

1987 December 29

[A LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

YIANNOULA A. PISSARIDES,

Applicant.

v

- THE REPUBLIC OF CYPRUS, THROUGH
- 1. THE MINISTRY OF FINANCE
- 2. THE DIRECTOR OF INLAND REVENUE.

Respondents.

(Case No. 197/86).

Taxation — «Artificial» or «Fictitious» transactions — The Collection and Assessment of Taxes Law 1978-1979 — Section 36(1) — Review of authorities expounding the meaning of the aforesaid terms — The question for this Court is whether it was reasonably open to the Commissioner to treat a transaction as «artificial» or «fictitious» — Capital Gains Tax — Gift of building site by applicant to her husband, who on the same day and at the same time transferred it in the name of another in consideration of a purchase price — In the circumstances, it was reasonably open to the Commissioner to treat such gift as «artificial» or «fictitious». 5

Immovable property — Transfer of — Declaration on Form I R. 302 — Court cannot accept anything inconsistent with its contents merely because it is useful so to do on a given occasion 10

Between the years 1958 to 1970 the applicant acquired by gift from her father a building site at Strovolos. On 28.7.83 she gifted the said site to her husband, who on the same day and at the same time transferred it in the name of E. Andreou in consideration of a sale price £15,000. 15

On 23.4.85, the respondent, having decided that section 36(1) of the Assessment and Collection of Taxes Law 1978-1979 was applicable, issued to the applicant a notice of assessment of Capital Gains Tax.

The applicant objected, alleging that the site in question was purchased from applicant's father in 1958 by her husband but it was registered in applicant's name because her husband could not attend at the District Lands Office Nicosia, as he was then an employee of the firm of Accountants, Russel and Co. Nicosia. 20

It must be noted that if the tax had been payable by applicant's husband, he would have been liable to pay only £200 — because he could claim an exemption of £5,000. (Section 5(1) of the Capital Gains Tax Law,) whereas, if it had been payable by the applicant, she would have had to pay £700 in view of previous disposals made by her.

As the objection of the applicant was turned down by the respondent, the present recourse was filed

Held, dismissing the recourse: (1) The point at issue is whether in such circumstances it was open to the respondent Director to treat the gift of the land by the applicant to her husband as fictitious or artificial and disregard same.

(2) Under section 36(1) of the Assessment and Collection of Taxes Laws 1978-1979 the respondent Director is empowered to disregard any transaction, which is artificial or fictitious and was entered into or done solely for the purpose of reducing or extinguishing one's liability to tax. (See *HjiEraklis v. The Commissioner of Income Tax* (1984) 3 C.L.R. 604; *T.Z. Guarantee Developments Ltd. v. The Republic* (1986) 3 C.L.R. 381, *Panayiotou v. The Republic* (1986) 3 C.L.R. 2311.

(3) The words «artificial» and «fictitious» in section 36(1) were judicially considered by this Court in a number of cases. In the light of all the circumstances of this case, the question should be answered in the affirmative.

(4) The allegation that applicant's husband purchased the site from her father in 1985 is both unsubstantiated and inconsistent with her own declaration on Form I.R.302. Form I.R. 302 is a formal document prescribed by law and the Courts cannot accept anything inconsistent with its contents that may render the same «as not containing true statements merely because it is useful so to do on a given occasion.»

Recourse dismissed.

No order as to costs

Cases referred to.

HjiEraklis v. The Commissioner of Income Tax (1984) 3 C.L.R. 604;

T.Z. Guarantee Development Ltd. v. The Republic (1986) 3 C.L.R. 381;

Panayiotou v. The Republic (1986) 3 C.L.R. 2311;

Adis Ltd The Republic (1986) 3 C.L.R. 900.

35 Recourse.

Recourse against the decision of the respondents whereby the gift of the land by the applicant to her husband was treated as fictitious and capital gains tax was imposed on the applicant.

X. Clerides, for the applicant.

Y. Lazarou, for the respondents.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. The recourse is
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against the Capital Gains Tax Assessment (Appendix «A»), relating
to the disposal on the 28th September 1983, by the applicant of
one building site situated at Strovolos under Registration No.
G747, Sh/Plan, 30/5. E.I., Plot 661 of an area of two evleks and
five-hundred square feet.

The applicant who is a housewife is the owner of several
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building sites, fields and shops at Strovolos, which were all
acquired by gift from her parents between the years 1958 to 1970,
as declared by her in a return submitted for immovable property
tax purposes (Appendix «B»).

On the 19th July, 1983, the applicant obtained from the
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respondent a certificate (Appendix «C»), stating that the
immovable property tax for the building site under Reg. No. G.
747 at Strovolos had been paid. The purpose was to produce
same to the Land Registration Office, Nicosia and effect a transfer
of that property. That was done on the 28th July 1983, when the
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building site in question was transferred in the name of her
husband by Declaration of Gift No. 5312/83 of the District Lands
Office, Nicosia, details of which appear on the relevant Form N.
313 (Appendix «D»). On the same day and at the same time, her
husband Andreas Pissarides, an authorized Accountant by
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profession, proceeded and transferred the same building site in
the name of the purchaser Eva K. Andreou of Strovolos as per
Declaration of Sale No. S. 5323/83, as shown on Form N. 313
(Appendix «E»). The sale price declared was £15,000.

On the 23rd April 1985, the respondent issued to the applicant
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a Note of Assessment (Appendix F), having decided that in the
circumstances of this case Section 36(1) of the Assessment and
Collection of Taxes Laws 1978-79 was applicable. The applicant
objected against this assesment through her husband's letter dated
7th May, 1985, (Appendix «G»). The reasons on which the
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applicant based her objection were the following:

(a) That she did not realize any gain from the sale of that building
site.

(b) That the building site was purchased from applicant's father in 1985 by her husband but it was registered in applicant's name, because her husband could not attend at the District Land's Office Nicosia, as he was then an employee of the firm of Accountants, Russel and Co., Nicosia.

(c) The circumstances under which the (alleged) purchase was effected were that applicant's husband at the time when they were about to get married, paid certain expenses relating to their marriage and that later on he paid by cheque a sum of £300 as far as he could remember. It was also explained that her father needed money to meet the expenses of the applicant's marriage and also to separate a field into four building sites. Instead of selling the said building site her father offered it to her then fiance to buy it at £500, a price which was offered to him by an interested buyer whom the applicant's husband had introduced to her father at that time.

(d) That applicant's husband sold the building site in 1983 and the transfer in the name of the purchaser was made on the same day on which the applicant transferred it by way of gift in her husband's name.

The objection of the applicant was examined and the whole matter was explained to her husband during an interview that he had with a Senior Assessor at the Offices of the Respondent in Nicosia. During that interview applicant's husband gave the following supplementary information:

- (a) No contract of sale was made with the purchaser.
- (b) The proceeds of sale amounting to £15,000 were used for the repayment of a loan due by the applicant and her husband to Strovolos Cooperative Credit Society Ltd and the surplus were deposited in a joint deposit account, that is applicant's and her husband's at the Bank of Cyprus Ltd., Nicosia.
- (c) That applicant's and her husband's financial transactions were not separated, stating that «they were keeping a common purse».

After the above interview applicant's husband addressed to the respondent a letter dated the 5th August 1985, (Appendix «H»), by which he was giving further reasons for her objections namely that the gifts made between spouses and from parents to

children were not liable to Capital Gains Tax under Section 10(b) of that Law, and that there was no provision in that section placing any time limit or restriction between the time of acquiring property by gift and the time of subsequent sale by the donee, in order to obtain the exemption provided by that section. 5

On the 10th January 1986, the respondent sent to the applicant a letter explaining the reasons for which her objection was determined (Appendix I). A Notice of Assessment was also forwarded with that letter of determination (Appendix J). The reasons on which the respondent based his decision to assess the applicant with the profit realized from the sale of the building site which was sold by her husband on the 28th July 1983, are as set out in paragraph 5.2, of the opposition the following: 10

«(a) The building site was in fact sold by the applicant prior to the time of making the declaration of gift in the name of her husband. The fact that the applicant obtained from the respondent on the 19th of July, 1983, a certificate (Appendix C), to enable her to effect a transfer through L.R.O. as well as the simultaneous deposit of the declaration of gift and sale on the 28th July, 1983, at L.R.O. Nicosia, indicate that the agreement of sale was made prior to the time of effecting the gift. Such a decision was reasonably open to the respondent on the basis of the particulars available to him and the circumstances surrounding the case. 15 20

(b) It was reasonably open to the respondent not to accept the argument of the applicant put forward through her husband that the said site was sold by the applicant's father in 1958 to her then fiance and that it was not possible for the applicant's husband to go to the L.R.O. Nicosia eversince to accept a transfer in his name either by his father-in-law, prior to the gift made in the applicant's name, or at any time thereafter to accept a gift from his wife. In any case the applicant failed to produce any evidence at all to substantiate her claim and in the absence of a valid enforceable contract between the registered owner / applicant and her husband and thus her claim could not be sustained. 25 30 35

(c) In spite of paragraph 5.2(b) above, even if there was a contract of sale between the applicant and her husband or between her husband and the applicant's father, the respondent had no power to accept the existence as at 1st 40

January, 1980, of any contract, as such a contract was not deposited with the respondent on or before the 30th of September, 1980, as provided by section 35 of the Capital Gains Tax Law, 1980. Thus the respondent could not accept that the gift made at the L.R.O. on the 27th July, 1983, by the applicant to her husband was in consequence of the agreement made in 1958 or anytime thereafter but prior to the 1st August, 1980. Thus the disposition made by way of gift on the 27th July, 1983, could legally be considered as a disposal attracting capital gains tax, having regard to the provision of section 36(1) of the Assessment and Collection of Taxes Laws, 1978-1979.

(d) It was also reasonably open to the respondent to invoke the provisions of section 36(1) of the Assessment and Collection of Taxes Laws 1978-1979 and consider the gift made to her husband as a fictitious and/or artificial transaction. In view of the close relationship between the spouses and the professional knowledge of the applicant's husband, in his capacity as an accountant-auditor, the whole scheme and acts of the spouses were considered as preordained wholly and exclusively for the purpose of tax avoidance and for no other purpose. The simultaneous deposit at L.R.O. of the declaration of gift and sale by the applicant and her husband and the subsequent use of the money for the common benefit of both spouses, as well as the applicant's claim that the Law does not provide for any time limits for the sale of a property for which section 10(b) applies (an argument confessing the intention of making those transactions for the purpose of avoiding tax) leave no room for any other conclusion than that reached by the respondent.

(e) The attempt of the applicant was to avoid payment of the tax assessed amounting to £700 - and the payment of £200 only by her husband, who could claim an exemption of £5000 under s. 5(1) of the Law, instead of the exemption of £2500 which was available to the applicant, in view of a previous disposal made by her by which the balance of £2500 was utilized, the husband's liability would have been computed as follows:

Proceeds of Sale	£15000	
Less: Market value as at 27.6.78	£ 9000	
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Capital gain	6000	
Less: Amount exempt	5000	
	<u> </u>	
Chargeable gain	£ 1000	5
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Capital gains tax 20%	200	
Payable by applicant	700	
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Tax avoidance	£ 500	
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(f) The respondent's decision is legally founded for not agreeing with the applicant that the provisions of section 10(b) of the Capital Gains Tax Law 1980 are always applicable to all and every particular case in general and without any limitation and that section 36(1) of the Assessment and Collection of Taxes Laws, 1978-79 could not be applied on any transaction covered by section 10(b) of the Capital Gains Tax Law, 1980». 15

Learned counsel for the applicant has submitted that the respondent decided to impose the capital gains tax on her, having formed the view that the acts of the applicant were preordained in order to avoid taxation. The respondent it was argued, relied on certain facts which, although they might create some suspicion, they were however, capable of being taken in another perspective. He disagreed with the view that in the circumstances it was reasonably open to the respondent that the transaction was a fabricated one, as it was open to the respondent to treat the transaction as a genuine one and he respectfully submitted that the respondent in his zeal to protect the best interests of the Revenue acted in an over suspicious manner. This was a transaction within the family and the absence of a contract in writing should not have been treated as yet another matter to increase the suspicion. 20 25

It was alternatively urged that irrespective of whether the respondent's suspicions were justified or not, under the Law, the respondent is not given a discretion. There is nothing in the law to the effect that certain time should elapse from the gift otherwise the donor steps into the shoes of the selling donee and has to pay the tax of the selling donee. Moreover, there is nothing in the Law to the effect that every gift of immovable property must be recorded 30 35

at the Lands Office otherwise it is not a disposition exempted by section 10.

The point at issue is whether in such circumstances it was open to the respondent Director to treat the gift of the land by the applicant to her husband as fictitious or artificial and disregard same.

Under section 36(1) of the Assessment and Collection of Taxes Laws 1978-1979, the respondent Director is empowered to disregard any transaction which is artificial or fictitious and was entered into or done solely for the purpose of reducing or extinguishing one's liability to tax.

The words «artificial» and «fictitious» in section 36(1) were judicially considered by this Court in a number of cases. In *Georghios HjiEraclis v. The Commissioner of Income Tax* (1984) 3 C.L.R. 604, the applicant's mother contracted to purchase some land in Paralimni. The purchase was negotiated by the applicants who also paid the down payment. The land was transferred by a declaration of sale in the name of the mother who, instantly and on the same day, transferred same by way of gift to the applicants who in a short period resold it at considerable profit. The Court held that it was reasonably open to the respondent Commissioner to conclude that the transaction of the purchase by the mother and the gift to the applicants was a fictitious one and that the applicant actually purchased the land directly from the seller. Stylianides J., stated:

«'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 without any commercial or business purpose apart from a tax advantage.»

The same conclusion was reached in *T.Z. Guarantee Developments Ltd. v. The Republic* (1986) 3 C.L.R. 381, where the Court held that it was not necessary for the transaction to be unlawful or illegal in order to be disregarded as artificial or fictitious but «it is sufficient if it was entered into or done only for the purpose of evading the payment of income tax».

In *Theofano Panayiotou v. The Republic* (1986) 3 C.L.R. 2311, the applicant was the owner of a plot of immovable property. She agreed to sell it for £26,000-. On the day set for the 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 whole property to the purchasers. The Court held that the conclusion of the respondent Director of Inland Revenue that the transaction was fictitious was reasonably open to him if not unavoidable. Pikiis J., stated:

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«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... 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.»

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Likewise, in the present case, the transaction whereby the applicant gifted her land to her husband had, as subsequent events showed an object other than the apparent or declared one, namely the enrichment of the husband by the property gifted to him. The property was sold by the applicant prior to the gift. The applicant remained the true owner with the husband playing the role of an agent who promptly complied with the wishes of the principal, implementing her wishes by doing what she had bargained to do, that is, transfer the property in the name of the purchasers.

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Moreover by the gift, the husband was enabled to claim the £5,000 exemption allowed under section 5(1) of the Capital Gains Tax Law, 1980, instead of the £2,500 exemption which was available to the applicant and as the applicant's liability to tax was reduced.

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The allegation advanced by the applicant that the actual owner of the land was her husband as he had purchased the site from her father in 1958 who transferred same to the applicant as her husband was unable to attend the Land Registry Office in Nicosia on the day the transfer was effected, is both unsubstantiated and

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inconsistent with her own declaration on Form I.R. 302. (Appendix B), on which she declared that the immovable property was gifted to her. Form I.R. 302 is a formal document prescribed by law and as was stated in *Adis Ltd. v. The Republic* (1986) 3
5 C.L.R. 900, the Court cannot accept anything inconsistent with the contents of such documents that may render the same «As not containing true statements merely because it is useful so to do on a given occasion». If, as the applicant claims, the land belonged to her husband, why did she wait twenty-five years to transfer the
10 property to him. The obvious answer is that the property in question was gifted to her by her father. But even if one assumes that the property was, as alleged, purchased by the husband, the registration of such property in the name of the applicant is concrete proof that he gave up in favour of the applicant any claim
15 which he may have had on that land.

For all the above reasons I have come to the conclusion that the sub judge decision was reasonably open to the respondent Director and that it was taken in accordance with the Law.

20 In the result the recourse is dismissed and the sub judge decision is confirmed in whole under Article 146(4)(a) of the Constitution. In the circumstances, however, there will be no order as to costs.

*Recourse dismissed.
No order as to costs.*