1985 December 14

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PANIKOS J. THEOCHARIDES,

Applicant,

v.

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

Respondent.

(Case No. 328/85).

Income Tax—The Income Tax Law as amended by Law 37/75—S. 12(2)(d)—S. 36(2)(3) of the Assessment and Collection of Taxes Law—A claim for deduction of payments made by the applicant under a contract made by applicant's daughter (a minor) executed by the applicant as her guardian— For the purchase of a flat by applicant's daughter from a firm as Land Developers—As applicant was not a party to the contract it was reasonably open to the Commissioner to disallow the claim—Additional assessments—Ambit of s. 23(1) of the Assessment and Collection of Taxes Law 4/78.

The Contract Law, Cap. 149—S. 11(2)—Contractual capacity of minors.

In September 1977 an agreement was executed between the daughter of the applicant on the one hand as purchaser and a firm of Land Developers as vendors on the other for the purchase of a flat under construction for £12,000. As the purchaser was a minor the agreement was executed on her behalf by the applicant who also financed the purchase for her benefit. A variety of reasons, such as avoidance of estate duty, avoidance of transfer fees as well as desire to make provision for his daughter's dowry, influenced his said decision. It was in the contemplation of

father and daughter that the flat would be let as an income earning asset.

The applicant claimed a right to deduct the amounts paid in respect of the said purchase by way of stipulated instalments for the years 1977 and 1978 pursuant to the provisions of s. 36 (2)(3) and s. 12 (2) (d) of the Income Tax Law as amended by Law 37/75 on the ground that the amounts paid constituted business expenditure for the acquisition of income earning property.

His claim was originally accepted, but following an advice by the Attorney-General, a revision was made and additional assessments were raised on the applicant under s. 23(1) of the Assessment and Collection of Taxes Law 4/78.

As a result applicant filed the present recourse.

Held, dismissing the recourse (1) The applicant was not a party to the contract for the purchase of the flat. The applicant was not the investor because money placed unreservedly at the disposal of another is equivalent to cash payment. In sum it was reasonably open to the respondent to conclude that the payments in question were not deductible under the the provisions of the Law.

(2) The invocation of the provisions of s. 23(1) of Law 4/78 was in the circumstances of this case permissible.

It is open to the Commissioner to raise an additional assessment whenever it appears to him within the six-year period, envisaged by the law, that the law was wrongly applied to the facts of the case and as a result tax was short levied. There is nothing before the Court to suggest that he exercised his discretion wrongly in this case.

Recourse dismissed.
No order as to costs.

Cases referred to:

Playboy Boutiques Ltd. v. *The Republic* (1983) 3 C.L.R. 1185;

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

Solomonides v. *The Republic* (1968) 3 C.L.R. 108;

Cenlon Finance Co. Ltd. v. *Ellwood* [1962] 1 All E.R. 854;

Garforth v. *Newsmith* [1979] 2 All E.R. 73.

Recourse.

Recourse against the decision of the respondent to raise on applicant an additional income tax assessment for the years 1977 and 1978.

Applicant appeared in person.

Y. Lazarou, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. In September 1977 an agreement was executed between the daughter of the applicant on the one hand as purchaser, and a firm of land developers as vendors on the other, for the purchase by the former of a flat then under construction for £12,000. As the purchaser was a minor, then aged 17, the agreement was executed on her behalf by the applicant, her father, who also financed the purchase for the benefit of his daughter. He signed the contract in the capacity of natural guardian of his minor daughter. A variety of reasons, as the applicant explained in his address, influenced his decision to help his daughter acquire the flat, including avoidance of estate duty, avoidance of transfer fees, as well as a desire to make provision for her dowry. The purchaser had no immediate need of the flat; it was in the contemplation of father and daughter that it should be let as an income earning asset. When the flat was completed, before the end of 1979, it was leased as planned.

Applicant claimed a right to deduct the amounts paid on behalf of the daughter by way of stipulated instalments for the acquisition of the property for the years 1977 and 1978, pursuant to the provisions of s. 36 (2) (3) and s. 12 (2) (d) of the Income Tax Law(1). Exception was claimed on the ground that the amounts paid constituted business

(1) As amended by Law 37/75.

expenditure incurred for the acquisition of income earning property. Originally his claim was accepted and assessments were raised accordingly for the years 1978-1979 respectively. Subsequently an additional assessment was raised under s.23(1) of the Collection of Taxes Law(1). The revision was made following advice from the Attorney-General that the payments made were not deductible from his chargeable income. The decision was taken within the six-year period envisaged by s. 23 and was communicated to the applicant on 27th October, 1984. It is against the validity of this decision that the recourse is directed.

The additional assessment is challenged as (a) erroneous in law because of a misapplication of the provisions of s.36(2)(3) of the Assessment of Taxes Law and s.12(2)(d) of the Income Tax Law, and (b) invalid because of the unwarranted invocation of the provisions of s. 23(1) of the Collection of Taxes Law, especially in view of the fact that the first assessment was agreed upon between the applicant and the Commissioner of Income Tax. In the absence of new facts it was, so it was argued, impermissible for the respondent to invoke the provisions of s. 23 (1).

In his address applicant placed his own construction on the facts of the case and discussed in detail the implications of the relevant provisions of the law. It is his case that he ought to be regarded as the effective investor and for that reason the amounts paid in 1977 and 1978 ought to have been deducted as business expenditure incurred for the acquisition of income earning property. The deduction is also justified in view of the provisions of s. 12 (2) (d) intended to encourage capital investment in the aftermath of the Turkish invasion. For income tax purposes he should be regarded as the purchaser of the property for he submitted his daughter could not validly contract in law to acquire the property. Lastly, he questioned the assessment as discriminatory and ill-motivated, allegedly inspired by feelings of vengeance on the part of the fellow employees at the Income Tax Dept. In the circumstances, the raising of an additional assessment was an abuse of the power vested in the Commissioner under s. 23(1).

(1) Law 4/78

Respondents submitted the sub judice decision is perfectly justified under the provisions of s. 36 (2) of the Income Tax Law(1). For an investment to qualify for deduction under its provisions it must meet three requirements: (a) The claimant must have been engaged in business; (b) The expenditure must have been incurred for the acquisition of a durable asset, and (c) The asset must be owned and used as such for the tax-payer's business. They disputed that applicant was the purchaser of the flat or that the investment was made for any business of the applicant. The payments made by the applicant were nothing other than a gift of the money to his daughter to make possible the acquisition on her part of the property in question. In their address they point out that applicant as much as admits in a letter addressed to the authorities that the money was a gift to his daughter. Given the circumstances surrounding the purchase of the flat there was no room for the application of the provisions of either s. 36 of the Assessment of Collection and Taxes Law or s. 12(2) (d) of the Income Tax Law(2). To say the least the interpretation placed by Commissioner on the facts of the case was reasonably open to him(3). One may go a step further and argue it was the only interpretation to which the facts were amenable. Seemingly the applicant is under a misapprehension as to the constractual capacity of minors and believes they are unable to enter into any contract whatever. This is not so. The matter is regulated by the provisions of s. 11(2) of the Contract Law, Cap. 149, making applicable English law on the subject of the contractual capacity of minors. Given the intention of the father to endow his daughter with the sums necessary to enter into this contract to acquire the flat, the contract was one for the benefit of the infant and as such could be enforced on her behalf. As much is said parenthetically: for the pertinent question is whether the applicant was a party to the contract for the purchase of the flat and the answer is obviously in the negative.

In relation to the contention of applicant that he was in effect the investor, it is worth recalling the decision of

(1) Assessment and Collection of Taxes Law.
(2) See also Laws 37/75, 12/76, 15/71—Also Playboy Boutiques Ltd. v. The Republic (1983) 3 C.L.R. 1185.
(3) Georghiades v. The Republic (1982) 3 C.L.R. 659.

Walton, J., in *Garforth* v. *Newsmith*(1) that money placed unreservedly at the disposal of another is equivalent to a cash payment. In sum, it was reasonably open to the respondent to conclude that the expenditure in question was not deductible under the relevant provisions of the Law. There remains to decide whether the invocation of the provisions of s. 23(1) of the Collection of Taxes Law was, in the circumstances of this case, impermissible. Counsel of the Republic drew attention to the decision in *Solomonides* v. *The Republic*(2) where Hadjianastassiou, J. debated the ambit of the provisions of a similar legislative enactment(3) to s. 23(1) and the light thrown by English decisions on the interpretation of a comparable provision of the law of the English tax legislation. The discretion of the Commissioner to raise an additional assessment, it appears, is not fettered by any distinct factor or consideration. To repeat the observations of Viscount Simons in *Cenlon Finance Co. Ltd.* v. *Ellwood* [1962] 1 All E.R. 854, the power to raise an additional assessment is not dependent on the discovery of new facts. It is open to the Commissioner to raise an additional assessment whenever it appears to him within the six-year period, envisaged by the law, that the law was wrongly applied to the facts of the case and as a result tax was short levied. There is nothing before me to suggest that he exercised his discretion wrongly in this case. Consequently the second ground of objection to the validity of the decision fails too. The recourse must be dismissed. Before ending this judgment I must remind everyone that the fact that applicant, an Officer in the Income Tax Department, had recourse to the Court respecting his tax liabilities, should in no way rank against him. Recourse to the Court for the ascertainment of one's rights is a fundamental human right, safeguarded by Art. 30.1 of the Constitution, the exercise of which should not, ever, draw any adverse consequences.

In the result the recourse is dismissed. Let there be no order as to costs.

Recourse dismissed with no order as to costs.

(1) [1979] 2 All E.R. 73.
(2) (1968) 3 C.L.R. 108.
(3) Section 35, Greek Communal Law—9/63.