IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DR. SOLON SOLOMONIDES,

Applicant,

and

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

Respondent.

(Case No. 282/66).

Income Tax—Assessment—Additional assessment—The Personal Contributions by Members of the Greek Community Law, 1963 (Greek Communal Law No. 9 of 1963), as re-enacted for the purposes of the year of assessment 1964 by the Personal Contributions by Members of the Greek Community Law, 1964 (Greek Communal Law No. 7 of 1964)—Commissioner's decision to raise against Applicant additional assessment to income tax—Validity—Commissioner not empowered, under the Law, to make a provisional assessment on a taxpayer—Subsequent assessment is an additional one under section 45 of Law No. 9 of 1963 (supra), not a complementary one to the original assessment—Whether Commissioner, having agreed to the accounts and the original assessment, is entitled to raise an additional assessment under section 45 of the Law—In a proper case he is entitled to do so—Principles applicable—But in the present case the Commissioner has wrongly exercised his statutory discretionary powers—In that no new grounds or new facts, reasonably warranting the view that the taxpayer had been undercharged, have been discovered—The Commissioner has no power to reject a taxpayer's objection to assessment, merely because he (taxpayer) failed to furnish the particulars regarding his assets and liabilities, which the Commissioner required under section 42—The Commissioner's decision to reject for that reason Applicant's objection is ultra vires—The Commissioner had a duty under section 42 to look into accounts and the evidence in order to review and to revise the assessment if necessary—Laws of the Greek Communal Chamber Nos. 9 of 1963 and 7 of 1964 (supra), sections 5(1)(a),

6, 39, 42(3), 45—*The English Income Tax Act*, 1952, *section* 41(1).

Words and Phrases—"Where it appears to the Commissioner" in section 45 *of Law* 9 *of* 1963, *supra—Meaning and effect—"If the surveyor discovers" in section* 41(1) *of the English Income Tax Act*, 1952—*Meaning and effect.*

Additional Assessment to income tax—When allowed—Section 45 *of Law No.* 9 *of* 1963 *(supra)—See above.*

Assessment — Additional — Provisional — Complementary — See above.

Provisional assessment—Not allowed—See above.

Complementary assessment—See above.

By this recourse the Applicant taxpayer challenges the validity of the decision of the Respondent to raise against him an additional assessment to income tax in respect of the year of assessment 1964 (year of income 1963). The taxpayer was originally assessed on February 5, 1965 in the amount of £1,355.070 mils, in respect of the year in question, by the Commissioner of Income Tax. Some time thereafter, the Commissioner discovered that the taxpayer has purchased in England War Loan Securities bearing 3 1/2% interest per annum, of a nominal value of £1,000, the purchase price of these securities however, amounting to only £520 to £570; these securities have yielded on 1st June, 1964, an amount of dividend of £17.10 which was paid in the personal bank account of the Applicant taxpayer in England. Armed with this information the Commissioner raised an additional assessment against the taxpayer in the sum of £656.550 mils, by adding on the taxpayer's income an amount of £1,000 over and above the amount in the first assessment, even though the Commissioner was fully aware from the relevant audited accounts that the Applicant taxpayer withdrew out of his chargeable income for the year 1963 an amount of £3,662. 104 mils. The said additional assessment was raised on January 13, 1966.

On January 20, 1966 counsel for the Applicant—taxpayer wrote a letter to the Commissioner objecting to the additional assessment, stating, *inter alia*, the following:-

"1. Our client's chargeable income for the year of

assessment 1964 was discussed, settled and confirmed by you, and the tax was duly paid.

. . . . . .

3. You have no power to make an additional assessment unless and until new facts are brought to your knowledge after the settlement, which justify such a revision and the raising of an additional assessment—and this is not the case".

On January 28, 1966, the Commissioner replied to counsel by letter, stating, *inter alia,* the following:-

"1.*(a)* The original assessment was only provisional

. . . . . .

2. You are hereby required, under section 42(3) of the Greek Communal Chamber Law No. 7/64 to furnish the following particulars, within a month from today:-

(a) A statement showing details of your assets and liabilities both in Cyprus and abroad as at 31.12.1963 other than those shown on the balance sheet of the same date.

. . . . . .

(c) Copies of all your Bank statements of your Bank accounts abroad.

3. *If you fail to comply with the above,* I regret to state that I shall reject your objection".

To that, counsel replied on February 17, 1966 and on February 22, 1966, the Commissioner replied, stating, *inter alia*:-

"1.*(a)* I require to be furnished with full details of the assets of your client abroad for the following reasons:

(2) So that I may be able to ascertain whether your client's capital abroad came from taxable amounts.

2. I do not accept your client's contention that the accounts in respect of the year of assessment 1964 were accepted, as no letter in this connection was ever sent by me to his auditors".

3. . . . . .

4..... If your client fails to comply with my request, then I shall have no alternative but to reject his objection".

On October 19, 1966, the Commissioner replied to another letter of counsel for the taxpayer, and in his letter he says:-

"*(a)* You failed to furnish me with the items referred to in para. 2 of my letter of the 28th January, 1966, required under the provisions of section 42(3) of the Greek Communal Law No. 7/64. In para. 4 of my letter dated 22nd February, 1966, I explained to you that I required the said information and documents for ascertaining your chargeable income.

(b) In view of the above I have no alternative but to reject your objection against the aforesaid assessments.

(c) .....

(d) I attach a notice of tax payable".

The statutory provisions applicable to this case are those of the Personal Contributions by members of the Greek Community Law, 1963 (Greek Communal Law No. 9 of 1963) re-enacted for the purposes of the year of assessment 1964 by the Personal Contributions by Members of the Greek Community Law, 1964 (Greek Communal Law No. 7 of 1964).

Section 45 of Law 9/63 *(supra)* provides:

"Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of assessment.....assess such person at such amount or additional amount as according to his judgment ought to have been charged and the provisions of this Law shall apply to such assessment and to the tax charged thereunder".

Section 45 of our Law corresponds to section 41 of the English Income Tax Act, 1952 (Note: the relevant parts of the English Act are set out *post*, in the judgment of the Court).

It was argued on behalf of the Applicant, *inter alia*,

that the Commissioner has no powers to raise provisional assessment and that, in the present case, he was not entitled to raise the additional assessment complained of, under the provisions of section 45 of Law No. 9 of 1963 *(supra)*, because neither new grounds nor new facts have been discovered reasonably warranting such additional assessment.

It was submitted, on the other hand by counsel for the Respondent, *inter, alia,* that even if the Commissioner's decision was not taken under section 45, this did not matter, once the Commissioner possessed such powers under this section; and that he used properly and correctly his discretionary powers to raise the additional assessment complained of, because of the "discovery" he has made regarding the purchase by the Applicant of the aforesaid War Loan securities.

In granting the application and annulling the *sub-judice* decision, the Court:

Held, (1)*(a)*. The Commissioner of Income Tax has no power under the provisions of Law No. 9 of 1963 (re-enacted by Law No. 7 of 1964) *(supra)* to make a provisional assessment on a taxpayer; he has, under section 39, a discretion to accept the return and make an assessment accordingly, or refuse to accept the return and to the best of his judgment determine the amount of the taxable income and assess the taxpayer accordingly. (Note: Section 39 is set out *post* in the judgment of the Court).

(b) Even counsel for the Respondent, quite properly in my view, has now conceded that the second assessment raised by the Commissioner *(supra)* was an additional assessment; and not a complementary to the original assessment.

(c) If the Commissioner really intended to convey to the Applicant taxpayer that he refused to accept his return of income, he ought to have said so more clearly; and in my view, the Commissioner could then have exercised his power to require particulars to be furnished to him under the provisions of section 50 of Law No. 9 of 1963 *(supra)*; and only with respect to the income of the taxpayer in order that he might be able to determine the latter's chargeable income.

(d) In the result, I do not accept the Respondent's

contention that he did not accept the accounts submitted by the taxpayer for the year of assessment 1964 and that he did not agree to the original assessment of the 5th February, 1965 in respect of the said same year of assessment (i.e. 1964).

(2) The question then arises as to whether the Commissioner, having agreed to the original assessment, is entitled to raise in the circumstances of this case, an additional assessment under the provisions of section 45 (see *supra*) of the aforesaid Greek Communal Law No. 9 of 1963:-

(a) Section 45 *(supra)* corresponds to section 41 of the English Income Tax Act, 1952 (note: the material parts of section 41 are set out *post* in the judgment) which has been considered in several English cases *(infra)*.

(b) Coming now to section 45 of our Law *(supra)*: the words "where it appears to the Commissioner....." *(supra)* conferring powers on the Commissioner concerning taxation of the subject, are obviously put in for the purpose of making the Commissioner the judge on the question whether any person liable to tax has been undercharged. It depends upon the opinion of the Commissioner either from information he may choose to receive or when he finds out from new facts that there was income chargeable to tax which had been omitted.

(3)*(a)* In the present case the real question is whether new facts have come to light so that the revenue authorities have formed the opinion that the taxpayer has been undercharged in his original assessment of the 5th February, 1965.

(b) The fact is that neither the War Loan securities *(supra)* nor the dividend therefrom amounting to £17.10 (not received in Cyprus) were chargeable to tax. But counsel for the Respondent submitted that the Commissioner had made a discovery of new facts within section 45 because the amount with which the aforesaid securities were purchased (i.e. a sum of between £520 to £570 or there about) did not appear in the accounts of the taxpayer; and that, therefore, it was reasonable to assume that the securities had been purchased out of income not declared to the Revenue Authorities in the original assessment.

(c) I am unable to accept this submission of counsel for the Respondent, because the Commissioner before raising an additional assessment must be satisfied from new facts he had found out and not as a matter of conjecture that the taxpayer has been undercharged. But in the present case the Commissioner knew that the Applicant taxpayer out of his taxable income of the year 1963, withdrew an amount of £3,662.104 mils *(supra)* and, therefore, he could not reasonably assume that the amount of £520 and with which the said foreign securities were purchased was property or income chargeable to tax which has been omitted from the original assessment for the year of income 1963 (year of assessment 1964).

(4) Although the Commissioner has powers under section 42(3)(iii) of Law No. 9 of 1963 *(supra)* to require from the taxpayer statements showing full details of all assets and liabilities of a person objecting to assessments, nevertheless nowhere is to be found a machinery section empowering the Commissioner to dismiss the Applicant—taxpayer's objection of January 20, 1966, because the latter failed to furnish him with such particulars. The Commissioner's decision therefore, under these circumstances was in my view *ultra vires*.

(5) Having reached the conclusion that the Applicant has succeeded in his claim that the additional assessment complained of was excessive and that the Commissioner has exercised wrongly his discretion under section 45 *(supra)*, the *sub judice* decision is hereby declared *null* and *void* and of no effect whatsoever.

Sub judice decision annulled.

Cases referred to:

R. v. Kensington Income Tax Commissioners [1913] 3 K.B. 870, at p. 889, *considered;*

Commissioners of Inland Revenue v. Mackinlay's Trustees (1938) S.C. 765; also in 22 Tax Cases 305; *considered*;

Commercial Structures Ltd. v. Briggs [1948] 2 All E.R. 1041, at p. 1048, *considered*;

Cenlon Finance Co., Ltd. v. Ellwood 40 Tax Cases, 176, at p. 203, *considered;*

Republic (Attorney-General and Another) v. Frangos (1965) 3 C.L.R. 641 at pp. 655-56 per Josephides J. *considered;*

London County Council v. A.G. [1901] A.C. 26, at p. 35 per Lord Macnaghten, *adopted;*

Secretary of State in Council of India v. Scoble [1903] A.C. 299, at p. 302 per Earl of Halsbury L.C. *adopted.*

Recourse.

Recourse against the validity of the decision of the Respondent raising additional assessments to income tax against the Applicant, in respect of the year of assessment 1964.

Sir P. Cacoyiannis, for the Applicant.

K. Talarides, Counsel of the Republic, and *Chr. Paschalides*, for the Respondent.

Cur adv. vult.

The following Judgment was delivered by:-

HADJIANASTASSIOU, J.: The Applicant by this recourse, under Article 146 of the constitution, seeks to challenge the validity of the decision of the Respondent, to raise against him additional assessments to income tax, in respect of the year of assessment 1964.

The facts in brief are as follows:

The taxpayer is a doctor by profession, and the income in respect of which the assessments were made was income arising out of his profession carried on at Limassol town, and out of his property of an orange grove in Famagusta; as well as the income of his wife. The taxpayer was originally assessed in February 5, 1965, in the amount of tax of £1,355.070 mils, in respect of the year in question (year of income 1963) by the Commissioner of Income Tax, hereinafter called the Commissioner. This amount of tax imposed upon the taxpayer was finally settled and paid by him in full discharge of his tax liability for that year.

On January 13, 1966, an additional assessment to income tax was raised against the taxpayer in the sum of £656.550 mils.

On January 20, 1966, counsel for the taxpayer wrote a letter, *exhibit 6*, to the Commissioner objecting to the additional assessment. He says:

"1. Our client's chargeable income for the year of assessment 1964 was discussed, settled and confirmed by you, and the tax was duly paid.

2. There was no discovery of new facts after the settlement of the case, to justify the revision of the original assessment the tax on which has already been paid.

3. You have no power to make an additional assessment unless and until new facts are brought to your knowledge after the settlement, which justify such a revision and the raising of an additional assessment — and this is not the case".

On January 28, 1966, the Commissioner replied to counsel and in his letter, *exhibit 7*, he says:

"1. *(a)* The original assessment was only provisional and was made prior to the examination of the audited accounts produced by your Auditors.

(b) On the 5th February, 1965, i.e. on the same day when the provisional assessment was raised you were required by letter to submit a statement showing your assets, other than those included in the balance sheet. I enclose herewith copy of the said letter.

(c) So far you have failed to comply with my above request.

2. You are hereby required, under section 42(3) of the Greek Communal Chamber Law No. 7/64 to furnish the following particulars, within a month from today:-

(a) A statement showing details of your assets and liabilities both in Cyprus and abroad as at 31.12.1963 other than those shown on the balance sheet of the same date. The said statement should also include any assets in the name of your wife or minor child.

(b) A true copy of your drawings account, explaining at the same time how each amount was spent.

(c) Copies of all your Bank statements of your Bank accounts abroad.

"3. *If you fail to comply with the above, I regret to state that I shall reject your objection.*"

To that, counsel replied on February 17, 1966:

"Our client, Dr. Solon Solomonides, has received your letter dated 28th January, 1966, but before he decides on whether you have the power to require particulars of the assets you have asked, he should have the following clarifications:

(a) whether you require details of our client's assets abroad, the income of which was never remitted to Cyprus and, therefore, is not liable to tax in Cyprus.

2. Our client contends that the assessment raised on him in respect of the year of assessment 1964 was made after the submission to you of fully audited accounts which show his chargeable income; these accounts were accepted by you, after examination, and then you issued the notice of assessment dated 5th February, 1965.

3. If you so wish, our client is willing to give an affidavit that no income arising from his assets, or the assets of his wife or child abroad, was received in Cyprus".

On February 22, 1966, the Commissioner replied:

"1. *(a)* I require to be furnished with full details of the assets of your client abroad for the following reasons:

(i) So that I may be able to ascertain whether your client's capital abroad came from taxable amounts.

(ii) I agree with you that no mention is made in the income tax law in respect of provisional assessment. It is, however, the practice — and this is known to the auditors of your client and may be also known to your client — that when accounts are submitted, and prior to their examination by the Income Tax Office, to raise an assessment on the declared income for immediate collection of the anticipated tax. When the accounts are subsequently examined, if necessary, an additional assessment is raised under the provisions of section 45.

2. I do not accept your client's contention that the accounts in respect of the year of assessment 1964 were accepted, as no letter in this connection was ever sent

by me to his auditors.

3. .....

4. I am of the opinion that the required details of your client's assets are connected with his chargeable income because the source of the moneys with which these were purchased might have come from undisclosed income. You realise that before I finally decide on the determination of an objection I must have all the details which are necessary in ascertaining the chargeable income. If your client fails to comply with my request, then I shall have no alternative but to reject his objection."

On October 19, 1966, the Commissioner replied again to a letter of counsel for the taxpayer, and in his letter he says:

"*(a)* You failed to furnish me with the items referred to in para. 2 of my letter of the 28th January, 1966, required under the provisions of section 42(3) of the Greek Communal Law No. 7/64. In para. 4 of my letter dated 22nd February, 1966, I explained to you that I required the said information and documents for ascertaining your chargeable income.

(b) In view of the above, I have no alternative but to reject your objection against the aforesaid assessments.

(c) .....

(d) I attach a notice of tax payable".

Pausing here, for a moment, I would like to observe that in going through the correspondence it becomes clear to me that the Commissioner has never alleged that the tax-payer has been taxed at a less amount than that which ought to have been charged or that he imposed the additional amount of £656.550 mils tax, because in his judgment a particular amount or item of income chargeable to income tax had been omitted from the original assessment of the taxpayer. On the contrary from his whole tenor, the Commissioner maintained all along that the original assessment was only a provisional one, which was made prior to the examination of the audited accounts delivered by the Applicant; and that he dismissed the objection of 19th October, 1966, because of the failure of the taxpayer to furnish him with the particulars

mentioned in his letter, in order to ascertain whether the capital abroad came from taxable income; and that no remittances of income were made and received by the Applicant in Cyprus.

Counsel for the taxpayer has contended *(a)* that nowhere in Section 39 of the Greek Communal Law 9/63 is to be found that the Commissioner was empowered to make provisional assessments; and *(b)* that the Commissioner has accepted the return of income tax of the Applicant and made an assessment accordingly. With regard to this particular question, the Commissioner is empowered to make assessments on a tax-payer under the provisions of section 39 of Law 9/63, which was re-enacted and incorporated by the Greek Communal Law 7/64. It reads:

> "The Commissioner shall proceed to assess every person chargeable with the tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.
>
> *(ii)* Where a person has delivered a return, the Commissioner may *(a)* accept the return and make an assessment accordingly; or *(b)* refuse to accept the return and to the best of his judgment determine the amount of the chargeable income of the person and assess him accordingly".

It would be observed that the Commissioner has no power under this law to make a provisional assessment on a tax-payer; he has a discretion where a person has delivered a return on his income, to accept the return and make an assessment on him, or refuse to accept the return and to the best of his judgment determine the amount of the taxable income of the taxpayer and assess him accordingly. Under the circumstances, I would accept the submission of counsel on this point.

With regard to the second question that he has accepted the return and made an assessment on the Applicant, the Commissioner in his letter dated 22nd February, 1966, at para. 2, he says:

> "I do not accept your client's contention that the accounts for the year of assessment 1964 were accepted, as no letter in this connection was ever sent by me to his auditors".

It seems to me that if the Commissioner really intended to convey to the taxpayer, that he refused to accept his return of income, he ought to have said so more clearly; and, in my view, then the Commissioner under those circumstances he could have exercised his power to require particulars to be furnished to him under the provisions of section 50 of the Greek Communal Law 9/63; and only with respect to the income of the taxpayer in order to enable him to determine the amount of his chargeable income; and to proceed to the best of his judgment to assess the taxpayer. Even at this late stage, it was never made clear to the taxpayer that the Commissioner in raising the additional assessment exercised his powers under section 45 of the Greek Communal Law 9/63.

After going carefully through the accounts, the notice of confirmation of tax, as well as para. 3 of *exhibit 3*, which in effect is a notice of the tax payable, and particularly the printed and typed words, I have reached the view, that the acts and deeds of the Commissioner, point to one and only conclusion that he has accepted the return of the Applicant and made an assessment on him. Furthermore, the Commissioner having agreed as to the amount of tax and its mode of payment by instalments, in my opinion, this matter was finalised and accepted by both parties, and the amount due of £1,355.070 mils paid by the taxpayer. I must, however add, that even counsel for the Respondent, quite properly, in my view, has conceded that the second assessment raised by the Commissioner was an additional assessment; and, not a complementary to the original assessment. I, therefore, accept the submission of counsel for the Respondent on this point also.

Be that as it may, the taxpayer being aggrieved by the decision of the Commissioner, made a recourse to the Supreme Court, dated 18th November, 1966, claiming, *inter alia*, in paragraph 2:

> "That the Commissioner of Income Tax has no power to make additional assessments, unless there are facts brought to his knowledge after the making of the original assessment, which prove that the taxpayer was taxed less than he ought to be taxed under the law.
>
> 3. The Commissioner of Income Tax arbitrarily and in excess or abuse of his powers under the law,

asked the Applicant to disclose all the assets and liabilities of himself and his wife and child abroad, notwithstanding the fact that the income from such properties is not liable to contribution or tax unless such income was brought or received in Cyprus. In fact no such income or part thereof was ever brought or received in Cyprus and there was no allegation to the contrary".

The opposition was filed on 28th January, 1967, to the effect that the additional amount of tax was raised by the Commissioner under the provisions of section 45 of Law 9/63, incorporated in the Greek Communal Law 7/64.

In view of my finding, the question then arises as to whether the Commissioner, having agreed to the original assessment, is entitled to raise an additional assessment under the provisions of section 45 of the Greek Communal Law, 9/63. Counsel for the taxpayer submitted *(a)* that the Commissioner was not entitled to raise an additional assessment under the provisions of section 45 of Law 9/63, because neither a new ground nor a new fact have been discovered; and *(b)* that he had not alleged that any income, or interest, or dividend chargeable to Cyprus income tax, has been omitted from the first assessment.

Counsel for the Respondent on the other hand has contended *(a)* that even if the decision of the Commissioner was not taken under the provisions of section 45 of the law, under the principles of Administrative Law it did not matter, once the Commissioner possessed such powers under the law; and *(b)* he submitted that the Commissioner used properly and correctly his discretionary power to raise an additional assessment because of the "discovery" he has made.

It is not in doubt that the effect of section 45 of Law 9/63, is that the Commissioner is empowered to impose on a taxpayer an additional amount of tax. Section 45, which corresponds to section 41 of the English Income Tax Act, 1952, is in these terms:

> "Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of assessment..... assess such person at such amount or additional amount as according to his judgment ought

to have been charged and the provisions of this Law shall apply to such assessment and to the tax charged thereunder;"

The words in that section 45, which are immediately applicable to the present case are:

"Where it appears to the Commissioner that any person liable to tax has been assessed at a less amount than that which ought to have been charged".

It would be observed that section 41(1) of the Income Tax Act 1952, begins—

"If the surveyor discovers — that any properties or profits chargeable to tax have been omitted from the first assessments;

.....

"or has been undercharged in the first assessments;

....."

And I return to paragraph *(ii)*—

"Where the charge is chargeable under Schedule D, the Additional Commissioners shall make an assessment on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to appeal".

This section has been considered in several cases, but I may venture to add, however, that where the facts of a case cited are so entirely different from those of the present case, any observations made there with regard to the reasoning to be attached to the word "discovery" really lend no assistance whatever in the solution of the problem with which I am now confronted. I propose dealing first with the case which was cited in argument, namely *R.* v. *Kensington Income Tax Commissioners*, [1913] 3 K.B. 870. Mr. Bray J. had this to say at p. 889:

"The question which we have to consider is what is the meaning of the word "discovers". That word obviously has more than one meaning, and the question which we have to consider is what meaning it has in this section. Does it mean, as contended by the Applicant, ascertain by legal evidence? In considering that question it is necessary to bear in mind the relevant

provisions of the Acts of 1842 and 1880. First of all, has the surveyor any right given to him to obtain legal evidence? I cannot find that he has any such right. He has no right whatever to examine the taxpayer on oath, or to require him to give the particulars of his profits and gains and to verify the same, or to call upon any one in his service to answer questions. It would therefore seem most unlikely that the Legislature should have intended by the word 'discovers' that the surveyor was to ascertain by legal evidence. The Act provides for a later trial, if I may call it so, of the question if and when there is an appeal. The stage preceding an appeal is not that at which legal evidence is required, and it seems to me to be clear that the word 'discovers' cannot mean ascertains by legal evidence. In my opinion it means comes to the conclusion from the examination he makes and from any information he may choose to receive. There is nothing to prevent him from getting such information as he can".

Later on he says:-

"It seems to me therefore that the surveyor on the evidence before him *bona fide* discovered that the Applicant had not made a full and proper return of his receipts from foreign possessions, and that being so, on communicating that fact to the additional Commissioners they would have the right to make an additional first assessment in such a sum as according to their judgment ought to be charged on such person subject to objection by the surveyor and to appeal'.

The second case is *Commissioners of Inland Revenue* v. *Mackinlay's Trustees*, 1938, S.C. 765; also in 22 Tax Cases, 305. Lord Normand stated:

"Accordingly, it remains to consider whether in this case the Commissioners are entitled to say that such a discovery has been made. In considering that question we have, of course, to assume pro veritate that the first assessment to sur-tax laid upon the trustees was mistaken, and that the additional assessment now laid on will be a correct assessment. The question therefore is whether a discovery that a mistake, essentially a mistake of law, has been made is a discovery within the meaning of s.125. I think the word 'discover' in itself,

according to the ordinary use of language, may be taken simply to mean 'find out'. What has to be found or found out is that any properties or profits chargeable to tax have been omitted from the first assessment. Now, it is clear that what has happened here is within the literal meaning of these words. If the additional assessment is a correct assessment, then it is plain that certain profits chargeable to tax have been omitted. I go on to the next paragraph of s.125(1), which is an alternative to the first paragraph. There the discovery which must be made is stated in alternative forms of which the first is that a person chargeable has not delivered any statement or has not delivered a full and proper statement. There is an express finding in the case that a full and proper statement has been made. But then we have to go on and give effect to the alternative which follows: 'Or has not been assessed to tax, or has been undercharged'. I think that, since these words must apply where the person chargeable had delivered a full and proper statement, they are apt to cover the case of a discovery of a mistake in the assessment caused by a mistake in the construction of the partnership deed or, it may be, caused by a mistake in the law applicable to such a deed, even where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based. I do not think it is stretching the word 'discovers' to hold that it covers the finding out that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment".

Later he says:

"That again seems to be rather to point to the discovery that a deduction claimed upon a true representation of the facts has been allowed, although it is contrary to those provisions in the Act which authorise deductions to be made. That is to say that again that third paragraph appears to be intended to apply to the discovery of an error in law just as much as to an error in fact. Of course, if there were any reason in the context for restricting the word 'discover' to the discovery of an error in fact, that restriction would necessarily receive effect, but, in my opinion, the context points, not to any such restriction, but on the contrary to so wide a meaning

that the word ought to be held to cover just the kind of discovery which was made here, when the Special Commissioners found out that by reason of a misapprehension of the legal position, certain of the profits chargeable to tax had been omitted from the first assessment".

The next case is *Commercial Structures, Ltd.* v. *Briggs*, [1948] 2 All E.R. 1041. Lord Justice Tucker after reviewing the authorities, adopted the opinion expressed by Lord Normand in *I.R. Commrs.* v. *Mackinlay's* (*supra*), and had this to say at p. 1048:

> "All I can say, with respect, is that what is there stated by Lord Normand appears to me completely to fit the present case, and I can do no more than say that the way he puts it convinces me that the argument of the Crown is the one which should be accepted by us. I can do no more than adopt the language of Lord Normand, and will not attempt to say the same thing in poorer language. Although he may not have been dealing with a mistake in the general law of the country as distinct from a mistake in the interpretation of a document, the case was rather on the border line. He was dealing with the proper application of the Income Tax Act, 1918, s.20, to the provisions of the particular deed, but I think his language is applicable here and the reasoning is equally applicable to mistakes made with regard to the discovery of the effect of the general law on a particular set of facts. It is true that the result of this construction of s.125 may of necessity in some cases involve the taxpayer in the hardship that assessments made some years previously may be affected or upset by additional assessments made in the light of, perhaps, some subsequent decision of the House of Lords, but, none the less, I think that this is the proper construction of the section. In my view, any other construction of the word 'discovers' might not be welcome to taxpayers when the provisions of s.140 come to be considered, where the legislature is dealing with discoveries made by the tax payer. However that may be, I base my decision on what I think is the clear language of s.125 as construed by Lord Normand in the opinion to which I have referred." .....

Finally the matter was considered for the first time by the

House of Lords in *Cenlon Finance Co., Ltd.*, v. *Ellwood*, 40 Tax Cases, 176, with the result that the meaning of the word "discovers" has been clarified. Viscount Simonds delivering his speech had this to say at p. 203:-

> "In the present case, the single question is whether the word 'discover' covers the case where no new fact has come to light but the Revenue Authorities have formed the opinion that, upon a mistaken view of the law, the taxpayer has been undercharged in his original assessment. Upon this question the Court of Appeal followed a previous decision of the Court in *Commercial Structures, Ltd.* v. *Briggs*, 30 T.C. 477. In that case the Court, preferring a decision of Finlay, J., in *Williams* v. *Trustees of W.W. Grundy*, [1934] 1 K.B. 524, to that of Rowlatt, J., in *Anderton and Halstead, Ltd.* v. *Birrell* [1932] 1 K.B. 271 and following a decision of the Court of Session, *Commissioners of Inland Revenue* v. *Mackinlay's Trustees*, 1938 S.C. 765 held that discovery had the wider meaning for which the Crown contended and contend in this case. I think that that decision was clearly right, and find the judgment of the Lord President (Normand) wholly convincing. I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged, and the context supports rather than detracts from this interpretation".

See also *Republic* (*Attorney-General and Another*) v. *Frangos* (1965) 3 C.L.R. 641 in which Mr. Justice Josephides after reviewing the authorities of *Williams* v. *Trustees of W. W. Grundy* [1934] 1 K.B. 524 and *Cenlon Finance Co., Ltd.*, v. *Ellwood* (*supra*) on the question of 'discovery' had this to say at pp. 655-656:

> "Once it is accepted, as it has been held in the case of *Demetris Petrou Christou* v. *The Republic* (1965) 3 C.L.R. 214, that the liability to pay tax under Cap. 323 accrued in the year when the income was earned, irrespective of whether a notice of assessment has been served on the tax-payer or not, it is clear that if the Director of the Department of Inland Revenue finds our that there was income chargeable to tax which had

been omitted from any previous assessment then he is empowered to apply the provisions of section 23 to raise an additional assessment within the period fixed therein, and it cannot be said that the income was omitted from any previous assessment with the sanction of the Director because he would have no power to sanction such an omission — at least in so far as the question of the *legality* of the assessment is concerned"

I now come to section 45 of our law. The words 'appears to the Commissioner' used in a statute conferring powers on the Commissioner concerning the taxation of the subject, are obviously put in for the purpose of making the Commissioner the judge on the question whether any person liable to tax has been undercharged It depends upon the opinion of the Commissioner either from information he may choose to receive or when he finds out from new facts that there was income chargeable to tax which had been omitted

In the present case the real question is whether new facts have come to light so that the revenue authorities have formed the opinion that the taxpayer has been undercharged in his original assessment

Upon this question as I have already said, counsel for the Respondent has argued that the Commissioner has formed the opinion that the taxpayer has been undercharged, because he found out new facts contained in a document dated 29th April 1965 According to the evidence of Mr Apostolides, the Assistant Commissioner, the taxpayer has purchased in England War Loan Securities bearing 3 1/2% interest per year of a nominal value of £1,000 He explained, however, that the purchase price of these securities was 52-57% of its nominal value, amounting to £520-£570, these have yielded on 1st June, 1964, an amount of dividend of £17 10s 0d This dividend, it appears, was paid in the personal bank account of the Applicant in England Mr Apostolides questioned further said that War Loan Securities are usually purchased between 1st December and 31st May of each year Armed with this information, as counsel for the Respondent has contended, the Commissioner raised an additional assessment against the taxpayer, adding on his income an amount of £1,000 over and above the amount in the first assessment Even though the Commissioner was fully aware from the audited accounts that the Applicant withdrew

out of his chargeable income for the year 1963 an amount of £3,662.104 mils.

I agree with the proposition argued that the onus under Article 146 is on the taxpayer to adduce evidence to prove that the assessment complained of is excessive. With this in mind, let us now turn to the charging section of our law dealing with the imposition of tax, in order to decide, whether or not the Commissioner has properly exercised his discretionary power in the making of such assessment. Section 5(1), so far as relevant, provides:-

> "Tax shall, subject to the provisions of this law, be payable at the rate or rates specified hereafter in each year of assessment upon the income of any person accruing in, derived from, received in the Republic in respect of—
>
> *(a)* gains or profits from any trade, business, profession or vocation, for whatever period of time such trade.....may have been carried on or exercised; .....*(d)* any dividend, interest or discount."

Year of assessment means, in accordance with section 2, "the period of 12 months commencing on the first day of January in each year". The next relevant section reads:

> Section 6: "Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment".

It is perfectly well-settled that interest or dividend derived from War Loan securities is tax-free in the hands of non-residents in England; and is not taxable unless and until it is received in the Republic.

It remains to consider whether, in the present case, the Commissioner is entitled to say that because of such information or discovery he has made, he was entitled to impose upon the taxpayer an additional amount of tax. In my opinion, in view of the facts in this case, the Commissioner has not found out that there was property or income chargeable to tax which had been omitted from the first assessment. He did not, I think, find out that fact. The fact is, of course, that the property or dividend were not chargeable to tax. He did know that shortly after he received *exhibit 14*, that the amount of £17.10s.0d. dividend from the foreign securities,

was not received in Cyprus by the taxpayer, because that amount was paid into his personal bank account in England. But, counsel further pointed out, that the Commissioner had made a discovery within our section because the amount with which the securities were purchased did not appear in the accounts of the taxpayer; and that it was reasonable to assume that the property abroad had been purchased out of income not declared to the Revenue Authorities in the original assessment.

I am unable to accept the submission of counsel for the Respondent, because the Commissioner before raising an additional assessment must be satisfied from new facts he had found out and not as a matter of conjecture that the taxpayer has been undercharged. I think here, there has been a complete disclosure of all facts upon which a correct assessment was based; and it was accepted by the Commissioner. The Commissioner in my view was stretching his discovery too far when he thought that the amount of the foreign securities might have come out of taxable income not declared by the taxpayer. What has to be found out is that any properties, dividend or profits chargeable to tax have been omitted from the original assessment. In this case, the Commissioner has failed to indicate any reason for his decision to raise the additional assessment and did not decide as a matter of fact that certain amount of income was omitted from the original assessments. In my opinion, therefore, from the facts of this case the Commissioner has failed to make a discovery that the taxpayer has been undercharged within the meaning of section 45 of Law 9/63. I must add, that this was not a case that the additional assessments were made on the taxpayer in respect of unexplained increases in his capital. In the present case the Commissioner knew that the taxpayer out of his taxable income, withdrew an amount of £3,662.104 mils and, therefore, he could not reasonably assume that the amount of £520 with which the foreign securities were purchased was property or income chargeable to tax which has been omitted from the original assessments for the year 1963. The nature of income tax was explained by Lord Macnaghten in *London County Council* v. *A.G.*, [1901] A.C. 26. He says at p. 35:

> "Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially

distinct. There is no difference in kind between the duties of income tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all".

In the case in hand, what the Commissioner has done I think, it was to tax the amount of the securities as being income; and as the Earl of Halsbury L.C. said in *Secretary of State in Council of India* v. *Scoble* [1903] A. C. 299, at p. 302:

> "I think it cannot be doubted, upon the language and the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital — as income at all events".

I will add three more observations: First, it appears to me — assuming that I am wrong and that the Commissioner made a correct discovery of undercharge — that the Commissioner formed the opinion upon a mistaken view of the facts that the amount of the purchase price of the foreign securities was £1,000 and not the amount of £520—£570; furthermore it is in evidence that it has not been established that such amount came out of the chargeable income of the taxpayer for the year immediately preceding the year of assessment; and in my opinion the onus is on the Respondent to prove their allegation.

Secondly, I would like to point out that although the Commissioner has powers under the provisions of section 42(3) *(iii)* of Law 9/63 to require from the taxpayer statements showing as at a certain date full details of all the business or private assets and liabilities or both owned by the person objecting or by any of his dependants, together with such supplementary evidence or other details, nevertheless nowhere is to be found a machinery section empowering the Commissioner to dismiss the objection because of the failure of the taxpayer disputing the assessment to furnish him with such particulars. The Commissioner's decision, therefore, under these circumstances was in my view *ultra vires*. I would also add that there was a duty of the Commissioner to ascertain what the true assessment

should be, in view of the evidence offered by counsel for the Respondent or to quote the words of section 43 of our law, the Commissioner had a duty to look into the accounts and the evidence in order to review and to revise the assessments if necessary. Of course, it must be stated that the Commissioner is entitled to dismiss the objection when on the evidence given, he was not satisfied that the assessment complained of was excessive.

Thirdly, in view of what I have already said I would leave open the question argued by counsel for the Applicant, that the powers of the Commissioner under section 42(3) ought to be restricted for the purposes of asking for such particulars only with regard to properties the income of which is subject to tax in Cyprus.

Havin greached the conclusion from the facts of this case, that the Applicant has succeeded in his claim that the additional assessments complained of are excessive, and that in view of the fact that the Commissioner has exercised wrongly his discretion, I am of the view, that his decision is *null* and *void* and of no effect whatsoever. I would, therefore, discharge the additional assessments, with £12.— costs being part of the costs in view of the special features of this case.

Sub judice decision annulled.
Order for costs as aforesaid.