1986 November 26

[A. LOIZOU, J.]

IN THE MATTER OF THE ARTICLE 146
OF THE CONSTITUTION

RIVER ESTATES LTD.,

*Applicants,*

v.

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

*Respondents.*

*(Case No. 540/84).*

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*Income tax—The Assessment and Collection of Taxes Laws, 1978 - 1979—Section 23—Ambit of.*

*Income tax— Assessments —Judicial control —Principles applicable.*

*Income tax—Trading in land—Sale of land, profit from—Facts relevant to the issue whether such profit is liable to income tax—The Income Tax Laws, 1961 - 1985, section 5(1)(a).*

*Income tax —Deductible expenses —Mortgage and commission expenses for securing a loan to be employed for acquiring an investment—In the circumstances not deductible—What expenses are, in ascertaining the chargeable income, deductible—The Income Tax Laws, 1961 - 1979, sections 11(1) and 13(c), (e) and (f).*

*Special Contribution—Capital allowance in respect of expenditure incurred for the construction of a building—The Special Contribution (Temporary Provisions) Law 34/78 as amended by Law 29/79, section 6 and paras. 2 and 3 of the Schedule thereto—Claim for such allowance cannot stand—The Income Tax Laws, 1961 - 1981, section 12(2)(b), (c) and (d).*

*Income Tax—Deductions and allowances—The Income Tax Laws, 1961-1981—Sections 12(2)(b), (c) and (d)—Paragraph (d) applies subject to paragraphs (b) and (c).*

*Income tax—Deductible expenses —The Income Tax Laws, section 11—"Common expenses" paid by tenants of block of flat to landlords—Landlords entitled to deduction of amount equal to their actual expenditure for such expenses.*

One of the main objects of the applicant company is "The acquisition by purchase, gift, lease or exchange or otherwise in Cyprus or elsewhere any lands, leaseholds or property of any kind of ownership either under any charges, obligations or not and the retaining or sale, lease, alienation, mortgage, charge or any other way disposition of all or any of such land premises and immovable properties".

This recourse is directed against the decision of the respondent Commissioner, whereby: (a) He considered as liable to income tax the profit realised from the sale in 1973 of 12/16th shares in a plot of land under Reg. A833/768 at Ayii Omoloyites purchased by the applicants in 1969 (the consideration of the sale was that the purchasers would built a block of flats to the value of £44,000 on the remaining share of the plot of land), (b) He disallowed the following deductions claimed by the applicants, that is £481.- paid by applicants in 1973 as mortgage expenses for securing a loan of £40,000, £9,700 paid by applicants in 1974 as commission for securing a loan, capital allowance for special contribution purposes in respect of expenditure in the construction of the block of flats, and (c) He considered that common expenses collected from tenants in the form of rents were liable to special contribution.

It should be noted that as the applicants had submitted their accounts for the year 1973 (year of assessment 1974) in 1974, whereas the same were rejected by the Commissioner in 1984, i.e. ten years later, the applicants raised the preliminary point that the rejection was invalid as the assessment was not disputed in time. The same point was raised in respect of all the years upto and including the

year of assessment 1977 (76). In support of their submission the applicants relied on s. 23(1) of the Assessment and Collection of Taxes Laws, 1978 - 1979.

*Held,* (1) Section 23 of the aforesaid laws is confined to instances where the Commissioner raises an assessment or additional assessment and does not cover instances such as the present case, where no assessment or additional assessment was raised imposing tax, because the tax payer had no income liable to tax, and what was done was merely to adjust a negative figure.

(2) This Court does not disturb an assessment, if it is a decision which could reasonably and properly, in law and in fact, be reached by the taxing authority. The substance of this case has to be considered in the light of such principle.

(3) Section 5(1)(a) of the Income Tax Laws, 1961-1985 provides that where a person buys and sells land he can be assessed to tax upon any gain or profit if it is shown that he was carrying on business of buying and selling land. The case law shows that it is permissible to look at the objects of a company as described in its constitution. In this case it is clear that the company was formed for the purpose of trading in land. Another relevant factor is that the land in question was sold after a relatively short period of ownership, something which is not a characteristic of a company that merely wishes to hold an investment. Moreover, the fact that the land was situated in an area with high development potential and the fact that it yielded no income indicate that it was held as a trading stock. The fact that the land in question was shown in the applicants' books as a "fixed asset" is not conclusive of their intention to hold it as an investment. The fact that the transaction in question was the only one since the incorporation of the company does not mean that the profit therefrom escapes tax, because it is clear from the definition of trade that even the profit of an isolated transaction is taxable. In the light of the above it was reasonably open to the Commissioner to treat the profit in question as liable to income tax.

(4) The mortgage and commission expenses were paid in order to acquire a loan, namely capital which was to be employed for the purpose of acquiring an investment. It is well settled that no deduction is allowable, in ascertaining the chargeable income, in respect of expenditure not wholly or exclusively made for the purpose of acquiring the income or in respect of capital or incurred in acquiring capital (The Income Tax Laws, 1961 - 1979, sections 11(1) and 13(c), (e), (f).

(5) The question, whether the expenditure incurred in the construction of flats qualifies for capital allowance for special contribution purposes, is governed by section 6 of Law 34/78 as amended by Law 29/79 and paragraphs 2 and 3 of the Schedule thereto*. It is clear that the investment deduction allowed under section 12(2)(b) and (c) of the Income Tax Laws, 1961 - 1981 for the acquisition of plant and machinery and the construction of buildings is not applicable for special contribution purposes. Since such deductions are not permitted the claim for capital allowance for the "expenditure it incurred on the acquisition of buildings" (Section 2(2)(d) of the aforesaid Income Tax Laws) for special contribution purposes cannot stand, because paragraph (d) applies subject to paragraphs (b) and (c) of section 12(2), which for special contribution purposes are expressly excluded. Regarding applicants' contention that they were entitled to the wear and tear allowance permissible for income tax purposes, this Court is of the opinion that the only allowance permissible under the Special Contribution Laws is a flat rate of 25% on the income from rents as well as the interest on capital borrowed for acquiring the building the rent of which is liable to special contribution.

(6) The "common expenses" though paid by the tenants do not amount to rent. They usually consist of expenses required for the smooth running of a block of flats, such as electricity for common use places, for the lift, cleaning of common use places etc. These expenses were paid to the landlords (the applicants) in consideration of actual expenses incurred by them for achieving the

* These provisions are quoted at pp. 2590-2591.

above purposes. It follows that the applicants were entitled to a deduction equal to their actual expenditure. This part of the decision has, therefore, to be annulled.

*Sub judice decision annulled in part. No order as to costs.*

Cases referred to:

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

*Minerva Cinetheatrical Co. Ltd.* v. *The Republic* (1975) 3 C.L.R. 116;

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

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

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

*Tsangaridou* v. *The Republic* (1969) 3 C.L.R. 409;

*Georghiades* v. *The Republic* (1982) 3 C.L.R. 659;

*Californian Copper Syndicate (Limited and Reduced)* v. *Harris* [1904] 5 T. C. 159;

*Commissioners of Taxes* v. *Melbourne Trust Ltd.* [1914] A. C. 1001;

*Reed Roturbo Development Syndicate Ltd.* v. *Ducker*, 13 T. C. 366;

*Cooksey and Biddey* v. *Rendnall (H.M. Inspector of Taxes)*, 30 T.C. 514;

*Cayser, Irvine and Co. Ltd.* v. *C.I.R.*, 24 T.C. 491;

*Turner* v. *Last* [1965] 4 T.C. 517;

*Eames* v. *Stepnell Properties Ltd.* [1966] 43 T.C. 672;

*Snell* v. *Rosser Thomas and Co.*, 44 T.C. 343;

*Georghiades* v. *The Republic* (1980) 3 C.L.R. 525;

*Georghiades* v. *The Republic* (1982) 3 C.L.R. 659;

*Granville Building Co. Ltd.* v. *Oxby*, 35 T.C. 245;

*Balgownie Land Trust Ltd.* v. *The Commissioners of Inland Revenue*, 14 T.C. 684;

*The European Investment Trust Company Ltd.* v. *Jackson (H.M. Inspector of Taxes)*, 18 T.C. 1;

*Ascot Gas Water Heaters Ltd.* v. *Duff (H.M. Inspector of Taxes)*, 24 T.C. 171;

*Bridgwater* v. *King (H.M. Inspector of Taxes)*, 25 T.C. 385;

*Panos Lanitis and Sons (Investments) Ltd.* v. *The Republic* (1984) 3 C.L.R. 1588;

*Panos Lanitis and Sons (Investments) Ltd.* v. *The Republic* (1973) 3 C.L.R. 667.

**Recourse.**

Recourse against the assessment in respect of income tax and special contribution raised on applicants for the years 1974 to 1982.

*C. Indianos*, for the applicants.

*Y. Lazarou*, for the respondents.

*Cur. adv. vult.*

A. Loizou J. read the following judgment. The applicant Company in this recourse prayed for an "Order and/or Declaration that the decision and/or act of the respondents to impose upon the applicants for the years 1974 (73) to 1982 both income tax and special contribution as per assessment (FILE No. 91 01 231/ON3) and/or as per their letter to applicants of the 23.7.1984 is null and void and of no effect whatsoever."

The facts pertaining to the recourse were these: The applicants are a Company limited by shares duly registered under the Companies Law, Cap. 113 and one of its main objects is the following:-

«Η απόκτησις δι' αγοράς, δωρεάς, ενοικιάσεως ή ανταλλαγής ή άλλως πως εν Κύπρω ή αλλαχού οιων-

δήποτε γαιών, μισθωτών κτημάτων ή οικημάτων οιασδήποτε μορφής ιδιοκτησίας, είτε δ·ατελουσών υπό οιασδήποτε επιβαρύνσεις ή υποχρεώσεις είτε μή, και η κράτησις ή πώλησις, ενοικίασις, απαλλοτρίωσις, υποθήκευσ·ς, επ·βάρυνσις ή κατ' άλλον τρόπον διάθεσις πασών ή οιωνδήποτε των τοιούτων γαιών, και ακινήτων κτημάτων».

And in English it reads:

"The acquisition by purchase, gift, lease or exchange or otherwise in Cyprus or elsewhere any lands, leaseholds or property of any kind of ownership either under any charges, obligations or not and the retaining or sale, lease, alienation, mortgage, charge or any other way disposition of all or any of such land premises and immovable properties."

The respondent Commissioner of Income Tax, upon examination of the returns and accounts submitted by the applicant Company for the years 1973 to 1982 on various dates, raised among others the following points:

"(a) Liability to tax, the profit or gain amounting to £13,449 realised from the sale of 12/16th share of a plot of land under registration No. A833/768 at Ayii Omologites purchased for £35,000 £1,400 land transfer fees in February, 1969.

The sale was made to Lordos and Florentiades Ltd. in 1973 and the consideration was that Lordos and Florentiades Ltd. would built a block of flats to the value of £44.000 on the remaining share of the plot of land i.e. 4/16th.

(b) Mortgage expenses amounting to £481 in 1973 for securing a loan of £40,000.-.

(c) Commission of £9,700 paid in 1974 for securing a loan of £40,000.-.

(d) Common expenses collected from Tenants which were in the form of rents and was liable to special contribution in accordance with the provisions of paragraph 3 of the Schedule to the

Special Contribution (Temporary Provisions) Law No. 34 of 1978 as amended by Law No. 29 of 1979.

(e) The expenditure incurred by the applicant Company in the construction of the block of flats did not qualify for capital allowances for special contribution purposes in accordance with the provisions of paragraphs 2 and 3 of the Schedule to the Special Contribution (Temporary Provisions) Law 34 of 1978 as amended by Law No. 29 of 1979."

The respondent Commissioner after taking into consideration all factors relating to the above points communicated his decision by letter of 4th April, 1984 (Appendix B).

On behalf of the applicant Company, its auditors Messrs Costouris Michaelides & Co. objected to the above decision of the respondent Commissioner by their letter of 30th April, 1984, (Appendix C) on grounds stated therein.

The respondent Commissioner after taking into consideration the grounds of objection raised by the applicant Company decided finally upon the points raised above (paragraph 4 of the opposition) and communicated his decision to the applicant Company by letter of 22nd May, 1984, (Appendix D) but as this was not received by them the letter was readdressed to the applicant Company on the 23rd July, 1984.

In the light of the letter of the respondent Commissioner (Appendix D) the applicant Company's Taxation Consultant Mr. Nicos G. Ionides objected to the decision taken by the respondent Commissioner and communicated his views by his letter of the 30th August 1984, (Appendix E). But as a final decision was already taken by the respondent Commissioner as communicated to the applicant Company by letter of 23rd July, 1984 (Appendix D) the objection of Mr. N. G. Ionides was not entertained and no reply given.

The recourse was in effect directed against the special contribution levied and determined for the quarters ended

30th June 1981, 30th September 1981, 31st December 1981, 31st March 1982, 30th June 1982, 30th September 1982 and 31st December 1982, as per Schedule A, and against the decision of the respondent Commissioner to assess profits or gains made from dealing in land and to disallow the aforesaid expenses.

As the applicant Company submitted to the respondents their accounts for the year 1973 (year of assessment 1974) and same were rejected by the respondents on the 4th April 1984, i.e. ten years later the applicant Company raised a preliminary objection to the effect that the rejection was invalid as the above assessment was not disputed in time. Further the applicant Company said that the same principle applies to all years up to and including the year of assessment 1977 (76).

Without prejudice to the above preliminary objection the applicant Company relied on the following grounds of Law:-

"The respondents act and/or decision to consider, inter alia, that the profit from the sale of land was liable to tax, that mortgage expenses was not an allowable deduction, that commission paid was also not an allowable deduction, that income in the form of common expenses collected took the form of rents and was liable to special contribution, that expenditure incurred in the acquisition of buildings could not be allowed as a deduction, as a result of which applicants were assessed to pay tax and special contribution, was wrong and/or arbitrary and/or unreasonable and/or was made in excess and/or abuse of their powers and/or was taken as a result of a bad and/or wrong exercise of their discretionary powers and/or contrary to the provisions of the Income Tax Laws 1961 - 1984 and the Special Contribution (Temporary Provisions) Laws 1978 - 1984 and/or after a wrong interpretation of the above Laws and/or is unlawful and/or was reached at without full investigation of all the facts of the case and/or is not duly reasoned."

On the other hand the respondents opposed the recourse on the following grounds of Law:

The acts and or decisions complained of were properly and lawfully taken after all relevant facts and circumstances were taken into consideration. viz:

(a) The decision of the respondent Commissioner of Income Tax to treat the transactions in land carried on by the applicant Company as transaction in the nature of trade and to assess the profit realised therefrom as profit coming under the provisions of section 5(1)(a) of the Income Tax Laws 1961 to 1979 was correctly and lawfully taken having regard to the facts and all the circumstances of the case.

(b) The respondent Commissioner correctly and lawfully as provided under sections 11(1) and 13(e) of the Income Tax Laws 1961 to 1979, decided not to allow the commissions paid and mortgage expenses as such expenses were not expenses wholly and exclusively incurred in the production of income.

(c) The special contribution for the quarters ended 30.6.81, 30.9.81, 31.12.81, 31.3.82, 30.6.82, 30.9.82 and 31.12.82 were levied under sections 3, 6 and 10 of the Special Contribution (Temporary Provisions) Law No. 34 of 1978 as amended by Law No. 29 of 1979, Law No. 12 of 1980, Law No. 13 of 1981, Law No. 12 of 1982, Law No. 13 of 1983 and Law No. 31 of 1984 and sections 3, 13(2)(b) and 23(1) of the Assessment and Collection of Taxes Laws 1978 to 1979.

(d) The objections to the above special contribution levied and to the decisions above were determined under section 20(5) of the Assessment and Collection of Taxes Laws 1978 to 1979.

Dealing first with the preliminary objection I am of the opinion that the period of limitation provided by section 23(1) of the Assessment and Collection of Taxes Laws 1978-1979—and on which the objection is based, is confined to instances where the Commissioner raises an assessment or

additional assessment and does not cover cases such as the instant one where no assessment or additional assessment was raised imposing tax, because the tax payer had no income liable to tax, and what was done was merely to adjust a negative figure. This conclusion is also born out from the case of *Mavrommati* v. *Republic* (1966) 3 C.L.R. 143 in which it was held that the period of six years prescribed by section 45 of the Income Tax Law, Cap. 323 and The Taxes (Quantifying and Recovery) Law, 1963 (Law No. 53 of 1963) is to be reckoned as from the date when an assessment is made.

Dealing, next, with the substance of the recourse I will consider first the principles governing judicial review of taxation decisions. According to the case-law the approach of this Court to the validity of a tax assessment, which is attacked by a recourse under Article 146 of the Constitution, has always been that it does not disturb such assessment if it is a decision which could reasonably and properly, in law and in fact, be reached by the taxing authority (see *Minerva Cinetheatrical Co. Ltd.*, v. *Republic* (1975) 3 C.L.R. 116 at p. 133; *Clift* v. *Republic* (1965) 3 C.L.R. 285 at p. 289; *Christides* v. *Republic* (1966) 3 C.L.R. 732 at p. 755; *Makrides* v. *Republic* (1967) 3 C.L.R. 147 at p. 154; *Tsangaridou* v. *Republic* (1969) 3 C.L.R. 409 at p. 416, and *Georghiades* v. *Republic* (1982) 3 C.L.R. 659 (F. B.) at pp. 667-669).

Having said the above I will proceed to deal with each and every one of the grounds of law in support of the recourse.

(a) *Profit from the sale of land:*

It is clear from the provisions of section 5(1)(a) of the Income Tax Laws 1961 - 1985 that where a person buys and sells land he can be assessed to tax upon any gain or profit if it is shown that he was carrying on a business of buying and selling land. And there arises the question whether on the facts it was reasonably open to the respondent Commissioner to reach the conclusion that the applicant was a Trader in land.

In *California Copper Syndicate (Limited and Reduced)* v. *Haris* [1904] 5 T.C. 159, Clerk L. J. at pages 165-166 had this to say:

> "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 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 land 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."

The above case and the cases of *Commissioners of Taxes* v. *Melbourne Trust Ltd.* [1914] A.C. 1001; *Reed Roturbo Development Syndicate Ltd.* v. *Ducker*, 13 T.C. 366 and *Cooksey and Bibbey* v. *Rendnall (H.M. Inspector of Taxes)*, 30 T.C. 514, show that it is permissible to look at the objects of a company as described in its constitution, in the memorandum of association, for the purposes of discovering the objects and intention with which a company makes a particular parchase.

Looking now at the objects of the applicant Company as same appear in paragraph 3 of its memorandum—quoted hereinabove—it is abundantly clear that the Company was formed for the purpose of trading in land.

Relevant in this respect is the case of *Cayser, Irvine & Co. Ltd.* v. *C.I.R.*, 24 T.C. 491, at p. 496 where the following were 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."

Another relevant factor is the fact that the applicant Company sold the land after a relatively short period of ownership—three years—something which is not a characteristic of a company that merely wishes to hold an investment.

In this respect reference may be made to *Turner* v. *Last* [1965] 4 T.C. 517, at p. 523:

"Of course the mere fact that when you buy property as well as intending to use it and enjoy it, you have also in mind the possibility that it will appreciate in value and that a time may come when you want to sell it and make a profit on it does not of itself make you a trader; but if the position is that you intend to sell it as soon as you can recover the cost of the purchase, the position is obviously very different."

The same approach appears in the judgment of Buckley, J., in *Eames* v. *Stepnell Properties Ltd.* [1966] 43 T.C. 672 where he said that "one element at least of an investment is that the acquirer intends to hold it for some time, with a view to obtaining either some benefit in the way of income in the meantime or obtaining some profit."

Another factor to be considered is the fact that the land was situated in an area with high development potential and the fact that it yielded no income prior to the sale situations that indicate that the land was held as trading stock. Relevant in this connection is the case of *Snell* v. *Rosser Thomas and Co.* 44 T.C. 343 in which the taxpayer—a developer bought a house and 5¾ acres of land. The house produces rent but the land produces no income and was, thus, held to be stock-in-trade.

Relevant are, also, the following dicta of Pikis J., in

*Lilian Georghiades* v. *The Republic* (1982) 3 C.L.R. 659, 670:

> "The character of the land purchased, its state of development and future potential as well as the income it yields in future, is a most consequential factor ..... 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 the 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."

Reference may also be made to the first instance judgment in *Lilian Georghiades* v. *The Republic* (1980) 3 C.L.R. 525 where I had the occasion to make an extensive analysis of these issues which were confirmed on appeal by the Full Bench.

Nor does the fact that in this case the land as shown in the applicant's books is a fixed asset is per se conclusive evidence of the applicant Company's intention to hold the property as an investment. (See *Granville Building Co., Ltd.*, v. *Oxby*, 35 T.C. 245.)

Also the fact that the transaction was the only one since the incorporation of the applicant Company does not mean that the profit therefrom escapes tax because it is clear from the definition of "trade" that even the profit of an isolated transaction is taxable. See the judgment of Lord President Clyde in *Balgownie Land Trust Ltd.* v. *The Commissioners of Inland Revenue*, 14 T.C. 684 at page 691:

> "A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade."

In view of the purpose for which the applicant Company was formed and all the above circumstances I hold that the conclusion reached by the Commissioner in respect of the above transaction was reasonably open to him on the material before him.

(b) *Mortgage expenses:*

In this case the expenditure was incurred in order to increase the applicant Company's capital; and it is a well-settled principle of income tax law that no deduction is allowable, in ascertaining the chargeable income, in respect of expenditure not wholly and exclusively laid out or expended for the purpose of acquiring the income, or in respect of capital, or any expense incurred in acquiring capital (sections 11(1) and 13(c), (e), (f) of the Income Tax Laws, 1961 - 1979). (See *The European Investment Trust Company Ltd.* v. *Jackson (H. M. Inspector of Taxes),* 18 T. C. 1, which was followed and applied in *Ascot Gas Water Heaters Ltd.* v. *Duff (H.M. Inspector of Taxes),* 24 T. C. 171 and *Bridgwater* v. *King (H. M. Inspector of Taxes),* 25 T.C. 385).

In view of the above the decision of the respondent Commissioner in relation to the item of "mortgage expenses" cannot be faulted in any way.

(c) *Commission expenses:*

My approach regarding this item is the same as the approach regarding the mortgage expenses because, again, the commission was paid in order to acquire a loan, namely capital which was to be employed for the purpose of acquiring an investment. (See *Panos Lanitis and Sons (Investments) Ltd.* v. *The Republic* (1984) 3 C.L.R. 1588. in which the Supreme Court held that interest on borrowed money, employed as capital in the trade is not an allowable deduction. and also my first instance judgment reported under the same name in (1973) 3 C.L.R. 667).

Therefore the contention of counsel for the applicant Company regarding this item is bound to fail.

(d) *Expenditure incurred in the construction of flats.*

The relevant statutory provision governing the above item is section 6 of the Special Contribution (Temporary Provisions) Law No. 34 of 1978 as amended by Law No. 29 of 1979 and paragraphs 2 and 3 of the Schedule thereto which read:

"6. The provisions of the Income Tax Laws and the Taxes (Quantifying and Recovery) Laws in force for the time being shall apply mutatis mutandis, subject to the amendments set forth in the Schedule, but no personal allowance shall be granted and no income shall be exempt from the contribution save -

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(2) Subject to the provisions of paragraph 3, in ascertaining the income, there shall be allowed all deductions under the Income Tax in force for the time being, with the exception of the following:

(a) the investment deduction allowed under the provisions of paragraphs (b) and (c) of sub-section (2) of section 12;

(b) the depletion allowance granted under the provisions of section 5 of the First Schedule:

(c) the loss carried forward from previous years:

Provided that for the quarter beginning as from the 1st April 1976 and thereafter, where the amount of a

loss which if it were a gain or profit would be chargeable to tax under section 3 is such that it cannot be wholly set off against a person's income from other sources for that quarter, the amount of such loss shall, to the extent to which it is not so set off, be carried forward and set off against such person's income for the subsequent quarters until such loss is exhausted.

(3) In computing the income from rents, there shall be allowed as a deduction twenty-five per cent of such gross income, as well as the interest on the capital borrowed for acquiring the building the rent of which is subject to the payment of special contribution:

Provided that where there has been a reduction of rent under any law in force for the time being, the special conrtibution in respect of those rents, such calculated before reduction, shall be reduced by the amount by which the rent has been reduced."

From a mere reading of the above-quoted section 6, it is clear that the Income Tax Law applies mutatis mutandis to cases of special contribution; and that such application is subject to the amendments referred to in the Schedule to the Special Contribution Laws. It is, also, clear from the aforequoted provision of paragraph 2 (a) of the Schedule that for special contribution purposes the investment allowance which is granted for income tax purposes under the provisions of paragraphs (b) and (c) respectively of sub-section (2) of section 12 of the Income Tax Laws 1961-1981 for the acquisition of new plant and machinery and for the construction of buildings is not deductible for special contribution purposes. Since therefore such allowances are not permitted the claim of the applicant Company that it is entitled to capital allowances for the "expenditure it incurred on the acquisition of buildings" for letting purposes cannot stand for the provisions of paragraph (d) of sub-section (2) of section 12 are applicable only if paragrahps (b) and (c) were also applicable, because paragraph (d) applies subject to the provisions of paragraphs (b) and (c) which, for special contribution purposes, are expressly excluded.

In view of all the above applicant Company's contention regarding the above item must fail.

Now regarding applicant Company's contention that it is entitled for special contribution purposes to the wear and tear allowance permissible for income tax purposes, I am of the opinion that the matter is governed by the aforequoted paragraph (d) of the above Schedule whereby the only allowance permissible under the Special Contribution Laws in respect of income from rents is a flat rate of 25% of such gross income as well as the interest on capital borrowed for acquiring the building the rent of which is liable to special contribution.

Therefore applicant Company's contention must fail.

(e) *Common expenses:*

Regarding the above item learned counsel for the respondent Commissioner contended that the common expenses "are in fact part of the rent paid to the company by each tenant for the lettings of its premises, that is, for the use by the tenants of facilities provided by the landlord, and therefore such amounts, with the exception of 25% which represents a flat rate allowance granted as a deduction under paragraph 3 of the Special Contribution Laws in respect of income from rents, are liable to special contribution."

On the other hand learned counsel for the applicant Company submitted that "these expenses are not income or rent. They are merely expenses on common utilities (parts) paid in the first instance by the landlord (applicants) and later recovered from the tenants.

Now under Section 11 of the Income Tax Laws for the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred by such person in the production of the income and there follows an enumeration of items expressly named in the aforesaid category. The amount to rent. They usually consist of expenses—such as "common expenses" though paid by the tenants do not

electricity for common use places, electricity for the lift, clearing of common use places etc—which are required for the smooth running of a block of flats; and their height is usually not flat but it depends on the actual expenses incurred for achieving the above purposes. And though in this case the applicant—landlord was paid the common expenses by the tenants it is, at the same time, true that these expenses were paid in consideration of actual expenses incurred by the landlord for achieving the above purposes — i.e. clearing electricity etc.

This being the actual position, I think that in respect of this item the applicant Company is entitled to a deduction equal to the actual expenditure it incurred in relation to common expenses and not to a deduction of 25% as submitted by counsel for the respondent Commissioner.

Moreover it can in any event be safely said that generally speaking a landlord acts as the conduit pipe between the tenants and the management of the block of flats or the other co-owners or tenants—as the arrangement between them regarding the payment of common expenses may be—towards whom the landlord is liable for the payment of the common expenses.

In view of the above the decision of the respondent Comissioner to ignore the actual expenditure incurred for the purpose of acquiring the income is a decision contrary to law, i.e. section 11 of the Income Tax Laws, and has to be annulled.

In the result the sub judice decision is annulled to the extent above indicated and is confirmed regarding its remaining parts. There will be however, no order as to costs.

*Sub judice decision partly annulled. No order as to costs.*