

1987 March 13

[SAVVIDES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION
PANAYIOTIS SERGHIS,

Applicant.

v

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF INCOME TAX.

Respondent

(Case No 556/85)

Income tax — Deductions and allowances — Capital assets in Turkish occupied area — Cannot be treated as definitely lost — Wear and tear allowance in respect of plant and machinery in such area — Allowed as a matter of policy in accordance with Circular 1983/18 dated 5 5 83

- 5 *Income tax — Deductions and allowances — Loss of stock in trade — Onus of proof is on the taxpayer*

The applicant is a displaced person. By letter dated 10 10 84 he claimed, for the first time, that losses incurred by him as a result of the Turkish invasion in July, 1974 should be set off against his income, thus leaving no chargeable income for the years 1977 - 1982

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The losses claimed as aforesaid were (a) Stock in trade (pigs, goats, sheep animal foodstuffs, animal wool, etc) valued at £28,075, and (b) Plants, machinery, sheds etc valued at £50,000

In support of his claim the applicant submitted a certificate of the Ministry of Agriculture dated 5 11 74 to the effect that he had 500 pigs as at December 1973 and that his pig farm was of a capacity of 800 pigs

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The respondent Commissioner decided that applicant's tax liabilities for the years in question should be settled on the basis of a maximum loss of stock in trade of £15,000 to be carried forward as at 1 1 75

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As a result the applicant filed the present recourse. During the trial the applicant modified his position as regards his fixed assets, conceding that in the light of the decisions in *Tsimon Ltd v The Republic* (1980) 3 C.L.R. 321 and *Geo. Pavides Ltd v The Republic* (1980) 3 C.L.R. 345 he was not entitled to deduct the amount of £50,000, but insisting that he was entitled to

deductions for wear and tear allowance in respect of such assets, pursuant to s 12(2)(a) of the Income Tax Laws In this respect applicant referred to the respondent's Circular No 1983/18 dated 5 5 83 para 2 of which reads as follows

«Claims for wear and tear allowances however have been allowed to continue as usual, such allowances being granted by concession This practice has been followed since the communal troubles of December 1963 and also the Turkish invasion of July, 1974»

Counsel for the respondent argued that the burden of proof in respect of deductions and losses lies upon the applicant, who failed to adduce any evidence as to the alleged figures representing his losses and that in any event though the respondent had, in the absence of proper accounts prepared by a practising accountant approved by the Minister of Finance, discretion to reject applicant's claims in toto nevertheless he concessionally decided to allow a deduction of £15,000

Finally, counsel for the respondent accepted that the applicant was entitled to a tax credit of £60 -for each of the years 1981 and 1982 under paragraph 3 of the Second Schedule to the Income Tax Laws as the applicant had four children

Held annulling in part the sub judice decision (1) The applicant rightly conceded that his capital assets within the Turkish occupied area could not be treated as a definite loss for income tax purposes (*Tsimon Ltd v The Republic and Geo Pavlides Ltd v The Republic*, supra cited with approval)

(2) In this strict application of the law the applicant would not be entitled to any wear and tear allowance for plant and machinery which were not used in his business during the years in question The case however, is covered by the aforesaid Circular which was issued, as a matter of policy, in order to allow such deductions in respect of properties situated in the Turkish occupied areas

(3) Although the applicant did not bring any evidence other than the certificate of the Ministry of Agriculture dated 5 11 74, it was not reasonably open to the Commissioner to disallow in toto the claim for wear and tear allowance, because, once the existence of the pig farm was established, he should, if he disputed its value, either request the applicant to produce evidence as to such value or proceed and make his own estimate The Commissioner could not reject applicant's claim as if the property never existed

(4) In the light of the material before the Court the sub judice decision was as regards the claim in respect of the loss of applicant's stock in trade, reasonably open to the Commissioner

(5) As the applicant had four children, he is entitled to a tax credit of £60 -for each of the years 1981 and 1982

(6) In the result this recourse succeeds in part to the extent mentioned above

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

5 *Cases referred to*

Tsimon Ltd v The Republic (1980) 3 C L R 321

Geo Pavlides Ltd v The Republic (1980) 3 C L R 345

Recourse.

10 *Recourse against income tax assessments raised on applicant for the years 1977-1982*

M Georghiou, for the applicant

M Phottou, for the respondent

Cur adv vult

15 SAVVIDES J read the following judgment The applicant is a displaced person from Milia village, Famagusta, where he had a livestock breeding business After his displacement in 1974, as a result of the Turkish invasion, he moved to Lamaca where he continued to carry on the business of animal dealer

20 As provided in section 13(3) of the Assessment and Collection of Taxes Laws 1978-1979, the respondent raised assessments on the applicant's income at various dates in respect of the years 1977-1982 The first assessment so raised was in respect of the year 1979 (year of income 1978) which was raised on 29th November, 1980 at £2 500 - according to which the tax payable was £222 75

25 On 4 5 1981 an assessment was raised in respect of the year 1980 on £3 000, according to which the tax payable was £340 75 On 3 4 82 the applicant filed an out-of-time objection on the ground that the assessments for the said two years were excessive and that no child allowances were granted in respect of his daughter who

30 was a student abroad The applicant's out-of-time objection was accepted on 21st April, 1982, in view of the fact that he was a new tax payer and on the understanding that a capital statement would be submitted by him for examining his objection On 2nd December, 1983 the applicant submitted a declaration, showing

35 his assets and liabilities as on 31st December, 1982

During the year 1983, the respondent raised estimated assessments in respect of the years 1977 (year of income 1976), 1978 (year of income 1977), 1979 (year of income 1978), 1979,

1981 and 1982. In view of the new assessment for 1979 the previous one for the same year raised on 29.11.80 was cancelled. Applicant failed to file an objection against any of the said assessments, neither did he file any returns of income in respect of any of the years subject matter of this recourse. 5

By letter dated 26th June, 1984, the applicant was requested to call at the income tax office on 6th July, 1984 in connection with his income tax affairs, but he failed to do so without giving any explanations. Sometime in 1984 the applicant's tax affairs were reviewed in respect of the period 1st January, 1976 to 31st December, 1982. During this period, the applicant's income was estimated by way of capital statement at £23,925.- but as no objections were made on the assessments already raised and amounting in all to £32,800.- the respondent did not revise the assessments. 10 15

Following certain legal proceedings initiated by the Collection Branch for the collection of tax and special contribution for the years subject matter of this recourse, the applicant wrote a letter on 10.10.1984 by which he claimed, for the first time, that losses incurred by him as a result of the Turkish invasion in July, 1974 should be set off against his income, thus leaving no chargeable income for the years subject matter of this recourse. The losses claimed, as set out in the letter of the 10th October, 1984, were- 20

(a) Stock in trade (pigs, goats, sheep, animal foodstuffs, animal wool, etc.).	£28,075.-	25
(b) Plant, machinery, sheds, etc.....	£50,000.-	
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Total	£78,075.-	
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In support of his claim the applicant submitted a certificate of the Ministry of Agriculture dated 5th November, 1974, that he had 500 pigs as at December, 1973 in accordance with a Ministry Census of pigs and that his pig farm was of a capacity of 800 pigs. 30

The respondent bearing in mind the applicant's said letter and the certificate of the Ministry of Agriculture and having taken into consideration the fact that the applicant was a displaced person, decided to accept his out-of-time objections and settle his tax liabilities for the years in question, upon the basis of the capital statement allowing a maximum loss of £15,000.- to be carried 35

forward as at 1st January, 1975.

The assessable income ascertained by the capital statement method at £23,925 against which no objection was made, was as a result reduced by the allowance of £15,000.- and fresh assessments were raised on 26.3.1985 demanding tax only in respect of the years 1981 (£348.75) and 1982 (£402.50), i.e. a total sum of £751.25. Particulars as to how the income of £23,925.- was ascertained, appear in a detailed statement annexed to the opposition as appendix «C». Such assessments were communicated to the applicant who, having felt aggrieved, filed the present recourse, challenging them as null and void contending that the sub judice decision was not duly reasoned, was wrong in law and in fact, that the computations acted upon by the respondent are wrong in fact and in law, that the respondents acted upon on a material misconception of law and fact and finally that the assessments complained of are arbitrary and legally as well as factually, unfounded.

By his written address counsel for applicant in expounding on the facts of the case, described the applicant as a person whose trade was devastated as a result of the Turkish invasion and who lost movable property to the total value of £28,075.- consisting of the following:

	560 pigs at £20.-each	£10,200.-
	230 goats and sheep at £30.-each	£6,900.-
25	10 tons of wool at £400.-each	£4,000.-
	13000 okes of wheat at 75 cent per oke	£975.-
	Amimal foodstuff approx	£6,000.-
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	Total	£28,075.-
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He further contended that the applicant lost fixed assets and in particular plant and machinery to the value of £50,000.-

In expounding on his grounds of law, counsel contented that the respondent failed to explain and to duly reason the assessments arrived at, after the determination of the objection of the applicant, and in particular he failed to explain how he arrived at the sum of £15,000.- as being the loss which the applicant was allowed to carry forward to future years.

Counsel by making reference to the contents of the letter of the respondent dated 25th November 1985 which was filed in response to an application on the part of the applicant for further and better particulars as to how the respondent arrived at the figure of £15,000, submitted that the reasoning contained therein is defective and that the decision of the respondent to accept a loss of £15,000 - by way of concession or ex grata is an arbitrary one. In his submission, the respondent should have taken into account the actual loss of movable assets amounting to £28,075 - and fixed assets at £50,000 -

Bearing in mind counsel submitted the decision in *Tsimon Ltd v The Republic* (1980) 3 C L R 321 and *Geo Pavlides Ltd v The Republic* (1980) 3 C L R 345, though the applicant might have not been entitled to deduct the amount of £50,000 - as a permanent loss, nevertheless, he was entitled to deductions for wear and tear allowance in respect of such assets, pursuant to section 12(2)(a) of the Income Tax Laws. In support of his argument, in this respect, he made reference to a circular of the Commissioner of Income Tax dated 5 5 83, copy of which he produced, according to which deduction of wear and tear allowance in respect of such capital assets is allowed concessionally. In conclusion counsel submitted that the revised assessments should be annulled.

Counsel for the respondent by his written address argued that the burden of proof in respect of deductions and losses lies upon the applicant and he failed to discharge same as no evidence was adduced by him as to alleged figure of £78,075 -, representing his losses as a result of the Turkish invasion. The only evidence produced by him was the certificate from the Ministry of Agriculture in which it was stated that in accordance with the Ministry's census of pigs as at December, 1973, the applicant had 500 pigs and that his pig farm was of a capacity of 800 pigs.

Furthermore, counsel added, the Commissioner of Income Tax has a discretion to refuse to allow deductions unless proper accounts to his satisfaction and a computation showing the assessable object of the tax is prepared by an independent practising accountant approved by the Minister of Finance. Though the respondent could reject the applicant's claim for losses in toto, nevertheless, taking into account the fact that he was a refugee, concessionally decided to allow a deduction of £15,000 - As to the claim of the applicant for entitlement to yearly

wear and tear allowance, counsel explained that this was not granted in the present case because of the applicant's failure to substantiate his claim before the Commissioner.

5 In concluding counsel affirmed his previous statement that the applicant was entitled to a tax credit of £60.- for each year in respect of the years 1981 and 1982 under paragraph 3 of the Second Schedule to the Income Tax Laws as he had four children and stated that the respondent is prepared to allow the said credits and reduce the applicant's tax liability accordingly.

10 Originally the claim of the applicant, according to the facts endorsed in the application, was in respect of deduction of the losses referred to in his letter to the Commissioner of Income Tax. According to the particulars set out therein, such losses were: £28,075.- in respect of stock in trade and £50,000.- in respect of
15 capital assets, such as plant, machinery, etc.

Counsel for applicant in the course of these proceedings and in particular by his written address, rightly conceded that in view of the decision in *Tsimon Ltd. and Geo. Pavlides Ltd.* (supra) the applicant could not claim that his capital assets within the Turkish
20 occupied area could be treated as a definite loss for income tax purposes. This question has been considered by me in the said two cases in which I found that the mere temporary inaccessibility of such property to the applicants and their temporary inability to use same for the purpose of their trade or business, due to enemy
25 occupation and for so long as such occupation lasts, does not amount to a definite ceasure of the use or a definite loss of their property which, as admitted by the applicants still stands registered in their names as absolute owners and it is not alleged that they have been lost permanently.

30 In the strict application of the law, as it now stands, the applicant would not be entitled to any wear and tear allowance for plant and machinery which were not used in his business during the years in question. However, the respondent, as a matter of policy, decided to allow such deductions in respect of properties situated in the
35 Turkish occupied areas, in view of the prevailing circumstances and the fact that such properties cannot be considered as permanently lost. To this effect, he issued Circular No. 1983/18 dated 5th May, 1983, para. 2 of which reads as follows:

40 «Claims for wear and tear allowances, however, have been allowed to continue as usual, such allowances being granted

by concession. This practice has been followed since the communal troubles of December, 1963, and also the Turkish invasion of July, 1974.»

In support of his claim for yearly wear and tear allowance in respect of his capital assets situated in the occupied areas, the applicant produced the certificate of the Ministry of Agriculture dated 5th November, 1974, to the effect that his pigsty was of a capacity of 800 pigs and stated that the value of his capital assets comprising plant, machinery, sheds etc. was £50,000.- Although he did not bring any other evidence establishing the alleged value of his aforesaid property, it was not reasonably open to the respondent, in the circumstances, to reject his claim for such allowance completely. Once the existence of such property was established, if the respondent disputed its value, he should have requested the applicant to produce any further evidence concerning its value or proceed to make his own estimate of the value of the property in question instead of rejecting the claim of the applicant as if the property never existed.

In this respect I find that the respondent failed to carry out a due inquiry into the actual value of the property and the sub judice assessments have to be annulled to this extent.

What remains to be considered is the alleged loss of stock in trade in respect of which the applicant claims as being £28,075.- and in respect of which respondent allowed £15,000.-

In a disputed case like the present one, the onus to support a claim for exemption or deduction allowance is on the applicant. The only material which he placed before the respondent Commissioner was the certificate from Ministry of Agriculture dated 5th November, 1984, to the effect that in December, 1973 he had 500 pigs according to a Ministry's census. Such certificate referred to a time prior to the Turkish invasion and the applicant never disclosed his stock in trade as at the end of 1974 in any declaration of his income. Furthermore, the applicant has not adduced any evidence before the court to substantiate his claim that his movable assets which he lost as a result of the Turkish invasion exceeded the amount of £15,000.- which the respondent concessionally allowed. Even if the certificate of the Ministry of Agriculture on which the appellant sought to rely is considered as disclosing the situation as at the time of the Turkish invasion as

well, the value of 500 pigs at £20 each, according to the value given by the applicant in his letter, amounts to £10,000.- The respondent, in addition to that amount, conceded to a deduction of a further sum of £5,000.-, thus making a total of £15,000.-.

- 5 In the light of all the above, I have come to the conclusion that it was reasonably open to the respondent to decide as he did in this respect, and allow the deduction of the £15,000.-. Lastly, in view of the admission made by counsel for respondent, the applicant is also entitled to a tax credit of £60.- for each of the years 1981, 10 1982, as he had four children.

In the result this recourse succeeds partly, to the extent mentioned above, but in the circumstances I will not make any order as to costs.

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Recourse succeeds in part. No order as to costs.