

1984 June 15

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS X. HJIERACLIS,

Applicant,

v.

THE COMMISSIONER OF INCOME TAX,

Respondent.

(Case No. 169/83).

NICOLAS HJIERACLEOUS,

Applicant,

v.

THE COMMISSIONER OF INCOME TAX,

Respondent.

(Case No. 402/83).

Income tax—"Artificial or fictitious" transaction—Transaction in the nature of trade—Sole transaction—Sections 36(1) and 5(1) (a) and 2(f) of the Assessment and Collection of Taxes Laws, 1978-1979—Purchase of land—Negotiated by applicants who were brothers and building contractors—And one of them paid by cheque the down payment—Mother the purchaser under the contract—Land transferred in her name but on the same day she transferred it by way of gift to the two applicants and resold by them at a considerable profit—Mother 80 years old and having no money or income—Seller stating that negotiations and transactions relevant to the sale made by the applicants—Land situated in an area where prices of land are galloping—Applicants in a position to know of speculative land dealings in the area—Reasonably open to the respondent Commissioner to conclude that the transaction was a fictitious one—And that though a sole transaction

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was not for investment purposes but for trading purposes—And the difference between the purchase price and the sale price was income liable to tax—Inquiry that led to sub judice decision not in any way faulty.

- 5 *Income tax—Primary facts not in dispute—It is for the respondent Commissioner to draw inferences from the primary facts—Principles on which Court will interfere with such inferences.*

10 Two plots of land in the vicinity of Paralimni, the purchase of which was negotiated by the applicants, brothers and building contractors by occupation, were, by contracts of sale entered into between the vendor and the mother of the applicants, purchased on the face of the contracts by the mother of the applicants. One of them paid by cheque the down-payment. The
15 two plots were transferred by a declaration of sale in the name of the mother who, instantly and on the same day, transferred them by way of gift to the two applicants who, in a short period, resold them at a considerable profit.

20 The respondent Commissioner in exercise of his powers under section 36(1)* of the Assessment and Collection of Taxes Laws, 1978–1979 decided that:

- (a) The transaction of the purchase by the mother and the gift to the applicants was a fictitious one and that the applicants actually purchased the properties directly from the seller; and
25 (b) The sale by them was an act in the nature of trade** and, therefore, the difference between the purchase price and the sale price was income liable to tax.

Hence these recourses in which Counsel for the applicants mainly contended:

- 30 (a) That the decision that the transaction was a fictitious one was faulty as it was reached after insufficient inquiry; and,

* Section 36(1) provides that "Where the Director is of the opinion that in respect of any year of assessment the object of the tax of any person is reduced by any transaction which in his opinion was artificial or fictitious, he may disregard any such transaction and assess the persons concerned on the proper object of the tax".

** This decision was taken under section 5(1)(a) and 2(f) of the Law which is quoted at p. 612 post.

- (b) That the transaction of the sale by the applicants was not trade and, therefore, no income liable to tax was derived.

In the course of the investigation by the respondent the applicants were asked about the financial position of their mother; and they said that she was an old woman of 80 and that she had no money or any income. They, also, said that they did not know how their mother acquired the lands or what she was doing. They simply knew that she gifted to them the two plots of land. The seller signed a responsible statement in which he stated that the negotiations and transaction relevant to the sale of the said plots were made by the applicants, never by their mother, though the name of the mother appeared in the contract of sale as the purchaser.

Held, (1) that having regard to all the circumstances of this case, including, inter alia, the age of the mother, the undisputed statements of the applicants, the statement of the seller, the payment by cheques by one of the applicants and the circumstances of the two transfers on the same day, the inquiry was not in any way faulty; that a proper inquiry under the circumstances was carried out and that the interview of the mother would serve no useful purpose in the process of the examination of the case; that the primary facts were not in dispute; that it was then for the Commissioner to draw the inferences from the primary facts; that this Court will interfere with the inference of fact only in a case where it is insupportable on the basis of the primary facts so found after due inquiry; that the decision reached by the respondent was not only reasonably open to him but it was also unassailable; that therefore, the transaction was a fictitious one; and the mother was used as a tool in a pre-ordained series of transactions to mask the fact that the actual purchasers of the two plots were the applicants themselves; accordingly contention (a) must fail.

(2) That since in the present case the applicants are building contractors of Paralimni, an area where the price of land is galloping due to an outburst of touristic development; that since they were in a position to know of speculative land dealings in the area; that since the land was purchased mainly on credit and was land that acquired a development value; that since they resold the property a few months after the completion of

5 their purchase at a price more than double the price at which they had acquired it; that since in the process of acquisition they applied a scheme of fictitious transaction, that is to say, they used their mother as a tool so as to appear that the property
 10 in question, purchased by them was gifted to them by their mother, the purchase was not for investment but for trading purposes though it was a sole transaction by these applicants; that, therefore, on the totality of the circumstances of the case the only reasonable conclusion to be drawn was the one reached
 15 by the respondent Commissioner and there was nothing justifying this Court to interfere with it; accordingly the recourses must fail.

Applications dismissed.

Cases referred to:

- 15 *Mangli v. Republic* (1983) 3 C.L.R. 52;
Furniss (Inspector of Taxes) v. Dawson [1984] 5 T.C. 153-167;
Agrotis Ltd. v. Commissioner of Income Tax, 22 C.L.R. 27 at p. 30;
Jones v. Leeming, 99 L.J.K.B. 318 at p. 322;
- 20 *Barry (Inspector of Taxes) v. Cordy* [1946] 2 All E.R. 396;
Edwards (Inspector of Taxes) v. Bairstow and Harrison [1955] 3 All E.R. 48 at p. 54;
Californian Copper Syndicate (Limited and Reduced) v. Harris 5 T.C. 159 at pp. 165-166;
- 25 *Greenberg v. I.R.C.* [1971] 3 All E.R. 136;
Makrides v. Republic (1967) 3 C.L.R. 147;
Droushiotis v. Republic (1967) 3 C.L.R. 15.

Recourses.

30 Recourses against the income tax assessments raised on applicants in respect of the years 1973-1979.

A. Poetis, for the applicants.

M. Photiou, for the respondent.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. By these recourses the applicants challenge the validity of the decisions of the respondent, the Commissioner of Income Tax (under the the Income Tax Law he is "the Commissioner of Income Tax" and under the Assessment and Collection of Taxes Law "the Director of Inland Revenue"), in determining their objections against the income tax assessments in respect of the years 1973-79 dated 8th March, 1983, and 9th August, 1983, respectively. 5

Two plots of land in the vicinity of Paralimni, the purchase of which was negotiated by the applicants, brothers and building contractors by occupation, were by contracts of sale entered into between the vendor and the mother of the applicants purchased on the face of the contracts by the mother of the applicants. One of them paid by cheque the down-payment. The two plots were transferred by a declaration of sale in the name of the mother who, instantly and on the same day, transferred them by way of gift to the two applicants who, in a short period, resold them at a considerable profit. 10 15

The respondent decided that—

- (a) The transaction of the purchase by the mother and the gift to the applicants was a fictitious one and that the applicants actually purchased the properties directly from the seller; and, 20
- (b) The sale by them was an act in the nature of trade and, therefore, the difference between the purchase price and the sale price was income liable to tax. 25

The recourses are directed against this decision.

These cases were taken together as they raise common points and the issues arose out of the same transaction.

The aforesaid decisions are challenged on two grounds:— 30

- (a) The decision that the transaction was a fictitious one is faulty as it was reached after insufficient inquiry; and,
- (b) The transaction of the sale by the applicants is not trade and, therefore, no income liable to tax was derived. 35

The sequence of events runs as follows:—

The applicants are brothers, building contractors of Paralimni village. In January, 1980, when the income tax affairs of the applicant in Application No. 402/83 were being examined, it was revealed that the applicants sold and transferred Plot No. 5 180, Sheet/Plan 33/64, in the area of Paralimni village, 2 donums and 2 evleks in extent, at £8,200.- on 25th January, 1979, and Plot No. 182 of the same Sheet/Plan, 4 donums and 2 evleks in extent, to another purchaser for £18,000.- on 3rd May, 1979

10 A further examination brought out that by the contract of sale entered into on the face of it by the vendor and the 80-year old mother of the applicants, these plots were purchased by the mother of the applicants; they were transferred in her name on 9th September, 1978, and on the very same day she transferred them into the name of the applicants by way of gift. In the 15 course of the investigation by the respondent the applicants were asked about the financial position of their mother. They said that she was an old woman of 80 and that she had no money or any income.

20 The seller, on the other hand, signed a responsible statement in which he stated that the negotiations and transaction relevant to the sale of the said plots were made by the applicants, never by their mother, though the name of the mother appears in the contract of sale as the purchaser.

25 One of the applicants paid by cheque the advance payment of part of the agreed purchase price and on the date of the transfer he issued another cheque in favour of the seller for the balance of the sale price. When, however, the applicants were asked to explain how their mother had acquired the said lands on the 9th September, 1978, and transferred same in their own name 30 on the very same day, they replied that the only thing they knew was that their mother gifted the said lands to them and no more. They stated that they did not know how their mother acquired the lands or what their mother was doing. They simply knew that their mother gifted to them on 9th September, 1978, the 35 two plots of land.

In September, 1981, it was discovered and confirmed that the payments by cheque by the applicants, as aforesaid, were made. The dates of the contracts of sale are 20.9.1977 and 6.10.1977, respectively. The stipulated price was £13,000.- 40 but upon the wish of the applicants the sale price appears in

the contracts as £4,000.- and £6,000.-, total £10,000.-, and this price was declared at the D.L.O. with the object of paying less transfer fees. The balance of the purchase price carried interest at 7% from the date of the contracts until payment.

The respondent, exercising his power under the Assessment and Collection of Taxes Law, 1978-79, s.36(1), which provides that "where the Director is of the opinion that in respect of any year of assessment the object of the tax of any person is reduced by any transaction which in his opinion was artificial or fictitious, he may disregard any such transaction and assess the persons concerned on the proper object of the tax", decided that the transfer in the name of the mother of the applicants was fictitious; that what actually happened was that the applicants purchased the two plots from the vendor which they resold at a profit and further he decided that the difference between the purchase price and the sale price was income liable to tax, as it was derived from an adventure or concern in the future or trade.

As no agreement could be reached between the Director and the applicants, the Director proceeded and made the assessment, determined the amount on the basis of the evidence available to him and notified the applicants accordingly. The decision of the respondent and notices of assessment were communicated to the applicants. The applicants by virtue of s.21(1) of the Assessment and Collection of Taxes Law, 1978-79 (Laws No. 4/78, 23/78 and 41/79), filed these recourses.

A recourse of this nature is governed by the same principles as any other recourse under Article 146 of the Constitution.

1. *WAS THE INQUIRY FAULTY?*

It is well settled that failure on the part of the Administration to carry out a sufficient inquiry into all the relevant factors is a ground for annulment of the decision of the Administration.

In the present case the complaint of the applicant is a very limited one: that the respondent failed to interview the mother and specifically ask her where she had found the money and whether the transaction was in fact made and negotiated or entered into on her behalf and not by her children.

The applicants alone and in the presence and with the assistance of their accountant had a number of meetings with the respondent. The seller, Flouris, was contacted and he even signed a written responsible statement (Appendix "D"). The applicants do not contest the statement of Flouris that they negotiated all along the purchase with him; that the purchase price was paid as aforesaid and that the mother simply signed the contract of sale and the declaration at the D.L.O. and no more. The applicants were asked about the financial condition of their mother. They know their mother and they said that she is an old woman, 80 years old, who had no money or income. The investigation lasted for over two years.

It was submitted by learned counsel for the applicants that the applicants negotiated the purchase all along with the seller and everything was done by them for and on behalf of their mother due to the old age and in effect the inability of the mother to carry out such a transaction.

Having regard to all the circumstances of this case, including, inter alia, the age of the mother, the undisputed statements of the applicants, the statement of the seller, the payment by cheques by one of the applicants and the circumstances of the two transfers on the same day, I have not been persuaded that the inquiry was in any way faulty. A proper inquiry under the circumstances was carried out. The interview of the mother would serve no useful purpose in the process of the examination of the case.

I have to note that the power of this Court is limited 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 actual 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— (*Mangli v. The Republic*, (1983) 3 C.L.R. 52, and cases cited therein).

The respondent is empowered by law to disregard any transaction which, in his opinion, is artificial or fictitious and assess

the persons concerned on the proper object of the tax. "Artificial" and "fictitious" have no definition but hardly anyone is needed. It is for the respondent to determine from his findings of primary fact the further fact whether there was an act which was not real, an act without any commercial or business purpose apart from a tax advantage. The primary facts are not in dispute. It is then for the Commissioner to draw the inferences from the primary facts. This Court will interfere with the inference of fact only in a case where it is insupportable on the basis of the primary facts so found after due inquiry— (Furniss (*Inspector of Taxes*) v. *Dawson and related appeals*, (1984) S.T.C. 153-167). 5 10

In my view the decision reached by the respondent was not only reasonably open to him but it is also unassailable. The transaction was a fictitious one; the mother was used as a tool in a preordained series of transactions to mask the fact that the actual purchasers of the two plots were the applicants themselves. 15

2. *WAS THE SALE BY THE APPLICANTS A TRANSACTION IN THE NATURE OF TRADE?*

Section 5(1)(a) of the Income Tax Law reads as follows:— 20

"5.—(1) Tax shall, subject to the provisions of this Law, be payable at the rate or rates specified hereafter for each year of assessment upon the income of any person accruing in, derived from, or received in the Republic in respect of—

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised". 25

The expression "trade" shall include every manufacture or adventure or concern in the nature of trade—(Section 5(2)(f)). 30

The issue raised is one of mixed question of law and fact which has to be decided in the light of the particular circumstances of each case—(*Savvas M. Agrotis Ltd. v. The Commissioner of Income Tax*, 22 C.L.R. 27, at p. 30; *Jones v. Leeming*, 99 1 L.J. K.B. 318, at p. 322). 35

"Trade" is a word of very wide import; the word "trade" must be used in its ordinary dictionary sense and the other

words of the definition must necessarily be intended to enlarge the statutory scope to be given to the word "trade". Whether the word "adventure" is intended to be read like the word "manufacture" as equally independent of the opening word "trade" or like the word "concern" as qualified by the attribute
 5 "in the nature of trade" does not matter—(*Barry (Inspector of Taxes) v. Cordy*, [1946] 2 All E.R. 396).

In *Edwards (H. M. Inspector of Taxes v. Bairstow & Harrison*, [1955] 3 All E.R. 48, Viscount Simonds said at p. 54:—

10 "To say that a transaction is, or is not, an adventure in the nature of trade is to say that it has, or has not, the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or in other words, what the statutory language means.
 15 It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder; a jury finding as a
 20 fact that murder has been committed has been directed on the law and acts under that direction".

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,
 25 or is it a gain made in an operation of business in carrying out a scheme for profit making? (*Californian Copper Syndicate (Limited and Reduced) v. Harris*, 5 Tax Cases p. 159, at pp. 165–166).

The test is whether the transaction exhibits features which give it the character of a business deal. A single transaction rarely (not never) attracts income tax—(*Greenberg v. I.R.C.*, [1971] 3 All E.R. 136 (H.L.)).

Lawrence, L.J., in *Jones v. Leeming*, [1930] 99 L.J. K.B. 17, at p. 24, said:—

35 "Speaking for myself, I have the greatest difficulty of seeing how an isolated transaction of this kind, if it be not an adventure in the nature of trade, can be a transaction ejusdem generis with such an adventure and therefore fall

within Case VI. All the elements which would go to make such a transaction an adventure in the nature of trade would, in my opinion, be required to make it a transaction ejusdem generis with such an adventure. It seems to me that in the case of an isolated transaction of the sale and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property". 5

This was approved by the House of Lords.

In determining the question posed the following factors must be taken into consideration in this case: the nature of the land and the income that it is producing—present and future—the manner of the finance of the transaction, the intention of the purchaser at the time of the acquisition, the prevailing circumstances in the country or in the area, the occupation and knowledge of the taxpayer and the length of period that the taxpayer has the ownership of the land sold. 10 15

In *Agrotis* case (supra) Hallinan, C.J., said at pp. 33-34:-

"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". 20 25 30

During the thirty years that elapsed since the decision in *Agrotis* case, we witnessed a rapid development in the country, especially touristic in certain areas including Paralimni, the concentration of the inhabitants in some vicinities for reasons not necessary to be enumerated, the galloping of prices of land and real property with developing prospects becoming a commodity of trade. The aforesaid gave rise to a class of develop- 35

ers and speculators of land. Furthermore speculation in land has become an incident of common occurrence.

The business knowledge of the taxpayer or of his associates may indicate the commercial nature of the transaction.

5 In *Pinson's Revenue Law*, 6th edition, p. 24, we read:—

“It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a
10 transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade”.

A transaction must be examined objectively—(*Makrides v. The Republic*, (1967) 3 C.L.R. 147. See, also, *Droussiotis v. The Republic*, (1967) 3 C.L.R. 15).

In the present case the applicants are building contractors of Paralimni, an area where the price of land is galoping due to an outburst of touristic development. They were in a position to know of speculative land dealings in the area. The land
20 was purchased mainly on credit. It was land that acquired a development value. They resold the property a few months after the completion of their purchase at a price more than double the price at which they had acquired it. In the process of acquisition they applied a scheme of fictitious transaction, that
25 is to say, they used their mother as a tool so as to appear that the property in question, purchased by them, was gifted to them by their mother. All the above point to one direction: that though it is a sole transaction by these applicants, nevertheless, the purchase was not for investment but for trading purposes.
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On the totality of the circumstances of the case I find that the only reasonable conclusion to be drawn is the one reached by the respondent Commissioner and there is nothing justifying me to interfere with it.

35 In the result the sub judice decisions are confirmed and the recourses are dismissed. In the circumstances of these cases I see no reason why the applicants should not pay the costs of the respondent. Such costs to be assessed by the Registrar.

40 *Recourses dismissed with costs against the applicants.*