[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MINERVA CINETHEATRICAL CO. LTD.,

Applicant,

and

1. THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INLAND REVENUE,

Respondents.

(*Case No.* 394/71).

Income Tax—Section 5 (1) (*a*) *of the Income Tax (Foreign Persons) Law,* 1961 (*Law* 58 *of* 1961)—*Capital receipt—Income receipt—Whether a receipt is a capital or income receipt depends on the facts of each particular case—Company entering into restrictive covenant upon ceding part of its business to another company—Amount received in consideration of the covenant was, in the circumstances of this case, a capital receipt which is non taxable.*

Income Tax—Assessment—Recourse against assessment—Approach of the Court—It will not disturb an assessment if it is a decision which could reasonably and properly, in law and in fact, be reached by the taxing authority.

Administrative Law—Recourse against income tax assessment——Principles on which Court acts.

By virtue of an agreement (*exhibit* 1) dated 22nd January, 1968, the applicant entered into an agreement with another company, Mimoza Films Ltd., the business of which is similar to that of the applicant, whereby the applicant on a consideration of C£5,000 undertook to cease for a period of five years all activities relating to the importation, exploitation or purchase of cinematograph films and, also, not to do anything which would amount to competing with the business of the said Mimoza Films Ltd.

The full text of the relevant clause reads as follows:

" In view of the fact that the 1st party cedes to the 2nd party for purposes of exploitation all its films circulating in

Cyprus, with the result that the 1st party ceases to import any films, subject to what is provided hereinafter, and because as from now and for a period of 5 years from to-day the 1st party undertakes the obligation to stop all its activities in relation to the importation and or exploitation or purchase of films and not to attempt to do anything which would probably amount to competing with the 2nd party, and because the 1st party gives up all its correspondents, the 2nd party, in view of this, pays to-day to the 1st party the amount of five thousand pounds (£5,000.000 mils) in cash as goodwill".

On the same date the same parties entered into another agreement (*exhibit* 2) by which the applicant, for a consideration of C£10,000 assigned to Mimoza Films Ltd. the right to exploit in Cyprus a number of cinematograph films; and some time after the signing of the above two agreements the applicant agreed orally with Mimoza Films Ltd. to hire to it, for the exhibition of films, two cinemas in Nicosia of which the applicant was the lessee.

The respondent commissioner decided to treat the aforesaid amount of C£5,000 as income from trade subject to income tax by relying an section 5 (1) (a) of the Income Tax (Foreign Persons) Law, 1961 (Law 58/61), which reads as follows:-

"5.-(1) Tax shall, subject to the provisions of this Law, be payable at the rate or rates specified hereafter for each year of assessment upon the income of any person accruing in, derived from, or received in the Republic in respect of -

(a) gains or profits from any trade, business, profession or vocation, for whatsoever period of time such trade, business, profession or vocation may have been carried on or exercised".

Counsel for the applicant has argued, mainly, that what was received in consideration of the said restrictive covenant is a capital receipt; on the other hand, counsel for the respondents contended that it was an income receipt.

Held, (1). The true effect of the two agreements (*exhibits* 1 and 2)—as well as of the subsequent arrangement--was, basically, that the applicant agreed with Mimoza Films Ltd., to create a restriction entering to a substantial part of the business

of the applicant, even though such restriction was of a limited nature (see *Higgs* (*Inspector of Taxes* v. *Olivier*, 33 T.C. 136 at p. 147).

(2) I do not agree with counsel for the respondents that the effect of the relevant transaction, between the applicant and Mimoza Films Ltd. was not to restrain the applicant from carrying on its business, but was merely an agreement as to how the applicant would continue to carry on such business. In my view, the true and actual result was, as in *Higgs* case (*supra*), to prevent the applicant from carrying on a considerable part of its business; and in this respect, it was not necessary, as shown by the *Higgs* case (*supra*), that the whole business of the applicant should have been affected in order to render the receipt concerned a capital receipt.

(3) I have, therefore, reached the conclusion that the said amount of C£5,000, mentioned in clause 1 of *exhibit* 1, was, in the circumstances of this case, a capital receipt, non-taxable; and in this respect I have taken into account all relevant considerations, on the basis of the particular facts of the case before me.

(4) The approach of this Court to the validity of a tax assessment, which is attacked by recourse under Article 146 of the Constitution, has always been that it does not disturb such assessment if it is a decision which could reasonably and properly, in law and in fact be reached by the taxing authority (see, *inter alia*, *Tsagaridou* v. *Republic*, (1969) 3 C.L.R. 409, at p. 416).

(5) In the present case, on the basis of the facts before me and in the light of the relevant law (statutory and case-law) applicable thereto, I am of the opinion that it was not reasonably and properly open to the respondent, either factually or legally, to treat the said amount of C£5,000 as being an income receipt.

Sub judice decision annulled.

Observations with regard to the need to reason duly decisions relating to income tax assessments.

Cases referred to:

Van Den Berghs, Ltd. v. *Clark* (*Inspector of Taxes*), 19 T.C. 390 at pp. 428-429, 431-432;

Higgs (Inspector of Taxes) v. *Olivier*, 33 T.C. 136 at pp. 144, 146, 147;

Glenboig Union Fireclay Co. Ltd. v. *The Commissioners of Inland Revenue*, 12 T.C. 427;

Barr, Crombie & Co. Ltd., v. *The Commissioners of Inland Revenue*, 26 T.C. 406 at p. 411; .

Thompson (Inspector of Taxes) v. *Magnesium Electron, Ltd.*, 26 T.C. 1;

Ensign Shipping Co., Ltd., v. *The Commissioners of Inland Revenue*, 12 T.C. 1169;

Shove (Inspector of Taxes) v. *Dura Manufacturing Co. Ltd.*, 23 T.C. 779;

Kelsall Parsons & Co. v. *Commissioners of Inland Revenue*, 21 T.C. 608 at pp. 623-624;

McLellan, Rawson & Co. Ltd. v. *Newall (Inspector of Taxes)*, 36 T.C. 117;

Clift v. *Republic* (1965) 3 C.L.R. 285, at p. 289;

Christides v. *Republic* (1966) 3 C.L.R. 732, at p. 755;

Makrides v. *Republic* (1967) 3 C.L.R. 147, at p. 154;

Tsagaridou v. *Republic* (1969) 3 C.L.R. 409, at p. 416;

Droussiotis v. *Republic* (1967) 3 C.L.R. 15, at p. 23.

Recourse.

Recourse against the validity of income tax assessments raised on applicant in respect of the years of assessment 1969 and 1970.

R. Stavrakis with *V. Sarris*, for the applicant.

A. Evangelou, Counsel of the Republic, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment* delivered by:

TRIANTAFYLLIDES, P.: By this recourse the applicant company challenges the validity of two income tax assessments

* An appeal has been lodged against this judgment. The appeal has been heard and judgment thereon has been reserved.

which were raised against it on the 29th July, 1971, for the years of assessment 1969 and 1970, respectively (see *exhibits* 6 and 7). The total tax involved is C£1,218.250 mils.

The salient facts of the case appear to be as follows:

The applicant is a private company incorporated in Cyprus in 1964 (see *exhibit* 13) and it has its registered office in Nicosia. Its main business is the import, distribution and exhibition of cinematograph films.

On the 22nd January, 1968, the applicant entered into an agreement (see *exhibit* 1) with another company, Mimoza Films Ltd., the business of which is similar to that of the applicant; by such agreement the applicant undertook to cease for a period of five years all activities relating to the importation, exploitation or purchase of cinematograph films and, also, not to do anything which would amount to competing with the business of Mimoza Films Ltd.; it was stated in the relevant clause (clause 1) of the agreement that because the applicant was giving up all its "correspondents" Mimoza Films Ltd. would pay at once to it, by way of "goodwill", C£5,000; the "correspondents" were cinema proprietors all over Cyprus with whom the applicant co-operated in the course of its business and were known, in the trade, as the applicant's "circuit"; at the material time the applicant was exhibiting films on its own only in Nicosia.

The full text of the said clause 1 is as follows:-

" 'Εν ὄψει τοῦ γεγονότος τῆς παραχωρήσεως πρὸς ἐκμετάλλευσιν ὑπὸ τοῦ 1ου συμβαλλομένου εἰς τὸν δεύτερον συμβαλλόμενον ὅλων τῶν ἐν Κύπρῳ κυκλοφορουσῶν ταινιῶν του ὥστε ὁ 1ος συμβαλλόμενος νὰ παύῃ νὰ εἰσαγάγῃ οἱασδήποτε ταινίας πλὴν τῶν προνοιῶν αἵτινες διαλαμβάνονται κατωτέρω καὶ ἐπειδὴ ἐκ τοῦ νῦν καὶ διὰ περίοδον 5 ἐτῶν ἀπὸ σήμερον ὁ πρῶτος συμβαλλόμενος ἀναλαμβάνει τὴν ὑποχρέωσιν νὰ παύσῃ ὅλας τὰς δραστηριότητας του ἐν σχέσει μὲ τὴν εἰσαγωγὴν ἢ καὶ ἐκμετάλλευσιν ἢ ἀγορὰν ταινιῶν ἢ νὰ ἐπιχειρῇ οἱανδήποτε πρᾶξιν ἥτις πιθανὸν νὰ συνιστᾶ ἀνταγωνισμὸν διὰ τὸν δεύτερον συμβαλλόμενον καὶ ἐπειδὴ ὁ 1ος συμβαλλόμενος παραιτεῖται ὅλων τῶν ἀνταποκριτῶν του, διὰ τοῦτο ὁ δεύτερος συμβαλλόμενος καταβάλλῃ σήμερον πρὸς τὸν πρῶτον συμβαλλόμενον τὸ ποσὸν τῶν πέντε χιλιάδων λιρῶν (£5,000.000 μίλς) τοῖς μετρητοῖς ὡς good will".

(" 1. In view of the fact that the 1st party cedes to the 2nd party for purposes of exploitation all its films circulating in Cyprus, with the result that the 1st party ceases to import any films, subject to what is provided hereinafter, and because as from now and for a period of 5 years from today the 1st party undertakes the obligation to stop all its activities in relation to the importation and or exploitation or purchase of films and not to attempt to do anything which would probably amount to competing with the 2nd party, and because the 1st party gives up all its correspondents, the 2nd party, in view of this, pays today to the 1st party the amount of five thousand pounds (£5,000.000 mils) in cash as goodwill").

Clauses 2 and 3 of *exhibit* 1 contain provisions enabling the applicant to continue, in a limited way, the business of exhibiting films; but it appears that these provisions were never actually implemented.

On the same date the same parties entered into another agreement (*exhibit* 2) by which the applicant, for a consideration of C£10,000, assigned to Mimoza Films Ltd. the right to exploit in Cyprus a number of cinematograph films.

The amount received under *exhibit* 2 has been taxed as income and the relevant amount of tax was paid by the applicant; the liability to pay income tax in respect thereof is not in issue in this case.

Some time after the signing of *exhibits* 1 and 2 the applicant agreed orally with Mimoza Films Ltd. to hire to it, for the exhibition of films, two cinemas in Nicosia of which the applicant was the lessee (the "Minerva" openair summer cinema and the "Pallas" winter cinema); the applicant at the time of the signing of *exhibits* 1 and 2 was lessee of only "Minerva" cinema, but it secured the lease of "Pallas" cinema some time later. In return for the hiring of these two cinemas to Mimoza Films Ltd. the applicant was receiving from it 50% of the collections from the exhibition of films, but sometimes this percentage might vary.

By a letter dated the 12th January, 1971 (*exhibit* 3) respondent 2—who comes under respondent 1—informed the applicant that it had been decided to treat the aforesaid amount of C£5,000 as income from trade subject to income tax.

Counsel for the applicant objected to this decision, by letter the 23rd April, 1971 (*exhibit* 4), and he contended that the amount concerned was not taxable income.

Respondent 2, by letter dated the 24th July, 1971, (*exhibit* 5), informed the applicant that after a re-examination of the matter he still intended to treat the amount in question as being taxable and on the 29th July, 1971, he raised the assessments complained of in these proceedings (*exhibits* 6 and 7, respectively).

In adopting this course respondent 2 relied on section 5 (1) (a) of the Income Tax (Foreign Persons) Law, 1961 (Law 58/61), which reads as follows:

> " 5. (1) Tax shall, subject to the provisions of this Law, be payable at the rate or rates specified hereafter for each year of assessment upon the income of any person accruing in, derived from, or 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, business, profession or vocation may have been carried on or exercised;"

By virtue of the Income Tax (Foreign Persons) Law, 1966 (Law 21/66) Law 58/61 ceased to be applicable to only foreign persons. So it became applicable, too, to the applicant in the present case.

Counsel for the applicant has argued, mainly, that what was received in consideration of the restrictive covenant in clause 1 of *exhibit* 1 is a capital receipt; on the other hand, counsel for the respondents contended that it was an income receipt.

A number of English cases have been cited to me by learned counsel on both sides, who have, indeed, acted with great diligence in preparing and presenting their arguments; though I have continuously borne in mind that a matter such as the one in issue in these proceedings has to be decided on the basis of the particular circumstances of the case before me, I have found that the cases cited to me have afforded me quite useful guidance. In this respect it is pertinent to refer to what Lord Macmillan said in *Van Den Berghs, Ltd.* v. *Clark* (*Inspector of Taxes*), 19 T.C. 390 (at pp. 428–9):–

" While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem.

The reported cases fall into two categories, those in which the subject is found claiming that an item of receipt ought not to be included in computing his profits and those in which the subject is found claiming that an item of disbursement ought to be included among the admissible deductions in computing his profits. In the former case the Crown is found maintaining that the item is an item of income; in the latter, that it is a capital item. Consequently the argumentative position alternates according as it is an item of receipt or an item of disbursement that is in question, and the taxpayer and the Crown are found alternately arguing for the restriction or the expansion of the conception of income".

While in cases such as *Higgs* (*Inspector of Taxes*) v. *Olivier*, 33 T.C. 136, *Van Den Berghs Ltd. supra*, *The Glenboig Union Fireclay Co., Ltd.* v. *The Commissioners of Inland Revenue*, 12 T.C. 427, and *Barr, Crombie & Co. Ltd.* v. *The Commissioners of Inland Revenue*, 26 T.C. 406, the receipt concerned was treated as "capital", in cases such as *Thompson* (*Inspector of Taxes*) v. *Magnesium Electron, Ltd.*, 26 T.C. 1, *Ensign Shipping Co., Ltd.* v. *The Commissioners of Inland Revenue*, 12 T.C. 1169, *Shove* (*Inspector of Taxes*) v. *Dura Manufacturing Co., Ltd.*, 23 T.C. 779, and *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue*, 21 T.C. 608, the receipt in question was found to be "income".

The case mostly relied on by counsel for the applicant has been the *Higgs* case, *supra*; the facts of such case appear in the following passage from the judgment of Sir Raymond Evershed M.R. (at p. 144):-

" On 12th September, 1943, an arrangement was made between the company I have mentioned, Two Cities Films, Ltd., and Sir Laurence Olivier relating to the production of a film known as Henry V. The agreement conforms with my limited experience of agreements of this character in that it is of a somewhat prolix character, but under it Sir Laurence undertook not only to act in the film but

also to be producer and director. I refer particularly to one clause, namely clause 14, because Sir Frank Soskice placed reliance upon it. It provided that during the subsistence of the agreement and until the completion of the shooting, cutting and editing of the film the respondent should, subject to a provision which need not be further mentioned, 'devote the whole of his time and ability to the production of the said film and shall not either directly or indirectly undertake any other work whatsoever either for himself or any other person firm or company'. That is to say, he undertook both by an affirmative covenant and by a negative restriction—the addition of the negative restriction had an obvious purpose to those who understand the law in these matters — to give his whole time and exclusive attention to the making of this film. Now the work had been done. The film was made in the sense referred to; that is to say, the shooting, cutting, editing and so on were finished. It appeared that the appeal it made to the public of the United Kingdom was less than had been hoped. As Sir Laurence Olivier was a well-known actor and was himself what is called a 'great draw' to those who go to films, it occurred to Two Cities Films, Ltd. that it would be a dangerous thing, while this film was not doing as well as they hoped, if Sir Laurence appeared in some other film; because those who might have gone to see Henry V because Sir Laurence was in it might go to some more frivolous entertainment in which he also appeared. So there came into existence the deed of covenant which is the subject of the present appeal. By that deed Mr. Laurence Olivier, as he then was, covenanted for a period of eighteen months that he would not 'appear as an Actor in or act as Producer or Director of any film to be produced either in the United Kingdom of Great Britain or the United States of America or elsewhere for any Company firm or person other than the Company', that is, Two Cities Films, Ltd. In other words, he covenanted that he would give up all film work (putting it broadly but, I think, accurately) except for Two Cities Films, Ltd. if they so asked him, for the period of eighteen months; and for that covenant he received the sum of £15,000 which has been the subject of assessment to tax".

The Special Commissioners, a Judge of the High Court on appeal from them, and the Court of Appeal, were all unanimous

in treating the abovementioned £15,000 as a "capital" receipt; and this conclusion was reached notwithstanding the fact that the taxpayer concerned had been prevented, by a restrictive covenant, from exercising only part of his profession and for a relatively short period of time. In this connection the Master of the Rolls stated (at p. 147):-

> "I follow the point that the restriction here is limited; it only relates to film acting and only excludes services with companies and persons other than the Two Cities Films, Ltd. Sir Laurence Olivier was free to act upon the stage, on what is called the legitimate stage; he was free, I take it, to undertake broadcasting work if he felt so disposed; and he was free to act for the Two Cities Films, Ltd. if they asked him to do so, which in fact they did not. Still it was a substantial piece, so to speak, out of the ordinary scope of the professional activities which otherwise were open to him. It was, in other words, a restriction extending to a substantial portion of the professional activities which were open to him. The sum he received therefore cannot properly, in my view, be regarded—and I now treat the question as *res integra*—as money which came to him (and which he received) from—that is in—the ordinary course of the exercise of his profession".

It is quite true that the *Higgs* case was described, (at p. 142) by Harman J., as "a very special case in very special circumstances" and by the Master of the Rolls (at p. 144) as a rather unusual case with rather unusual facts; but it, nevertheless, cannot be overlooked or disregarded as not being capable of being treated in a proper case as a relevant precedent; nor can I accept the proposition that the approach adopted in it is to be regarded as specially confined to cases in which the taxpayer concerned exercises a vocation and is not a trader; it is useful, in this respect, to quote, again, from the judgment of the Master of the Rolls (at p. 146):-

> "I think Sir Frank was disposed to agree that if a trader or a professional man for a money consideration covenanted to give up his trade or profession for the rest of his life, then it would be difficult to say that the money received was 'profits or gains accruing or arising from his trade or profession'. On the other hand it is not difficult to see that a restriction of a very limited or partial character might less easily be taken out of the ambit of the taxing

provision. One example in the argument was that of an actor who covenanted for a limited period not to act for one particular company out of a large number. I gave myself the example of an actor who covenanted for a limited period not to act under his own or well-known stage name. But between the two extremes there is a large area, and for myself I am disposed to think that within that area it may well be a matter of degree. In so far as it is a matter of degree it would be, I think, a question of fact".

A case which was much referred to in the *Higgs* case was the *Glenboig* case, *supra*; in relation to it Sir Raymond Evershed M.R. said in his judgment in the *Higgs* case (at p. 146):-

> " On the other side there are cases—the *Glenboig* case, 12 T.C. 427, as it is called, has been referred to—where the monies received for the sale of an asset, or for what is the equivalent of a sale or disposition of an asset, have been held not to be taxable. In the *Glenboig* case the question arose out of the well-known provisions which apply when a railway company require a mining company not to undermine the railway, and compensation has to be paid to the mining company in consequence. The Glenboig Company undertook not to mine one and a half acres (out of a total 'take' of about 1,800 acres) underneath the railway. I think there is a true analogy between such an arrangement as that or between a sale of one of a trader's capital assets and a restrictive covenant of a substantial character entered into by a trader relating to trading".

In *Van Den Berghs Ltd., supra*, the facts were that an English company—the taxpayer—and a foreign company had entered into an agreement for the purpose of sharing the profits of their respective margarine businesses in specified proportions, and this agreement was followed by two supplemental agreements as a result of which the initial agreement would continue in force for about 32 years; some years later it was agreed by the two companies to cancel their co-operation and a payment was made by the foreign company to the English company as compensation for the cancellation of its rights under the agreement. It was held that the payment in question was to be regarded as a capital, and not as a revenue, receipt.

Lord Macmillan stated in his judgment (at pp. 431-2):-

" Now what were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the Stated Case 'pooling agreements', but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily in itself an item of income. As Lord Buckmaster pointed out in the case of the *Glenboig Union Fireclay Co., Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 427, at p. 464: 'There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test'.

The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary, the cancelled agreements related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organisation of a trader's activities can be regarded as an income disbursement or an income receipt. Mr. Hills very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved.

In the present case, however, it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion that asset, the congeries of rights which the appellants enjoyed under the agreements and which for a price they surrendered, was a capital asset.

I have not overlooked the criterion afforded by the economists' differentiation between fixed and circulating capital which Lord Haldane invoked in *John Smith & Son* v. *Moore*, 12 T.C. 266, and on which the Court of Appeal relied in the present case, but I confess that I have not found it very helpful. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in that process, and remains unaffected by it. If this is to be the test, I fail to see how the appellants could be said to have been engaged in turning over the asset which the agreements in question constituted. The agreements formed the fixed framework within which their circulating capital operated; they were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself. They provided the means of making profits, but they themselves did not yield profits. The profits of the appellants arose from manufacturing and dealing in margarine".

A different result was reached in the *Kelsall Parsons and Co.* case, *supra*, where the receipt in question was found to be a taxable profit; Lord Moncrieff stated in his judgment the following (at pp. 623–4):-

> " The present case, in my view, is clearly an example of the contrasted class of case where the payment is made in respect of the cancellation of a contract directed to result in the making of trading profits. A typical example of such a case was considered by the English Courts in the case of *Short Bros.*, 12 T.C. 955. In that case a ship-building firm had made a contract for the building of a ship. In the course of the execution of that contract the contract was cancelled by arrangement. A payment of compensation was made by the prospective purchaser of the ship to the builders, and the sum so paid was regarded and held by the Courts to be a revenue and not a capital payment. The payment there had been made in respect

of the cancellation of a contract which, had it continued to operate, was directed to result in the making of trading profits. It was the business of the shipbuilders to enter into contracts for the building of ships, and, having done so, to execute these contracts. In the present case it was the business of the appellants to enter into contracts for exclusive or local agencies for the selling of goods, and, having done so, to execute these contracts.

In the present case, as in the case of *Short Bros.* cancellation of the agreement has resulted in the disturbance of the contracted profits of the appellants, and for such a loss, subject to one distinction, compensation when paid seems to share the revenue quality of the benefit in respect of the loss of which it has been paid. The distinction I would draw was incidentally recognised in the case of *Short Bros.* The trading profits which had been contracted for in that case were trading profits which were to be ingathered within what I may call the revenue period of the outlook of a shipbuilding business. The revenue period of each particular business of course will vary, but profits can, in general, be said to fall within the revenue period which are payable within the time which, in ordinary course, is granted for the execution of the contracts which the trader is in use to make. In this case accordingly where, in the events which happened, payment was made of a single sum in lieu of the single sum which would have been payable under the agreement if not cancelled within the year, I regard the profits, of the contracted prospect of which the appellants sustained a loss, as being profits within the outlook of realisation within the revenue period of their particular business.

If, on the other hand, an agreement such as this, though directed towards resulting in the making of trading profits, has an outlook over a period of years, then I agree with Lord Fleming that disturbance of such an agreement, although associated with the disturbance of a prospect of the making of trading profits, may be a disturbance of what should properly be regarded as a capital interest".

Another case which may be referred to is that of *McLellan, Rawson & Co., Ltd.* v. *Newall (Inspector of Taxes)*, 36 T.C. 117, the headnote of which reads as follows:–

"The appellant Company, which carried on business as timber merchants, became interested in 1948 in the purchase of three lots of woodland on an estate as a source of supply of timber. Following the sale of the whole estate by private treaty the Company entered into negotiations with the purchaser for the purchase of these lots. In the course of the negotiations it became apparent to the Company that the price it would have to pay would be much higher than that originally contemplated, and it would have been uneconomical to lock up so much capital for the five years or so it would have taken to clear the timber. The Company therefore, while the negotiations were proceeding, arranged to sell the woodlands to two other timber merchants. The carrying out of these transactions was delayed owing to the making of a Tree Preservation Order, but arrangements were eventually made enabling the timber to be felled. The Company completed the purchase of the three lots in May, 1949, and later that year resold them to the other timber merchants at a net profit of £4,846. The transaction was the only one of its kind undertaken by the Company and a separate account of it was kept in the Company's books.

The Company was assessed to Income Tax under Case I of Schedule D for the year 1951–52 on the basis that the profit on the transaction was part of its trading profits. On appeal to the General Commissioners the Company contended that the transaction was an isolated one and that there was no evidence that it formed part of the Company's trade of timber merchants. The Commissioners found that the purchase and sale of the woodlands was part of the general trade of the Company and that the profits were assessable under Case I of Schedule D accordingly. The Company demanded a Case.

Held, that there was no evidence upon which the Commissioners could properly reach their decision".

I have considered carefully all the cases cited by learned counsel for the respondents; I found that cases such as the *Magnesium Electron Ltd., supra,* the *Ensign Shipping Co. Ltd.,* and *Dura Manufacturing Co., Ltd., supra,* have no real analogy to the situation in the case before me, though they give valuable guidance as regards the general principle involved. But, as shown also by the contents of paragraphs 60–65 in Simon's

Income Tax, vol. 1, 1964–65, it is clear that though there cannot be any real difficulty in formulating the principle applicable, it is a matter depending entirely on the facts of each particular case whether the receipt concerned is a capital, or an income, receipt. As was aptly stated by Lord Normand in *Barr, Crombie and Co., Ltd., supra*, (at p. 411):-

> " It has been truly said that every case must be considered on its own facts, and that no legal criterion for distinguishing between capital payments and income payments is readily applicable. Therefore, though we have had a considerable citation of cases, I do not propose to refer to more than a few of them".

In the case before me, a matter which has been pressed in argument by learned counsel for respondents, as distinguishing it clearly from the *Higgs* case, *supra*, was that the two agreements between the applicant and Mimoza Films Ltd. should be treated as one transaction, whereas in the *Higgs* case the two agreements involved therein were treated as separate. I must say that, indeed, the two agreements in the *Higgs* case were rightly treated as separate, because they were for entirely different purposes (the one provided for remuneration, whereas the other contained the restrictive covenant); in the present case, however, there is no doubt that the two written agreements (*exhibits* 1 *and* 2) should be treated as one transaction and as being closely interrelated; this is shown by their contents, as well as by the opening phrase in clause 1 of *exhibit* 1; and, actually, counsel for applicant has argued that it would not have made the slightest difference to his case if such agreements were contained in one and the same document. Furthermore I would say that in determining this case I have also taken into account the subsequent arrangement by means of which the applicant was exhibiting at its cinemas films provided by Mimoza Films Ltd. and I do treat this arrangement as part of the whole transaction.

In my view the true effect of *exhibits* 1 *and* 2—as well as of the said subsequent arrangement—was, basically, that the applicant agreed with Mimoza Films Ltd. to create a restriction extending to a substantial part of the business of the applicant, even though such restriction was of a limited nature (see in this respect the passage from the judgment of Sir Raymond Evershed in the *Higgs* case, at p. 147, which has been already referred to above); and I do not agree with learned counsel for

the respondents that the effect of the relevant transaction, between the applicant and Mimoza Films Ltd., was not to restrain the applicant from carrying on its business but was merely an agreement as to how the applicant would continue to carry on such business. In my view, the true and actual result was, as in the *Higgs* case, to prevent the applicant from carrying on a considerable part of its business; and in this respect, it was not necessary, as shown by the *Higgs* case, that the whole business of the applicant should have been affected in order to render the receipt concerned a capital receipt.

I have not lost sight of the fact that clauses 2 and 3 of *exhibit* 1 enabled the applicant to continue carrying on, to a limited extent, its business as a trader in, or as an exhibitor of, films; but, in actual fact, as it has been clearly stated before me, the said clauses 2 and 3 were never implemented; and, in any case, they cannot be treated as being of such significance as to alter the essential nature of the restriction on the applicant's business, imposed by clause 1 of *exhibit* 1; I regard them as being only consequential arrangements, of minor importance, which were made as a result of the restrictive covenant contained in such clause.

Another argument of counsel for the respondents was that the agreement *exhibit* 1 is *ultra vires* the objects of the applicant company; I do not think that such a consideration could be decisive in a case such as the present one, but, in any event, I cannot share in this connection the view of counsel for the respondents:

Paragraph 3 (o) of the Memorandum of Association of the applicant (*exhibit* 13) reads as follows (at p. 4):-

> " Νὰ πωλῆ, ἐνοικιάζῃ, ὑποθηκεύῃ, ἐπιβαρύνῃ ἢ ἄλλως ἀποξενώνῃ τὴν ἐπιχείρησιν, ἐργασίαν, ἐνεργητικόν, περιουσίαν, δικαιώματα ἢ συμφέροντα τῆς 'Εταιρείας ἢ οἱονδήποτε μέρος τούτων εἴτε πάντα ταῦτα ὁμοῦ εἴτε εἰς δόσεις ἢ μερίδια ἀντὶ τοιούτου ἀνταλλάγματος ὡς ἡ 'Εταιρεία ἤθελε θεωρήσει πρέπον".
>
> (" To sell, hire, mortgage, charge or otherwise alienate the enterprise, business, assets, property, rights or interests of the Company or any part thereof either all together or in portions or parts for such consideration as the Company may deem fit").

In my opinion *exhibit* 1 is not *ultra vires* the applicant company's objects, in view of the above-quoted contents of paragraph 3 (o) of its Memorandum of Association; it is specifically and clearly provided therein that the applicant may alienate its rights or interests in whole or in part.

As already indicated earlier, I have reached the conclusion that the amount of C£5,000, mentioned in clause 1 of *exhibit* 1, was, in the circumstances of this case, a capital receipt, non-taxable; and in this respect I have taken into account all relevant considerations, on the basis of the particular facts of the case before me.

As regards the already mentioned consideration that the restrictive covenant contained in *exhibit* 1 extended to a substantial part of the applicant's business—and so substantial as to render the above amount a capital receipt—it is useful to refer, also, to a table showing the income of the company before and after the signing of *exhibits* 1 *and* 2 (see *exhibit* 10, which contains the same information as *exhibit* 9).

The mere fact that accounts of the company were apparently kept in the same manner both before and after the signing of the agreements concerned cannot, in my opinion, be treated as a decisive factor; and I would like, in any case, to point out that the accounts for 1967 and 1969 which were produced (*exhibits* 11 *and* 12, respectively) are not accounts for the business of the applicant company as a whole, but relate only to the operation of the Minerva Cinema which continued unaffected by the said agreements.

I have, also, accepted as correct in toto the evidence of Mr. Sarris, who has been at all material times an Executive Director of the applicant. His evidence establishes, in a very useful way, the background of this case and provides supplementary information which cannot be derived from other material which has been placed before the Court during the hearing of the case.

The approach of this Court to the validity of a tax assessment, which is attacked by recourse under Article 146 of the Constitution, has always been that it does not disturb such assessment if it is a decision which could reasonably and properly, in law and in fact, be reached by the taxing authority (see *Clift* v. *Republic* (1965) 3 C.L.R. 285, at p. 289, *Christides* v. *Republic*

(1966) 3 C.L.R. 732, at p. 755, *Makrides* v. *Republic* (1967) 3 C.L.R. 147, at p. 154 and *Tsagaridou* v. *Republic* (1969) 3 C.L.R. 409, at p. 416).

In the present case, on the basis of the facts before me and in the light of the relevant law (statutory and case-law) applicable thereto, I am of the opinion that it was not reasonably and properly open to the respondent, either factually or legally, to treat the amount of C£5,000, received by the applicant in relation to the restrictive covenant contained in clause 1 of *exhibit* 1, as being an income receipt.

Before concluding I must state that I have looked in vain for the specific reasoning, on the part of respondent 2, which led to the *sub judice* decision; his relevant letters (*exhibits* 3 *and* 5) do not adequately contain the reasons for his approach to the facts of this particular case. In *Droussiotis* v. *Republic* (1967) 3 C.L.R. 15, at p. 23, I had occasion to observe that:-

> " Irrespective of what may have been the practice before the coming into operation of Article 146 of the Constitution, there is no doubt that when nowadays an objection against an assessment is being determined it is necessary to reason duly the relevant decision; and if this cannot be done in the formal notice of determination of objection, then the reasons therefor must be recorded in, and, also, made known to the objector by, an appropriate communication".

It is a pity that the course suggested above has not been adopted by respondent 2 in this case; I should however make it clear that I have not annulled the *sub judice* assessments because of lack of due reasoning, as this matter was not raised and argued before me at all, but on the grounds already stated in this judgment.

By setting aside the assessment in question I have not, of course, taken the matter concerned entirely out of the competence of respondent 2. He is still at liberty to re-examine the matter and reach a new decision thereon in the light of any further facts, other than those established in the course of the present proceedings; and I trust that there will be adequate reasoning contained in any new decision of his.

Regarding costs, taking into account the nature of the issues before me, I have decided to leave each side to bear its own costs.

Sub judice decision annulled. Each side to bear its own costs.