1988 May 31.

[SAVVIDES J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

STAVROS PAVLOU,

Applicant,

v.

THE DIRECTOR OF INLAND REVENUE,

Respondent.

(Case No. 17/86).

Taxation—Capital Gains—The Capital Gains Tax Law, 1980 (Law 52/1980)—Sections 6 and 9—Whether retrospective and, therefore, inconsistent with Art. 24 of the Constitution—Question determined in the negative—"Retrospective", meaning of.

Taxation—Assessment and Collection of Taxes—Failure of applicant to respond to repeated requests by respondents to submit information—Significance.

Immovable Property—Transfer—Declaration of transfer—Statements therein—Significance of.

Immovable Property—Transfer—Declaration of transfer—Statements therein—Significance of.

Taxation—Assessment and Collection of Taxes—Excessive taxation, allegation as to—Burden of proof—Rests on applicant.

Taxation—Assessment and Collection of Taxes—Judicial control—Principles applicable.

Constitutional Law—Taxation—Constitution, Art. 24—The Capital Gains Tax Law, 1980 (Law 52/1980), Sections 6 and 9—Whether retrtospective and, therefore, unconstitutional—Question determined in the negative.

Words and phrases: "Retrospective".

The facts of this case sufficiently appear in the Judgment of the Court.

Recourse dismissed.
Costs against applicant.

Cases referred to:

Master Ladies Tailors Organization v. Minister of Labour and National Service [1950] 2 All E.R. 525;

Customs and Excise Commissioners v. Thorn Electrical Industries Ltd. [1975] 3 All E.R. 881;

Papaconstantinou and another v. Director of the Department of Inland Revenue (1986) 3 C.L.R. 1672;

Adis Ltd. v. The Republic (1986) 3 C.L.R. 900;

Nicou v. The Republic (1983) 3 C.L.R. 1113;

Panayiotou v. The Republic (1984) 3 C.L.R. 857;

Markides v. The Republic (1967) 3 C.L.R. 147;

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

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

Coussoumides v. The Republic (1966) 3 C.L.R. 1;

Georghiades v. The Republic (1980) 3 C.L.R. 525 and on appeal (1982) 3 C.L.R. 659.

Recourse.

Recourse against the decision of the respondent to impose on

applicant capital gains tax amounting to £1,475.- as a result of the disposition of his property.

C. Loizou, for the applicant.

Y. Lazarou, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. By the present recourse applicant challenges the decision of the respondent dated 5th November, 1985, imposing upon him capital gains tax amounting to £1,475.- as a result of the disposition by him of half a share of the property under registration D198 and of the whole share in property under registration D292.

Applicant was the owner of half a share in a field under registration D198, sheet/plan 30/36/Wl, plot 227, the other one half share of which belonged to his wife and of the whole share in the field under registration D292 sheet/plan 30/36/Wl, plot 226 at Kato Deftera village. The first field was acquired by him in 1970 for £1,500.- and the second in 1972 for £450.-.

During the period 1st April, 1975 to 31st March 1980 the applicant leased the said properties to Mintikis Farm Ltd. on condition that the tenants would erect sheds at their own expense which would belong absolutely to the owners of the fields on the termination of the lease agreement on 31st March, 1980. According to a capital statement submitted by applicant on 29th March, 1977 through his accountant (copy of which has been attached as Appendix B to the opposition) the following structures, plant and machinery were to be found on applicant's fields:

(a) A water pump which was in existence at the time of the purchase of the field in 1970;

(b) Chicken barracks which cost, with the additions up to 1975, £3,600.-

On 14th January, 1930, applicant submitted a second capital statement (Appendix C to the opposition) in which he declared that further additional costs of £902.- were incurred for barracks bringing the capital cost of all the barracks for the period 1970 to 31st October, 1979 to £4,502.-

On 1st December, 1980 applicant sold his share in the property under registration D198 as well as the share of his wife in such property and also his property under registration D292 to George E. Paraskevaides of Nicosia acting on account of New Lapatsa Co. Ltd and also to one Andreas Savva Liassi for the sum of £50,000.-

During the examination of applicant's income tax liability in respect of the years 1970-1980 the applicant maintained that the price which he obtained from the sale of the fields represented the value of the land only as the barracks had no value being of no use to the purchasers and were thus demolished on the acquisition of the fields by the new owners. Such contention was accepted by the respondent in computing applicant's income tax liability and so the value of the barracks was fixed at nil and consequently no tax was levied on the applicant in respect thereof.

On 17th October, 1983, the respondent issued to applicant assessments imposing capital gains tax in respect of the disposition of his fields, to which he objected on the ground that the proceeeds of £50,000.- which he and his wife received from the disposition in question represented in addition to the land which he computed to be worth £25,000.-, the barracks, plant and machinery thereof valued at £20,00.- as well as goodwill valued at £5,000.-.

The respondent on numerous occasions according to copies of the letter attached to the opposition (Appendices H and I) requested applicant to call at his office and produce documentary evidence in support of his objection against the assessments raised, including the sale agreement as well as a valuation report supporting his valuations but although he called and discussed his liabili-

ty to capital gains tax with the respondent he failed to present any documentary evidence in support of his claims.

As a result respondent on 5th November, 1985 proceeded and determined applicant's objections maintaining his original assessments. His reasoned decision was communicated to applicant (Appendix J to the opposition) together with the relevant notices of capital gains tax payable. The reasons given by the respondent in the said letter are as follows:

"After a careful examination of the market value of your properties under registration D198 and D292 both on the 1st December, 1980, the date of their disposal, as well as on the 27th June, 1978, I have reached the conclusion that the assessment of their market value which you have declared does not correspond with their market value on the aforesaid dates.

On the basis of the material before me concerning sales of other similar properties in the same area about the same period, the valuation of the Lands & Surveys Department for the purpose of collection of registration fees as well as all factors which in my mind affect the market value of immovable property I have reached the conclusion that the market value of your property under registration D198 and D292 on the 1st December, 1980 was £20,000,- (D198) and £10,000.- (D292) and on the 27th June, 1978 £11,250.- (D198) and £6,375.- (D292)."

The applicant filed the present recourse challenging the said assessments.

The grounds of law raised in support thereof are:

That the sub judice decision was taken in excess and/or abuse of powers, under a misconception of law and fact and in violation of the Constitution; that it is contrary to the accepted principles of law and/or natural justice, and it is not duly reasoned.

Counsel for the applicant neither by his written address nor by any evidence whatsoever disputed the facts set out in the opposition of the respondent. In expounding on his legal grounds he contended that:

(a) The Capital Gains Tax Law, 1980 and in particular s.6(1) is unconstitutional in that by allowing the imposition of tax on the increase of the market value of the property between 27th June, 1978 and the date that the law came into operation violates Article 24.3 of the Constitution which provides that "no tax, duty or rate of any kind whatsoever shall be imposed with retrospective effect".

(b) Subject to his aforesaid objection he submitted that the assessments were excessive and that the capital value of his property was not more than what is stated in his declaration to the respondent.

(c) The respondent wrongly applied the law in reaching his conclusion about the realized profit as he had not taken into consideration the factor of inflation which if it had been taken into account it would have led to the conclusion that no gain had in fact been realized.

Counsel for the respondent, in support of his opposition, annexed thereto appendix "K", a valuation report prepared by Mr. Mateas, the Assistant Commissioner of Estate Duty as to the value of the relevant properties as on 27th June, 1978. Such valuation is based on comparable sales of properties effected in 1978 and 1979 and after making a comparison between the said properties and the subject-matter ones and making all necessary adjustments both properties were assessed, as on 27th June, 1978, at £29,000.-

I shall deal first with the contention of counsel for applicant as to the unconstitutionality of s.6 and s.9 of the Capital Gains Tax Law, 1980 (Law 52 of 1980).

Sections 6 and 9 of the law read as follows:

"6.(1) Κατά τον υπολογισμόν του κέρδους -

(α) οιαδήποτε προ της 27.6.1978, ή κατ' επιλογήν του ιδιοκτήτου προ της 14.7.1974, αύξησις της ιδιοκτησίας δεν θα λαμβάνηται υπ' όψιν:

Νοείται ότι αναφορικώς προς ιδιοκτησίαν ευρισκομένην εντός απροσπελάστου, λόγω της Τουρκικής εισβολής, περιοχής ουδεμία αύξησις της αξίας της ιδιοκτησίας θα λαμβάνηται υπ' όψιν.

(β) θα εκπίπτηται οιαδήποτε δαπάνη εξ ολοκλήρου ή και αποκλειστικώς γενομένη προ κτήσιν του κέρδους μετά την 27.6.1978 και η οποία δεν εκπίπτεται δυνάμει των εκάστοτε εν ισχύϊ περί Φορολογίας του Εισοδήματος Νόμων.

.....

9.(1) Το προϊόν της διαθέσεως ιδιοκτησίας είναι το ποσόν όπερ η τοιαύτη ιδιοκτησία, κατά την γνώμην του Διευθυντού, θα απέφερεν εάν επωλείτο εν τη ελευθέρα αγορά κατά τον χρόνον καθ' ον η ιδιοκτησία διετέθη.

(2) Εάν δεν έχη λάβει χώραν αγορά ή πώλησις, θα λογίζηται ως πληρωθέν ή ληφθέν, αναλόγως της περιπτώσεως, ποσόν ίσον πρός το ποσόν όπερ η τοιαύτη ιδιοκτησία, κατά την γνώμην του Διευθυντού θα απέφερεν εάν ηγοράζετο ή επωλείτο, αναλόγως της περιπτώσεως, εν τη ελευθέρα αγορά καθ' ον χρόνον επισυνέβη το γεγονός."

In English they read:

"6.(1) In computing the gains -

(a) any appreciation in the value of the property before

27.6.1978 or if the owner so chooses, before 14.7.1974, shall not be taken into account:

Provided that no appreciation in the value of the property shall be taken into account in respect of property situated within an area that became inaccessible by reason of the Turkish invasion;

(b) allowance shall be made for any expenditure wholly and exclusively incurred after 27.6.1978 in relation to the acquisition of such gains, which is not an allowable deduction under the Income Tax Laws in force for the time being.

.....

9.(1) The proceeds from the disposition of property shall be the amount which, in the opinion of the Director, such property might be expected to realize if sold in the open market at the time of the disposition of such property.

(2) If no purchase or sale has taken place, there shall be deemed to have been paid or received an amount equal to the amount which in the opinion of the Director such property would realize, if bought or sold, as the case may be, in open market at the time of the occurrence of the event."

In Halsbury's Laws of England, 4th ed., vol. 44, p.570, paragraph 921, the meaning of "retrospective" is given as follows:

"921. Meaning of 'retrospective'. It has been said that 'retrospective' is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it af-

fects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing."

Reference in respect thereof is made to the case *of Master Ladies Tailors Organization v. Minister of Labour and National Service* [1950] 2 All E.R. 525, where it was pointed out by Somervell L.J. that "the fact that a prospective benefit is in certain cases to be measured by or depends on antecedent facts does not necessarily ..... make the provision retrospective".

Furthermore in *Customs and Excise Commissioners v. Thorn Electrical Industries Ltd.* [1975] 3 All E.R. 881 at p.890 it was said by Lord Morris of Borth-Y-Gest that: "The fact that as from a future date tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed."

The above authorities were considered by A. Loizou, J., as he then was, in the case of *Papacostantinou and Another v. The Director of the Department of Inland Revenue* (1986) 3 C.L.R. 1672 where at p. 1678 he concluded as follows:

"It is clear therefore that the sections of our Law challenged do not impose tax retrospectively merely because the profit is calculated by reference to time prior to its enactment. Nor are they retrospective merely because a part of the requisites for its action is drawn from a time antecedent to the enactment of the Law. It would have been retrospective only if the section imposed tax on transactions prior to the date of its coming into force, namely the 1st August 1980."

I fully agree with the opinion expressed in the above cases and I conclude that the relevant provisions of Law 52/80 challenged as unconstitutional on the ground of retrospectivity are constitutional and valid and consequently the objections based on this ground fails.

I come next to consider the second ground of law argued by counsel for the applicant.

It is common ground that the properties in question were sold in 1980 for the sum of £50,000.- including any boreholes and fixtures standing thereon. On the declaration of sale signed by the applicant, his wife and the purchaser, the value of the land was declared at £50,000.- and transfer fees were paid on the amount of £50,000.- Leaving aside the question that any structures, wells and boreholes existing on the said property are under the definition of the Immovable Property (Tenure, Registration and Valuation Law) Cap. 224 "immovable property", there is no mention either in the contract of sale or in the declaration of transfer that the actual value of the immovable property was less than £50,000.- as declared at the time of effecting the transfer. As to the effect of a declaration of transfer useful reference may be made to the following dicta in *Adis Ltd. v. The Republic* (1986) 3 C.L.R. 900 at p. 907:

> "I must say at this stage that a Declaration of Transfer is a formal document prescribed by Law and one cannot accept anything inconsistent with its contents that may render the said Declaration as not containing true statements merely because it is useful so to do on a given occassion."

Applicant though repeatedly asked to produce to the respondent any documents or other relevant material in support of his contentions, failed and/or refused to do so. It is expressly provided by law and it is well settled that in tax cases the burden of proof that an assessment is excessive rests on the person challenging the decision.

The effect of failure by an applicant to submit to the respondent the relevant information despite repeated reminders to that effect has been commented in a number of cases (see, inter alia, *Nicou v. The Republic* (1983) 3 C.L.R. 1113 and *Panayiotou v. The Republic* (1984) 3 C.L.R. 857). Relevant in this respect is the following passage in the *Nicou case* at p. 1118;

"Needless to say that one should not lose sight of the fact that the applicant himself failed to submit at the appropriate time his returns of income which would inevitably contain matters that would have been within his exclusive knowledge and which could be duly investigated by the respondent Commissioner. A tax-payer that fails or neglects to submit the income tax returns takes upon himself the risk of having his assessable income arrived at by an inquiry, which in the present case could not but have been the best possible.

Moreover under section 13(3) of the Assessment and Collection of Taxes Law, 1978-1979, in cases where a person has not delivered a return and the Director is of the opinion that such person is liable to pay tax to the best of his judgment, the Director may determine the object of the tax and assess such person according to the nature and extent of his business.".

As to the value of the property on 27th June, 1978 the respondent based his finding as to the market value of the property on such date on an expert's valuation report which has been produced before the Court. According to such valuation report which is based on comparable sales the value of the whole of the subject-matter properties on 27th June, 1978 was £29,000.-. No valuation has been carried out by an expert on behalf of the applicant. Applicant's allegation in the written address of his counsel is that the market value of the property was on 27th June, 1978, £26,000.-

In the light of the above I have come to the conclusion that the contention of the applicant that out of the amount of the sale a sum of £20,000.- should be deducted in respect of installations existing on the said property is untenable and the applicant failed to discharge the burden cast on him to prove such claim. As to the amount of £5,000.- claimed by him as representing goodwill of the land in question such claim has not been established and, therefore, the respondent rightly refused to accept same.

I come now to the last ground raised by counsel for applicant

that any actual gain in this case is merely an appreciation of the value of the property due to the inflation. No sound argument has been advanced in this respect and no authority in support thereof. I, therefore, find that such ground should fail.

It is well settled that in recourses against assessment of taxes this Court will not interfere with the decision of the Inland Revenue authorities, when it comes to the conclusion that such decision was reasonably and properly open to them on the basis of the relevant facts and in the light of the application of the relevant legislation and principles of law. The burden of proof to satisfy the Court that it should interfere with such a decision lies always on an applicant. (See *Markides v. The Republic* (1967) 3 C.L.R. 147; *Cliff v. The Republic* (1965) 3 C.L.R. 285; *Christides v. The Republic* (1966) 3 C.L.R. 732; *Coussoumides v. The Republic* (1966) 3 C.L.R. 1, adopted and followed in Lillian *Georghiades v. The Republic* (1980) 3 C.L.R. p.525 at pp. 544-545 which was approved on appeal by the Full Bench of this Court in (1982) 3 C.L.R. p. 659.

From the material before me I have come to the conclusion that it was reasonably open to the respondent Director of Inland Revenue at the time and in the light of the relevant legislation and the material before him to reach the sub judice decision and that the assessments complained of were neither arbitrary nor contrary to the law. The applicant has failed to discharge the burden of satisfying this Court that the case under consideration is a proper one to interfere with the sub judice decision complained of.

Therefore, this recourse fails and is hereby dismissed with costs in favour of the respondent.

Recourse dismissed with costs in favour of respondent.