1988 November 7

[CHRYSOSTOMIS, Ag. J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EVDOKIA VORKA AND OTHERS,

Applicants,

v.

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

Respondents.

(Case No. 263/86).

Constitutional Law—Taxation—Constitution, Art. 24—The Capital Gains Tax Law, 1980 (Law 52/80), sections 6 and 9—Whether the provision, as to valuation of property as at 27.6.78, i.e. on a date prior to the enactment of the law amounts to retrospective taxation in a manner infringing Art. 24 of the Constitution—Question determined in the negative.

Taxation—Capital gains tax—The Capital Gains Tax Law, 1980 (Law 52/80)—Exchange—It is a "disposal" within the meaning of the law—Land held by three sisters in undivided shares—Division of, into building sites—Exchange of the undivided shares in such a way as at the end each sister remained the sole owner of some of the sites—The relevant declaration in the D.L.O. referred to an "exchange"—The transaction was correctly treated as an "exchange" and not as a gift.

The facts of this case need not be summarized, as they are sufficiently indicated in the hereinabove headnote.

Recourse dismissed.

No order as to costs.

Cases referred to:

Papaconstantinou and Another v. The Republic (1986) 3 C.L.R. 1672;

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

Lagou v. The Republic (1986) 3 C.L.R. 2317.

Recourse.

Recourse against the decision of the respondent to impose on applicants capital gains tax as a result of the disposal of immovable property at Paphos.

L. Kythreotis, for the applicants.

A. Evangelou, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

CHRYSOSTOMIS Ag. J. read the following judgment. By the present recourse the three applicants challenge the validity of the assessments of the Respondent Director of the Department of Inland Revenue for the payment of capital gains tax on the capital gained by them and arising from the disposal of immovable property in Paphos and they seek:

(a) A declaration that the act and/or decision of the respondent to assess the applicants for capital gains tax is null and void and of no effect whatsoever.

(b) A declaration that an exchange by way of gift made from parent to child or between husband and wife or relations within the second degree of kindred is not subject to tax.

(c) A declaration that the provisions of section 6 of Law 52/80 in so far as they purport to tax gains accruing before

1.8.80 are null and void and of no effect whatsoever as being contrary to or inconsistent with Article 24.3 of the Constitution.

Also the applicants raised objections to the said assessments on the ground that the respondent failed to carry out the necessary inquiry to ascertain the price of the land as at 27.6.78 and as at 8.1.85.

The facts of this case, which are not in dispute, are as follows:

The three applicants are sisters and at the material time they were co-owners of the immovable property under Reg. No. 3072, Sheet/Plan 51/10 + 18, plot 218, at Kato Paphos. Applicant Evdokia Vorka owned 10/32 undivided shares, Chrystalla Vorka owned 11/32 undivided shares and Anthoulla Vorka owned 11/32 undivided shares..

During 1981/82 this piece of land was developed and was divided into 21 building sites. On 5.5.84 the applicants exchanged their shares in certain for these plots of land as follows:

Evdokia Vorka:

(i) Disposed to Chrystalla Vorka her 10/32 shares in each of the plots described in the notice of assessment of capital gains tax, Appendix A(1) to the opposition.

(ii) Disposed to Anthoulla Vorka her 10/32 shares in each of the plots described in the notice of assessment of capital gains tax, Appendix A(2) to the opposition.

Chrystalla Vorka:

(i) Disposed to Evdokia Vorka her 11/32 shares in each of the plots described in the notice of assessment of capital gains tax, Appendix B(1) to the opposition.

(ii) Disposed to Chrystalla Vorka her 11/32 shares in each of the plots described in the notice of assessment of capital gains tax, Appendix B(1) to the opposition.

Anthoulla Vorka:

(i) Disposed to Evdokia Vorka her 11/32 shares in each of the plots described in the notice of assessment of capital gains tax, Appendix C(2) to the opposition.

(ii) Disposed to Chrystalla Vorka her 11/32 shares in each of the plots described in the notice of assessment of capital gains tax, Appendix C(2) to the opposition.

The applicants in their respective declarations of transfer to the Land Registry Office, declared this disposition as an exchange of properties and not as a gift.

On 26.11.84 the applicants applied in writting to the respondent requesting him not to impose capital gains tax on them, as the disposition of the said shares was made by way of gift, without consideration, not for the purpose of exchange but for the purpose of distribution of the land which was divided into building sites.

On 7.10.85 the respondent raised the capital gains tax assessments referred to in the aforementioned notices of assessment which are appended to the opposition. The applicants objected to these asessments through their auditor Mr. G. Avraamides on the ground that:

(i) The value of the land disposed of, as at 27.6.78, was higher than the amount estimated by the respondent;

(ii) The disposal between the three sisters was by way of gift and not by way of sale (vide Appendices E(1) E(2), E(3)).

On 8.11.85 the respondent, wrote to each applicant explaining

the basis on which the assessments had been raised and requested a valuation of the property as at 27.6.78 by an independent professional valuer (vide Appendices F(1), F(2), F(3)).

Such a valuation as at 27.6.78 was eventually submitted and the value of the land was valued at £96,000.-, i.e. at £4,614.- for each one of the 21 building sites into which the land was subdivided. The comparative estimate of the respondent had been £66,700 for the whole land, i.e. £3,176 for each one of the 21 building sites. The respondent then considered the applicants' objections as well as the valuations as at 27.6.78 and he determined the objections by maintaining his original decision. As a result, on 11.3.86, he served upon the applicants the relevant notices of assessment together with a covering letter of the same date indicating his duly reasoned decision. In computing the gains tax, the respondent director relied on sections 6(1) and 9(2) of Law 52/80. Sections 6 and 9 of the Law read as follows:

"6.(1) In computing the gains -

(a) any appreciation in the value of the property before the 27.6.1978 or if the owner so chooses, 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 situate within an area that became inaccessible by reason of the Turkish invasion;

(b) allowance shall be made for any expenditure wholly and exclusively incurred after the 27.6.78 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.

9.(1) The proceeds from the disposal of property shall be the amount which, in the opinion of the Director, such property might be expected to realise if sold in

the open market at the time of the disposal of such property.

(2) If no purchase or sale has taken place, there shall be deemed to have been paid or received an amount equal to the amount which in the opinion of the Director such property would realise, if bought or sold, as the case may be, in open market at the time of the occurrence of the event."

At this stage I find it pertinent to say that the applicants through their counsel refrained from making any argument whatsoever, and they failed to substantiate in any way their contention, that the respondent failed to carry out the necessary inquiry to ascertain the value of the land as at 27.6.78 and as at 8.1.85. As regards the last mentioned valuation, it must also be stated that the applicants introduced it for the first time when they filed their recourse and not when they objected to the respondent.

Consequently the remaining issues which fall for determination in the present case are as follows:

(a) Whether the provisions of section 6 of the Capital Gains Tax Law 52/80, providing for the valuation of the property as at 27.6.78, a date prior to the enactment of the Law, are unconstitutional as involving the imposition of retrospective taxation, contrary to Article 24.3 of the Constitution;

(b) Whether the exchange of property made by the applicants can properly be treated as a "disposal" within the meaning of the aforesaid Capital Gains Tax Law 52/80.

Learned counsel for the applicants in his written address referred in extenso to the first issue and he cited a number of authorities to which I need not refer, as this submission, as rightly pointed out by learned counsel for the respondent, found no favour in a number of cases decided by the Supreme Court. In this respect, reference may be made to the cases of *Papaconstantinou*

and Another v. The Republic (1986) 3 C.L.R. 1672, *Panayiotou v. The Republic* (1986) 3 C.L.R. 2311, and *Lagou v. The Republic* (1986) 3 C.L.R. 2317.

In those cases the Supreme Court dismissed the contention that Sections 6 and 9 of the Law, or even the Law as a whole, are unconstitutional in that they impose tax retrospectively and that consequently they offend against Article 24.3 of the Constitution. On the contrary, it was held that the said sections do not impose tax retrospectively merely because the profit is calculated by reference to time prior to its enactment nor are they retrospective merely because a part of the requisites for its action is drawn from a time antecedent to the enactment of the Law. I had the opportunity to consider all these cases with which I agree and I humbly adopt. In the circumstnaces I do not find it necessary to embark any further either on the issue of retrospectivity or on the issue of unconstitutionality of Law 52/80.

As regards the second issue, the contention of learned counsel for the applicants is also untenable. The applicants exchanged their respective shares in the said lands as aforesaid and this is what they declared before the D.L.O. They did not, in any way, declare that the said disposals were made by way of gift and in the circumstances the respondent was right in considering these disposals an exchange of their respective shares. That there is a difference between an exchange and a gift is elementary and I need not cite any authority in order to illustrate the difference. It suffices to say that the applicants did not gift their respective shares to each other as aforementioned, as they all received shares in the said land, in return, by exchanging their respective shares. That there is a difference between an exchange and a gift can also be gathered from the provisions of the relevant section of the Law which also provodes the answer to the second issue raised by the applicants. This section is Section 10 of the Law and provides as follows:

"10. For the purpose of this Law, disposal of property includes a sale, an agreement of sale, an exchange, a lease regis-

tered in accordance with the provisions of the Immovable Property (Tenure, Registration and Valuation) Law in force for the time being and a gift of property, as well as an abandonment of the use or enjoyment of any relevant right but it does not include:

(a) a transfer in contemplation of death;

(b) a gift made from parent to child or between husband and wife or relations within the second degree of kindred or to a limited company whose shareholders all are and continue to be member of the disponer's family for a period of five years after such gift:

Provided that in such case the value of the property shall be deemed to be the original value of the property at the time of its acquisition by the donor or the value thereof on 27th June, 1978, whichever date is subsequent:

Provided further that where the property has been acquired by the donor before the 14th July, 1974, the donee may elect that the value of the property be deemed to be the value thereof as on 14th July, 1974;

(c) a gift to the Republic or to any charitable institution therein approved as such by the Council of Ministers;

(d) an exchange or sale under the Agricultural Land (Consolidation) Laws in force for the time being."

From the wording of the above section it is abundantly clear that an exchange of property is included in the word "disposal" and is, therefore, subject to capital gains tax.

For all the above reasons I have come to the conclusion that the sub judice decisions of the respondent were reasonably open to him and they were reached after a due inquiry. No misconception of fact or Law exists and there is no unconstitutionality. In

the result this recourse fails and the decisions of the Director are affirmed. There will be no order as to costs.

Recourse dismissed.
No order as to costs.