1965
Oct. 4, 9,
Dec. 27, 28, 29
1966
Jan. 18,
Sept. 3

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CHRISTOS CHRISTIDES
and
THE REPUBLIC OF CYPRUS, THROUGH THE DIRECTOR OF INLAND REVENUE DEPARTMENT OF THE MINISTRY OF FINANCE,

[TRIANTAFYLLIDES, J.

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTOS CHRISTIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE DIRECTOR OF INLAND REVENUE DEPARTMENT OF THE MINISTRY OF FINANCE,

Respondent.

(*Case No. 7/64*).

Income Tax—Assessments—Income subject to tax—Bonus on retirement from service—Subject to tax—Years to be attributable—The issue depends on the particular facts of each case—In the instant case the bonus paid to an employee on retirement, there being no provision for such bonus in the relevant contract of service, was held to be taxable in relation to the years it was actually paid—And not to be apportioned or spread over the whole period of service

Compensation paid for breach of contract viz. *for abandonment of a general partnership agreement—Capital receipt—The whole amount not taxable to income tax.*

*Amount paid to an employee by virtue of a consent judgment, such amount representing a 30% share of the employee in the profits of the particular service—Taxable—Taxable in relation to the two years during which such income accrued—And not in relation to the year it was actually received—*Viz. *taxable under section 5(1)(b) of the Income Tax Law, Cap. 323, as emolument from services in the employment of a certain person —And not under section 5(1)(a) of the statute.*

Assessment—The respondent-director in assessing the income of the tax-payer, must take into account all relevant factors—In the instant case he disregarded a computation submitted by the applicant-taxpayer on the ground that it was not signed by the auditor purporting to have made such computation —The respondent's decision is on that ground void—Because he should have considered such computation—And if he was not certain that such computation was made by the auditor,

he ought to have asked futher confirmations from applicant.

The Income Tax Law, Cap. 323, section 5 (1) (a) and (b)—Section 56 of the Taxes (Quantifying and Recovery) Law 1963 (Law No. 53 of 1963).

Administrative Law—Constitutional Law—Article 146 of the Constitution—Discretionary powers vested in the Administration—Defective exercise thereof—In that the organ concerned acted under basic misconceptions of fact and erroneous assumptions—Such defective exercise of the discretionary powers rendering the relevant decision (a) contrary to law, and (b) in excess and abuse of powers—Article 146, paragraph 1, of the Constitution—In exercising its discretionary powers the administration must take into account all relevant factors.

Abuse and excess of power—See above.

Discretionary powers of the administration—Defective exercise thereof—See above under Income Tax, Administrative Law.

Basic misconception of fact—Erroneous assumptions—Relevant factors to be taken into account—See above.

Administrative and Constitutional Law—Article 146—The competence of the Court under that Article—Its limits—It would seem that in view of the limits of such competence under Article 146, the Court is precluded from interfering with certain decisions of the administration—In circumstances in which, possibly, it could interfere had it been acting free from such limits.

Section 5 (1) (*a*) and (*b*) of the Income Tax Law, Cap. 323, 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—
>
> (*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 ;
>
> (*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";....."

There are four complaints of applicant in the present recourse under Article 146 of the Constitution :—

(A) That the respondent has wrongly included in applicant's taxable income for the year 1957 an amount of £700 paid to applicant in March, 1957, by Messrs. Titan Construction Company in the way of a bonus on the cessation of his employment with such concern in March, 1957, the applicant's contention being that the said amount (admittedly taxable) should have been spread over the whole period of his service with his said employers *viz.* 1953 to March 1957.

(B) That the respondent has wrongly included in applicant's taxable income for the years 1957 and 1958 an amount of £6,000 paid to applicant by a certain Saoullis as agreed damages for breach of contract, such contract being an agreement whereby applicant and the said Saoullis became general partners for the purpose of obtaining and executing contracts for the construction of buildings and other works. Applicant's contention in that regard was that the said amount was not taxable at all as being a capital receipt.

(C) That the respondent Director has wrongly included in the applicant's taxable income for the years 1957 and 1958 an amount of £3,000 paid by the said Saoullis to applicant by virtue of a consent judgment dated January, 1960, for that amount representing a 30% share of the applicant in the profits from the execution of a certain contract (the "Air Ministry contract," *infra*). In this instance the respondent Director taxed the said amount under section 5(1)(*b*) of the Income Tax Law, Cap. 323 as being emolument from the applicant's services in the employment of Saoullis *(infra)*, the applicant contending that the said amount should have been taxed under section 5(1)(*a*) of Cap. 323 (*supra*) in relation to the period it was actually received.

(D) That the respondent in assessing applicant's income for the year 1959 failed to consider or take into account certain factors which he ought to have considered, namely the computation of applicant's income for that year sent to the respondent through the former's advocate, the respondent Director having declined to consider this computation on the ground that it was not signed by the applicant's auditor who purported to have made it.

Regarding complaint (A), above, the relevant facts are that applicant ceased being in the employment of Messrs. Titan Construction Co. in March, 1957, having worked in the service of this concern as a civil engineer since 1953. At the cessation of his employment, and without any provision to that effect in his relevant contract of service, applicant received from his said employers a bonus of £700. It was the contention of applicant that this bonus had to be correlated to all his years of service with Titan Construction Co. whereas the respondent had taken the view that it is income received in 1957 and it is taxable in respect of that year only.

Regarding complaints (B) and (C), above, the relevant facts are shortly as follows :

On the 5th March, 1957, the applicant and a certain Saoullis agreed to form a general partnership for a period of two years, sharing profits and losses equally, for the purpose of obtaining and executing contracts for the construction of buildings and other works in Cyprus. One of the construction contracts secured by them was a contract, referred to in these proceedings as " the Air Ministry contract " involving works of the value of approximately £150,000 plus extras. It would seem that the said Saoullis was not willing to go on with the partnership and started proposing to applicant modified means of business co-operation, other than the general partnerhsip originally agreed upon. Applicant objected strongly and, eventually, after both sides had instructed lawyers and negotiated in the matter, a service agreement was signed on the 12th September, 1957, with effect as from the 1st July, 1957, by virtue of which applicant, in consideration of a monthly salary of £140 agreed to supervise the technical execution of the aforesaid " Air Ministry contract ". It was agreed at the same time, that Saoullis would pay applicant by means of a number of monthly maturing promissory notes an amount fixed by them at £6,000 as compensation for breach of contract, such contract being the agreement regarding the said general partnership which was abandoned, and all arrangements relevant to it cancelled. In addition to the aforesaid service agreement signed on the 12th September, 1967, it was also agreed between the applicant and Saoullis that the former would be entitled to 30% of the profits from the execution of the said " Air Ministry contract ", such share of the profits being payable to applicant in addition to his monthly salary of £140 as

aforesaid and independently of the compensation to be paid to him by means of the promissory notes referred to above

Eventually applicant brought an action against Saoullis claiming payment of his 30% aforesaid share of the profits from the execution of the aforementioned "Air Ministry contract". This action was settled on the 14th January, 1960 By virtue of this settlement an amount of £3,000 was agreed to be paid by Saoullis to applicant in two equal instalments, on the 30th June, 1960, and on the 31st December, 1960

The learned Justice in dismissing the recourse as to complaints (A) and (C) and granting it only as to complaints (B), and (D) above :—

Held, (1) *As to applicant's complaint (A) above*

(1) The issue has not arisen in the present case as to whether the said bonus of £700 (*supra*) is taxable at all , the applicant only contends that it should be apportioned over the years 1953 to 1957 and taxed accordingly , therefore, considerations such as those which this Court had to deal with in the case of *Coussoumides and the Republic*, reported in this Part at p 1 *ante*, do not arise in the present case

(2) There is no positive evidence in the present case, as there existed in the *Heasman's* case *(infra)*, to the effect that the bonus concerned was calculated by direct reference to the past years of service and that it was not intended to be a reward for services rendered in the particular year in which it was paid (*i e* 1957)

(3) There is, moreover, nothing to exclude the possibility that, notwithstanding the long hours of work of applicant in the past and promises of his employers to pay him a bonus therefor, it was not, nevertheless, some particular service rendered by Applicant, or some other relevant specific consideration arising in 1957, which was the decisive cause for the grant to him of the bonus of £700 in March, 1957.

(4) In view of all the foregoing and in the light of all the material before me, bearing, also, in mind our relevant provision—section 5 (1) of Cap 323—and the limits of the Courts competence under Article 146, I am not prepared to interfere with the relevant decision of respondent and to hold that it was not legally and reasonably open to him to decide that the aforesaid bonus of £700 represents gains from

applicant's employment with Titan Construction Co., which accrued to, and were received by, him in 1957, and tax that amount accordingly.

Henry v. *Foster* 16 Tax Cases 605, *distinguished* ;

Heasman v. *Jordan* 35 Tax Cases 518; [1954] 3 All E.R. 101, all *distinguished* on the facts, and reasoning of Roxburgh J. at p. 106, *adopted*.

(5) Therefore, applicant's complaint under (A) above fails.

Held (II). As to applicant's complaint (B) above:

(1) The amount paid by means of the said promissory notes to applicant by Saoullis (*supra*) was paid as compensation in relation to the abandonment of contractual rights, *viz.* the rights arising under the aforesaid general partnership agreement. The nature of consideration for such promissory notes was expressly written on the face thereof: "Value received in agreed compensation in breach of contract".

(2) Therefore, the sum received by virtue of the promissory note is not income assessable to income tax. It is merely a capital receipt.

(3) The mere fact of applicant's continuing co-operation with Saoullis, as a supervising engineer only being remunerated by means of salary and/or share in the profits of a particular contract (*supra*), (the applicant having lost as aforesaid the status of a general partner), cannot, in the circumstances of this case, prevent the compensation paid to him, for the abandonment of the partnership, from being treated as a capital receipt.

Van den Berghs Ltd v. *Clark*, 19 Tax Cases, 390, H.L., *followed* ;

Hunter v. *Dewhurst*, 16 Tax Cases, 605, *followed*.

(4) Nor is it sufficient, in order to render the amount, paid to applicant under the aforesaid promissory notes in question, a taxable receipt, the fact that when it was calculated, one of the factors which, perhaps, was taken into account was the possible future profits under the general partnership which applicant was losing.

Dictum by Lord Buckmaster in *Glenboig Union Fireclay*

Co. Ltd. v. *Commissioners of Inland Revenue*, 12 Tax Cases 427, at p. 464, *applied.*

(5) In the light of the foregoing I reached the conclusion that in treating the whole amount, paid to applicant by means of the aforesaid promissory notes, as taxable the respondent Director acted under the influence of basic misconceptions of fact and erroneous assumptions—as above explained—with the result that the exercise of his discretionary powers in the matter was, indeed, a defective one, rendering his relevant decision contrary to law and in excess and abuse of powers.

(6) Applicant is, therefore, entitled to succeed as regards his complaint (B) against the finalized assessments for the years 1957 and 1958 ; as a result they have to be annulled.

Held (III). As to applicant's complaints (C) above:—

(1) (*a*) The applicant contends that the amount of £3,000 paid to him in two instalments by means of the judgment given by consent in his favour in January, 1960, in action 493/59 *(supra)*, cannot be treated as taxable in respect of the years 1957 and 1958; applicant does not allege that this amount is not taxable at all, but alleges that it should be taxed in respect of the period in which it was actually received.

(*b*) In this connection applicant's case is that the said amount is a receipt under section 5 (1) (*a*) of the Income Tax Law, Cap. 323 (*supra*) and not under section 5 (1) (*b*) thereof (*supra*).

(2) On the facts of this case, I have reached the conclusion that the respondent Director was right in treating the said amount of £3,000 as income of a nature coming under section 5(1)(b) *(supra) i.e.* emoluments from the applicant's services in the employment of the said Saoullis in relation to the Air Ministry contract *(supra)*.

(3) It is clear that the said amount represents what was paid to applicant in respect of the 30% share of the profits from the said contract and that applicant was entitled, only, to a 30% share of the profits, without any participation in any possible losses ; therefore, he was in the position of an employee receiving a share of profits—in addition to his regular salary—by way of emoluments from his employment.

(4) Such emolument in effect accrued to applicant in the sense of section 5 (1) (*b*) (*supra*), in relation to the time he rendered the relevant services to Saoullis, *viz* in 1957 and 1958 It was, thus, reasonably and properly open to the respondent Director to tax them accordingly as he did and the applicant's complaint (C) above in that regard fails

Dewar v *Commissioners of Inland Revenue*, 19 Tax Cases 561, *distinguished*.

St Lucia Usines and Estates Co Ltd v *Colonial Treasurer of St Lucia* 93 L J P C *212 distinguished*

Held (IV) As to the finalized assessment for the year 1959

(1) In all the circumstances of the case, there does not appear that the respondent Director has duly examined all relevant circumstances

(2) The applicant having objected to the assessment for the year 1959 through his advocates, forwarded through them a computation of his income for the year 1959 The respondent Director appears not to have paid due regard to such computation because it was not duly signed by the auditor who appeared to have prepared it But one such computation was placed before the respondent Director by responsible advocate acting for the applicant, I am of the view that it should have been fully gone into, in examining the relevant objection

(3) I find therefore that the respondent Director rejected the relevant objection of applicant without full examination of all relevant factors in the matter

(4) In the circumstances the sub judice decision for the year has to be annulled

Sub judice assessments annulled as aforesaid No order as to costs

Cases referred to

Coussoumides and The Republic reported in this Part at p 1 *ante distinguished*

Heasman v *Jordan 35 Tax Cases 518* [1954] 3 All E R 101,

and at p. 106, reasoning adopted, but distinguished on the facts ;

Henry v. *Foster* 16 Tax Cases 605, *distinguished ;*

Short Bros. Ltd. v. *Commissioners of Inland Revenue* 12 Tax Cases 955 ;

Van Den Berghs Ltd. v. *Clark 19* Tax Cases 390, *followed;*

Kelsall Parsons and Co. v. *Commissioners of Inland Revenue,* 21 Tax Cases 608 ;

Prendergast v. *Cameron* 23 Tax Cases 122 ;

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

Commissioners of Inland Revenue v. *Fleming and Co. (Machinery) Ltd.* 33 Tax Cases 57 ;

Hunter v. *Dewhurst* 16 Tax Cases 605 ; *followed ;*

Glenboig Union Fireclay Co. Ltd. v. *Commissioners of Inland Revenue,* 12 Tax Cases 427, at p. 464 per Lord Buckmaster, *applied;*

Dewar v. *Commissioners of Inland Revenue.* 19 Tax Cases 561 ;

St Lucia Usines and Estates Co. Ltd. v. *Colonial Treasurer of St. Lucia* 93 L.J. (Privy Council) 212;

Dracup v. *Radcliffe,* 27 Tax Cases 188.

Recourse.

Recourse against three decisions of the Respondent by which he finally determined, on the 19th December, 1963, the objections of Applicant in respect of assessments of income tax raised against Applicant for the years of assessment 1957, 1958 and 1959.

Sir P. Cacoyiannis, for Applicant.

M. Spanos, Counsel of the Republic, with *Chr. Paschalides,* for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: The subject-matter of this recourse are three decisions of the Respondent Director of Inland Revenue, by which he finally determined, on the 19th December, 1963, the objections of Applicant in respect of assessments of income tax raised against him for the years of assessment 1957, 1958 and 1959; in the particular circumstances of the case of Applicant the years of assessment have been treated by Respondent as coinciding with the respective years of income.

The aforesaid decisions are assessments EN11/50/AD/60, EN36/EX/60 and EN484/SP/60, (see *exhibits* 26, 28 *and* 30).

The original assessments in respect of the aforesaid years were raised against Applicant on the 9th May, 1960, (see *exhibit* 47).

After the raising of the original assessments the advocates for Applicant objected against them, on his behalf, by letter dated the 13th May, 1960 (see *exhibit* 46) and they attached thereto three formal notices of objection; in respect of each one of the assessments concerned.

On the 3rd June, 1960, advocates for Applicant wrote once again to Respondent (see *exhibit* 48) enclosing computations of his chargeable income in respect of the years concerned (see *exhibits* 25, 27, *and* 29).

By a letter of the 20th January, 1961, Respondent requested from Applicant certain further information (see *exhibit* 35) which was supplied in due course in the form of a detailed statement on the various points raised by Respondent (see *exhibit* 36).

Eventually Respondent reached the sub judice decisions.

The original assessments were raised under the provisions of the Income Tax Law, Cap. 323, and the Respondent's decisions, determining the objections against such assessments, were made under the provisions of the Taxes (Quantifying and Recovery) Law, 1963 (Law 53/63).

There are mainly three complaints of Applicant in the present recourse:-

(A) That Respondent has wrongly included in Applicant's

taxable income for the year 1957 an amount of £700 paid to Applicant by Messrs. Titan Construction Company on the cessation of his employment with such concern, early in 1957.

(B) That Respondent has wrongly included in the Applicant's taxable income for the years 1957 and 1958 an amount of £6,000 allegedly paid by a certain Mr. S. Saoullis to Applicant, by means of six promissory notes; Respondent has apportioned the said amount of £6,000 between the two years concerned.

(C) That Respondent has wrongly included in the Applicant's taxable income for the years 1957 and 1958 an amount of £3,000 paid by way of a judgment debt by the said Saoullis to Applicant; Respondent has apportioned the said amount of £3,000 between the two years concerned.

As it will be noticed at once none of the aforesaid three main complaints of Applicant refers to the year 1959; Applicant's case in that respect appears to be limited to the contention that the relevant assessment is excessive.

Regarding complaint (A), above, the relevant facts are that Applicant ceased being in the employment of Titan Construction Co. in March, 1957, having worked for this concern as a civil engineer since 1953. At the cessation of his employment, and without any provision to that effect in his relevant contract of employment, Applicant received from Titan Construction Co. a bonus of £700.

It is the contention of Applicant that this bonus had to be correlated to all his years of service with Titan Construction Co. whereas Respondent has taken the view that it is income received in 1957 and it is taxable in respect of that year only.

The issue has not arisen in the present Case as to whether the said bonus is taxable *at all;* Applicant only contends that it should be apportioned over the years 1953 to 1957 and taxed accordingly; therefore, considerations such as those which this Court had to deal with in the case of *Coussoumides and The Republic,* (reported in this Part at p. 1 *ante*), do not arise in the present Case.

Both counsel have referred the Court to the case of *Heasman* v. *Jordan* (35 Tax Cases p. 518; [1954] 3 All E.R. p. 101), each one arguing that it supports his own contention; counsel

for Respondent has also referred the Court to the case of *Henry* v. *Foster* (16 Tax Cases p. 605).

The *Foster* case is in my opinion clearly distinguishable from the present Case; such case cannot be of any decisive effect in relation to the issue under examination.

On the other hand, the *Heasman* case is more similar in certain material respects to the present Case and in a way quite helpful; the facts there were as follows ([1954] 3 All E.R. p. 101):-

> "During the war a company was under pressure to produce aircraft and all its employees worked long hours for approximately six and a half days a week and sacrificed their normal holidays. Employees paid weekly received overtime pay at premium rates together with cost-of-living bonuses but staff paid monthly received no additional remuneration for their additional work. After representations from the staff paid monthly that they were suffering financially by comparison with the employees paid weekly, and assurances to the monthly staff that the matter would not be overlooked, the directors on June, 27, 1945, resolved to pay a bonus to members of the monthly staff not exceeding in all £50,000. This sum was apportioned among the monthly staff, taking into consideration salaries and the period of paid monthly service during the war (excluding any service paid for weekly) on the basis that they had been paid for ordinary working hours and that the bonus was for something outside their normal work. Employee who had left before June, 1945 were not paid. The taxpayer, who had been appointed a member of the staff in 1941, and had received a bonus in July, 1945, under this decision, was assessed to income tax on the whole sum paid him for 1945-46".

Roxburgh J., in deciding the issue of whether or not the said bonus was payment for services in 1945-1946 or for services rendered during all the war years, 1941 to 1945, had this to say, *inter alia* (at p. 106):-

> "Now, what are the facts here? The bonus was not calculated with reference to output in the year of assessment, nor were all members of the staff in one salary group paid equal amounts. The bonus was correlated

with the length of service of the particular member of the staff during the war years, and it was limited to the monthly staff to the exclusion of the weekly staff. Where a particular member of the staff had been transferred during the war period from weekly payment to monthly payment of remuneration, only his monthly service was taken into consideration. The bonus was given in pursuance of a promise which had been reiterated in many directions over many years. The very terms of the letter which accompanied the payment seem to me clearly to show that the bonus was not intended to be a reward for services rendered in that particular year of assessment only".

He decided that the bonus ought to be treated as reward for services rendered between 1941 and 1945 and be taxed accordingly.

In the present Case Applicant has testified that during his employment with Titan Construction Co. he was working for very long hours without any overtime pay and that he had been promised a bonus for his hard work; and that eventually he was paid a bonus of £700 in 1957.

I am of the view, however, that the facts of the present Case fall far short of being so clearly in favour of the taxpayer's contention, as they were in the *Heasman* case: There is no positive evidence in the present Case, as there existed in the *Heasman* case, to the effect that the bonus concerned was calculated by direct reference to the past years of service and that it was not intended to be a reward for services rendered in the particular year in which it was paid. There is, moreover, nothing to exclude the possibility that, notwithstanding the long hours of work of Applicant in the past and promises of his employer to pay him a bonus therefor, it was not, nevertheless, some particular service rendered by Applicant, or some other relevant specific consideration arising, in 1957, which was the decisive cause for the grant to him of the bonus of £700 in March, 1957.

In view of all the foregoing and in the light of all the material before me, relevant to the issue under consideration, bearing in mind our relevant legislative provision—section 5(1) of Cap. 323—and the limits of the Court's competence under Article 146, I am not prepared to interfere with the relevant decision of Respondent and to hold that it was not legally

and reasonably open to him to decide that the aforesaid bonus of £700 represents gains from Applicant's employment with Titan Construction Co., which accrued to, and were received by, him in 1957.

Therefore, complaint (A), above, of Applicant cannot succeed.

Before dealing with complaints (B) and (C) of Applicant it is necessary to state the facts relevant to both of them, as shortly as possible; I find the said facts, on the material before me, including evidence which I accept as true, to be as follows:-

On the 5th March, 1957, Applicant and the aforesaid Saoullis agreed to form a general partnership for a period of two years, sharing profits and losses equally, for the purpose of obtaining and executing contracts for the construction of buildings and other works in Cyprus; it was expressly agreed that during the duration of the partnership neither of the partners would have the right of contracting in the Island on his own account, (see *exhibit* 1).

The late Mr. John Clerides, advocate, was instructed to draw up an instrument of partnership agreement and he did so, (see *exhibit* 2). It provided for an extension of the duration of the partnership to three years, instead of two years, as originally agreed upon. Such agreement was, however, never formally signed by the parties thereto.

The reasons for this are in dispute between the Applicant and Saoullis and it is not necessary in this present Case to go at any length into such disputed issue, because the fact remains that, on the material before the Court, there can be no doubt whatsoever that notwithstanding the non-signing of the formal instrument of partnership agreement and the non-registration of the partnership, Applicant and Saoullis commenced co-operating on the basis of the partnership being a reality; to that purpose they opened together joint partnership bank accounts, as well as trading accounts with firms dealing in building materials. They prepared and submitted tenders. One of the construction contracts which was secured is contract WAC/108/119, which has been referred to all along in the present proceedings as the large Air Ministry contract, and which involved works of the value of approximately £150,000 plus extras. There were other smaller contracts, too.

In the meantime, for reasons with which I need not deal, Saoullis started proposing to Applicant modified means of business co-operation, other than the general partnership originally agreed upon; Applicant objected strongly and, eventually, after both sides had instructed lawyers and negotiated in the matter, a service agreement was signed on the 12th September, 1957, (see *exhibit* 11) by virtue of which Applicant, in consideration of a monthly salary of £140 (plus travelling expenses) agreed to supervise the technical execution of the aforesaid Air Ministry contract; the effect of such agreement was to commence retrospectively from the 1st July, 1957. It was agreed, at the same time, that Saoullis would pay Applicant, by means of a number of montly maturing promissory notes, dated 12th September, 1957, an amount fixed between them as compensation for breach of contract; such contract being, of course, the agreement regarding the general partnership which was abandoned, and all arrangements relevant to it cancelled.

The issue has arisen in this Case whether the amount fixed, as above, and payable by means of promissory notes (for £1,000 each) was £5,000 or £6,000 i.e. whether there were six promissory notes maturing monthly from October 1957 to March 1958, or only five promissory notes maturing from November 1957 to March 1958. Actually a promissory note has been issued also in respect of October, 1957, and Saoullis insists that it has been paid off too, whereas the Applicant insists that it was subsequently cancelled and that, therefore, only five promissory notes were in fact paid off.

If I had come to determine this issue of the exact number of payable promissory notes I would have unhesitatingly preferred the evidence of the Applicant to that of Saoullis; but I have decided not to determine finally such issue and leave it open because, for the purposes of this Judgment —as it will appear later on—it is not really necessary to resolve it.

In addition to the service agreement signed, as above, on the 12th September, 1957, (*exhibit* 11), it was agreed, also that Applicant would be entitled to 30% of the profits from the execution of the Air Ministry contract in question. Such share of the profits would be payable to Applicant in addition to his salary under the service agreement and independently of the compensation to be paid to him by means of promissory notes, as aforesaid.

I am satisfied regarding the existence of such an agreement about a 30% share of the profits because I accept, in this respect, as true the relevant evidence of Applicant; I disbelieve any evidence to the contrary, and particularly that of Saoullis.

It was verbally agreed, further, (see confirmatory letter dated 14th September, 1957, *exhibit* 45) that another building contract, for which a tender had been made, would, if obtained, be executed on a 50% profit and loss basis, between Applicant and Saoullis, and that any other contracts for the British Army or the R.A.F., for which tenders would be submitted together by Applicant and Saoullis would, if secured, be executed jointly on a 50% profits or loss basis.

Further, as it appears from a letter dated 6th January, 1958, (*exhibit* 13), it was also agreed verbally, at the time, that Applicant would be entitled to a 50% share of the profits from two other contracts, the work on which he would supervise without any salary.

Early in 1958 a dispute arose between Applicant and Saoullis regarding payment off of the promissory notes which fell due in November and December 1957 and, eventually, a civil action, 242/58, was filed on the 21st January, 1958, in the District Court of Nicosia by Applicant against Saoullis. (See the pleadings therein, *exhibit* 8).

Then, on the 28th March, 1959, a further civil action, 493/59, was filed by Applicant against Saoullis, in the District Court of Limassol (see the pleadings therein, *exhibit* 17); by means of such second action Applicant claimed payment of his 30% share of the profits from the execution of the aforementioned Air Ministry contract (WAC/108/119).

Action 242/58 was settled (see *exhibit* 16) on the 29th December, 1959; by virtue of such settlement all differences between the parties were settled; in view of this, it was also agreed to withdraw civil action 493/59 on certain terms.

The settlement of action 493/59 was declared on the 14th January, 1960, (see *exhibit* 18). By virtue of such settlement an amount of £3,000 was agreed to be paid in two equal instalments, on the 30th June, 1960 and on the 31st December, 1960, by Saoullis to Applicant.

Having heard all the relevant evidence, and in the light of all other material before the Court, I have no difficulty

in accepting as true that the said £3,000 represented a compromise figure regarding the 30% share of the profits to which Applicant was entitled under the large Air Ministry contract, and it did not relate to any other contracts; any evidence of Saoullis to the contrary is disbelieved.

Coming now, first, to complaint (B) in this Case Applicant contends that the amount he received by virtue of the aforesaid promissory notes dated 12th September, 1957, is a non-taxable capital receipt; but Respondent contends that it is income subject to tax.

The Respondent Director has given evidence and has set out at length the reasons for which he reached the decision that this amount—which he regarded to be £6,000 on the basis of six promissory notes—was taxable.

He has himself, in his evidence, summarized his view as follows:- "I regarded the £6,000 either as the share of profits of Christides for the period up to the 12th September, 1957 or pre-estimation of his 30% under the large Air Ministry contract".

I have duly weighed the submissions made by the counsel for the parties on the relevant legal issue and I have, *inter alia*, considered in this connection the cases of *Short Bros. Ltd.* v. *Commissioners of Inland Revenue* (12 Tax Cases p. 955), *Van Den Berghs Ltd.* v. *Clark* (19 Tax Cases p. 390), *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue* (21 Tax Cases p. 608), *Prendergast* v. *Cameron* (23 Tax Cases p. 122), *Barr, Crombie & Co. Ltd.* v. *Commissioners of Inland Revenue* (26 Tax Cases p. 406), and *Commissioners of Inland Revenue* v. *Fleming & Co. (Machinery) Ltd.* (33 Tax Cases p. 57).

Though I have not the slightest doubt in my mind that the Respondent Director approached the matter in question most carefully, anxiously trying to reach the proper decision thereon, I am bound on the basis of the correct facts as found by me earlier on in this Judgment to hold that his sub judice decision is erroneous as based, largely, on misconceptions of fact viz. that the amount paid by means of promissory notes by Saoullis to Applicant—be it £5,000, be it £6,000—represented either profits up to the 12th September, 1957 (when the service agreement, *exhibit* 11, was signed between Saoullis and Applicant) on a pre-estimation of the 30% share of Applicant of the profits under the large Air Ministry

contract. As already indicated, I find, on evidence which I accept as correct, that such amount was agreed compensation for breach of the agreement regarding a general partnership between Applicant and Saoullis, which was to last at first two, and as agreed later, three years.

In my view the situation in the present Case bears in material respects some useful analogies to that with which the House of Lords in England had to deal with in the *Van Den Berghs* case (*supra*). The relevant facts there were as follows:-

> "In 1908 the Appellant Company, which carried on the business (inter alia) of manufacturing and dealing in margarine and similar products, entered into an agreement with a competing Dutch company by which the two Companies bound themselves for the future to work in friendly alliance and agreed (inter alia) (a) to share the profits of their respective margarine businesses in specified proportions, (b) to bring within the operation of the agreement, if required, any interest in other margarine concerns acquired by companies under their control, (c) not to enter any pooling or price arrangements with third parties inimical to the interests of the two Companies, (d) to set up a joint committee to make arrangements with outside firms as to prices and limitation of areas of supply of margarine and (e) to promote generally the interests of the two Companies in the margarine business. Supplemental agreements made in 1913 and 1920 provided that, with certain modifications, the provisions of the 1908 agreement were to continue in force until 1940.
>
> "In the period from 1908 to 1913 payments were made under the agreements by and to the Appellant Company and were treated for Income Tax purposes as trading expenses and receipts, respectively, of the years in which they were made. From 1914 to 1919 the two Companies were unable to compute their profits owing to the difficulties caused by the war. In 1922 the Appellant Company arrived at the sum of £449,042 as being the amount due to it by the Dutch Company under the agreements. This liability was not admitted by the Dutch Company, which claimed that under the agreements there was, on balance, a sum due to it by the Appellant Company. The matter was referred to

arbitration which, however, proved so lengthy and costly that, in 1927, the Companies, in contemplation of a merger of interests, entered into negotiations with a view to a settlement of the dispute. The Dutch Company desired to cancel the agreements, but the Appellant Company, which considered that such a course would be to its disadvantage, refused to consent to cancellation unless the Dutch Company paid to it, at least, £449,042.

"A settlement was finally reached in 1927, whereby, inter alia, (a) all claims and counterclaims under the agreements for the period 1914 to 1927 were withdrawn; and (b) in consideration of the payment by the Dutch Company of £450,000 to the Appellant Company 'as damages,' the agreements were determined as at 31st December, 1927, and each party released the other party from all claims thereunder. That sum was paid in 1927 and credited in the Appellant Company's accounts for that year".

It was held in that case that the payment of £450,000 was a payment for the cancellation of the Company's future rights under the agreements in question, which constituted a capital asset of such Company, and that it was, accordingly, a capital receipt.

As stated, my conclusion, on the correct facts of the present Case, is that in this Case, also, the amount paid by means of promissory notes to Applicant by Saoullis was paid as compensation in relation to the abandonment of contractual rights, viz. the rights arising under the general partnership agreed upon between them. In this respect, it is also useful to bear in mind that the nature of the consideration for such promissory notes was expressly written on the face thereof: "Value received in agreed compensation in breach ofcontract". I really could never accept, bearing especially in mind that at the time Applicant and Saoullis were certainly not at the best of terms regarding mutual trust for each other and that Saoullis was an experienced businessman advised by a competent lawyer, that he could agree to describe falsely the amount, payable to Applicant by means of the aforesaid promissory notes, as compensation for breach of contract, thus depriving himself possibly of the opportunity to deduct it from his own taxable income himself, if in fact such amount was not what it was stated to be on the face of the promissory notes. In this respect I disbelieve completely any evidence

to the contrary given by Saoullis, accepting the relevant evidence of Applicant in toto.

It might be added, also, that the Respondent Director has stated, himself, in evidence that he never actually reached the conclusion that the consideration for the promissory notes in question was artificial or fictitious under section 56 of Cap. 323. He merely regarded what was described as "compensation" as being in fact a taxable receipt.

The Respondent Director has been influenced unduly, in reaching the decision complained of, by the fact that no formal partnership instrument was signed nor was a partnership registered by the parties; and that it was probably impossible to do so at the time due to the then immigration status of Applicant. But even assuming that Applicant might not have had a perfect case in law for claiming compensation from Saoullis—for breach of contract regarding the partnership agreed upon between them—this does not necessarily mean that Applicant and Saoullis could not validly agree, by way of compromise, that Applicant would be compensated off through the payment of the amount which was eventually paid by means of the promissory notes; and once such an agreement for compensation was reached it is a factor to be recognized, for such as it is, by the income tax authorities, irrespective of the strength of the claim which led to it.

The Respondent Director appears, further, to have acted on the assumption that there was nothing, really, to compensate Applicant for, because he continued working on the large Air Ministry contract (and receiving a monthly salary plus 30% of the profits) and, furthermore, Applicant continued to be entitled to a 50% share of the profits from two other, smaller, contracts, which were under execution, and he was also given a promise by Saoullis that he would be granted a 50% share of the profits on contracts to be secured in future. But, notwithstanding the above, it should not have been lost sight of that under the partnership agreement Applicant would have been entitled to a 50% share of the profits on all contracts to be entered into for the duration of the partnership *and* neither of the two partners would have been entitled to secure contracts on his own, whereas, as things developed, Applicant retained an interest in contracts already secured —as stated above— and he was merely given a promise (see *exhibit* 45) that he would be entitled to 50% of the profits

on contracts to be secured through tenders *submitted together* by him and Saoullis; there being nothing to prevent Saoullis from obtaining, at the same time, other contracts on his own, without bringing in Applicant at all.

A related, to the above, consideration which seems to have, also, unduly influenced the Respondent Director was the fact that the co-operation between the Applicant and Saoullis continued after the abandonment of the partnership; that the capital asset—so to speak—of such co-operation was not lost, so as to render the compensation therefor a capital receipt. It is on this ground, too, that counsel for Respondent has tried to distinguish the present Case from the *Van Den Berghs* case (*supra*). But in cases of this nature the continuance of the business co-operation is only one of the elements to be considered in deciding the specific issue, as it arises on the facts of each particular case; and as it appears from the case of *Hunter* v. *Dewhurst* (16 Tax Cases p. 605) the continuance of such co-operation does not necessarily prevent a relevant payment from being treated as a capital receipt, and not as taxable income.

The situation in the aforesaid case was as follows:-

The taxpayer was a director of a limited company. He had no written contract of service with the company. Article 109 of the company's articles provided that in the event of any director, who had held office for less than five years, dying or resigning or ceasing to hold office for any cause other than misconduct, bankruptcy, lunacy or incompetence, the company should pay him or his representatives by way of compensation for loss of office a sum equal to the total remuneration received by him in the preceding five years.

The taxpayer had held office for not less than five years. He decided to retire from active management of the company, but his co-directors wished to be able still to consult him, and it was agreed that he should resign the office of Chairman, receive as "compensation" a lump sum in lieu of the provision under article 109, waiving any future claim under that article, and remain on the board of the company at a reduced rate of remuneration.

It was held that, in the circumstances of the case, the sum received was not income assessable to income tax.

Likewise, in the present Case, the mere fact of Applicant's continuing co-operation with Saoullis, as a supervising engineer only, being remunerated by means of salary and/or share of the profits, having lost the status of a general partner, cannot, in the circumstances of this Case, prevent the compensation paid to him, for the abandonment of the partnership, from being treated as a capital receipt.

Nor is it sufficient in order to render the amount, paid to Applicant by means of the promissory notes in question, a taxable receipt, the fact that, when it was calculated, one of the factors which was, perhaps, taken into account was the possible future profits under the general partnership which Applicant was losing. In this respect it is useful to refer to the following dictum by Lord Buckmaster in *Glenboig Union Fireclay Co. Ltd.* v. *Commissioners of Inland Revenue* (12 Tax Cases 427 p. 464) which was cited with approval by Lord Macmillan in the *Van Den Berghs* case, *supra,* at p. (431): "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".

In the light of all the foregoing I have reached the conclusion that in treating the *whole* amount paid to Applicant by means of the aforesaid promissory notes, as taxable the Respondent Director (not having, perhaps the benefit of the exhaustive enquiry which took place in this Case) acted under the influence of basic misconceptions of fact and erroneous assumptions—as above explained—with the result that the exercise of his discretionary powers in the matter was, indeed, a defective one, rendering his relevant decision contrary to law and in excess and abuse of powers. Applicant is, therefore entitled to succeed as regards his complaint (B) against the finalized assessments for the years 1957 and 1958; as a result they have to be annulled accordingly.

In the previous paragraph, in referring to the amount concerned, I used the term "*whole*"; I did so advisedly because I am leaving quite open the issue whether the Respondent Director could, in the light of the correct facts—as found in this Judgment—regard the amount of compensation in question as including, to a very minor part thereof, earned already and, thus, taxable, remuneration of Applicant, in respect of work done for the benefit of Saoullis during the

period until July 1957 when the service agreement (*exhibit* 11) came into effect. It is up to the Respondent Director to decide such an issue in the first instance.

Coming now to complaint (C) of the Applicant:- The Applicant contends that the amount of £3,000, paid to him in two instalments by means of the judgment given in his favour, by consent, in January, 1960, in action 493/59, cannot be treated as taxable in respect of the years 1957 and 1958; Applicant does not allege that this amount is not taxable at all, but alleges that it should be taxed in respect of the period in which it was actually received.

In this connection Applicant's case is that the said amount is a receipt under section 5(1)(a) of Cap. 323, and not under section 5(1)(b) thereof. Counsel for Applicant has also referred the Court to the cases of *Dewar* v. *Commissioners of Inland Revenue* (19 Tax Cases p. 561) and *St. Lucia Usines and Estates Co. Ltd. v. Colonial Treasurer of St. Lucia* (93 L.J. (Privy Council) p. 212). Both such cases concern income of a nature other than income of the nature which would in Cyprus be within the ambit of section 5(1)(b) of Cap. 323.

On the other hand Respondent contends that the aforesaid £3,000 represents gains or profits within section 5(1)(b) of Cap. 323 and that, as such, should be taxed in relation to the relevant period of service of Applicant in the employment of Saoullis, in the same way as arrears of salary due to Applicant in respect of that service would have been taxed; in this connection I have, inter alia, been referred by counsel for Respondent to the case of *Dracup* v. *Radcliffe* (27 Tax Cases p. 188) and to the case of *Heasman* (*supra*).

Having given this matter full consideration in the light of all the material before me, I have reached the conclusion that the Respondent Director was right in treating the amount of £3,000 as income of a nature coming under section 5 (1)(b) *i.e.* emoluments from his services in the employment of Saoullis in relation to the large Air Ministry contract (WAC/108/119). It is clear that the said amount represents what was paid to Applicant in respect of the 30% share of the profits from the said contract and that Applicant was entitled, only, to a 30% share of the *profits*, without any participation in any possible losses; therefore, he was in the position of an employee receiving a share of profits—in addition to his regular salary—by way of emoluments from his employment.

Such emoluments in effect accrued to Applicant, in the sense of section 5(1)(b), in relation to the time when he rendered the relevant services to Saoullis; viz. in 1957 and 1958. It was, thus, reasonably and properly open to the Respondent Director to tax them accordingly as he did. The position in this respect is very similar to the position in the *Heasman* case (*supra*). Complaint (C), therefore, of Applicant fails.

Regarding, lastly, the finalized assessment for the year 1959 I have to say at once that, in all the circumstances of this Case, there does not appear that the Respondent Director has duly examined all relevant circumstances:–

Applicant having failed to file a proper return, an estimated assessment regarding the year 1959 was raised on the basis of the information available to the income tax authorities. Then Applicant objected to such assessment, as stated earlier in this Judgment; he did so through his advocates, on the 13th May, 1960 (see *exhibit* 46) and on the 3rd June, 1960, Applicant's advocates forwarded to the income tax authorities a computation of Applicant's income for the year 1959 (see *exhibits* 48 *and* 29). The Respondent Director appears from his evidence not to have paid due regard to such computation because it was not duly signed by the auditor who appeared to have prepared it. But once such computation was placed before the Respondent Director by responsible advocates acting for the Applicant, I am of the view that it should have been fully gone into, in examining the relevant objection of Applicant; if the Director had any doubts about the authenticity of the computation in question he could have asked for a properly signed copy thereof, but he does not appear to have done so. I find, therefore, that the Respondent Director has rejected the relevant objection of Applicant without full examination of all relevant factors in the matter; he himself has frankly and fairly stated to the Court that he did not have sufficient material for the purpose of assessing Applicant's chargeable income in 1959. In the circumstances his sub judice decision for 1959 has to be annulled and it is hereby so declared accordingly; the matter would have now to be reconsidered in the light of a proper examination.

In the result, for the reasons explained in this Judgment, the sub judice finalized assessments for the years 1957, 1958 and 1959 are annulled; of course, the finalized assessments

for the years 1957 and 1958 have been found to be invalid only to the extent in which the amount received by Applicant, by means of the promissory notes dated 12th September, 1957, has been included therein, but as such amount constitutes a major part of what was treated as the taxable income of Applicant, and the tax payable will have to be calculated afresh, I have thought it proper, in the present Case, to annul the finalized assessments, for the years in question, as a whole, so as to clear the way for any proper action in the matter, especially as the Respondent Director, in respect of 1957, may still decide to treat part of the aforesaid amount as taxable on the ground of being remuneration already earned by Applicant,—a matter left open earlier on in this Judgment.

The Respondent Director has to re-examine now the objections of Applicant to the original assessments for the years 1957, 1958 and 1959 and decide afresh on them in the light of this Judgment. During such re-examination any other proper adjustments of the assessments in question, such as e.g. in relation to allowances for children, which have been claimed by Applicant, and which the Respondent Director has agreed to consider, may also be made; so I need not go into such matters in this Judgment.

Regarding costs, and taking into account that Applicant has been successful on only one of the three major issues raised in these proceedings, I have decided to make no order as to costs.

I would like to end by thanking counsel for the parties for assisting the Court to the best of their considerable abilities, through presenting to the Court *all* relevant facts, as known to them, in a very fair and complete manner, and through going thoroughly into the relevant law in relation to all points argued; they have risen fully to what was expected of them as responsible counsel conscious of their duties. Also, I would like to express my deep appreciation for the utmost fairness with which the Respondent Director has, in evidence, tried to assist the Court in deciding this Case.

Sub judice assessments annulled.

No order as to costs.