



**MALTA**

**Administrative Review Tribunal  
Magistrate  
Dr. Gabriella Vella B.A., LL.D.**

**Application No. 34/16VG**

**David Henry and Jean spouses Kitts**

**Vs**

**Commissioner for Revenue**

**Today, 11<sup>th</sup> March 2019**

**The Tribunal,**

After having considered the application submitted by David Henry and Jean spouses Kitts on the 25<sup>th</sup> May 2016, by means of which they request that the Tribunal: (i) declare that the value of the properties, namely of the apartment number C12, Sea Haven Apartments, Triq is-Simar, Xemxija, and the garage internally numbered 14 situated at semi-basement level accessible from a ramp in Triq is-Simar, Xemxija, purchased by them is the value declared in the deed of transfer in the records of Notary Clarissa Cuschieri dated 25<sup>th</sup> July 2013, and consequently declare that the assessment issued against them by the Commissioner for Revenue is null and without effect; and (ii) order the cancellation and revocation of the Assessment issued against them by the Commissioner for Revenue and also the revocation of the request by the Commissioner for Revenue for the payment of duty and additional duty/penalty and interest, together amounting to €2,247.86; with costs against the Commissioner for Revenue;

After having considered the documents submitted by spouses Kitts together with their application, marked as Dok. "A1" to Dok. "J" at folios 5 to 30 of the records of the proceedings;

After having considered the Reply by the Commissioner for Revenue by means of which he objects to the appeal lodged by spouses Kitts from the Assessment issued against them and requests that the same be rejected and instead the Assessment confirmed, with costs against spouses Kitts, since the allegations put forth by them are unfounded in fact and at law;

After having considered the documents submitted by the Commissioner for Revenue together with his Reply, marked Dok. "KT1" to Dok. "KT6" at folios 40 to 63 of the records of the proceedings;

After having heard testimony by the Applicants given during the sitting held on the 24<sup>th</sup> January 2016<sup>1</sup> and considered the documents submitted by the Applicant David Henry Kitts marked Doc. “DK1” a folios 78 to 87 of the records of the proceedings, after having heard testimony by Mark Arrigo A&CE<sup>2</sup> and by John Middleton<sup>3</sup> given during the sitting held on the 20<sup>th</sup> April 2017, after having heard testimony by Stephanie Cassar A&CE given during the sitting held on the 22<sup>nd</sup> May 2017<sup>4</sup> and by Oliver Magro, in representation of the Planning Authority, given during the sitting held on the 28<sup>th</sup> November 2017<sup>5</sup> and after having considered the documents submitted by Oliver Magro marked Doc. “OM1” to Doc. “OM3” at folios 121 to 133 of the records of the proceedings, and after having heard testimony by Anthony Camilleri A&CE given during the sitting held on the 15<sup>th</sup> January 2018<sup>6</sup>;

After having considered the Note of Submissions by the Applicants at folios 146 to 159 of the records of the proceedings and the Reply by the Commissioner for Revenue at folios 162 to 168 of the records of the proceedings;

After having considered all the records of the proceedings;

### **Considers:**

By virtue of a deed in the records of Notary Dr. Clarissa Cuschieri dated 25<sup>th</sup> July 2013<sup>7</sup>, the Applicants purchased and acquired: (i) the apartment internally marked C12, forming part of a block of twenty six apartments, which is unnumbered and named “Sea Haven Apartments” in Triq is-Simar, Xemxija, limits of St. Paul’s Bay, together with 1/26<sup>th</sup> undivided share of the common parts of the block; and (ii) the garage internally numbered 14 situated at semi basement level and underlying third party property, forming part of a block of 16 garages, accessible from an unnumbered ramp onto Triq is-Simar, Xemxija, limits of St. Paul’s Bay, both free and unencumbered, with all their rights and appurtenances, with free vacant and material possession, for the global price of €106,500. The said transfer was notified to the Commissioner for Revenue on the 9<sup>th</sup> August 2013<sup>8</sup> and the Commissioner proceeded to instruct Architect Stephanie Cassar to inspect the said properties for the purpose of giving their market value as at the date of transfer.

After inspecting the property purchased by the Applicants, Architect Cassar valued the same as follows: (i) the apartment numbered C12, Sea Haven Apartments, Triq is-Simar, Xemxija, limits of St. Paul’s Bay - €140,000; and (ii) the garage numbered 14 at semi-basement level accessible from a ramp onto Triq is-Simar, Xemxija, limits of St. Paul’s Bay - €30,000, globally valued at €170,000<sup>9</sup>. Since the price declared in the deed of transfer is less than 85% of the value as established by the Commissioner for Revenue on the basis of the valuation given by Architect Cassar, the Commissioner proceeded to issue against the Applicants an Assessment bearing Claim No. IV127154

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<sup>1</sup> Testimony by David Henry Kitts at folios 88 to 95 of the records of the proceedings and testimony by Jean Kitts a folio 96 of the records of the proceedings.

<sup>2</sup> Folios 103 and 104 of the records of the proceedings.

<sup>3</sup> Folios 105 to 108 of the records of the proceedings.

<sup>4</sup> Folios 114 to 116 of the records of the proceedings.

<sup>5</sup> Folios 134 to 136 of the records of the proceedings.

<sup>6</sup> Folios 141 to 143 of the records of the proceedings.

<sup>7</sup> Dok. “A2” a t folios 5 to 11 of the records of the proceedings.

<sup>8</sup> Dok. “KT1” at folios 40 to 44 of the records of the proceedings.

<sup>9</sup> Dok. “KT2” at folios 45 to 50 of the records of the proceedings.

by means of which he requested them to pay the sum of €2,522.50 representing duty due on the additional chargeable value of €63,500, together with the sum of €504.50 representing additional duty/penalty<sup>10</sup>.

The Applicants objected to the Assessment issued against them by means of two letters of objection dated respectively 10<sup>th</sup> April 2014<sup>11</sup> and 15<sup>th</sup> April 2014<sup>12</sup>. Following their objection, the Commissioner for Revenue instructed a second architect, Anthony Camilleri, to inspect the premises and give the market value of the properties purchased by the Applicants as at the date of transfer. Architect Camilleri inspected the properties in question and valued the same as follows: (i) the apartment numbered C12, Sea Haven Apartments, Triq is-Simar, Xemxija, limits of St. Paul's Bay - €145,000; and (ii) the garage numbered 14 at semi-basement level accessible from a ramp onto Triq is-Simar, Xemxija, limits of St, Paul's Bay - €14,000, globally valued at €159,000<sup>13</sup>.

The Commissioner for Revenue proceeded to adopt the valuation of the apartment as given by Architect Cassar, that is the value of €140,000, and the valuation of the garage as given by Architect Camilleri, that is the value of €14,000, and established the market value of the apartment **and** garage purchased by the Applicants, as at the date of transfer, at €154,000<sup>14</sup>. Since the price declared in the deed of transfer is less than 85% of the second revised valuation, the Commissioner proceeded to issue against the Applicants an Assessment bearing Claim No. IV127817 by means of which he requested them to pay the sum of €1,722.50 representing duty due on the additional chargeable value of €47,500, together with the sum of €344.50 representing additional duty/penalty<sup>15</sup>.

The Applicants objected to this last Assessment by means of a letter of objection dated 29<sup>th</sup> August 2014<sup>16</sup>, however the Commissioner for Revenue rejected their objection by a Decision dated 27<sup>th</sup> April 2016 and proceeded to confirm the Assessment bearing Claim No. IV127817 and re-issued the same in terms of Section 56(3) of Chapter 364 of the Laws of Malta and requested the Applicants to pay the sum of €1,722.50 representing duty due on the additional chargeable value of €47,500, together with the sum of €344.50 representing additional duty/penalty, together with interest as at the 27<sup>th</sup> April 2016 amounting to €232.54<sup>17</sup>.

The Applicants felt aggrieved by the decision of the Commissioner for Revenue dated 27<sup>th</sup> April 2016 and by the consequent Assessment bearing Claim No. IV127817 and proceeded to lodge this appeal therefrom, requesting that the Tribunal: (i) declare that the value of the properties, namely of the apartment number C12, Sea Haven, Triq is-Simar, Xemxija, and the garage internally numbered 14 situated at semi-basement level accessible from a ramp in Triq is-Simar, Xemxija, purchased by them is the value declared in the deed of transfer in the records of Notary Clarissa Cuschieri dated 25<sup>th</sup>

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<sup>10</sup> Dok. "B" at folio 13 of the records of the proceedings.

<sup>11</sup> Dok. "C" at folios 14 and 15 of the records of the proceedings.

<sup>12</sup> Dok. "D" at folios 16 to 21 of the records of the proceedings.

<sup>13</sup> Dok. "KT5" at folios 60 to 62 of the records of the proceedings.

<sup>14</sup> *Ibid* and para. 4 of the decision of the Commissioner for Revenue dated 27<sup>th</sup> April 2016, folio 27 to 30 of the records of the proceedings.

<sup>15</sup> Dok. "F" at folio 22 of the records of the proceedings.

<sup>16</sup> Dok. "G" at folio 23 of the records of the proceedings.

<sup>17</sup> Dok. "I" and Dok. "J" at folios 25 to 30 of the records of the proceedings.

July 2013, and consequently declare that the Assessment issued against them by the Commissioner for Revenue is null and without effect; (ii) order the cancellation and revocation of the Assessment issued against them by the Commissioner for Revenue and also the revocation of the request by the Commissioner for Revenue for the payment of duty and additional duty/penalty and interest, together amounting to €2,247.86.

The Applicants are founding their appeal from the Assessment bearing Claim No. IV127817 issued against them on the grounds that: (i) when considering and determining the market value of the apartment acquired by them, the Commissioner/Architects instructed by him failed to take into account the fact that at date of transfer the apartment was subject to an Enforcement Notice issued by the Malta Environment and Planning Authority and it was not covered by the necessary permits, a fact which necessarily impinges on the value of apartment; and (ii) the Commissioner/Architects instructed by him also failed to take into account the fact that after purchasing the apartment, they carried out improvements to the same.

The Commissioner for Revenue objects to the appeal lodged by the Applicants and requests that the same be rejected and instead the Assessment issued against them confirmed, since the allegations put forth by them are unfounded in fact and at law.

When the Applicant David Henry Kitts testified before the Tribunal, he declared, and this with particular reference to the issue concerning permits covering the apartment, that: *it [that is the apartment] was a store room so being the price was a hundred and twenty, we thought a fair price was a hundred and six and a little bit extra which that is what we paid and we agreed on it. ... Apparently there was a problem with the building, it was too low but really I do not know much about that but we did see an architect and since got it passed. ... It [that is the permit] was obtained by myself. ... I applied for the permit ... after I purchased the property. We had already been there for three years. In so far as concerns the state of the apartment when it was purchased the Applicant David Henry Kitts declared that: it was very damp because it was a holiday home rather than lived-in, there was a lot of fungus on the walls so before we actually moved in we were in a hotel for about six weeks while we went in an cleaned it up and decorated it. We had to put windows in it because some of the windows were falling out and we had fitted fly screens and made it habitable really. Asked whether the property was, when purchased, fit to live in, the Applicant replied: not really no. Given our age and circumstances no it was too damp. Asked and when you said that you had to change the windows why was that please? the Applicant replied: some of the back windows were falling out and one was a sheet of glass and we could not clean it so we had proper windows fitted. To the statement it was in an inhabitable state right, the Applicant replied yes it was inhabitable. With regard to the site inspections carried out by the Architects instructed by the Commissioner for Revenue, the Applicant declared: when the architects saw it they came over and it was obviously in a habitable condition because it was a year later so we had done a lot of work so obviously it looked as though it was worth more than what we paid for it. We had windows fitted, painted, we done a lot of fly screens on the outside and things like these. Asked and the mould or fungus that you mentioned was it still there when the architects came? the Applicant replied: there was all fungus and because it is an outside wall, when they removed the pictures you could see where the pictures had been and it was all black fungus all over the walls and there was some on the ceiling as well. Asked and when the Inland Revenue Department appointed architect and*

*saw the property, was there this fungus there please? the Applicant replied: no it was all painted after that. We put some of this stuff that protects against fungus and mould and since we had the outside painted as well so it stays quite a lot drier now. We put dehumidifiers as well<sup>18</sup>.*

The Applicants summoned as a witness John Middleton, at the time an agent with Frank Salt Real Estate, who was the person who showed the property to them and helped conclude the deal which led to the transfer of the property. John Middleton declared that the asking price for the property was €120,000 and that *it was always at that value. It was at that value because it came without permits and plans and any of the other relevant documentation which the buyers were made aware of when I actually took them to see it. ... It was not built according to plan, it was not built according to permit, there were big issues with the block which I explained to the buyer when we went to the property. ... Originally I think the block was built as a warehouse and I don't think that it was actually built as a block of apartments as such. Therefore, they couldn't get the plans or the permits with any legal representation to get them so it would always be as we sold it at the time some sort of warehouse apartment or something but it wasn't actually registered as an apartment at the time it was sold.* With regard to the state of the property John Middleton declared that *in total the property needed complete renovation and the property was used as a summer home by the present owner, his wife was deteriorating over the last sort of two or three years that I actually got to hear from him and they kept going back to the UK quite frequently and then they went back to the UK. ... So they went back to the UK immediately with his wife so yes it hadn't been looked after for quite a long time. In my opinion it needed complete renovation which is also why the price at the time was actually a very good and marketable price.* On being asked under cross-examination: *you mentioned that it required renovation and perhaps can you specify a bit what kind of renovation please?* John Middleton declared *some electricians in the apartment needed updating, there were boilers that probably needed replacing, all of the bathrooms definitely needed upgrading, new windows, there were damp issues on quite a lot of the ceilings and walls which needed to be taken care of. Looking at the property if you've seen it for the first time you would have thought that it needed quite a lot of money spending on it so Mr. Kitts obviously being in the building trade prior to moving to Malta didn't bother him at all so he was happy to take in the work<sup>19</sup>.*

Another witness summoned by the Applicants in support of their appeal from the Assessment issued against, is Architect Mark Arrigo who was instructed by the Applicants to give a market value of the properties purchased by them. In a report dated 11<sup>th</sup> March 2014<sup>20</sup>, Architect Mark Arrigo concluded that *following the visual inspection and taking into account all factors affecting the value of the property, including size, location, condition of finishes, condition of structure and permit situation, I give these properties a total current market value of one hundred and five thousand Euro (€105,000).* When testifying before the Tribunal Architect Arrigo declared that *the main issue that led me to this valuation is that this is a property at basement level. Now when I inspected the property, the layout is like of a residence but when I checked permits, the permit is for a store and an enforcement action*

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<sup>18</sup> Vide testimony given during the sitting held on the 24<sup>th</sup> January 2017, folios 88 to 95 of the records of the proceedings.

<sup>19</sup> Vide testimony by John Middleton given during the sitting held on the 20<sup>th</sup> April 2017, folios 105 to 108 of the records of the proceedings.

<sup>20</sup> Dok. "E" at folios 18 to 21 of the records of the proceedings.

*existed as well on that same property. So I had to come up with a value that would be reasonable because technically it is an illegal residence so how can I certify a value as a residential property when it had a permit as a store? So what I did was I came to a number somewhere in between what a store would be valued, a store that to be honest is not even a garage so it is just a store like you are going to a common area, go downstairs or a lift and you get to this residence which is used as a residence. So I got a value somewhere in between, the actual value if it was a legal residence and another value a lower value as a store. There was a garage as well included in this but that was all ok and that was valued as a garage. Asked by the Tribunal: so the primary issue that impacted your valuation was the fact that even though the unit was sold and used as a residence in reality the permits did not cover it as such, correct? Architect Arrigo replied: yes, exactly. Further asked by the Tribunal apart from the issue of the permit, the property itself did it have any other problems please? Architect Arrigo replied: besides that as a residence it had issues with regards to the side of the internal shafts that are not according to sanitary laws but other than that those were the main issues<sup>21</sup>.*

Architect Stephanie Cassar and Architect Anthony Camilleri both gave testimony during these proceedings, with Architect Cassar declaring that she valued the premises purchased by the Applicants as a habitable apartment and a garage. With particular reference to the apartment, asked *so am I understanding well that you valued the property as an apartment please?* Architect Cassar replied *yes* and clarified *but if I may make a point, in my notes submitted on the forms, now that I am seeing them again, I had made some observations regarding the apartment and it being come information that was also given to me by the taxpayer which I then carried out brief search on the MEPA website and some case files came up to confirm what the taxpayer was referring to. So I am aware that there might be circumstances that affect the property in this case and so the value I arrived to is the value for that property for that particular use but having note of the other circumstances.* Asked by the Tribunal *so it reflects the problems that there were, reflected in your valuation right?* Architect Cassar replied *yes, correct<sup>22</sup>.*

Architect Anthony Camilleri, who testified during the sitting held on the 15<sup>th</sup> January 2018<sup>23</sup>, also with reference to the apartment, declared that: *I arrived to the valuation as I carried out a site inspection, I have taken notes during the site inspection with reference to the size of the apartment and the subdivision of the apartment different rooms and I have some notes regarding the view of the sea which is an attribute to the apartment and valuation and I have taken some other notes like for example how it is divided into different rooms and could be used as an apartment. Furthermore, during the site inspection in my records I've got here a paper which says there was an enforcement notice. I believe this was given to me by the buyer and the enforcement notice is for the fact that originally the building permit referred to these premises as a store and in fact on my inspection I confirmed that it is an apartment. Furthermore, in the description by the notary it is said that it is an apartment. The apartment internally marked with the letter "C" and number 12, so to all intents and purposes according to the description of the notary and my visual inspection it actually serves*

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<sup>21</sup> Vide testimony by Architect Mark Arrigo given during the sitting held on the 20<sup>th</sup> April 2017, folios 103 and 104 of the records of the proceedings.

<sup>22</sup> Vide testimony given during the sitting held on the 22<sup>nd</sup> May 2017, folios 114 to 116 of the records of the proceedings.

<sup>23</sup> Folios 141 to 143 of the records of the proceedings.

as an apartment having 3 bedrooms, a kitchen, a living room, sanitary facilities and a view of the sea from the terrace. Asked: so you confirm that you did not check whether the permit or the enforcement is in force, whether the permit is for a residential purpose or not? Architect Camilleri replied: actually this is a printout from the Planning Authority stating that there is an enforcement notice. I also have a note here that says that although there is an enforcement notice the buyer also informed me that there is an application so that it would be used as a residence. Asked once again: so you valued the apartment as an apartment? Architect Camilleri replied: yes precisely. For the knowing that although there was an enforcement and as it was used as a residence, the permit for a residence could also be issued. Under cross-examination, asked: so can you confirm that you took note of the fact that a permit was not yet issued? Architect Camilleri replied: yes, I confirm and asked by the Tribunal: but you valued it as an apartment nonetheless right? he replied yes, in fact I have got written here - valued so much due to the view - and then I have got another note here - valued €1,400 for €45,000 as there is not permit for residential use as yet but there is a pending application - so my valuation is based on the fact that there is no permit for an apartment and there is a pending application. Asked further by the Tribunal: but when you gave that value you presumed that the application would be actually granted and therefore the permits issued or not? Architect Camilleri replied: yes I presumed that, and being asked to clarify: that it would be? he replied: yes. Asked: so basically your presumption is that the situation would be regularised? Architect Camilleri replied: yes and besides that not just an apartment but it has a view of the sea which has got its own market value as well having a view from the terrace. Asked once more: so basically that work does not reflect a property which is used as an apartment but which has a permit as a store so basically that it is being illegally used? It is not that? That wasn't in your consideration? Architect Camilleri replied: well had it full development permissions for a residence the value would have been more, so the value given was actually taken into consideration that it had no official permit although it could easily obtain a permit.

From all the evidence submitted during the hearing of these proceedings it clearly results that the main issue concerns **the valuation of the apartment** rather than the valuation of the garage, and what is particularly being contested by the Applicants are the following: (i) the fact that the premises purchased by them within the block "Sea Haven Apartments", Triq is-Simar, Xemxija, are being valued as an apartment; (ii) the fact that the said premises are being so valued as an apartment without any consideration regarding the lack of permits; and (iii) that the improvements carried out by them to the premises after the purchase thereof, which naturally effect the market value of the said premises, are also not being considered.

In their Note of Submissions the Applicants submit that: *the permit was that of a store. Therefore, it could have never been given the price of a proper residential unit. Architect Arrigo took into account that the garage was built according to permit, he took into account that the apartment had the permit of a store but used for residential purposes and came to the same amount of EUR 105,000 which is in the vicinity of the amount the applicants paid. **The error made by the two architects appointed by the Department was that they both assessed and valued it as an apartment***<sup>24</sup>. Architect Stephanie Cassar said the following: ... "yes the property

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<sup>24</sup> Emphasis by the Tribunal.

was being used as an apartment and the value being given to that property was of a habitable apartment in that case and a garage I believe, so a garage and an apartment”. Architect Cassar did later on mention that she conducted a “... brief search on the MEPA website and some case files came up to confirm what the taxpayer was referring to. So I am aware that there might be circumstances that affect the property” when coming up with a valuation (which was later on decreased without reason by the Department itself when it appointed a second architect). However, it is not merely a matter of “... there might be circumstances that affect the property.” It is a matter not of **might** but of **were**<sup>25</sup>. In fact the ‘circumstances’ were Enforcement Notice (EC/1412/97) and it had a permit of a store and not of an apartment (See Doc. OM1). Yet, Architect Cassar referred to the property as an apartment and she crucially said that she valued the property as that of a habitable apartment and garage. Indeed, the Department itself engaged another architect to value the said property. They engaged Architect Anthony Camilleri, who also erroneously valued it as an apartment when really and truly it did not have the permit of an apartment but that of a store<sup>26</sup>.

The Tribunal does not agree with the Applicants’ claim that *the error made by the two architects appointed by the Department was that they both assessed and valued it as an apartment* and this in view of the fact that both as per deed of transfer and as per actual fact the Applicants did indeed purchase a premises which was **an apartment**.

In the deed of transfer in the records of Notary Clarissa Cuschieri dated 25<sup>th</sup> July 2013<sup>27</sup>, it is clearly stated and provided that *in virtue of this deed the Vendors, are hereby jointly and severally selling, conveying and transferring in favour of the Purchasers, jointly accept, purchase and acquire, in equal and undivided shares between themselves:- The **apartment**<sup>28</sup> internally marked with the letter C and number twelve (C12), forming part of a block of twenty six apartments, which is unnumbered and named “Sea Haven Apartments”, in Triq is-Simar, in Xemxija, limits of Saint Paul’s Bay. The said block is bounded on the North by the said street, on the East by property of Family Fenech or their successors in title, and on the South by property of Families Borg, Chase and others. Included with the said **apartment**<sup>29</sup> is one twenty sixth (1/26<sup>th</sup>) undivided share of the parts intended for common use in the block, generally being the main entrance, foyer, stairwell and staircase, lift, lift shaft and roof of the apartment, internally numbered twenty five (25) and twenty six (26), both also forming part of the said block, as well as the drainage system. The said property is free and unencumbered, with all its rights and appurtenances, with free vacant and material possession. The said property enjoys and is subject to the active and passive servitudes resulting from its position.*

When the transfer was notified to the Commissioner for Revenue in terms of Law, the Commissioner was informed of the transfer of **the apartment internally marked with the letter C and number twelve (C12), forming part of a block of twenty six apartments, which is unnumbered and named “Sea Haven**

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<sup>25</sup> Emphasis by the Applicants.

<sup>26</sup> Note of Submissions by the Applicants, folios 146 to 159 of the records of the proceedings.

<sup>27</sup> Dok. “A2” at folios 5 to 11 of the records of the proceedings.

<sup>28</sup> Emphasis by the Tribunal.

<sup>29</sup> Emphasis by the Tribunal.



***Apartments”, in Triq is-Simar, in Xemxija, limits of Saint Paul’s Bay***<sup>30</sup>. Furthermore from Dok. “A1”<sup>31</sup> submitted by the Applicants together with their application, it also results that the premises in issue were marketed as an apartment in fact the description given was: *situated on high grounds, comes this ground floor APARTMENT served with lift and hall porter. Accommodation comprising entrance hall, spacious open plan fitted kitchen/breakfast and living room combined, leading out onto a back balcony, three bedrooms, bathroom, shower room en suite, store room and a two car lock up garage. Freehold. Property enjoys lovely sea views of Xemxija Bay.* The Applicants themselves declare that the premises purchased by them was an apartment and that they intended to and did actually use the same as their residence here in Malta.

When these facts are considered in the light of Regulation 3(1) and (2) of the Duty on Documents and Transfers Rules, Subsidiary Legislation 364.06, which rules as applicable at the time when the premises were inspected by both Architect Cassar and Architect Camilleri provided that: *(1) The value of any property subject to duty under the Act, transferred inter vivos or transmitted causa mortis, shall be the value of such property on the date of the said transfer inter vivos or on the date of death of the person from whom the transfer causa mortis originates, as the case may be, (hereinafter referred to as “the relevant date”) and such value shall be established in accordance with the following provisions. (2) The value of the full ownership of any property on the relevant date shall be the average price which such property would fetch if sold on the open market on that date, regard being had to all circumstances affecting such property,* it clearly results that both Architect Cassar and Architect Camilleri were correct in valuing the premises purchased by the Applicants as an apartment.

In so far as concerns the issue regarding the lack of proper permits covering the said premises, the Tribunal agrees with the Applicants that this particular matter had to be taken into consideration by the Architects instructed by the Commissioner for Revenue but disagrees with their claim that the said Architects failed to do so. From the testimony given by both Architect Cassar and Architect Camilleri, whose respective valuations of the apartment in question are very close to each other, it clearly transpires that in reaching their respective values of €140,000 (Architect Cassar) and of €145,000 (Architect Camilleri), they both took into consideration the fact that at the time of transfer the premises purchased by the Applicant were not duly covered with a permit for residential use.

The Applicants object to the consideration made, in particular by Architect Camilleri, that even though at the time of transfer the premises purchased by them were not duly covered with a permit for residential use, such a permit could be obtained following an application lodged with the Planning Authority. The Applicants argue that this particular consideration should not have been made in determining the market value of the premises at the time of transfer. In this regard, in their Note of Submissions they submit that: *Architect Camilleri justified his valuation by saying that a residence permit could subsequently be issued. However, apart from the fact that this was and has not been the case as testified by Oliver Magro in representation of the Planning*

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<sup>30</sup> Dok. “KT1” at folios 40 to 44 of the records of the proceedings. Emphasis by the Tribunal.

<sup>31</sup> Folio 12 of the records of the proceedings.

*Authority: “... So the concession was granted right? ... It was granted yes and the concession says for the change of use and apart from other illegalities on site. This concession does not grant you any permits with regards to the illegal development on site. In fact, the enforcement notice is still pending because it has to be regularised which cannot be regularised. Nowadays CTB are no longer there”. Oliver Magro pointedly remarked “... the enforcement notice is still pending because it has to be regularised which cannot be regularised”. Therefore, contrary to Architect Camilleri’s positive belief, it seems that it cannot be regularised. However, even if there is the possibility that it can be regularised, it still does not mean that a property can be increased in value to take such consideration. In fact the value needs to be a reflection of the market value and building without the necessary permit will have such reflected in the price. The price cannot reflect a future possibility but the current and actual scenario. It is clear that the valuation presented by Architect Camilleri is not an actual valuation but a projected valuation. One cannot claim duty on a projected valuation but only on an actual valuation which actual valuation would be a reflection of the market value<sup>32</sup>.*

In this case too the Tribunal is not in agreement with the claims made and submissions put forth by the Applicants. As clearly results from Regulation 3(2) of Subsidiary Legislation 364.06, already quoted further up in this judgement, the Architects were legally bound to take into consideration **all** the circumstances affecting the transferred property. Whilst the lack of a valid permit for residential use covering the premises is undoubtedly a circumstance which has to be taken into consideration, it is equally undoubted that the possibility of regularising such a position is another circumstance which must also be taken into consideration for the purposes of determining the market value of the property at date of transfer. Both aspects are, in the opinion of the Tribunal, circumstances which clearly and surely affect the value of the property.

In so far as concerns the actual regularisation of the situation, the Tribunal points out that the main issue with the Applicants was, and has always been, the fact that the premises in question were not covered by a valid permit for residential use. As correctly foreseen by Architect Camilleri, this particular issue seems to have been resolved as declared by the Applicant David Henry Kitts himself who during his testimony stated that he had obtained a permit for the premises to be used as a residential unit. Contrary to that argued by the Applicants in their Note of Submissions, the fact that the issue concerning **the permit for residential use** has been resolved is confirmed by the Planning Authority representative Oliver Magro who testified that: *with regards to particularly flat number 12, an enforcement notice was issued on the 13<sup>th</sup> November of 1998, was issued against Mr. Spiteri regarding the legal development which consisted in the change of use from a store to residential unit ... the last application regarding flat number 12 was submitted by David Kitts on the 11<sup>th</sup> March of 2015, it was a category B application CTB number 329/2015 on this permit actually a permit as a concession was issued on the 25<sup>th</sup> June of 2015. ... It was granted ... and the concession says for the change of use and apart from other illegalities on site. This concession does not grant you any permits with regards to the illegal development on site. In fact, the enforcement notice is still pending because it has to be regularised which cannot be regularised. Nowadays CTB are no longer there. Asked by the Tribunal: so in reality the concession hardly means anything right? Oliver Magro*

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<sup>32</sup> Note of Submissions by the Applicants, folios 146 to 159 of the records of the proceedings.

replied *no, it is just used either to sell the apartment or to bring the compliance certificate used for those purposes*<sup>33</sup>.

From this testimony it is clear that to date the issue regarding the permit for use as a residential unit has been resolved and even though the Enforcement Notice regarding other issues pertaining to the block is still pending, these other issues never seemed to be of much concern to the Applicants and weren't the basis on which they contested the Assessments issued against them by the Commissioner. As a matter of fact, when Architect Mark Arrigo, the Architect instructed by the Applicants to give a fair value for the apartment and garage purchased by them, testified before the Tribunal, he clearly stated that even though the internal shafts of the block of apartments were not according to sanitary laws, the main issue concerning the properties purchased by the Applicants was the fact that the apartment was not covered with a valid permit for residential use.

Considering all of the above the Tribunal deems that the Architects instructed by the Commissioner for Revenue, particularly Architect Camilleri whose valuation, it is being reiterated was very close to the valuation given by Architect Cassar, were correct in valuing the premises purchased by the Applicants as an apartment which at date of transfer was not covered with a valid permit for use as a residential unit but which could be duly regularised by the issue of a permit for use as a residential unit by the Planning Authority. This therefore means that the value of €140,000 ultimately adopted by the Commissioner for Revenue as the market value of the apartment acquired by the Applicants as at date of transfer is a fair and correct value.

The Applicants further argue that the Architects instructed by the Commissioner for Revenue did not take into account the improvements made by them to the apartment in question. In their Note of Submissions the Applicants submit that *apart from the enforcement notice the property when bought was not in tip top shape. When Architects Cassar and Camilleri viewed the property it was several months after it was bought which had in the meantime been renovated by the applicants. What Architects Cassar and Camilleri saw was not the property as it was at the time of the actual sale but a property which had been upgraded by the applicants. This also affected the valuation by the said architects as visually they could not visualise the property as it had been before. ... The fact that the Architects saw an upgraded property would lead to an erroneous valuation as they clearly did not take into consideration the property as it was at the time of sale. In fact the Architects said that they valued it as a residential apartment - as they actually saw it at the time of their valuation...*<sup>34</sup>.

The Tribunal is however of the opinion that the Applicants did not submit any evidence which satisfactorily proves and confirms the improvements and upgrades which they allege to have made to the apartment purchased by them. Even though John Middleton - the agent with Frank Salt Real Estate involved in the transfer at issue - claims that the apartment purchased by the Applicants had to be completely renovated in the sense that *some electricians in the apartment needed updating, there were boilers that probably needed replacing, all of the bathrooms definitely needed updating, new*

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<sup>33</sup> Vide testimony by Oliver Magro given during the sitting held on the 28<sup>th</sup> November 2017, folios 134 to 136 of the records of the proceedings.

<sup>34</sup> Note of Submissions by the Applicants, folios 146 to 159 of the records of the proceedings.

*windows, there were damp issues on quite a lot of the ceilings and walls which needed to be taken care of. Looking at the property if you've seen it for the first time you would have thought that it needed quite a lot of money spending on it so Mr. Kitts obviously being in the building trade prior to moving to Malta didn't bother him at all so he was happy to take on the work<sup>35</sup>, the Applicants did not submit any evidence concerning this alleged complete renovation.*

The documents submitted by the Applicant David Henry Kitts during the sitting held on the 24<sup>th</sup> January 2017<sup>36</sup> are mainly statements pertaining to purchases made by him and which were paid for via his MasterCard, which statements however do not indicate what those purchases were and therefore the Tribunal has no way of ascertaining that these purchases were indeed aimed at the renovation of/improvements to the apartment. Apart from this fact, the total value spent by the Applicant for the purchases highlighted by him amounts to €2,558.64, which sum clearly does not reflect extensive improvements made to the property, least of all a complete renovation of the same, as alleged by them.

In the light of the above, the Tribunal reiterates that the value for the apartment of €140,000 given by Architect Cassar is indeed a fair market value of the said apartment at date of transfer. Since the Applicants do not seem to be contesting the value of €14,000 given by Architect Camilleri for the garage, the Tribunal finds no reason why it should not consider this value as being a fair market value of the garage at date of transfer.

The Applicants are also contesting the interest imposed on them in the Assessment bearing Claim No. IV127817 issued against them by the Commissioner for Revenue, which interest as at 27<sup>th</sup> April 2016, amounted to €232.54. In their Note of Submissions the Applicants submit that: *without prejudice to the above, the applicants in the letter dated 27 April 2016 were asked to pay the amount of EUR 2,299.54, that is, duty of EUR 1,722.50; additional duty/penalty of EUR 344.50 and interests as at 27 April 2016 of EUR 232.54. It is being submitted that even if the Honourable Tribunal finds in favour of the defendant, the interests are definitely not due. The applicants had asked for a refusal so that they can take the case in front of this Tribunal on 29 August 2014. If the Department had granted a timely refusal and not a year and eight months later, no interest would have accrued<sup>37</sup>.*

Section 52(4)(a) of the Duty on Documents and Transfers Act, Chapter 364 of the Laws of Malta, as applicable at the time of issue of the Assessment bearing Claim No. IV127817, provided that: *where the Commissioner has determined that the value of an immovable as declared in a deed of transfer or in a declaration of a transfer causa mortis is less than eighty five per centum of the real value or consideration as provided in subarticle (1) or where in the opinion of the Commissioner the deed of transfer or the deed of declaration made in accordance with article 33 does not reflect the true conditions of the transfer, the transferor in a transfer inter vivos and the transferee shall be liable to pay an additional duty equivalent to twenty per centum (20%) of the amount of duty assessed by the Commissioner as aforesaid: Provided*

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<sup>35</sup> Vide testimony given by John Middleton during the sitting held on the 20<sup>th</sup> April 2017, folios 105 to 108 of the records of the proceedings.

<sup>36</sup> Folios 79 to 87 of the records of the proceedings.

<sup>37</sup> Note of Submissions by the Applicants, folios 146 to 159 of the records of the proceedings.

*that, in addition to the above-mentioned additional duty the transferor in a transfer inter vivos and the transferee shall be liable to pay interest at the rate of point seven five per centum (0.75%) per month or part thereof, which interest shall start accruing after the expiration of three months from either of the following: (i) the date of notification of the original assessment where no objection is made, or where the value is not reduced by the Commissioner following the filing of an objection; or (ii) the date of notification of the revised assessment issued in terms of article 56, where the value has been reduced by the Commissioner following an objection: Provided further that the additional duty and interest shall in no case exceed in total fifty per centum (50%) of the duty assessed by the Commissioner in respect of each assessment.*

When the facts of this case are considered in the light of this provision of the law it clearly results that in this case interest could start accruing **only after the expiration of three months from the notification of the Assessment bearing Claim No. IV127817 dated 27<sup>th</sup> April 2016**, since as can be seen from the said Assessment<sup>38</sup>, it is issued in terms of Section 56 of Chapter 364 of the Laws of Malta. This therefore means that at date of issue of the said Assessment the Commissioner for Revenue could not, since he was not legally empowered to do so, impose interest on the Applicants. Therefore, the interest element imposed in the above-mentioned Assessment bearing Claim No. IV127817 must be cancelled and revoked.

For these reasons the Tribunal upholds **in part** the appeal lodged by the Applicants from the Assessment bearing Claim No. IV127817 issued against them by the Commissioner for Revenue, in the sense that it cancels and revokes the interest element imposed on the Applicants in said Assessment and directs the Commissioner for Revenue to calculate and consequently impose any interest due in terms of Section 52(4)(a) of Chapter 364 of the Laws of Malta, but otherwise confirms the Assessment in so far as concerns the additional chargeable value of the property purchased by the Applicants, that is the apartment internally numbered C12, Sea Haven Apartments, Triq is-Simar, Xemxija, limits of St. Paul's Bay, and the garage internally numbered 14, accessible from a ramp onto Triq is-Simar, Xemxija, by virtue of the deed of transfer in the records of Notary Clarissa Cuschieri dated 25<sup>th</sup> July 2013, and also in so far as concerns the duty due on said additional chargeable value and the additional duty/penalty being imposed on the Applicants.

In the circumstances of this case costs are to be borne entirely by the Applicants.

**MAGISTRATE**

**DEPUTY REGISTRAR**

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<sup>38</sup> Dok. "I" at folio 25 and 26 of the records of the proceedings.