[HALLINAN C.J. AND ZANNETIDES J.]

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SAVVAS M. AGROTIS LTD.

v.

THE COMMISSIONER OF INCOME TAX.

(*Case Stated No.* 107)

AND

LIMASSOL LAND INVESTMENTS LTD.

v.

THE COMMISSIONER OF INCOME TAX.

(*Case Stated No.* 106).

SAVVAS M. AGROTIS LTD. *v.* THE COMMISSIONER OF INCOME TAX AND LIMASSOL LAND INVESTMENTS LTD. *v.* THE COMMISSIONER OF INCOME TAX

Income Tax—Sale of land by company—Realization of investment or sale of current asset—Capital accretion or trading profit—"Profits" within the meaning of section 5 (1) (*a*) *of the Income Tax Law, Cap.* 297.

In *case stated No.* 107 the deceased S. A. of Paphos formed and registered a private company to which he and his wife transferred 79 building sites thus maintaining the unity of his estate. Over a period of seven years the company sold many of these plots at a substantial profit realising the sum of about £11,000. The company then purchased a site in Nicosia and erected flats by using the above sum of £11,000 and borrowing the balance. These flats were let and the company collected the income, but the company did not buy or sell any other land.

The Commissioner of Income Tax considered that the sales of the building sites were trading operations and not the realisation of an investment; he accordingly assessed them to income tax on the profits of these operations. Upon appeal to the District Court it was held that the sales of these sites were not trading operations and the appeal was allowed.

Upon appeal to the Supreme Court,

Held: that it was open to the Court below to come to the conclusion that the profit from the sale of the plots was not a trading profit but a realisation of an investment and not liable to income tax under Section 5 of the Income Tax Law, Cap. 297; and that if the Court below had decided the matter the other way the Supreme Court would not have disturbed that decision.

Decision of District Court affirmed.

In *case stated No.* 106 the L.L.I.Limited was formed for the purpose of developing a garden belonging to Mrs. T., situate in Limassol, on which the company erected shops, flats and offices which were being let by the company and the rents derived therefrom formed the income of the Company. The main objects of the Company were to carry on the trade or business of immovable property owners, purchasers,

sellers and dealers; and to acquire, sell and generally deal in immovable properties or to erect buildings for sale or lease. In 1951 the company spent the sum of £1,400 on purchasing a building site on the new by-pass road at Limassol and proposed to erect there stores which would be rented for warehousing goods to other companies of which Mr. T. was the Managing Director. Before the stores could be erected the area where the building site was situate was zoned for residential purposes only. The company thereupon sold the site at a profit and bought another site in the industrial area of Limassol, where they erected the stores according to their original intent, and these stores were let. The company sold no other land.

The Commissioner of Income Tax being of opinion that the sale of the site on the by-pass was not the realisation of an investment but a trading operation assessed the company to income tax on the profit resulting from this sale. Upon appeal to the District Court it was held that the profit realised from the sale of the building site was a capital accretion and the appeal was allowed.

Upon appeal to the Supreme Court,

Held: that the Court below had sufficient evidence before it to find that the company when it bought the site on the by-pass was not acquiring a current asset so that the profit when it was sold would be a profit arising from trade. As in the previous case (Case Stated No. 107), if the Court below had decided the matter the other way the Supreme Court would not have disturbed that decision.

Decision of District Court affirmed.

Per curiam: It is admissible for the Court to take into account the part that real estate plays in the economic life of Cyprus. Here the main and almost sole field for investment is immovable property. There is no stock exchange and almost all businesses and corporate bodies carrying on business are private and not public in nature. Most Cypriot individuals and families of substance put their money into land as an investment and the companies whose shareholders are members of a family are formed not for the purpose of buying and selling land or speculating therein but for the purpose of maintaining the unity of the estate and of investing the family assets in immovable property.

Cases referred to:

(1) *Californian Copper Syndicate (Limited and Reduced)* v. *Harris (Surveyor of Taxes)* 5 T.C. 159.
(2) *St. Aubyn Estates, Ltd.* v. *Strick* 17 T.C. 412.
(3) *Rand* v. *The Alberni Land Co., Ltd.* 7 T.C. 629.
(4) *Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue* 14 T.C. 684.
(5) *Glasgow Heritable Trust, Ltd.* v. *The Commissioners of Inland Revenue* 35 T.C. 196.

Case Stated (No. 106) by the Full District Court of Limassol (Zenon P.D.C. and Kacathimis D.J.) (Income Tax Appeal No. 1/55), and Case Stated (No. 107) by the Full District Court of Paphos (Zenon P.D.C. and Evangelides D.J.) (Income Tax Appeals Nos. 1, 2, 3, 4, 5 and 6/56), on the application of the Commissioner of Income Tax, on the point whether a company incorporated under the Companies Law which sells certain land is merely realizing an investment or is selling a current asset in the nature of its stock and trade so that any resulting profit is not a capital accretion but a trading profit liable to income tax under section 5 of the Income Tax Law, Cap. 297.

Sir Panayiotis Cacoyannis for the taxpayers.

M. Houry for the Commissioner of Income Tax.

The facts are fully set out in the judgment of the Court which was delivered by :—

HALLINAN, C.J. : Both these cases are concerned with substantially the same point, namely, whether a Company incorporated under the Companies Law which sells certain land is merely realising an investment or is selling a current asset in the nature of its stock and trade so that any resulting profit is not a capital accretion but is a trading profit liable to income tax under section 5 of the Income Tax Law, Cap. 297. The principle of law applicable in these cases was stated by Lord Justice Clerk in the *Californian Copper Syndicate (Limited and Reduced)* v. *Harris (Surveyor of Taxes)*, 5 T.C. 159 at 165 and 166 :

> " It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.
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> What is the line which separates the two classes of cases may be difficult to define, and each case must

be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit making?"

A great number of cases have been cited to us by counsel and some of them would appear to be difficult to distinguish from others. To some extent the reason for this is, I think, that the question to be decided is a mixed question of law and fact and Courts of Appeal have been slow to disturb the determination of Commissioners for the purposes of income tax, unless there was no evidence to support their conclusions. The matter is put thus in Simon's Income Tax, Vol. 2, 19:

"Whether or not a trade is being carried on is a mixed question of fact on the one hand and of law on the other. It is for the Appeal Commissioners to consider whether there is a trade or the exercise of a trade by considering a number of business facts. But a question of law is also involved, inasmuch as failure by the Appeal Commissioners to appreciate the nature of the facts submitted in relation to a trade may render their decision invalid in Law. In a given case the Commissioners must, therefore, deduce conclusions from the facts proved or admitted before them, and these are conclusions of fact, but the question whether there was any evidence to justify those conclusions is one of law, on which the aggrieved party can appeal to the Court."

The position of a Court of Appeal on the hearing of a case stated is further clarified in the following passage from the judgment of Finlay, J. in *St. Aubyn Estates Ltd. v. Strick*, 17 T.C. 412, at p. 419:

"The substance of the thing is quite clear. What one has got to do is to look at the whole of the facts, not for the purpose of considering what one's own conclusion of fact might be, but for the purpose of seeing, in fact, whether there is evidence both ways—whether there is material upon which the Commissioners could arrive at their conclusion. When one looks at the memorandum and articles, when one one looks at the inception of the Company, when one looks at what the Company in fact did, it did in fact purchase, it did in fact develop, it did in fact sell and it did in fact make profits by selling. When one looks at all those circumstances I think it is impossible to say that they do not constitute evidence upon which a tribunal of fact might arrive at a conclusion that here there was a trade being carried on. There are considerations—and Mr. Latter with the utmost force called my attention to them—the other way to which, if I were a tribunal of fact, I should certainly have given the most anxious

consideration, but it is important that I should not slip into it. Supposing I were a tribunal of fact, which I am not, I should say that I think that this is a question of degree and a question of fact and that there certainly was before the Commissioners evidence upon which they were entitled to arrive at the conclusion to which they did arrive."

I shall not attempt to review the authorities but content myself with referring to three cases which illustrate the way in which the principle of law as stated by Lord Justice Clerk is applied and also the way in which a Court of Appeal deals with findings of the Commissioners. It is interesting to note that in cases where different conclusions have been reached on somewhat similar facts the decision of the Commissioners was not disturbed by the Court of Appeal, for it is often open to a judge deciding a question of fact to come to a conclusion different to that of another judge on somewhat similar facts.

In *Rand* v. *The Alberni Land Company Limited*, 7 T.C. 629 the facts were that the respondent Company was incorporated in 1904 with the primary object of acquiring, managing and developing with a view to ultimate sale, certain lands in British Columbia which were held in trust for various persons who were interested therein either as owners, joint owners or as trustees. Subject to an extra-ordinary resolution, the Company had power to deal in other lands, but it had not at any time exercised that power.

The share capital of the Company was fixed at a nominal amount, solely to facilitate division among the beneficiaries, and was not determined by reference to the value of the lands acquired. All the ordinary shares had been allotted in consideration of the conveyance of the lands to the Company and these shares had been continuously held by the original allottees, or their representatives. Working capital had been provided by the issue to ordinary shareholders of preference shares for cash. In 1908 the Company created and allotted to persons other than the ordinary shareholders deferred shares in return for services which enhanced the value of the lands.

On these facts it was held that the surplus arising from the sale by the Company of portions of the lands was not the profits of a trade or business and that the function of the Company was merely to realise the capital value of the respective interests in the land under the trust.

In the course of his judgment at pages 638 and 639 Rowlatt, J. said :—

" If a land owner finding his property appreciating in value, sells part of it, and uses part of his money still further to develop the remaining parts, and so on, he is not carrying on a trade or business ; he is only properly developing and realising his land."

And in the last paragraph of his judgment he states :—

"I think that in this case the Company has done no more than provide the machinery by which the private landowners were enabled, under the peculiar circumstances of their divided title, to properly realise the capital of the property which they held in the lands in question, and that it is not income or the proceeds of trade, and, therefore, I think the appeal of the Crown must be dismissed with costs."

In the other two cases which I shall cite, the Commissioner of Income Tax held that (unlike Rand's case) the Company in selling its land had engaged in trade and the profits of the transaction were liable to tax.

As in Rand's case, however, the Judges on appeal refused to set aside the determinations of the Commissioners. The first case in the *Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue*, 14 T.C. 684. The facts were that the owner of a landed estate at his death left this estate to trustees with a direction to realise. The trustees, being unsuccessful in their efforts to sell the estate on the market, formed a Company with general powers to deal in real property and transferred the estate to this Company in exchange for shares which, with few exceptions, were allotted to the beneficiaries or their representatives.

Shortly after its incorporation the Company made a substantial purchase of other property at Union Street with funds acquired by borrowing on the security of the original estate. The Company received rents and paid a regular dividend on its capital.

The Company sold no property until 1921. In 1921, 1924, 1926 and 1927 parts of the original estate were sold and in 1925 the whole of the additional property. The Union Street property was sold at a profit. It was held, affirming the decision of the General Commissioners, that the Company was carrying on a trade and was assessable under Case I, Schedule D. The judgment of Lord Sands at p. 693 is brief and of great interest :

"I think I cannot say that I attach very much importance to the sale of the small portion of Balgownie Estate in question. The matter of the Union Street property is on a very different footing. The purchase of this property seems to me, to use the words of Mr. Justice Rowlatt in one of the cases cited, " a launching forth " albeit not on a very large scale. A matter which causes me some difficulty is the long tenure of this property apparently as an investment or at all events in a manner quite consistent with the fact that it is being treated as an investment. In other circumstances the case appears to be a nice one, but the Commis-

sioners, with all the facts before them and a more intimate knowledge of local conditions than we can pretend to, have decided adversely to the Appellants, and I do not see sufficient grounds for disturbing their decision."

The other case in which the profits derived from the Company's dealings in land were profits of trade, is the case of St. Aubyn Estates Limited to which I have already referred and from which I have already cited a passage from Finlay J.'s judgment. The facts in that case were that the Appellant Company, which was incorporated in 1927 with wide powers, *inter alia*, to develop and dispose of lands and other property, acquired, by purchase, from the life tenant of certain settled estates, all the funds and properties subject to the settlement, including therein some twelve hundred acres of land adjoining a populous town. All the issued preference shares of the Company were allotted to the life tenant and all the issued ordinary shares, with the exception of seven shares to the subscribers of the memorandum of association, were allotted to the trustees of the settlement.

The Appellant Company proceeded to develop a part of the land as building sites and to sell off portions of the estate as opportunities arose. Certain areas were laid out as desirable sites, involving expenditure on development by the Company, and the developed sites were sold in plots to applicants. Between the date of its incorporation and the date of the appeal to the Commissioners, the Company sold 31 acres of land, including 14 acres for building purposes, in 411 transactions of sale. The Company throughout treated the proceeds of its sales of lands as transactions on capital account and no portion of those profits was distributed to the shareholders.

In a case stated it was held that there was evidence on which the Commissioners could arrive at the conclusion of fact that the Company was carrying on a trade of dealing in property.

We have been referred in some detail to a more recent case, the *Glasgow Heritable Trust, Ltd.* v. *Commissioners of Inland Revenue*, 35 T.C. 196, but I only refer to the judgment of Lord President at p. 213 for the purpose of observing that the Court refers to well known facts concerning the fluctuation in value of tenements in Scotland between the last decade of the 19th century, during the period of two world wars, and the years that have followed. I think it is admissible for the Court below and for us on appeal to take into account the part that real estate plays in the economic life of Cyprus. Here, the main and almost sole field for investment is immovable property. There is no stock exchange and almost all businesses, and corporate bodies carrying on business, are private and not public in

nature. Most Cypriot individuals and families of substance put their money into land as an investment and the Companies whose shareholders are members of a family are formed not for the purpose of buying and selling land or speculating therein but for the purpose of maintaining the unity of the estate and of investing the family assets in immovable property.

It is convenient to consider first the Case Stated No. 107 in the matter of Savvas M. Agrotis, Limited, of Paphos. The facts are fully set out in the Case Stated. The deceased Savvas Agrotis decided that a private company with limited liability should be formed and registered under the name "Savvas M. Agrotis Ltd." to whom all his and his wife's properties should be assigned and transferred thus maintaining the unity of his estate. The main objects of the Company were:

(*a*) to acquire and take over all immovable properties of Savvas Agrotis of Paphos, including shares, bonds, book and other debts, trees, buildings, fixtures, lands, rights, servitudes, easements, and all other assets and liabilities, and to accept transfer thereof;

(*b*) to carry on a commercial, manufacturing or any other business or undertaking which may seem to the company fit to carry on, or as calculated, directly or indirectly, to enhance the value of or render more profitable any of the company's assets, or generally to the interest of the company."

Some 79 building sites were transferred by Mr. Agrotis and his wife to the Company which decided to sell from time to time these sites and put the proceeds into any other investments more profitable to the Company thus increasing its annual income. Over a period of 7 years the Company sold many of these sites at a substantial profit, realising the sum of about £11,000.

The Company then purchased a site in Nicosia and erected flats by using the £11,000 and borrowing the balance. These flats are let and the Company collects the income. The Company has not bought or sold any other land.

The Commissioner of Income Tax considered that the sales of the building sites were trading operations and not the realisation of an investment; he accordingly assessed them to income tax on the profits of these operations. Upon appeal to the District Court the Full Court held that the sales of these sites were not trading operations and allowed the appeal.

The facts of this case resemble those in Rand's case where the sale of plots was held to be a realisation and not

a trading operation. But in Rand's case the proceeds were not used to buy another piece of land as they were in this case. In the case of the Balgownie Land Trust Ltd. the Company had not only disposed of the land taken over when it was formed, but bought the property in Union Street and this was held to be a launching out in trade so that the proceeds from the whole of the Company's operations became taxable. In the St. Aubyn Estates' case, there was no purchase of land but merely a development and realisation of the settled estates ; yet the decision of the General Commissioners in that case, which held the profits arising out of the sales of land were trading profits, was not disturbed upon a case stated. However the decisive factor in that case may have been the very large and valuable estate which was being developed and sold—1200 acres near a populous town for which the Company had paid over a million pounds. Having regard to the fact that in Cyprus there is little or no field for investment other than real property and to the comparative small value of the property in Agrotis's case (51 out of 79 sites realised about £11,000), I consider that it was open to the Court below to come to the conclusion that the sale of the building sites and the purchase of a site in Nicosia and the erection of flats was not a launching out in trade but a realisation of capital asset and a reinvestment. I think the Court below had evidence to support its decision although, if it had found the other way, I am not prepared to say that I would have disturbed that decision either. Since we affirm the decision of the Court below that the profits from the sale of the plots were not trading profits I assume from the form in which the cross-appeal of the Company has been filed that the Company will now agree that the loss suffered through the purchase of shares in the Paphos Wine Industry Limited was a capital loss.

I now turn to Case Stated No. 106 in the matter of the Limassol Land Investment Limited. According to the facts as stated the Company was formed for the purpose of developing a garden belonging to Mrs. Chrystalleni Theodossiou situated at Saripolo Street, Limassol, on which the Company has erected shops, flats and offices which are being let by the Company and the rents derived therefrom form the income of the Company. The main objects of the Company were to carry on the trade or business of immovable property owners, purchasers, sellers and dealers; and to acquire, sell and generally deal in any immovable properties or to erect any buildings for sale or lease. In 1951 the Company spent the sum of some £1,100 on purchasing a building site on the new by-pass road at Limassol and proposed to erect there stores which would be rented for warehousing goods to other Companies of which Mr. Theodossiou was the Managing Director. Before the stores could be erected the area where the building site

is situated was zoned for residential purposes only. The Company thereupon sold the site at a profit and bought another site in the industrial area of Limassol where they erected the stores according to their original intent and these stores are let to the two Companies of which Mr. Theodossiou is the Managing Director.

The Commissioner of Income Tax being of opinion that the sale of the site on the by-pass was not the realisation of an investment but a trading operation assessed the Company to income tax on the profit resulting from this sale. The Court below allowed the appeal from this assessment holding that the profits realised from the sale of the building site was a capital accretion. In so holding the Court below has stated at paragraph 5 of the Case:

> "Had the Company in this present case bought the land and then sold it without buying another plot on which they built the stores it had originally contemplated building on the first building site, we would have no hesitation in finding that the surplus they got from the sale of that first site was a profit or gain, covered by Section 5 (1) (*a*) of Cap. 297, in view of the fact that the appellant company was formed, *inter alia*, for the purpose of trading in land, it would not also make a difference for so holding because this was the first and only buying and selling of immovable property by the appellant company."

In our view this case of the Limassol Land Investment Limited is much nearer than the case of Savvas M. Agrotis Limited to the line which must be drawn between the realisation of an investment and a trading operation. In the Agrotis' case the main object was to acquire all the immovable property of Mr. Agrotis and all his other assets and liabilities. The Company appears merely to have realised the building sites transferred to it by Mr. Agrotis and reinvested the proceeds. In the Limassol Land Investment case, however, the main object of the Company was to carry on the trade or business of immovable property owners, purchasers, sellers and to erect buildings for sale or lease. The Company did not merely realise the garden of Mr. Theodossiou at Saripolo Street but (presumably with capital obtained from other sources) erected shops, flats and offices. The purchase of a building site on the by-pass was not a reinvestment from the sale and realisation of the garden but was from a source undisclosed in the Case Stated.

In favour of the Company the contention that in buying the site on the by-pass they were making an investment and they were not buying the land for resale or trading in it as a current asset, is the fact that they did propose to build stores on the site which would be leased to the Companies of which Mr. Theodossiou was the Manager;

that the sale of this site was forced on the Company when the area in which it was situated was zoned as a residential area, and that the *bona fides* of their intention was made manifest by the purchase of another site and the erection of stores thereon. Bearing in mind the importance of real property in Cyprus as a field for investment, the circumstances in which the site on the by-pass was sold and the fact that the Company has sold no other land, we have come to the conclusion, not without some hesitation, that the Court below had sufficient evidence before it to find that the Company, when it bought the site on the by-pass, was not acquiring a current asset so that the profit, when it was sold, would be a profit arising from trade. As in the Paphos case, if the Court below decided the matter the other way, I should not have disturbed that decision.

For these reasons we consider that both these appeals must be dismissed with costs.

Appeals dismissed.