IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

METALOCK (NEAR EAST) LIMITED,

Applicant,

and

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

Respondents.

(*Case No.* 226/68).

Income Tax—Assessments—Annulled for lack of due reasons thereof—See, also, herebelow under Administrative acts or decisions.

Income Tax—Assessments—Capital receipt—Revenue or income receipt—Whether a receipt is of a capital or of a revenue nature depends upon the particular circumstances of each case—No single infallible test for settling the vexed question whether a receipt is of an income or a capital nature—Receipt treated in the present case as revenue receipt by having been wrongly correlated with expenditure which had been treated—no matter whether rightly or not—as revenue expenditure—Matter decided, therefore, on the basis of a misconception to a material extent—Consequently the sub judice decision (assessment) is wrong in Law and in excess of powers and has to be annulled.

Administrative acts or decisions—Due reasons must be given therefor—Vacuum or lack of reasoning cannot be remedied by counsel's argument at the hearing of the case—General principles regarding due reasoning of administrative acts or decisions adverse to the subject—Reminded.

Reasoning of administrative acts or decisions—Due reasoning therefor—Need of—See hereabove.

Misconception—Administrative decision taken under a material misconception—Wrong in Law and has to be annulled as contrary to Law and in excess of powers—See, also, hereabove.

Excess of powers—See hereabove.

Capital or income (revenue) receipt—Distinction—See hereabove under Income Tax.

Practice—Costs—Costs not awarded to the successfull Applicant—Because Applicant was partly to blame for the situation which has arisen.

In this case the Applicant company challenges by a recourse under Article 146 of the Constitution the validity of income tax assessments in respect of the year of assessment 1958 (year of income 1957) and the year of assessment 1963 (year of income 1962). The relevant decision of the Respondent Commissioner of Income Tax relates to both the said assessments and is contained in a letter sent to the Applicant dated March 27, 1968 (*Exhibit* 1). No reasons at all are shown in the said letter for such decision. Regarding the substance of the matter the whole case turns on the very short point whether or not a sum of £2,250 received by the Applicant company in 1957 is a capital receipt as alleged by the tax-payer company or a revenue receipt as alleged and decided upon by the Respondent Commissioner. The facts on this aspect of the case are shortly as follows:

In 1957 by virtue of an agreement entered into between the Applicant company and a Swedish Company the option to acquire the right to the exclusive use of the "metalock process" (which is what is known as a cold process for engine repairs) in respect of the Persian Gulf territories was ceded by the Applicant company to the Swedish company and the Applicant company received in return £2,250. In 1963 the Applicant, for a consideration of £500, was given by the Swedish company the right to use the said "metalock process" in Kuwait and Saudi Arabia (i.e. being two out of the six said Persian Gulf territories (*supra*)). In due course these £500 paid in 1963 were claimed by the Applicant company and allowed by the Commissioner, as revenue expenditure; this seems to have been treated by the Commissioner as a significant factor relevant to the nature of the receipt by the Applicant company of the aforesaid sum of £2,250 from the same said Swedish company in 1957 (*supra*).

Annulling the *sub-judice* assessments the Court:-

Held, I. As to the lack of reasoning:-

(1) This is a case where, in view of its nature, due reasons had to be given by the Commissioner for his decision inasmuch

as, *inter alia*, it was a decision adverse to a tax-payer. The Applicant's accounts in respect of the years of income 1957–1964 were accepted by the Commissioner in so far only as the years 1963 and 1964 were concerned; but in respect of the other years the computations of the taxable income of the Applicant as shown in such accounts, were revised by the Commissioner in the manner set out in the letter of March 27, 1968 (*Exhibit* 1 *supra*); and no reasons at all were given as to why such revision took place.

(2) As no other relevant document or record has been produced before the Court, setting out any reasons for the course adopted in this matter by the Commissioner, I would, in any event, annul the two assessments on this ground (see *inter alia*, *Droussiotis* v. *The Republic* (1967) 3 C.L.R. 15 at p. 23). Arguments advanced by counsel for the Respondent during the hearing of a case of this nature cannot, really, fill the vacuum existing through the lack of due reasons dating back to the material time (*Droussiotis* case, *supra*).

(3) In this case there exists, too, cause for annulling such decision, due to a ground relating to the substance of the matter (*infra*).

Held, II. As regards the substance of the matter i.e. whether or not the aforesaid sum of £2,250 *received by the Applicant company in* 1957 *is a capital or revenue receipt:*

(1) Helpful though the cases cited might be, it is very useful to bear in mind the warning by Lord MacDermott in *Harry Ferguson (Motors), Ltd.* v. *Commissioners of Inland Revenue*, 33 T.C. 15, at p. 42 (Note: The full passage is set out in the judgment of the Court *post*) to the effect that "there is so far as we are aware no single infallible test for settling the vexed question whether a receipt is of an income or a capital nature. Each case must depend upon its particular facts and what may have weight in one set of circumstances may have little weight in another". The same approach was adopted in Anglo-French *Exploration Co., Ltd.* v. *Clayson* [1955] 3 All E.R. 779; [1956] 1 All E.R. 762.

(2) It has emerged sufficiently clearly at the hearing of this case that, in taking the view which he did take the Respondent Commissioner was influenced, to a material extent, by the fact that the £500 which the Applicant company paid as aforestated in 1963 to the Swedish company, in order to

acquire the use of the "metalock process" in Kuwait and Saudi Arabia (*supra*), was claimed by the Applicant, and allowed by the Commissioner, as a revenue expenditure; this seems to have been treated as a significant factor relevant to the nature of the receipt by the Applicant company of the aforesaid sum of £2,250 from the same Swedish Company in 1957 (*supra*).

(3) In my opinion it was erroneous on the part of the Commissioner to correlate as he has done the payment of £500 in 1963 with the receipt of the £2,250 in 1957. The nature of each transaction had to be determined in the light of its own particular circumstances; and it might well be found that the payment of £500 was revenue expenditure whilst the receipt of £2,250 was a capital receipt—though I am not at this stage expressing myself any view about the nature of either.

(4) In view of the above I have reached the conclusion that the *sub judice* decision has to be annulled in that the Respondent Commissioner of Income Tax by correlating more than he could properly have done, the two aforementioned transactions decided the matter before him on the basis of a misconception to a material extent; with the result that his *sub judice* decision is rendered wrong in Law (the Law having not been applied in the proper context) and in excess of powers.

Held, III. As to the result of the recourse:

(1) In the result—and on the basis of all the foregoing reasons—the assessments challenged by this recourse are declared to be *null* and *void* and of no effect whatsoever; the matter is to be reconsidered by the Respondent Commissioner and decided afresh, with due reasons being given for the decision to be reached.

(2) Regarding costs I decided to make no order as to costs because to a certain extent the situation which has arisen may be blamed on the Applicant in that it does not appear that the Applicant before filing this recourse made an objection under the relevant legislation against the assessment in question, so as to secure a further examination and in all probability a reasoned determination of the matter by the Respondent Commissioner.

Sub judice decision annulled;
no order as to costs.

Cases referred to:

Droussiotis v. *The Republic* (1967) 3 C.L.R. 15 *applied*;

Cyprus Wines Co. Ltd. v. *The Republic* (1965) 3 C.L.R. 345;

Short Bros., Ltd. v. *Commissioners of Inland Revenue*, 12 T.C. 955;

Van Den Berghs, Ltd. v. *Clark*, 19 T.C. 390;

Kelsall Parsons and Co. v. *Commissioners of Inland Revenue*, 21 T.C. 608;

Thompson v. *Magnesium Elektron, Ltd.* 26 T.C. 1; [1944] 1 All E.R. 126;

Barr, Crombie and Co., Ltd. v. *Commissioners of Inland Revenue*, 26 T.C. 406;

Evans Medical Supplies, Ltd. v. *Moriarty*, 37 T.C. 540; [1957] 3 All E.R. 718;

Dain v. *Auto Speedways, Ltd.* 38 T.C. 525;

Jeffrey v. *Rolls-Royce, Ltd.* 40 T.C. 443; [1962] 1 All E.R. 801;

Vacu-Lug (P.V.T.) Ltd. v. *Tax Commissioner*, a Rhodesian case reported in a summary form in the Seven-Year Digest of Income Tax Cases 1959–1965 p. 54;

Harry Ferguson (Motors), Ltd. v. *Commissioner of Inland Revenue*, 33 T.C. 15, at p. 42 per Lord MacDermott; *followed;*

Anglo-French Exploration Co., Ltd. v. *Clayson* [1955] 3 All E.R. 779; [1956] 1 All E.R. 762.

Recourse.

Recourse against the validity of income tax assessments raised on Applicant in respect of the years of assessment 1958 (year of income 1957) and 1963 (year of income 1962).

A. Triantafyllides, for the Applicant.

Chr. Paschalides, for the Respondents.

Cur. adv. vult.

The following judgment was delivered by:—

TRIANTAFYLLIDES, J.: In this case the Applicant company challenges the validity of income tax assessments in respect of the year of assessment 1958 (year of income 1957) and the year of assessment 1963 (year of income 1962).

The relevant decision of the Respondent Commissioner of Income Tax—who comes under the Respondent Minister of Finance—relates to both the said assessments and was communicated by means of a letter dated the 27th March, 1968, (see *exhibit* 1).

A mere perusal of this letter shows that it does not contain any reasons at all for such decision; and, as no other relevant document or record has been produced before the Court, setting out any reasons for the course adopted in this matter by the Commissioner, I would, in any event, annul the two assessments on this ground.

I have no difficulty in holding that this was a case where, in view of its nature, due reasons had to be given by the Commissioner for his decision inasmuch as, *inter alia*, it was a decision adverse to a tax-payer; by virtue thereof the Applicant's accounts, which had been submitted in respect of the years of income 1957–1964, were accepted in so far only as the years 1963 and 1964 were concerned, and in respect of the other years the computations of the taxable income of the Applicant, as shown in such accounts, were revised in the manner set out in the letter of the 27th March, 1968; and no reasons at all were given as to why such revision took place.

I need not refer at length to our, and foreign, judicial precedents on the point that due reasons have to be given in a case of this nature; it suffices I think, to refer only to one of such precedents, namely, *Droussiotis* v. *The Republic* (1967) 3 C.L.R. 15 at p. 23.

But I shall not confine myself to annulling the *sub judice* decision on the ground of lack of reasons therefor; in this case there exists, too, cause for annulling such decision, due to a ground related to the substance of the matter; and in this respect it is necessary to give, first, a short outline of salient events:—

The Applicant company was incorporated in Cyprus in 1954, and, by an agreement entered into in 1955, it secured the option

to acquire from an association in England known as the Metalock International Association Limited, the exclusivity regarding the right to use the "metalock process"—which is what is known as a cold process for engine repairs—in respect of Cyprus, Syria, Lebanon and the Persian Gulf territories, namely, Iraq, Iran, Kuwait, Bahrein, Qatar and Saudi Arabia; no copy of such agreement has been traced (in spite of the efforts made by the Applicant for the purpose, see *exhibit* 10).

In 1957, by virtue of an agreement entered into between the Applicant and a Swedish company, Svenska Metalock Aktiebolag, the option to acquire the right to the exclusive use of the metalock process in respect of the Persian Gulf territories was ceded by the Applicant to the Swedish company and the Applicant received in return £2,250.

This was done with the knowledge and approval of Metalock International Association Limited (see *exhibits* 4, 5, 6, 7 and 8).

In 1963 the Applicant, for a consideration of £500, was given by the Swedish company the right to use the metalock process in Kuwait and Saudi Arabia; it was part of such agreement that the Swedish company would have no right to any commission past or future or for work done or to be done by the Applicant in the said two countries, including the repair of a certain ship (see *exhibit* 9).

Eventually, in 1966 an agreement was concluded between the Applicant and Metalock International Association Limited by virtue of which the Applicant was granted the right to the exclusive use of the metalock process in Cyprus, Syria, Lebanon, Kuwait and Saudi Arabia (see *exhibit* 3).

The Applicant in its accounts for 1957 treated the £2,250, received as aforesaid from the Swedish company, as a capital receipt, whereas the Commissioner of Income Tax, revising the computation of the taxable income of the Applicant for 1957, treated this amount as a taxable revenue receipt.

In the year of income 1957 the accounts of the Applicant showed a trading loss of £2,106; as, however, the aforementioned amount of £2,250 was not treated by the Commissioner as a capital receipt, but as a revenue receipt, the revised computation made by the Commissioner in respect of such year showed a profit of £144.

In the ensuing years of income, 1958–1961, the business of the Applicant showed a loss every year; such losses stood-accumulated-at the end of 1961 at £910.

In the year of income 1962 the business of the Applicant resulted in a profit of £8,384; and for purposes of income tax taxation the Commissioner deducted therefrom the said amount of £910. Had the amount of £2,250, received in 1957 from the Swedish company, been treated as a capital receipt, and not as a revenue receipt, then the accumulated losses to be deducted from the profits of 1962 would have been £3,016 (£910 plus the £2,106 loss in 1957) and the taxable income of the Applicant in 1962 would have been reduced accordingly.

Thus, the view taken by the Commissioner regarding the nature of the receipt of £2,250 in 1957 affected the assessments in respect of both the 1958 and the 1963 years of assessment (years of income 1957 and 1962, respectively); as a result the Applicant by this recourse complains against the assessments in relation to both the said two years.

So, the issue to be decided in this case has been whether or not the Respondent Commissioner of Income Tax, in treating the amount of £2,250 as being a revenue receipt reached a decision which was properly open to him in the circumstances, in law and in fact.

In this connection counsel appearing in the proceedings referred the Court to, *inter alia*, the case of *Cyprus Wines Co. Ltd.* v. *The Republic* (1965) 3 C.L.R. 345; the English cases of *Short Bros., Ltd.* v. *Commissioners of Inland Revenue* (12 T.C. 955); *Van Den Berghs, Ltd.* v. *Clark* (19 T.C. 390); *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue* (21 T.C. 608); *Thompson* v. *Magnesium Elektron, Ltd.* (26 T.C. 1; [1944] 1 All E.R. 126); *Barr, Crombie & Co., Ltd.* v. *Commissioners of Inland Revenue* (26 T.C. 406); *Evans Medical Supplies, Ltd.* v. *Moriarty* (37 T.C. p. 540; [1957] 3 All E.R. 718); *Dain* v. *Auto Speedways, Ltd.* (38 T.C. 525); *Jeffrey* v. *Rolls-Royce, Ltd.* (40 T.C. 443; [1962] 1 All E.R. 801); and the Rhodesian case of *Vacu-Lug (P.V.T.) Ltd.*, v. *Tax Commissioner* (reported in a summary form in the Seven—Year Digest of Income Tax Cases 1959–1965, p. 54).

Helpful though the above case law might be, it is very useful to bear in mind the following warning by Lord MacDermott in *Harry Ferguson (Motors), Ltd.* v. *Commissioners of Inland Revenue* (33 T.C. 15, at p. 42):–

" During the debate many cases were cited in which a decision was reached as to whether particular payments were capital or income. We do not propose to review these authorites. They set up no conclusive test of general applicability and it is fruitless to argue from the facts of one instance to the differring facts of another. There is so far as we are aware no single infallible test for settling the vexed question whether a receipt is of an income or a capital nature. Each case must depend upon its particular facts and what may have weight in one set of circumstances may have little weight in another".

And the same approach was adopted in *Anglo-French Exploration Co., Ltd.* v. *Clayson* [1955] 3 All E.R. 779; [1956] 1 All E.R. 762.

In examining the validity of the *sub judice* decision of the Respondent Commissioner, in the context of the particular circumstances of the present case, I found myself gravely handicapped by the fact that he has stated no reasons at all as to why he decided as he did; and, as pointed out in the *Droussiotis case* (*supra*), the arguments advanced by counsel for Respondent, during the hearing of a case of this nature, cannot, really, fill the vacuum existing through lack of due reasons dating back to the material time.

It has, however, emerged sufficiently clearly at the hearing of this case that, in taking the view which he did take, the Commissioner was influenced, to a material extent, by the fact that the £500 which the Applicant paid, as aforestated, in 1963, to the Swedish company, in order to acquire the right to use the metalock process in Kuwait and Saudi Arabia, was claimed by the Applicant, and allowed by the Commissioner, as revenue expenditure; this seems to have been treated as a significant factor relevant to the nature of the receipt by the Applicant of £2,250, from the same company, in 1957.

In my opinion it was erroneous on the part of the Commissioner to correlate, as he has done, the payment of £500 in 1963 with the receipt of £2,250 in 1957. The nature of each transaction had to be determined in the light of its own particular circumstances; and it might well be found that the payment of £500 was revenue expenditure whilst the receipt of £2,250 was a capital receipt—though I am not, at this stage, expressing, myself, any view about the nature of either.

The only nexus between the said two transactions, that might have been relied upon, was that they both related to the right regarding the use of the metalock process; in other words the second transaction, in 1963, might be an element to be taken into account when considering whether or not the Applicant had acted in the course of trade in connection with such right.

In view of the above I have reached the conclusion that the *sub judice* decision has to be annulled in that the Respondent Commissioner of Income Tax by correlating, more than he could properly have done, the two aforementioned transactions decided the matter before him on the basis of a misconception, to a material extent; with the result that his *sub judice* decision is rendered wrong in law (the law having not been applied in the proper context) and in excess of powers.

In the result—and on the basis of all the foregoing reasons set out in this judgment—the assessments challenged by this recourse are declared to be *null* and *void* and of no effect whatsoever; the matter is to be reconsidered by the Respondent Commissioner and decided afresh, with due reasons being given for the decision reached.

Regarding costs I have decided to make no order as to costs because to a certain extent the situation which has arisen may be blamed on Applicant in that it does not appear that the Applicant, before filing this recourse, made an objection, under the relevant legislation, against the assessments in question, so as to secure a further examination, and, in all probability, a reasoned determination, of the matter by the Respondent Commissioner.

Sub judice decision annulled;
no order as to costs.