1988 December 30

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

AKINITA STEPHANOU IOANNIDE LTD.,

Applicants,

v.

THE REPUBLIC OF CUPRUS, THROUGH
1. THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,

Respondents.

(Case No. 258/87).

Taxation—Assessment and Collection of Taxes—The Assessment and Collection of Taxes Laws 1978-1979, section 23(1)—Assessment raised after the lapse of 6 years—Though invalid, it cannot be disregarded in ascertaining whether an actual loss had been incurred in the year in question—Otherwise the taxpayer would have been entitled to carry forward and set off against his income in subsequent years loss that in reality had not been incurred.

Taxation—Income Tax—Trading in land—Finding as to, by the Commissioner of Income Tax—Judicial control—Principles applicable.

Taxation—Income tax—Trading in land—A question of mixed law and fact—The criteria applicable in order to determine the question—The company's objects and their importance—The subject matter of the sale in question (in this case land yielding neither income nor personal enjoyment to the owner)—The length of the period of ownership (Five years elapsing between acquisition and sale of land held to be a relatively short priod)—Whether the taxpayer has engaged in repeated transactions of a similar nature.

The two main questions in this cases were: (a) Whether an assessment of income made out of time, i.e. after the lapse of six years, as provided by section 23(2) of the Assessment and Collection of Taxes Laws 1978-1979,

can be disregarded as far as the actual loss incurred in the year in question is concerned, and (b) Whether the profit derived by the applicant from the sale of a particular piece of land was justifiably treated as liable to income tax.

The principles expounded by the Court in determining the aforesaid matters appear sufficiently from the headnote hereinabove.

Recourse dismissed.
No order as to costs.

Cases referred to:

Georghiades v. The Republic (1982) 3 C.L.R. 659;

HjiEraclis and Another v. The Republic (1984) 3 C.L.R. 604;

Amani Enterprises (Houses) Ltd. v. The Republic (1985) 3 C.L.R. 198;

River Estates Ltd. v. The Republic (1986) 3 C.L.R. 2575;

Commissioners of Taxes v. Melbourne Trust Ltd. [1914] A.C.1001;

Rees Roturbo Development Syndicate Ltd. v. Ducker, 13 T.C.366;

Cooksey and Bibbey v. Rednall (H.M. Inspector of Taxes), 30 T.C. 514;

Californian Copper Syndicate (Limited and Reduced) v. Harris, 5 T.C. 159;

Cayser, Irvine & Co.Ltd. v. I.R.C, 24 T.C. 491;

Edwards v. Bairstow and Harrison, 36 T.C. 207;

Snell v. Rosser Thomas & Co. Ltd., 44 T.C. 343;

Frazer v. I.R.C., 24 T.C. 498;

I.R.C. v. Reinhold, 34 T.C. 389;

Turner v. Last [1965] 42 T.C. 517;

Eames v. Stepnell Properties Ltd., 43 T.C. 678;

Bolston & Son Ltd. v. Farrelly, 34 T.C. 161;

Pickford v. Quirke, 13 T.C. 251;

Rellim Ltd. v. Vise [1951] 32 T.C. 254.

Recourse.

Recourse against the income tax assessments raised on applicants for the years 1979 and 1980.

G. Triantafyllides, for the applicants.

Y. Lazarou, for the respondents.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. By the present recourse the applicant Company challenges the income-tax assessments for the years of assessment 1979 (78) and 1980 which were raised and determined by the respondent Commissioner (Appendix A).

The facts of the case are briefly these:

The applicant Company is a private Company with limited liability incorporated in 1969. Its issued share capital at the material time was six-hundred shares of one pound each. Its income was derived from interest, rents and as alleged by the respondent Commissioner, profits from trading in land. It submitted its income-tax returns for the years 1979-(78) and 1980 and the income-tax assessment for the years 1979-(78) was for the profit derived from the sale of a plot of land of a building site under plot No. 473, in Makedonitissa, Nicosia, by virtue of Section 5(1) (a), 5 (1) (h), of the Income- Tax Laws 1961-1981. As regards the year 1980, there was no change in the taxable income of that year, except that the respondent Commissioner reduced the loss

brought forward from previous years from £572 to £75.

I shall not refer at this stage to the acquisition of the immovable property by the applicant Company and their disposal, which transactions are set out in part C of the Opposition, as I shall be referring to those facts to the extent that they are relevant for the determination of the legal issues before me, later in this judgment.

Learned counsel on both sides agree that the points in issue are the following:

(a) Whether the assessment for the year of assessment 1979 (78) is out of time.

(b) Whether the applicant Company can be treated as having traded in land or embarked upon an adventure or concern in the nature of trade.

(c) Whether the decision of the respondent Commissioner to increase the income declared by the applicant Company for the year 1980 by £497. - is justified.

As regards the first issue learned counsel for the respondent Commissioner conceded that the said asssessment was out of time as it was raised after the lapse of six years and as such it is invalid as not falling within the provisions of section 23(1) of the Assessment and Collection of Taxes Laws 1978-1979. This, however, does not mean, and I agree with learned counsel for the respondent Commissioner, that such profit can be disregarded in ascertaining whether an actual loss had been incurred in the year in question, otherwise the applicant company would be allowed to carry forward and set off against their income in subsequent years a loss which in reality was not incurred. The contention of counsel for the applicant Company that the loss of £497 remains, should the assessment prove to be out of time, cannot, stand. Such loss would remain, in my opinion, only if the profit which was made from the sale of the land at Makedonitissa is found to

be a capital as opposed to a revenue receipt. The question, therefore, whether the applicant Company was a trader in land has to be examined.

The issue of taxability of profits arising from the sale of land has been judicially considered by this Court in a number of cases. The principle enunciated by all the authorities is that the question is one of mixed law and fact and that the Court will not interfere with the findings of the respondent Commissioner if it was reasonably open to him to find as he did. (See, inter alia, *Lilian Georghiades v. The Republic* (1982) 3 C.L.R. 659; *HjiEraclis and Another v. The Republic* (1984) 3 C.L.R. 604; *Amani Enterprises (Houses) Ltd v. The Republic* (1985) 3 C.L.R. 198; *River Estates Ltd. v. The Republic* (1986) 3 C.L.R. 2575).

It may as well be said that in deciding whether certain activities constitute trading - the expression "trade" includes adventure or concern in the nature of trade by virtue of section 5(2) (f) of the Income Tax Laws 1961-1981, a number of criteria may be relevant though no one of them has any superior force. I shall refer to the following three: (a) the company's objects, (b) the subject matter of the realisation, (c) the length of the period of ownership and (d) the frequency of number of similar transactions.

Having set out these criteria I shall proceed to examine them in relation to the facts of the present case.

As regards the issue of the first criterion, namely the company's objects, one may look at its objects as set out in the Memorandum of Association, for the purpose of discovering the nature of a particular transaction entered into by such company. This is clear from the authorities both in England and in Cyprus, namely *Commissioners of Taxes v. Melbourne Trust Ltd.* [1914] A.C. 1001; *Rees Roturbo Development Syndicate Ltd v. Ducker,* 13 T.C. 366; *Cooksey and Bibbey v. Rednall (H.M. Inspector of Taxes).* 30 T.C. 514; *Amami Enterprises (Houses) Ltd v. The Republic* (1985) 3 C.L.R. 198 and *River Estates v. The Republic* (1986) 3 C.L.R. 2575.

In *Californian Copper Syndicate (Limited and Reduced) v. Harris,* 5 T.C. 159, Clerk L.J. had this say at pages 165-166.

"It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change in investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax."

In the case in hand among the applicant company's objects, as they appear in its Memorandum, trading in land is its basic object. This is of decisive importance. Support for this is to be found in the case of *Cayser, Irvine & Co. Ltd. v. I.R.C.,* 24T.C. 491 at p. 496.

"Again, there is the case where a company is formed to trade in land and is found to be dealing with its land much as this company has been found to be dealing with its land. In such a case I think it might be comparatively easy to hold that it was dealing with the land as a trader, since the Company itself was formed for that very purpose."

Moving next to the second criterion, namely the subject matter of the realisation, I find that this has been considered in the case of *Lilian Georghiades v. The Republic* (supra) and found to be a

most crucial factor in determining, whether there is an intention to trade. Thus Pikis, J., said at page 670:

"The character of the land purchased its state of development and future potential as well as the income it yields at the time of purchase or is likely to yield in future, is a most consequential factor."

Likewise in *Edwards v. Bairstow and Harrison,* 36 T.C. 207, it was held that when the subject matter cannot yield to its owner any income or personal enjoyment merely by virtue of ownership, a commercial transaction is indicated. Thus in *Snell v. Rosser Thomas & Co. Ltd.,* 44 T.C. 343, the taxpayer - a developer - bought a house and 5 3/4 acres of land. The house produced rent from tenants but the land produced no income and was therefore held to be stock in trade (see also *Frazer v. I.R.C.,* 24 T.C. 498).

In our case the property in question was land which yielded neither income to their owner, nor personal enjoyment as in the case of a person purchasing a picture for purposes of aesthetic enjoyment. This factor indicates that the land held was trading stock as opposed to an investment since the feature expected of investments, namely yielding an income while being held, was lacking (see *I.R.C. v. Reinhold,* 34 T.C.389).

The third criterion, namely, the length of the period of ownership is relevant and a short period of ownership is an indication of trading. This is to be found in *Turner v. Last* [1965] 42 T.C. 517, where Cross said the following at p. 523:

"Of course, the mere fact than when you buy property, as well as intending to use and enjoy it, you have also in your mind the possibility that it will appreciate in value, and that a time may come when you want to sell it and make a profit on it, does not of itself make you a trader; but if the position is that you intend to sell it as soon as you can to recover the cost of the purchase, the position is obviously very different - and

that is what the Commissioners, having heard this appellant, thought was the position here."

In the present case the period between acquisition and sale of the subject property was five years, which is a relatively short one. One element of an investment is that the acquirer intends to hold it for a considerable period of time with a view to obtaining, either some benefit in the way of income in the meantime, or obtaining some profit, but not an immediate profit by resale. (See *Eames v. Stepnell Properties Ltd.*, 43 T.C. 678. The sale of the subject property in such a relatively short time after its acquisition is in the light of the authorities not characteristic of a person who wishes to hold land as investment.

Another important consideration in deciding whether or not a trade is carried on is whether the taxpayer has engaged in repeated transactions of a similar nature. Thus in *J. Bolston & Son Ltd., v. Farrely*, 34 T.C. 161 where the tax payer company who ran a passenger service bought a large number of boats in a short time for the service and resold them after modification, the Commissioners' finding that the sales were made in the way of trade, was inevitable. Harman J. had this to say at p. 167:-

"A deal done once is probably not (an activity in the nature or trade), though it may be. Done three of four times it usually is. Each case must depend on its own facts".

A similar view was expressed in *Pickford v. Quirke*, 13 T.C. 251 where Rowlat J. said the following at page 263:

"Now of course it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade."

The number of transactions of a similar nature also play a part. In *Rellim Ltd., v. Vise* [1951] 32 T.C. 254, the Court of Appeal so held. There a company acquired a number of houses, a farm and 13 acres of land by four separate purchases. Some six years later, the land, the farm and two of the houses were disposed by five separate sales. It was held that the profits accruing from theses transactions were trading profits.

In the present case the applicant acquired by way of exchange a number of immovable properties and sold two of them in 1976 and another building site, i.e. the subject property, in 1978. The engagement by the applicant in repeated transactions of the same nature supports the inference of trading.

Moreover I hold on the authority of *River Estates v. The Republic* (supra) that the respondent Commissioner was legally entitled to disallow the loss which the applicants allegedly had incurred in 1978, as the period of six years is inapplicable to loss adjustments.

Finally I shall proceed to examine the last point, that is whether the decision of the respondent Commissioner to increase the income declared by the applicant Company for the year 1980 by £497, is justified by his disallowing, in computing their taxable income for that year, the amount of £497, which the applicant company claimed that it represented losses carried forward from the previous year. As already seen no such losses were incurred, as this amount had already been disallowed as a loss to be carried forward and set off against the income of the applicant Company, for subsequent years by the assessment which was raised in 1979, and which was accepted by the applicant Company which in view of their acceptance of the assessment for the year 1979, leaves them with no legitimate interest.

For all the above reasons the sub judice decision to treat the applicant Company as traders in land, in the present case, and to disallow the loss in question is correct in law and in the circumstances it was reasonably open to the respondent Commissioner

being a matter of appreciation of all relevant facts a matter within the province of the administration, there being neither a miconception of fact, nor of law, nor an abuse or excess of power.

The recourse is therefore dismissed but in the circumstances there will be no order as to costs. 5

Recourse dismissed.
No order as to costs.