1965
Dec. 6,
1966
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KURT
KINGSFIELD
and
THE REPUBLIC OF
CYPRUS,
THROUGH
1. THE MINISTER
OF FINANCE
2. THE COMMIS-
SIONER OF INCOME
TAX

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KURT KINGSFIELD

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH

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

Respondents.

(Case No. 57/64).

Income Tax—Assessment—"Artificial or fictitious transaction" in the sense of the Income Tax (Foreign Persons) Law, 1961, (Law No. 58 of 1961), section 56(1)—Powers and discretion of the Commissioner of Income Tax to disregard any transaction which in his opinion is "artificial or fictitious" and to assess the person concerned accordingly—In the circumstances of the instant case the Commissioner in assessing the income of the applicant has rightly disregarded as "artificial or fictitious" in the sense of the said section 56(1) a contract of lease as well as a provision in a partnership agreement whereby the applicant's daughter was introduced as general partner in the partnership and given a share of 13% in the profits of the partnership business—Factors which rightly were taken into account by the Commissioner.

Partnership—Partnership is a legal conception defined by section 5 of the Partnership and Business Names Law, Cap. 116—Whether or not a given venture falls within the definition is a question of mixed law and fact depending on the circumstances of the particular case—The mere execution of a partnership agreement may not in itself constitute a partnership, for the terms of the agreement must be put into effect—Conversely, a declaration in an agreement that there is not to be a partnership may not prevent the formation of a partnership in fact.

The applicant Kurt Kingsfield, his wife Cecily and Ronald Deepwell, all resident in England, were at all material times the co-owners in undivided shares of a citrus grove situate at Derynia, Famagusta District. On the 28th

of March, 1960, the said co-owners became general partners in a partnership registered under the name "Deepwell and Kingsfield", its objects being to exploit, cultivate and sell the crops of the grove in question and to control and manage it. On the 27th February, 1961, all three co-owners entered into a contract of lease with the aforesaid partnership, due to expire on the 1st July, 1966, whereby they leased the said grove to the partnership at the agreed rent of £1,000 per annum. On the following day (the 28th February, 1961) a new partnership agreement was entered into between the three co-owners and the applicant's daughter, Susan Kingsfield (also resident in England) and David Assodri of Ayios Loukas, Famagusta. By this new partnership agreement the applicant's said daughter, and the said Assodri were also included as general partners in the aforementioned partnership "Deepwell and Kingsfield", making thus five partners in all. The objects of the new partnership agreement were likewise to exploit, cultivate etc. and sell the crops of the aforesaid citrus grove and to control and manage it. By clause 6 of the new agreement it is provided that the net profits of the partnership business shall be shared among the partners and the losses shall be borne by them in the following shares: (a) Deepwell, 45%, (b) Kurt Kingsfield (applicant) 16% (c) Mrs. Kingsfield 16% (d) Susan (the daughter) 13% and (e) Assodri, 10%.

It is to be noted that prior to the new agreement of 1961 the shares of the three original partners and co-owners of the grove were as follows: (a) Deepwell 50% (b) Kingsfield (applicant) 25% (c) Mrs. Kingsfield 25%.

By clause 7 of the partnership agreement of 1961 the duration of the partnership shall be for the period of the said contract of lease, *i.e.* until the 1st July, 1966. By clause 4 of the new partnership agreement it is provided that Susan "shall have no right of say whatsoever in the control and management of the partnership business" and she has no right to draw any money from the partnership account. Susan contributed no capital to the firm. Another relevant fact is that the profits earned from the grove were four to five times the amount of £1,000, the agreed rent under the said contract of lease of the 27th February, 1961.

The Commissioner of Income Tax in assessing the income tax payable by the applicant (Kurt Kingsfield) in respect of the year of assessment 1962 calculated the applicant's income as being £1762, and in making this calculation he disregarded the 13% share of the profit which was payable under clause 6 *(supra)* to the applicant's daughter Susan and, also, disregarded the contract of lease referred to above of the 27th February, 1961. In acting so, the Commissioner relied on section 56(1) of the Income Tax (Foreign Persons) Law, 1961, (Law No. 58/61). Section 56(1) provides:

> "56(1) Where the Commissioner is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious he may disregard any such transaction and the persons concerned shall be assessable accordingly".

The applicant duly made an objection to that assessment which was formally rejected by the Commissioner on the 15th May, 1964. It is against that decision of the Commissioner that the applicant filed on the 7th July, 1964, the instant recourse under Article 146 of the Constitution. It was argued on his behalf that the Commissioner did not exercise reasonably or properly his discretion under section 56(1) *(supra)* when he decided to disregard as "artificial or fictitious" (a) that part of the said partnership agreement of the 28th February, 1961, regarding the 13% share of the applicant's daughter in the profits of the partnership business, and (b) the said contract of lease.

In upholding the assessment complained of and dismissing the recourse, the learned Justice:-

Held, (1) whether or not a given venture falls within the definition of partnership in section 5 of the Partnership and Business Names Law, Cap. 116 is a question of mixed law and fact depending on the circumstances of the particular case. The execution of a partnership agreement is only one way of evidencing a partnership that it has been established by the case *Dickenson* v. *Gross,* 11 Tax Cases 614, that the mere execution of such a partnership agreement may not in itself constitute a partnership for the terms of the agreement must be put into effect. Conversely, a declaration in an agreement that there is

not to be a partnership does not prevent the formation of a partnership in fact.

(2) I am of the opinion that there was material before the Commissioner of Income Tax upon which he could come to the conclusion which he arrived at, that that part of the partnership agreement which provided for a 13% share of the profits of the partnership business to be given to the applicant's daughter Susan amounted to an "artificial or fictitious" transaction in the sense of section 56(1) of Law 58 of 1961 *(supra)*, which reduced the amount of tax payable by the applicant and I am further of the opinion that the Commissioner properly exercised the powers vested in him by the aforesaid section 56(1) in disregarding the 13% share of the applicant's daughter Susan Kingsfield under the partnership agreement, when he assessed the tax payable by the applicant for the year of assessment.

(3) I am of the opinion that in coming to the conclusion to which he did the Commissioner properly took into account the following factors:

(a) That the applicant's daughter Susan Kingsfield, owned no share in the grove;

(b) that she rendered no service whatsoever to the partnership;

(c) that she contributed no capital to the partnership;

(d) that the share of the profits of the said Susan Kingsfiled was only made up by taking 6 1/2% from each of the shares of her parents, and not from the share of Mr. Deepwell;

(e) that although considerable profit was made fom the grove (the profit for example for 1962 being £6,944) Susan Kingsfield had only withdrawn £88 in 1962 and £42 in 1961, whereas Mr. and Mrs. Kingsfield had overdrawn their account by about £140 each in 1962 and by £300 each in 1963 whereas Susan drew nothing for the last mentioned year;

(4) I am also of the opinion that there was material upon which the Commissioner could properly come to the conclusion that the said contract of lease (*supra*) was also "artificial and fictitious" in the sense of section 56(1)

(*supra*) and subsequently to disregard it for the purposes of assessing the tax payable by the applicant, on the ground that the said rent of £1000 payable under the contract of lease bore no reasonable relationship to the profits in fact earned from the grove which were in the region of four or five times that amount and in 1959 was eight times that amount.

(5) In view of the above I hold that the assessment subject matter of this recourse was lawfully and properly made by the Commissioner of Income Tax in exercise of his aforesaid powers vested in him. The recourse must be dismissed, but having regard to all the circumstances of this case and the nature of the points involved, I shall make no order as to costs.

Application dismissed.
No order as to costs.

Cases referred to:

Whitmore v. *The Commissioner of Inland Revenue,* 10 Tax Cases 645, at pp. 656-665;

The Duke of Westminster v. *Commissioners of Inland Revenue,* 19 Tax Cases 490, at pp. 518-521;

Dickenson v. Gross, 11 Tax Cases 614, at pp. 614-615, 620;

Hawker v. *Compton,* 8 Tax Cases 306, at pp. 313-314;

In re Charis Georghallides (1958) 23 C.L.R. 249;

Commissioner of Inland Revenue v. *Williamson,* 14 Tax Cases 335.

Recourse.

Recourse against the decision of the respondents to impose on applicant an amount of £160.250 mils as income tax for the year 1962.

A. Michaelides, for the Applicant.

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

The following judgment was given by:—

MUNIR, J.: By this recourse, which is made under Article

146 of the Constitution, the Applicant seeks the following reliefs:—

"*(a)* Declaration of the Court that the Income Tax Notice of Tax payable of the Commissioner of Income Tax File No.F. 2135, Assessment No. 88/AD/64, dated the 23rd April, 1964, by which £160.250 mils was imposed by Respondent No. 2 on the applicant as Income Tax for 1962, and collected by Respondents is unconstitutional and/or in excess or abuse of their powers and/or in contravention of section 56(1) of the Income Tax (Foreign Persons) Law No.58 of 1961, to the aforesaid excess.

"*(b)* An Order of Court directing the Respondents to repay and/or refund to the applicant any sum the Respondents received from the applicant by way of Income Tax for 1962, in excess of what the Respondents are entitled having regard to section 56(1) of the Income Tax (Foreign Persons) Law No. 58 of 1961".

The basic facts of this Case are not contested and may briefly be stated as follows:—

The Applicant was at all material times, and still is, the registered owner in undivided shares of a citrus grove (hereinafter referred to as "the grove") comprising about 63 donums at Derynia village, Famagusta District, and registered under Registration Nos. 6746, 6748 and 7505. The other two co-owners of the grove were, and still are, the Applicant's wife, Cecily Kingsfield, and Ronald Harry Deepwell. The Applicant and the other two co-owners of the grove are all resident in England.

On the 28th March, 1960, the three co-owners of the grove registered a partnership under the name of "Deepwell and Kingsfield" under Certificate No.P.2210 which was published in Supplement No. 4 to Gazette No. 4323 of the 26th May, 1960. The said three co-owners were registered as general partners and the objects of the partnership were to exploit, cultivate, improve and sell the crops of the grove and to control and manage it. This partnership was for an indefinite period but subject to dissolution by two months' notice by any partner.

On the 27th February, 1961 all three co-owners entered into a contract of lease (hereinafter referred to as "the con-

tract of lease") with the partnership of "Deepwell and Kingsfield" whereby the co-owners leased the grove to the partnership at the agreed rental of £1,000 per annum. This contract of lease, (which is Appendix B to *Exhibit 5*) is still in force and is due to expire on the 1st July, 1966.

On the 28th February, 1961, a new partnership agreement *(Exhibit 1)* was entered into between the Applicant, the Applicant's wife (Cecily Kingsfield), Ronald Harry Deepwell —being the three co-owners of the grove and the three partners of the original partnership of the 28th March, 1960— the Applicant's daughter (Susan Sophia Kingsfield, who is also resident in England) and David Assodri of Ayios Loucas, Famagusta. Thus, by this new partnership agreement (hereinafter referred to as "the partnership agreement of 1961") the Applicant's daughter (hereinafter referred to as "Susan Kingsfield") and David Assodri were also included as general partners in the partnership of "Deepwell and Kingsfield", making five partners in all. The objects of the partnership agreement of 1961 were likewise to exploit, cultivate, improve and sell the crops of the grove and to control and manage it.

It is specified in clause 6 of the partnership agreement of 1961 that the net profits of the partnership business shall be shared among the partners and the net losses shall be borne by the partners in the following proportions:—

(a)	Mr. Deepwell	45%
(b)	Mr. Kingsfield (Applicant)	16%
(c)	Mrs. Kingsfield	16%
(d)	Miss Susan Kingsfield	13%
(e)	Mr. Assodri	10%

It might be convenient to state here that it is not in dispute that prior to the partnership agreement of 1961 the shares of the three original partners and co-owners of the grove were as follows:—

(a)	Mr. Deepwell	50%
(b)	Mr. Kingsfield (Applicant)	25%
(c)	Mrs. Kingsfield	25%

This was admitted by the Applicant's Accountant, Mr. Takis

Christofides, in answer to questions put to him by Counsel for the Respondent.

Clause 7 of the partnership agreement of 1961 provides that the duration of the partnership shall be for the period of the contract of lease, i.e. until the 1st July, 1966.

The variations made by the partnership agreement of 1961 to the earlier partnership agreement of the 28th March, 1960, were likewise published in Supplement No. 5 to Gazette No.75 of the 27th July, 1961.

The Applicant's accountants, Messrs. Sarris & Christofides of Famagusta, who were also the accountants of the partnership of "Deepwell and Kingsfield", were instructed by the Applicant to prepare the Applicant's accounts on the basis of the partnership agreement of 1961, as well as Applicant's accounts in respect, *inter alia*, of the year of assessment 1962, which is the material year in this Case, and which were submitted to the Commissioner of Income Tax duly prepared in accordance with such instructions on the basis of the said partnership agreement of 1961.

The Commissioner of Income Tax (hereinafter referred to as the "Commissioner"), in assessing the income tax payable by the Applicant in respect of the year of assessment 1962, calculated the Applicant's income for the year in question as being £1762, and, in making this calculation, he disregarded the 13% share of the profits of the partnership business which was payable to Susan Kingsfield under clause 6 of the partnership agreement of 1961 and also disregarded the contract of lease.

In due course the Commissioner sent to the Applicant's accountants Form I.R.8, dated the 17th March, 1964, by which he demanded from the Applicant (who had, in the meantime paid the undisputed portion, namely £124.650 of the total tax of £160.250 with which he had been assessed) payment of the balance of tax which the Commissioner claimed was still due, namely, the sum of £35.600.

An objection to the Commissioner's assessment was made on behalf of the Applicant on the 28th March, 1964, which was rejected by the Commissioner by his letter dated the 23rd April, 1964 *(Exhibit 4)*. The Applicant's objection was formally determined by the Commissioner by Form I.R.31 dated the 15th May, 1964, and this recourse was subsequently

filed on the 7th July, 1964.

It is not in dispute, and is frankly admitted by Mr. Apostolides in his evidence, in answer to questions put to him by counsel for Applicant, that the Applicant's accountants had in fact fully acted upon the partnership agreement of 1961, in accordance with the instructions which they had received, in preparing the accounts for the year in question.

It is also not in dispute that it was under the provisions of sub-section (1) of section 56 of the Income Tax (Foreign Persons) Law, 1961 (No. 58 of 1961, hereinafter referred to as "Law 58/61") that the Commissioner, in making the assessment in question, had disregarded that portion of the partnership agreement of 1961 which related to Susan Kingsfield's 13% share of the profits of the partnership business and had also disregarded the contract of lease, for the purposes of the said assessment.

It may, therefore, be convenient, at this stage, to set out in full the provisions of sub-section (1) of section 56 of Law 58/61, which are as follows:—

> "56. (1) Where the Commissioner is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious he may disregard any such transaction and the persons concerned shall be assessable accordingly".

At the hearing of this recourse an affidavit sworn by the Applicant at the Registry of the District Court of Famagusta on the 17th November, 1965 *(Exhibit 5)* was, by consent, admitted in evidence, on the ground that the Applicant, who had visited Cyprus, *inter alia*, with the object of giving evidence at the hearing of this recourse had to be recalled back to London before the hearing date due to his wife's illness.

The only witness called by Counsel for Applicant was Mr. Takis Christofides, who had been a partner of the firm of accountants of Sarris & Christofides of Famagusta, until the dissolution of the partnership. Mr. Christofides, who at all material times had been dealing with the relevant accounts of the Applicant, testified that in accordance with instructions received from the Applicant he had prepared the relevant accounts, which had been submitted to the Commissioner for the purposes of income tax, on the basis of the

partnership agreement of 1961. Mr. Christofides also gave details of the partnership business and testified, *inter alia*, with regard to the correspondence which he had on this subject with the Income Tax Office which had culminated in the final decision which is the subject-matter of this recourse.

The Assistant Commissioner of Income Tax, Mr. Andreas Apostolides, who gave evidence on behalf of the Respondent at the hearing, testified that the Commissioner was of the opinion that the inclusion of the Applicant's daughter, Susan Kingsfield, as a partner with a share of 13% of the profits, was an "artificial or fictitious" transaction, in the sense of section 56(1) of Law 58/61 and that the said share of 13% was, therefore, disregarded under the said section 56(1) as being an "artificial or fictitious" transaction which had reduced the amount of tax payable by the Applicant. Mr. Apostolides in his evidence made a distinction between the two new partners, i.e. Susan Kingsfield and Assodri, (who were both introduced into the partnership by the partnership agreement of 1961 and who were not co-owners of the grove) and pointed out that, whereas Mr. Assodri (who under the partnership agreement of 1961 was entitled to 10% of the share of the profits) was in fact performing some service to the partnership, in that under clause 4(*d*) of the partnership agreement of 1961 Mr. Assodri had the control and management of the partnership business in the absence from Cyprus of the other partners, Susan Kingsfield, on the other hand, performed no such services and was, on the contrary, expressly excluded by clause 4(*e*) of the partnership agreement of 1961 from having any right of say whatsoever in the control and management of the partnership business.

Mr. Apostolides also testified that, in calculating the Applicant's income for the material year of assessment 1962, the Commissioner also disregarded, under section 56(1) of Law 58/61, the contract of lease for the purposes of income tax because it was considered that the rent stipulated therein of £1,000 per annum for the lease of the grove was not a realistic one, and was, therefore, artificial in view of the fact that the profit derived from the grove in previous years was far in excess of £1,000 a year. Mr. Apostolides testified in this connection that the annual profit derived from the grove was far in excess of £1,000 and pointed out, for example, that in 1957 it was £6,034, in 1958 it was £4,962, in 1959 it was £8,420 and in 1960 it was £4,936.

Counsel for Applicant, while conceding that a discretion is given to the Commissioner under section 56(1) of Law 58/61 to disregard any artificial or fictitious transaction which reduced or would reduce the amount of tax payable by any person, submitted that the partnership agreement of 1961, which was in fact entered into and signed by the partners concerned and which was actually published in the official Gazette and which had, furthermore, been fully acted upon by the partners and the accountants of the Applicant, was neither artificial nor fictitious. He submitted that, in the circumstances, the discretion of the Commissioner under section 56(1) was not reasonably or properly exercised when the Commissioner decided to treat the partnership agreement of 1961 and the contract of lease as artificial or fictitious under section 56(1) of Law 58/61. In support of his argument counsel for Applicant pointed out that Susan Kingsfield was not the only partner who was not a co-owner of the grove and that Mr. Assodri, who also had no share in the ownership of the grove, was a partner and that his 10% share of the profits had not been disregarded by the Commissioner in making the assessment in question. In support of his case counsel for Applicant cited *Whitmore* v. *The Commissioner of Inland Revenue* (10 Tax Cases p. 645 at pp. 656-665) and the *Duke of Westminster* v. *Commissioners of Inland Revenue* (19 Tax Cases p. 490 at pp. 518-521).

Counsel for Respondent submitted, on the other hand, that the discretion of the Commissioner under section 56(1) of Law 58/61 had been properly exercised and that the Commissioner was right, having regard to all the facts and circumstances, to disregard the 13% share of Susan Kingsfield as a partner of the partnership. He pointed out that paragraph (*e*) of clause 4 of the partnership agreement of 1961 provides that Susan Kingsfield "shall have no right of say whatsoever in the control and management of the partnership business" and that Susan Kingsfield has no power to draw any money from the partnership account. Counsel for Respondent further pointed out that Susan Kingsfield had never invested any capital in the partnership and that, unlike three of the five partners, was not a co-owner of the grove. Counsel for Respondent also drew attention to the fact that Susan Kingsfield, unlike Mr. Assodri, never rendered any services to the partnership as to justify the payment to her of 13% of the profits. Counsel for Respondent

recalled that before the partnership agreement of 1961 the share of Mr. Deepwell was 50% and the shares of Mr. and Mrs. Kingsfield were 25% each. Counsel explained that, in order to give 10% of the share of the profits to Mr. Assodri, 5% was taken from Mr. Deepwell's original share of 50%, thus reducing his share to 45%, and 5% was likewise taken jointly from Mr. and Mrs. Kingsfield reducing each of their original 25% share to 22 1/2% each. Counsel for Respondent then went on to point out that the 13% share of Susan Kingsfield was not made up, as in the case of Mr. Assodri's share, also from the share of Mr. Deepwell, (the third co-owner of the grove and third member of the original partnership) but was entirely taken from the 22 1/2% share of each of the parents, Mr. and Mrs. Kingsfield. That is to say, both Mr. and Mrs. Kingsfield, counsel explained, each gave up a further 6 1/2% of their remaining 22 1/2% share, thus further reducing each of their shares to 16%, and making up their daughter's share (i.e. twice 6 1/2%) to 13%, whereas Mr. Deepwell did not contribute at all from his share towards Susan Kingsfield's 13% share. Counsel for Respondent further submitted that the existence of a partnership agreement in itself is not conclusive and did not fetter the discretion of the Commissioner under section 56(1) of Law 58/61. In support of his case Counsel for Respondent cited *Dickenson* v. *Gross* (11 Tax Cases p. 614), *Commissioner of Inland Revenue* v. *Williamson* (14 Tax Cases p. 335) and *In Re Charis Georghallides* ((1958) 23 C.L.R. p. 249).

It will be seen from the foregoing that this case really turns on the crucial issue of whether the Commissioner properly exercised the powers vested in him by section 56(1) of Law 58/61 in holding the opinion that that portion of the partnership agreement of 1961 which gave Susan Kingsfield a share of 13% in the profits of the partnership business, and which undoubtedly reduced the amount of tax payable by the Applicant, was an "artificial or fictitious" transaction, in the sense of the said section 56(1), and whether it was proper for the Commissioner consequently to disregard, under the said section 56(1), such transaction in assessing the tax payable by the Applicant in respect of the year of assessment 1962.

It is, of course, an undisputed fact that an agreement of partnership was actually signed by the five persons concerned on the 28th February, 1961 *(Exhibit 1)*; and it is also an

undisputed fact that the partnership agreement of 1961 was acted upon in the sense that the Applicant had instructed his accountants to prepare the accounts on the basis of the partnership agreement of 1961 and that the accounts so prepared by the accountants were, in accordance with those instructions, actually prepared on the basis of the partnership agreement of 1961. It is also not disputed by Respondent that the partnership agreement of 1961 may well be a perfectly lawful agreement in other respects. Furthermore, from the fact that both the original partnership of the 28th March, 1960, and the variations made to it by the new partnership agreement of 1961 were published in the official Gazette of the Republic, it would not be unreasonable to presume that the partnership in question was formed, and the necessary formalities were duly completed, under, and in accordance with, the Partnership and Business Names Law (Cap. 116) and that the partnership in question is a partnership as defined by section 5 of Cap. 116. To that extent, there can be no doubt, in my opinion, that a partnership, which appears to comply with the formalities and requirements of Cap.116, does generally exist in fact. The question which I have to decide for the purposes of this case, however, is not whether the partnership agreement of 1961, as a whole, is "artificial or fictitious" in the sense of section 56(1) of Law 58/61, because it was not the whole of the partnership agreement of 1961 which was disregarded by the Commissioner under section 56(1) of Law 58/61 as being "artificial or fictitious", but only whether that part of it which gives Susan Kingsfield a 13% share of the profits was properly regarded by the Commissioner as being an "artificial or fictitious" transaction. On the contrary, cognizance was taken by the Commissioner of the 10% share of Mr. Assodri under the partnership agreement of 1961. Thus, even the Commissioner recognized the factual and legal existence of the partnership agreement of 1961 as a whole and only disregarded one particular aspect of it that is to say, Susan Kingsfield's share, for one particular purpose, namely, for the purpose of making the assessment in question. What I have to decide is whether the particular act of the bringing in of the Applicant's daughter, Susan Kingsfield, as a partner and giving her 13% share of the profits, as a result of which the tax payable by the Applicant was reduced, was a transaction regarding which the Commissioner could properly come to the opinion, under section 56(1) of Law 58/61, that it was "artificial or fictitious".

Of the five parties to the partnership agreement of 1961 there is no doubt or dispute about the role and status of the three original partners, who were also the three co-owners of the grove, namely, Mr. Deepwell and Mr. and Mrs. Kingsfield. Of the remaining two parties, namely, the Applicant's daughter, Susan Kingsfield and Mr. Assodri, I agree with Counsel for Respondent that a distinction must be made between Mr. Assodri, on the one hand, and Susan Kingsfield, on the other. As rightly pointed out by Counsel for Respondent, under paragraph *(d)* of clause 4 of the partnership agreement of 1961 it is provided that "In the event of Mr. Assodri alone being in Cyprus then he alone shall have the control and management of the Partnership business". Thus it was proper, in my opinion, for the Commissioner not to disregard the 10% share paid to Mr. Assodri under the partnership agreement of 1961 in view of the services which Mr. Assodri rendered to the partnership, particularly as all the other four parties are resident in England. With regard to Susan Kingsfield, however, paragraph *(e)* of clause 4 of the partnership agreement expressly provides that "Miss Kingsfield whether or not she be in Cyprus shall have no right of any say whatsoever in the control and management of the Partnership business".

Partnership is a legal conception, defined by section 5 of the Partnership and Business Names Law, Cap. 116, as "the relation which subsists between persons carrying on a business in common with a view of profit". Whether or not a given venture falls within the definition is a question of mixed law and fact depending on the circumstances of the particular case. The execution of a partnership agreement is only one way of evidencing a partnership. It has been well established by the case of *Dickenson* v *Gross (supra)* that the mere execution of such a partnership agreement may not of itself constitute a partnership, for the terms of the agreement must be put into effect. Conversely, a declaration in an agreement that there is not to be a partnership does not prevent the formation of a partnership in fact. (In this connection see also Simon's Income Tax, Volume 2 (1964-65 Replacement) p. 213).

I cannot better summarise the facts of *Dickenson* v. *Gross (supra)* than if I were to give in full the facts summarised in the head-note of the report of that case (at pp. 614-615) which reads as follows:—

"The Appellant, a farmer, had entered into a Deed of Partnership with his three sons with the admitted intention of reducing the Income Tax liability in respect of the profits. The deed provided *inter alia* that two farms owned by the Appellant should be let to the Appellant and his sons at stated rentals, that accounts should be made up annually, that the net profits should be divided equally between the partners, and that each of the partners should have the right to sign and endorse cheques on behalf of the firm. It was shown in fact that no rent had been paid, that no accounts or books had been kept, or any distribution of profits made, that cheques had been signed only by the Appellant, and that business receipts had been paid indiscriminately into the Appellant's private bank account and into the firm's account. The General Commissioners decided that there had been no partnership in fact, and accordingly that there was no partnership for Income Tax purposes.

"Held, that as a partnership did not exist in fact, there was no partnership for the special purposes of the Income Tax Act".

The following passage from the judgment of Rowlatt, J. in *Dickenson* v. *Gross* (at p. 620) is of particular interest:—

"A partnership, of course, is a legal position and a legal result, but like every other legal position it depends on facts, and what the Commissioners are saying here is: 'The facts are not those from which a legal partnership results, because although there was the deed they are not acting on it; it is not governing their transactions; they are not paying the slightest attention to it. They are going on just as before'. They have not used the word 'fictitious', and they have not used the word 'sham', but I think they have put it even more clearly. They say: 'The facts here were not a partnership although there was a bit of paper in the drawer, which if the facts had been according to it, would have shown there was a partnership' ".

Another case in point is that of *Hawker* v. *Compton* (8 Tax Cases, p. 306). In that case the question in issue was whether the appellant was the sole occupier of a certain farm or whether he occupied it jointly with his three sons and daughter. The appellant had been assessed for the purposes

of income tax on the basis that he was the sole occupier of the farm. In that case, *inter alia*, a written agreement was produced purporting to be an agreement of partnership in the farming business between the appellant and his three sons and daughter. The Commissioners came to the conclusion that the appellant was the occupier of the farm and that the assessment was correctly raised in his name and that there had been no partnership in fact during the year in question and, further, that the terms of the deed were not consistent with the existence of an actual partnership. In dismissing the appellant's appeal from the decision of the Commissioners, Sankey, J. correctly sets out, in my opinion, in the following passages of his judgment, (at pp. 313-314), the approach which should be made in deciding an issue such as the one which he decided in that case and which I now have to decide in this case:—

> "Then Mr. Hawker comes along and gives evidence and he not only gives evidence, but he produces documents. There are obviously certain documents. There was first the tenancy agreement. That showed, according to the tenancy agreement, that he was the tenant, and that nobody else was the tenant. I do not attach so much importance to the question of the rates, because they might have followed the tenancy agreement. Then he goes into the box and he produces a document which would show the other thing, namely, that he is not in the use and occupation, but that it is a partnership. Hard things have been said about this partnership. I quite agree with what the learned Attorney-General said, which is this—I have said it already twice this morning—that it is perfectly open for persons to evade this particular tax if they can do so legally. I again say I do not use the word "evade" with any dishonourable suggestion about it. If certain documents are drawn up, and the result of those documents is that persons are not liable to a particular duty, so much the better for them. But it looks to me that the position was this. There was evidence one way to show that he had the use of it, and he alone had the use of it; there was evidence the other way rather to show that he had not.He was the Appellant; this was a case where he was appealing, and the Commissioners found this. They say: 'The Commissioners having heard the contentions

were of opinion'—and Mr. Romer, who has argued the case, if I may say so, very well on behalf of the Appellant, says that he agrees that that means the Commissioners find as facts—'(1) That Sidney William Hawker was the occupier of the farm and the assessment was correctly raised in his name'. That may be a question of fact. If there was no evidence upon which the Commissioners could have come to that conclusion there would have been a question of law, but, if there was evidence upon which they come to that conclusion, I do not think that I could disturb it. One of the things they had to consider, as I have pointed out, was the tenancy agreement. Another thing they had to consider was the partnership. With regard to the partnership they find that there was no partnership in fact during the year in question. That is to say, they find that although this deed looked very nice and very proper, it was a fact that there was no partnership during the year in question. Then they went on to consider the terms of the deed, and they say:— 'That the terms of the deed are not consistent with the existence of an actual partnership'. Then they go on finally to say: 'Accordingly (we) dismiss the appeal upon the ground that the deed was entered into only for the purpose of evading the payment of Income Tax'.

"I do not think that the mere fact of a deed being entered into only for the purpose of evading the Income Tax would be sufficient to say that the deed cannot be considered, and that the person is liable to Income Tax in spite of it; because if it is possible to make a deed which can evade Income Tax and can do it legally, that is one matter. But I have to see whether the Commissioners had evidence before them on which they could come to the conclusion; and having looked at the evidence and having seen, for example, where they say (1) that he was the occupier, I think there was evidence upon which they could find that; and (2) that there was no partnership in fact during the year in question, there was evidence upon which they could find that, because the gentleman was before them, and they asked him questions. Personally I think that the terms of the deed are not consistent with the existence of the partnership claimed in this case, but I do not found my judgment

upon that. All I say is there was evidence upon which they could come to the conclusion which they in fact did arrive at.

"I have endeavoured to show that I do not quite agree with 'that accordingly we dismiss the appeal on the ground that the deed was entered into for the purpose of evading the payment of Income Tax'. I put my judgment upon the ground that they heard his evidence; it was a question of fact for them, and there was material upon which they could come to the conclusion which they arrived at. I think they were right".

Having given careful consideration to the able submissions made by both counsel in this Case and to the various authorities to which they have referred, I am of the opinion that there was material before the Commissioner upon which he could come to the conclusion which he arrived at, namely, that that part of the partnership agreement which provided for a 13% share of the profits of the partnership business to be given to Susan Kingsfield amounted to an "artificial or fictitious" transaction, in the sense of section 56(1) of Law 58/61, which reduced the amount of tax payable by the Applicant and I am further of the opinion that the Commissioner properly exercised the powers vested in him by the said section 56(1) of Law 58/61, in disregarding the 13% share of Susan Kingsfield under the partnership agreement, when he assessed the tax payable by the Applicant for the year of assessment 1962.

I am of the opinion that in coming to the conclusion to which he did the Commissioner properly took into account the following factors:—

(a) that Susan Kingsfield owned no share in the grove;

(b) that she rendered no service whatsoever to the partnership;

(c) that she contributed no capital to the partnership;

(d) that Mr. Deepwell did not contribute to the 13% share of the profits of Susan Kingsfield which was only made up by taking 6 1/2% from each of the shares of her parents, Mr. and Mrs. Kingsfield, and not from the share of Mr. Deepwell;

(e) that although considerable profit was made from the

grove (the profit for example for 1962 being £6,964) Susan Kingsfield had only withdrawn £88 in 1962 and £42 in 1961, whereas Mr. and Mrs. Kingsfield had overdrawn their accounts by about £140 each in 1962. In 1963 Mr. and Mrs. Kingsfield had overdrawn by about £300 each whereas Susan Kingsfield drew nothing for that year. It was not until 1965 that Susan Kingsfield drew any appreciable sum, namely, £1,037.

I am also of the opinion that there was material upon which the Commissioner could properly come to the conclusion that the contract of lease was also "artificial and fictitious", in the sense of section 56(1) of Law 58/61 and subsequently to disregard it for the purposes of assessing the tax payable by the Applicant for the year of assessment 1962 on the ground that the rent of £1,000 payable under the contract of lease bore no reasonable relationship to the profits in fact earned from the grove, which, on the undisputed evidence, were in the region of four or five times that amount and, in 1959, was eight times that amount.

In view of the above, I am of the opinion that the assessment which is the subject-matter of this recourse was lawfully and properly made by the Commissioner in exercise of the statutory powers vested in him.

In conclusion, I should like to reiterate that the issue decided in this judgment does not concern the legality, validity or existence of the partnership agreement of 1961 generally or for any purpose other than for the purposes of assessing the income tax payable by the Applicant in respect of the year of assessment 1962. Furthermore, even for the purposes of the assessment of the tax in question, I need hardly point out that the decision given in this judgment does not relate to the partnership agreement of 1961, as a whole, but only relates to that portion of it which provides for the payment to the Applicant's daughter, Susan Kingsfield, of 13% of the share of the profits of the partnership business.

For all the reasons given above this Application cannot succeed and it is hereby dismissed accordingly. Having regard to all the circumstances of this case and the nature of the points involved, I shall make no order as to costs.

Application dismissed.
No order as to costs.