1986 November 15

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

THEOFANO PANAYIOTOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF FINANCE AND/OR
2. THE DIRECTOR OF INLAND REVENUE DEPARTMENT,

Respondents.

(Case No. 99/86)

Taxation—Capital Gains Tax—Fictitious transaction—Agreement to sell immovable property—Transfer by seller of ½ share therein by way of gift to her husband—Later on same day the seller and her husband transferred the property to purchasers—Gift disregarded as being fictitious—Decision reasonably open to respondent 2—Section 36(1) of the Tax Assessment and Collection of Taxes Law 4/78—Sections 3(2) and 36(1)—Section 36(1) could be invoked in present case—It may be invoked in raising an assessment under any tax legislation.

Taxation—Fictitious transaction—The Tax Assessment and Collection of Taxes Law 4/78, section 36(1)—Classification of transaction as fictitious—Depends on its objective implications.

Constitutional Law—Taxation—Constitution Article 24.3—The Capital Gains Tax Law 52/80, Section 6(1)—Prospective in scope and effect and, therefore not repugnant to Article 24.3.

Construction of Statutes—Retrospectivity—Test of.

The applicant agreed to sell a plot of land for £26,000

On the day fixed for the relevant transfer, the applicant transferred by way of gift one half share in the plot to her husband. Later on the same day her husband joined her in transferring the property to the purchasers.

In exercise of the powers vested in him under s. 36(1) of Law 4/78 respondent 2 treated the gift as a fictitious transaction and charged the applicant under Law 52/80 to capital gains tax for the whole amount.

Hence the present recourse. Counsel for the applicant argued that section 6(1) of Law 52/80 is retrospective in character, in that the assessment of the value of the property is made with reference to an antecedent date, that is 27.6.78, and, therefore, repugnant to Article 24.3 of the Constitution and that section 36(1) of Law 4/78 is not applicable to the raising of an assessment of capital gains tax.

Held, dismissing the recourse: (1) The classification of a transaction, whether or not of a contractual character, depends on its objective implications and the person charged by s. 36(1) of Law 4/78 to judge such implication is the Director of Inland Revenue. In this case it is difficult to escape the conclusion that the gift was fictitious, that is, it had an object other than the one declared, namely the enrichment of applicant's husband.

(2) The test of retrospectivity of a statute is whether the statute in question impairs existing rights and obligations. If it has that effect it is retrospective *(Yew Bon Tew* v. *Kenderaan Bar Maro* [1982] 3 All E.R. 833 adopted). Law 52/80 did not alter the tax obligations of the applicant prior to the date of its enactment. It is prospective in scope and effect.

(3) Section 3(2) of Law 4/78 expressly empowers the Director to invoke s. 36(1) in raising an assessment under any tax legislation. Law 4/78 is not limited in scope to assessments under the Income Tax Laws, but it is a comprehensive enactment for the effective enforcement of tax legislation generally.

Recourse dismissed.
No order as to costs.

Cases referred to:

Newstead v. *Frost* [1978] 2 All E.R. 241;

Furniss v. *Frost* [1984] 1 All E.R. 530;

Santis and Others v. *The Republic* (1983) 3 C.L.R. 419;

Yew Bon Tew v. *Kenderaan Bar Mara* [1982] 3 All E.R. 833;

Papaconstantinou and Another v. *The Director of Inland Revenue* (1986) 3 C.L.R. 1672.

Recourse.

Recourse against the decision of the Director of Inland Revenue whereby the applicant was charged to capital gains tax for the whole amount she agreed to sell her property i.e. £26,000.- disregarding the gift of one half share to her husband who joined her later on the same day in transferring the property to the purchasers.

D. Papachrysostomou, for the applicant.

Y. Lazarou, for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. The applicant was the owner of a plot of immovable property. She agreed to sell it for £26,000.-. On the day set for transfer but before effecting it, she conveyed by way of gift one half share to her husband who joined her later that day in transferring the property to the purchasers.

In exercise of the powers vested him by s.36(1) of the Assessment and Collection of Taxes Law (4/78) the Director charged the applicant to capital gains tax for the whole amount, disregarding the gift as a fictitious transaction, solely designed to reduce her liability to tax under the Capital Gains Tax Law 1980—Law 52/80.

In her address applicant acknowledges that the gift had a tax objective intended, in the words of counsel, to make it possible for the husband to share in the tax liabilities of his wife. Whatever gloss one may put upon the facts surrounding the gift, it is difficult to escape the conclusion that the transaction was fictitious, that is, it had an object other than the apparent or declared one, namely the enrichment of the husband by the property gifted to him. On the authority of *Newstead* v. *Frost*[1] and the cases reviewed therein, the classification of a transaction as fictitious depends on its objective implications; not the subjective motives of the parties associated therewith. And this is equally true, as explained in *Furniss* v. *Dawson*[2], whether the transaction has a contractual or non contractual character. The one charged by s. 36(1) to judge within the framework of his administrative duties the implications of the transaction is the Director of Inland Revenue.

The conclusion of the Director that the transaction was fictitious was reasonably open to him, if not unavoidable. The property was sold by the applicant before the gift. The gift to her husband, as subsequent events showed, did not cause any embarrassment in the discharge of her contractual obligations. On the contrary, the husband did as she had contracted to do. The inescapable inference is that the property was gifted to the husband with sure knowledge he would be a party to the implementation of her contractual obligations. The only effect of the gift was to reduce the liability to tax of the applicant.

Notwithstanding the amenity of the Director to classify the transaction as fictitious, given the facts of the case, applicant contended this course was not open to him because of -

(a) the inapplicability of s. 36(1) to the raising of an assessment to capital gains tax and

(b) the retrospective character of the tax imposed by Law 52/80 arising from the assessment of the value of the property by reference to an antecedent date, that is 27.6.78.

The argument is that the relevant provision of the law, notably s. 6(1), was enacted in breach of the provisions of

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1 [1978] 2 All E.R. 241.
2 [1984] 1 All E.R. 530 (H.L.).

Article 24.3 of the Constitution, prohibiting retrospective taxation.

The Constitutionality of Law 52/80:

As I had occasion to explain in *Santis & Others* v. *The Republic*[1],

> "Retrospectivity, in the context of legislation, primarily signifies alteration of rights and the imposition of obligations ex post facto. It is a course regarded as repugnant to fairness and justice, destructive of certainty in the law and the legal process."

Later on it was observed:

> "It is imperative to keep in perspective that a Statute is not repugnant in character merely because the rights accruing thereunder are determinable by reference to past events. Events of the past and experience gained in times gone is the underlying theme of most Statutes. A statute retains its prospective character so long as rights conferred thereunder, or obligations created thereby, arise from the date of its enactment or from a future date."

The test of retrospectivity, as indicated by the Privy Council in *Yew Bon Tew* v. *Kenteraan Bar Mara*[2] is whether the statute impairs existing rights and obligations. If it has that effect it is retrospective; but not otherwise. The law here under consideration is, in my judgment, prospective in scope and effect. It does not alter the tax obligations of the applicant prior to the date of its enactment. In fact, the obligation to pay tax under the statute arose years after its enactment on 29.3.84. coincident with the sale of immovable property.

Similar submissions of unconstitutionality of Law 52/80 found no favour with A. Loizou, J., in *Papaconstantinou and Another* v. *The Director of the Department of Inland Revenue*[3]. He dismissed them as untenable, ruling

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1 (1983) 3 C.L.R. 419. 423.
2 [1982] 3 All E.R. 833.
3 See Cases Nos. 1005/85 and 1006/86, decided on 23.9.86 -- (Reported in (1986) 3 C.L.R. 1672).

that the law is prospective in character, leaving unaffected rights and obligations that crystallized prior to the enactment of the law I am of the same opinion and for much the same reasons I hold likewise

Applicability of the Provisions of 36(1)—Law 4/78—to Assessment of Capital Gains Tax

The applicability of s 36(1) to the raising of an assessment to capital gains tax turns on the interpretation and scope of s 3(2) and s 3(3) of Law 4/78 In agreement with counsel for the respondents, I find that s 3(2) expressly empowers the Director to invoke s 36(1) in raising an assessment under any tax legislation The submission of counsel for the applicant that the existence of machinery under Law 52/80 to raise an assessment under the specific statute is not conclusive and cannot be reconciled with the provisions of s 3(2) The Assessment and Collection of Taxes Law—4/78—is not limited in scope to assessments raised under the Income Tax Laws It is an enactment intended to make comprehensive provision for the effective enforcement of tax legislation generally Consequently, the Director could legitimately invoke the powers under s 36(1) and disregard the gift to the husband as fictitious

The recourse fails The decision of the Director is affirmed under Article 146 4(a) of the Constitution

Let there be no order as to costs

Recourse dismissed
No order as to costs