1987 Apnl 11

[STYLIANIDES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

FRIXOS ROUSSOUNIDES,

Applicant,

v

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF INCOME TAX,

Respondents

(Case No 712/85)

Income tax — Deductible expenses — Travelling expenses — Civil servant posted in Nicosia travelling to and from Larnaca for the purpose of performing overtime work at Larnaca airport — Wholly and exclusively incurred in the production of income — Requirement of section 11(1) of the Income Tax Laws, 1961-1981 satisfied — Whether deduction disallowed on account of section 13(a) of the same Laws referring to expenses for «travelling between residence and place of business» — «Place of business» of a civil servant is the place where he is posted — Larnaca in this case is not a «place of business» — It follows that section 13(a) does not disallow the deduction of the aforesaid travelling expenses

Words and Phrases «Wholly and exclusively incurred in the production of income» in section 11(1) of the Income Tax Laws, 1961-1981 and «place of business» in section 13(a) of the same Laws

Income Tax — Deductible expenses — The Income Tax Laws 1961-1981, Sections 11(1), 13(a) and 13(e) — Civil servant posted in Nicosia travelling to and from Larnaca for the purpose of performing overtime work — The relevant travelling expenses are deductible

The applicant is a Customs Officer posted at the Customs Headquarters in Nicosia His income is derived from his salary and from overtime work done at Larnaca airport He works during office hours at his office in Nicosia The service at Larnaca airport starts after 3 p m until after midnight, sometimes ending as late as 6 a m the following morning

In the return of income which the applicant submitted for the year 1982 he claimed a deduction of £216 -incurred as travelling expenses from Nicosia to Larnaca The Commissioner of Income Tax refused to allow the aforesaid deduction and as a result the applicant filed the present recourse

The sub judice decision was taken on the following grounds namely

(a) The expenses were not incurred wholly and exclusively for the production of income

(b) The travelling expenses from the place of residence to the place of work are not deductible (section 13(a) of the Income Tax Laws 1961-1981)

(c) The applicant's post is in Nicosia and he had no obligation to work overtime in Larnaca The travelling expenses were not incurred during the performance of applicant s duties because such duties began as from the time of applicant s arrival at Larnaca airport

Held, *annulling the sub judice decision* (1) The relevant statutory provisions are section 11(1) and section 13(a) and 13(e) of the Income Tax Laws, 1961 1981*

(2) The respondent Commissioner was labouring under a misconception that the applicant «had no obligation to work overtime at Larnaca» (Vide the letter dated 24 1 85 by the Director of the Department of Customs to the respondent Commissioner quoted at pp 527-528) However it may validly be said that the substantial question in this case is not whether the applicant had an obligation to work overtime at Larnaca airport

(3) The questions, which pose for determination are

(a) Whether the travelling expenses in question were wholly and exclusively incurred in the production or for the purpose of acquiring the income (sections 11(1) and 13(e)) and

(b) If yes, whether they represent the cost of travelling between residence and place of business

(4) As regards question (a) the material words of section 11(1) are «wholly and exclusively in the production of the income» The test is objective and not subjective It is essential to have clear findings of fact on certain matters

There is nothing in our Law providing that the expenses should be incurred «during the performance of the duties» In this case, though no income is produced during the journey to and from Larnaca such journey is made by the applicant for one purpose only the production of income It follows that the applicant satisfies the requirements of section 11(1) This answers as well the provision of section 13(e)

* *The aforesaid sections are quoted at pp 526 527 post*

(5) As regards question (b) the material words for this case of section 13(a) are «travelling between residence and place of business»

In the case of a civil servant the «place of business» is the place of his posting The travelling expenses between the place of the residence of the civil servant and the «place of business» are not deductible

However, the Law does not refer to a person who has dual location of business A civil servant posted at place A and then obliged to go to place B to perform certain duties there, has to travel to place B The second place of work is not within the ambit of the expression «place of business» of section 13(a) The statutory provision disallowing the cost of travelling between residence and place of business relates only to the travelling of the taxpayer from his residence to his office at Nicosia and not to the travelling from the place of his posting to Larnaca, which is not «a place of business», this being in Nicosia

Sub judice decision annulled
Respondent to pay £50 -towards applicant's costs

Cases referred to

Nolder (H M Inspector of Taxes) v Walters, 15 T C 380,

Bolam v Barlow [1949] 31 T C 136,

Burton v Rednall (H M Inspector of Taxes) [1954] 35 T C 435,

Sanderson v Durbridge [1955] 36 T C 239,

Ricketts v Colquhoun (H M Inspector of Taxes), 10 T C 118,

Owen v Pook (Inspector of Taxes) [1969] 2 All E R 1,

Taylor v Provan (Inspector of Taxes) [1974] 1 All E R 1201

Recourse.

Recourse against the validity of the income tax assessment for the year of assessment 1982 in respect of the decision not to allow travelling expenses from Nicosia, where applicant's residence is situated, to the place of his overtime work at Larnaca.

A. Haviaras, for the applicant.

Y. Lazarou, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant

by this recourse challenges the validity of the income tax assessment for the year of assessment 1982 in respect of the decision not to allow travelling expenses from the place of residence - Nicosia - to the place of overtime work - Larnaca

The applicant is a Customs Officer posted at the Customs H Q in Nicosia His income is derived from his salary and overtime work done at Larnaca Airport He works during office hours at his office in Nicosia The service at Larnaca Airport starts after 3 00 p m until after midnight, sometimes ending as late as 6 00 a m in the morning

The terms and conditions of employment of customs and excise officers appear in the scheme of service for their respective posts

The applicant together with other customs officers wrote to the respondent on 15 2 84 claiming a deduction from their overtime work at Larnaca Airport in respect of travelling expenses from Nicosia to Larnaca The respondent having considered their claim decided that their case could not be satisfied as the expenses claimed did not fall within the provisions of Section 11 of the Income Tax Law - (Appendix «C» to the opposition)

The applicant submitted his return for income for the year 1982 on 6 10 83 in which he declared his salary and claimed certain deductions including travelling expenses of £216 - incurred from Nicosia to Larnaca, which as he stated, were necessarily incurred and which were not reimbursed by his employer

On 25 9 84 the respondent issued an assessment based on the return but the travelling expenses were not allowed as a proper deduction for income tax purposes

The applicant objected to such assessment stating that the said expenses were incurred wholly and exclusively in producing the income from overtime - (Appendix «F») - and were not costs of travelling between residence and «τόπος επαγγέλματος» («the place of his post») The respondent determined the applicant's objection, he decided that applicant's aforesaid claim was not acceptable and communicated his such decision to the applicant by letter dated 4 7 85

I consider pertinent to set out senatim the letter of 4 7 85 containing the sub-judice decision - (Appendix «G») -

«Αναφέρομαι στην ένσταση σας κατά της

φορολογίας του έτους 1982, με αναφορά 82/84/09/05, και σας πληροφορώ ότι αφού εξέτασα την εν λόγω ένσταση σας αποφάσισα να βεβαιώσω τη φορολογία σας χωρίς να αφαιρέσω από το εισόδημα σας τα έξοδα μετάβασή σας από τη Λευκωσία, όπου είναι η κατοικία σας, στο αεροδρόμιο Λάρνακας όπου εργάζεστε υπερωριακή εργασία.

2. Η απόφασή μου να μη αποδεκτώ το αίτημά σας που αφορούσε ποσό £216, αναφορικά με τα πιο πάνω έξοδα, βασίστηκε στους πιο κάτω λόγους:

(α) Τα εν λόγω έξοδα δεν επιτρέπονται σαν έκπτωση στον υπολογισμό του φορολογητέου εισοδήματος σύμφωνα με τις πρόνοιες των άρθρων 11(1) και 13(α) των περί Φορολογίας του Εισοδήματος Νόμων του 1961-1981, για το λόγο ότι δεν έγιναν καθολοκληρία και αποκλειστικά για την κτήση του εισοδήματος σας.

(β) Τα έξοδα μετάβασης από τον τόπο διαμονής στον τόπο εργασίας δεν επιτρέπονται σύμφωνα με το άρθρο 13(α) των περί Φορολογίας του Εισοδήματος Νόμων του 1961-1981.

(γ) Η έδρα σας είναι η Λευκωσία και σύμφωνα με πληροφορίες που πήρα δεν είχετε υποχρέωση να εργαστείτε υπερωριακώς στη Λάρνακα. Τα έξοδα μετάβασής σας από τη Λευκωσια στη Λάρνακα δεν έγιναν στη διάρκεια εκτέλεσης των καθηκόντων σας γιατί τα καθήκοντά σας άρχιζαν από τη στιγμή που θα εφθάνετε στον τόπο προσφοράς της υπερωριακής σας εργασίας που ήταν το αεροδρόμιο της Λάρνακας».

(«I refer to your objection against the assessment for the year 1982, under reference 82/84/09/05 and I hereby inform you that, having examined your said objection, I decided to assess your taxation without deducting from your income the travelling expenses from Nicosia, where you reside, to the Larnaca airport, where you are doing overtime work.

2. My decision not to accept your claim for £216.- in respect of such travelling expenses was based on the following grounds:

(a) The aforesaid expenses are not deductible from your taxable income in accordance with the provisions of sections

11(1) and 13(a) of the Income Tax Laws, 1961-1981, because they were not wholly and exclusively made for the acquisition of your income.

(b) The expenses for travelling from your place of residence to the place of your business are not allowable in virtue of section 13(a) of the Income Tax Laws, 1961-1981.

(c) Your post is in Nicosia and in accordance with information I received you were not bound to work overtime at Larnaca. The travelling expenses from Nicosia to Larnaca were not made during the performance of your duties, because such duties began as from the time of your arrival at the place of your overtime work, that is at Larnaca airport»).

Counsel for the applicant submitted that these travelling expenses were incurred wholly and exclusively in the production of the income, the object of the tax; that the provisions of paras. (a) - (h) of Section 11(1) are not exhaustive; that the provisions of Section 13 should be interpreted restrictively. The applicant was posted at the office of the Director of the Department in Nicosia. His office or place of business is Nicosia and the phrase «τόπος επαγγέλματος» («place of business») in s.13(a) should be limited to the Nicosia office and not his second place of work where he is obliged to perform duties, i.e. Larnaca. The rendering of services at Larnaca Airport was compulsory and it was not taken up by the volition of the officer. The sub-judice decision is invalid in that it suffers from misconception of fact and misconception of law.

Counsel for the respondent admits that the applicant was a Customs Officer posted at Customs Headquarters in Nicosia. His duties in Nicosia commenced at 7.30 a.m. and ended at 2.00 p.m. in the winter and 1.30 p.m. in the summer. Once he finished his duties in Nicosia he journeyed to Larnaca Airport to undertake overtime duties there. His duties began on arrival at Larnaca Airport and the income was derived from work related solely to the services rendered by him whilst at Larnaca Airport. He contended that the expenditure which the applicant incurred in travelling to Larnaca Airport was not incurred in the production of his income because he did not begin to produce/acquire such income until his arrival and assumption of his duties at Larnaca Airport; that the expression «τόπος επαγγέλματος» («place of business») in s.13(a) encompasses not only the regular place of a person's

employment but also the place where such person renders overtime services, wherever that place might happen to be. He further submitted that although the applicant may have been obliged to do overtime work and, therefore, he had to get to Larnaca Airport, he is, nevertheless, not entitled to deduct the expenditure incurred in travelling there and back because at the time of the journeys he was not producing the income from which the expenditure is sought to be deducted.

In support of his arguments he cited a number of English cases, including *Nolder (H.M. Inspector of Taxes) v. Walters,* 15 T.C. 380; *Bolam v. Barlow,* [1949] 31 T.C. 136; *Burton v. Rednall (H.M. Inspector of Taxes),* [1954] 35 T.C. 435; *Sanderson v. Durbridge,* [1955] 36 T.C. 239.

This case has to be determined on the relevant Cyprus statutory provisions - Sections 11(1) and 13(a) and 13(e) of the Income Tax legislation and the facts of the case. Though the English statutory provision is different, a review of the English case-law is useful, more so as reliance was placed on same by counsel for the respondent.

In *Ricketts v. Colquhoun (H.M. Inspector of Taxes),* 10 T.C. 118, the substantial question was whether the appellant, a barrister, having his chambers in London, who held the office of Recorder of Portsmouth, was entitled to deduct from the emoluments of his office as Recorder the cost of travelling between London and Portsmouth in order to attend the Quarter Sessions. Rowlatt, J., in his first instance judgment said at p.121:-

> «It is, of course, settled by the two cases which have been cited, *Cook v. Knott,* 2 T.C. 246, and *Revell v. Elworthy Bros.,* 3 T.C. 12, that a man cannot charge the expenses of travelling from his residence, which is in his own choice, to the place where he exercises his office, for reasons, which I need not repeat; but it is said that this is not on the same footing. It is true that a Recorder must by Statute be a barrister of five years' standing, and that in practice means that in nine cases out of ten he has to travel from London to perform his duties, though it need not be so. The Statute, however, does not say he must be a practising barrister; still less does it say that he must be a barrister practising in London. In my opinion the place where he practises is really, in point of law, as much as the place where he resides, at his own discretion to select. In these

circumstances it seems to me that I can only arrive at one conclusion. The matter has been complicated, in the view of many of us who are in the habit of thinking over these dry questions, by the case of Members of Parliament, who are allowed their travelling expenses as a deduction, but then that deduction is put upon the footing - and whether it is right or wrong it is not for me to say - that they have an office the duties of which are exercisable in two places, and involve in the performance of those duties passing from one place to the other, which, of course, makes all the difference, if that explanation is sound».

In the Court of Appeal Pollock, M.R., said:-

«Now, the first thing is this, that at the outset you have to find that the holder is necessarily obliged to incur and defray expenses out of his emoluments, and I attach importance to those words 'necessarily obliged', because I think they are to be read as meaning this, that where an obligation is imposed upon the holder of the office which ex necessitate of the office compels him to make outlays, it is in those cases, and after you have fulfilled that condition, that you first begin to consider what is the possible expenditure which may be deducted».

And further down:-

«The first expenditure that is dealt with is that relating to the expenses of travelling in the performance of the duties of the office or employment. Now I think that means that where the office is of such a nature that in order to execute its duties its holder has to travel from place to place, has, in other words, itinerant duties, there the expenses of such travelling necessary to and involved in the work attached to the office are and may be allowed as an expense, the obligation of which is necessarily incurred by the holder of the office. Now, upon consideration, the travelling which is in question in this case is not of that nature. The duties of a Recorder are to sit and to hear the cases that come before him. A Recorder has, so far as I know, in this case if not in all cases, no duties which would take him from one Court to another in the capacity of the particular Recordership which he holds».

And further down:-

«... that the Appellant travelled from London to hold his

Courts at Portsmouth and returned to London at the close of the Sessions was, in my judgment, a course prescribed for him by his own convenience as a practising London barrister and by nothing else. But his position and activities as such had nothing to do with the performance of his duties as Recorder of Portsmouth».

In the House of Lords the question depended entirely on the proper construction of paragraph 7, Schedule 9, that reads:-

«If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed».

Mr. Ricketts, the appellant, had no finding to show either that he had to reside at a distance from Portsmouth or that no one could have been appointed to the office who could reside in Portsmouth. So, it was true to say on the facts found in the case that his continuing to reside in London was «the result of his own volition».

Viscount Cave, L.C., said at p.133:-

«They must be expenses which the holder of an office is necessarily obliged to incur - that is to say, obliged by the very fact he holds the office, and has to perform its duties - and they must be incurred in, that is, in the course of, the performance of those duties. The expenses in question in this case do not appear to me to satisfy either test. They are incurred, not because the Appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder, and having concluded those duties, desires to return to his home. They are incurred, not in the course of performing those duties, but partly before he enters upon them, and partly after he has fulfilled them. No doubt the Rule contemplates that the holder of an office may have to travel in the performance of his duties, and there are offices of which the duties have to be performed in several places in succession, so that the holder of them must

necessarily travel from one place to another»

Lord Blanesbugh said at p 135 -

«The language of the Rule points to the expenses with which it is concerned as being confined to those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties, to expenses imposed upon each holder ex necessitate of his office and to such expenses only»

And further down -

«The deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition»

In *Nolder (H M Inspector of Taxes) v Walters,* 15 T C 380, an aeroplane pilot employed by a limited company claimed deductions in the assessment of his remuneration to Income Tax in respect of, inter alia, the upkeep of a motor-car to convey the pilot between the aerodrome and his home He resided at Purley so as to be as near the Croydon Aerodrome as possible, but admitted that theoretically he was free to live where he liked It was necessary for the respondent to keep a motor-car on his own premises as the duties often commenced and ended when ordinary conveyance by public transport was not available and on some occasions after he had returned home he had been called upon to go out again within a short time Again the case turned on the construction of Rule 9, Schedule E of the Income Tax Act, 1918 Rowlatt, J , said -

«What the statute allows to be deducted are expenses of travelling in the performance of the duties of the office, or employment, or money wholly, exclusively, and necessarily expended in the performance of the duties As regards the latter branch, it seems quite clear that what is to be allowed to be deducted are expenses 'wholly, necessarily', and so on, incurred in doing the work of the office 'In the performance of the duties' means in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office. A man who holds an office or employment has, equally necessarily, to do other things incidentally, and spend money incidentally, because he has the office He has to get to the

place of employment, for one thing. If he had not got the employment, he could stay at home. As he has got the employment he has necessarily got to get there, and it costs him something, if it is only shoe leather, to get there; but that is not in the performance of the office, because in getting there he is not doing the duties, or doing the work of the office. Incidentally, he is obliged to do that, but it is not in doing the work of the office, which begins when he arrives, and sets to work to perform his duties. That seems to me to be quite a clear rule. I think that is what was said by the learned Lords in *Ricketts'* case, and I think it is what a great many people have understood for a very long time».

In *Bolam (H.M. Inspector of Taxes) v. Barlow,* [1949] 31 T.C. 136, the two aforesaid cases were followed.

In *Burton v. Rednall (H.M. Inspector of Taxes),* 35 T.C. 435, the appellant, the secretary of a cattle society in Ipswich, was unable to rent a house in Ipswich but had secured one in a village about 19 miles away. He was required by the society to have a motor-car available in order to visit farmers in the district. He kept the car at his home and, although he preferred to travel to Ipswich by train, and did so when he knew that the society's business would keep him in Ipswich all day, he normally motored there in order to have the car available for any necessary visits. He claimed that he was entitled to a deduction from his remuneration for the excess cost of travelling to Ipswich by car over the expenses of going by train. It was held that the expense claimed could not be allowed as a deduction because it was not incurred in the performance of the duties of the appellant's office. The case was decided on the construction of the words «in the performance of the duties of his office» and the decision of Lord Cave in the Case of *Ricketts v. Clolquhoun* (supra).

In *Owen v. Pook (Inspector of Taxes),* [1969] 2 All E.R. 1, the taxpayer was a medical practitioner and resided at Fishguard. He held part-time appointments as obstetrician and anaesthetist at Haverfordwest, 15 miles away. Under his appointments he was on stand-by duty for emergencies as an obstetrician one weekend a month, as an anaesthetist one weekend a month, and on Monday and Friday nights. He had to be accessible on the telephone at those times, and on receipt of a telephone call telling him of an emergency he would give instructions over the telephone to the hospital staff and then, usually, would set off immediately for the

hospital by car. It was held by the House of Lords that the taxpayer had, in respect of the employment in question, two places of work, and the expenses which were necessarily incurred in travelling between them in the performance of his duties properly fell within the scope of r.7 of Sch.9 of the Income Tax Act 1952; accordingly the expenditure was deductible. Lord Pearce at p.7 said:-

«It is argued that the case of *Ricketts v. Colquhoun (Inspector of Taxes)* compels us to hold otherwise. With all respect to their Lordships who decided that case, I find it, as some others have done, very unsatisfactory both in its result and in its reasoning. In order to carry out his duties as recorder, the taxpayer had to travel to Portsmouth, since he was a London practitioner (and it was, no doubt, by virtue of his London practice that he was appointed recorder). It was, therefore, unreasonable to tax him on the emoluments of his office without allowing the travelling expenses. ..... In my opinion, that case should be considered afresh by your Lordships' House».

Lord Donovan at p.7 said:-

«Rule 7 of Sch. E requires that they should be 'necessarily' incurred and defrayed; and the decision of this House in *Ricketts v. Colquhoun (Inspector of Taxes)* has laid down that the word 'necessarily' imports an objective and not a subjective test. The expenses must be such as any holder of the employment would be bound to incur. It is not enough that they are incurred simply because the employee happens or chooses to live some distance from his work».

The *Ricketts'* case was distinguished also by Lord Wilberforce. At p.11 he said:-

«What is required is proof, to the satisfaction of the fact-finding commissioners, that the tax payer, in a real sense, in respect of the office or employment in question, had two places of work, and that the expenses were incurred in travelling from one to other in the performance of his duties».

In *Taylor v. Provan (Inspector of Taxes)*, [1974] 1 All E.R. (H.L.) 1201, the taxpayer was a Canadian citizen with substantial business interests in Canada. He was a resident of that country and

had never lived in the United Kingdom. Due to his importance because of the taxpayer's business experience in Canada, he was employed by United Kingdom breweries «for reasons of prestige» but he had none of the normal duties. Because of the taxpayer's business commitments in Canada it was arranged (a) that he would do as much as possible of his work for the company in and from Canada but that when it was necessary for him to visit the United Kingdom in connection with that work he would be regarded as travelling on the company's business and the company would reimburse the costs of his transatlantic air travel ... and (c) that he would receive no remuneration for his services. The taxpayer was assessed to income tax under Sch. E on the sums paid to him by the company by way of reimbursement. on the basis that, as sums paid to a director by the company in respect of expenses, they were to be treated as emoluments of his office. The taxpayer contended (i) that the sums were not chargeable as emoluments under s.160(1) since they had been paid to him by virtue of his special assignment and not by virtue of his directorship, and (ii) that, if they were emoluments, the sums were deductible under Sch. 9, para. 7, to the 1952 Act, as expenses necessarily incurred in the performance of his duties as a director. It was held that those sums were deductible from his emoluments under Sch. 9, para. 7, as expenses necessarily incurred in the performance of the duties of his office, because his contract with the company required the work to be done in Canada and, when circumstances made it necessary, in the United Kingdom.

Lord Reid at p.1206 said:-

«Lord Cave, L.C., recognises that the holder of an office may have to travel if his duties have to be performed in several places in succession. I would doubt whether such travelling is always 'in the course of' the performance of his duties. If a part-time officer has to work at A today and at B a week hence he is not on duty meanwhile and can travel whichever day he chooses. He is entitled to deduct the expenses of travelling from A to B but it seems to me unreal to say that during the hours he is travelling he is on duty. He is travelling not in the course of performing his duties but to enable him to perform his next duty when the time comes».

Lord Morris of Borth-Y-Gest at p. 1209 said:-

«I refer to the words 'necessarily' and 'wholly' and 'exclusively'.

There is little room for doubt as to the meaning of those words. They are not ambiguous.

It will, however, always be essential to have clear findings of fact on certain matters In the first place, it will be necessary to know what exactly was the office or employment that a person held In the second place, it will be necessary to know what exactly were the duties of the office or employment In a great many cases it might be determined that a person's obligations were to be in an office at a certain place at certain appointed times and in that office to perform certain duties. The person concerned would probably reside elsewhere But the position of his home would be a matter for him to decide For reasons personal to himself he might wish to live near to his work or he might wish to live far away from his work How much time or how much, if any, expense would be involved in getting to his work would be entirely his affair If of two such men who had to be in an office at a certain place at certain appointed times so as there to perform similar duties one lived within walking distance and had no travelling expenses while the other chose to live a long distance away with consequent heavy travelling expenses it could not successfully be argued that the latter as the holder of an office or employment of profit was 'necessarily obliged' to incur travelling expenses nor that he was necessarily obliged to incur such travelling expenses in performing the duties of his office or employment The phrases 'in the performance of the duties' or 'in performing the duties' may to some extent be inexact. There may be cases in which someone who has performed certain duties at place A is then obliged to go on to place B and to perform certain duties there While actually travelling between A and B he might or might not be able to perform any of his specifically assigned duties but yet he might be incurring travelling expenses in the performance of or in performing the duties of his office or employmet On those facts he would be necessarily obliged to get from A to B his duty would require him to travel He would be travelling on his work»

Lord Simon of Glaisdale said that the double work-location must not be merely colourable, but also that the two places of work were a necessary obligation arising from the very nature of the office or employment itself and not from the circumstances of

the particular person appointed or employed. He only dissented on the finding of facts.

Lord Salmon at p.1223 said:-

«In my view, the decision in *Ricketts v. Colquhoun* does no more than confirm the proposition that 'in the performance of the duties' must be given a strict interpretation and does not mean in order to enable his duties to be performed. Expenses incurred in travelling to work are not deductible ... The duties of the recorder were not itinerant. They were all performed in one place. The position of a taxpayer whose duties have to be performed in several places so that he must necessarily travel from one place to another was not in question».

I turn now to the present case.

The relevant statutory provisions are Section 11(1) and Section 13(a) and 13(e). They read as follows:-

«11. -(1) Προς εξεύρεσιν του φορολογητέου εισοδήματος παντός προσώπου θα εκπίπτωνται άπασαι αι δαπάναι ας το τοιούτο πρόσωπον υπέστη εξ ολοκλήρου και αποκλειστικώς προς κτήσιν του εισοδήματος. Εν αυταίς περιλαμβάνονται - .....».

«13. Προς εξεύρεσιν του φορολογητέου εισοδήματος προσώπου τινός δεν θα εκπίπτωνται τα ακόλουθα -

(α) αι οικιακαί ή ατομικαί δάπάναι, περιλαμβανομένων των εξόδων μεταβάσεως απο του τόπου διαμονής εις τον τόπον του επαγγέλματος

(ε) πάσα δαπάνη η έξοδον όπερ δεν αντιπροσωπεύει ποσόν εξ ολοκλήρου και αποκλειστικώς διατεθέν η δαπανηθέν προς τον σκοπόν κτήσεως του εισοδήματος».

(«11) - (1) For the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred by such person in the production of the income, including - .....».

«13. For the purpose of ascertainting the chargeable income of any person no deduction shall be allowed in respect of -

(a) domestic or private expenses including the cost of

travelling between residence and place of business;

.....

(e) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring the income»).

In paragraph 2(c) of the sub-judice decision it is written that «your post is Nicosia and according to my information received you had no obligation to work overtime at Larnaca».

The information to which reference is made is the letter of the Director of the Department of Customs & Excise dated 24th January, 1985 (Appendix «E»), which was sent in answer to an inquiry by the Commissioner on the matter, the material part of which reads:-

«(b) according to Section 4 of the Customs & Excise Law No. 82/67 '... the Director may, if satisfied that the exigencies of public business so require, permit offices of customs & excise to be open and officers to be available there or elsewhere for the despatch of business on other days and at other times ...'. Furthermore, according to paragraph 12 of the Departmental Instructions on Overtime, 'No officer may refuse to work overtime unless on application and for just cause, is exempted in writing by the Director';

(c) the attendance of Customs & Excise Officers from Nicosia at Larnaca Airport on overtime was agreed upon at a meeting which was held at my office on the 26 July, 1976 (photocopy of the minutes is enclosed as Appendix II). Subsequent developments such as the spectacular increase in freight and passenger traffic at the airport as well as the port of Larnaca have necessitated the attendance of the Nicosia staff on overtime;

(d) the period during which they are employed on overtime may begin as early as 3.00 o'clock in the afternoon and last until after midnight sometimes ending as late as 6.00 o'clock in the morning; and

(e) the only compensation received by the officers in respect of their travel from Nicosia to Larnaca Airport and back is a commuted allowance of 58 cents and it is the same amount granted by the Government to the Officers who travel

from Larnaca to the airport for the same purpose. Be it noted also that no allowance is granted by the Government in respect of expenses for meals»

It may be rightly considered that the officer was bound to perform such overtime work as he could not refuse to do so. The fact that he did not apply to the Director for exemption does not in any way change the colour of such overtime. Therefore, the overtime work at Larnaca was obligatory as the increase in freight and passenger traffic at the Airport have necessitated the attendance of the Nicosia staff on overtime. The exigencies of the service required overtime work for the proper functioning of the Customs Department at the Airport. The respondent Commissioner was labouring under a misconception that the taxpayer «had no obligation to work overtime at Larnaca». It may validly be said that for the purposes of this case the substantial question is not whether the taxpayer had an obligation under his terms and conditions of service to work overtime at Larnaca Airport.

Two questions pose for determination:-

(a) Whether these travelling expenses were wholly and exclusively incurred in the production or for the purpose of acquiring the income; and,

(b) If so, whether they represent the cost of travelling between residence and place of business.

(a) The material words of s.11(1) are «εξ ολοκλήρου και αποκλειστικώς προς κτήσιν του εισοδήματος» («wholly and exclusively in the production of the income»). These words are not ambiguous; there is no doubt as to their meaning. The test is objective and not subjective. It is essential to have clear findings of fact on certain matters.

The income is produced by overtime work as Customs Officer at Larnaca Airport. The production of the income starts from the moment he resumes his duty at the Airport and continues during the performance of the duties there. No income is produced during the journey to and from Larnaca. The journey to Larnaca is made by the applicant for one purpose only: the production of the income. The travelling expenses to and from Larnaca for the purpose of the overtime are not incurred mainly for the production of the income but exclusively and wholly for that purpose.

Expenses are not deductible only when they are incurred during the performance of the duties, as decided by the respondent. There is nothing in our Law providing that the expenses should be incurred «during the performance of the duties».

The applicant satisfies the requirements laid down in Section 11(1) of the Income Tax legislation. This answers the provision of Section 13(e).

(b) The material words for this case of s.13(a) are «μεταβάσεως από του τόπου διαμονής εις τον τόπον του επαγγέλματος». The substantial question in this case is the place of business and in the case of a civil servant the place where he is posted.

The words «the cost of travelling between residence and place of business» have to be construed that the expenses of travelling between the residence and the office by a civil servant are not deductible. A civil servant posted at Nicosia may reside at a walking distance from his office or far away, depending on his own finance, volition and other circumstances. These travelling expenses are not deductible. When, however, he has to perform the duties of his post at two different places in two different towns - Nicosia and Larnaca - the position is different. If a civil servant is posted at Larnaca and he resides at Nicosia, his travelling costs from Larnaca to Nicosia are not deductible. If for reasons personal to himself he might wish to live away from his place of work and incurs expenses in getting to his work, this is entirely his own affair and are not allowed by the Law. They are explicitly excluded by the provision of paragraph (a) of s.13.

In the case of a civil servant the «τόπος επαγγέλματος» is the place of his posting where he is required under the Law to attend and perform his normal regular duties. The Law does not refer to a person who has dual location of business. A civil servant posted at Nicosia, has to attend his office and perform the duties required of him at such office. The travelling expenses to and from that office are not deductible.

Travelling expenses incurred when the taxpayer civil servant has to travel to another place to produce taxable income are not excluded. A civil servant posted at place A, say, Nicosia, and then obliged to go to place B, say, Larnaca, to perform certain duties there, his additional duties would require him to travel to place B. Thus he has dual location of business. This second place of work

is not within the ambit of the expression «place of business» of s.13(a) of the Law.

As in order to produce the object of the tax he is obliged to incur such travelling expenses to another place than the place of his posting, these travelling expenses are deductible.

To sum up, the sole issue in this case is whether the travelling expenses from Nicosia to Larnaca and back incurred by the taxpayer - Customs Officer -for the purpose of attending his duties for overtime work at the Larnaca Airport, wherefrom the taxable income was produced, are deductible.

The applicant civil servant is posted at Nicosia, where he attends his office during all Government working hours - 8.00 a.m. - 2.00 p.m. or 7.30 a.m. - 1.30 p.m. - and after those hours he is required by the Director of the Department, due to the «spectacular increase in freight and passenger traffic at the airport have necessitated the attendance of the Nicosia staff on overtime» for the performance of the duties of the Department and for the proper administration of the country. He has dual location of duty. The statutory provision disallowing the cost of travelling between residence and place of business relates only to the travelling from his residence to his office at Nicosia and not to the travelling from the place of his posting to Larnaca, which is not the «τόπος επαγγέλματος», this being Nicosia. The travelling expenses are objectively incurred for the sole purpose and, therefore, wholly and exclusively for the production of the income and, therefore, they are deductible.

The sub judice decision suffers from misconception of fact and is contrary to law. It is hereby annulled.

The question of costs gave me some concern. Having regard to all the circumstances of the case, respondent to pay £50.- towards applicant's costs.

Sub judice decision annulled. Respondent to pay £50. - costs.