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[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, DEMETRIADES, STYLIANIDES, PIKIS, JJ.]

LILIAN GEORGHIADES,

Appellant,

v.

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

Respondents.

(Revisional Jurisdiction Appeal No. 237).

Income Tax—Assessment—Judicial control—Principles applicable.

Income Tax—Assessments—Dealings in land—Whether a receipt constitutes income—Principles applicable—Buying jointly land with land dealers and sale at a profit—Purchase and resale at a profit of undeveloped and non-income producing property—Receiving damages arising from breach of contract for purchase of land—Reasonably open to the respondent Commissioner to treat the receipt as a trading one and as such taxable—Agrotis Ltd. *v.* Commissioner of Income Tax, 22 *C.L.R.* 27, *modified to the effect that speculation in land has become an incident of common occurrence.*

This appeal was directed against a judgment of a Judge of the Supreme Court dismissing the appellant's recourse taken against the decision of the Commissioner of Income Tax whereby he imposed tax in respect of the compensation received by the appellant for breach of a contract for the purchase of land, in the years it was received, that is, in 1971, 1972 and 1974, treating the receipt as income arising from the disposition of a trading asset. Tax was levied under the provisions of sub-sections 1 and 6 of section 5 of the Income Tax Laws 1961-1976, and sections 3, 13(2)(b) and 23 of the Taxes (Quantifying and Recovery) Law, 1963 (Law 53/63) as amended by Law 61/69. The sub judice decision was taken by the Commissioner on 8.4.1976 after a re-examination of the case on the basis of a joint statement of facts submitted by Mr. Ionides, a taxation

consultant acting for the appellant, in agreement and collaboration with an official of the Income Tax Office

In evaluating the facts, the Commissioner attached considerable weight to the successive purchases by the applicant, over a relatively short period of time, of land with a development potential, the manner of finance of these transactions, particularly her inability to meet from existing resources the commitments undertaken thereby, the fact that the property was not expected to yield any income, as well as the association of the applicant with land dealers in making an investment The Commissioner concluded that the asset or chose-in-action represented by the agreement breached by the vendor, resulting in the payment of compensation to the appellant, the purchaser, was a trading asset in the hands of the applicant and consequently the damages received for the loss of the right to acquire it, should be treated as income received from the alienation or parting with a trading asset

The trial Judge held that it was reasonably open to the Commissioner to decide as he did and treat the receipt as a trading one.

Counsel for the appellant mainly contended

(a) That the involuntary disposition of land is not a sale, consequently the proceeds resulting from such alienation of an asset can, under no circumstances, be treated as income attracting tax.

(b) That the element of trading is altogether missing in a transaction not involving a voluntary purchase or sale, therefore, the money received by the appellant could, under no conceivable circumstances, be treated as a receipt arising from a trading operation or activity.

Held, (*after dealing with the principles governing judicial review of taxation decisions—vide* pp. 669–670 *post*)

(1) That the element of compulsion or involuntariness in a disposition is not conclusive, that if the product of the disposition is the result of alienation of a trading asset, the receipt constitutes income in the possession of the tax payer liable to tax; that the crucial question does not concern the manner of parting with an asset but the character of the asset, whether of a trading or a capital nature; that not every transaction that yields an advantage, however indirect, constitutes an adventure in the

nature of trade; that the test is whether the transaction exhibits features which give it the character of a business deal; that a single transaction rarely attracts income tax; that the character of the 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, is a most consequential factor.

(2) That it may properly be assumed that the viability of the investment and the income it is likely to produce in future, is the dominant consideration in the mind of the investor; that, on the other hand, where the land is undeveloped and the purchaser cannot be deemed to look to its income, present or future, as an incentive for entering into the transaction, but to its future potential as an asset, one may discern an intention to trade with it, speculating thereby in the realisation of profit from a sale in future; that also the manner of the finance of the transaction is relevant; that intention to trade a given asset need not be formed at the time of its acquisition; that whether in the particular circumstances of a case a given receipt should be treated as income or capital is a question of fact; that the inescapable inference is that the appellant engaged in a series of investments not designed to change over one capital asset with another, but with a view to exploiting future opportunities that might materialise from the crystallization of the development potential of the land; that the decision taken by the Commissioner was one reasonably open to him, as the trial Judge held at first instance; and that, therefore, the appeal must be dismissed. (*Agrotis Ltd.* v. *Commissioner of Income Tax*, 22 C.L.R. 27 modified to the effect that speculation in land has become an incident of common occurrence–vide pp. 670–671 post).

Appeal dismissed.

Cases referred to:

O'Brien v. *Benson's Hosiery Ltd.* (1979) 3 All E.R. 652 (H.L.);

Sutherland v. *The Commissioner of Inland Revenue*, 12 T.C. 63;

The Commissioner of Inland Revenue v. *Newcastle Breweries Ltd.*, 12 T.C. 927;

IRC v. *Church Commissioners for England* [1976] 2 All E.R. 1037 (H.L.);

Yiannakis S. Droussiotis v. *Republic* (1967) 3 C.L.R. 15;

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

Mavrommati v. *Republic* (1966) 3 C.L.R. 143;

Kingsfield v. *Republic* (1966) 3 C.L.R. 45;

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

Hadjiyiannis v. *Republic* (1966) 3 C.L.R. 338;

Pappous v. *The Republic* (1966) 3 C.L.R. 77;

Pavlides v. *The Republic* (1966) 3 C.L.R. 530; (1967) 3 C.L.R. 217;

Manufacturers Life Insurance v. *The Republic* (1967) 3 C.L.R. 460;

Costas M. Pikis v. *The Republic* (1965) 3 C.L.R. 131 at p. 149;

Zamir v. *Secretary of State* [1980] 1 All E.R. 768;

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

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

Johnston v. *Heath* [1970] 1 W.L.R. 1567;

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

Edwards (H.M. Inspector of Taxes) v. *Bairstow & Harrison*, 36 T.C. 207;

Tempest Estates Ltd. v. *Walmsley*, cited in Simon's Taxes, Vol. B1. 618;

Turner v. *Last*, 42 T.C. 517;

Greenberg v. *IRC* [1971] 3 All E.R. 136 (H.L.);

Ransom v. *Higgs* [1974] 3 All E.R. 949 (H.L.).

Appeal.

Appeal against the judgment* of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 8th October, 1980 (Revisional Jurisdiction Case No. 186/76) whereby appellant's recourse against the validity of the income tax assessments raised on her for the years of assessment 1971, 1972 and 1974 was dismissed.

A. Triantafyllides, for the appellant.

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

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Pikis, J.

PIKIS J.: The appeal is directed against a judgment of a

* Reported in (1980) 3 C.L.R. 525.

judge of this court, dismissing the appellant's recourse taken against the decision of the Commissioner of Income Tax, whereby he imposed tax in respect of the compensation received by the appellant for breach of a contract for the purchase of land, in the years it was received, that is, in 1971, 1972 and 1974, treating the receipt as income arising from the disposition of a trading asset. Tax was levied under the provisions of sub-sections 1 and 6 of s.5 of the Income Tax Laws 1961 - 1976, and ss. 3, 13(2)(b) and 23 of the Taxes (Quantifying and Recovery) Law, 53/63, as amended by Law 61/69. The decision impeached in these proceedings was taken by the commissioner on 8/4/76, after a re-examination of the case on the basis of a joint statement of facts submitted by Mr. Ionides, a taxation consultant acting for the appellant, in agreement and collaboration with Mr. Shammashian of the Income Tax Office. An undertaking to re-examine the case was given in the course of the proceedings initiated by Recourse No.399/74, challenging a decision of the Commissioner to the same effect, given earlier in the day.

On a re-appraisal of the facts, the Commissioner concluded that the asset or chose-in-action represented by the agreement breached by the vendor, resulting in the payment of compensation to the appellant, the purchaser, was a trading asset in the hands of the applicant and consequently the damages received for the loss of the right to acquire it, should be treated as income received from the alienation or parting with a trading asset. We may appropriately mention that the assignability of a chose-in-action is not a pre-requisite for the imposition of tax on its alienation. (See, *O'Brien v. Benson's Hosiery Ltd.* (1979) 3 All E.R. 652 (H.L.)).

The learned trial judge held, on a review of the assessments, that it was reasonably open to the Commissioner to decide as he did and treat the receipt as a trading one; consequently, he dismissed the recourse. Reference is made in the judgment to the criteria and factors that may guide the taxing authorities in the discharge of their duties, subscribing to the view that there was, in the present case, ample material upon which the Commissioner could conclude that the land purchased by the appellant was meant for trading.

In evaluating the facts, the Commissioner attached con-

siderable weight to the successive purchases by the applicant, over a relatively short period of time, of land with a development potential, the manner of finance of these transactions, particularly her inability to meet from existing resources the commitments undertaken thereby, the fact that the property was not expected to yield any income, as well as the association of the applicant with land dealers in making an investment. The judge remained unimpressed by the oral testimony of the applicant before him and her attempt to play down the effect of the averments made on her behalf in the action for breach of contract, to the effect that plans were being prepared for the division of the land into building sites, an allegation treated as revelatory of her intentions and designs with regard to the asset under scrutiny.

On appeal, it was strenuously argued that there was no room in law, or as a matter of proper interpretation of the facts, for treating the land or chose-in-action in question as a trading asset. However, it must be said that in the course of the address of counsel for the respondents, counsel for the appellant felt constrained to concede that, if the land was, in point of fact, a trading asset, damages received for breach of the contract to acquire it, could be treated as income in the same way as the proceeds of an outright sale would be treated.

The appellant rested her case primarily on a twofold submission, that -

(1) The involuntary disposition of land is not a sale, consequently the proceeds resulting from such alienation of an asset can, under no circumstances, be treated as income attracting tax.

To our mind, this submission is to a degree contradictory to the aforementioned consensus with regard to the alienation of a trading asset. Further, it was made in defiance to the principles established by a series of English decisions, laying down that the manner of parting with an asset does not change the character of the receipt, the receipt always taking colour from the nature of the asset parted with. (See, inter alia, *Sutherland v. The Commissioner of Inland Revenue*, 12 T.C. 63; *The Commissioner of Inland Revenue v. Newcastle Breweries Ltd.*, 12 T.C. 927).

(2) The element of trading is altogether missing in a transaction not involving a voluntary purchase or sale; therefore, the money received by the appellant could, under no conceivable circumstances, be treated as a receipt arising from a trading operation or activity.

In order to evaluate the soundness of the assessments, and decide upon the correctness of the first instance judgment, it is necessary to make brief reference to the facts of the case, as they emerge from the joint statement of facts submitted to the Commissioner.

The appellant made, between the years 1965 and 1970, a number of investments in land, situate on the outskirts of Limassol, that had the following common characteristics:

(a) The land purchased was not immediately developable but had a distinct development potential in the near or foreseeable future.

(b) The investments committed the appellant to heavy financial obligations, far beyond her immediate income or her income in the near or foreseeable future. The investments were in part financed by borrowed capital.

At the time of making the investments, the appellant was a nurse in the employment of her husband, an ENT specialist, running a clinic in Limassol, earning an annual income of between £300.- to £550.- between the years 1963 and 1967. More analytically, the transactions she entered into, were the following:

(a) In 1965 she purchased two adjoining plots at Ay. Athanassios for an amount of £250.-. She was unable to raise the outlay at the time of entering into the agreement for the acquisition of the land, and had to invoke the assistance of a fellow nurse for the finance of the purchase.

The two plots were sold in 1968 at considerable profit for £1,950.-. The explanation of the appellant for this disposition is that it was a poor investment and, therefore, it was not worth retaining.

(b) In 1966 or 1967, she purchased immovable property at Limassol and invested in the family home and her husband's clinic at Limassol from money received from the sale of a building site at Famagusta, amounting to £3,000.-, donated to her by her father by way of dowry. The Commissioner rightly disregarded the sale and subsequent transactions, taking the view that it amounted to a substitution of an investment.

(c) In mid 1965 and early 1966, she agreed to purchase two adjoining plots at Ay. Phylaxis notwithstanding her inability to finance the Ay. Athanassios investment and the fact that she had to rely on borrowed capital for its finance. The two plots were purchased for £6,000.-, payable over a period of three years.

In 1967 the vendor signified his intention not to proceed with the sale, defaulting thereby in the discharge of his contractual obligations. Legal proceedings were taken by the appellant for damages for breach of contract, resulting in a settlement of the action in 1970 for £25,000.- damages. The compensation was paid in the years 1971, 1972 and 1974. It is these receipts that were taxed and formed the subject-matter of the present proceedings. The Commissioner was impressed by the fact that, in defining her claim to damages, the appellant averred in her statement of claim that plans were being prepared for the division of the land into building sites. It is permissible for the Commissioner in evaluating the relevant facts to have regard to such extrinsic evidence that may shed light on the true nature and effect of a transaction. (see, *IRC v. Church Commissioners for England* [1976] 2 All E.R. 1037 (H.L.)).

(d) In 1967, a plot of land was purchased, again on the outskirts of Limassol, at Ay. Phylaxis, from a certain Maria Karapatea for £3,120.—, again payable by instalments, extending over a period of three years.

(e) Towards the end of 1968, she purchased jointly with two other persons, land at Polemidhia, becoming

thereby the owner of one third of the property. In assessing the income of this investment and its nature, the Commissioner took into consideration that her co-purchasers were land dealers. This is indeed a relevant consideration, as Triantafyllides, J., as he then was, pointed out in *Yiannakis S. Droussiotis* v. *The Republic* (1967) 3 C.L.R. 15.

(f) A year later, on 19.12.1970, the appellant agreed to purchase land at Pyrgos, nine miles outside Limassol, for £17,000.— obviously adding to her financial commitments, making, as one might say, her future dependent on the commercial viability of her investments.

In arguing his case before us, learned counsel for the appellant, reminded us of the observations of Hallinan C.J., in *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), 22 C.L.R. 27, as to the economic realities of the country. He pointed out in *Agrotis* case, that the opportunities for investments in Cyprus are, in the absence of a stock exchange, very limited and that real estate plays a dominant part in the economic life of the country, being nearly the only asset in which one may invest. Building upon this statement, counsel for the appellant submitted that the taxing authorities should be very slow to treat the acquisition of land as a trading asset, especially in a case like the present when an intention to trade could not be gathered from successive sales made by the owner.

The position portrayed in *Agrotis*, supra, about the economic realities of Cyprus, is still sound but not altogether accurate and should be modified in this way. The analysis of the economic conditions of the country made by Hallinan C.J., should be coupled with the following statement: Speculation in land has become an incident of common occurrence.

JUDICIAL REVIEW OF TAXATION DECISIONS:

The decision of the Commissioner of Income Tax is liable to judicial review by the Supreme Court in the exercise of its revisional jurisdiction under Article 146, a fact signified by

the provisions of the law itself. (See, s.21 of the Taxes (Quantifying and Recovery) Law 1963 (53/63) (as amended by s.9 of Law 61/69). Taxation decisions have been the subject of review in numerous cases. (See, inter alia, *Mavromati* v. *Republic* (1966) 3 C.L.R. 143; *Kingsfield* v. *The Republic* (1966) 3 C.L.R. 45; *Christides* v. *The Republic* (1966) 3 C.L.R. 732; *Hadjiyiannis* v. *The Republic* (1966) 3 C.L.R. 338; *Pappous* v. *The Republic* (1966) 3 C.L.R. 77; *Pavlides* v. *The Republic* (1966) 3 C.L.R. 530; *Pavlides* v. *The Republic* (1967) 3 C.L.R. 217; *Manufacturers Life Insurance* v. *The Republic* (1967) 3 C.L.R. 460).

The scope and compass of the jurisdiction under Article 146 is by now firmly established. The review and the inquiry it entails is limited to the validity of the act impeached. Such validity is tested by reference to the powers vested by law in the administration, the manner of their exercise and the factual substratum, particularly its correctness. The revisional jurisdiction of the Supreme Court is primarily of a corrective character. It is aimed to ensure, in the interest of legality and public good, that the administration functions within the sphere of its authority and always subject to the principles of good administration. The court will not assume administrative responsibilities, a course impermissible under a system of separation of State powers, constitutionally entrenched in Cyprus. It is appropriate to recall in this respect, the observations of Triantafyllides, J., as he then was, in *Costas M. Pikis* v. *The Republic* (1965) 3 C.L.R. 131, at 149, earmarking the powers of the executive and the judiciary: "After all it must not be lost sight of that it is for the Government to govern and for the Court only to control....."

Unlike the powers vested in the District Court before independence to adjudicate upon a taxation assessment by s.43 —Cap. 233—and earlier by virtue of s.39 of Cap. 297 (of the old edition of the Statute Laws of Cyprus), the Supreme Court has 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 has exceeded the outer limits of its powers. Provided they confine their action within 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 background 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. The same approach was sanctioned by the House of Lords with regard to the powers vested in the courts in England, to review decisions of an administrative nature. In *Zamir* v. *Secretary of State* [1980] 1 All E.R. 768, they decided that the administrative decision of an immigration officer could be impugned only on two grounds: (a) Absence of evidence on which he could reach his decision, and (b) where no reasonable person in the position of the immigration officer could reach the decision taken. The approach of the court to the validity of a taxing decision is no different from its approach in respect of any other administrative decision liable to review under Article 146. Therefore, the learned trial Judge rightly approached the decision, confining his review to ascertaining whether the decision taken by the Commissioner was one reasonably open to him. (See, also, *Clift* v. *The Republic* (1965) 3 C.L.R. 285, and *Christides* v. *The Republic* (1966) 3 C.L.R. 732). The initial burden of establishing that the decision complained of is vulnerable to be set aside, is upon the party propounding its invalidity. (See, *Coussoumides* v. *The Republic* (1966) 3 C.L.R. 1).

CONSIDERATIONS RELEVANT TO DETERMINING WHETHER A RECEIPT CONSTITUTES INCOME:

We have earlier indicated that the element of compulsion or involuntariness in a disposition is not conclusive. If the product of the disposition is the result of alienation of a trading asset, the receipt constitutes income in the possession of the tax payer liable to tax. We find ourselves in agreement with the submission of learned counsel for the Republic, that the crucial question does not concern the manner of parting with an asset but the character of the asset, whether of a trading or a capital nature. What is sound, with respect, in the submission of counsel for the appellant, is that the taxing authorities cannot, from an involuntary parting with an asset discern exclusively therefrom an intention to trade.

The definition of "trade" suggested by counsel for the appel-

lant, that is, voluntary purchase and voluntary sale, is far from exhaustive and certainly incomplete. The categories of trade, as judicially observed, are never closed, as it was acknowledged in the case of *Ransom* v. *Higgs* [1974] 3 All E.R. 949 (H.L.). "Trade" denotes operations of a commercial character by which the trader provides the customers for reward some kind of goods or services. Not every transaction that yields an advantage, however indirect, constitutes an adventure in the nature of trade. The Privy Council earmarked the considerations that should guide the authorities responsible for taxation in determining whether a single transaction is a trading activity or adventure in the nature of trade. The test is whether the transaction exhibits features which give it the character of a business deal. A single transaction rarely attracts income tax. (See, *Greenberg* v. *IRC* [1971] 3 All E.R. 136 (H.L.)).

Intention to trade may be gathered from a great variety of facts and circumstances, including those adverted to hereinbelow:

The character of the 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, is a most consequential factor. (See, *Johnston* v. *Heath* [1970] 1 W.L.R. 1567; *Californian Copper Syndicate* (*Limited and Reduced*) v. *Harris*, 5 T.C. 159; *Edwards* (*H.M. Inspector of Taxes*) v. *Bairstow & Harrison*, 36 *T.C.* 207; *Tempest Estates Ltd.* v. *Walmsley*, cited in Simon's Taxes, Vol. B1. 618; *Turner* v. *Last*, 42 T.C. 517).

A stable investment may naturally lead to the inference that the investor merely changes one form of investment for another without any intention, on his part, to trade with the land itself. It may properly be assumed that the viability of the investment and the income it is likely to produce in future, is the dominant consideration in the mind of the investor. On the other hand, where the land is undeveloped and the purchaser cannot be deemed to look to its income, present or future, as an incentive for entering into the transaction, but to its future potential as an asset, one may discern an intention to trade with it, speculating thereby in the realisation of profit from a sale in future. Also the manner of the finance of the transaction is relevant. 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.

Intention to trade a given asset need not be formed at the time of its acquisition, as the case of *Taylor* v. *Good* [1973] 2 All E.R. 785 illustrates. In that case, the tax payer had purchased a house at an auction, intending to use it as a family residence. His wife objected to his plans; subsequently, the investor applied for a planning permission and eventually sold it at a profit. It was said that the proceeds were liable to tax as income. Subject to this, the value of the property should be taken as at the date when he actually formed an intention to trade with it and not at the time of its acquisition.

Brief reference has been made to some of the considerations that may appropriately guide the taxing authorities in the discharge of their tasks. Given these principles, the question that must be resolved thereafter is one of fact whether in the particular circumstances of a case a given receipt should be treated as income or capital.

The learned trial Judge, in a well reasoned judgment, held, it was reasonably open to the Commissioner to treat the compensation received by the appellant as income. Nothing that has been said before us justifies a departure from the view taken by the trial Judge. On the contrary, there was plenty of room for the Commissioner to arrive at the decision he did. On any view of the facts, the inescapable inference is that the appellant engaged in a series of investments not designed to change over one capital asset with another, but with a view to exploiting future opportunities that might materialise from the crystallization of the development potential of the land.

In our judgment, the decision taken by the Commissioner was one reasonably open to him, as the trial Judge held at first instance. Therefore, the appeal is dismissed. It is with a degree of reluctance we shall refrain from ordering the appellant to pay costs.

Appeal dismissed. No order as to costs.