1985 January 21

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

AMANI ENTERPRISES (HOUSES) LTD.,

Applicants,

v.

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

Respondents.

(Case No. 481/80).

Income Tax—Special Contribution—Principles on which Court interferes with decisions of Commissioner of Income Tax—Trading profit—Trade in land—Company incorporated in 1957 and deriving its income from the construction and sale of flats during 1957-1961—Purchasing a plot of land in 1963 and constructing a block of flats in 1972—Selling one of the flats in 1978 in order to meet financial difficulties that have been created from the cost of construction—Reasonably open to the respondent Commissioner to reach conclusion that the company were traders in land.

The applicant company was incorporated in 1957 and it derived its income mainly from dealings in immovable property and in particular, from the construction and sale of flats. During the years 1957 to 1959 it constructed the Amani Building situated at Makarios Avenue in Nicosia and on the 31st December, 1961 it sold all the shops and flats of this building. In 1963 it acquired a large building site near the Trust Club premises in Nicosia for £34,300.—. Construction of a new Amani Building on this latter plot began in 1968 and was completed in 1972. In the meantime all the shares of the

applicant company were sold to the company "Akinita Nicolaou Karandoki Ltd." In order to meet the cost of construction of the new Amani building the applicant borrowed the sum of £300,000; and in 1978 the Board of its Directors decided that the only possible way to get out of their financial difficulties and the pressure of their creditors to settle their outstanding debts was to sell part of the building. Thereafter applicants sold a flat for £37,000. The respondent treated the profit from the sale of this flat as a trading profit and as such liable to special contribution. Hence this recourse in which the sole issue for consideration was whether on the particular facts the respondent Commissioner could have reasonably reach the conclusion that the transaction was in the nature of a trade in land and was, thus, subject to payment of special contribution.

Held, after stating the principles on which the Court may interfere with decisions of the Commissioner of Income Tax—vide pp. 204-205 post, that since the applicant company was formed, inter alia, for the development of immovable property and for ten years it conducted itself as a trader in land, it was reasonably open to the respondent Commissioner to reach the conclusion that the applicants were traders in land; accordingly the recourse must fail.

Held, further, that the fact that the applicant company embarked on such a substantial expenditure in order to construct the building in question is not characteristic of a company that merely wishes to hold an investment.

Application dismissed.

Cases referred to:

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

Rand v. *The Alberni Land Company Ltd.,* 7 T.C. 629;

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

Makrides v. Republic (1967) 3 C.L.R. 147;

Georghiades v. *Republic* (1980) 3 C.L.R. 525 and on appeal (1982) 3 C.L.R. 659;

Cooper v. *Stubbs*, 10 T.C. 29;

Californian Copper Syndicate (Limited and Reduced) v Harris, 5 T.C. 159 at pp. 165-166;

Cayser, Irvine & Co. Ltd. v. *C.I.R.*, 24 T.C. 491 at p. 496.

Recourse.

Recourse against the decision of the respondent whereby a special contribution was levied on the applicants in respect of the profit made from the sale of one of their flats.

G. Triantafyllides, for the applicants.

M. Photiou, for the respondents.

Cur. adv. vult.

MALACHTOS J. read the following judgment. By the present recourse the applicant Amani Enterprises (Houses) Ltd., a private company with limited liability, seeks a declaration of the Court that the decision of the Commissioner of Income Tax that a special contribution be levied on them in respect of the profit made from the sale of one of the flats of the company during the year 1978, is null and void and of no legal effect whatsoever.

The relevant facts of the case are as follows:

The applicant company was incorporated in 1957 and it derived its income mainly from dealings in immovable property and in particular, from the construction and sale of flats.

During the years 1957 to 1959 it constructed the Amani Building situated as Makarios Avenue in Nicosia and on the 31st December, 1961 it sold all the shops and flats of this building. In 1963 it acquired a large building site near the Trust Club premises in Nicosia for £34,300.- In 1966 a certain Nicos Karandokis was admitted as a shareholder to the applicant company and bought all its shares except 500 shares which were retained by a certain A. Photiades. On the 7th November, 1967 Photiades sold his

shares to the company "Akinita Nicolaou Karandoki Ltd" and a new Board of Directors consisting of Karandokis and his wife, Eleni Karandoki, was then appointed. Construction of a new Amani Building began in 1968 on the plot bought in 1963 and was completed in 1972.

In order to meet the cost of construction of this building which rose to £482,110.- the applicant company borrowed on mortgage security from the Barclays Finance Corporation (Cyprus) Ltd., the sum of £300,000.- and also owed considerable sums to the company Medcon Construction Ltd. which was the contractor awarded the contract for the erection of the building. As a result, the applicant company, on the 31st December, 1977, had liabilities to the extent of £545,256.

According to the applicants, the Board of Directors of the applicant company met on the 3rd July, 1978, and it decided that the only possible way to get out of their financial difficulties and the pressure of their creditors to settle their outstanding debts, was to sell part of the building. For this purpose the chairman of the Board of Directors was authorised to apply to the Land Registry Office for separate certificates of registration for each one of the shops and flats of the building.

A purchaser was found in respect of one of the flats (flat No. 40, 9th floor), a certain Faten Mahmoud Kinani from Syria who agreed to purchase the flat for £37,000.-. A contract of sale was entered into on the 26th July, 1978 and by the 31st December, 1978 the amount of £20,000.- was paid against the sale price. The profit from the sale of this flat, viz. £26,076, was treated in the company's accounts as a profit from the realization of a capital asset not liable to income tax and was transferred to the company's capital reserve.

On the other hand, the respondent treated this profit as a trading profit of the company and as in the case of immovable property sold on the instalment basis only proportion of the profit corresponding to the payments made by the purchaser in any one year is considered as the profit made in that year, reduced the amount of the loss which

the company was entitled to carry forward as on 31.12.78 by £14,091 and issued a notice of assessment to the company.

The respondent assessed the profit from the sale of the flat as liable to special contribution in the 3rd and 4th quarters of 1978 and on 6.10.80 issued a Notice of Assessment (No. 3B221/1—4/78 X) requiring the company to pay £1108.000 special contribution for the quarter ended 30.9.78 and another £2,252.500 for the quarter ended 31.12.78.

The applicants filed an objection as against the income tax assessment and also objections against the assessments for special contribution. These objections were considered by the respondents who decided to maintain the original assessments in full and issue accordingly notice of tax payable.

As a result the applicant company filed on 19th December, 1980, the present recourse.

The main argument of the applicant company—as the other arguments put forward were withdrawn during the course of the hearing—was that the profit realised from the sale of the flat was in the present case not taxable at all not being a trading transaction but a realisation of a capital asset or investment. It was argued that the applicant did not sell the flat intending to make a profit. The only reason for the sale was that there was no other way out of the financial difficulties and the pressure brought to bear upon the company to settle the instalments in arrear in respect of the loan from the Barclays Finance Corporation (Cyprus) Ltd., the sale of the flat being the only way open to the applicant in order to escape from a financial disaster. Their intention was not to make any profit but simply to pay off their debts which were accumulating greatly, year after year. This it was argued is also strengthened by the fact that when the control of the applicant company came into hands of the present shareholders, i.e. the Karandokis family, as they wanted the whole project to be a family investment, they took all necessary steps to cancel the sale on paper of one of the shops, which sale had been arranged whilst the plans were in the course of preparation. Moreover, they never advertised for sale of shops or flats and from

1972, when the building was completed, they were renting all the flats and shops ever since.

The applicants relying on the case of *Savvas M. Agrotis Ltd.* v. *The Commissioner of Income Tax*, 22 C.L.R. 27, and the case of *Rand* v. *The Alberni Land Company Ltd.*, 7 T. C. 629, referred to therein, contended that the said sale should on its facts be considered as a realisation of an investment and not a trading operation, the more so, in view of the fact that in Cyprus there is little field for investments other than in immovable property and in view of the financial difficulties that the applicant company found itself.

The respondents on the other hand, contended that in view of the relevant facts and the law, the sub judice decision was reasonably open to them and that on the authority of *Coussoumides* v. *The Republic* (1966) 3 C.L.R. 1, *Rallis Makrides* v. *The Republic* (1967) 3 C.L.R. 147, *Lilian Georghiades* v. *The Republic* (1980) 3 C.L.R. 525, and on appeal (1982) 3 C.L.R. 659, the burden was on the applicants to satisfy the Court that it should interfere with the decision complained of. The main point for consideration is whether on the particular facts the respondent Commissioner could have reasonably reached the sub judice decision.

It was further argued by the respondents that the applicant company was originally a trader in land, mainly constructing and selling flats. This was included in the objects clause of the Memorandum of the applicant company. There is no evidence that after the company was bought over by the Karandokis family, this object was abandoned. As it is admitted, the reason the flat was sold was in order to meet the instalments in arrear due on their debt to the Barclays Finance Corporation (Cyprus) Ltd., for the purpose of erecting the block of flats in question. However, it is argued by the respondents that this is not merely a case of a company finding itself in financial difficulties. The fact that the cost of the building was far higher than the bank loan indicates an intention, possibly, to meet the extra cost by selling some of the flats. In view of the above, it was submitted, that it was reasonably open to the respondents

to reach the conclusion that the transaction was in the nature of a trade in land and was thus subject to payment of special contribution.

The basic principles the Court must have in mind when dealing with decisions by the Commissioner of Income Tax were summed up in the case of *Cooper* v. *Stubbs*, 10 T. C. 29 where the following is stated at page 51:

> "The Commissioners are the judges of fact, and this Court, and every Court of Appeal from the Commissioners which has jurisdiction in questions of law only, is very much tempted, when it feels that it cannot agree with the Commissioners in the finding of fact, to find some reason in law by which that finding can be reversed. In my opinion the Court of Appeal ought to be careful not to yield to that temptation, except in very clear cases where either the Commissioners have come to their conclusion without evidence which would support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, have misdirected themselves in points of law."

What has to be decided in the present case is whether on the facts it was reasonably open to the respondent to reach the conclusion that the applicant was a trader in land. Useful guidance may be found in the case of *Californian Copper Syndicate (Limited and Reduced)* v. *Harris*, 5 T. C. 159 at pages 165-166, where we read:

> "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 1942 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 is liable to be assessed for Income Tax.

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?"

In the present case the applicant company was formed, inter alia, for the development of immovable property and for ten years there is undisputed evidence that it conducted itself as a trader in land.

In *Cayser, Irvine & Co. Ltd.*, v. *C.I.R.*, 24 T. C. 491 at page 496 the following is stated:-

"Again, there is the case where a company is formed to trade in land and is found to be dealing with its land much as this company has been found to be dealing with its land. In such a case I think it might be comparatively easy to hold that it was dealing with the land as a trader, since the company itself was formed for that very purpose."

Moreover, the fact that the applicant company embarked on such a substantial expenditure in order to construct the building in question is not characteristic of a company that merely wishes to hold an investment. On this point the following passage from the *Cayser, Irvine* case, supra, at page 497, is relevant.

"What is more important is that in the same period it spent nearly £90,000 on development. It is true that all this might have been done by the proprietor of a large landed estate in the neighbourhood of an urban area which he intended and continued to hold

as an investment, but it is not the kind of transaction which is characteristic of a company which merely wishes to hold an investment. For one thing, the maximum incidence of the expenditure thus embarked on might coincide with a period of financial embarrassment when the main line of the Company's business was in the trough of the wave. And I have noticed that that actually did occur in 1932, for it is notorious that shipping at that time was not prosperous; and that was the year in which by far the greatest expenditure was incurred on development by that Company. The large development expenditure appears to me to be on the whole consistent with the idea that the Company was carrying on a trade in land rather than with the idea that it was throughout holding it as an investment only to be realised, if at all, when it desired to meet some financial need."

Consequently, it seems to me that in the circumstances and on the basis of what was before the Commissioner of Income Tax and the relevant facts, it was reasonably open to reach the conclusion that the applicants were traders in land.

The applicants have failed to discharge the burden of satisfying this Court that the sub judice decision ought to be annulled. The recourse, therefore, fails and is hereby dismissed.

There will be no order as to costs.

Recourse dismissed.
No order as to costs.