

1988 February 29

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SOPHOULLA LERNI,

Applicant,

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

Respondents.

(Case No. 2/84).

Taxation—Income tax—Trading in land—Isolated transactions in land by ordinary landowners—Not treated, as a general rule, as trading in land—Each case depends on its own facts.

5 *Taxation—Income tax—Trading in land—The question is one of mixed law and fact.*

Taxation—Income tax—Trading in land—Judicial control—Principles applicable.

10 The present recourse is directed against the assessments raised by the respondents as regards the applicant's income in respect of the years of assessment 1977 (76) to 1980.

The applicant is a gynaecologist and she has been exercising her profession in Nicosia since 1966.

15 The main issue in this recourse is whether the profit that the applicant made by the sale of certain properties at Aglandjia and Tersephanou, is of a capital nature and thus not liable to income tax, or whether such profit was made in the course of a trading in land by the applicant in which case

it is liable to income tax.

The purchases and sales of immovable property effected by the applicant over the period concerned are the following:

1. Purchase on 16.10.68 of a building site at Larnaca for £4,160.- which was partly financed by a loan of £2,000.- The property was sold in 1973 for £9,200.- It is the allegation of the applicant that this property was purchased for the purpose of building on it a clinic. 5

2. Purchase on 6.10.69 of a plot of land at Voroklimi for £5,200.-, payable by instalments. The applicant claims that she bought it as an investment. This property has not as yet been sold. 10

3. (a) In August 1972 the applicant purchased a building site in Aglandjia for £5,000.-, payable by instalments. (b) Later, in the same year, she bought again on credit an adjacent site for £3,000.- Both sites were, according to applicant purchased in order to build on them a clinic and her residence. Both sites were sold in 1978 for £25,000.- 15

4. The applicant, in 1974, bought five plots of land at Tersephanou, for £9,319.- for the purpose, as she claims, of creating an orchard. Her allegation is that this property was bought with the money received from the sale of item (1) above. She sold it in 1978 for £20,000.- and

5. On 12.10.77 and on 7.10.78 she purchased two adjoining houses in Nicosia, for £34,650., and £50,400.- respectively, which she now uses as a clinic and a residence. 20

It is the allegation of the applicant that the sales of the properties under items (3) and (4) above were made for the purpose of enabling her to buy the property under item (5). 25

Held, *annulling the sub judice decision*: (1) The question is one of mixed law and fact and this Court will not interfere with the Commissioner's decision, if it was reasonably open to him to arrive at the conclusion he did on the facts before him, provided, also, that the law was applied correctly. 30

(2) As a general rule isolated transactions by ordinary landowners are not treated as trading in land, but as realizations or substitution of investments, no matter that steps are taken to enhance the value of the property before its sale. The general principle is that each case must be decided in the light of its own particular circumstances and particular view must be 35

had to the transaction itself.

(3) The building sites at Aglandjia were obviously purchased for the purpose of building a clinic and a house thereon. This is evidenced by the fact that the applicant had proceeded to prepare plans for building. The fact that she later on, before proceeding to implement her plans, found a better investment or a more convenient structure for her needs and decided to sell those properties in order to buy the new investment is a case of substitution of one investment for another and not a case of trading in land, even though the said properties were sold at a profit. The genuineness of applicant's allegation as regards the property in Tersefanou is evidenced by the fact that the applicant proceeded to obtain permits to sink wells. The fact that the applicant did not proceed, until 1978 to the erection of the orchard must not have so much bearing on the case, as a landowner is at liberty to postpone or even change his plans. The property in question was finally sold in 1978 for the purpose of financing partly the purchase of a house and a clinic by the applicant, at Glastone street, Nicosia, that is item (5) earlier referred to. This again amounts to a substitution of one investment for another.

20 *Sub judice decision annulled.*
Costs in favour of applicant.

Cases referred to:

Agrotis v. The Commissioner of Income Tax, 22 C.L.R. 27;

Droushiotis v. The Republic (1967) 3 C.L.R. 15;

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

25 *Philippou v. The Republic* (1983) 3 C.L.R. 1386;

HjiEraclis & another v. The Republic (1984) 3 C.L.R. 604;

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

Pitsiakkos v. The Republic (1985) 3 C.L.R. 1700;

Varnavides v. The Republic (1986) 3 C.L.R. 1385;

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

California Copper Syndicate (Limited and Reduced) v. Harris [1904] 5 T.C. 159;

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

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Taylor v. Good [1974] 1 W.L.R. 556.

Recourse.

Recourse against the income tax assessments raised on applicant in respect of the years 1977-1980.

G. Triantafyllides, for the applicant.

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

Cur. adv. vult.

DEMETRIADES J. read the following judgment. The present recourse is directed against the assessments raised by 15 the respondents as regards the applicant's income in respect of the years of assessment 1977 (76) to 1980, which were communicated to the applicant by letter of respondent No. 2, dated the 25th October, 1983.

The applicant is a gynaecologist and she has been exercising 20 her profession in Nicosia since 1966.

On various dates, the applicant submitted returns of her income in respect of the years of assessment 1977 - 1980, stating that they were estimated figures since she did not keep proper accounts. The Commissioner raised assessments for 25 the said years against which the applicant objected. In order to resolve the objections, the Commissioner required and obtained from the applicant's tax consultant, a statement of assets

and liabilities as at the 31st December, 1980.

During the examination of the applicant's tax liability on the basis of the statement of her assets and liabilities obtained as above, as well as another one submitted by her in 1973, it
5 transpired that the applicant had dealings in land, as a result of which she was asked by the Commissioner to produce more information and particulars. After several meetings between the respondent on the one hand and the applicant and her tax
10 consultant on the other, the Commissioner determined the objections treating the transactions carried out by the applicant as trading in land, and communicated his decision to the applicant by letter dated the 25th October, 1983.

In addition the applicant was required to pay a 10 per centum surcharge on the difference between the amount of her tax
15 as finally ascertained and the amount of the temporary tax paid by her on the basis of her estimated return, in accordance with the provisions of section 29(1) of the Assessment and Collection of Taxes Laws 1978 to 1979. She was also required to
20 pay interest on the additional tax demanded, at the rate of 6 per centum for the year 1977(76) and 9 per centum for the remaining years.

As a result of the decision of the respondents the applicant filed the present recourse by which she challenges the above assessments.

25 The main issue in this recourse is whether the profit that the applicant made by the sale of certain properties at Aglandjia and Tersephanou, is of a capital nature and thus not liable to income tax, or whether such profit was made in the course of a
30 trading in land by the applicant, in which case it is liable to income tax.

Before proceeding to deal with the issue raised in these proceedings, I find that it is necessary to see what were the transactions in land that were carried out by the applicant and which

led the respondent Commissioner to reach his decision that she was trading in land.

The purchases and sales of immovable property effected by the applicant over the period concerned are the following:

1. On the 16th October, 1968, purchase of a building site at Larnaca for £4,160.- which was partly financed by a loan of £2 000.-. The property was sold in 1973 for £9,200.-. It is the allegation of the applicant that this property was purchased for the purpose of building on it a clinic. (It is to be noted that the profit made out of this transaction does not form part of the present recourse).

2. Purchase on the 6th October, 1969, of a plot of land at Voroklini, for £5,200.-. The price of this property was paid by instalments. The applicant claims that she bought it as an investment. This property has not as yet been sold.

3. (a) In August 1972 the applicant purchased a building site in Aglandjia for £5,000.- which amount she agreed to pay by instalments. (b) Later, in the same year, she bought again on credit an adjacent site for £3,000.-. Both sites were, according to the applicant's case, purchased in order to build on them a clinic and her residence. Both sites were sold in 1978 for £25,000.-.

4. The applicant, in 1974, bought five plots of land at Tersephanou, for £9,319.- for the purpose, as she claims, of creating an orchard. Her allegation is that this property was bought with the money received from the sale of the building site at Larnaca (property under item (1) above). She sold it in 1978 for £20,000.-. And

5. The last transaction of the applicant in land, the purchase on the 12th October, 1977 and the 7th October, 1978, of two adjoining houses in Nicosia, for £34,650.- and £50,400.- respectively, which she now uses as a clinic and a residence.

It is the allegation of the applicant that the sales of the properties under items (3) and (4) above were made for the purpose of enabling her to buy the property under item (5).

5 Counsel for the applicant argued that all acquisitions of immovable property made by the applicant were made for investment purposes and the sales made by her were either in the nature of a change of investment or to buy premises for the purpose of using them as a clinic and residence and these transactions do not amount to trading in land. As a result, the
10 profits realized from the sale of the properties in question are not taxable. Counsel also contended that the Commissioner was labouring under a misconception of fact as to the dates of the purchases of the properties in question and, also, as to the intended purpose of the purchase of the building sites at
15 Aglandjia and Tersephanou.

Counsel for the respondent submitted that the dispositions by the applicant of the land at Aglandjia and Tersephanou constitute transactions in the nature of trade and, therefore, the profit realized therefrom is taxable. Counsel argued that there
20 was an intention to trade on the part of the applicant and this is evidenced from the fact that the properties in question yielded no income; that their purchase price was paid by instalments and, that the period of ownership of the said properties by the applicant was short.

25 The question which has to be decided here is whether the profits which the applicant realized from the sale of the land at Aglandjia and Tersephanou were derived from a concern or adventure in the nature of trade.

30 The question of the taxability of profits arising from the sale of land has been considered by this Court in a number of cases (see *Agrotis v. The Commissioner of Income Tax*, 22 C.L.R. 27; *Droushiotis v. The Republic*, (1967) 3 C.L.R. 15; *Georgiades v. The Republic*, (1982) 3 C.L.R. 659; *Philippou v. The Republic*, (1983) 3 C.L.R. 1386; *HjiEraclis & another*

v. The Republic, (1984) 3 C.L.R. 604; *Amani Enterprises v. The Republic*, (1985) 3 C.L.R. 198; *Pitsiakkos v. The Republic*, (1985) 3 C.L.R. 1700; *Varnavides v. The Republic*, (1986) 3 C.L.R. 1385; *River Estates Ltd. v. Republic* (1986) 3 C.L.R. 2575).

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What emanates from the above authorities is that the question is one of mixed law and fact and this Court will not interfere with the Commissioner's decision if it was reasonably open to him to arrive at the conclusion he did on the facts before him provided, also, that the law was applied correctly. It also transpires that the attitude of the courts, both here and in England, where the relevant legislative provision is the same is not, as a general rule, to treat isolated transactions by ordinary landowners as profits from trading in land, but as realizations or substitution of investments, no matter that steps are taken to enhance the value of the property before its sale.

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In *California Copper Syndicate (Limited and Reduced) v. Harris*, [1904] 5 T.C. 159, Clerk L.J. at pages 165-166 had this to say:

"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 realize 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 1942 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be assessable where what is done is not merely a realization of change of investment, but an act done in what is truly the carrying on, or carrying out of a business."

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In *Turner v. Last*, [1965] 42 T.C. 517, the following is stated, at p. 523:

"Of course the mere fact that when you buy property as well as intending to use and enjoy it, have also in mind the possibility that it will appreciate in value and that a time

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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 recover the cost of the purchase, the position is obviously very different."

- 5 In *Lilian Georghiades v. The Republic*, (supra), the following was stated at p. 670:

"The character of the land purchased its state of develop-
ment 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 conse-
10 quential factor. (See, *Johnston v. Heath* [1970] 1 W.L.R. 1567; *Californian Copper Syndicate (Limited and Reduced) v. Harris*, 5 T.C. 159; *Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison*, 36 T.C. 207; *Tempest Estates Ltd. v. Walmsley*, cited in *Simon's Taxes*, Vol. B1. 618; *Turner v.*
15 *Last*, 42 T.C. 517).

As stable investment may naturally lead to the inference that the investor merely changes one form of investment for another without any intention, on his part, to trade with the land itself. It may properly be assumed that the viability of the invest-
20 ment and the income it is likely to produce in future, is the dominant consideration in the mind of the investor".

In *Taylor v. Good*, [1974] 1 W.L.R. 556, a retail grocer bought a house with grounds at a public auction, having in mind the possibility that he and his family might live there. Since, how-
25 ever, his wife objected, he obtained, 4 years later, a planning permission to develop the property by the erection of 90 houses and sold it to a firm of developers at a considerable profit. His profit was assessed to income tax and his appeals both to the special Commissioners and to the High Court were dismissed on the
30 ground that although there had not been initial trading at the time of the purchase, there was sufficient evidence to support the Commissioners' findings of supervening trading. On appeal by the taxpayer, the Court of Appeal held, allowing the appeal, that where a taxpayer, not being a property developer, bought propér-

ty with no initial intention of selling it for profit but later took steps to enhance its value, did not amount to an adventure or concern in the nature of trade, assessable to income tax.

Russel L.J., in delivering the judgment of the Court, after making reference to a number of cases, said the following at p. 560: 5

"All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development." 10

In *Pitsiakkos v. The Republic*, (supra), the applicant, an Estate Agent, divided land gifted to him by his father into building sites and sold several of them. Being assessed to income tax on the profits realized from the sales, he filed a recourse to the Supreme Court. The learned trial judge, after making reference to the case law, found as follows, at p. 1712: 15

"In the light of the above authorities and bearing in mind the circumstances of the case, especially the fact that the property was gifted to the applicant by his father, as well as the fact that there were no other purchases and sales on his part, I think that a finding of trading in land on the part of the Commissioner was not warranted. The applicant was not himself a developer and had no other transactions in land. Being an estate agent does not make him a developer as well". 20 25

The general principle is that each case must be decided in the light of its own particular circumstances and particular view must be had to the transaction itself. 30

In the present case, the building sites at Aglandjia were obviously purchased by the applicant for the purpose of building a clinic and a house thereon. This is evidenced by the fact that the

applicant, as soon as the property was transferred in her name, proceeded to prepare plans for building, instructing an architect for this purpose, and, also, paying the amount of £750.- to him. The fact that they were purchased by instalments is immaterial,
5 bearing in mind that this is the usual practice in Cyprus as is also the fact that they were not producing any income at the time, bearing in mind the nature of the property.

It is clear to me, on the basis of the above, that the building sites at Aglandjia were bought by the applicant as an investment.
10 The fact that she later on, before proceeding to her plans, found a better investment or a more convenient structure for her needs and decided to sell those properties in order to buy the new investments, is to my mind, a case of substitution of one investment for another and not a case of trading in land, even though the said
15 properties were sold at a profit.

The property in Tersephanou was again bought by the applicant, according to her own allegation, for purposes of investment, and more specifically for the purpose of creating an orchard. The genuineness of the applicant on this is again evidenced
20 by the fact that the applicant proceeded to obtain permits to sink wells. The fact that the applicant did not proceed, until 1978, to the erection of the orchard, must not have so much bearing on the case, as a landowner is at liberty to postpone or even change his plans. The property in question was finally sold in 1978 for the
25 purpose of financing partly the purchase of a house and a clinic by the applicant, at Gladstone street, Nicosia, that is item (5) earlier referred to. This, in my view, again amounts to a substitution of one investment for another.

In the circumstances of the present case, I find that the finding
30 by the Commissioner of an element of trading in land was not warranted and his decision should be annulled.

Having found as above, I find it unnecessary to deal with the questions of surcharge and interest imposed on the applicant.

In the result, this recourse succeeds and the sub judice assessments are hereby annulled.

The respondents to pay the costs of these proceedings.

Sub judice decision annulled.

Respondents to pay costs.

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