MALTA

THE ADMINISTRATIVE REVIEW TRIBUNAL

MAGISTRATE DR.
GABRIELLA VELLA

Sitting of the 26 th November, 2013

Rikors Number. 45/2009

Karl Heinrich Guenter Hobein

Vs

Director General (Inland Revenue)

The Tribunal,

After having taken cognizance of the application filed by Karl Heinrich Guenter Hobein before the Board of Special Commissioners and subsequently transferred before this Tribunal, by means of which he requests the revocation of the Assessment dated 29th October 2003 having Claim No. IV027154 and of the Assessment dated 22nd September 1998 having the reference JPH 184/97 and Claim No. 27154 and the consequent cancellation of the Claim No. 27154;

After having taken cognizance of the Decision of the Commissioner of Inland Revenue dated 27th October 2003 at folio 1 to 3 of the records of the proceedings and

of documents submitted by the Applicant together with his application marked as Doc. "A" to Doc. "E" at folio 9 to 20 of the records of the proceedings;

After having taken cognizance of the Reply submitted by the Commissioner of Inland Revenue by means of which he opposes the requests put forth by the Applicant and pleads that the same be rejected, with costs against the Applicant, on the grounds that for the reasons given in the decision dated 29th October 2003, the Assessment issued against The Applicant and Gisela Hobein with regard to the transfer of immovable property by virtue of a deed on the records of Notary John P. Hayman dated 1st November 1997 is fair and correct and must therefore be confirmed;

After having taken cognizance of the documents submitted by the Commissioner of Inland Revenue together with his Reply marked as Doc. "A" to Doc. "D" at folio 22 to 25 of the records of the proceedings;

After having taken cognizance of the Decree dated 14th July 2011 at folio 33 to 35 of the records of the proceedings and after having taken cognizance of the Decree dated 15th March 2012 by means of which the Tribunal ordered that in the light of Act XXII of 2011 and Legal Notice 16 of 2012 the title "Commissioner of Inland Revenue" be corrected to "Commissioner of Revenue" wherever it appears in the records of the proceedings;

After having heard evidence given by Dr. Kai Jochimsen during the sitting held on the 26th January 2012[1] and evidence given by Ivan Portelli as representative of the Director General (Inland Revenue) during the sitting held on the 15th March 2012[2] and during the sitting held on the 23rd May 2012[3] and after having taken cognizance of the documents submitted by Ivan Portelli together marked as Doc. "IP" at folio 47 and 48 of the proceedings, after having taken cognizance of evidence given by Architect

[1] Folio 38 of the proceedings.
[2] Folio 41 to 44 of the proceedings.
[3] Folio 49 and 50 of the records of the proceedings.

Michael Busuttil during the sitting held by Judicial Assisstant Dr. Daniela Mangion on the 6th November 2012[4] and of the documents submitted during that sitting marked as Doc. "MB1" and Doc. "MB2" at folio 59 and 60 of the proceedings and after having heard evidence given by Judicial Assistant Dr. Daniela Mangion during the sitting held on the 12th November 2012[5];

After having taken cognizance of all the records of the proceedings;

Considers:

By virtue of a decision dated 27th October 2003[6] the Commissioner of Inland Revenue rejected the objection submitted by the Applicant to the Assessment having Claim No. 27154 dated 22nd September 1998 pertinent to the acquisition of immovable property by the Applicant and Gisela Hobein, namely the garage internally numbered thirteen (13) forming part of a block of flats without name and without number in Tonna Street, Sliema, by virtue of a deed in the records of Notary John P. Hayman dated 1st November 1997, and determined that he *does not see any valid reason to cancel the assessment in question as desired by transferees and, in accordance with the provisions of article 56(3) of the Duty on Documents and Transfers Act (Cap. 364), he does hereby determine the duty and additional duty payable by Karl Heinrich Guenter Hobein and Gisela Hobein in respect of the aforesaid transfer to be Lm340* (today equivalent to €791.99) *and Lm680* (today equivalent to €1,583.97) *respectively, a total amount payable of Lm1,020* (today equivalent to €2,375.96).

The Commissioner of Inland Revenue founded his decision on the following grounds: *Rule 3 of the Duty on Documents and Transfers Rules, 1993 it is established that the value of any property subject to duty under the Act "shall be the average price which such property would*

[4] Folio 56 to 58 of the proceedings.
[5] Folio 61a and 61b of the records of the proceedings.
[6] Folio 1 to 3 of the records of the proceedings.

fetch if sold on the open market...” and the value of the property “shall be the value of such property on the date of the said transfer inter vivos ...”. In determining the value of the immovable property transferred, the Commissioner has obtained the advice of his technical expert, who valued the said garage at four thousand Maltese Liri (Lm4,000). The Commissioner had no option other than to proceed with an assessment on the basis of the difference between the value on the immovable property in question as determined by him on technical advice and the declared price. At objection’s stage the departmental engineer confirmed his original valuation and stated that he considered his valuation for a lock up garage in Sliema, as being fair. On the other hand transferees have failed to produce any evidence to show that the value declared in the deed is correct. The Commissioner respectfully observes that transferor had agreed to the assessment and paid the duty and additional duty accordingly. Under the circumstances, the Commissioner sees no valid reason for discarding the advice obtained by him and confirms his assessment in that respect. As regards additional duty, this was imposed in terms of article 52(4) of the Duty on Documents and Transfers Act (Cap. 364), whereby the transferee shall be liable to pay an additional duty equal to ten times the difference between the duty paid on such deed and the duty chargeable as determined by the Commissioner. The amount of additional duty properly chargeable in this case was Lm3,400 but the Commissioner availed himself of the powers conferred upon him by article 24 of the Act and reduced such additional duty to Lm680. It is this latter amount which is in contestation. However, the Commissioner sees no valid reason to remit or reduce further the additional duty incurred.

The said decision was followed by an Assessment having Claim No. IV027154 dated 29th October 2003[7] whereby the Applicant is once again being requested to pay the sum of Lm340 (€791.99) representing tax due on the additional chargeable value of Lm2,000 (€4,658.75) and

[7] Folio 25 of the records of the proceedings.

the sum of Lm680 (€1,583.97) representing additional duty/penalty, together amounting to Lm1,020 (€2,375.96). The Applicant however felt aggrieved by the decision and consequent Assessment issued by the Commissioner of Inland Revenue against him and submitted an appeal before the Board Special Commissioners subsequently transferred before this Tribunal requesting the revocation and consequent cancellation of the Assessment having Claim No. 27154 dated 29th October 2003 and previously dated 22nd September 1998.

The grounds for Appeal put forth by the Applicant are the following: (i) the Law on the basis of which the Commissioner of Inland Revenue gave his decision has been repealed, and was null and void during the whole period applied, since it was in violation of Article 14 of the European Human Rights Convention, Chapter 319 of the Laws of Malta, in that it discriminated against persons not having Maltese citizenship who had to pay a higher duty on the transfer of immovables on the basis of nationality only; (ii) the decision by the Commissioner of Inland Revenue violates his right to peaceful enjoyment of his possessions according to Article 1 of the First Protocol of the European Human Rights Convention; (iii) the valuation by the expert appointed by the Commissioner of Inland Revenue is not reliable since the same expert had valued a previous property acquired by the Applicant and the Assessment issued against him on the basis of that valuation was eventually revoked and cancelled; (iv) any expert appointed by the Commissioner of Inland Revenue is not asked to determine the "real value" according to Article 10(1) of the Duty on Documents and Transfers Act but in every case to determine the market price of the property; (v) the address of the garage as indicated on the Assessment dated 22nd September 1998 and on the Assessment dated 29th October 2003 is not accurate and therefore these Assessments do not determine nor describe the accurate location or address of the immovable in question with the resulting consequence that the garage in question was not valued by any expert.

The Comissioner of Inland Revenue opposes the requests put forth by the Applicant and pleads that the Appeal from his decision and consequent Assessment by rejected since for the reasons given in the decision dated 29th October 2003, the Assessment issued against the Applicant and his wife with regard to the transfer of immovable property by virtue of a deed on the records of Notary John P. Hayman dated 1st November 1997 is fair and correct and must therefore be confirmed.

Prior to dealing with the merits of the Applicant's Appeal from the decision and consequent Assessment by the Commissioner of Inland Revenue, the Tribunal deems it necessary to refer to the Delegation of Functions Order published in the issue of the Government Gazette of the 20th July 2012 pursuant to the powers conferred by Article 3(4) of the Commissioner for Revenue Act, Chapter 517 of the Laws of Malta. The said Delegation of Functions Order *inter alia* provides that *pursuant to the powers conferred by subarticle (4) of article 3 of the Commissioner for Revenue Act, the Commissioner for revenue with the concurrence of the Minister responsible for finance hereby delegates all rights, duties, powers and functions, including the legal and judicial representation of Government as conferred by subarticle (5) of article 3 of the said Act, hereinafter referred to as "the rights" as follows: (a) the rights under the Income Tax Act, the Income Tax Management Act, the Duty on Documents and Transfers Act, the Monte di Pietà Act, the Gold and Silversmiths Ordinance, the Immovable Property (Acquisition by Non Residents) Act, and any regulations made thereunder, shall be vested in the official who from time to time occupies the position of Director General (Inland Revenue). ... This Order and the delegations made thereunder shall have effect from 20th January 2012, and Government Notice number 55 published in the Government Gazette dated 20th January 2012 and Government Notice number 398 published in the Government Gazette dated 2nd March 2012 are being revoked without prejudice to the validity of any actions taken in accordance with the said notices during the time when such notices were in force.*

In terms of Section 3(5) of Chapter 517 of the Laws of Malta *the Commissioner shall have the legal and judicial representation of the Government on all documents, judicial acts and actions relating to revenue collection and any other matter in which the revenue departments have an interest, unless such representation has been delegated in accordance with sub-article (4)*, however from the above-mentioned Delegation of Functions Order it results that with effect from the 20th January 2012 the Commissioner Revenue delegated the said judicial representation in so far as concerns matters arising out of the Duty on Documents and Transfers Act onto the person of the Director General (Inland Revenue). Therefore by virtue of the said Order the interests of the Commissioner of Inland Revenue in these proceedings have been transposed onto and are today vested in the Director General (Inland Revenue).

In terms of Regulation 2 of Legal Notice 173 of 2012, Revenue Department Posts (Equivalence of Certain References) Regulations, 2012, *the words listed in the first column of the Schedule shall, in any judicial act or judicial action and in any communication notified or addressed to any department of revenue and in any communication sent from any department of revenue, be deemed to be equivalent and shall have the same meaning and legal effect as the words listed in the same item of the second column of the Schedule and in such a way that the words used in the two columns of the same item shall have the same meaning and effect for all purposes of law.* In terms of the Schedule of the said Regulations this effectively means that the title "Commissioner of Inland Revenue" is to be deemed as equivalent to the title "Director General (Inland Revenue)" thus making an corrections to the records of pending proceedings where the Applicant or Respondent public authority, as the case may be, is the Commissioner of Inland Revenue unnecessary in spite of the Delegation of Functions Order.

However in these proceedings by a Decree dated 15th March 2012 the Tribunal ordered that the title "Commissioner of Inland Revenue" be corrected to "Commissioner for Revenue" wherever necessary in the records and in terms of the above-mentioned Regulation 2 of Legal Notice 173 of 2012 the title "Commissioner for Revenue" is not equivalent to the title "Director General (Inland Revenue)", thus making it necessary to further correct the records of these proceedings wherever necessary to the effect that the title " Commissioner for Revenue" be corrected to " Director General (Inland Revenue).

Having dealt with this particular issue the Tribunal will now proceed to deal with the grounds for Appeal being put forth by the Applicant against the decision and consequent Assessment issued by the Commissioner of Inland Revenue against him.

In his first ground for Appeal the Applicant claims that *the law, which was applicable and which was justifying the Commissioner's decision has been repealed, and was nill and void during the whole period applied, because it was violating Art. 14 of the European Human Rights Convention (EHRC), Cap.319 of the Laws of Malta. The law had stipulated that persons not having Maltese citizenship had to pay a higher duty on the transfer of immovables than persons having Maltese citizenship. This fact led to a distinction on the basis of nationality only. It therefore violated superceeding and supranational Maltese Law and was nill and void on the day applied to the disadvantage of the appellant*.

The provision of the law to which the Applicant refers is Section 32(2) of Chapter 364 of the Laws of Malta as introduced by Act XVII of 1993. Section 32(1) and (2) of Chapter 364 of the Laws of Malta as introduced by the said Act provided that: *(1) there shall be charged on every document and on every judgement, decree or order of any Court or other lawful authority, whereby any immovable or any real right over an immovable is transferred to any person, and on every declaration made in accordance*

with section 33 of this Act a duty of Lm7 for every Lm100 or part thereof of the amount or value of the consideration for the transfer of such thing or of the value of such thing, whichever is the higher. (2) Where the transfer other than a transfer causa mortis, requires a permit by the Minister under the Immovable Property (Acquisition by Non-Residents) Act, the duty chargeable in virtue of subsection (1) shall be increased by ten per cent of the amount or value of the consideration for the transfer of the immovable property or of the value of the immovable property, whichever is the higher. For the purposes of this subsection "immovable property" has the same meaning assigned to it by section 2 of the said Immovable Property (Acquisition by Non-Residents) Act. Provided that the duty as aforesaid shall not be so increased where the immovable property falls under paragraph (a) of the proviso to subsection (1) of section 5 of the Immovable Property (Acquisition by Non-Residents) Act, and this fact results from the permit issued by the Minister in terms of the said Act.

As a matter of fact subsection 2 of Section 32 of Chapter 364 of the Laws of Malta was repealed by Act XI of 2000 and the Applicant claims that this provision was repealed specifically because it was found to be in violation of Article 14 of the European Convention of Human Rights. In spite of this claim the Applicant failed to submit evidence which satisfactorily supports it, evidence which he was bound produce in terms if Section 58(3) of Chapter 364 of the Laws of Malta which provides that *the onus of proving that the assessment complained of is excessive shall be on the appellant*[8].

In default of said evidence the Tribunal cannot assume and consequently conclude that Section 32(2) of Chapter 364 of the Laws of Malta was repealed because it was found to be in violation of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as claimed by the Applicant. Neither can it determine that the said provision of the law

[8] Provision originally introduced by Act XVII of 1993 and retained ever since.

was in violation of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms since under the Maltese Legal System the only Courts which are competent to determine whether or not a particular provision of the Law is in violation of the Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms are the First Hall Civil Court in its Constitutional Jurisdiction and the Constitutional Court. This competence clearly results from Section 46(1), (2) and (4) of the Constitution which provides that *subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of article 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress[9];(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article[10], and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45 (inclusive) to the protection of which the person concerned is entitled: Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law; ... (4)any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court[11],* and from similar provisions under Section 4(1),(2) and (4) of Chapter 319 of the Laws of Malta in so far as concerns alleged violations of the

[9] Underlining by the Tribunal.
[10] Underlining by the Tribunal.
[11] Underlining by the Tribunal.

Fundamental Human Rights and Freedoms protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Even though Section 46(3) of the Constitution and Section 4(3) of Chapter 319 of the Laws of Malta provide that *if in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said articles 33 to 45 (inclusive)* [or of any of the Human Rights and Fundamental Freedoms as the case may be], *that Court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that Court shall give its decision on any question referred to it under this sub-article and, subject to the provisions of sub-article (4) of this article, the court in which the question arose shall dispose of the question in accordance with that decision*, the Administrative Review Tribunal is not a court in terms of Section 46(3) of the Constitution and Section 4(3) of Chapter 319 of the Laws of Malta and therefore cannot refer issues pertaining to alleged violations of Human Rights and Fundamental Freedoms vpbefore the First Hall Civil Court.

This particular matter has already been addressed by the Tribunal in the proceedings **Malcolm Ellul v. Kummissarju tat-Taxxi Interni, Application No. 68/09VG** in a decree dated 18th April 2011 and in the proceedings **Emanuel Falzon v. Awtorità ghat-Trasport f'Malta, Application No. 3/10VG** in a decree dated 3rd May 2011, wherein it stated that *fi kwalunke kaz però anke kieku stess is-sitwazzjoni kienet tali li taghti lok ghal referenza kostituzzjonali, fil-fehma tat-Tribunal it-talba tar-rikorrenti xorta wahda ma tistax tigi milqugha in kwantu dan it-Tribunal ma huwiex fakoltizzat biex iressaq referenza kostituzzjonali ai termini ta' l-Artikolu 46(3) tal-Kostituzzjoni u l-Artikolu 4(3) tal-Kap.319 tal-Ligijiet ta' Malta, billi ma jaqax taht it-tifsira ta' "qorti" kif intiza fl-imsemmija artikoli tal-Kostituzzjoni u tal-Ligi. Mhux kull awtorità gudikanti ghandha s-setgha li tressaq referenza kostituzzjonali quddiem il-Prim' Awla tal-Qorti Civili (Sede*

Kostituzzjonali). Biex tali setgha tissussisti l-awtorità gudikanti in kwistjoni trid tkun ***qorti*** *ghall-finijiet ta' l-Artikolu 46(3) tal-Kostituzzjoni u fl-Artikolu 4(3) tal-Kap.319 tal-Ligijiet ta' Malta. Dan il-principju gie stabbilit fis-sentenzi fl-ismijiet* ***Kummissarju ta' l-Artijiet v. Ignatius Licari noe, Rikors Nru. 9/01*** *u* ***Anthony Grech v. Claire Calleja et, Rikors Nru. 11/07****, entrambe decizi mill-Qorti Kostituzzjonali fit-30 ta' Gunju 2004 u 29 ta' Frar 2008 rispettivament – fejn inter alia inghad illi l-organi gudizzjarji ordinarji huma dawk li jikkwalifikaw bhala jew Qorti Superjuri jew Qorti Inferjuri fit-termini tal-Kodici ta' Organizzazzjoni u Procedura Civili, u huwa ghal dawn il-'qrati' li l-legislatur qed jirreferi fl-Artikoli 46(3) u 47(1) tal-Kostituzzjoni (eccettwati dejjem il-qrati marzjali limitatament ghall-Artikoli 33 u 35). Din id-differenza bejn dawk l-organi li jiffurmaw parti mill-istruttura gudizzjarja ordinarja u dawk l-organi l-ohra li, ghalkemm jamministraw il-gustizzja (u jistghu anke jissejhu "qrati"), ma jiffurmawx hekk parti giet senjalata minn din il-Qorti, ukoll diversament komposta, fis-sentenza taghha tat-3 ta' Dicembru 1997 fl-ismijiet "Cecil Pace et v. Onorevoli Prim' Ministru et" fejn inghad hekk: Tribunal jew, kif grafikament espress fil-Kostituzzjoni, "awtorità gudikanti" imwaqqfa b'ligi biex ikun jista' jikkwalifika bhala tali jehtieg li jkun karatterizzat bil-fatt li jkun korp b'funzjoni gudizzjarja bil-fakoltà li jiddetermina u jiddeciedi materji li skond dik il-ligi jaqghu fil-kompetenza tieghu. Hu korp li jehtieg li jipprocedi skond ir-regoli precizi u ben stabbiliti fil-ligi li tikkostitwih u li jiddecidi skond dawk ir-regoli. Ghandu jkollu l-poter li jorbot lill-partijiet li jidhru quddiemu in kontestazzjoni u d-decizjoni tieghu jehtieg allura li jkollha effett vinkolanti anke jekk mhux necessarjament b'mod finali. Mill-banda l-ohra dan il-korp mhux bilfors – kif ga accennat – ghandu jkun jifforma parti mill-istruttura gudizzjarja ordinarja però jrid jinkorpora fih dawk il-karatteristici fondamentali assocjati mal-process gudizzjarju li jkunu jiggarantixxu s-smigh xieraq fosthom dak il-minimu ta' indipendenza u imparzjalità essenzjali biex juru li mhux biss il-gustizzja tkun qed issir sewwa u kif mistenni imma li jkun hemm jidher fid-deher li jkun qed isir. Biex tikkonkludi, ghalhekk, din il-Qorti tafferma li l-qrati li l-legislatur qed jirreferi ghalihom fis-subartikolu (3)*

tal-Artikolu 46 tal-Kostituzzjoni (moqri fid-dawl kemm ta' l-Artikolu 47(1) kif ukoll tad-disposizzjonijiet l-ohra tal-Kostituzzjoni), kif ukoll fis-subartikolu (3) ta' l-Artikolu 4 tal-Kap.319 li gie mehud testwalment mill-Kostituzzjoni, huma, fil-kamp civili, il-Qorti, Civili, il-Qorti ta' l-Appell u l-Qorti Kostituzzjonali kwantu Qrati Superjuri, u l-Qorti tal-Magistrati (Malta) u l-Qorti tal-Magistrati (Ghawdex) kwantu Qrati Inferjuri; u fil-kamp penali l-Qorti tal-Magistrati (Malta) u l-Qorti tal-Magistrati (Ghawdex) ghal dak li huma l-Qrati Inferjuri, u l-Qorti Kriminali u l-Qorti ta' l-Appell Kriminali ghal dak li huma Qrati Superjuri. Fis-sentenza ***Kummissarju ta' l-Artijiet v. Ignatius Licari noe, Rikors Nru. 9/01*** *minn fejn ittiehed il-bran appena citat, il-kwistjoni trattata kienet dwar jekk il-Bord ta' Arbitragg dwar Artijiet huwiex fakoltizzat li jaghmel referenza kostituzzjonali u, fil-fehma ta' dan it-Tribunal, dak li inghad mill-Qorti Kostituzzjonali in sostenn tar-risposta Taghha fin-negattiv ghal tali kwezit japplika b'mod partikolari ghat-Tribunal ta' Revizjoni Amministrattiva: Il-Bord ta' Arbitragg dwar Aritijiet la jista' jigi ikkunsidrat bhala Qorti Superjuri u anqas bhala Qorti Inferjuri f'dan is-sens [ossia fis-sens premess fil-bran iktar 'l fuq citat]; u ghalhekk l-Artikolu 46(3) tal-Kostituzzjoni u l-Artikolu 4(3) tal-Kap.319 ma japplikawx ghalih. Din il-Qorti hi konfortata f'din id-decizjoni taghha minn zewg konsiderazzjonijiet ohra. Skond l-Artikolu 23(2) tal-Kap.88, ic-Chairman tal-Bord jista' jkun "… persuna li jkollha jew kellha l-kariga ta' mhallef jew persuna li jkollha l-kariga ta' magistrat." Ghalhekk, kieku wiehed kellu jiehu l-kriterju tal-presidenza tal-Bord bhala xi kriterju determinanti ghad-decizjoni jekk l-istess Bord hux "qorti" o meno … ikun ifisser li dana l-Bord ikun xi mindaqqiet "Qorti Superjuri" u xi mindaqqiet "Qorti Inferjuri" – sitwazzjoni ta' incertezza li hi certament kontroindikata ghall-fini biex jigi determinat il-post ta' organu gudizzjarju fis-sistema gudizzjarja tal-pajjiz. Inoltre, il-Bord jista' jkun presjedut minn persuna li kellha l-kariga ta' mhallef (u meta jkun hekk dik il-persuna trid tiehu l-gurament kif preskritt fl-Artikolu 24(1) tal-Kap.88). Il-Kostituzzjoni, invece, b' "qorti" tifhem biss qorti li tkun presjeduta minn Imhallef jew minn Magistrat li jkun ghadu fil-kariga (ossia jkun ghadu ma rtirax bl-età jew ma irrizenjax jew tnehha) jew minn Agent Imhallef nominat*

skond l-Artikolu 98(2) ta' l-istess Kostituzzjoni. Konsiderazzjoni ohra temani mill-Artikolu 25(2)(a) tal-Kap.88. Tanti l-Bord ma hux, u ma jistax jitqies li hu, la Qorti Superjuri u lanqas Qorti Inferjuri fis-sens tal-Kostituzzjoni li l-legislatur kellu jinkludi fil-ligi disposizzjoni partikolari biex il-Bord ikollu l-istess setghat tal-Prim' Awla tal-Qorti Civili. Differentement, per ezempju, il-legislatur ipprovda dwar il-Qorti tal-Minorenni mwaqqfa taht il-Kapitolu 287 – Artikolu 3(2) ta' l-imsemmi Kap.287 jipprovdi espressament li: il-Qorti tal-Minorenni titqies li hi Qorti tal-Magistrati u jkollha l-istess gurisdizzjoni dwar is-smigh ta' akkuzi u dawk procedimenti ohra li ghandhom x'jaqsmu ma' tfal jew zghazagh li l-Qorti tal-Magistrati, bhala qorti ta' gudikatura kriminali u bhala qorti ta' inkjesta, kien ikollha, kieku ma kinux ghad-disposizzjonijiet ta' dan l-Att. Fil-kaz ta' dan it-Tribunal fl-Att dwar il-Gustizzja Amministrattiva l-Legislatur ukoll ipprovda li t-Tribunal ta' Revizjoni Amministrattiva jkun maghmul minn President li jippresjedi t-Tribunal. Il-President ta' Malta, li jagixxi fuq il-parir tal-Prim' Ministru, jista' jahtar iktar minn President wiehed fit-Tribunal ta' Revizjoni Amministrattiva, izda f'kull kaz partikolari joqghod President wiehed biss. ***President, meta jkun ex-imhallef jew ex-Magistrat, ghandu jigi mahtura ghal perijodu ta' erba' snin u ghandu jispicca minn din il-kariga meta jiskadi l-perijodu ta' dik il-kariga. President ghandu jkun persuna li jokkupa jew kien jokkupa l-kariga ta' mhallef jew magistrat f'Malta[12] –*** *Artikolu 8(1) – (4) tal-Kap.490 tal-Ligijiet ta' Malta u li* ***t-Tribunal ta' Revizjoni Amministrattiva ghandu jkollu l-istess setghet li huma vestiti fil-Prim' Awla tal-Qorti Civili mill-Kodici ta' Organizzazzjoni u Procedura Civili[13]*** *– Artikolu 20(1) tal-Kap.490 tal-Ligijiet ta' Malta. Fid-dawl ta' dawn id-disposizzjonijiet tal-Kap.490 tal-Ligijiet ta' Malta u fid-dawl tal-principju enuncjat fil-precitati sentenzi tal-Qorti Kostituzzjonali ma jistax ghajr li jirrizulta li dan it-Tribunal ma huwiex "qorti" ghall-finijiet ta' l-Artikolu 46(3) tal-Kostituzzjoni u ta' l-Artikolu 4(3) tal-Kap.319 tal-Ligijiet ta' Malta u ghalhekk ma huwiex*

[12] Enfasi tat-Tribunal.
[13] Enfasi tat-Tribunal.

fakoltizzat li jressaq referenza kostituzzjonali quddiem il-Qorti kompetenti.

Therefore in the light of the above the Tribunal reiterates that it is not competent to determine claims concerning an alleged violation of Fundamental Human Rights and Freedoms as protected by the Constitution and by the European Convention for Human Rights and Fundamental Freedoms.

Apart from the above the Tribunal observes that even though Section 32(2) of Chapter 364 of the Laws of Malta was repealed by virtue of Article 23 of Act XI of 2000, in terms of Article 21(2)(b) of the said Act, Article 23 *shall be deemed to have come into force on the* ***23rd November 1999***. This effectively means that all transfers effected **before** the 23rd November 1999 would still fall under the application of Section 32(2) of Chapter 364 of the Laws of Malta. The garage forming the subject of these proceedings was purchased by the Applicant and his wife Gisela Hobein by virtue of a deed in the records of Notary John P. Hayman dated **1st November 1997** and therefore in terms of that just observed the transfer of the said immovable in favour of spouses Hobein was and remained regulated by Section 32(1) and (2) of Chapter 364 of the Laws of Malta as introduced by Act XVII of 1993.

In the light of the above the Tribunal finds that the first ground for Appeal raised by the Applicant is unfounded and therefore cannot be upheld.

In his second ground for Appeal the Applicant claims a further violation of the European Convention for Human Rights and Fundamental Freedoms and more specifically a violation of his right to peaceful enjoyment of his possession as protected by Article 1 of the 1st Protocol of the Convention since *the Commissioner's decision is among others based on Rule 3 of the Duty on Documents and Transfers Rules, which defines the term "real value" of Art. 10(1) of the Duty on Documents and Transfers Act. Rule 3 of the Duty on Documents and Transfers Rules is*

not democratically legitimated. It is neither ratified by the legislator nor is any Authority but the legislator empowered to constitute such a rule. This rule is therefore nill and void and can neither interpret, extend, clarify or complete the Laws of Malta. Rule 3 of the Duty on Documents and Transfers Rules as mentioned in the decision dated 27.10.2003 by the Commissioner further does not define the term "real value" of Art. 10(1) of the Duty on Documents and Transfers Act, but it consists of a definition to the term "market value". There is no room to assume that the Maltese Legislator in 1981 and during the periods of amendment was unable to distinguish between afore-mentioned terms, and internationally established and internationally identical, and is not of replaceable identically to the term "real value". The Maltese Legislator consequently had not ratified any regulation to receive any duty to a value as determined in Rule 3. The term "possession" according to Art.1, 1st Protocol EHRCC consists of any value being at a person's disposal and obviously includes all funds. Demanding an amount of money without democratically legitimated justification consequently causes a violation of one's peaceful enjoyment of such possession.

For the same reasons already set out above with regard to the first ground for Appeal – namely the fact that the Administrative Review Tribunal is not the competent forum to deal with and determine alleged violations of Fundamental Human Rights and Freedoms as protected by the Constitution and the European Convention on Human Rights and Fundamental Freedoms and that the said Tribunal does not qualify as a Court in terms of Section 46(3) of the Constitution and Section 4(3) of Chapter 319 of the Laws of Malta for the purposes of Constitutional references – the Tribunal cannot deal with and determine this particular ground for Appeal raised by the Applicant and therefore abstains from considering the same.

Apart from the alleged violations of his fundamental human rights and freedoms the Applicant contests the decision and consequent Assessment by the

Commissioner of Inland Revenue against him on three further grounds namely: (i) the payment by transferors of the penalty demanded by the Commissioner of Inland Revenue cannot and does not constitute an admission which can be used and enforced against him as transferee [third ground for Appeal]; (ii) the valuation by the Expert appointed by the Commissioner of Inland Revenue is not reliable [fourth ground for Appeal]; and (iii) the Assessment issued by the Commissioner on the 22nd September 1998 and subsequently on the 29th October 2003 does not give a correct indication of the address of the immovable acquired by him and his wife and this therefore means that the immovable actually purchased by him and his wife was never inspected by the Expert appointed by the Commissioner [fifth ground for Appeal].

The Tribunal will deal first with the fourth ground for Appeal raised by the Applicant that is the ground that the valuation of the Expert appointed by the Commissioner is not reliable. The Applicant founds this ground for Appeal on the fact that an Assessment issued against him by the Commissioner of Inland Revenue with regard to immovable property purchased by him at 6, Belvedere Terrace, Sliema, also based on a valuation by an Expert appointed by the Commissioner, was cancelled following an objection by him namely that the valuation by the Expert appointed by the Commissioner was *obviously excessive*. The Applicant claims that *the appellant had appointed the Chairman of the Chamber of Architects to re-evaluate the same premises, which result is attached to this appeal and which document is marked as "A". The appellant's further investigation resulted in the fact that any architect appointed as the Commissioner's expert never was ordered to determine the "real value" according to Art. 10(1) of the Duty on Documents and Transfers Act, but in every case to determine the market price. Under these circumstances the Commissioner has sufficient reason and a corresponding duty not to rely on his expert's valuation to the disadvantage of the appellant with respect to the garage in question*.

Even though the Applicant submitted a document issued by the Office of Inland Revenue (Capital Transfer Duty Department)[14] from where it results that Claim No. 16635 issued against him with reference to the purchase of a house in Sliema, was being cancelled following advice by the Department's engineer, the Tribunal must point out that the Applicant failed to satisfactorily prove that the said cancellation was actually acknowledging an objection by him allegedly on the grounds that the value attributed by the Commissioner of Inland Revenue to the premises purchased by him was excessive, thus acknowledging that the valuation by the Expert appointed by the Department was excessive. The letter issued by the Office of Inland Revenue (Capital Transfer Duty Department) does not give too much information as to why the Claim was cancelled and the Applicant did not submit a copy of his objection to that claim. The Applicant merely submitted a copy of a report issued by Architect Anthony Fenech Vella on the 10th November 1998 which was generally addressed to *To Whom it May Concern* thus leaving a doubt as to whether this report was ever submitted to the Department.

However, irrespective of this observation and even if the Tribunal where to accept the Applicant's claim that Claim No. 16635 was cancelled because the valuation of the Expert appointed by the Commissioner of Inland Revenue was excessive, it cannot be automatically assumed – as expected by the Applicant – that the valuation of the Expert appointed by the Commissioner in this particular case is excessive too. The two properties, that is the premises at No.6, Belvedere Terrace, Sliema, and the garage internally numbered 13 at No.87, Tonna Street, Sliema are not only two separate properties but were acquired by two separate transfers, thus making one totally separate and independent from the other. This therefore means that the Tribunal must examine this case on its own merits and not on the basis of what the Applicant claims with regards to Claim No. 16635 which is totally extraneous to these proceedings.

[14] Dok. "E" a folio 20 of the records of the proceedings.

The Applicant further contests the valuation of the Expert appointed by the Commissioner of Inland Revenue on the ground that contrary to that provided for in the law, namely Section 10(1) of Chapter 364 of the Laws of Malta, the Expert valued the market price of the garage in question and not the real value of the said property, thus making his valuation unreliable. The Tribunal deems this particular argument raised by the Applicant to be completely frivolous and consequently unacceptable.

Section 10(1) of Chapter 364 of the Laws of Malta **and** Section 52(1) of the said Chapter of the Laws of Malta, which latter section specifically refers to immovable property transferred, both make reference to the "real value of property" as the parameter to be applied by the Commissioner in his considerations with regard to declarations made in documents and transfers subject to regulation under Chapter 364 of the Laws of Malta. The term "real value of property" has not been left undefined and totally up to the discretion of the Commissioner or any expert appointed by him, but it is specifically defined under Rule 3 of the Duty on Documents and Transfers Rules, Subsidiary Legislation 364.06, which *inter alia* provides that: (1) *the value of any property subject to duty under the Act, transferred inter vivos or transmitted causa morits, 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, due regard being had to all circumstances affecting such property*. Therefore for the purposes of Chapter 364 of the Laws of Malta the real value of the property is that value which results by applying the definition set out in Rule 3(2) of the Duty on Documents and Transfers Rules in so far as concerns property in full ownership and not that value as differently defined by the Applicant.

The Tribunal must now determine whether or not the valuation of the expert appointed by the Commissioner of Inland Revenue can be accepted as a valid and correct valuation on which the Commissioner correctly founded his decision and consequent Assessment against the Applicant.

The Applicant claims that the valuation of the expert can never be considered to be a valid valuation because the said expert never inspected the garage in question as clearly evidenced by the fact that the address of the immovable shown on the Assessment issued on the 22nd September 1998 and subsequently on the 29th October 2003 does not in any way refer to the property acquired by him. In this regard the Applicant claims that *according to the deed before Notary Dr. Hayman and dated 1.11.1997, … the appellant acquired a garage internally numbered 13 at No.87 in Tonna Street of Sliema. The Notice of Assessment dated 22.9.1998 obliged the appellant to pay Lm1,020.00 as further duty on documents for the "Purchase of Garage no.13, Tonna Str, Sliema". The Notice of Assessment dated 29.10.2003 obliged the appellant to pay Lm1,202.00 as further duty on the document in respect of "NO 13, TONNA STR, SLIEMA". The assessments do not determine nor describe the accurate location or address of the object in question. According to the Commissioner's direction and order it was not possible for any expert to value the garage acquired by the appellant without an accurate address or accurate direction of location. The garage in question was therefore not valued by any expert. A garage of no.13, Tonna Street in Sliema was not acquired by the appellant. The garage the appellant had acquired at no.87, Tonna Street in Sliema was subject to extensive works or restauration and innovation immediately after the appellant had taken the garage into his possession*.

The proof submitted by the Applicant in these proceedings is limited solely to the evidence given by his representative Dr. Kai Jochimsen who addresses this particular issue raised by the Applicant in his fifth ground

for appeal. During the sitting held on the 26th January 2012 Dr. Jochimsen claimed that *I was appointed in 1997 to object against any claims from the Commissioner of Inland Revenue in this case, to examine any matter. The first thing I had to realize indeed was that the applicant has no link or relation to any property at no.13, Tonna Street, Sliema, he never had and he still doesn't have and this request for payment is only subject to a property situated under that address and from my point of view this is the end of it the case stops here*[15].

The Tribunal deems it necessary to point out that the Applicant raised this particular issue only at Appeal stage after his objection was refused by virtue of the decision by the Commissioner for Inland Revenue dated 27th October 2003, and did not raise it at objection stage even though he claims that the original Assessment issued on the 22nd September 1998 already showed what he deems to be an incorrect indication of the address of the property acquired by him by virtue of the deed in the records of Notary John P. Hayman dated 1st November 1997. In fact in his letter of objection dated 18th October 1998[16] the Applicant claimed that the property acquired by him *was not examined in a proper manner and as such your assessment is based on an inaccurate premise* without however explaining why the property was not examined in a proper manner other than by claiming that he paid a fair market price for the property.

The Director General (Inland Revenue) counters the fifth ground for Appeal raised by the Applicant and the testimony given by Dr. Kai Jochimsen *inter alia* with testimony given by Architect Michael Busuttil[17] who was the expert appointed by the Commissioner of Inland Revenue for the purpose of valuing the immovable property acquired by the Applicant. Architect Busuttil stated that *I conform that the report being shown to me* [Dok. "MB1" at folio 59 of the proceedings] *is my own. The*

[15] Folio 38 of the records of the proceedings.
[16] Dok. "C" a folio 24 of the records of the proceedings.
[17] Sitting held by Judicial Assistant Dr. Daniela Mangion on the 6th November 2012, folio 56 and 57 of the records of the proceedings.

property was a one car garage in the address 13, Tonna Street, Sliema. It seems that I did not enter the garage as neither the seller nor the buyer attended although notified. I take into consideration the positioning of the garage, whether it is a one car garage or more, whether it is a space and whether it was at street level. I don't remember what information I had in hand. I clarify that the only information I had was the description done by the notary. On being shown a minute carried on a page in the internal file of CTD, which minute is number 12 and the page is being exhibited as Doc. MB2, I confirm that I entered that minute.

From this testimony it clearly results that Architect Michael Busuttil did not inspect the property acquired by the Applicant not because he could not or did not identify the correct property acquired by the Applicant but because the vendor and the purchaser, the latter being the Applicant, **failed to attend the on-site inspection scheduled by him even though they were duly notified with the appointment**. Apart from this fact, which has not been in any contradicted or contested by the Applicant who failed to cross-examine Architect Busuttil even though his representative was duly informed of the sitting scheduled for the 6th November 2012 by the Judicial Assistant[18], it also results that whilst the garage acquired by the Applicant is described in the deed of transfer in the records of Notary John P. Hayman as being *the garage internally numbered thirteen (13) forming part of a block of flats and underlying garages at basement level, without name and bearing number eighty seven (87) in Tonna Street, Sliema* …[19], the Notary's description of the said garage – which is the only description submitted to the Capital Transfers Department and subsequently forwarded to any expert appointed by the Commissioner for Inland Revenue for the purposes of valuing the property transferred – reads as follows *the garage internally numbered 13 forming part of a block of flats* ***without name and without number in Tonna Street,***

[18] Testimony given by Dr. Daniela Mangion during the sitting held on the 12th November 2012.
[19] Doc. "D1" to "D5" a folio 15 to 19 of the records of the proceedings.

Sliema[20]*, free and unencumbered*[21]. Once this was the description officially provided to the Commissioner of Inland Revenue of the garage acquired by the Applicant, the said Applicant cannot today successfully argue that the expert appointed by the Commissioner did not examine the property actually purchased by him because the Commissioner indicated another property, and this even more so when it was he as purchaser who failed to attend an on-site inspection duly scheduled by the expert. These two facts together shed a totally different light on the allegation being put forth by the Applicant in his fifth ground for Appeal and on that which Dr. Kai Jochimsen tries to convey and establish through his testimony given during the sitting held on the 26th January 2012. In fact in the light of these facts the Tribunal is of the opinion that the fifth ground for Appeal raised by the Applicant must be rejected since he did not satisfactorily prove that the valuation by Architect Busuttil, which undoubtedly is a best of judgment valuation, is excessive, proof which he had the onus of providing as per Section 58(3) of Chapter 364 of the Laws of Malta.

In so far as concerns the third ground for Appeal raised by the Applicant that is that the payment by transferors of the penalty demanded by the Commissioner of Inland Revenue cannot and does not constitute an admission which can be used and enforced against him as transferee, the Tribunal cannot but agree with the submission as put forth by the Applicant however this fact does not change the Tribunal's final conclusion that the Appeal put forth by the Applicant cannot be upheld since Applicant systematically failed to satisfy the onus of proof imposed upon him in terms of Section 58(3) of Chapter 364 of the Laws of Malta, that is that the Assessment complained of is excessive.

For the above reasons the Tribunal:

1. Orders that wherever necessary in the records of these proceedings, including the *occhio*, the title

[20] Underlining by the Tribunal.
[21] Dok. "A" a folio 22 of the records of the proceedings.

"Commissioner of Revenue" be corrected to read "Director General (Inland Revenue)"; and

2. Rejects the Appeal lodged by the Applicant from the decision of the Commissioner of Inland Revenue dated 27th October 2003 and consequent Assessment issued on the 29th October 2003 and confirms the said decision and Assessment.

Costs pertinent to these proceedings are to be borne by the Applicant.

In terms of Section 58(4) of Chapter 364 of the Laws of Malta, the Tribunal orders that Notice of this decision, of the date therefore and of that determined by the Tribunal be sent to the Director General (Inland Revenue).

< Final Judgement >

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