Between the years 1956 to 1972 the three brothers sold 17 jointly owned building sites at a total price of £94,200.-.

Meanwhile in 1968 they divided 33 building sites held by them in undivided shares amongst themselves and upon the said sub-division each of them was registered as the sole owner of eleven building sites.

A building site under. Registration No. C. 389, plot C. 367, was left in undivided shares but in 1974 it was transferred by way of gift to Yiannoulla A. Michael, daughter of V. Varnavides applicant in case No. 390/74.

In 1970 applicant in case 390/74 sold two building sites out of those registered in his name as sole owner for the total price of £17,000.- and the remaining 9 building sites he gifted to his two daughters and their children between the years 1968 to 1972.

Meanwhile the heirs of Hji Kyriacos Savva had obtained some building sites in that region by sub-dividing the lands inherited from their father and sold them.

On 20.6.74 the respondent Commissioner raised the sub judice additional assessments for the years 1969, 1973 to the amount of about £64,986.- on the applicant in recourse 390/74 and forwarded them to him with a covering letter.

An objection to this assessment was filed on 1.7.74 by the applicant's Tax Consultant. The Commissioner determined the objection by maintaining in full the additional assessments raised and issued Notices of Tax Payable which he forwarded to the applicant with his letter of 5.10.74.

Also on the 9th July 1974, the respondent Commissioner raised the additional assessments to the total amount of £7,790.810. for the years 1969, 1972. 1973 on the applicant in recourse 392/74 and forwarded them to him with a covering letter.

An objection to these assessments was made by the applicant on his return from abroad on the 18th July 1974, and his Tax Consultant addressed on 3.9.74 a letter to the Commissioner of Income Tax in which he stated the grounds of the objection. The Commissioner determined the objection by maintaining in full the additional assessments raised and issued Notices of Tax payable which he forwarded to him with his letter of 5.10.74.

As a result the applicants filed the present recourses. The grounds of law on which they are based can be summarised as follows:

1. The additional assessments raised on the Applicant were not duly reasoned.

2. In the present case there has not been any "discovery" on the part of the respondent justifying the raising of the additional assessments.

3. The profit from the sale of the building sites is not a profit from the exercise by applicants of a trade in developing and selling land in order that it may be brought within the ambit of the provisions in Section 5(1)(a) of the Income Tax Laws, 1961-1969, but profit of a capital nature not liable to income tax.

4. The computation of the profit as made by the respondent is erroneous.

5. The tax demanded from the applicant is of a destructive nature, which is contrary to the provisions in Article 24 of the Constitution.

It is the main argument of the applicants that the respondent Commissioner was wrong in considering that by sub-dividing their property and subsequently selling it the applicants were carrying out a trade in land.

Primarily it has been argued that there is a dispute as to the actual facts behind the transaction in the light of which the respondent Commissioner reached his conclusion that the applicants were traders in land.

It is the contention of the applicants that the property was acquired by them as a result of a family arrangement, that is by way of gift in undivided shares in their joint names from their aged father but in order to avoid paying estate duty in the event of his death, it is alleged that the transfer was declared to be by way of sale. The sums of £800.- and £700.- paid for the two properties and which appear in the declaration of transfer at the Land Registry Office in no way represent the actual value of the properties at the time of the transfer and to this effect they filed affidavits as to what the value of the properties was in 1947 and 1956. Such amounts, it is claimed, were entered by the advocate's clerk who carried out the transfer and are a clear indication that the declared sales were not true sales but fictitious and the lands came to them by way of gift.

It is stated in section 4 of the Land Transfer Amendment Law, Law 19 of 1890 (now Cap. 228 section 5).

> "The written statement or statements so produced to the Land Registry Official shall be read over to the parties by whom they were produced and the contents thereof shall be declared by them to be true in the presence of the Land Registry official.
>
> The parties producing the statement or statements shall thereupon, if they are able to do so, sign the

same, or, if illiterate, affix their marks thereto, and they shall then be signed by the Land Registry official before whom the declarations were made."

And in section 7 thereof: (now 58 of Cap. 228).

"Any person who knowingly and with fraudulent intent makes or causes to be made a false statement in any declaration made under section 4 of this Law shall be guilty of an offence and shall be punishable in the same way as though he had given false evidence in any judicial proceeding".

As already stated above, it is before the L.R.O. and it has so been declared at the time of the transfer that the said transfer was by way of sale. The applicants and their father made at the time of the transfer the requisite declarations to that effect and all the formalities were complied with. It was never alleged in the past that such declarations were false or untrue or that the sale was fictitious. This Court cannot go behind what was stated in the Official documents at the Land Registry which in law are deemed to be true.

The fact that, it is alleged, that the price paid for them was low and that their actual value was by far higher, even if so, cannot lead the Court to a conclusion that the declared sale was fictitious because it is a well accepted principle of contract law that the consideration given does not have to be adequate nor can such adequacy be questioned by the Courts. Furthermore there is nothing in law to prevent a father from selling to his sons at a lesser value on account of their special relationship.

Secondly it is claimed that as regards the fact that they joined with the owners of the adjacent properties in order to effect the sub-division, they did so not at their own initiative but at the initiative of the other parties and it was done in order that a better sub-division may be carried out. To this effect they filed affidavits that such initiative was taken by the other owners, namely the heirs of Hji-Kyriakos Savva. They have argued that if somebody has come to property either by gift or by way of inheritance, the mere fact that he divides the property and sells it does

not make him a dealer in land. He is merely realising an investment he came to possess.

It was further contended that even if it is found to be a straightforward purchase, the fact that such property was kept for several years and was being cultivated before it was divided and sold as building sites, it is almost conclusive evidence that the property had been purchased as an investment and not for trade.

On behalf of the respondent Commissioner it was contended that in order to decide whether the Commissioner was entitled to raise the additional assessments it must first be decided whether they were correct assessments.

It is the contention of the respondents that the full facts came into light in May 1974 until when it was believed that they were inherited lands from their late father. When it emerged that the land had in fact been purchased and was not in fact inherited property as had been stated all along by applicants in their income tax returns the respondent Commissioner by virtue of section 23(1) of the Taxes (Quantifying and Recovery) Law 1963 (Law 53 of 1963), as amended by section 10 of Law 61 of 1969 became entitled to raise the additional assessments in the light of the new facts.

The aforesaid section 23(1) provides:

> "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".

It is my view that in view of the above the respondent was perfectly entitled to raise the additional assessments in question provided it is found that the profits realised by the applicants are taxable. It is stated at p. 868 of *Constanne Estates Ltd.* v. *Republic* (1982) 3 C.L.R. 859.

"In our judgment s. 23 confers power on the Commissioner to raise, subject to the time limitation envisaged by the Law, an additional assessment whenever he bona fide forms the view that the tax payer was undercharged as a result of an earlier assessment. It is open to the Commissioner to conclude thus, either because of a new appreciation of the facts or the implications of the law in their application to the particular facts of the case".

And see also generally at pp. 867-868.

The general principle is that the taxability of profits from the sale of land must be decided in the light of the particular circumstances of each case (See *Savvas M. Agrotis Ltd.* v. *Commissioner of Income Tax,* 22 C.L.R. 27; *Californian Copper Syndicate (Limited and Reduced)* v. *Harris,* 5 T. C. 159; *Jones* v. *Leeming* [1930] A. C. 415). And in order to determine such matter one must look closely into the transaction itself. Undoubtedly land may be held as an investment yet it may be the subject of trading if for instance such land has great development potentiality, is non income producing, and supplementary work was done in order to make it more marketable.

In the present case it was declared at the L.R.O. in 1947 that the transfer from father to sons was by way of sale. As alleged by respondents and has not been contradicted by applicants, in 1950 the applicants joined with the heirs of Hji Kyriakos—it is immaterial on whose initiative—and applied for a sub-division of the land, which

was not approved. In 1956 they reapplied and this new application was approved and a sub-division was carried out. Subsequently, they joined with other neighbouring property owners, first with a certain Ourania Papanicolaou and later with a Makis Christou for a further division.

From the time of the first division in 1956 they began selling land and continued to do so until 1972.

As regards their allegations that when they obtained the land their intention was not to trade but that they cultivated the land until 1956, as correctly stated by the respondent they never, during the years 1947 to 1956, or at any time thereafter until now, declared any losses or profits in respect of such alleged cultivation, nor in my view have they brought any evidence before this Court to establish such fact, the burden being at all time upon them to prove such allegation of theirs. But even if they did so this does not change the situation.

The main point for consideration is whether on the above facts it would be reasonable to conclude that the profits were "a mere enhancement of value by realising a security, of a gain made in an operation of business in carrying out a scheme of profit making" (See *Californian Copper Syndicate* (Supra) at p. 166).

The Case Law on the matter is clearly defined. In *Pilkington* v. *Randal*, 42 T. C. 662, at pp. 671-672 it was stated by Lord Denning M. R.:-

> "Now Mr. Potter has put forward a strong argument in favour of Mr. Pilkington. He says that if this had remained simply trust property, and Mr. Pilkington had not bought out his sister's share, it would come within a whole line of authority, such as *Hudson's Bay Co.* v. *Stevens*, 5 T.C. 424, and *Rand* v. *Alberni Land Co. Ltd.*, 7 T. C. 629, where it was said that a landowner who has land and sells it off to get the best price he can, even if he makes roads and so forth, is merely realising his own land and is not embarking on a trade. Nevertheless, there are other cases which show that, even though a man inherits land, or has had it for a long time, he may

by his conduct embark and launch upon a trade by developing it. You have to look at all the circumstances, and see if he has launched himself on a trading activity. In *Alabama Coal Co., Ltd.* v. *Mylan*, 11 T. C. 232, at page 253, Rowlatt, J., said that even a person in the position of a landowner can use his existing lands as an article of trade if that is the true view of what he has done with them".

And further down at p. 672:

"They held that he had embarked on a trade. The decision of the Commissioners is not such an unreasonable conclusion that this Court should interfere with it. We cannot say, in the words of Lord Radcliffe in *Edwards* v. *Bairstow*, [1956] A. C. 14, that the case is 'one in which the true and only reasonable conclusion contradicts the determination' ".

Rowlatt, J. in the case of *Alabama Coal, Iron Land and Colonization Co. Ltd.* v. *Mylan*, 11 T. C. 232 at p. 253 had this to say:

"The question was whether, looking at it in that way, they had merely developed and sold their lands as a landowner might whose lands had come down from his ancestors or whether they had taken those lands into their trade, so to speak, and traded in them. That even a landowner may be liable for trading in land under certain circumstances is made clear by Lord Justice Farwell, I think, in the *Hudson's Bay* case, because he says:

'A man who sells his land, or pictures, or jewels, is not chargeable with Income Tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining

which those prices will no doubt come into consideration.'

Therefore, even a person in the position of a landowner can use his existing lands, to put it shortly, as an article of trade, if that is the true view of what he has done with them".

In Cyprus the Law is likewise settled on the matter and the principles are extensively stated in the recent case of *Hji Eraclis* v. *The Commissioner of Income Tax* (1984) 3 C.L.R. 604 at pp. 612-615.

I have considered the position in the light of all the authorities cited by both parties as regards the Law and the factual situation as put before me and I find that I can reach no other conclusion but that on the facts it was reasonably open to the respondent Commissioner to reach the conclusion that the applicants were traders in land. The burden was on the applicants to convince this Court that it must interfere with the sub judice decision. See *Lilian Georghiades* v. *Republic* (1980) 3 C.L.R. 525; where an extensive analysis of the Law on this point is made and *Pilkington* v. *Randal* (supra) at p. 673; per Dankwerts, L. J.

"However, it is for the Commissioners to find the facts, as has been repeated many times. We are not at liberty to reverse a decision of the Commissioners unless we can say that it was a decision which could not reasonably have been reached on the facts and the evidence. I am unable to say that the Commissioners could not reasonably have reached that result, particularly in view of the result which has been reached by Lord Denning, M. R.".

No doubt the decision of the respondent Commissioner is not such an unreasonable conclusion that this Court should interfere with it. Furthermore it was for him to find the facts, and this Court cannot interfere with his decisions which could reasonably be reached on the facts.

A final point with which I must deal with in respect of recourse No. 390/74 is the contention of the applicant that the respondent Commissioner was wrong in assessing the

applicant's notional profit arising out of the gift to his daughters and grandchildren of building plots and that this is contrary to section 13(d) of the Income Tax Laws 1961 to 1973.

Though the fundamental principle of Income Tax Law is that a man cannot be taxed on profits that he might have but has not made (See *Sharkey* v. *Wernher* [1956] A. C. 58) in the case of a trader there is an exception to this principle. It was so held in *Mason* v. *Innes* [1967] 1 Ch. 1079 at p. 1089 where Lord Denning M. R. said:

> "But in the case of a trader there is an exception to that principle. I take for simplicity the trade of a grocer. He makes out his accounts on an 'earnings basis'. He brings in the value of his stock-in-trade at the beginning and end of the year: he brings in his purchases and sales; the debts owed by him and to him; and so arrives at his profit or loss. If such a trader appropriates to himself part of his stock-in-trade, such as tins of beans, and uses them for his own purposes, he must bring them into his accounts at their market value. A trader who supplies himself is accountable for the market value. That is established by *Sharkey* v. *Wernher* (supra) itself. Now, suppose that such a trader does not supply himself with tins of beans, but gives them away to a friend or relative. Again he has to bring them in at their market value. That was established by *Petrotim Securities Ltd.* v. *Ayres*, 41 T.C. 389".

Lord Denning went further at p. 1090 to distinguish between professional men (such as the respondent in that case who was an author) who keep their accounts on a "cash basis" who have no stock-in-trade to bring into accounts, and traders who keep their accounts on an "earnings basis" and concluded that:

> "The proposition in *Sharkey* v. *Wernher* does not apply to professional men. It is confined to the case of traders who keep stock-in-trade and whose accounts are, or should be, kept on an earnings basis, whereas a professional man comes within the general

principle that, when nothing is received, there is nothing to be brought into account".

In the *Petrotim Securities Ltd* case (Supra) it was considered at p. 407 that:-

"The case of *Sharkey* v. *Wernher*, 36 T. C. 275, points the answer. It is not confined to case where a person is a 'self-supplier'. It applies to any case where a trader may, for no reason, choose to give things away or throw them into the sea".

And in *Skinner* v. *Berry Head Lands Ltd.* [1970] 1 W.L.R. 1441 at p. 1448 per Goff J.:

"I had occasion myself to advert to *Sharkey* v. *Wernher* [1956] A. C. 58 when dealing with the author case of *Mason* v. *Innes* [1967] Ch. 436, and I said, at p. 446: '.... the basis on which *Sharkey* v. *Wernher* was decided is that, by consuming or giving away his stock-in-trade, a trader appropriates its value, so that there is a notional receipt', and I still think that that is the principle of that case".

In the light of the authorities and the facts of the present case I have decided that the respondent Commissioner rightly considered that the applicants were liable to be assessed on notional profit therefore I would dismiss this ground also.

For the reasons stated above I find that in the circumstances it was reasonably open to the respondent Commissioner to reach the sub judice decision which is duly reasoned, such reasoning being also amply supplemented from the relevant files and they are hereby confirmed.

In the result these recourses fail and are hereby dismissed with no order as to costs.

Recourses dismissed.
No order as to costs.