# CASES

## DECIDED BY

# THE SUPREME COURT OF CYPRUS

## IN ITS REVISIONAL JURISDICTION AND IN ITS REVISIONAL APPELLATE JURISDICTION

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGE COUSSOUMIDES,

*Applicant,*

*and*

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE COMMISSIONER OF INCOME TAX,

*Respondents.*

*(Case No. 12/64).*

*Income Tax—Assessment—Ex gratia payment of an amount of seven hundred pounds made to the applicant by his employers on leaving his service with them to take up a post elsewhere—Whether the amount in question constitutes "gains" or "profits" from, or "allowance" in respect of, the said employment within the ambit of section 5(1) (b) of the Income Tax Law, Cap. 323—And as such liable to income tax as part of the taxable emoluments of the employee under the statute—Or whether the said amount is a "lump sum received in the way of retiring gratuity" within the provisions of section 8(i) of the aforesaid Law, Cap. 323 (supra) and as such exempt from the tax under that part of the statute—The question is one of mixed law and fact—In the circumstances of the instant case the aforesaid amount constitutes neither "gains", "profits" or "allowance" (or bonus) within section 5(1) (b), nor "a lump sum received in the way of retiring gratuity" within section 8(i) of the statute—But it is merely an amount paid to the applicant-employee and received by him in the way of testimonial for his services—Such services having been perhaps the causa sine qua non for the payment in question, but not the causa causans—Therefore, the aforesaid amount is not a taxable emolument of the applicant-employee*

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GEORGE COUSSOUMIDES
*and*
THE REPUBLIC OF CYPRUS,
THROUGH
1. THE MINISTER OF FINANCE
2. THE COMMISSIONER OF INCOME TAX

*within the ambit of section 5(1) (b) of the statute, Cap. 323 (supra).*

*Income Tax—The Income Tax Law, Cap. 323—"Gains", "profits" from, or "allowance" in respect of, any employment within the meaning of the words in section 5(1) (b) of the statute.*

*Income Tax—The Income Tax Law, Cap. 323—"Lump sum received by way of retiring gratuity"—Meaning and effect of the said words in section 8(i) of the statute.*

*Income Tax—Assessment—Objection to an assessment under the provisions of section 42 of the statute (Cap. 323, supra)—A tax-payer should, as a rule, state clearly his grounds of objection, as he intends to put them forward later on, if need be, before this Court by way of recourse under Article 146 of the Constitution.*

*Income Tax—Onus of proof—The provisions of sub-section 5 of section 43 of the statute i.e. Cap. 323 (supra), casting the burden of proof on the tax-payer, are no longer operative, in view of the decision of the former Supreme Constitutional Court in the case Mikrommatis and The Republic 2 R.S.C.C. 125, at p. 128—However, such a view does not lead to a much different result as regards the burden of proof—Because even under Article 146 of the Constitution, the initial onus is on the applicant to satisfy the Court that it should interfere with the subject-matter of a recourse.*

*Administrative Law—Recourse under Article 146 of the Constitution—Onus of proof—Under that Article it is on the applicant on whom lies the initial burden to satisfy the Court that it should grant redress.*

At the material time the applicant was in the service of LOEL Ltd., a wines and spirits producing concern, as chemist under an agreement dated the 2nd February, 1954, and due to expire on the 31st December, 1959. There was no provision at all in that agreement for any gratuity or bonus to be paid to the applicant on determination of his employment. In September 1958, the applicant decided to leave his said employment with LOEL in order to take up a post with the Greek Gymnasium of Limassol. He accordingly requested his employers to be released from his obligations under the agreement and, also, to be given a gratuity on leaving his service. Eventually, the

employers agreed to release him as from the end of September 1958 and to give him a gratuity for his services amounting to seven hundred pounds, the company expressing its appreciation for the good services rendered by the applicant. In October 1959, the Applicant was assessed to income tax in a manner by which the aforementioned amount of seven hundred pounds paid to him as aforesaid was treated as part of his taxable emoluments under section 5(1) (b) of the Income Tax Law, Cap. 323. The Applicant objected under section 42 of the statute on the 23rd of October, 1959, to that part of the assessment concerning the amount in question, alleging in a general manner that it represented "compensation upon retirement". The Commissioner of Income Tax rejected the objection by means of a decision which is now attacked by the applicant through the instant recourse under Article 146 of the Constitution.

Applicant's case is twofold:

The first submission made by his counsel was that this amount of seven hundred pounds does not come within section 5 of the Income Tax Law, Cap. 323 and, particularly of sub-section 1(b) thereof. Section 5(1)(b) of the statute provides:

> "5.(1) Tax shall, ....., be payable..... upon the income of any person accruing in, derived from, or received in the Colony" *(now the Republic)* in respect of-.....
> (b) Gains or profits from any employment..... or of any other allowance granted in respect of employment whether in money or otherwise;
> .....

The second submission made by counsel for the applicant was that the amount in question of seven hundred pounds is a lump sum received by way of "retiring gratuity" within the meaning of section 8(i) of the statute, Cap. 323 *(supra)* and, therefore, it should not be treated as part of the applicant's taxable emoluments. Section 8(i) of the statute provides:

"8. There shall be exempt from tax-

.....

(i) any lump sum received by way of retiring gratuity, commutation of pension, death gratuity or as consoli-

dated compensation for death or injuries;

. . . . . "

On the other hand, counsel for the respondents submitted that the said amount was taxable under the provisions of section 5(1)(b) *(supra)*, and that it is not a gratuity under section 8(i) above. He submitted, also, that the applicant failed to discharge the onus cast on him by section 43(5) of the statute, Cap. 323 *(supra)* to satisfy the Court that the assessment in question should be set aside.

In granting the application and setting aside the decision complained of the learned Justice:-

*Held,* (1). A tax-payer who lodges an objection under section 42 of Cap. 323 (*supra*) should, as a rule, set out his grounds clearly. In the present case, however, bearing in mind that the two points taken by counsel for the applicant before the Court *(v. supra)* may be said to be covered—though admittedly not too clearly—by the objection made to respondent 2 on the 23rd October 1959, *(v. supra)*, and bearing in mind also that the respondents have not thought fit—and rightly so, in my opinion—to rely on technicalities, I have reached the conclusion that the correct course is to regard both contentions of the applicant in this recourse as properly before the Court, irrespective of the manner in which his earlier objection under section 42 of Cap. 323 has been framed; after all, they both relate to the legality of the *sub judice* decision and, as such, they have to be gone into.

(2) Counsel for the respondents submitted that under section 43(5) of Cap. 323 *(supra)*, the burden of proof lies with the applicant to satisfy me that the assessment in question should be set aside. Section 43, however, has been declared to be contrary to Article 146 of the Constitution—as providing for a competence inconsistent with the aforesaid Article—and "in accordance with the provisions of Article 188 of the Constitution, must be regarded as having been repealed as from the date of the coming into operation of the Constitution" *(vide: Mikrommatis and The Republic* 2 R.S.C.C. 125, at p. 128). So I do not think that in the present case, either, I can regard section 43 as being in force for the purposes of these proceedings. Nevertheless, such a view does not lead to a

much different result in relation to the question of the burden of proof, because under Article 146 of the Constitution, also, it is on the applicant on whom lies the initial onus to satisfy the Court that it should interfere with the subject-matter of a recourse.

(3) With regard to the second submission made by counsel for the applicant i.e. that the amount of seven hundred pounds was paid to him by way of "retiring gratuity" and, as such, it is exempted from tax under section 8(i) of Cap. 323 *(supra)*, I am of the opinion that what is really contemplated under the above provision is a gratuity payable on retirement due to age or other cause putting an end to a person's working life and not a gratuity on changing employment after a certain number of years, especially if the said years do not represent practically a life's work, but are only a part thereof. I have come, therefore, to the conclusion that in the circumstances of this case the said amount cannot be brought within either the letter or the spirit of section 8(i) *(supra)* and that, consequently, cannot be exempted from being computed as part of the taxable emoluments of the applicant, on this ground.

(4) Bearing fully in mind that it is up to an applicant under Article 146 of the Constitution to make out a case for redress, bearing in mind as a guide the English cases cited and whatever other authorities or submissions have been put to the Court by the parties, I have come to the conclusion that on the totality of the material before me, I must resolve the *sub judice* issue of mixed law and fact, regarding the assessability of the aforesaid amount of seven hundred pounds, in favour of the applicant, because I am satisfied that in the circumstances of this case it does not come within the ambit of the provisions of section 5(1)(b) of Cap. 323 *(supra)*. I am of the opinion that the said amount was paid to the applicant and received by him by way of testimonial for his services. Such services were perhaps the *causa sine qua non* for the payment in question but not the *causa causans*.

(5) I do not think that it is proper to treat the payment of the aforesaid seven hundred pounds to the applicant as being similar to the bonus paid to an employee at Christmas. Such a bonus is paid during the currency of an em-

ployment with a view, *inter alia*, to encouraging the recipient to further exertions and, therefore, it is not comparable to a payment made to an employee such as applicant, on leaving completely the service of his employers.

Furthermore I do not think that the amount in question could be treated as an "allowance" in the sense of section 5(1)(b) *(supra)* especially as I have found that it is not "gains or profits" in the sense of such provision.

(6) In deciding this Case in favour of the applicant I have, *inter alia*, borne in mind that the payment in question was made to him not in respect of a continuing employment but at the termination thereof, that he was not entitled to such payment under his contract of service, and that it was not a case of a recurrent payment but a single donation to him.

(7) Regarding costs, I have decided to award to the applicant part of his costs which I assess at £12.

*Sub-judice decision declared null and void. Order for costs as aforesaid.*

Cases referred to:

*Commissioners of Inland Revenue* v. *Joseph Robinson and Sons*, 9 Tax Cases 59, at p. 60;

*Wright* v. *Boyce* [1958] 2 All E.R. 703, at p. 708;

*In re Strang*, 1 Tax Cases, 207;

*Herbert* v. *McQuade*, 4 Tax Cases, 489;

*Turner* v. *Cuxson*, 2 Tax Cases, 422;

*Cooper* v. *Blakiston*, 5 Tax Cases, 347;

*Cowan* v. *Seymour*, 7 Tax Cases, 372;

*Seymour* v. *Reed* [1927] All E.R. (Rep.) 294;

*Moorhouse* v. *Dooland* [1955] 1 All E.R. 93;

*Bridges* v. *Hewitt* [1957] 2 All E.R. 289;

*Hochstrasser* v. *Mayes* [1959] 3 All E.R. 817, at pp. 825, 827;

*White* v. *Franklin* [1964] 3 All E.R. 307;

*Mikrommatis* and *The Republic*, 2 R.S.C.C. 125, at p. 128.

**Recourse.**

Recourse against the decision of the Respondents refusing to amend the Income Tax Assessment made upon the Appli-

cant so as to deduct from it a sum of £700.- paid to Applicant by his employers on determination of his services.

*J. Potamitis*, for the Applicant.

*M. Spanos*, Counsel of the Republic, for the Respondents.

*Cur. adv. vult.*

The following judgment was delivered by:-

TRIANTAFYLLIDES, J.: By this recourse, the Applicant challenges, in effect the validity of an income-tax decision of Respondent 2, who comes under Respondent 1. Such decision consists of a "notice of determination of objection" which is dated 26th November, 1963, (vide *exhibit 3*). Applicant does not challenge such decision as a whole, but only to the extent to which it treats as part of Applicant's taxable emoluments in 1958 a sum of £700 paid to Applicant by LOEL Ltd.

This recourse was originally filed also against the Greek Communal Chamber but was withdrawn and struck out, by consent, as against such Chamber, on the 2nd December, 1964.

The history of events in this Case is as follows:-

At the material time Applicant was serving, in Limassol, LOEL Ltd., a wines and spirits producing concern, as a chemist.

He was doing so under an agreement dated the 2nd February, 1954, (vide *exhibit 1*). Under such agreement there was no provision at all for any gratuity or bonus to be paid to Applicant on determination of his employment.

The said agreement, which was due to end on the 31st December, 1959, was, in fact, a renewal of the current employment of Applicant, under an earlier agreement.

In September 1958, Applicant decided to leave the employment of LOEL Ltd. in order to take up a post with the Greek Gymnasium of Limassol and he, accordingly, saw the Managing-Director of LOEL Ltd., Mr. G. Minas, and requested to be released from his obligations under the agreement — *exhibit 1* — and also to be given a gratuity on leaving the service of the company. The Directors of LOEL Ltd.

agreed to release him, as requested, as from the end of September 1958, and to give him a gratuity for his services, amounting to £700 (vide letter of the 29th September, 1958, *exhibit 2*). The Company also expressed its appreciation for the good services rendered by Applicant.

It appears that on the 8th October, 1959, Applicant was assessed, in respect of the year of assessment 1958, in a manner by which the amount of £700, which was paid to him as above, was treated as part of his taxable emoluments and, therefore, he objected in writing on the 23rd October, 1959, (vide *exhibit 4*). Such objection was, eventually, dismissed by means of the decision, *exhibit 3*, which is now attacked through this recourse.

Applicant's case is twofold:

The first submission made by his counsel is that the amount of £700 does not come within the provisions of section 5 of the Income Tax Law, Cap. 323 and, particularly, of subsection 1(b) thereof; it is common ground that it is on the strength of this provision, and under the subsequent machinery provisions of the Taxes (Quantifying and Recovery) Law, 1963, (Law 53/63) that the assessment complained of has been made.

Furthermore, counsel for Applicant has submitted that the said amount is "retiring gratuity" within the meaning of section 8(i) of Cap. 323 and, therefore, should not be treated as part of Applicant's taxable emoluments.

On the other hand, counsel for Respondents submitted that the said amount is taxable under the provisions of section 5(1) (b), above, and that it is not a gratuity paid on retirement, under section 8(i), above.

Actually, in the objection made by Applicant on the 23rd October, 1959, (vide *exhibit 4*), Applicant does not appear to have put forward separately both the contentions which he has made in these proceedings; he has alleged in a general manner that the amount in question represented "compensation upon retirement".

It is only by means of the present recourse that he put forward expressly the two grounds on which he relies *viz.* that the said amount does not constitute gains or profits within section 5(1) (*b*) of Cap. 323 and, further, that it is in

any case a retiring gratuity under section 8(*i*) of Cap. 323.

A tax-payer who lodges an objection under section 42 of Cap. 323 should, as a rule, set out his grounds clearly, as he intends to put them forward later on, if need be, before this Court by way of recourse.

In the present Case, bearing in mind that the two points taken by counsel for Applicant in the proceedings before the Court may be said to be covered — though admittedly not too clearly — by the objection made to Respondent 2 on the 23rd October, 1959, (vide *exhibit 4*), and bearing in mind also that Respondents in defending these proceedings have not thought fit—and rightly so, in my opinion—to rely on technicalities and submit that Applicant, in view of the rather loose drafting of his said objection, was not entitled to put forward either of his aforesaid two points, I have reached the view that the correct course is to regard both contentions of Applicant in this recourse as properly before the Court, irrespective of the manner in which his earlier objection under section 42 of Cap. 323 has been framed; after all, they both relate to the legality of the *sub judice* decision and, as such, they have to be gone into.

It is convenient to dispose, first, of the second submission made on behalf of Applicant, *i.e.* that the amount of £700 was paid to him by way of retiring gratuity.

The relevant provision is section 8(*i*) of Cap. 323 which reads as follows:—

> "8. There shall be exempt from the tax—.....
>
> .....
>
> "(*i*) any lump sum received by way of retiring gratuity, commutation of pension, death gratuity or as consolidated compensation for death or injuries;
>
> "....."

I am of the opinion that what is really contemplated under the above provision is a gratuity payable on retirement due to age or other cause putting an end to a person's working life and not a gratuity on changing employment after a certain number of years, especially if the said years do not represent practically a lifetime's work, but are only a part thereof; as counsel for Applicant has frankly informed the Court, Applicant after receiving the said amount of £700 took up an employment as a schoolmaster, then he started

his own office as an analyst, then he took up employment with SODAP, another wines and spirits concern, and now he is again practising on his own as an analyst.

Bearing in mind all the circumstances of this Case, I am of the opinion that the said amount of £700 cannot be brought within either the letter or the spirit of the aforesaid provision and, therefore, cannot be exempted, from being computed as part of the taxable emoluments of Applicant, on this ground.

Coming now to the other and, in my opinion, more weighty submission of Applicant, the relevant provision is section 5(1) (*b*) of Cap. 323 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 the year of assessment commencing the 1st day of January, 1941, and for each subsequent year of assessment upon the income of any person accruing in, derived from, or received in the Colony"—now the Republic—in respect of—
>
> .....
>
> "(*b*) gains or profits from any employment including the estimated annual value of any quarters or board or residence or of any other allowance granted in respect of employment whether in money or otherwise;
>
> ....."

As corresponding statutory provisions in the United Kingdom—into which I need not go in detail—are quite similar to our section 5(1) (*b*), both counsel have rightly relied in argument on decided cases there.

All such cases appear to lay down that the issue of whether or not a certain payment made to a person by his employers, or otherwise, amounts to gains or profits derived from employment is in the last analysis a matter of mixed law and fact to be decided on the particular facts of each case concerned. It is often a matter in which it is very difficult to draw the line. In this respect reference may usefully be made to the words of Rowlatt, J. in the *Commissioners of Inland Revenue* v. *Joseph Robinson and Sons*, (9 Tax Cases, p. 59, at p. 60), which read as follows:—

> "This case, like all cases of a similar nature, is very

troublesome; because all these cases turn upon nice questions of fact, and at least I find very great difficulty in apprehending any permanent and clear line of division between the cases which are within and the cases which are without the scope of the Income Tax Acts. I think everybody is agreed, and has been agreed for a long time, that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter. As Sir Richard Henn Collins said, you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade, if it is a question of trade, and so on. You have to look at his point of view to see whether he receives it in respect of those considerations. That is perfectly true. But when you look at that question from what is described as the point of view of the recipient, that sends you back again, looking, for that purpose, to the point of view of the payer; not from the point of view of compellability or liability, but from the point of view of a person inquiring what is this payment for; and you have to see whether the maker of the payment makes it for the services and the receiver receives it for the services".

From the decided cases it is only possible to draw guidance to a certain extent regarding, mostly, matters of principle. In this respect it is proper to bear in mind the admonition given by Jenkins L.J. in a similar case, *Wright* v. *Boyce*, [1958] 2 All E.R. 703 at p. 708):

> "It is little to the purpose to multiply citations in cases of this kind, where all that can be done is to deduce from the authorities such general propositions as they lay down. I do not think that the general propositions are really in dispute; the difficulty concerns their application to the facts of the particular case".

It is useful, however, to refer to some of the relevant decided cases in the United Kingdom, because each one of them, in my opinion, may be found to have contributed a little bit towards building the overall framework of principle.

The first such case to be referred to is *In Re Strang*, (1 Tax

Cases, p. 207). The question to be determined there was whether a gift of money raised by voluntary subscriptions and made annually to a minister of religion by his congregation was assessable. It was held that this was so, because it was a payment made to such clergyman "in respect of the discharge of his duties".

Another case, also relating to a clergyman, is that of *Herbert* v. *McQuade*, (4 Tax Cases, p. 489). It was held there that grants made to a clergyman, in augmentation of the inadequate income of his benefice, by a benevolent Society, the Queen Victoria Clergy Sustentation Fund, were assessable as profits accruing to him by reason of his office. In that case, the case of *Turner* v. *Cuxson* (2 T.C. p. 422) was distinguished; that was a case where a yearly amount was granted to a curate after lengthy and satisfactory service and such grant was treated as not assessable because it was a *donatio honoris causa*.

The next case concerns again a clergyman: In *Cooper* v. Blakiston, (5 Tax Cases, p. 347) it was decided that sums given to a vicar by way of Easter Offerings by his parishioners and others, in response to an appeal by the Bishop, were assessable. The Lord Chancellor said, in his judgment, at p. 355:

> "In my opinion where a sum of money is given to an Incumbent substantially in respect of his services as an Incumbent it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present.
>
> In this case, however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the Bishop on behalf of all alike".

In *Cowan* v. *Seymour* (7 Tax Cases, p. 372) the facts were that the appellant had acted as the Secretary of a company, without remuneration, from the date of its incorporation

until his appointment as the Liquidator of the Company; he acted as Liquidator again without any remuneration. When the liquidation of the company was completed there was a sum in hand after discharge of all liabilities which was divisible amongst ordinary shareholders of the company. By a unanimous resolution such shareholders voted the sum in question in equal shares to the Chairman of the Company and to the appellant. The Master of the Rolls, in giving judgment, at p. 379 observed that "the fact that the office is at an end is a fact of very, very great weight" and, after proceeding to refer to the aforequoted passage from *Cooper* v. *Blakiston*, he found that the sum involved was "not a payment for services rendered in the true sense, nor was it a profit which accrued to this gentleman by reason of his office, but it was very much more in the nature of a testimonial to him for what he had done in the past while his office, which had then terminated, was in existence".

In *Commissioners of Inland Revenue* v. *Joseph Robinson and Sons* (*supra*) a payment made to the tax-payer firm at the end of its services to a company, which went into voluntary liquidation with a view to being reconstituted, was treated not as a profit but as a "*solatium*" to the said firm "not because of anything they were doing, but really very much, I think, as ..... a testimonial for what they had done in the past in their office which had now terminated" (per Rowlatt, J. at p. 61).

In *Seymour* v. *Reed* [1927] All E.R. (Rep.) p. 294, the facts were that in 1920 a cricket club awarded one of its professional players a benefit match. The money paid for admission by spectators at the match, less some expenses, was, in accordance with the club's regulations, held by the club for the player until, in 1923, it was applied in the purchase of a farm for him. Income tax was claimed on the net admission money under Schedule E of the Income Tax Act, 1918, as income of the player for the year 1920-21. It was held that the money was not taxable because it was not salary, fees, wages, perquisites or profits from an office or employment of profit, within rule 1 of the said Schedule E, but was a personal gift. In his judgment at p. 297 the Lord Chancellor, had this to say:

> "The question to be answered is, as Rowlatt J., put it, 'Is it in the end a personal gift or is it remuneration?'

If the latter, it is subject to the tax; if the former, it is not. Applying this test, I do not doubt that in the present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the committee of the club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement; and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities. It is usually associated, as in this case, with a public subscription; and, just as those subscriptions, which are the spontaneous gift of members of the public, are plainly not income or taxable as such, so the gate-moneys taken at the benefit match, which may be regarded as the contribution of the club to the subscription list, are, I think, in the same category".

At p. 302 Lord Phillimore, in giving judgment in the same case, discussed previous cases relating to clergymen, such as *Cooper* v. *Blakiston* (*supra*) and distinguished them on the ground that though the payments made to the clergymen concerned were voluntary and they were not the fruits of legal compulsion, they, nevertheless, represented a legal due of the parishioners concerned. He proceeded to state at p. 303: "In fact, in these cases of ministers of religion there is always, I think, some element of periodicity or recurrence which makes another distinction between them and the case of a single gift by an employer or employers".

Further on in his judgment at p. 303 he added:

"I do not feel compelled by any of these authorities" —he had referred in the meantime also to *Cowan* v. *Seymour*—"to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Schedule E. Nor do I think it matters that the gift is made during the period of service, and not after its termination, or that it is made in respect

of good, faithful and valuable service".

In *Corbett* v. *Duff* (23 Tax Cases, p. 763) it was held, on the other hand, that the proceeds of a benefit match for a professional football player were part of his remuneration. Such conclusion appears to have been reached on the basis of the terms under which the said football player was serving his club; and such terms were to be found laid down, *inter alia*, by the regulations of the football league. The payment in question was treated as being in the nature of remuneration —though it was not obligatory—because it was, by its nature, a payment which was expected, generally asked for and usually accorded.

In *Moorhouse* v. *Dooland* [1955] 1 All E.R. 93, the tax-payer, who was a professional cricketer of a league club, was entitled, (under his contract of employment which incorporated a rule of a cricket league applying also to amateur players), to have a collection made whenever he had a particularly meritorious performance in batting or bowling for the club. Such performances occurred with considerable frequency and collections were made. The General Commissioners of Income Tax found that the collections were not taxable on the ground that they were not a profit arising from the tax-payer's employment, but on appeal it was held that the decision of the Commissioners was erroneous and that the said collections were taxable. In his judgment the Master of the Rolls, (p. 94 *et seq.*) clearly treated the issue, which had arisen, as involving aquestion of mixed law and fact and, after reviewing previous decided cases, proceeded to find that the collections in question were indeed taxable. He stressed, however, that he was unable (at p. 99) "to assent to the wide proposition that, if it be shown of a voluntary payment to an employee, whether it be a Christmas box, a wedding present or any other kind of gift, made by the employer or by a third party, that it was only made because the recipient was the employer's servant or that it would not otherwise have been made, therefore, the sum was taxable". He took the view that this was a matter to be determined on the particular facts of each case and, as he put it, it was the Court's duty "to relate particular facts to established principles". In his judgment in the same case, at p. 104, Jenkins L.J. propounded the following principles, on the basis of relevant decided cases (including *Cooper* v. *Blakiston*, *supra*, *Seymour* v. *Reed*, *supra*, and *Herbert* v. *McQuade*, *supra:*—

"(*i*) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words by way of remuneration for his services. (*ii*) If the recipient's contract of employment entitles him to receive the voluntary payment, whatever it may amount to, that is a ground, and I should say a strong ground, for holding that, from the standpoint of the recipient, it does accrue to him by virtue of his employment, or in other words by way of remuneration for his services. (*iii*) The fact that the voluntary payment is of a periodic or recurrent character affords a further, but I should say a less cogent, ground for the same conclusion. (*iv*) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as for example a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances, or a benefit held for a professional cricketer in recognition of his long and successful career in first-class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual paid and received by reason of his personal needs in the former example and by reason of his personal qualities or attainments in the latter example".

Also, as it appears from the judgment of Birkett, L.J. in the same case, at p. 107, this case was decided on the particular facts thereof and was, thus, distinguished from *Seymour* v. *Reed*, the main consideration being that the contract of employment in this case provided for the very collections which had been made.

In *Bridges* v. *Hewitt* [1957] 2 All E.R. p. 289, a question such as the one at issue in the present Case was again treated as one of mixed law and fact; it is useful to note in particular the following passage from the judgment of Morris L.J. at p. 298, where he refers to the features of payments attracting tax and of those which do not:—

"It may be difficult to describe in precisely accurate lan-

guage the features of payments or benefits received which must attract tax and the features of those which will not. The general distinction as outlined by Lord Cave, L.C., is between payments made by way of remuneration for services and payments made by way of personal gifts. Yet some payments may seem to have a blend of both of these elements. The tip given to the taxi driver is in one sense a gift; a particular tip may be somewhat above what would normally be expected by the taxi driver and may reflect a bountiful impulse. Yet all the tips received, including the specially generous one, must be regarded as being by way of remuneration for services. But, on the other hand, it seems to me that a payment which has the attributes of being a personal gift does not necessarily lose those attributes merely because the gift is in recognition of services or because the donor agrees to bind himself so as to be compellable at law to make the payment".

Lastly, in *Hochstrasser* v. *Mayes* [1959] 3 All E.R. p. 817, Lord Cohen put the test, for resolving the question whether a payment is remuneration for services or not, as follows: "The court must be satisfied that the service agreement was the *causa causans* and not merely the *causa sine qua non* of the receipt of the profit" (at p. 825). This was adopted by Ungoed-Thomas, J. in *White* v. *Franklin* [1964] 3 All E.R. p. 307.

I have made the above review of decided cases fully bearing in mind the warning given by Lord Denning in *Hochstrasser* v. *Mayes* (*supra*) at p. 827, when he stated: "I do not find much help in any of the previous decisions; and the speeches in them cannot rule the day. They show the way in which judges look at cases and in that sense are useful and suggestive but, in the last resort, each case must be brought back to the test of the statutory words".

Coming, thus, back to the words of our section 5(1) (*b*) and considering whether the payment in question constitutes a taxable emolument within the ambit of such provision, I have first examined the submission made by counsel for Respondent to the effect that under section 43(5) of Cap. 323, the burden of proof lies with the Applicant-taxpayer to satisfy me that the assessment in question should be set aside. Section 43, however, has been declared to be con-

trary to Article 146 of the Constitution—as providing for a competence inconsistent with such Article—and "in accordance with the provisions of Article 188, must be regarded as having been repealed as from the date of the coming into operation of the Constitution" (*vide Mikrommatis and The Republic*, 2 R.S.C.C. p. 125 at p. 128). So I do not think that in the present Case, either, I can regard section 43 as being in force for the purposes of these proceedings. Nevertheless, such a view does not lead to a much different result in relation to the question of the burden of proof, because under Article 146, also, it is on applicant on whom lies the initial burden of proof to satisfy the Court that it should interfere with the subject-matter of a recourse.

Bearing fully in mind that it is up to an applicant under Article 146 to make out a case for redress, bearing in mind as a guide the afore-reviewed Case Law and whatever authorities or submissions have been put to the Court by the parties, I have come to the conclusion that on the totality of the material before me, I must resolve the *sub judice* issue of mixed law and fact, regarding the assessability of the amount of £700 in question, in favour of Applicant, because I am satisfied that in the circumstances of this Case it does not come within the ambit of the provisions of section 5(1) (*b*) of Cap. 323. I am of the opinion that the said amount was paid to Applicant and received by him by way of testimonial for his services. Such services were perhaps the *causa sine qua non* for the payment in question but not the *causa causans* also.

I do not think that the case of *Corbett* v. *Duff* (*supra*), which has been relied upon by Respondent in argument, could be treated as a precedent directly governing the present matter, because there the payment concerned was made in circumstances connected with the terms of the employment, whereas this is not so in the present Case.

Nor do I think that it is proper to treat the payment of the £700 to Applicant as being similar to the bonus paid to an employee at Christmas. Such a bonus is paid during the currency of an employment, with a view, *inter alia*, to encouraging the recipient to further exertions and, therefore, it is not comparable to a payment made to an employee, such as Applicant, on leaving completely the service of his employers.

Furthermore, I do not think that the amount in question could be treated as an "allowance" in the sense of section 5(1) (*b*), especially as I have found that it is not "gains or profits" in the sense of such provision.

The fact that LOEL Ltd. has, in its own tax-return, treated the payment in question to Applicant as remuneration is not in my opinion a decisive consideration at all, because an employer by treating as remuneration a testimonial payment, in order to deduct it from his own assessable receipts, cannot alter the real nature of such payment, as found to be in the light of all other relevant material.

In deciding this Case in favour of Applicant I have, *inter alia*, borne in mind that the payment in question was made to him not in respect of a continuing employment but at the termination thereof, that he was not entitled to such payment under his contract (*exhibit* 1), and that it was not a case of a recurrent payment but a single donation to him; I have also felt satisfied that there was no question of the payment of £700 having been made to him by way of a fictitious transaction in order to render part of his emoluments under the contract, *exhibit 1*, free of income tax.

In view of the fact that I have found that the inclusion of the £700 in question in the taxable emoluments of Applicant was not within the relevant legal provisions, I have to declare *exhibit 3*, the *sub judice* decision, to be contrary to law and, thus, *null* and *void* to that extent.

Regarding costs, I have decided to award to Applicant part of his costs which I assess at £12.

*Sub judice decision declared null and void. Order for costs as aforesaid.*