

1988 May 31

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ELENI COSTA HADJIALEXANDROU,

Applicant,

v.

1. THE DIRECTOR OF INLAND REVENUE DEPARTMENT,
2. THE DIRECTOR OF LANDS AND SURVEY DEPARTMENT,
3. THE REPUBLIC OF CYRPUS, THROUGH THE ATTORNEY-GENERAL,

Respondents.

(Case No. 283/86).

5 *Compulsory acquisition—Compensation—Deductions—Deduction of amount assessed as payable by way of Capital Gains Tax on the profit made by reason of the acquisition—The Compulsory Acquisition of Property (Amendment) Law, 1985 (Law 148/85)—Compensation for acquisition exempted from all taxes retrospectively as from 27.5.83—Refund of amount of said tax—Whether the amount should be paid under the Compulsory Acquisition Law as part of the compensation or under section 23 of the Capital Gains Tax Law, 1980 (Law 52/1980)—Second alternative adopted—Kythreotis v. The Republic (1987) 3 C.L.R. 495 adopted.*

10 *Taxation—Capital Gains—The Capital Gains Tax Law, 1980 (Law 52/1980), section 23—Refund of overpaid tax—Tax paid in respect of compulsory acquisition of immovable property—Payment effected by deducting it from the compensation payable for the acquisition—Compensation for such acquisition exempted by a law (Law 148/85) enacted after payment of tax*
15 *from all taxes—Retrospectivity of such law—Whether amount of tax should be refunded under section 23 or paid as part of the compensation under the Compulsory Acquisition of Property Law—First alternative adopted—Kythreotis v. The Republic (1987) 3 C.L.R. 495 adopted.*

The issues in this recourse sufficiently appear from the hereinabove notes.

Recourse dismissed.

No order as to costs.

Cases referred to:

Kythreotis v. The Republic (1987) 3 C.L.R. 495.

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Recourse.

Recourse against the decision of the respondents to impose the sum of £4,000.- as capital gains tax representing the disposal of applicant's immovable property at K. Paphos.

P. Philippou, for the applicant.

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Y. Lazarou, for the respondents.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. The applicant was the owner of Immovable property under Reg. Nos 2722 and 2723 at Kato Paphos which were on the 25th February 1981, gifted to her son-in-law Stephanos Manoli and also of property under Reg. No. 2729 at Paphos which was compulsorily acquired by the Republic on the 30th July 1982. Both the gift and the compulsory acquisition were considered by respondent 1, to represent disposals of property as provided by section 10 of the Capital Gains Tax Law, 1980 (Law No 52 of 1980) - hereinafter to be referred to as the Law - and thus attracting capital gains tax, prior to the enactment of the Compulsory Acquisition (Amendment) Law 1985 (Law No. 148 of 1985).

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On the 10th November, 1984, the applicant was requested by respondent 1, to submit capital gains tax returns for the disposals made by gift and the compulsory acquisition, as provided by section 12 of the Law. On the 11th December 1984, the applicant

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submitted such returns for the properties disposed of which did not show any capital gains tax liability. (Appendices "A" and "B").

5 On the 13th December 1985, respondent 1, handed to the applicant Notices of Assessment for capital gains tax showing the following amounts of tax payable. (Appendices "C" and "D").

For the properties gifted £1000 tax plus 9% interest from 25.5.1981.

10 For the property compulsorily acquired by Government £3000 tax plus 9% interest from 30.10.1982

Total £4000

15 The applicant was also informed that the said tax would be collected by the Director of the Department of Lands and Surveys, that she could object to such assessments, if she wished and that finalization of her liability could be made thereafter and if any amount appeared to have been collected in excess, it would be repaid to her with interest, as provided by section 23 of the Law. The applicant did not object to such a procedure and had in fact
20 accepted on the 19th December 1984, the money paid to her by respondent 2 after deduction of all taxes due by her, reserving at the same time her right to challenge in Court both the assessment and the deduction of the tax. (Appendix E).

25 As a result of the above on the 18th December 1984, respondent 1, addressed a letter to respondent 2 by which he was requested to deduct an amount of £5361.99 from the compensation which was to be paid to the applicant, which was payable by her by way of taxes and interest (Appendix E).

30 On the 28th January, 1985, the applicant objected only against the capital gains tax assessments and the only reason of objection stated therein was that the assessments were excessive and particularly that the market value of the properties as at 27th June 1978

were £15000.- for the properties covered by each assessment, (Appendix "C"). There was no claim for repayment of any interest.

On the 19th June, 1985, respondent 1 proceeded and determined the applicant's objections against the capital gains tax assessments and issued to the applicant Notices of Assessment, (Appendices "H" and "I"), under which the following amounts became repayable and were in fact repaid by voucher issued on the 20th June 1985:

Assessment reference	Tax	Interest	Total
	£	£	£
	1000	22.93	1022.93
	400	9.17	409.17
	£1400	£32.10	£1432.10

Subsequently in 1985 the Acquisition of Property (Amendment) Law, 1985, (Law No. 148 of 1985), was enacted whereby the compensation payable on property compulsorily acquired was exempted from all taxes. Such provision was given retrospective effect as from the 27th May, 1983.

As a result of the enactment of Law No. 148 of 1985, respondent 1, decided that in view of the retrospectivity of such law the capital gains tax and interest thereon which were collected by him should be refunded to the applicant in accordance with the provisions of section 23 of the Capital Gains Tax Law 1980, with interest on the amount of the tax at 9% as from the 18th March, 1986, that is, three months after such tax had been collected. Respondent 1, informed the applicant of the above decision by means of his letters of the 22nd February 1986 and the 13th March, 1986 (Appendices A and B, respectively).

After receiving the aforesaid letters the applicant filed the present recourse. Though the prayer for relief is drafted in a rather vague manner it can be gathered therefrom that the main prayer of the applicant is that the amounts which were collected by respondent 1, should not be repaid by him under the provisions of section 23 of the aforesaid Law, and under section 38 of the Assessment and Collection of Taxes Laws, 1978-1979, under which respondent 1 has legal authority to repay taxes collected by him, but instead that the amounts due to her should be repaid by respondent 2, the Director of the Department of Lands and Surveys by virtue of the provisions of The Compulsory Acquisition (Amendment) Law 1983 (Law No. 25 of 1983), as amended by Law No. 148 of 1985. The reasons for which the applicant requests such an action are the collection of interest for certain periods of time and on certain amounts for which no interest may be repaid by respondent 1, as the laws administered by him do not empower him to do so.

In view of what appears in the prayer for relief, the opposition and the addresses made on behalf of the parties, the essential question to be decided in this recourse is whether respondent 1, could apply the provisions of section 23 of the Law on refunding to the applicant the tax and interest collected on the 19th December 1985.

Section 23 of the Law reads as follows: -

"23. Εάν αποδειχθή κατά τρόπον ικανοποιούντα τον Διευθυντήν, ότι πρόσωπον τι κατέβαλε φόρον υπερβαίνοντα το ποσόν του φόρου του ορθώς επ' αυτού επιβλητέου, το πρόσωπον τούτο δικαιούται όπως τω αποδοθή το ούτω καθ' υπερβολήν καταβληθέν ποσόν ομού μετά απλού τόκου προς εννέα τοις εκατόν κατ' έτος από της παρόδου τριών μηνών από της ημερομηνίας της πληρωμής του καθ' υπέρβασιν πληρωθέντος φόρου μέχρι της ημερομηνίας της αποδόσεως."

("23. If it be proved, to the satisfaction of the Director, that

a person has paid tax in excess of the amount with which he is properly chargeable, that person shall be entitled to have the amount so paid in excess refunded to him, together with simple interest at the rate of nine per centum per annum from the expiry of three months from the date of payment of the tax paid in excess until the date of the refund." 5

Learned counsel for the respondents submitted that the answer to the question is given in the case of *Kythreotis v. The Republic* (1987) 3 C.L.R. 495 the facts of which were on all fours with this case and in which Savvides, J., said the following at p. 502:- 10

"Bearing in mind the legal position as above, the Director of Inland Revenue could only act in the circumstances under the provisions of section 23 of Law 52/80, and by virtue of such provision he was not entitled to refund any other amount in excess of what is provided therein. I therefore find that the decision of the respondent was correct and in accordance with the relevant law." 15

I agree fully with the approach of my learned brother in that recourse.

Section 23 of the Law authorizes the Director of Inland Revenue to pay interest at the rate and from the date specified therein and nothing more. It contravenes no provision of the Constitution and anyone having a claim for damages beyond that amount can very well fall back in case there is an annulling judgment of this Court under Article 146 of the Constitution, to paragraph 6 thereof or in case of an unlawful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or Authorities of the Republic, to the provisions of Article 172 of the Constitution. 20 25

Had I decided otherwise and ruled that section 23 of the Law was inapplicable to the facts of this case I would have been denying the applicant of his right to interest provided thereby. Moreover there was nothing to be done by the acquiring Authority as 30

this was a pure case of tax paid in advance, and at that, rendered so on account of the retrospectivity given to the amending Law No. 148 of 1985.

5 Needless to say that the tax was properly levied in accordance
with the legislation in force at the material time, that the repay-
ment of such tax to the applicant was governed by the law under
which it was levied, and in particular under the provisions of sec-
tion 23 thereof whereby (a) the payment of interest is confined to
10 the tax paid in excess (b) no interest is allowable on refunds of in-
terest and (c) the interest on the tax paid in excess is payable from
the expiry of three months from the date that such tax was collect-
ed.

15 Furthermore, the applicant cannot in these proceedings chal-
lenge the validity of the respondent's decision to levy the tax and
interest under consideration; such challenge should have been
made at the time the assessment was determined, that is, on the
19th June 1985 or within 75 days thereof as prescribed by Article
146.3 of the Constitution. The allegations as to the date of dispo-
sal of the immovable property should therefore be ignored.

20 For all the above reasons the present recourse fails and is here-
by dismissed but in the circumstances there will be no order as to
costs.

Recourse dismissed.

No order as to costs.