

1988 June 30

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTIS PHYLACTOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,

Respondents.

(Case No. 640/84).

5 *Taxation—Capital Gains Tax—The Capital Gains Tax Law, 1980 (Law 52/80)—Expenditure incurred after 27.6.78 wholly and exclusively incurred in relation to the acquisition of the gain—Legacy of immovable property on condition that legatee pays £25,000 bequests to various persons and the estate duty—Sale of legatee, who had paid such sums, of the said property—Whether in computing the "gain" liable to the tax such payments are deductible—Question determined in the negative.*

Constitutional Law—Equality—Constitution, Art. 28—Safeguards against arbitrary discrimination between persons in similar circumstances.

10 In this case the issues were:

- 15 (a) Whether the seller of immovable property, who had acquired it by a bequest in a will on condition that he should pay various money bequests as well as the estate duty, was entitled, in computing the gain to be taxed under the aforesaid law, to deduct such payments as expenditure incurred in the acquisition of the gain and, if no, whether the principle of equality is violated because of discrimination between the applicant and persons, who acquire immovable property by a bequest unconditionally.

In dismissing the recourse the Court held that:

(a) Such payments are not deductible. Only express words in the Statute could justify a different conclusion. Such payments* could not be considered as made "wholly and exclusively" in the acquisition of the gain.

(b) The applicant and a person, who receives an unconditional bequest of property, are not persons in similar circumstances and, therefore, the conclusion under (a) hereinabove does not violate Art. 28 of the Constitution. 5

*Recourse dismissed.
No order as to costs.*

Cases referred to:

10

Republic v. Arakian (1972) 3 C.L.R. 294;

Kalisperas and Another v. The Republic (1973) 3 C.L.R. 109.

Recourse.

Recourse against the decision of the respondents to impose on applicants the sum of £11,600.= as capital gains tax.

15

G. Triantafyllides, for the applicant.

Y. Lazarou, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Before delivering judgment I wish to state that the delay in the delivery of the reserved judgment in this case was due to an oversight of the Registry of the Court which misplaced the file of the present case and brought it before me on the 14th June, 1988. 20

The applicant by the present recourse challenges the validity of the decision of the respondent Commissioner of Income Tax by which an assessment imposing capital gains tax was raised and 25

* Section 6(1) (b) "..... δαπάνη εξ ολοκλήρου και αποκλειστικώς γενομένη προς κτήσιν του κέρδους....."

determined as per exhibit 1 attached to the opposition. According to the said exhibit capital gains tax on property inherited by the applicant was assessed at £11,600.- less an amount of £241.70 already paid leaving a balance of £11,358.30.-

5 The facts of the case are as follows:

Applicant, a Cypriot now residing in England, was by the will of his aunt Julia Phylactou who died in January, 1983, bequeathed immovable property comprising of a plot of land under registration No. 472 at the corner of Evagoras Avenue and The-
10 mistoclis Dervis Street, Nicosia.

The said bequest was subject to the condition that the applicant should pay:

(a) £25,000.- to the executor of the will who under the terms of the will was bound to pay the said sum in settlement of various
15 bequests mentioned in the will for the benefit of a number of persons who were going to receive the bequests free of any charge from estate duty.

(b) Any balance from the amount of £25,000.- after the pay-
20 ment of the aforesaid bequests was according to the will to form part of the movable property of the deceased which was bequeathed to a cousin of the applicant, namely, Thrassos Phylactou who was to take such property free of any charge from estate duty.

(c) The estate duty on the whole of the property of the de-
25 ceased was, after the death of the deceased, assessed at £31,140.-

The said immovable property was sold on the 22nd May, 1984. to the Bank of Cyprus (Holdings) Ltd. for the sum of £150,000.- and on the 28th May, 1984, the executor of the estate submitted a capital gains tax return in which he declared that the immovable
30 property bequeathed was sold for £150,000.- and that the capital

gain made, after deducting from the said sale proceeds its value at the date of death, was £65,000.-

On the 7th September, 1984, the respondent raised a capital gains tax assessment on the amount declared by deducting £2,000.- as commissions to estate agents and £5,000.-, the allowed exception, thus leaving a balance of £58,000.- on which a capital gains tax of £11,600.- was assessed. 5

On the 14th September, 1984, applicant through his advocate objected to the above mentioned assessment claiming that out of the proceeds of the sale the amount of £25,000.- which was paid to the executor for the account of the other legatees and the sum of £31,140.- paid for estate duty should be deducted from the sale proceeds. 10

Respondent 2 having considered the objection raised on behalf of the applicant decided to reject same for the reasons stated in his letter dated 12th November, 1984, addressed to applicant's counsel and which reads as follows: 15

"Αναφέρομαι στην ένσταση σας με ημερομ. 10.9.1984 και στις επιστολές σας με ημερ. 24.5.84 και 10.9.1984 εκ μέρους του πιο πάνω πελάτη σας και σας πληροφορώ τα πιο κάτω:- 20

Εχω μελετήσει προσεκτικά τα σημεία της ένστασης σας σύμφωνα με τα οποία απαιτείτε αφαίρεση από το κέρδος των £63,000, ποσό από £31,140 που αντιπροσωπεύει φόρο κληρονομίας και ποσό από £25,000 που πληρώθηκε στον εκτελεστή της διαθήκης κο Νίκο Μ. Φιερό και σας πληροφορώ ότι η απαίτηση σας αυτή δεν μπορεί να γίνει αποδεκτή για τους ακόλουθους λόγους- 25

(α) Οι πιο πάνω πληρωμές δεν θεωρούνται σα δαπάνη που έχει γίνει εξ ολοκλήρου και αποκλειστικά προς κτήση του κέρδους. 30

(β) Οι πληρωμές αυτές δεν έχουν καμμία σχέση με την αγοραία αξία του κτήματος κατά την ημέρα της κτήσεως αυτού από τον πελάτη σας ή σε οποιαδήποτε μεταγενέστερη ημερομηνία.

5 (γ) Οι πληρωμές αυτές αποτελούν μέρος του κόστους κτήσεως από τον πελάτη σας της ακίνητης ιδιοκτησίας. Ο πελάτης σας πλήρωσε £56,140 (31,140 + 25,000) και απέκτησε την ακίνητη αυτή ιδιοκτησία της οποίας η αξία εξετιμήθη στο ποσό των £85,000.

10 Σας εσωκλείω ειδοποίηση-επιβολής φορολογίας κεφαλαιουχικών κερδών και παρακαλώ να προσέξετε ιδιαίτερα την παράγραφο 7 στην οποία σας δίνεται το δικαίωμα προσφυγής στο Ανώτατο Δικαστήριο της Δημοκρατίας μέσα σε 75 μέρες από την ημερομηνία της ειδοποίησης
15 αυτής αν θεωρείτε τον εαυτό σας αδικημένο από την πιο πάνω απόφαση μου."

The English translation reads as follows:

20 ("I refer to your objection dated 10.9.1984 and your letters dated 24.5.84 and 10.9.1984 on behalf of your aforementioned client and inform you as follows:

I have considered carefully the points of your objection according to which you claim deduction from the gain of £63,000, of a sum of £31,140 which represents estate duty and a sum of £25,000 which has been paid to the executor of
25 the will. Mr. Nicos M. Fieros and inform you that your said claim cannot be accepted for the following reasons-

(a) The above payments are not considered as an expense which has been wholly and exclusively incurred for the acquisition of the gain.

30 (b) The said payments have no relation with the purchase value of the property on the date of its acquisition by your client or on any subsequent date.

(c) These payments form part of the cost of acquisition by

your client of the immovable property. Your client has paid £56, 140 (31,140 + 25,000) and acquired the said immovable property whose value was assessed at £85,000.

I enclose a notice of assessment of capital gains tax and please note especially paragraph 7 under which you have the right of recourse to the Supreme Court of the Republic within 75 days from the date of this notice if you consider yourself displeased from my above decision." 5

As a result applicant filed the present recourse challenging the above decision. 10

The sole question which poses for consideration in the present case is whether the sums of (a) £31,140.- paid by applicant in settlement of the estate duty and (b) £25,000.- paid by applicant to the executor of the will of the deceased should have been deducted by the respondents out of the gain realized. 15

Counsel for applicant submitted that the present case does not concern a sale of property but an aquisition of property on account of death and under the provisions of the law acquisition of property on account of death is not sale. Furthermore he contended that the above two amounts must be considered as an expenditure which was made for the purpose of acquiring the property and as such it must be added to the amount of £85,000.- which was the market value of the property at the time of death and be deducted from the proceeds of the sale. He made extensive reference to the provisions of the law and concluded that bearing in mind the definition of the word "property" in s.2 of the law in order to arrive at the proper figure one must deduct the amount which was paid as a condition for acquiring the property. 20 25

Counsel further argued that the decision of the respondents leads to a discrimination against the applicant contrary to Article 28 of the Constitution if a comparison is made between the case of the applicant who received the property subject to payment of a sum of money and the estate duty on the whole estate and the case 30

of a taxpayer who received property by virtue of a will without having to pay the amounts paid in the present case.

5 If such taxpayer, counsel added, sells the property left to him by the will of the deceased he will get as a profit the whole difference between the market value at the time of death and the sale price whereas the applicant has not actually received such a profit because he has paid out of his own pocket the amounts mentioned above as a condition for acquiring the property.

10 Counsel for the respondents, on the other hand, submitted that the sub judice decision is correct and that there is no provision in the law enabling the deduction claimed. Under the provisions of the law, he submitted, the gain accrued to an individual from the disposition of property is computed by comparing the disposal consideration with the cost of acquisition, that is, the market value of the property as at 27th June, 1978, or as at the date of the death in the case of a transfer in contemplation of death, accruing after 27th June, 1978, and any expenditure wholly and exclusively incurred after such date in acquiring the gain.

20 In dealing with the alleged violation of Article 28 he submitted that the principle of equality, safeguarded by Article 28, is to safeguard against arbitrary discrimination between persons in similar circumstances and that the example of the two cases given by counsel for applicant in support of his argument cannot be considered as amounting to an example of persons in similar circumstances. The position of the applicant, counsel submitted, 25 who received the property subject to payment of certain bequests and estate duty on the whole property cannot be assimilated to that of a person who is bequeathed property free from the conditions attached in the applicant's case.

30 The assessment of capital gains was introduced in Cyprus by the Capital Gains Tax Law, Law 52 of 1980 which under s.4 provides that "gains tax is imposed on any gain realized by disposition of property at the rate of 20% on such gain". The exemptions to the tax are provided by s.5 and the calculation of profit is

covered by s.6 which provides as follows:

"6.- (1) Κατά τον υπολογισμόν του κέρδους -

(α) Οιαδήποτε πρό της 27.6.1978, ή κατ' επιλογήν του ιδιοκτήτου πρό της 14.7.1974, αύξεις της αξίας της ιδιοκτησίας δέν θα λαμβάνηται υπ' όψιν:

5

Νοείται ότι αναφορικώς πρός ιδιοκτησίαν ευρισκομένην εντός απροσπελάστου, λόγω της Τουρκικής εισβολής, περιοχής ουδεμία αύξεις της αξίας της ιδιοκτησίας θα λαμβάνηται υπ' όψιν

(β) Θά εκπίπτηται οιαδήποτε δαπάνη εξ ολοκλήρου και αποκλειστικώς γενομένη πρός κτήσιν του κέρδους μετά την 27.6.1978 καί η οποία δέν εκπίπτεται δυνάμει των εκάστοτε εν ισχύι περί Φορολογίας του Εισοδήματος Νόμων."

10

The translation in English reads as follows:

15

("In computing the gains -

(a) any appreciation of the value of the property before the 27.6.1978 or, if the owner so elects, before the 14.7.1974, shall not be taken into account.

Provided that no appreciation in the value of the property shall be taken into account in respect of property situated within an area that became inaccessible by reason of the Turkish invasion;

20

(b) allowance shall be made for any expenditure wholly and exclusively incurred after the 27.6.1978 in relation to the acquisition of such gains, which is not an allowable deduction under the Income Tax Laws in force for the time being)".

25

I have carefully considered the arguments advanced by counsel

on both sides and the relevant provisions of the law but I could not trace anything in the law allowing the exemption from the gains realized by the sale of immovable property of any bequests of a deceased by virtue of a will, or of any amount payable as estate duty. In the present case the bequest of the immovable property of the deceased to the applicant was not an unconditional one but it was subject to bequests to other persons as well. The other bequests amounting to £25,000.- were made free of payment of any estate duty which was under the terms of the will the absolute liability of the applicant. I find myself unable to accept the submission of counsel for applicant that the amounts paid should be deducted from the capital gain realized as expenditure wholly and exclusively incurred for the purpose of acquiring the property. If such contention is accepted it inevitably leads to a situation where the acquisition by will of property of extensive value and subject to payment of considerable capital gains tax should not be subject to the payment of tax or subject to payment of considerably reduced tax if it is bequeathed subject to payment of legacies which may considerably reduce or exhaust capital gains. If such serious situation was intended then express provision should have been included in the law to that effect alongside with the other exemptions provided therein.

The same applies to the claim for deduction from the profits of the amount of the estate duty paid. There is no provision in the law that such amount is deductible.

Under sections 6 and 10 of the Capital Gains Tax Law, 1980 the method of assessing capital gains is expressly set out therein. According to such provisions the gain accruing to an individual from a disposal of property is computed by comparing the cost of acquisition i.e. the market value of the property as at 27th June, 1978 or as at the date of the death in case of a transfer in contemplation of death accruing after the 27th June, 1978 and the market value of the property at the time of its disposition. The difference between the two is the chargeable gain. From such calculation the only amounts which can be deducted are expenses wholly and exclusively incurred after the 27th June, 1978 in acquiring the gain.

It is for this reason that the respondents deducted an amount of £2,000.- as estate agents fees for realizing the sale of the property though there is no claim by the executor for such deduction. I find that, in the circumstances of the present case and bearing in mind the provisions of the law, it was reasonably open to the respondent to reach the conclusion that the deductions claimed by the applicant were not expenditure wholly and exclusively incurred in acquiring the gain. 5

I come next to consider whether Article 28 has been violated. It is well settled that the principle of equality is to safeguard against arbitrary discrimination between persons in similar circumstances (*The Republic v. Arakian* (1972) 3 C.L.R. 294; *Kalisperas and Another v. The Republic* (1973) 3 C.L.R. 109). The example on which counsel for applicant sought to base his argument, that is, a comparison between a person to whom property is bequeathed subject to certain conditions and a person to whom property has been bequeathed unconditionally is not persuasive as the two examples do not represent similar situations, which may lead to violation of Article 28. In my view Article 28 does not come into play in the present case. 10 15 20

For all the above reasons I have come to the conclusion that the recourse is bound to fail and is hereby dismissed but in the circumstances I make no order for costs.

Recourse dismissed.

No order as to costs. 25