1988 October 27

[CHRYSOSTOMIS, AG.J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PROCOPIS PHILIPPOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF INCOME TAX,

Respondent.
(Case No.390/82).

Taxation—Income Tax—Trading in land—A question of mixed law and fact—The factors applicable in order to determine the question—Review of the authorities—Depending on the circumstances even an isolated transaction, may be treated as constituting trading in land.

Taxation—Assessment and Collection of Taxes—The Taxes (Quantifying and Recovery) Law, 1963 (Law 53/63), section 23(2)—Assessment raised out of time, i.e. the six years' period—Invalid.

Taxation—Assessment and Collection of Taxes—The Taxes (Quantifying and Recovery) Law, 1963, section 23(2) and 21(3)—Additional assessment raised within the time period of six years annulled by Supreme Court for lack of due reasoning—Reconsideration of matter under section 21(3) within reasonable time after annulment, but after the lapse of the six years—Such new assessment is not statute barred—Commissioner correctly decided that the code applicable was code of taxation No.3 and not No.1

The first issue in this case was whether the profit derived by the applicant from the sale in 1968 and 1969 of his two pieces of land at Kyrenia which he had purchased on credit, to be paid by instalments, earlier in 1968, could be reasonably treated as being liable to income tax.

The second issue was whether upon annulment for lack of due reasoning of the original additional assessments, which had been raised in respect

of such profit, the Commissioner should have issued new assessment under section 23(1) of the Assessment and Collection of Taxes Laws 1978-79, instead of a fresh determination of the old objections.

Having reviewed the authorities and having expounded the factors, which are applicable in order to determine whether the sale of land constitutes "trading in land" the Court concluded that, in the circumstances of this case, it was reasonably open to the respondent to conclude that the sale constituted "trading" in land.

In the opinion of the Court the Commissioner, in reconsidering the matter, correctly used Code of Taxation No.3, instead of No.1 as he merely supplied the missing reasons and no useful purpose would have been served by affording the applicant a new opportunity of objecting to the assessment.

Recourse dismissed.
No order as to costs.

Cases referred to:

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

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

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

Vassos Estates Ltd. v. The Commissioner of Income Tax (1969) 3 C.L.R. 58;

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

Georghiades v. The Republic (1982) 3 C.L.R. 659;

Californian Copper Syndicate v. Harris, 5 T.C. 159;

Tebrau (Johore) Rubber Syndicate v. Farmer, 5 T.C. 658;

Commissioners of Inland Revenue v. Livingston, 11 T.C. 538;

Leeming v. Jones, 15 T.C. 333;

Commissioners of Inland Revenue v. Reinhold, 34 T.C. 389;

Edwards v. Bairstow and Harrison, 36 T.C. 207;

Turner v. Last [1965] 42 T.C. 517;

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

Bolson and Son Ltd. v. Farrely [1953] 34 T.C. 161.

Recourse.

Recourse against the additional income tax assessments raised on applicant for the years 1966, 1969 and 1970.

P. Kyriakidou (Miss) for P. Polyviou, for the applicant.

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

Cur. adv. vult.

CHRYSOSTOMIS Ag. J. read the following judgment. By the present recourse, the applicant applies for the declaration that two additional income tax assessments Nos. 0212779/4-82 and 0212779/4-70/82, raised in respect of his taxable income for the years of assessment 1969 and 1970 on the ground that the applicant has allegedly derived profit from trading in land, are statute barred and in any event have been raised in excess or abuse of power and so they are wrong in law and null and void and of no effect whatsoever. These two additional income tax assessments are continuations of assessments Nos. 1.915/AD/74/69 and 1.916/AD/74/70 respectively which were raised by the respondent on 20 July, 1974.

The applicant also challenges the validity of another additional

income tax assessment No. 0212779/4-66/82 for the year of assessment 1966 and which concerns a gratuity that the applicant received. This additional assessment is a continuation of a previous additional assessment No. 1.913/AD/74/66 which was raised on 20 July, 1974. This sub judice income tax assessment can be annulled without further consideration as it was raised after the expiry of the period prescribed by section 23 of the Taxes (Quantifying and Recovery) Law 53/63, as amended, and subsequently replaced by the Assessment and Collection of Taxes Laws 1978 to 1979. Counsel for the respondent conceded to this course being followed.

All the aforementioned sub judice additional assessments were raised, because the previous additional assessments on the same income and for the same years of assessment, formed the subject matter of Recourse No. 382/74, as a result of which they were annulled by the Court on 6.2.82, on the ground that they were not duly reasoned. Learned counsel for the applicant takes the stand that the respondent Commissioner did not raise new additional assessments but he only made a fresh determination of the objections of the old assessments following the judgment in the said recourse. This issue will be considered at a later stage of my judgment.

The facts of this case are as follows:

Due to the fact that the applicant failed to submit returns of income for each of the years under recourse, the respondent commissioner raised assessments on him to the best of his judgment, to which assessments the applicant objected in writing. In order that the respondent commissioner may examine applicant's objections to the said assessments, by his letter dated 14.8.72, he asked the applicant in writing to submit a statement of assets and liabilities as at 1.1.65 and 31.12.71 and his returns of income for a number of years, including those under recourse. The applicant submitted the required returns and statements from which it came to light that the applicant received an amount fo £4,767.- representing profit from the sale in 1968 and 1969 of applicant's, two

pieces of land at Kyrenia. In order to bring into charge the above two receipts, the respondent commissioner had raised the aforementioned additional assessments to which the applicant objected. No agreement was reached, the objection of the applicant was dismissed and eventually these additional assessments formed the subject matter of the said Recourse No. 382/74 and which were annulled for the reasons aforesaid. Following the said decision of the Court, the respondent commissioner reconsidered the matter and made fresh assessments, the two sub judice additional assessments, in accordance with the provisions of S. 3, 13(2)(b), 21(3) and 23(1) of the Taxes (Quantifying and Recovery) Law 53/63 as amended and subsequently replaced by the Assessments and Collection of Taxes Laws 1978 to 1979. The applicant, as said earlier, takes the stand that these are not fresh assessments. The respondent commissioner by his letter dated 15.7.82 (Appendix B to the opposistion) set out the facts and reasons that led him to the conclusion that the profit realised from the sale of the said land was liable to income tax, as the dealing constituted trading in land or an adventure in the nature of trade, and therefore, the profit therefrom was chargeable to tax under sections 5(1)(a) and 6 of the Income Tax Laws 1961 to 1966. The facts pertaining to the purchase and sale of the building sites in question, as verified by the respondent commissioner, are stated in his said letter of 15.7.82 and are as follows:

"(1) In September 1968, you purchased on credit, to be paid by instalments, the said building sites from the Bank of Cyprus Ltd for £6,900.-

(ii) After negotiations which took place between yourself and the Englishmen Messrs Sanderland and Hannan, in November 1968, you agreed to accept their offer to sell the said building sites for £12,000.-.

(iii) On 25.11.68, i.e. two months later, you concluded the contract of sale between yourself and Mr. Sanderland, to sell half share of the said building sites for £6,000. Sanderland paid the purchase price as follows:

£2,000.- on 25.11.68

£2,000.- on 28.11.68

£2,000.- in 1969.

(iv) As Mr. Hannan had no cash money available to conclude the agreement in November 1968, the said contract was delayed and made on 22.3.69 for the other half share of the said building sites, for the originally agreed price of £6,000.- which was paid to you as follows:

£2,000.- on 22.3.69

£2,000.- on 22.6.69

£2,000.- on 22.9.69.

(v) The said building sites were registered in your name in December, 1968 after selling half share to Mr. Sanderland from whom you received £4,000.- in November, 1968, and paid off your debt to the Bank of Cyprus Ltd.

(vi) For the purchase of the said building sites, finally you paid to the Bank of Cyrpus Ltd the agreed price of £6,000.- plus land transfer fees of £276.- and the sum of £57.283 being interest on the balance of your debt from date of purchase in September, 1968, to date of payment in December, 1968."

The respondent commissioner communicated his decision to the applicant by his said letter and the relevant notices of assessment dated 23.7.82 were enclosed. In these notices of assessment it is stated that code of taxation No. 3 was employed and the applicant was informed of the provisions of the law concerning objections to the tax raised. The relevant information in this respect is endorsed on the said notices under paras. 5 and 6, which read as follows:

"Objections/Appeals.

5. In case of taxation under codes 1 and 4 you have the right to object. This objection must be made in writing to the Director of Income Tax not later than the end of the month following the month during which the present notice was made and it must mention clearly the reasons for which the objection is made.

6. In case of taxation under code 3 your attention is drawn to section 21 of the Assessment and Collection of Tax Laws 1978 to 1979, which gives you the right to file a recourse in the Supreme Court of the Republic within 75 days from the date of the present notice."

The various codes of taxation are given in the same endorsement under para. 8 under the heading "Code of Taxation" which reads as follows:

"Code 1 Original Taxation.

Code 2 Taxation based on information given by the Tax Payer.

Code 3 Final Taxation following the determination of an objection.

Code 4 Revised (additional) taxation.

Code 5 Taxation after a judgment of the Court."

As a result of the use of code No. 3 the applicant did not file an objection to the respondent commissioner, but instead he filed the present recourse. As a result of this course followed by the respondent, learned counsel for the applicant further complains that his client was led to believe that the sub judice assessments were final and could not be objected to and that his only remedy was to file the present recourse.

The main points raised by learned Counsel for the applicants

and which are in issue can be summarised as follows:

1. The profit from the sale of the building sites is not a profit resulting from the exercise by the applicant, of a trade in land or an adventure or concern in the nature of trade in order that it may be brought within the ambit of the provisions of s. 5(1)(a) of the Income Tax Laws 1978 to 1979, but a profit of a capital nature not liable to income tax.

2. The respondent commissioner failed to raise new assessments under s. 23(1) of the Assessment and Collection of Taxes Laws 1978 to 1979 and instead he proceeded with a fresh determination of the old objections which formed the subject matter of the first recourse.

As regards the first issue, as to whether an adventure is or is not in the nature of a trade, the question is of mixed law and fact, which had to be decided in the light of the particular circumstances of each case (Vide *Savvas M. Agrotis Ltd v. The Commissioner of Income Tax*, 22 C.L.R. 27; *Yiannakis S. Droussiotis v. Republic* (1967) 3 C.L.R. 15; *Rallis Makrides v. The Republic* (1967) 3 C.L.R. 147; *Vassos Estates Limited v. The Commissioner of Income Tax* (1969) 3 C.L.R. 58).

In the case of *Lilian Georghiades v. Republic* (1980) 3 C.L.R. 525, A. Loizou J. as he then was, had this to say, at page 544:

"The conclusion to be reached is that each case must be considered according to its facts and the question to be answered is whether the profit that has been made is a mere enhancement of value by realising a security or is it gain made from an operation or business for carrying out a scheme for profit making. The whole issue is a mixed question of fact and law and it is well settled that it is for the respondent Commissioner to deduce the conclusion from the facts proved or admitted before him and these are conclusions of fact and that the question whether there was evidence to justify those conclusions is one of law on which the aggrieved party can appeal to

the Court. In the case of *Rallis Makrides* (supra) and by reference to the case of *Clift v. The Republic* (1965) 3 C.L.R. 732, it was stated at p. 153 that

> '... in a recourse against an assessment under Article 146 of the Constitution, the Court will not interfere with the sub judice decision of the Income Tax authorities if it is of the opinion that such decision was reasonably and properly open to them on the basis of the correct facts and in the light of the correct application of the relevant legislation and principles of law; furthermore, the initial burden of proof, to satisfy the Court that it should interfere with a sub judice decision, lies on an applicant (see *Coussoumides v. The Republic* (1966) 3 C.L.R. 1)'".

In *Georghiades v. The Republic* (1982) 3 C.L.R. 659, which is a Full Bench decision of the Supreme Court the following was said at pages 668 and 669:

> "... the Supreme Court had no jurisdiction to go into the merits of the taxation and substitute, where necessary, its own decision. The power of the Supreme Court is limited, as indicated, to the scrutiny of the legality of the action, and to ascertain whether the administration had exceeded the outer limits of its powers. Provided they confine their action withing the ambit of their power, an organ of public administration remains the arbiter of the decision necessary to give effect to the law; and so long as they make a correct assessment of the factual back-ground and act in accordance with the notions of sound administration, their decision will not be faulted. In the end, the courts must sustain their decision if it was reasonably open to them."

Apart from the aforementioned cases, the Supreme Court had the opportunity, in a number of other cases, to deal with the various factors which are relevant in deciding the nature of the transaction. Triantafyllides, P., in his judgment in the first recourse of the applicant No. 382/74 involving the same issues, referred ex-

tensively to the relevant case law on the matter.

Learned counsel for the applicant relied on the cases cited in the judgment, and in particular on the cases, *Californian Copper Syndicate v. Harris*, 5 T.C. p. 159; *Tebrau (Johore) Rubber Syndicate v. Farmer*, 5 T.C. p. 658; *Commissioners of Inland Revenue v. Livingston*, 11 T.C. p. 538; *Leeming v. Jones*, 15 T.C. p. 333; *Commissioners of Inland Revenue v. Reinhold*, 34 T.C. p. 389, and supported the stand that the profit made by the applicant is a profit of capital nature not liable to income tax.

Learned counsel for the respondent commissioner, supported the opposite and pointed out that, although there is no single overriding criterion, nevertheless, the subject matter of the realisation, the length of the period of ownership, the manner of the finance of the transaction, and the frequency or the number of similar transactions, are relevant factors in deciding whether certain activities constitute trading. For this purpose he cited a number of authorities. Among those reference may be made to the case of *Edwards v. Bairstow and Harrison*, 36 T.C. 207, where the view was expressed that when the subject matter cannot yield to its owner an income or personal enjoyment merely by virtue of ownership, a commercial transaction is indicated. From the case of *Turner v. Last* [1965] 42 T.C. 517, he referred to a dictum of Cross J., which supports the view that a short period of ownership is an indication of trading. It reads as follows at page 523:

> "Of course, the mere fact that when you buy property, as well as intending to use and enjoy it, you have also in your mind the possibility that it will appreciate in value, and that a time may come when you may want to sell it and make a profit on it, does not of itself make you a trader, but if the position is that you intend to sell it as soon as you can to recover the cost of the purchase, the position is obviously very different..."

Learned Counsel for the respondent also cited *Johnston (Inspector of Taxes) v. Heath* [1970] 1 W.L.R. 1567, in support of the proposition that the inability of a tax payer to finance the pur-

chase, is an important factor in deciding the nature of the transaction.

As regards the factor of frequency or number of similar transactions, reference was made to the case of *Bolson & Son Ltd v. Farrely* [1953] 34 T.C. 161, where it was said at page 167:

> "A deal done once is probably not, though it may be. Done three or four times it usually is. Each case must depend on its own facts."

In the case of *Lilian Georghiades v. Republic* (supra) it was held that the test as regards the considerations that should guide the authorities responsible for taxation in determining whether a single transaction is trading activity or adventure in the nature of trade, is whether the transaction exhibits features which give it the character of a business deal and that intention to trade may be gathered from a great variety of facts and circumstances including the character of land purchased, its state of development and future potential, as well as the income it yields at the time of purchase or is likely to yield in future. Also at pages 670 and 671 the following was said:

> "... An investor who has funds immediately available may be assumed to substitute a piece of land for an enhanced bank account as a more durable asset. This cannot be said to be the case where the element of speculation in the transaction is present, whereupon one may presume that the investor intends to meet financial commitments incurred for the purchase by the sale of the asset in future."

Mr. Evangelou, in referring to the said considerations, also related them to the facts of the present case.

Learned Counsel for the applicant, argued that the facts of the cases cited by counsel for the respondent commissioner, were very different from the facts of the present case, and he made brief comments. He also described the reasoning in respondent's

letter dated 15.7.82 as defective and he criticised same.

Having considered all relevant factors, I find myself in agreement with the contentions of learned Counsel for the respondent commissioner, and I have arrived at the conclusion that the applicant has not discharged the burden of satisfying me, that I should interfere with the sub judice decision which I find was reasonably open to the respondent commissioner.

The facts before the respondent commissioner are stated earlier in my judgment. The legal grounds upon which the commissioner based his decision to assess the profit realised from the sale of the said land are also stated in his said letter of 15.7.82 and are as follows:

"(i) I cannot accept your claim that the said building sites were purchased for investment purposes since they were purchased on credit payable by instalments and how could a person incur debts to invest in investments which did not yield any income from which the purchase money could be payable. You foresaw that the said building sites would be sold at a short time and at a profit thus enabling you to recover the purchase money and realising a profit.

(ii) The building sites were purchased in a developed and highly then speculative area of Ayios Georghios, Kyrenia, foreseeing that you could sell them at a short time and at a handsome profit.

(iii) Your intention that the building sites were purchased with a motive to realise a profit is proved by the fact that they were sold at a very short time after their purchase.

(iv) Although immovable property in Cyprus is a recognised means of investment, yet it is an established fact beyond doubt that in Cyprus where great speculation in land has become an incident of common occurrence, dealings in immovable property are means of quick and easy way of making a

profit, thus constituting trading in land or an adventure in the nature of trade."

These views of the respondent commissioner are supported by authority, among which are the cases cited by Mr. Evangelou. It is my view that factually and legally and although the respondent was dealing with a single transaction, yet it was reasonably open to him to arrive at the decision that the gain the applicant realised from the said sales is taxable income, and, in exercising his discretion, he did not exceed the outer limits of his powers. The proposition of learned Counsel for the applicant that land in Cyprus was at the time the sole means of investment as it was portrayed in *Agrotis case*, 22 C.L.R. 27 and that everybody here is buying immovable property, building sites or flats on credit and that such purchase of capital assets on credit must, therefore, not lead to the conclusion that the purchasers of such property embark upon a venture in the nature of trade, is not altogether accurate. Such factor although relevant, yet cannot be isolated from all other relevant factors that must be taken into consideration in evaluating the facts and circumstances from which the intention to trade may be gathered. It may also be added by way of a useful reference that there is a subsequent development, in that the proposition portrayed in *Agrotis* case (supra) was modified by the Full Bench of the Supreme Court in *Georghiades v. The Republic* (1982) (supra), to the effect that in Cyprus, speculation in land has become an incident of common occurrence.

The respondent commissioner as a result of the judgment in recourse No. 382/74 and pursuant to s. 21(3) of the Assessment and Collection of Taxes Laws 1978 to 1979 reconsidered the matter and made in his said letter a sufficient statement of his reasons that led him to his decision, and within a period of six months he raised the fresh assessments. Therefore these fresh assessments are not statute barred and they have not been raised in excess or abuse of power.

In view of the nature of these new assessments which only involved reconsideration and statement of missing reasons, there

was no need for the respondent to rely on code of taxation No. 1 and in my view, in the circumstances he rightly relied on code of taxation No.3, and a fresh objection by the applicant to the respondent would have added nothing new. Furthermore, such a course cannot be said that it affected the rights of the applicant. For these reasons the validity of the sub judice decisions cannot be affected.

In the result the sub judice decision concerning the additional income tax assessment No. 0212779/4-66/82 for the year of assessment 1966 is declared null and void and of no effect whatsoever.

As regards the other two additional assessments Nos. 0212779/4-69/82 and 0212779/4-70/82 raised in respect of applicants' taxable income for the years of assessment 1969 and 1970, the decision of the Commissioner is affirmed.

There will be no order as to costs.

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