1982 February 6

[TRIANTAFYLLIDES, P.]

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.* 382/74).

Administrative Law—Administrative acts or decisions—Reasoning—Due reasoning—Need for—Income tax—Assessments—Dealing in land—Impossible to deduce from sub judice decision what were the grounds on which respondent Commissioner decided that the transactions in question were ventures in the nature of trade—Impossible to determine judicially whether or not conclusion of the respondent was reasonably open to him on a proper application of the law, in the circumstances of this particular case—Sub judice assessments defective because of lack of due reasoning—Annulled.

The applicant, a director and shareholder of a company dealing with electrical appliances, bought two plots of land in September, 1968 which he sold at a profit in November, 1968 and March, 1969. The respondent Commissioner decided that the transactions in question were of a trading nature and, consequently, in respect of the profit that had accrued to the applicant therefrom income tax had to be paid. An objection in this respect was lodged on behalf of the applicant on the 27th August, 1974 but it was determined against him by the respondent by means of a letter dated 26th September, 1974. Hence this recourse in which the sole issue for determination was whether the transaction in question was an isolated one and in respect of the profit therefrom no income tax was payable, or whether such profit had accrued to the applicant as a result

of trading in land and, therefore, he had to pay tax in relation to it (under section 5(1)(a) of the relevant income tax legislation).

Held, that it is impossible to deduce from the relevant letters of the respondent Commissioner of Income Tax what are the grounds on which he decided that the transactions in question were ventures in the nature of trade; that in the said letters there is set out, devoid of any reasoning whatever, only the complained of by the applicant conclusion of the respondent and it is, therefore, impossible to determine judicially whether or not such conclusion was, on a proper application of the law, reasonably open to the respondent in the circumstances of this particular case; that, also, there have not been placed before the Court any administrative records from which the required reasoning could be ascertained; that an administrative act should contain all the elements which are necessary for the ascertainment of its legality in case of exercise of judicial review; and that, therefore, the only course which is open to this Court is to annul the sub judice decision of the respondent on the ground that it is defective because of lack of due reasoning.

Sub judice decision annulled.

Cases referred to:

Agrotis Ltd. v. *Commissioner of Income Tax*, 22 C.L.R. 27 at p. 30;

Droushiotis v. *Republic* (1967) 3 C.L.R. 15 at pp. 23–24, 27–28;

Vassos Estates Ltd. v. *Republic* (1969) 3 C.L.R. 58 at pp. 71, 72;

Californian Copper Syndicate (Limited and Reduced) v. *Harris (Surveyor of Taxes)*, 5 T.C. 159 at pp. 165–166;

Commissioner of Taxes v. *Melbourne Trust Ltd.* [1914] A.C. 1001 at p. 1010;

Ducker v. *Rees Roturbo Development Syndicate Ltd.* [1928] A.C. 132 at p. 140;

Tebrau (Johore) Rubber Syndicate Ltd. (in Liquidation) v. *Farmer (Surveyor of Taxes)*, 5 T.C. 658 at pp. 664–666;

Commissioner of Inland Revenue v. *Livingston*, 11 T.C. 538 at p. 542;

Leeming v. *Jones* [1930] 1 K.B. 279;

Commissioners of Inland Revenue v. *Reinhold*, 34 T.C. 389 at pp. 394, 395;

Makrides v. *Republic* (1967) 3 C.L.R. 147 at pp. 152, 153;

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

Cooke v. *Haddock*, 39 T.C. 64;

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

Wilcock v. *Pinto and Company* [1925] 1 K.B. 30 at p. 45;

Edwards (Inspector of Taxes) v. *Bairstow* [1956] A.C. 14 at pp. 30, 31;

Eames (Inspector of Taxes) v. *Stepnell Properties Ltd.* [1967] 1 All E.R. 785;

Kittides v. *Republic* (1973) 3 C.L.R. 123 at p. 143;

Demosthenous v. *Republic* (1973) 3 C.L.R. 354 at p. 365.

Recourse.

Recourse against two additional assessments raised on applicant for the years of assessment 1969 and 1970 on the ground that he derived profit from trading in land.

G. Polyviou, for the applicant.

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

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By the present recourse the applicant challenges two additional income tax assessments, raised on 20th July 1974, in respect of his taxable income for the years of assessment 1969 and 1970, respectively, on the ground that the applicant has, allegedly, derived profit from trading in land.

Another additional income tax assessment, dated also 20th July 1974, in respect of the year of assessment 1966, can be annulled straightaway as it was raised after the expiry of the period prescribed by section 23 of the Taxes (Quantifying and Recovery) Law, 1963 (Law 53/63); and counsel for the respondent has very fairly conceded that it is legally invalid as being out of time.

The salient facts of this case appear to be as follows:

The applicant, after having been employed at Dhekelia by the British Ministry of Defence for about twenty-two years, resigned from such employment in May 1966. He then started an electrical appliances business in Nicosia and formed a company

"Angelides & Philippou Ltd" in which he became a director and shareholder.

On 24th September 1968 the applicant bought from the Bank of Cyprus Ltd two plots and land (Nos. 166 and 167) in Kyrenia for the sum of C£6,900, plus interest due to the Bank and Land Office transfer fees, that is for a total C£7,233.283 mils. He paid at once the sum of C£1,800 and agreed to pay off the remainder by monthly instalments of C£100 each.

In November 1968 he entered into an agreement with a certain Samuel Sunderland from England to sell to him plot No. 166 for the sum of C£6,000 and in March 1969 he entered into another agreement for the sale of plot No. 167 to a certain Arthur Hannan from England for the sum of C£6,000.

The payment of the sale price by the two aforementioned purchasers was made as follows:

In November 1968 Sunderland paid two instalments of C£2,000 each and in November 1969 another instalment of C£2,000. In March, June and September 1969 Hannan paid on each occasion an instalment of C£2,000.

The applicant disclosed to the respondent, when submitting accounts, the amount of C£4,767 which represented the difference in value between the total price at which he had purchased the plots in question and the total amount at which they were sold by him in 1968 and 1969, as aforesaid.

As the respondent by a letter of 3rd June 1974 insisted that the transactions concerned were of a trading nature and, consequently, in respect of the profit that had accrued to the applicant therefrom income tax had to be paid, an objection in this respect was lodged on behalf of the applicant on 27th August 1974, but it was determined against him by the respondent as it appears from a letter dated 26th September 1974; and as a result the present recourse has been filed.

The issue that calls for determination in the present case is whether the transaction in question is an isolated one and in respect of the profit therefrom no income tax is payable, or whether such profit has accrued to the applicant as a result of trading in land and, therefore, he has to pay tax in relation to it (under section 5(1)(a) of the relevant income tax legislation).

Whether or not in a particular case trade has been carried on is a question of mixed law and fact and there does not exist in this respect a conclusive test of general applicability; and such question has to be resolved on each occasion by the application of the law to the facts and circumstances of each particular case (see, inter alia, in this respect, *Agrotis Ltd.* v. *The Commissioner of Income Tax*, 22 C.L.R. 27, 30, *Droussiotis* v. *The Republic*, (1967) 3 C.L.R. 15, 23 and *Vassos Estate Ltd.* v. *The Republic*, (1969) 3 C.L.R. 58, 71, 72).

It is helpful to refer, first, to relevant case-law:

In the case of *Californian Copper Syndicate (Limited and Reduced)* v. *Harris (Surveyor of Taxes)*, 5 T.C. 159, Lord Justice Clerk said (at pp. 165–166):

> "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 Inome Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, 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 in 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?"

The above approach has been followed in *Commissioner of Taxes* v. *The Melbourne Trust, Limited*, [1914] A.C. 1001, 1010, and *Ducker* v. *Rees Roturbo Development Syndicate, Ltd.*, [1928] A.C. 132, 140.

Before proceeding further it is useful to note that the *Californian Copper Syndicate* case, supra, was distinguished, on its own particular facts, in *Tebrau (Jehore) Rubber Syndicate, Limited (in Liquidation)* v. *Farmer (Surveyor of Taxes)*, 5 T.C. 658, where there were stated the following by Lord Salvesen (at pp. 664-666):

> "In this case I am of opinion that the determination of the Commissioners is wrong. I am unable to distinguish the position of the Appellants from that of a person who acquires a property by way of investment and who realises it afterwards at a profit. It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income tax but results from an appreciation of his capital. No doubt if it is part of his business to deal in land or investments, any profits which in the course of that business he realises form part of his income; but the mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realised a profit on his purchase does not make that profit liable to assessment.
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> In any event I cannot find sufficient evidence from this single transaction, which at the same time brought the Syndicate to an end, that the profits so made are to be treated as income or gains made by trade, and I should hesitate to extend the decision in the *Californian Rubber Syndicate* beyond the facts of that case. The other case to which we were referred to the *Scottish Investment Trust Limited* has no application, because it was part of the ordinary business of the Company to make profits by the purchase and sale of investments; and accordingly the profits made in any particular year were assessable for income tax, in whatever way the Company choose to treat these profits in their books. The present case appears to me to fall within the principles enunciated in *The Assets*

Company, and in *Stevens* v. *The Hudson Bay Company*, in both of which the profit realised by the sale of the Company's assets were not treated as income for the purpose of income tax".

In *The Commissioners of Inland Revenue* v. *Livingston*, T.C. 538, Lord President Clyde said (at p. 542):

"I think the profits of an isolated venture, such as that in which the Respondents engaged, may be taxable under Schedule D provided the venture is 'in the nature of trade'. I say 'may be', because in my view regard must be had to the character and circumstances of the particular venture. If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made".

In *Leeming* v. *Jones*, [1930] 1 K.B. 279, as it appears from the headnote of the report of that case, it was held "that having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade, and to its being merely an isolated transaction of purchase and resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, and were therefore not subject to tax under case VI. of Sch. D of the Income Tax Act, 1918".

The summary of the report of the case of *Commissioners*

of Inland Revenue v. *Reinhold*, 34 T.C. 389, reads as follows:

"Income Tax, Schedue D—Purchase and sale of house property—Whether adventure in the nature of trade.

The Respondent, a director of a company carrying on the business of warehousemen, bought four houses in January, 1945, and sold them at a profit in December, 1947. He admitted that he had bought the property with a view to resale, and had instructed his agents to sell whenever a suitable opportunity arose.

On appeal before the General Commissioners he contended that the profit on resale was not taxable. On behalf of the Crown it was contended that the purchase and sale of the property constituted an adventure in the nature of trade, and that the profits arising therefrom were chargeable to Income Tax. The General Commissioners, being equally divided, allowed the appeal.

Held, that the fact that the property was purchased with a view to resale did not of itself establish that the transaction was an adventure in the nature of trade, and that the Commissioners were justified in treating the profit in question as not assessable to Income Tax".

Lord Russell stated the following in that case (at pp. 394, 395):

"The profit of an isolated transaction by way of purchase and resale at a profit may be taxable as income under Schedule D if the transaction is properly to be regarded as 'an adventure in the nature of trade'. In each case regard must be had to the character and circumstances of the particular transaction. ....

The circumstance stressed by the Appellants was that the houses purchased by the Respondent were bought for sale and that the Respondent's agents were instructed to sell whenever a suitable opportunity arose. The Lord Advocate contended that if a person buys anything with a view to sale, that is a transaction in the nature of trade; that the purpose of the acquisition in the mind of the purchaser is all-important and conclusive; and that the nature of the thing purchased and the other surrounding circumstances do not and cannot operate so as to render

the transaction other than an adventure in the nature of trade. In my opinion that argument, so formulated, is too absolute and is not supported by the judicial pronouncements on which it was sought to be based. It takes no account of a variety of circumstances which are or may be relevant to the determination of such a question. Among such features adverted to in previous cases reference may be made to such matters as these, viz., whether the article purchased, in kind and in quantity, is capable only of commercial disposal and not of retention as an investment or of use by the purchaser personally, e.g. aeroplane linen, toilet paper, whisky; whether the transaction is in the line of business or trade carried on by the purchaser; whether the purchaser before resale has caused expenses to be incurred in making the commodity more readily saleable, e.g., a ship converted before resale into a trawler, whether the transaction is exactly of the kind that takes place in ordinary trade in which the resale requires a number of separate disposals".

In *Droussiotis* v. *The Republic*, (1967) 3 C.L.R. 15, on the question as to whether or not gain derived from sale of land amounted to taxable income or constituted a mere accretion of capital this Court stated the following (at pp. 23-24, 27-28):

"Also, in approaching such an issue in Cyprus, it must be borne in mind that, the following, which has been stated in the *Agrotis* case (supra, at p. 33) by Hallinan C.J. in 1956, appears to still hold good, ten years later, to day:

'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 ..... Most Cypriot individuals and families of substance put their money into land as an investment.....' ".

"It is not, however, inevitable to conclude, always, when there has taken place sale of land, or of other capital, after development, that the resulting profit is taxable income

and not merely a capital accretion not subject to income tax. In this respect it is useful to bear in mind the dictum of Rowlatt, J., in *Rand* v. *The Alberni Land Company Ltd.* (7 Tax Cases p. 629 at pp. 638-639):

> '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' ".

In the case of *Vassos Estate Ltd.*, supra, Hadjianastassiou J., after having considered the circumstances in which the applicant company in that case had sold immovable property at a profit, arrived at the conclusion that the surplus which resulted from the said sale was the realization of an investment and the enchanced price was not profit or gain made in an adventure in the nature of trade.

In addition to the above referred to case-law I have, also, duly considered cases such as *Makrides* v. *The Republic*, (1967) 3 C.L.R. 147, 152, 153, *Johnston (Inspector of Taxes)* v. *Heath*, [1970] 1 W.L.R. 1567 (in which the *Reinhold* case, supra, was distinguished), *Cooke* v. *Haddock*, 39 T.C. 64 and *Turner* v. *Last*, 42 T.C. 517, which were cited in the course of argument by counsel.

As to the task of finding whether or not a transaction is a trading one the following are stated in Halsbury's Laws of England, 4th ed., vol. 23, p. 142, para. 212:

> "In disputed cases the appropriate commissioners, on appeal to them, decide whether there is a trade, but the question what are the characteristics of an adventure in the nature of trade is a question of law. If the commissioners direct themselves rightly on the law, their decision on the evidence before them whether there is or is not a trade is an inference of fact with which an appellate Court will not interfere, but if it appears to the Court that the decision could not reasonably have been reached if there had been proper direction in law, the Court may proceed on the footing that there has been a misconception of law".

Also, useful reference in this respect may be made too, to

cases such as *Wilcock* v. *Pinto and Company*, [1925] 1 K.B. 30, 45, *Edwards (Inspector of Taxes)* v. *Bairstow*, [1956] A.C. 14, 30, 31 and *Eames (Inspector of Taxes)* v. *Stepnell Properties, Ltd.*, [1967] 1 All E.R. 785.

Unfortunately in the present instance it is impossible to deduce from the relevant letters of the respondent Commissioner of Income Tax (dated 3rd June 1974 and 26th September 1974) what are the grounds on which he decided that the transactions in question were ventures in the nature of trade. In the said letters there is set out, devoid of any reasoning whatsoever, only the complained of by the applicant conclusion of the respondent and it is, therefore, impossible to determine judicially whether or not such conclusion was, on a proper application of the law, reasonably open to the respondent in the circumstances of this particular case. Nor have there been placed before the Court any administrative records from which the required reasoning can be ascertained; and as has been pointed out by this Court, in cases such as *Kittides* v. *The Republic*, (1973) 3 C.L.R. 123, 143, and *Demosthenous* v. *The Republic*, (1973) 3 C.L.R. 354, 365, an administrative act should contain all the elements which are necessary for the ascertainment of its legality in case of exercise of judicial review.

In the light of the foregoing the only course which is open to me is to annul the sub judice decision of the respondent on the ground that it is defective because of lack of due reasoning; and as the respondent will have to reach afresh a new decision in the matter concerned I should not express in this judgment any view as to whether or not the transactions in question are in the nature of trade, because if I do this I will, in effect, substitute my decision on this point in the place of the new decision which has to be reached in a proper manner by the respondent; and I am not, as an administrative Court, entitled to forestall the action to be taken by the administration.

For the reasons set out in this judgment this recourse succeeds and the complained of assessments are annulled; but I shall make no order as to the costs of this case.

Sub judice decision annulled.
No order as to costs.