IN THE PRIVY COUNCIL

17 OF 1970

ON APPEAL FROM THE COURT OF APPEAL
OF NEW ZEALAND

JUDGMENT

17/1970

BETWEEN THE COMMISSIONER OF INLAND REVENUE

Appellant

A N D ASSOCIATED MOTORISTS PETROL COMPANY LIMITED a Wellington holding company

Respondent

RECORD OF PROCEEDINGS

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EVIDENCE: By consent the evidence heard in the Case Stated between Europa Oil (N.Z.) Limited and the Commissioner of Inland Revenue was treated in the Supreme Court (and in the Court of Appeal) as applicable, where relevant to this case.

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IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE COMMISSIONER OF INLAND REVENUE

APPELLANT

A N D

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED
of Wellington Holding Company

RESPONDENT

RECORD OF PROCEEDINGS

NO. 1

CASE STATED

Supreme Court No. 1 Case Stated 23 November 1967

pursuant to section 32 of the Land and Income Tax Act 1954.

1. AT all material times the Objector was a private limited liability company having its registered office at Wellington where it carried on the business of holding company. The authorised capital at all such times was uncalled and amounted to £100 divided into 100 ordinary shares of £1 each. The shares comprising the said authorised capital were at all such times wholly owned by Europa Oil (N.Z.) Limited and held by the said Europa Oil (N.Z.) Limited as to 98 shares and by two others on behalf of the said Europa Oil (N.Z.) Limited as to 1 of the remaining shares each. At all material times the Objector was a shareholder in Pan-Eastern Refining Company Limited (hereinafter referred to as "Pan-Eastern").

2. AT all material times Pan-Eastern was a duly incorporated limited liability company having its registered office at Bahama Islands. The fully paid issued capital of Pan-Eastern during all such times was £100,000 divided into 100,000 ordinary shares of £1 each of which 50,000 of such shares were held by the Objector and the remaining 50,000 by Propet Co. Ltd a subsidiary of Gulf Oil Corporation.

3. IN furnishing returns of income to the Commissioner of Inland Revenue (hereinafter referred to as "the Commissioner") the Objector's accountant declared that the Objector had derived assessable and non-assessable income during the income years ended on the 31st day of March 1960 to 1965 inclusive as follows:

Income Year ended 31 March 1960

Net profit shown in profit and loss account	£151,608.16. 9
Ordinary income tax and social security income tax not allowable as deduction	946. 1. 7
Total income for income tax purposes	152,454.18. 4
Less non-assessable income	150,562.10. 0 *
Assessable income	1,892. 8. 4
Non-assessable income - dividends from Pan-Eastern	150,562.10. 0 *

Income Year ended 31 March 1961

Net profit shown in profit and loss account	£154,042.17. 5
Ordinary income tax and social security income tax not allowable as deduction	3,711. 0. 8
Total income for income tax purposes	157,753.18. 1
Less non-assessable income	150,562.10. 0 *
Assessable income	7,191. 8. 1
Non-assessable income - dividends from Pan-Eastern	150,562.10. 0 *

Income Year ended 31 March 1962

Net profit shown in profit and loss account	£202,943.15. 1
Ordinary income tax and social security income tax not allowable as deduction	2,377.11. 6
Total income for income tax purposes	205,321. 6. 7
Less non-assessable income	200,750. 0. 0 *
Assessable income	4,571. 6. 7
Non-assessable income - dividends from Pan-Eastern	200,750. 0. 0 *

Income Year ended 31 March 1963

Net profit shown in profit and loss account	£204,807.15. 2
Ordinary income tax and social security income tax not allowable as deduction	4,057.10. 6
	208,865. 5. 8
Less accrued interest	93.17. 4
Total income for income tax purposes	208,771. 8. 4
Less non-assessable income	200,750. 0. 0 *
Assessable income	8,021. 8. 4
Non-assessable income - dividends	

4

Income Year ended 31 March 1964

Net profit shown in profit and loss account	£2,525,174. 6.10
Ordinary income tax and social security income tax not allowable as deduction	267.17.11
Add accrued interest	93.17. 4
Total income for income tax purposes	2,525,536. 2. 1
Less non-assessable income	2,525,000. 0. 0 *
Assessable income	536. 2. 1
Non-assessable income - dividends from Pan-Eastern	2,525,000. 0. 0 *

Income Year ended 31 March 1965

Net profit shown in profit and loss account	£404,207. 6. 5
Ordinary income tax and social security income tax not allowable as deduction	206. 0. 8
	404,413. 7. 1
Less accrued interest	393.11. 6
Total income for income tax purposes	404,019.15. 7
Less non-assessable income	404,000. 0. 0*
Assessable income	19.15. 7
Non-assessable income - dividends from Pan-Eastern	404,000. 0. 0*

Copies of the financial accounts accompanying the said returns are annexed hereto and marked "A", "A1", "A2", "A3", "A4" and "A5" respectively.

The said returns of income were received by the Commissioner on the respective dates shown hereunder:

Return of income for the income year ended 31 March	Date of receipt by the Commissioner
1960	15.12.60
1961	8. 1.62
1962	24.12.6
1963	4. 2.64
1964	18. 2.65
1965	8. 2.66

4. FOLLOWING the receipt of each of the said returns for the income years ended on the 31st day March 1960 to 1964 inclusive the Commissioner made an assessment of the Objector's liability for ordinary income tax and social security income tax in respect of the income to which the particular return related. Details of each such assessment and the date on which it was made are as follows:

Income year ended 31 March	Assessable Income	Non-Assessable Income
1960	£1,892. 8. 4	£150,562.10. 0
1961	7,191. 8. 1	150,562.10. 0
1962	4,571. 6. 7	200,750. 0. 0
1963	8,021. 8. 4	200,750 0. 0
1964	536. 2. 1	2,525,000. 0. 0

	Ordinary Income Tax	Social Security Income Tax	Date of Assessment
1960	£804. 2. 0	£141.18. 8	11.1.61
1961	3056. 3. 6	539. 7. 2	7.2.62
1962	1930.13. 0	342.17. 0	28.2.63
1963	3388. 3. 6	601.12. 2	18.2.64
1964	227.13. 6	40. 4. 2	28.2.65

5. THE Commissioner on the 30th day of March 1965 made an amended assessment of the Objector's liability for ordinary income tax and social security income tax in respect of income derived during the income year ended on the 31st day of March 1960 to include proprietary income pursuant to section 138 of the Land and Income Tax Act 1954 (hereinafter referred to as "the said section 138") as follows:

Assessable income as previously	£ 1,892. 0. 0*
Add proprietary income Pan-Eastern	441,048. 0. 0
Total assessable income	442,940. 0. 0
Ordinary income tax	188,249.10. 0*
Social security income tax	141.18. 8

*A deduction pursuant to paragraph (c) of sub-section (3) of the said section 138 has no application.

6. THE Objector objected to the said amended assessment on the grounds set forth in its adviser's letter dated the 7th day of April 1965 a copy whereof is annexed hereto and marked "B".

7. SUBSEQUENTLY discussions in respect of inter alia the said objections took place between the Commissioner or certain of the Commissioner's officers and representatives of the Objector or the said Europa Oil (N.Z.) Limited.

8. AS a result of the said objections and the said discussions further letters in respect of such objections passed between the Commissioner and the Objector, the Objector's adviser or the said Europa Oil (N.Z.) Limited. Annexed hereto and marked in alphabetical sequence "C" to "R" inclusive are copies of the said letters. The date and writer of such letters and the marking of such copies are as follows:

Letter dated	Writer	Marked
21 April 1965	Commissioner	"C"
29 April 1965	Objector's adviser	"D"
5 May 1965	Commissioner	"E"
20 May 1965 *	Objector's adviser	"F"
14 June 1965	Commissioner	"G"
22 June 1965	Objector's adviser	"H"
28 June 1965	Objector's adviser	"I"
29 June 1965	Commissioner	"J"
30 June 1965	Commissioner	"K"
15 July 1965	Objector's adviser	"L"
6 August 1965	Commissioner	"M"
24 August 1965	Objector's adviser	"N"
13 September 1965	Commissioner	"O"
13 October 1965	Objector's adviser	"P"
17 February 1966	Objector	"Q"
12 April 1966	Europa Oil (N.Z.) Ltd	"R"

* The letter dated the 20th day of May 1965 referred incorrectly to two dates as follows; the reference in the introductory first paragraph to 7th April should read 5th May, and the reference in paragraph 4 to 31st March 1959 should read 31st December 1959.

9. THE Commissioner on the 17th day of December 1965 made amended assessments of the Objector's liability for ordinary income tax and social security income tax in respect of income derived during the income years ended on the 31st day of March 1961 to 1964 inclusive to include proprietary income pursuant to the said section 138 as follows:

Income Year ended 31 March 1961

Proprietary assessable income ex Pan-Eastern	£410,944. 0. 0
Other assessable income	7,191. 8. 1
Total assessable income	418,135. 8. 1
Ordinary income tax	177,707. 7. 6*
Social security income tax	539. 7. 2

Income Year ended 31 March 1962

Proprietary assessable income ex Pan-Eastern	£516,239. 0. 0
Other assessable income	4,571. 6. 7
Total assessable income	520,810. 6. 7
Ordinary income tax	220,804. 5. 0*
Social security income tax	342.17. 0

Income Year ended 31 March 1963

Proprietary assessable income ex Pan-Eastern	£480,594. 0. 0
Other assessable income	8,021. 8. 4
Total assessable income	488,615. 8. 4
Ordinary income tax	207,121. 7. 6*
Social security income tax	601.12. 2

Income Year ended 31 March 1964

Proprietary assessable income ex Pan-Eastern	£536,087. 0. 0
Other assessable income	536. 2. 1
Total assessable income	536,623. 2. 1
Ordinary income tax	227,524.15. 6*
Social security income tax	40. 4. 2

*A deduction pursuant to paragraph (c) of sub-section (3) of the said section 138 has no application.

The respective amounts of proprietary income included in the amended assessments set forth in this paragraph in respect of the income years ended on the 31st day of March 1961 to 1964 inclusive were based upon information in respect of such respective years furnished to the Commissioner by the Objector's adviser in the letter dated the 22nd day of June 1965 which is referred to in paragraph 8 hereof and is annexed hereto and marked "H".

10. THE Objector objected to the amended assessments referred to in paragraph 9 hereof on the grounds set forth in its adviser's letter dated the 28th day of March 1966 a copy whereof is annexed hereto and marked "B1".

11. THE Commissioner on the 12th day of May 1966 made an assessment of the Objector's liability for ordinary income tax and social security income tax in respect of income derived during the income year ended on the 31st day of March 1965 and on the 19th and 25th days of May 1966 made amended assessments of the Objector's liability for ordinary income tax and social security income tax in respect of income derived during the income years ended on the 31st day of March 1964 and 1960 respectively. Details of the assessments so made are as follows:

Income Year ended 31 March 1965

Proprietary assessable income ex Pan-Eastern	£553,695. 0. 0
Other assessable income	19.15. 7
Total assessable income	553,714.15. 7
Ordinary income tax	234,788. 9. 0*
Social security income tax	1. 9. 9

Supreme Court
No. 1
Case Stated
23 November 1967
(continued)

Income Year ended 31 March 1964	
Proprietary assessable income ex Pan-Eastern	£511,315. 0. 0
Other assessable income	536. 2. 1
Total assessable income	511,851. 2. 1
Ordinary income tax	216,996.13. 6*
Social security income tax	40. 4. 2
Income Year ended 31 March 1960	
Proprietary assessable income ex Pan-Eastern	£425,239. 0. 0
Other assessable income	1,892. 8. 4
Total assessable income	427,131. 8. 4
Ordinary income tax	181,530.13. 6*
Social security income tax	141.18. 8

* A deduction pursuant to paragraph (c) of sub-section (3) of the said section 138 has no application.

The respective amounts of proprietary income included in the assessment in respect of the income year ended on the 31st day of March 1965 and the amended assessment in respect of the income year ended on the 31st day of March 1964 set forth in this paragraph were based upon information supplied to the Commissioner by the said Europa Oil (N.Z.) Limited and the Objector respectively in the letters dated the 17th day of February 1966 and the 12th day of April 1966 which are referred to in paragraph 8 hereof and are annexed hereto and marked "Q" and "R" respectively.

The amount of proprietary income included in the amended assessment set forth in this paragraph in respect of the income year ended on the 31st day of March 1960 was based upon information in respect of that year supplied to the Commissioner by the Objector's adviser in the letter dated the 22nd day of June 1965 which is referred to in paragraph 8 hereof and is annexed hereto and marked "H".

12. THE Objector objected to the assessment in respect of income derived during the income year ended on the 31st day

of March 1965 referred to in the preceding paragraph hereof on the grounds set forth in its adviser's letter dated the 11th day of July 1966 a copy whereof is annexed hereto and marked "B2".

13. UPON the remaining objections referred to in paragraphs 6, 8 and 10 hereof and the objections referred to in paragraph 12 hereof being disallowed the Commissioner was required to state this case.

14. THE Objector contends that:

(a) In relation to the shareholding of the Objector in Pan-Eastern during each of the income years ended on the 31st day of March 1960 to 1965 inclusive and at all other material times Pan-Eastern was not a proprietary company or ordinary proprietary company within the meaning of the said section 138 nor was it a proprietary company within the meaning of section 2 of the said Act.

(b) The Objector did not during each or any of the said years or at any other material time derive proprietary income from Pan-Eastern within the meaning of the said section 138.

(c) (i) In respect of each of the income years ended on the 31st day of March 1960 to 1964 inclusive the Commissioner made an assessment of the liability of the Objector for ordinary income tax and social security income tax on the basis that Pan-Eastern was not a proprietary company within the meaning of the said section 138.

(ii) Consequent upon such assessments and unaware of its possible assessability for proprietary income and to comply with the requirements of the excess retention tax provisions of the said Act the Objector maintained its ordinary practice and distributed by way of dividends

to its shareholders the total of the amounts received in each such year by way of dividends from Pan-Eastern as set out in paragraph 3 hereof. The total of the said amounts so distributed by the Objector during the said period was £3,227,625.0.0.

(iii) In making his said original assessments for each of the years ended on the 31st day of March 1960 to 1964 inclusive the Commissioner acted with knowledge of all the relevant facts and circumstances. The Objector acted to its detriment by distributing to its shareholders the said sum of £3,227,625.0.0 and the Commissioner was thereby precluded from making his amended assessments dated the 30th day of March 1965 and the 17th day of December 1965 in respect of the same years wherein he claimed that Pan-Eastern was a proprietary company within the meaning of the said section 138 and wherein he purported to assess as proprietary income the said amounts totalling £3,227,625.0.0.

(d) The Commissioner has made amended assessments of income tax against Europa Oil (N.Z.) Limited in respect of the profits of Pan-Eastern upon the grounds that such amounts are the income of Europa Oil (N.Z.) Limited and not of Pan-Eastern and upon the grounds that the agreements which resulted in the said profits are void under section 108 of the said Act and the Commissioner is precluded from making contemporaneous amended assessments involving the same amounts against the Objector whereby the Commissioner implicitly asserts that the same agreements are valid.

(e) The said amended assessments made on the 30th day of March 1965 and the 17 th day of December 1965,

being in each case proprietary assessments, did not constitute alterations in or additions to the original non-proprietary assessments in order to ensure the correctness thereof within the meaning of section 22 of the said Act, and each and all of the said amended assessments are accordingly invalid.

(f) The said amended assessments made on the 30th day of March 1965 and the 17th day of December 1965, purporting in each case to correct an alleged mistake of law on the part of the Commissioner in making his original assessments, did not constitute alterations in or additions to the original assessments in order to ensure the correctness thereof within the meaning of section 22 of the said Act, and each and all of the said amended assessments are accordingly invalid.

(g) The amended assessments made by the Commissioner in respect of income for the year ended on the 31st day of March 1960 and referred to in paragraphs 5 and 11 hereof are invalid in that the Commissioner was and is precluded by virtue of section 24 of the said Act from using as a reference by which the amount of proprietary income included in such assessments was calculated income derived by Pan-Eastern prior to the 1st day of January 1960.

15. THE Commissioner contends that:

(a) At all material times Pan-Eastern was a proprietary company within the meaning of the said section 2 and the said section 138 and an ordinary proprietary company within the meaning of the said section 138 and the respective amounts set forth, under the heading "Proprietary assessable income ex Pan-Eastern", in paragraph 9 hereof in respect of the income years ended on the 31st day of March 1961 to 1963 inclusive and in paragraph 11 thereof in respect of the income years ended

on the 31st day of March 1960, 1964 and 1965 constitute proprietary income derived by the Objector from Pan-Eastern in such years respectively.

(b) The Commissioner was not precluded from making all or any of the assessments or amended assessments to which the objections herein relate.

(c) The Commissioner was not precluded by virtue of section 24 of the Land and Income Tax Act 1954 from including in the amended assessment in respect of the income year ended on the 31st day of March 1960 referred to in paragraph 11 hereof the amount of £425,239.0.0 set forth in that paragraph in respect of that year under the heading "Proprietary assessable income ex Pan-Eastern".

16. WITHOUT detracting from the generality of the Commissioner's contentions in paragraph 15 hereof, the Commissioner does not necessarily accept any allegations of fact in the Objector's contentions nor the factual basis upon which they are claimed to be made.

17. THE questions for the determination of this Honourable Court are whether the Commissioner acted incorrectly in making the amended assessments in respect of the income years ended on the 31st day of March 1961, 1962 and 1963 referred to in paragraph 9 hereof and in respect of the income years ended on the 31st day of March 1960 and 1964 referred to in paragraph 11 hereof and in making the assessment in respect of the income year ended on the 31st day of March 1965 referred to in paragraph 11 hereof and if so in what respects should such amended assessments and assessment and which of them be amended.

Dated at Wellington this 23rd day of November 1967

D. A. Stevens

Commissioner of Inland Revenue

Case Stated
Annexure A
"A"

ASSOCIATED MOTORISTS PETROL CO. LTD. - ANNUAL ACCOUNTS

PROFIT AND LOSS ACCOUNT FOR YEAR ENDED 31.3.60

1959		1960	1959		1960
	To: Transfer from Provision for Taxation 1959	11	100,375	By: Dividends	150,562.10. 0
826	Provision for Taxation	946. 0. 8	1,653	Interest	1,892. 8. 4
101,202	Transfer to Profit & Loss Appropriation A/c	151,508.16. 9			
102,028		£152,454.18. 4	102,028		£152,454.18. 4

PROFIT AND LOSS APPROPRIATION ACCOUNT AS AT 31.3.60

75,281	To: Dividend	100,375. 0. 0	75,279	By: Balance brought forward	101,199.11. 2
101,200	Balance 31.3.59	152,333. 7.11	101,202	Net Profit	151,508.16. 9
176,481		£252,708. 7.11	176,481		£252,708. 7.11

"A"

ASSOCIATED MOTORISTS PETROL CO. LIMITED - ANNUAL ACCOUNTS

BALANCE SHEETS AT 31ST MARCH 1960

1959		1960	1959		1960
100	Authorised Capital	100. 0. 0.	102,028	Cash at Bank	154,107. 9. 6.
100	Less Uncalled Capital	100. 0. 0.	50,500	Shares in other Companies	50,500. 0. 0.
-		- - -			
101,200	Profit & Loss Appropriation A/c	152,333. 7.11.			
826	Provision for Taxation	946. 0. 8.			
50,502	Europa Oil (N.Z.) Ltd. Current A/c	51,328. 0.11.			
152,528		£204,607. 9. 6.	152,528		£204,607. 9. 6.

Wellington N.2
7th November 1960

.....Director

.....Director

Auditors' Report to Members of Associated Motorists Petrol Co. Limited

We have obtained all the information and explanations that we have required. In our opinion proper books of account have been kept by the Company so far as appears from our examination of those books. In our opinion, according to the best of our information and the explanations given to us and as shown by the said books, the balance sheet and the profit and loss account are properly drawn up so as to give respectively a true and fair view of the state of the Company's affairs as at 31st March 1960, and of the results of its business for the year ended on that date. According to such information and explanations the accounts, the balance sheet, and the profit and loss account give the information required by the Act in the manner so required.

PATTRICK, FEIST, JACK & MIDDLEBROOK
PUBLIC ACCOUNTANTS
AUDITORS

Wellington 7th November 1960

15

Supreme Court
No. 1
Case Stated
Annexure A1

"A1"

ASSOCIATED MOTORISTS PETROL CO. LIMITED

PROFIT AND LOSS ACCOUNT FOR YEAR ENDED 31.3.61

1960			1961	1960			1961
-	TO	Sundry Expenses	2 3 10	150,563	BY	Dividends	150,562 10 0
946		Provision for Taxation	3,711 0 8	1,892		Interest	7,193 11 11
151,509		Transfer to Profit & Loss Appropriation A/C	154,042 17 5				
152,455			£ 157,756 1 11	152,455			£ 157,756 1 11

PROFIT AND LOSS APPROPRIATION ACCOUNT AS AT 31.3.61

100,375	TO	Dividend	150,562 10 0	101,199	BY	Balance brought forward	152,333 7 11
152,333		Balance carried forward as per Balance Sheet	155,813 15 4	151,509		Net Profit	154,042 17 5
252,708			£ 306,376 5 4	252,708			£ 306,376 5 4

"A1"

ASSOCIATED MOTORISTS PETROL CO. LIMITED

BALANCE SHEET AS AT 31.3.61

1960		1961	1960		1961
			154,107	Cash at Bank	161,298 17 7
			50,500	Shares in other Companies	50,500 0 0
100	Authorised Capital	100 0 0			
100	Less: Uncalled Capital	100 0 0			
-		. . .			
152,333	Profit & Loss Appropriation A/C	155,813 15 4			
946	Provision for Taxation	3,711 0 8			
51,328	Europa Oil (N.Z.) Ltd, Current A/C	52,274 1 7			
204,607		£ 211,798 17 7	204,607		£ 211,798 17 7

WELLINGTON, N.Z.,
20th November, 1961.

..... Director.

..... Director.

AUDITORS' REPORT TO MEMBERS OF ASSOCIATED MOTORISTS PETROL CO.LIMITED:

We have obtained all the information and explanations that we have required. In our opinion proper books of account have been kept by the Company so far as appears from our examination of these books. In our opinion, according to the best of our information and the explanations given to us and as shown by the said books, the balance sheet and the profit and loss account are properly drawn up so as to give respectively a true and fair view of the state of the Company's affairs as at 31st March, 1961, and of the results of its business for the year ended on that date. According to such information and explanations the accounts, the balance sheet and the profit and loss account give the information required by the Companies Act 1955 in the manner so required.

[illegible]
AUDITORS.

WELLINGTON, N.Z.,
20th November, 1961.

Case Stated
Annexure A2

A2

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

PROFIT AND LOSS ACCOUNT FOR YEAR ENDED 31ST MARCH 1962

	1961	1962		1961	1962
: Sundry Expenses	2. 3.10	- - -	By: Dividends	150,562.10. 0	200,750. 0. 0
Provision for Taxation	3,711 0. 8	2,377.11. 6	Interest	7,193.11.11	4,571. 6. 7
Transfer to Profit and Loss Appropriation Account	154,042.17. 5	202,943.15. 1			
	£157,756. 1.11	£205,321. 6. 7		£157,756. 1.11	£205,321. 6. 7

PROFIT AND LOSS APPROPRIATION ACCOUNT AS AT 31ST MARCH 1962.

: Dividend	150,562.10. 0	152,750. 0. 0	By: Balance Brought Down	152,333. 7.11	155,813.15. 4
Balance Carried Forward as per Balance Sheet	155,813.15. 4	206,007.10. 5	Net Profit Brought Down	154,042.17. 5	202,943.15. 1
	£306,376. 5. 4	£358,757.10. 5		£306,376. 5. 4	£358,757.10. 5

"A2"

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

BALANCE SHEET AS AT 31ST MARCH 1962

	1961	1962
Authorised Capital	100. -. -	100. -. -
Less: Uncalled Capital	100. -. -	100. -. -
	- - -	- - -
Profit and Loss Appropriation Account	155,813.15. 4	206,007.10. 5
Provision for Taxation	3,711. 0. 8	2,285.10. 6
Europa Oil (N.Z.) Ltd. Current Account	52,274. 1. 7	56,077. 3. 3
	£211,798.17. 7	£264,370. 4. 2

	1961	1962
Cash at Bank	161,298.17. 7	13,120. 4. 2
Shares in other Companies	50,500. -. -	50,500. -. -
Sundry Debtors	- - -	200,750. -. -
	£211,798.17. 7	£264,370. 4. 2

. . . . . Director

. . . . . Director

WELLINGTON, N.Z.
30th November, 1962.

AUDITORS' REPORT TO MEMBERS OF ASSOCIATED MOTORISTS PETROL COMPANY LIMITED:

We have obtained all the information and explanations that we have required. In our opinion proper books of account have been kept by the Company so far as appears from our examination of those books. In ouropinion, according to the best of our information and the explanations given to us and as shown by the said books, the Balance Sheet and the Profit and Loss Account are properly drawn up so as to give respectively a true and fair view of the state of the Company's affairs as at 31st March, 1962, and of the results of its business for the year ended on that date. According to such information and explanations the Accounts, the Balance Sheet and the Profit and Loss Account give the information required by the Companies Act 1955 in the manner so required.

WELLINGTON, N.Z.
30th November, 1962.

PATTRICK, FEIST, JACK & MIDDLEBROOK
PUBLIC ACCOUNTANTS
AUDITORS.

Case Stated
Annexure A3

A3

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

PROFIT & LOSS ACCOUNT FOR YEAR ENDED 31ST MARCH, 1963

	1962	1963		1962	1963
To: Sundry Expenses	- - -	6. 1. 3	By: Dividends	200,750. 0. 0	200,750. 0. 0
Provision for Taxation	2,377.11. 6	4,057.10. 6	Interest	4,571. 6. 7	8,121. 6.11
Transfer to Profit & Loss Appropriation A/c.	202,943.15. 1	204,807.15. 2			
	£205,321. 6. 7	£208,871. 6.11		£205,321. 6. 7	£208,871. 6.11

PROFIT & LOSS APPROPRIATION ACCOUNT AS AT 31ST MARCH, 1963

To: Dividend	152,750. 0. 0	402,425. 0. 0	By: Balance brought down	155,813.15. 4	206,007.10. 5
Balance	206,007.10. 5	8,390. 5. 7	Net Profit	202,943.15. 1	204,807.15. 2
	£358,757.10. 5	£410,815. 5. 7		£358,757.10. 5	£410,815. 5. 7

"A3"

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

BALANCE SHEET AS AT 31ST MARCH, 1963

	1962	1963
Authorised Capital	100. 0. 0	100. 0. 0
Less: Uncalled Capital	100. 0. 0	100. 0. 0
	- - -	- - -
Profit & Loss Appropriation A/c.	206,007.10. 5	8,390. 5. 7
Provision for Taxation	2,285.10. 6	4,057.10. 6
Sundry Creditors	- - -	12. 0. 6
Europa Oil (N.Z.) Ltd. Current A/c.	56,077. 3. 3	259,101.13. 3
	£264,370. 4. 2	£271,561. 9.10

	1962	1963
Cash at Bank	13,120. 4. 2	20,217.12. 6
Shares in other Companies	50,500. 0. 0	50,500. 0. 0
Sundry Debtors	200,750. 0. 0	200,843.17. 4
	£264,370. 4. 2	£271,561. 9.10

WELLINGTON, N.Z.
29th November, 1963.

..... Director

..... Director

AUDITORS' REPORT TO MEMBERS OF ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

We have obtained all the information and explanations that we have required. In our opinion proper books of account have been kept by the Company so far as appears from our examination of those books. In our opinion, according to the best of our information and the explanations given to us and as shown by the said books, the Balance Sheet and the Profit and Loss Account are properly drawn up so as to give respectively a true and fair view of the state of the Company's affairs as at 31st March, 1963, and of the results of its business for the year ended on that date. According to such information and explanations the Accounts, the Balance Sheet and the Profit and Loss Account give the information required by the Companies Act 1955 in the manner so required.

PATRICK, ERNST, JACK & MIDDLEBROOK
PUBLIC ACCOUNTANTS

WELLINGTON, N.Z.
29th November, 1963.

Supreme Court
No. 1
Case Stated
Annexure A4

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

"A4"

(1) Calculation of Assessable Income

Net Profit Year Ended 31.3.64 (as returned)	£	442. 4. 9
Add Interest Accrued 31.3.63 received during Year Ended 31.3.64	£	93.17. 4
	£	536. 2. 1

(2) Non-assessable Income £ 2,525,000. 0. 0

(3) Provision for Taxation £ 267.17.11

EUROPA OIL (N.Z.) LIMITED

OVERSEAS INCOME INCLUDING DIVIDENDS

YEAR ENDED 31st MARCH, 1964

Description of Income	Gross Income in N.Z. Currency	Oversees Tax Paid
Dividend	£(N.Z)2,525,000	-

"A4"

	1963	1964
BY: Dividends	200,750. 0. 0.	2,525,000. 0. 0.
Interest	8,121. 6.11.	443. 4. 9.
	208,871. 6.11.	2,525,443. 4. 9.

ACCOUNT AS AT 31ST MARCH, 1964.

BY: Balance brought down	206,007.10. 5.	8,390. 5. 7.
Nett Profit	204,807.15. 2	2,525,174. 6. 10.
Transfer from Prov. for Tax	-	287. 6. 4.
	410,815. 5. 7.	2,533,851. 18. 9.

ASSOCIATED MOTORISTS PETROL CO
PROFIT & LOSS ACCOUNT FOR Y

		1963			1964		
TO:	Sundry Expenses	6.	1.	3.	1.	0.	0.
	Provision for Taxation	4,057.	10.	6.	267.	17.	11.
	Transfer to Profit & Loss Appropriation A/C	204,807.	15.	2.	2,525,174.	6.	10.
		208,871.	6.	11.	2,525,443.	4.	9.

PROFIT & LOSS APPROPRIATION

TO:	Dividend	402,425.	0.	0.	2,525,000.	0.	0.
	Balance carried forward	8,390.	5.	7.	8,851.	18.	9.
		410,815.	5.	7.	2,533,851.	18.	9.

:OMPANY LIMITED.
IARCH, 1964.

"A4" 25

	1963.	1964.
ısh at Bank	20,217. 12.6.	674.19. 9.
ıares in other Companies	50,500. 0.0.	50,500. 0. 0.
ındry Debtors	200,843. 17.4.	- - -
	271,561. 9.10.	51,174.19. 9.

..... Director.

..... Director.

LIMITED.
required. In our opinion proper books of account have
hese books. In our opinion, according to the best of
.e said books, the Balance Sheet and the Profit and Loss
fair view of the state of the Company's affairs as at
.ded on that date. According to such information and
.s Account give the information required by the Companie

PATTRICK, FEIST, JACK AND MIDDLEBROOK.

Public Accountants
Auditors

ASSOCIATED MOTORISTS PETROL C
BALANCE SHEET AS AT 31ST M

	1963.	1964.	
Authorised Capital	100. 0. 0.	100. 0. 0.	Ca
Less: Uncalled Capital	100. 0. 0.	100. 0. 0.	Sh
	- - -	- - -	Sh
Profit & Loss Appropriation A/C.	8,390. 5. 7.	8,851. 18. 9.	
Provision for Taxation	4,057. 10. 6.	267. 17.11.	
Sundry Creditors	12. 0. 6.	- - -	
Europa Oil (N.Z) Ltd. Current A/C	259,101. 13. 3.	42,055. 3. 1.	
	271,561. 9.10.	51,174. 19. 9.	

WELLINGTON, N.Z.
30th November, 1964.

AUDITORS' REPORT TO MEMBERS OF ASSOCIATED MOTORISTS PETROL COMPANY

We have obtained all the information and explanations that we have been kept by the Company so far as appear from our examination of t our information and the explanations given to us and as shown by th Account are properly drawn up so as to give respectively a true and 31st March, 1964 and of the results of its business for the year en explanations the Accounts, the Balance sheet and the Profit and Los Act 1955 in the manner so required.

WELLINGTON, N.Z.
30th November, 1964

No. 1
Case Stated
Annexure A5

"A5"

ASSOCIATED INDUSTRIES HOTEL COMPANY LIMITED

TAXATION PROVISION 31.3.65.

Assessable Income

Net Profit per Profit & Loss Account	404,413 - 7 - 1
Less Dividends - Non Assessable	404,000 - 0 - 0
	413 - 7 - 1
Less	
Interest earned not yet received at 31.3.65	393 -11 - 6
Assessable income year ended 31.3.65	£19 -15 - 7

Provision for Taxation

(1)	To be assessed for year ended 31.3.65 on	£19 -15 - 7	
	Income Tax		8 - 0 -11
	Social Security Income Tax		1 - 9 - 9
			9 -10 - 8
(2)	Estimated year ended 31.3.66 on	£393 -11 - 6	196 -10 - 0
	Total Provision		£206 - 0 - 8

COMPANY LIMITED

ENDED 31ST MARCH, 1965.

"A5"

1964		1965
443	Interest	414 - 7 - 1
2,525,000	Dividends	404,000 - 0 - 0
£2,525,443		£404,414 - 7 - 1
2,525,442	Balance brought down	404,413 - 7 - 1
£2,525,442		£404,413 - 7 - 1

AS AT 31ST MARCH, 1965.

8390	Balance brought down	8,851 -18 - 9
2,525,174	Nett Profit	404, 207 - 6 - 5
288	Transfer from Prov. for Tax	1
£2,533,852		£413,059 - 5 - 3

ASSOCIATED MOTORISTS PETROL

PROFIT & LOSS ACCOUNT FOR YEA

1964		1965
1	Sundry Expenses	1 - 0 - 0
2525442	Net Profit Carried Down	404,413 - 7 - 1
2,525,443		£404,414 - 7 - 1
268	Provision for Taxation	206 - 0 - 8
2,525,174	Transferred to P.&.L. Appropriation A/c	404207 - 6 - 5
£2,525,442		£404,413 - 7 - 1

PROFIT & LOSS APPROPRIATION ACCOUNT

2,525,000	Dividend	404,000 - 0 - 0
8,852	Balance carried forward	9,059 - 5 - 3
£2,533,852		£413,059 - 5 - 3

"A5"

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

BALANCE SHEET AS AT 31st MARCH, 1965

1964		1965	1964		1965
100	Authorised Capital	100 0 0	675	Cash at Bank	695 15 4
100	Less: Uncalled Capital	100 0 0	50,500	Shares in other Companies	50,500 0 0
8,852	Profit & Loss Appropriation A/C	9,059 5 3	-	Sundry Debtors	393 11 6
268	Provision for Taxation	206 0 8			
42,055	Europa Oil (N.Z.) Ltd Current A/C	42,324 0 11			
51,175		£ 51,589 6 10	51,175		£ 51,589 6 10

CONTINGENT LIABILITIES:

No provision has been made for additional tax assessed amounting to £187,445 in respect of the income year ended 31st March 1960 and relating to dividends previously assessed as non-assessable income,
Similar assessments may be made for subsequent years.

.....DIRECTOR.

.....DIRECTOR.

AUDITORS' REPORT TO MEMBERS OF ASSOCIATED MOTORISTS PETROL COMPANY LIMITED:

We have obtained all the information and explanations that we have required. In our opinion proper books of account have been kept by the Company so far as appears from our examination of these books. In our opinion, according to the best of our information and the explanations given to us and as shown by the said books, the Balance Sheet and the Profit and Loss Account are properly drawn up so as to give respectively a true and fair view of the state of the Company's affairs as at 31st March, 1965, and of the results of its business for the year ended on that date. According to such information and explanations the Accounts, the Balance Sheet and the Profit and Loss Account give the information required by the Companies Act 1955 in the manner so required.

Patrick Feist Jack & Middlebrook.

PATTRICK, FEIST, JACK and MIDDLEBROOK
Public Accountants
AUDITORS

WELLINGTON, N.Z.

30 NOV 1965

DR. C. A. LAU
LL.B. (LOND.), B.COM. (N.Z.), F.C.A. N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762
TELEGRAPH: LAUTANT

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Supreme Court 29
No. 1
Case Stated
Annexure B
7 April 1965

7th April, 1965.

"B"

Mr. L.F.Rathgen,
Commissioner of Inland Revenue,
Inland Revenue Department,
WELLINGTON.

Dear Sir,

Re: Associated Motorists Petrol Company Ltd.

I have been instructed by the above Company to lodge formal objection against the assessment dated 30th March 1965 for proprietary income tax in respect of the share of the profits deemed to have been derived from Far Eastern Refining Company Ltd. during the income year 1960. The objection is in the main based on the following reasons, but it is without prejudice to further reasons being given when the grounds for the Department's amended assessment are made known to the Company:

1. The provisions under Section 138 of the Land and Income Tax Act 1954, read in conjunction with Section 2 establish clearly that a Company incorporated outside of New Zealand, which neither carries on business in New Zealand nor derives any income in New Zealand, is not a proprietary Company, and that a proprietary assessment cannot be made on a Company resident in New Zealand in respect of a share of the overseas income derived by such a non-resident Company.

2. Since the proprietary tax legislation was introduced succeeding Commissioners have established and continued the ruling that New Zealand Companies are not assessed for proprietary tax in respect of their holdings in non-resident Companies which neither carry on business in New Zealand nor derive income in New Zealand. It is submitted that while a ruling or the practice of previous Commissioners does not bind a new Commissioner when he takes office, a new Commissioner is not entitled to alter with retrospective effect, for a period during which he did not hold that office, rulings made or practices established by his predecessors, for their terms of office.

3. In respect of the year ended 31st March 1960, it has not been the practice of the Department to make proprietary assessment to all Companies to whom the circumstances outlined would apply. It appears that Associated Motorists Petrol Company Ltd. has been singled out, and it is submitted that it is against natural justice that a Commissioner applies or makes an assessment on one Company without making an assessment on all Companies in New Zealand to whom the same circumstances apply, and that the Commissioner is precluded from doing so.

4. The suggested proprietary income tax figure, £491,643, is in any case substantially in excess of the share of the income for the financial year of the Far Eastern Refining Company in question to which Associated Motorists Petrol Company Ltd. would be deemed to be entitled, if the proprietary provisions were to apply.

In view of the importance of the matter, I have been asked to request your early decision to this objection. The Company requests also that, if the objection is not allowed by you, a case should be stated at the earliest moment, and it desires that in view of the importance and of the questions of law involved, that such a case should be referred in the first instance directly to the Supreme Court.

As Associated Motorists Petrol Company Ltd. under the Retention Tax Provisions had to distribute all its dividend income, it has no liquid funds available to make payment. In view of the assessment at this late stage, and the magnitude of the amount involved, it is requested that you agree to defer the requirement of payment until the case has been decided, if you do not feel that the foregoing submissions justify your allowing the objection, and your early advice would be appreciated.

Yours faithfully,

G.A. Lau

DR. G. A. LAU
LL.B. (Lg.), B COM. (N.Z.), F.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762
TELEGRAPH. LAUTANT

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31
Supreme Court
No. 1
Case Stated
Annexure B1
28 March 1966

28th March, 1966

The Commissioner of Inland Revenue,
Inland Revenue Department,
WELLINGTON.

Attention Mr. A.L. Twhigg

Dear Sir,

Re: Associated Motorists Petrol Co. Ltd.

I have been instructed by the above Company to lodge formal objection against the assessments dated 17th December 1965 for proprietary income tax in respect of the share of the profits deemed to have been derived from Pan Eastern Refining Company Limited during the income years 1961 to 1964 inclusive. The objection is in the main based on the following reasons, but it is without prejudice to further reasons being given when the grounds for the Department's amended assessments are made known to the Company:

1. The provisions under Section 138 of the Land and Income Tax Act 1954, read in conjunction with Section 2 establish clearly that a Company incorporated outside of New Zealand, which neither carries on business in New Zealand nor derives any income in New Zealand, is not a proprietary Company, and that a proprietary assessment cannot be made on a Company resident in New Zealand in respect of a share of the overseas income derived by such a non-resident Company.

2. Since the proprietary tax legislation was introduced, succeeding Commissioners have established and continued the ruling that New Zealand Companies are not assessed for proprietary tax in respect of their holdings in non-resident Companies which neither carry on business in New Zealand nor derive income in New Zealand. It is submitted that while a ruling or the practice of previous Commissioners does not bind a new Commissioner when he takes office, a new Commissioner is not entitled to alter with retrospective effect, for a period during which he did not hold that office, rulings made or practices established by his predecessors, for their terms of office.

3. In respect of the years for which the assessments have been issued, it has not been the practice of the Department to make proprietary assessments to all Companies to whom the circumstances outlined would apply. It appears that Associated Motorists Petrol Company Limited has been singled out, and it is submitted that it is against natural justice that a Commissioner applies or makes an assessment on one Company without making an assessment on all Companies in New Zealand to whom the same circumstances apply, and that the Commissioner is precluded from doing so.

"B"

4. Apart from the general observations set out in paragraph 2 above, it is claimed by my client company that the Commissioner considered in 1963 the liability of the Company to proprietary tax and made a determination that the Company was not liable. It is further claimed that there is no new evidence which would justify you in upsetting your predecessor's ruling.

5. In your letter of the 17th December 1965 to Europa Oil (N.Z.) Ltd. you refer that certain adjustments have been made in the assessments for the income years 1961 to 1964 taking into consideration inter alia Section 108 because of the agreements entered into with Gulf Oil and all the surrounding circumstances. This suggests that the Department claims there were in existence agreements which are void. If the agreements referred to include any agreement entered into by Pan Eastern Refining Company Limited or by Associated Motorists Petrol Company Limited, it is submitted you are precluded from making the proprietary assessments.

In view of the importance of the matter, I have been asked to request your early decision to this objection. The Company requests also that, if the objection is not allowed by you, a case should be stated at the earliest moment, and it desires that in view of the importance and of the question of law involved, that such a case should be referred in the first instance directly to the Supreme Court.

My client Company understands that the position as set out in the letter of intention of the Commissioner to Mr. B.J. Todd of the 29th July 1965 applies also to any payments of the amounts referred to in the above assessments.

Yours faithfully,

G.A. Lau

DR. G. A. LAU
LL.D. (LG.), M.COM. (N.Z.), F.P.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762
TELEGRAPH: LAUTANT

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117 C
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Supreme Court
No. 1
Case Stated
Annexure B2
11 July 1966

11th July, 1966.

"B2"

Chief Deputy Commissioner of Inland Revenue,
Inland Revenue Department,
Private Bag,
WELLINGTON

Dear Sir,

re: Associated Motorists Petrol Company Limited

I have been instructed by the above Company to lodge formal objection against the assessment dated 12th May, 1966, for proprietary income tax in respect of the share of the profits deemed to have been derived from Pan Eastern Refining Company Limited during the year ended 31st March, 1965. The objection is in the main based on the following reasons, but it is without prejudice to further reasons being given when the ground for the Department's amended assessment is made known to the Company:

1. The provisions under Section 138 of the Land and Income Tax Act 1954, read in conjunction with Section 2 establish clearly that a Company incorporated outside of New Zealand, which neither carries on business in New Zealand nor derives any income in New Zealand, is not a proprietary Company, and that a proprietary assessment cannot be made on a Company resident in New Zealand in respect of a share of the overseas income derived by such a non-resident Company.

2. In previous correspondence with Europa Oil (NZ) Limited, you advised that certain adjustments had been made in the assessment taking into consideration inter alia Section 108 because of the agreements entered into with Gulf Oil and all the surrounding circumstances. This suggests that the Department claims there were in existence agreements which are void. If the agreements referred to include any agreement entered into by Pan Eastern Refining Company Limited or by Associated Motorists Petrol Company Limited, it is submitted you are estopped from making the proprietary assessment

In view of the importance of the matter, I have been asked to request your early decision to this objection. The Company requests also that, if the objection is not allowed by you, a case should be stated at the earliest moment, and it desires that in view of the importance and of the questions of law involved, that such a case should be referred in the first instance directly to the Supreme Court.

Yours faithfully,

Supreme Court
No. 1
Case Stated
Annexure C
21 April 1965

MD

"C"

21 April 1965

Dr G.A. Lau,
P.O. Box 1931,
WELLINGTON

Dear Dr Lau,

ASSOCIATED MORRISON'S PETROL CO. LTD

In your letter of objection dated 7 April 1965, against the assessment of proprietory tax for the year ended 31 March 1960 you stated in paragraph 4, that the proprietory income included (£441,048) is excessive. In order that the proper amount may be included, would you please advise to what extent, and the reason why, the figure of £441,048 is excessive.

Yours faithfully,

(B.H.C. Tyler)
Special Inspector

DR. G. A. LAU
LL.D. (LG.), M.COM. (N.Z.), F.P.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762

COLONIAL MUTUAL LIFE BUILDING
117 CUSTOMHOUSE QUAY
WELLINGTON, C.1, N.Z.
P.O. BOX 1931

"D"

29th April, 1965

Mr L.J. Rathgen,
Commissioner of Inland Revenue,
Inland Revenue Department,
WELLINGTON.

Dear Sir,

Re: Associated Motorists Petrol Co. Ltd.

Further to my letter to you of the 7th April re the above at the conference with you on the 12th April you indicated that the Department may wish to rely also on Section 108 in respect of the amended assessment made to Europa Oil (N.Z.) Ltd. This suggests that the Department claims there was in existence an arrangement which for the purposes of that assessment shall be void.

It is submitted as a further ground of objection that in such case you are estopped from making the proprietary assessment as issued. It is also claimed that there is no new evidence which would justify you to upset your predecessor's ruling.

The foregoing is without prejudice to further grounds for the objection being given when the reasons for the Department's amended assessment are made known to the Company.

Yours faithfully,

G.A. Lau

E

5 May 1965

Dr G. A. Lau,
P.O. Box 1931,
WELLINGTON.

Dear Dr Lau,

ASSOCIATED MOTORISTS PETROL COMPANY LTD

I refer to your letters of 7 April 1965 and 29 April 1965 in which you object to the assessment in respect of the year ended 31 March 1960 issued on 30 March 1965.

As regards paragraphs 1, 2 and 3 of your letter of 7 April, I do not agree with the contentions set out therein. So far as legal issues are concerned, the Department has, as you are aware, taken legal advice and has been advised that it is acting correctly.

In connection with the policy issues there are only two specific comments I would like to make.

The first is that I emphatically deny the suggestion that Associated Motorists Petrol Company Ltd has been singled out and I assure you that all companies falling into this category will be similarly assessed.

The second is that I am not aware of any ruling along the lines referred to in paragraph 2 of your letter. Even if there had been a ruling of the kind you suggest, the Commissioner would not be prevented from applying what he considers to be the correct interpretation of the law.

In your letter of 29 April you suggest that because the Department considers Section 103 to be relevant in the assessment issued to Europa Oil (N.Z.) Limited, it is estopped from issuing a proprietary assessment to Associated Motorists Petrol Company Ltd. I have received legal advice to the effect that the assessments issued to both these companies are in no way incompatible.

You also state that, "....there is no new evidence which would justify you to upset your predecessor's ruling". I would advise that the application of the proprietary provisions to the present circumstances was not considered by the previous Commissioner.

As regards payment, I am prepared to allow the additional tax now assessed to remain outstanding, without

DR. G. A. LAU
LL.B. (Lond.), M.COM. (N.Z.), F.P.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762
TELEGRAPH: LAUTANT

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117 CUSTOM
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20th. May, 1965.

"F"

Mr. A.L. Twhigg,
Chief Deputy Commissioner
of Inland Revenue,
Inland Revenue Department,
Private Bag,
WELLINGTON.

Dear Mr. Twhigg,

re: Associated Motorists Petrol Co. Ltd.,

I received your letter of the 7th. April, which has been handed over to the Company's legal adviser for dealing with appropriately. However, there are three matters which I have been asked to reply to:

1) While in view of the fact that in future the Department may assess other New Zealand Companies with proprietary tax in respect of overseas interests, as far as the year ended 31st. March 1960 is concerned, as the 31st. March 1965 was given as the last date on which the Commissioner could make an assessment in respect of that year, it still appears that Europa has been singled out.

2) The particular question of proprietary tax in respect of Pan Eastern Refining Company's profit was mentioned by Mr. Tyler early during his investigation. The suggestion that it was not considered by the previous Commissioner comes as a surprise.

3) Regarding payment: In my letter of the 7th. April, I requested that the payment be deferred until the matter has been finally decided. It is not possible for the Company to budget from three months to three months, particularly where such substantial amounts are involved as contemplated here.

In a recent discussion the Commissioner, Mr. L.J. Rathgen, agreed to give further consideration to the matter, and we request you kindly put the original application before him.

4) As far as the amount is concerned the Company understands that the amount assessed is to represent the income of the Pan Eastern Refining Co. Ltd. for the twelve months ended 31st. March 1959. However, this happens to be the financial year of an overseas company which is not within hte orbit of the New Zealand Tax legislation, therefore as the Commissioner is precluded from going back more than four years for assessment it is submitted that the financial year of the overseas company ended 31st. December 1960 is the first year which may be taken into account. If this should not be correct, it is submitted that only income earned during the twelve months to the 31st. March 1960 could be taken into account, the New Zealand Company's balance day being the 31st. March. This is of course subject to its being decided that the Company is liable for proprietary tax.

Yours faithfully,

G

14 June 1965

Dr G. A. Lau,
P.O. Box 1931,
WELLINGTON.

Dear Dr Lau,

ASSOCIATED MOTORISTS PETROL CO. LTD

Your letter of 20 May 1965 raises several matters which have been the subject of earlier correspondence.

You have referred once more to the question of Europa having been singled out. I can only repeat what I stated in my letter of 5 May (to which letter you were presumably referring) to the effect that all companies falling into the same category will be similarly assessed and also that the application of the proprietary provisions to the present circumstances was not considered by the previous Commissioner.

As regards payment, the Commissioner has considered this matter again but he is not prepared to allow the tax to remain outstanding without periodical reviews.

If it would assist in any way with budgeting, the Commissioner would consider an alternative by way of payment of one quarter of the tax with the residue to remain outstanding for a period of six months from the due date for payment. The position would then be reviewed at six monthly periods thereafter.

Should this alternative be unacceptable the present arrangement must be adhered to.

Your other point suggests that the income of Pan Eastern Refining Co. Limited for the year ended 31 December 1960 is the first year which should have been taken into account for assessment purposes under Section 138. Alternatively, if this is not correct you submit that the income of Pan Eastern Refining Co. Limited for the 12 months ended 31 March 1960 only should be taken into account in arriving at the income to be assessed to Associated Motorists Petrol Co. Limited for the same period. In order that I can consider this aspect of the objection would you please advise the amount of income derived by Pan Eastern Refining Co. Limited for the years ended 31 March 1960 to 1964 inclusive.

Yours faithfully,

(A. L. Tehigg)
Chief Deputy Commissioner
of Inland Revenue

DR. G. A. LAU
LL.B. (Lond.), Hons. Econ. (N.Z.), F.P.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762

COLONIAL MUTUAL
117 CUBA TOMB
WELLINGTON
P.O. BOX

22nd June, 1965.

"H"

The Commissioner of Inland Revenue,
P.O. Box 2198,
WELLINGTON.

Attention Mr. A.L. Twhigg

Dear Mr. Twhigg,

Associated Motorists Petrol Co. Ltd.

I acknowledge receipt of your letter of June 14. I submit the position still is that the company would be the only one in New Zealand assessed on the proposed basis as far as its income year ended 31st March 1960 is concerned.

The part of your letter dealing with payment is received with extreme regret, as it entirely disregards the practical considerations of the company's finances. Therefore in the meantime the company is not in a position to accept the proposed alternative.

With reference to the final paragraph of your letter, the company advises that only the income figures of Pan Eastern Refining Company Ltd. for each year ending on the 31st December are available, but if they take, as they understand the suggestion made by Mr. R.T. Phillips, a simple proration according to time the position would then be:-

12 months ended	£
31.3.60	850,479
31.3.61	821,888
31.3.62	1,032,478
31.3.63	961,188
31.3.64	1,072,174

Yours faithfully,

G.A. Lau

Supreme Court
No. 1
Case Stated
Annexure I
28 June 1965

DR. G. A. LAU
LL.B. (LG.), M.COM. (N.Z.), F.P.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762

COLONIAL MUTUAL LIFE BUILDING
117 CUSTOMHOUSE QUAY
WELLINGTON, C.1, N.Z.
P.O. BOX 1931

I

28th June, 1965.

The Commissioner of Inland Revenue,
Inland Revenue Department,
WELLINGTON.

Dear Sir,

Re: Associated Motorists Petrol Co. Ltd.

In respect of the year ended 31st March 1960 the above-named company has received notice of amended assessment of tax dated 30th March 1965. Objection to the said assessment has been duly made and although there has not yet been received from you a letter specifically disallowing such objection it is clear from the correspondence that the company's objection has already been disallowed in so far as it disputes liability for proprietary tax.

Under the circumstances I therefore request on behalf of the company that you state a case pursuant to Section 32 of the Land and Income Tax Act 1954 for the determination of this objection by the Supreme Court.

You will no doubt submit in due course a draft Case Stated for consideration by the Company's advisers.

Yours faithfully,

G. A. Lau

"J"

29 June 1965

The Secretary,
Associated Motorists Petrol Co. Ltd.,
P.O. Box 591,
[illegible]

Dear Sir,

Would you please supply copies of the entries required to incorporate into your books the dividend declared by Pan Eastern Refining Co. Ltd. on the following dates:-

Date declared in London	Amount in Sterling	Shown in Accounts Associated Motorists	Exchange
29. 3.58.	£ 75,000	£ 75,281	100 = 100.7.6.
25.3.59.	100,000	100,375	"
31.3.60.	150,000	150,562	"
21.3.61.	150,000	150,562	"
15.3.62.	200,000	200,750	"
15.3.63.	200,000	200,750	"
9.11.63.	200,000 }		
17.3.64.	2,300,000 }	2,525,000	100 = 101
19.3.65.	400,000	-	

Also please supply copies of the entries in respect of the dividends declared in favour of Europa and state the basis of the exchange rate adopted for other than the November, 1963 and March, 1964 dividend.

Yours faithfully,

(R.T. Phillips)
Special Inspector

Supreme Court
No. 1
Case Stated
Annexure K
30 June 1965

"K"

30 June 1965

Dr G. A. Lau,
P.O. Box 1931,
WELLINGTON.

Dear Dr Lau,

ASSOCIATED MOTORISTS PETROL CO LTD

I wish to thank you for the information in your letter of 22 June 1965 concerning the income derived by Pan Eastern Refining Co. Ltd during the respective years ending on the 31 March.

I note from the third paragraph of your letter that the only income figures of Pan Eastern Refining Co Ltd are those for the company's financial year ending 31 December. As this is the best information available I propose to use your figures showing the incomes to the 31 March on a simple proration according to time.

I should add that I would prefer to have details of the actual income derived during the respective years ending on the 31 March and in this respect I have noticed from the processing contract between Pan Eastern Refining Co Ltd and Gulf Oil Corporation that Gulf guarantees certain net earnings to Pan Eastern Refining Co. Ltd for each quarter. This suggests that quarterly accounts should be available and I would like you to confirm that despite the agreement, details of the quarterly incomes are not in the company's possession or available in New Zealand or overseas.

Yours faithfully,

(A. L. Tuhigg)
Chief Deputy Commissioner
of Inland Revenue

Supreme Court
No. 1
Case Stated
Annexure L
15 July 1965

DR. G. A. LAU
LL.B. (LG.), M.COM. (N.Z.), F.P.A N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762

COLONIAL MUTUAL LIFE BUILDING
117 CUSTOMHOUSE QUAY
WELLINGTON, C.1, N.Z.
P.O. BOX 1931

15th July, 1965.

The Chief Deputy Commissioner
of Inland Revenue,
Inland Revenue Department,
P.O. Box 2198,
WELLINGTON.

Dear Mr. Twhigg,

Re: Associated Motorists Petrol Co. Ltd.

With reference to your letter of the 30th June.

The Company advises that it has not available here accounts showing the income for each quarter. If necessary the figures could be calculated here, but even then, as you know, they would have to include prorating of annual crude price reductions, interest earnings and expenses.

Yours faithfully,

G. A. Lau

Supreme Court
No. 1
Case Stated
Annexure M
6 August 1965

"M"

6 August 1965

Dr G. A. Lau,
P.O. Box 1931,
WELLINGTON.

Dear Dr Lau,

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

I wish to acknowledge your letter of 28 June 1965 requesting a case to be stated for determination by the Supreme Court of the objection to the assessment in respect of the year ended 31 March 1960 and also your letter of 15 July 1965 concerning the basis of calculation of the annual incomes.

In respect of the basis of calculating incomes I am prepared to accept the proration according to time as set out in your letter of 22 June and I will be obliged if you would let me know whether this is acceptable to you.

You mention that the objection to the 1960 assessment concerning the proprietary provisions has not been specifically referred to and I confirm that your objection was disallowed except so far as it relates to the question of the date from which income of the Dan Eastern Refining Company Limited should be brought into account. It is agreed that the income first included should be that derived during the year ended 31 March 1960 and not that for its financial year ended 31 December 1959. On this basis there will be a reduction in income of £15,803 (£441,042 - £425,239) according to the information in your letter of 22 June.

If the proration mentioned above is acceptable to you the assessment will be reduced accordingly, and the reduced assessment will be the one to be dealt with by the Court.

Yours faithfully,

(A. L. Tubigo)
Chief Deputy Commissioner
of Inland Revenue

Supreme Court
No. 1
Case Stated
Annexure N
24 August 1965

DR. G. A. LAU
LL.B. (LG.), M.COM. (N.Z.), F.P.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762
TELEGRAPH: LAUTANT

COLONIAL MUTUAL LIFE BUILDING
117 CUSTOMHOUSE QUAY
WELLINGTON, C.1, N.Z.
P.O. BOX 1931

24th. August, 1965.

Chief Deputy Commissioner of Inland Revenue,
Inland Revenue Department,
Private Bag,
W E L L I N G T O N.

"N"

Dear Sir,

re: Associated Motorists' Petrol Co. Ltd.

I acknowledge receipt of your letter of the 6th. August. You will remember that in my letter of the 20th. May, under No. 4, I submitted to you that the financial year of Pan Eastern Refining Company Ltd. ended 31st. December 1960 should be the first year which should be taken into account, should Associated Motorists' Petrol Co. Ltd. be found liable to proprietary tax, and only if this should not be found to be correct, then income earned after the 1st. April 1959 may be so liable.

As income earned is not ascertained until the Balance Sheet for the year ended 31st. December 1960 is approved, it is submitted that if the first contention made above should not be upheld, then in respect of the financial year of Associated ended 31st. March 1960, on a pro rata time basis three-quarters of the income of Pan Eastern for the year ended 31st. December 1959 should be included as proprietary income of Associated. In such case the income from the 1st. January 1960 to 31st. March 1960 forming part of the annual income of Pan Eastern for the twelve months ended 31st. December 1960 would be included in the proprietary income of Associated's financial year ended 31st. March 1961 and so on. This is of course always subject to the Company's liability tax having been established.

I trust you will agree that the foregoing represents the correct apportionment in the circumstances should the question finally arise.

Thanking you,

Yours faithfully,

47
Supreme Court
No. 1
Case Stated
Annexure O
13 September
1965

13 September 1965

Dr G. A. Lau,
P.O. Box 1931,
WELLINGTON.

Dear Dr Lau,

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

I have your letter of 24 August concerning the income of Pan Eastern Refining Company Limited which may be first taken into account for New Zealand tax purposes.

As regards the date from which the proprietary provisions can be first applied to Associated Motorists Petrol Co. Ltd you will be aware that where the Act refers to a 'year' or an 'income year' it means a 'year commencing on the first day of April and ending on the thirty-first day of March, both of these days being included', (Section ?). As a result, it is necessary to look, not at the income derived by Pan Eastern Refining Company Ltd during a year ending on the 31 December but on that ending on the 31 March. Having calculated the income derived during this latter period, it is that which must be used for the purposes of applying the proprietary provisions.

This is what has been done in the case of Pan Eastern Refining Company Ltd and Associated Motorists Petrol Co. Ltd. The income which is deemed to be derived by Associated Motorists Petrol Company Limited under Section 103 for the year ended 31 March has been calculated on the basis of Pan Eastern's accounts apportioned as to time.

I trust that you will agree that this results in the correct income being calculated and assessed to Associated Motorists Petrol Co. Ltd.

Yours faithfully,

(A. L. Twigg)
Chief Deputy Commissioner
of Inland Revenue

Supreme Court
No. 1
Case Stated
Annexure P
13 October
1965

DR. G. A. LAU
LL.B. (Eng.). M.Com. (N.Z.). F.C.A.N.Z.
BUSINESS CONSULTANT
TELEPHONE 41-762
TELEGRAPH: LAUTANT

COLONIAL
117 C
WE

13th. October, 1965.

"P"

The Chief Deputy Commissioner
of Inland Revenue,
Inland Revenue Department,
Private Bag,
W E L L I N G T O N.

Attention: Mr. A.L. Twhigg.

re: Associated Motorists' Petrol Co. Ltd.,

Dear Mr. Twhigg,

Owing to the absence overseas of Mr. Mahon and later my absence from Wellington, I was not in a position to reply earlier to your letter of the 13th. September.

As my client Company cannot agree with the proposals set out in your letter, it appears that there is a continuing difference of opinion as to which period would be the first period which should be taken into account, should the Associated Motorists' Petrol Co. Ltd. be liable for proprietary tax. In view of this, this matter has to be placed before the Court as part of the case stated, and I would appreciate if you would proceed along these lines accordingly.

Thanking you,

Yours faithfully,

Supreme Court
No. 1
Case Stated
Annexure Q
17 February
1966

BOX 591

ASSOCIATED MOTORISTS PETROL COMPANY LIMITED

110-116 COURTENAY PLACE
WELLINGTON. C.3. NEW ZEALAND

17th February, 1966

The Commissioner of Inland Revenue,
Inland Revenue Department,
WELLINGTON.

Attention Mr. B.H.C. Tyler

Dear Sir,

In reply to your letter of the 10th February 1966, the net profit derived by Pan Eastern Refining Company Ltd. for the year ended 31st December 1964 was £1,124,119 (converted at $2.80 to £Stg.).

The net profit for the year ended 31st December 1965 is not yet available.

Yours faithfully,

ASSOCIATED MOTORISTS
PETROL CO. LTD.

Secretary

Supreme Court
No. 1
Case Stated
Annexure R
12 April 1966

CABLES & TELEGRAMS
"EUROPA"

TELEPHONE 56-590
P.O. BOX 591

EUROPA OIL (N.Z.) LTD.

MARKETERS OF PETROLEUM PRODUCTS

"R"

RHC:MKS:RL

HEAD OFFICE
110-116 COURTENAY PLACE
WELLINGTON, C.3. NEW ZEALAND

12th April 1966

The Commissioner of Inland Revenue,
Inland Revenue Department,
Private Bag,
WELLINGTON.

Attention: Mr. B.H.C. Tyler.

OIL SECTION HEAD OFFICE

Dear Sir,

Further to our letter dated 16th March 1966 the net profit derived by Far Eastern Refining Company Limited for the year ending 31st December 1965 was £1,057,207 (converted at two dollars eighty to the pound).

Yours faithfully,
EUROPA OIL (N.Z.) LTD.

Treasurer

REASONS FOR JUDGMENT

OF McGREGOR J.

These are two cases stated pursuant to s.32 of the Land and Income Tax Act 1954 as a result of objections lodged by Europa Oil (N.Z.) Limited (to which company I will hereinafter refer as "Europa") and Associated Motorists Petrol Company Limited, to assessments of income tax made by the Commissioner in respect of the years ending 31st March 1959 to 1965 inclusive.

EUROPA OIL (N.Z.) LIMITED:

Europa is a company incorporated in New Zealand, and carrying on business in the marketing of Petroleum Products. Another company, Associated Motorists Petrol Limited (to which I shall refer as "A.M.P.") also incorporated in New Zealand, is a wholly owned subsidiary of Europa. On the 1st June 1956 A.M.P. in conjunction with the Gulf Oil

Corporation of the United States procured to be incorporated in the Bahama Islands a company known as the Pan Eastern Refining Company Limited (hereinafter referred to as "Pan-Eastern") with a capital of £100,000. Of this capital sum one half was subscribed by A.M.P. and one half by Propet Company Limited, a wholly owned subsidiary of the Gulf Oil Corporation.

The narrative in regard to Europa's purchase of gasoline and other petroleum products for marketing in New Zealand for the purposes of the present case commences in 1936. In that year Europa's subsidiary entered into a contract with California Texas Oil Company Limited (generally known as "Caltex") for the purchase of Europa's requirements. This contract was for a term of 14 years to 1951, and was then renewed for a further 5 years, to expire on the 31st December 1956. Under this contract Caltex agreed to supply motor gasoline at the lower of the lowest current market quotations for the nominated quality or specifications as published in the National Petroleum News, U.S. Gulf of Mexico quotations or Californian quotations for export, whichever was the lowest. This contract did, however, contain at least one concession in favour of the purchaser in the form of a freight concession. A refund was agreed on freight paid by the purchaser equivalent to the difference between freight actually paid and the current freight rate from Dutch East Indies to New Zealand, Dutch East Indies being treated as "the staging point".

(I will throughout use the spelling "gasoline", as appears in the contracts, which seems to be the U.S. custom, whereas "gasolene" is more common in British countries.)

In 1955 it became necessary for Europa to renew its Caltex contract, or arrange an alternative source of supply. Europa's trade is predominantly in gasoline. In refining crude oil a typical yield is 25% gasoline, 10.8% kerosene, 17.8% diesel oil, and 40% fuel oil. Those products total 93.6%,

the remaining 6.4% representing waste in refining. Europa possessed practically no market for the lower grade refining products. The 1955 negotiations for a new Caltex contract seem to have commenced with a suggestion that a price formula should be negotiated, giving recognition to Europa receiving a refining profit on the products of refining uplifted by Europa under the Caltex contract.

I must at this juncture endeavour to explain what is understood in oil circles by the term "posted prices". Platt's Oilgram provides a service whereby it gathers and publishes daily what the publishers believe to be accurate news of sales and prices in the oil industry, both in regard to crude oil and refined products. These published or posted prices generally provide a yardstick of market values and a basis for costs in bulk contracts. Platt's Oilgram originally published North American sales, but was later extended to include Caribbean sales, and it would seem in the early 1950's included sales in the East of Suez area. The posted price system for products fitted into the general international set-up with its supply and competitive patterns.

The negotiations between Caltex and Europa broke down in June 1955, and Mr Todd, Chairman of Europa, then commenced negotiations with Gulf Oil Corporation (to which company and some of its subsidiaries I will refer as "Gulf") to some of the officers of which company he had had earlier introductions. Gulf possessed huge supplies of crude oil in the Middle East. Earlier in 1945 Europa had discussed with Gulf the possibilities of establishing a refinery in New Zealand, and later Europa had had refinery projects prepared by other consultants, but for various sound reasons the projects had been allowed to lapse.

In February 1955 there were discussions between officers of Gulf and Mr Todd in regard to proposals that the two companies should engage in refinery operations outside New

Zealand, east of Suez. Gulf had a large market for what are known as the heavy-end products of refining, fuel oil and the like, but East of Suez it had no market for the light ends, gasoline and the like. On the other hand Europa had a substantial market for gasoline, but little market for fuel oil. The interests of the two companies were for this reason substantially complementary.

Discussions with Gulf continued into 1956. On the 3rd April 1956 three contracts, which contain the substance of the agreements reached, were entered into. First, a petroleum products sales contract was entered into between Gulf-Iran Company - a subsidiary of the Gulf Oil Corporation - and Europa. Among the provisions of this contract are the following:-

(1) A contract period of 10 years from the 1st January 1957 to the 31st December 1966, subject to certain rights of renewal.

(2) Quantity: All of Europa's requirements of gasoline and certain of its requirements of gas oil.

(3) Provisions as to quality.

(4) Delivery F.O.B. tanker to be provided by Europa.

(5) Price: "The price to be paid by Europa for the gasoline or gasolines certified as shipped shall be, regardless of where loaded, the lower of (a) the lowest quotation applicable for each quality of gasoline supplied hereunder as published in Platt's Oilgram under the heading of 'Caribbean and Far East Refined Products Prices' for cargo lots f.o.b. Caribbean ports, and, (b) the lowest quotation (as and when published by Platt's Oilgram) for cargo lots f.o.b. Persian Gulf Ports for the date on which loading commenced.

(6) Terms of payment: By a letter of amendment dated 11th April 1957 to clause 6.01 of the contract payment was to be made by Europa upon presentation of documents in

Wellington 120 days from date of lifting.

The second contract is a contract of affreightment; the parties being Gulf Oil Corporation and Europa. It recites the sale contract between Gulf Iran and Europa, and Gulf agrees to transport in bulk by tanker owned, operated, chartered or otherwise controlled by it, Europa's gasoline and gas oil requirements in New Zealand. The freight rates payable are what are known as "AFRA rates" Average Freight Rate Assessment from Abadan to New Zealand, AFRA being the relevant rate at date of loading as determined by a panel of shipbrokers known as the London Tanker Brokers' Panel. This contract, however, contains an elaborate provision for what is known as the Alternate Freight Rate, Europa ultimately, it seems, obtaining the benefit of the lower of the two rates under the following provision :-

"For each voyage performed hereunder, the freight charges to EUROPA shall be computed as if the freight rate were the ALTERNATE FREIGHT RATE for the voyage from Abadan to North Island or to South Island as the case may be, and the difference between such freight charges and the freight charges billed to EUROPA, based on the rates specified in Paragraph IV (a) above, shall be entered in a suspense account. If, upon the termination of this Contract, the balance in such account indicates that the freight charges to EUROPA were less than such charges would have been had the freight rates been the ALTERNATE FREIGHT RATES, no further payment by EUROPA to GULF's designated collection agent will be due. If, however, upon the termination of this Contract, the balance in such account indicates that the freight charges to EUROPA were more than such charges would have been had the freight rates been the

ALTERNATE FREIGHT RATES, GULF's designated collection agent shall pay to EUROPA a sum equal to such difference."

The third contract entered into on the 3rd April 1956 is entitled "Contract for Organization of Pan-Eastern Refining Company Limited", a Bahama Corporation, and is entered into between Gulf Oil Corporation and Europa. As the recitals in this contract seem to me to be of importance, I quote them in full :-

"WHEREAS, contemporaneously herewith GULF IRAN COMPANY and EUROPA have entered into a Petroleum Products Sales Contract and GULF and EUROPA have entered into a Contract of Affreightment;

WHEREAS, GULF and EUROPA have mutually agreed to procure the incorporation in and under the laws of the Bahama Islands of PAN-EASTERN REFINING COMPANY, LIMITED, a company to be registered under the Companies Act (Revised Edition 1929, Chapter 83), and hereinafter referred to as "PAN-EASTERN", in which EUROPA shall beneficially be interested as to a moiety of the shares therein, either directly or through its subsidiaries and in which GULF or its nominee shall beneficially be interested as to a moiety of the shares therein;

WHEREAS, GULF and EUROPA have further agreed that GULF shall enter into a contract with PAN-EASTERN, within a reasonable time after its incorporation, for a supply of crude oil and the processing thereof and disposal of the products therefrom which contract is hereinafter referred to as the "Processing Contract";

WHEREAS, the benefits to be secured and enjoyed by EUROPA by reason of its beneficial interest in the company so to be incorporated and the execution and

carrying out by GULF and PAN-EASTERN of the Processing Contract is a major inducement to EUROPA to enter into the Petroleum Products Sales Contract and the Contract of Affreightment; and WHEREAS, the parties hereto accordingly are desirous of securing such benefits to EUROPA and for that purpose have agreed to enter into this present Contract;"

This agreement provides for the incorporation of Pan Eastern Refining Co. Ltd. with a capital of $100,000 to be subscribed by the two parties in equal shares. It provides that Gulf shall enter into the processing contract with Pan-Eastern set out in the 3rd schedule.

The processing contract in conformity with the other contracts is for a term of ten years. Gulf for a processing fee payable by Pan-Eastern of $0.475 per net barrel of crude oil to be supplied by Gulf, agrees to process the crude oil at refineries provided or caused to be provided by Gulf. The agreement further provides a price for the crude oil and the purchase and sale of Petroleum Products at certain prices, but the price to be paid by Gulf for kerosene distillate and residuals re-sold by Pan-Eastern was to be subject to such adjustment upwards or downwards as should ensure that the net earnings of Pan-Eastern should be determined in accordance with a formula set out in the agreement. It seems clear from the evidence, and particularly from subsequent adjustments to which I shall refer later, that the intention of the parties was that Pan-Eastern's profit should be protected, and should be not less than 2.5 cents per gallon on gasoline produced from the crude oil and supplied to Europa. In effect the intention of the parties seems to be clear, that Gulf should guarantee to Pan-Eastern a profit on this basis, and it was anticipated that the formula set out in the processing contract would produce this result.

As I have said, the sales contract between Gulf Iran

and Europa fixed the purchase price for gasoline supplied in accordance with the posted price at date of loading. Such price was not subject to any discount in the ordinary way.

The general scheme and the relationship between the various companies Gulf, Pan-Eastern and Europa, is summarised in a letter from Gulf's solicitor in the Bahamas to the Controller of Exchange at Nassau, under date the 5th March 1956. It sets out the nature of Pan-Eastern's operations, namely, the purchase from Gulf of crude oil at posted prices, the resale to Gulf of motor gasoline derived from refining at posted prices, the sale of other products to Gulf's subsidiary the Propet Company, a Bahamas company, at posted prices, and it estimates that on this basis the net result should be to produce for Pan-Eastern a profit of approximately the sterling equivalent of 50 cents (U.S.) per barrel on all crude oil processed. The profits derived by Pan-Eastern would be declared as dividends, half of which would go to A.M.P., the Europa subsidiary, and the other half to Propet, the Gulf subsidiary. It also refers to the sales contract between Gulf Iran and Europa in respect of Europa's gasoline requirements.

Although it was not anticipated that Propet would show any substantial profits from the sale of the heavy ends, it is clear that the proposed arrangements were most advantageous both to Europa and to Gulf. It was essential to Gulf with its substantial market for the heavy ends, and lack of market for gasoline, that it should procure a market East of Suez for gasoline to absorb this product of its refining process. This would enable it to derive substantial profit from its crude oil supply, and to refine the crude oil to provide the heavy ends for its existing customers.

The New Zealand gasoline market in 1955-1956 was in the hands (apart from Europa) of international oil companies, through their various subsidiaries. Gulf at this time had no

outlet in New Zealand, except that it had some pooling arrangement with the Shell Group. Some time, it would appear, before 1950, Gulf developed substantial crude oil production in Kuwait, and acquired a 7% participation in the Iranian consortium. It lacked market outlets of its own in the Eastern hemisphere, but it had prior to 1955 concluded an arrangement with the Shell Group by pooling with Shell the costs and benefits on Kuwait crude oil from the well to the ultimate consumer for those quantities which Shell took under contract with Gulf. This gave Gulf access to Eastern hemisphere markets, for which it accepted a realisation per barrel which allowed for a certain margin for Shell, thus giving Shell crude oil at well below posted prices.

By the arrangement with Europa, Gulf obtained a market outlet in New Zealand without making an investment of its own. Owing to the nature of the Gulf-Shell contract, and it would appear owing to Gulf's relationship with other international oil companies operating through subsidiaries in New Zealand, Gulf was not in a position to sell gasoline at a discount which would disturb the market in New Zealand, and which in particular would have affected Gulf's relationship with Shell. To obtain the Europa outlet for gasoline, Gulf could not give to Europa any direct discount on posted prices, and any concession to obtain the Europa outlet had to be provided by Gulf by some indirect means. The posted prices represented the market level of Middle East oils.

While there is no evidence of discounts on posted prices about the years 1955 and 1956, it seems that there were various indirect methods of inducement to obtain sales to purchasers. As I have mentioned, the earlier Caltex contract with Europa gave Europa indirect benefits. In the 1955 negotiations between Europa and Caltex there were discussions in regard to indirect benefits, although these negotiations broke down as Caltex was not prepared to make the concessions

desired by Europa. Direct discounts from 1955 on do seem to have been granted by various international oil companies to bulk purchasers comprising in the main military authorities, or government controlled purchasers. Indirect benefits seem to have been granted by way of freight concessions, provisions of finance and in other ways, and from 1959 on it is clear that numerous contracts, including long term contracts, were entered into at substantial discounts on posted prices.

The methods adopted by the various contracting parties in regard to the operation of the 1956 contracts and subsequent events are of assistance in endeavouring to determine the real arrangements between the parties and the objects which they were endeavouring to obtain. Under the contracts the method originally envisaged consisted of five steps. The first step was the sale of crude at posted prices from Gulf to Pan-Eastern. The second step was the return of the crude from Pan-Eastern to Gulf for refining at the stipulated fee. The third step was the return of the products of refining to Pan-Eastern. The fourth step was the return to Propet and Gulf of the heavy products re-sold to Gulf and Propet. The fifth step was the resale of the gasoline from Gulf subsidiary, Gulf Iran, to Europa, and payment by Europa to Gulf Iran. In practice, however, the parties adopted a simplified method of operation. Gulf arranged with a refiner for the refining of crude oil, and after refining sold to Europa the gasoline at posted prices, gas oil at posted prices less 5 cents a barrel, and charged freight at lower AFRA or alternate freight rate. In other words, the products sold to Europa passed directly from Gulf to Europa, and payment was made to Gulf by Europa. Gulf paid as a credit to Pan-Eastern the profits of the refining venture, which profits Pan-Eastern shared equally between Gulf's subsidiary, the Propet company, and Europa's nominee, A.M.P., it being intended that the latter should receive equivalent to 2.5 cents per gallon of gasoline

uplifted by Europa.

The complicated formula set out in the contracts was intended to provide Pan-Eastern with profit expressed as a gain per gallon of motor gasoline imported by Europa. Owing to fluctuations in the posted prices of crude oil compared with posted prices of products, the formula did not for long operate as anticipated. The contract commenced on the 1st January 1956, and the profit arrived at by the formula seems at the outset to have been in accordance with anticipations. In 1957-58 the profit seems to have been in the vicinity of 2.7 cents per gallon. Thereafter it declined. On the 31st January 1958 Mr Bryan Todd, Managing Director of Europa, took up the matter with Mr Paton, the Vice-President of Gulf Oil Corporation. In a letter of this date Mr Todd reminds Mr Paton that the purpose of the formula was to produce a "clampening or unnubbing" effect to protect Pan-Eastern's returns against sharp fluctuations which might be caused by market movements in the prices of crude and products. In practice the result had not been as anticipated, and Mr Todd pointed out that it appeared that the return to Pan-Eastern could be sharply affected by price movements in crude and gasoline without taking into account other elements which went to make up the integrated results of the industry as a whole. During the first quarter of 1957 crude prices continued unchanged, and all products improved, resulting in a market increase in overall refining margins. The rise in gasoline prices was reflected in an improvement to 2.7315 cents per gallon in the formula result. During the second quarter of 1957, however, owing to variations in prices, the effect of the formula was to reduce Pan-Eastern's return to 2.09 cents per gallon on Europa's gasolines, and at the time of writing the letter calculations showed Pan-Eastern's return reduced to 1.965 cents per U.S. gallon. Mr Todd pointed out that it seemed apparent at a time when the industry

was enjoying an improved price for crude oil, and when overall refining margins had not deteriorated, the formula which resulted in a substantial reduction in Pan-Eastern's return was a somewhat unrealistic one, and he suggested that the matter seemed to need some revision.

Mr Paton replied later suggesting that the existing price formulation should be allowed to continue until the end of the third quarter of the 1958 year, when the matter could be reconsidered if Pan-Eastern's earnings continued "below the anticipated average". He further suggested that should it prove that Pan-Eastern's earnings did not live up to expectations, a new formula could be devised which would give "the desired snubbing effect" against sharp fluctuations in prices of either gasoline or crude oil.

It appears from the correspondence that as at the 30th June 1958 the formula return to Pan-Eastern had fallen to as low as 1.71 cents per U.S. gallon, and a graph prepared by Mr Todd indicates the fluctuations. Again in January 1959 a letter from Gulf to Europa expressed the view that a slight revision was necessary to make Pan-Eastern's earnings more realistic. A telegram from Gulf confirmed the fact that the original offer to Pan-Eastern was intended to be a flat 2.5 cents per gallon. Correspondence then took place with suggestions in regard to a new formula which might produce the original anticipated profit to Pan-Eastern. In August 1959 Mr Todd suggested that a composite formula plan should continue, but that in each year in which Pan-Eastern's profits were below 2½ cents Gulf should pay by way of "a crude discount" to Pan-Eastern the difference between processing contract formula and 2½ cents, such discounts to apply from start of contract. The parties agreed thereafter annually for variations to the contract formula to secure the intended profit to Pan-Eastern. (Correspondence B14).

The variations contained in the correspondence were

dated back to the commencement of the contract, and it is clear that from 1958 to 1965 Europa's share of the Pan-Eastern profit corresponded, with only very slight variations, to the 2.5 cents per gallon on the gasoline purchased by Europa. In my view Professor Leeman's evidence as to the nature of the amendments is a fair summary. Pan-Eastern was made into a repository for a shared discount to Europa, a minimum 2½ cents per gallon on gasoline purchases by Europa for the duration of the agreement. In effect, while the parties avoided any expression of discount, the effect was a benefit to Europa through Pan-Eastern and A.M.P. of what was equivalent to a discount on the price of Europa's gasoline purchases.

The Pan-Eastern arrangement in my view cannot be regarded as a conventional refining arrangement. Pan-Eastern provided an intermediate organisation for the somewhat unusual co-operative arrangements between Gulf and Europa. Gulf provided the crude oil, made its own arrangements for refining through a subsidiary in the Middle East; after refining it retained the heavy products for its own marketing through subsidiaries, and it delivered the gasoline and gas oil required by Europa. It further made arrangements for the necessary shipment in tankers. It gave Europa extended terms of credit for payment for Europa's gasoline. The whole of the accounting was done by the Gulf Oil Corporation. It paid the refining charges to the company which processed the crude oil, it paid to Pan-Eastern in the Bahamas the agreed share of profit on refining in accordance with the contracts as varied by the subsequent agreements to which I have referred. Pan-Eastern was then in a position to divide its profits equally between Propet and A.M.P. Pan-Eastern in effect had no organisation and its only participation was in the receipt of profits. As I have said, the subscribed capital of Pan-Eastern was £100,000. Pan-Eastern's balance

sheets and trading accounts are illuminating. The following table indicates the position :-

Year	F.O.B. Value of Gasoline Shipments	50% Pan-Eastern Profit adjusted as per Note U.S.	%age
1956/7	$5,333,713 U.S.	1,383,284	25.93
1958	4,196,989	1,168,789	27.85
1959	4,479,349	1,234,886	27.56
1960	3,656,945	1,036,071	28.33
1961	5,035,424	1,475,687	29.31
1962	4,333,525	1,324,226	30.56
1963	4,484,419	1,375,855	30.68
	$31,520,364	8,998,798	28.55

In Pan-Eastern's balance sheet for 1963 the accumulated amounts receivable from Propet company and Gulf Iran company amounted to $11,965,380, and the retained earnings after payment of dividends amounting to $2,239,000 were $12,040,510.

For the same year the sale of refined products to Europa amounted to $12,960,178. Purchases of crude amounted to $9,318,499. After payment of processing fees, the surplus amounted to $2,751,710.

In this year in regard to purchases of crude, there is what is described in the Pan-Eastern balance sheet as "volume discounts relating to 1963 purchases" $1,596,709. As I understand the position this is the adjustment arranged under the variation agreements in the correspondence to which I have referred. Pan-Eastern had no separate office in the Bahamas, but the small organisation there was conducted in the office of its solicitors. In one year its total overhead was as low as $85. There is a consistent pattern of only nominal overhead expenses. The expression "volume discount" in the 1963 accounts is in my view significant as showing the real nature of the profit distributed through Pan-Eastern and A.M.P. and finally accruing to Europa's

funds. In regard to another aspect of the matter I will comment later in regard to this expression "volume discount".

Mr Mahon has made a number of submissions relevant to facts, from which he asks I should draw inferences. With some of these facts as emerging from the evidence I am in agreement. Some I do not consider are fair deductions from the evidence, and some I do not think assist me in drawing inferences favourable to the objector.

I agree with the first submission, that Europa was and is an independent New Zealand marketer of petroleum products, with its own particular problems concerning supply contracts, and I agree that Europa had a necessity for a long term contract from a global source. It might well have been that if the contracts were limited to a specified refinery force majeure might have frustrated the contract. I also agree that in 1954 to 1956, with the approach of the expiry date of the Caltex contract, it was a necessity for Europa to obtain a new contract with some supplier on the most advantageous terms available. In the 1955 period there is no definite evidence of discounts being granted off posted prices of products East of Suez. There were, it seems to me, on the evidence, discounts granted in the Caribbean on spot sales and in distress sales. In my view, from the expert evidence I have heard, firms seeking new outlets or endeavouring to hold existing outlets did at times grant indirect concessions by freight arrangements, by advantageous market arrangements of an indirect nature, or by provision of advantageous finance facilities. In fact, as far back as 1935 in the Caltex arrangement there was, as I have mentioned, a substantial freight concession to Europa, and it does seem that there was in this contract also a slight discount to Europa on gasoline supplied. As I have mentioned on several occasions, Gulf had particular reasons for endeavouring to obtain Europa's trade in gasoline, particularly as gasoline

was generally in surplus supply when the 1956 agreement was concluded. Gulf had unlimited lifting rights in Kuwait crude, and had to have a substantial market, and I would think an increasing market, for gasoline to enable it to refine sufficient crude to produce the heavy fuel oil and the middle distillates which it could readily sell. Gulf had also shortly before acquired a 7% interest in the Abadan refinery. If a substantial purchaser for gasoline could be obtained, Gulf would have increased profitability from its output of crude oil and fuel oil. I agree that in 1955-57 as far as the Persian Gulf area was concerned market prices were generally equivalent to posted prices when these commenced to be recorded.

I agree that the Caltex negotiations in 1954-55 did not come to fruition, mainly for the reason that Caltex was not prepared to continue the basic point allowance for freight, and the quality differential of .125 cents per gallon benefit derived by Europa under the earlier contract. In these negotiations Mr Todd was adamant in endeavouring to obtain concessions of some nature, either by a discount on posted prices, or probably what would have been more easily obtained, concessions of another nature, but producing the same result by indirect means. But these negotiations indicate no more than a refusal on the part of Caltex, and persistent endeavours on the part of Mr Todd. The plain result is that when it became likely that the negotiations would prove abortive, Mr Todd concentrated on another source of supply, and on another source which by various means might provide a likelihood of higher profitability to Europa. I think both parties in the Gulf-Europa negotiations in 1955 and 1956 recognised that direct discount on products would cause embarrassment, particularly in regard to the New Zealand trade, to the supplier, and might well also if such discounts became public, be a source of embarrassment in New Zealand to the marketer

in New Zealand.

I do not think the Caltex-Sleigh negotiations or arrangements in regard to Australian marketing are of assistance, although it is clear that Caltex would make no concessions off posted prices.

I agree that the early 1955 negotiations with Gulf were on a refinery basis. It is clear that Europa recognised that refining in New Zealand or elsewhere would be likely to be a profitable venture, but with the limited market for heavy oils in New Zealand there were obvious disadvantages at that time in setting up a refinery in New Zealand. Gulf's proposal for supply from a refinery in the East of Suez area was distinctly advantageous to Gulf. From Europa's point of view the location of the refinery was immaterial, provided Europa could obtain by some arrangement a share of a refiner's profit. This was indirectly finally effected by the 1956 agreements. The evidence does show that international oil companies conveniently spread their activities among subsidiary companies, and the practice has been to keep the subsidiary activities in water-tight compartments for various reasons, not necessarily for taxation purposes. Questions of exchange of currencies might well enter into the matter.

The nature of the Pan-Eastern set-up is, in my opinion, entirely different from that of a recognised refining joint venture. While the contracts involved normal posted prices for crude and products, and involved payment of a normal processing fee of 47.5 cents, leaving an ordinary refiner's margin, Europa anticipated in the terms of the 1956 contracts a half share in this normal refiner's margin usually regarded as equivalent to $1.00 U.S. per barrel of crude. By the subsequent variations it was assured of, and received, a half interest in this refining profit margin. I have already adverted to the intentions of the parties as set out in the letter of the 5th March 1956 to the Exchange Control

authorities whereby the end result of all the transactions was described as to produce for Pan-Eastern a profit of approximately the sterling equivalent of 50 cents U.S. per barrel on all crude oil purchased. While this is an ordinary refiner's margin, it seems to me of prime importance that A.M.P. were to provide an insignificant amount of capital, Pan-Eastern was a passive acceptor of the profits, and the whole of the business arrangements were conducted by Gulf.

I mentioned earlier that in one year the total expenses of Pan-Eastern amounted to $85.00, and a further perusal of the accounts seems to show that the highest overhead in any year amounted only to the insignificant sum of $1,974.00. Pan-Eastern also derived substantial earnings from interest received on bank deposits, which seem to have been handled by the Propet company. In addition, under the contract of affreightment substantial discounts were received.

I accept that it was impossible for Gulf to offer a discount on a straight-out supply contract, for various reasons. There is little evidence of any custom of granting discounts on posted prices East of Suez on long term contracts prior to 1956. Discounts would be likely to upset the general price structure in the international oil industry East of Suez. There is a general antipathy to price cutting, and in so far as New Zealand is concerned there would have been likely repercussions in regard to the Gulf-Shell agreement, and on the return to Gulf on the crude oil sold to Shell. It seems further that the Gulf-Shell agreement provided for penalties if Shell could substantiate that by any action of Gulf it had lost market in any of the relevant areas, and Shell had a contractual right in such events to reduce its crude oil off-take from Gulf. I agree that the 1958-59 and subsequent negotiations for variation of profit, which in effect resulted in a guaranteed profit to Pan-Eastern, not based on the original contract formula, but preserved the

2.5 cents per gallon gasoline profit, were conducted on an "arms length" commercial basis. In my opinion, however, Europa was in much the stronger position, Gulf was anxious to increase its production of crude oil to maintain or increase its fuel oil sales. By 1959 there was the prospect of the establishment in New Zealand of a refinery in which Europa and international companies would acquire joint interests. Europa would continue to require for its share in the trade of the New Zealand oil refinery substantial quantities of feed stock or naphtha, which, if procured from Gulf, would retain a substantial advantage to Gulf. It would seem that about July-August 1959 Gulf had become aware of approaches made to Europa by other companies to secure the feed stock contract for the proposed New Zealand refinery. While Europa's suggestions of crude discount were at this stage rejected by Gulf, the variations of the 1956 agreements provided an equivalent result.

The next step in negotiations commences about 1962. From 1956 on it had been in the minds of the parties that a refinery might be established in New Zealand. Prior to 1962 Europa acquired an interest along with a number of international oil companies in a New Zealand refinery to be constructed at Whangarei, and on the completion of the refinery Europa had become entitled to utilise a part of the refining capacity of the Whangarei refinery. As a result, Europa desired to purchase feed stocks for the purpose of utilising its New Zealand refining capacity. Further negotiations then took place between Gulf and Europa in regard to a feed stock supply contract, and between Gulf and Pan-Eastern in regard to a processing contract. Such contracts were finally entered into on the 27th December 1962. I need say little in regard to the 1962 contracts, as they were replaced by another series of contracts on the 10th March 1964, before the Whangarei refinery commenced operations, or in accordance with the

expression used in the oil industry "came on stream". These contracts bear a resemblance to the 1956 series of contracts with the Gulf organisation, although there are some differences. The 1964 agreements comprise first a supply agreement between Gulf and Europa for crude oil and other refinery feed stocks, and some other petroleum products if required. This agreement, which is Ex. B in the Case Stated, is adequately and correctly explained in the evidence of Mr Newton, a British consultant on economic problems relating to the petroleum industry, and a world authority, at page 31 et seq. of his evidence in chief. Under the supply agreement Europa purchases crude oil at posted prices, and naphtha at the posted price of Kuwait crude oil plus an additional charge in respect of excess of naphtha gravity over the gravity of Kuwait crude oil.

A further agreement between Gulf and Pan Eastern (Ex.B5) arranged for Gulf to supply to Pan-Eastern crude oil sufficient to meet the requirements of crude oil feed stocks, and finished products required by Europa under the Gulf-Europa supply agreement. Gulf then processed for Pan-Eastern a part of the crude oil and purchased back from Pan-Eastern the resultant feed stocks and products, and the unrefined crude oil equivalent to the quantity supplied to Europa by Gulf. The prices to Pan-Eastern under this contract in respect of crude oil were posted price less 15%, and for naphtha a per barrel charge irrespective of gravity, covering the cost of related crude oil and processing. Pan-Eastern sold the naphtha to Gulf at the same price as Gulf had arranged to sell to Europa. I need not refer to the prices of other products.

A further contract for transportation of feed stock to be supplied to Europa was entered into between Propot (a Gulf subsidiary) and Europa. At the time these contracts were entered into it seems that substantial discounts on Middle East crude oils were available, and had become customary in a number of transactions. The Europa supply

arrangements provide for posted prices on crude oil without any discount, but in effect by means of the Pan-Eastern arrangements there was an indirect discount to the Europa group. This is clear from the subsequent correspondence Exs. B1 to B4 in the Case Stated. By letter of the 16th March 1965, Gulf, with effect from April 1st 1964, granted a reduction in the price of Kuwait and Iranian crude oil sold to Europa under the supply contract of 10th March 1964, and revised invoices giving effect to the reductions covered cargoes sold to Europa during the period between April 1st 1964 and March 1965. A similar reduction was made in the price of naphtha sold under the supply contract. Again, on the 30th June 1966 reductions were made in the price of Kuwait and Iranian light crude oils with effect from the 2nd May 1966. Contemporaneously with the letter of March 1965 Gulf advised Pan Eastern of the reduction in price to Europa, and pointed out that under the terms of the Pan-Eastern - Gulf processing contract a corresponding reduction would apply in the prices paid by Gulf to Pan-Eastern Refining Company.

It seems clear, as analysed by Mr Newton, that under the 1964 series of contracts a discount or concession was provided by means of the Pan-Eastern arrangement, although at the outset Europa paid Gulf full posted prices. When direct discounts were granted to Europa in the 1965 and 1966 correspondence, the profit of Pan-Eastern was reduced by the full extent of these direct discounts. With this reduction in discounts the profit of Pan-Eastern to be shared equally between Gulf and Europa was at a reduced level. Nevertheless, from 1964 onwards Pan-Eastern, which neither handled nor refined the crude oil, nor handled the feed stock supply to Europa for its New Zealand refinery operations, received profits in effect gratuitously, and half of such profits still passed down the chain through A.M.P. for the

benefit of Europa. The only inference that can be drawn is that through this channel Europa received a reduction on the posted prices of its supplies, in addition to the direct discount granted in the 1965-1966 correspondence. The arrangements, in effect, and in the method of operation, continued the arrangements under the 1956 contracts, whereby a profit or a concession passed directly to Pan-Eastern, and a half share thereof passed indirectly to Europa.

I now turn to another branch of Europa's operations.

In 1961 it became evident that after the commencement of operations by the New Zealand refinery it would be convenient for Europa to obtain its supplies of gas oil, lighting kerosene and fuel oil in New Zealand. On the 18th December 1961 it entered into an agreement with British Petroleum Company's subsidiary B.P. New Zealand Ltd. to supply these products, the B.P. Company having adequate storage facilities in New Zealand. The prices to be paid to B.P. were based on Abadan posted prices ruling at the date of supply.

About this time a fully owned subsidiary of Europa, called Pacific Trading & Transport Co. Ltd. (hereinafter referred to as P.T.T.) was incorporated in the United Kingdom. On the 12th April 1962 British Petroleum Trading Ltd. (U.K.) agreed with P.T.T. that in consideration of the latter company having procured a contract for supply between Europa and B.P. (New Zealand) Ltd., B.P. Trading Ltd. would pay P.T.T. a 10% commission on each delivery of gas oil, lighting kerosene and fuel oil purchased by Europa under the supply agreement. This agreement with P.T.T. also provided for, in certain events, freight concessions. Payment of the commission was to be made in sterling to P.T.T. in England at quarterly intervals. It is somewhat difficult to understand the purpose of payment of this commission to a subsidiary in England. I do not think that Europa had any intention of tax saving by payment of the B.P. commission

to P.T.T., as the latter company would clearly be liable either in the United Kingdom or in New Zealand for income tax on its profits. It was certainly receiving such profits without being actively engaged in the matter. Mr Todd in his evidence stated that the B.P. Trading Company, London, was agreeable that its New Zealand subsidiary should enter into the supply contract, but it was not agreeable that any discount should be granted in New Zealand for the supply of the products into New Zealand. It was agreeable to pay commission to a subsidiary of Europa in England, and the P.T.T. Company was incorporated for this purpose. Be that as it may, the agreement falls into the general pattern of commissions or concessions being received by Europa outside New Zealand through subsidiaries, and is another indication of an indirect concession or discount on products purchased by Europa in New Zealand. I understand, however, that at some stage the New Zealand Inland Revenue authorities arranged with the British Revenue authorities that P.T.T. company would be regarded for taxation purposes as a company resident in New Zealand, and taxation on profits would be levied in New Zealand and not in the United Kingdom.

On the 30th March 1965 the Commissioner furnished to the objector an amended tax assessment in respect of the objector's income in the year ending 31st March 1960, such assessment disallowing proportion of the cost price of gasoline debited in the objector's accounts. As I understand the position this deduction on cost is equivalent to the share of Pan-Eastern profit in this year received by Europa's subsidiary A.M.P. Similar amended assessments were made in regard to subsequent years. The Commissioner disallowed the proportion of cost price in reliance on the provisions of ss.108 and 111 of the Land and Income Tax Act 1954 (hereinafter referred to as "the Act").

Section 110 and s.111 of the Act must be read

together. They are as follows :-

"110. No deductions unless expressly provided - Except as expressly provided in this Act, no deduction shall be made in respect of any expenditure or loss of any kind for the purpose of calculating the assessable income of any taxpayer.

111. Expenditure or loss exclusively incurred in production of assessable income:

(1) In calculating the assessable income of any person deriving assessable income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may, except as otherwise provided in this Act, be deducted from the total income derived for that year.

(2) In calculating the assessable income of any person deriving assessable income from two or more sources, any expenditure or loss exclusively incurred in the production of assessable income for any income year may, except as otherwise provided in this Act, be deducted from the total income derived by the taxpayer for that year from all such sources as aforesaid".

In regard to s.111 the learned Solicitor-General makes the following submissions :-

"(1) That the appropriate test of deductibility in this case is whether the expenditure in question was exclusively incurred in producing assessable income of Europa.

(2) That the test of deductibility of expenditure under s.111 is narrower than the test applied in the United Kingdom and Australia.

(3) That while the Commissioner may not challenge the wisdom of an expenditure he may question its purpose (and the two are distinct).

(4) Expenditure may be apportionable where it is incurred for two or more purposes, a deduction being allowed in respect of that part which is exclusively incurred in the production of assessable income of the taxpayer.

(5) Applying the law to the facts, that the expenditure by Europa on petroleum supplies obtained from Gulf and B.P. was incurred for two

purposes :

(i) for the purpose of procuring supplies for Europa and thereby producing assessable income of Europa; and

(ii) for the purpose of producing a return to Europa through Pan-Eastern and P.T.T. respectively and such part of the expenditure is not deductible".

The Solicitor-General makes the further submissions on the facts :-

"When we come to the crux of the matter the basic submission of Europa is that the Commissioner's assessment is wrong because (Europa claims) the Pan-Eastern set up is a conventional refining venture which produced a refining profit. It is our submission on the facts that the objector has failed to establish that claim because when the whole of the evidence is considered the proper inference to be drawn is that the profit of Pan-Eastern which came to Europa was a Price Concession or Discount for which the Pan-Eastern set up was merely the machinery.

I propose to consider the evidence under the following two more detailed submissions on the facts.

1. That the primary object of the overall arrangements between Gulf and Europa was to obtain products and later feed stocks at an attractive price (a discounted price), the Pan-Eastern set up being a means to that end adopted in 1956 by Gulf and Europa which had the purpose and effect of avoiding upsetting the pattern of posted prices and providing non-assessable income for Europa.

2. That the properties (sic) which may be pointed to as suggesting a refining venture are entirely outweighed by evidence showing that the arrangement is not a refining or commercial venture, and that the Pan-Eastern arrangements in the guise of a refining venture simply provide for a guaranteed return to Europa, directly related to Europa's own purchases, and unrelated to a conventional refiner's margin or any commercial dealing".

Mr Mahon on the other hand submits on the facts that Europa could not purchase gasoline from Gulf at other than the posted price, that the whole matter is one of contract, and that the profits derived by Pan-Eastern cannot be deducted from the market price paid by Europa to Gulf for gasoline, that the fact that some part of the payment comes back to Europa indirectly cannot render it a deduction from the purchase price, and that the payments by Europa were contractual, and not voluntary payments, and that in the negotiations the method and quantum of payment was stipulated by Gulf, and Europa had no option in the matter.

While I do not entirely disagree with Mr Mahon's submissions on the facts, from what I have already said it seems to me that the Solicitor-General's submissions are substantiated by the evidence, and more particularly by the records of what took place from time to time between the parties.

In my opinion in all the contractual dealings on the part of Europa in obtaining gasoline supplies it is clear that it contracted for a concession on posted prices based on the volume of its purchases. In the 1936 arrangements with Caltex, putting aside the small qualitative concession, there was a freight concession throughout. This freight concession was directly related to the quantity of

gasoline purchased. In the 1954-1955 negotiations with Caltex Mr Todd was endeavouring to obtain what can broadly be described as a volume discount on purchases, and also a volume discount on freights. To these proposals Caltex would not agree, and it was then he commenced negotiations with Gulf. I accept that Gulf, for the reasons I have already given, was not prepared to agree to a direct discount to a New Zealand purchaser on posted prices. Gulf was anxious to secure the Europa contract. The parties then explored ways and means of giving an indirect concession. No doubt the scheme of incorporating Pan-Eastern in the Bahamas originated with Gulf. No doubt consideration of the refiner's profit was a basic factor in the provisions of the 1956 series of contracts. I do not think these contracts can be considered individually. They are all allied and form parts of one complete and related arrangement between the two companies and their respective subsidiaries, all under the control of the two principal contracting parties. The recitals in the various contracts show clearly that they are interlinked. The whole basis of the arrangements was that Europa should obtain what might be described as a refund through Pan-Eastern and A.M.P. of 2.5 cents per gallon on its cost price in New Zealand of gasoline. This is amply confirmed by the correspondence contained in Ex.B14 from 1959 onwards, and this was the result attained. The elaborate provisions in regard to the sale of crude, the refining of the crude, and the resale of the heavy products to Gulf, and of the gasoline and gas oil to Europa was, as has been said, a notional arrangement. In fact, it might be described as a fictional arrangement, and the practical method of carrying the contractual provisions into effect was simpler and more direct, but attains the same desired intention. The complete series of contracts and the series of events must be regarded as one whole. It would be quite lacking in reality to regard

any of these individually.

The 1962 and 1964 contracts establish a similar pattern. The indirect concession or concessions to Europa based on the volume of feed stocks it purchased, and which were derived from Gulf supplies of crude. Again a concession, although in this case a direct concession or discount to another overseas subsidiary, P.T.T., formed an essential part of the B.P. - Europa arrangement.

I must accept from the whole series of transactions, and from the records which are before the Court, that on the whole of the evidence, and in this connection I accept substantially the evidence both of Mr Newton and Professor Leeman, the profit of Pan-Eastern which ultimately came to Europa was a price concession directly related to the cost of Europa's purchases of gasoline, and the intermediate companies were merely machinery.

I am satisfied that Gulf did not enter into or intend to enter into any joint refinery venture with Europa or through the instrumentality of Pan-Eastern. Both parties recognised that a refinery through its operations enjoys a profit as a middle man between the supplier of crude oil and the purchaser of the refined products, that this profit was conventionally a substantial one, although it might be affected by the refiner's squeeze, that is, in the event of an increase in cost of crude oil and a decrease in the market prices of the refined products. In my view the parties recognised that participation in what was equivalent to the refiner's profit, even although Europa would not or could not engage itself in refining operations, would be a means of providing Europa with a concession on its cost price of gasoline. Likewise, Gulf was prepared to grant such concession to obtain a market for gasoline of which it was likely to have a surplus, and to obtain a greater volume of production and sale of crude oil. The arrangement was

profitable to both companies. I am satisfied that the whole basis of the arrangement was a return guaranteed to Europa by Gulf of 2.5 cents or thereabouts per gallon on gasoline purchased by Europa. This seems to me also to be implicit in Mr Todd's memorandum Ex.P., supplied to the Commissioner in March 1963, when he mentions that in the petroleum industry it is well established that much refining is done on a fee basis, and refers to the operations and the earning capacity of the New Zealand Refining Company expected from the New Zealand Refining Company which had not then commenced its operations. In his evidence he also confirmed that he anticipated a gross refiner's margin through Pan-Eastern of $1 U.S. per barrel of crude, and a margin to be earned by Pan-Eastern of approximately 52.5 cents per barrel of crude, and that such figures were a realistic expression of the profitability, based upon the current price of crude oil, current cost of processing, and the current values of the respective market yields. He later stated that in a fifty/fifty participation in result Europa felt that it was proper that there should be some protection against erosion of profit, and the formula provisions were put forward to offer some sort of stability in the overall earnings to be shared. Pan-Eastern, if it had acted as the refiner, would have expected a gross profit of the difference between cost of crude and sale profits, less the refining cost, but in the practical arrangements ultimately made Pan-Eastern did not operate as a refiner. The refining was done by a subsidiary of Gulf, but Pan-Eastern was guaranteed by Gulf the normal refiner's profits. Gulf provided the crude, supplied the refinery, took all profits, kept the records, arranged all accounting, and any functions conducted by Pan-Eastern in the Bahamas were minimal only.

The evidence of Mr Smith sets out the position realistically. He stated that Pan-Eastern never at any stage held stocks of oil. Under the processing contract crude

oil was delivered to the refinery at the sole risk of Gulf, the crude was processed at the sole risk of Gulf. All products were taken by Gulf at the refinery, Gulf Iran the gasoline, and Propet the heavier oils. There was no indication in Pan-Eastern records that at any time Pan-Eastern owned any tangible assets. Pan-Eastern did not incur any normal commercial liabilities other than to Gulf, that is, other than for expenses in the Bahamas. When Pan-Eastern required moneys to make dividend payments, the moneys were made available to Pan-Eastern by the Propet company. The operations in the Bahamas seem to have been limited to the keeping of the statutory records of the company, and the directors' and shareholders' meetings, which were held in the Bahamas, and all necessary accounting records were prepared and kept by Gulf. The whole Pan-Eastern set up seems to me to have been artificially designed, mainly, it would seem, to provide machinery to produce a result agreed to by Gulf and Europa, resulting in a concession to Europa, based on its purchases from Gulf. It may be, and this may have been for the benefit of both organisations, that Pan-Eastern was also of assistance as a medium of currency exchange, but in my view this does not alter the real position between Europa and Gulf, and the former's purchases.

I therefore find as facts that Pan-Eastern cannot be regarded as a conventional refining venture, as suggested by the objector; that the primary object of the arrangements was to enable Europa to obtain products and later feed stocks at a concession price which would avoid the repercussions or embarrassments of departing from the pattern of posted prices; that the arrangement, while of a commercial nature, was not a refining venture, and the arrangements merely provided for a guaranteed return to Europa directly related to Europa's own purchases, although the estimated anticipated profits or anticipated return was based on what

might have been expected from an alternative joint refining venture. But there was never such a joint refining venture, and Europa was relieved from making the necessary substantial investment in such a venture.

Accepting this view, Mr Mahon's submission that the whole payments received by Europa through the Pan-Eastern - A.M.P. chain were contractual, and not voluntary payments, seems to me to be beside the point. Also accepting, as Mr Mahon submits, that Europa could buy only at posted prices, this rendered it necessary that to attract Europa's trade Gulf had to and did devise a means to sell at posted prices, but to grant concessions for the ultimate benefit of Europa in the indirect manner adopted.

I must now, in the light of these findings of fact, consider the application of s.111 to the situation.

In considering Mr White's submissions I must bear in mind certain general principles which are applicable in general in revenue matters. The burden of proof lies with the objector. This applies to questions of fact and, but perhaps to a lesser extent, the inferences of fact to be drawn from the primary facts and the overt acts of the parties.

The mere form by which a transaction is carried through is not conclusive as to its nature, either against the Commissioner or the taxpayer; where such form does not truly express the real position, the matter must be looked at as a whole, and the nature, purpose and substance of it must be regarded: (Commissioners of Inland Revenue v. Wright [1927] 1 K.B. 333). The Court must look at the whole nature and substance of the transaction and not be bound by the mere use of words: (Secretary of State in Council of India v. Scoble [1903] A.C. 299, 302). The legal effect of the contract as it stands must be ascertained and not what might be the legal effect if the words of the contract must be disregarded and the substance of the matter be considered:

(Duke of Westminster v. I.R. Commissioner (1934) 19 T.C. 490 at p. 509 per Lord Romer).

A taxpayer is entitled to order his affairs so as to attract the least amount of tax. I quote the classic statement of Lord Atkin in the Duke of Westminster case at p. 511 :-

> "It was not, I think, denied, at any rate it is incontrovertible, that the deeds were brought into existence as a device by which the respondent might avoid some of the burden of surtax. I do not use the word 'device' in any sinister sense: for it has to be recognised that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a court of law is to determine the legal result of his dispositions so far as they affect tax".

The principle is even more graphically stated by Lord Clyde in Ayrshire Pullman Motor Service v. Commissioner of Inland Revenue 14 T.C. 754 at p. 763 :-

> "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow - and quite rightly - to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue".

Once the real nature of the transactions is ascertained, the results for taxation flow only from what is in fact done, and not from the intention of the parties: (O'Kane & Co. v. Inland Revenue Commissioners (1922) 12 T.C. 303, 347, per Lord Buckmaster.)

In regard to Mr White's two primary submissions, in my opinion they are incontrovertible. The Act is clear. Except as expressly provided, no deduction shall be made in respect of any expenditure. The deduction provided is for expenditure exclusively incurred in the production of the assessable income.

In Ward & Co. v. Commissioner of Taxes [1923] A.C. 145 where the taxpayer, a brewery company, sought to deduct money

spent in advertising to defeat a prohibition poll, their Lordships had to consider the real question whether the expenditure was within the true meaning of s.86(1) of the Act of 1916 (now s.111 of the Act) exclusively incurred in the production of assessable income. In delivering the opinion of the Board, Viscount Cave L.C. at p. 149 says :-

> "The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s.86, sub-s, 1(a) of the Act. For that purpose it must have been incurred for the direct purpose of producing profits".

Again in Aspro Limited v. The Commissioner of Taxes [1932] A.C. 683 the judgment of their Lordships in the Privy Council upheld the decision of the Magistrate, and the majority of the Court of Appeal who refused to hold it proved that the payment of £10,000 out of profits to the two directors who were also the sole shareholders in the company was an expenditure exclusively incurred in the production of the assessable income.

There in the Court of Appeal Herdman J. (1930 N.Z.L.R. 935 at p. 946) recognised a general principle acted upon in allowing deductions in Usher & Wiltshire Brewery Ltd. v. Bruce [1915] A.C. 433) that deductions are allowed on the grounds that the expenses were incurred not as a matter of charity, but as a matter of commercial expediency, and were obviously a sound commercial outlay. This principle is relied on by Mr Mahon in the present argument.

In this case the Brewery Company were owners or lessors of a number of licensed premises which they had acquired solely in the course of and for the purpose of their business as brewers, and as a necessary incident to the more profitable carrying on of their said business. The premises were let to

tenants, who were tied to purchasing their beers from the company. The company claimed that in the computation of their profits for assessment, expenses, including repairs to the tied houses, fire and life insurance premiums, rates and taxes, and legal and other costs should be allowed. It was held that all the expenses claimed were deductible as being money wholly and exclusively laid out or expended for the purpose of the trade of the brewery. The basic reason for the decision is set out by Lord Sumner at p. 437. There Lord Sumner says :-

> "It is said that such expenditure is not wholly and exclusively expended. Insofar as any questions of law arise here - and it is not clear that there are any - I think that the decision in Smith v. The Lion Brewery [1911] A.C. 150 disposes of them. Where the whole and exclusive purpose of the expenditure is the purposes of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of finding as to the whole and exclusive purpose".

It seems to me that this authority is distinguishable on the facts from the present case. There it would seem that the whole and exclusive purpose of the expenditure was for the purposes of the company's ordinary trading operations. Incidentally a benefit was derived by the publican lessees. Here the cost of the objector's purchase of gasoline was an expenditure incurred in its ordinary marketing business in New Zealand, but the question at issue is whether the whole amount paid to the Gulf organisation was paid exclusively for the ordinary New Zealand trade of the objector. No discount was given on the amount charged by the Gulf company, but a benefit by way of a discount or concession directly related to Europa's purchases was by virtue of the allied contracts obtained by Europa's subsidiary A.M.P. The position can be regarded in another way. By subscribing to the capital of Pan-Eastern, Europa through its wholly-owned subsidiary A.M.P. acquired a right to a half share in the profits of

Pan-Eastern. Pan-Eastern acquired such profits directly by payments to it by Gulf, payments agreed between Gulf and Europa, as a refund or discount on the amount paid by Europa to Gulf-Iran for the gasoline Europa purchased. The rights acquired by Europa and the profits accruing to A.M.P. flowed from the combined effect of the 1956 series of contracts. By virtue of these contracts and the purchases and payments thereunder made by Europa to Gulf, Europa through A.M.P. obtained the power to enjoy the sums paid by way of a concession by Gulf to Pan-Eastern. In my view here there were two purposes attached to the expenditure, first, the ordinary trading gain to Europa, but equally important, the profit by way of concession to its wholly owned subsidiary. The purpose of the whole series of contracts entered into in 1956 was a dual purpose. It cannot in my opinion be said that the purpose of the expenditure was exclusively for the purpose of the expender's ordinary trade.

The second purpose, the profit to be obtained by A.M.P., is not by any means minimal or insignificant. In fact, during the years of operation it amounted to 25% or more of the amount paid by Europa for gasoline supplied to it. The same considerations seem to me to apply to the 1962 and 1964 series of contracts, and also to the contract between B.P. and P.T.T., again directly allied to Europa's contract with B.P.'s New Zealand subsidiary.

In the third place the Solicitor-General submits that while the Commissioner may not challenge the wisdom of an expenditure, he may question its purpose, and that these two matters are distinct. In other words, the Commissioner is not entitled to ask whether the taxpayer should have incurred the expenditure, but he may ask why did the taxpayer incur the expenditure. This is implicit in the judgments of the High Court of Australia in Ron Pibon Tin No Liability and Tong Kah Compound No Liability v. The Federal Commissioner

of Taxation (1948-49 78 C.L.R. 47). There, before the outbreak of the war, the taxpayer carried on in Siam and Malaya tin-mining operations from which it derived a substantial income. During the occupation by the Japanese it derived no income from mining, but it maintained its administrative structure in Australia. It incurred expenditure, such as directors' fees and expenses of management in the central administration of its affairs, and in making allowances to the widows and families of managers who were prisoners of the Japanese, but whose widows and families were living in Australia. It was held that only a small part of the total expenditure was referable to the gain of assessable income from investments, and the Commissioner allowed as a deduction only a small percentage from the gross income. The only deductions allowable were losses and outgoings to the extent to which they were necessarily incurred in carrying on a business for the purpose of gaining or producing such income. In the judgment of the Court at p. 60 it is said :-

> "It is important not to confuse the question how much of the actual expenditure of the taxpayer is attributable to the gaining of assessable income with the question how much would a prudent investor have expended in gaining the assessable income. The actual expenditure in gaining the assessable income if and when ascertained must be accepted. The problem is to ascertain it by an apportionment. It is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent".

The same matter was considered in the Aspro case [1930] N.Z.L.R. 935 in the New Zealand Court of Appeal, by Mr Justice Herdman, where he said at p. 946 :-

> "Strong as are the inquisitorial powers vested in the taxing authorities, they, of course, cannot dictate to a taxpayer as to how he shall carry on his business. As was said by Ferguson J., in Toohey's Limited v. Commissioner of Taxes, 'it is nothing to the point that if he had been more capable, more experienced or more prudent, he might have cut down his expenses. The question is what he did in fact spend on his business. If he chooses to employ a hundred men where twenty

> would have been ample, that is his own affair. Of course, it may still be a matter for inquiry whether these men were really employed in the business, or were merely put on the pay-roll as a device to swell the apparent expenses of the business; but that is another matter.' Johnson Bros. and Co. v. Commissioner of Inland Revenue is a case which has an important bearing upon the present one, because in it the Commissioners conducted an investigation into the relations which existed between a father and his sons in carrying on a business, and because it was held that the Inland Revenue Commissioners were entitled to say what amount of the share of profits paid to the sons should be allowed to be deducted as their remuneration for time and labour expended by them in the business".

The authority of Johnson Bros. v. Commissioner of Inland Revenue [1919] 2 K.B. 717 referred to by Mr Justice Herdman is also accepted in the judgment of the Privy Council in the same case.

The only other authority to which I need refer on this aspect is Shipbuilders v. Commissioner of Inland Revenue [1968] N.Z.L.R. 885. There in his judgment in the Court of Appeal Turner J. says that "in deciding whether an expenditure is incurred exclusively in the production of the assessable income it is usual to examine the purpose for which such expenditure was made". And in my own judgment in the same case at p. 912 I place emphasis on the dominant purpose of the appellant in making certain payments.

Mr Mahon has referred to Cecil Bros. Pty. Ltd. v. Federal Commissioner of Taxes 1962-1964 111 C.L.R. 430. I propose to refer to this authority at a later stage, but on this aspect it seems to me that the case was decided on the same principles as the Ron Pibon Tin authority. In his judgment at first instance Owen J. says this :-

> "The fact that the taxpayer paid more for its purchases than it would have paid had it dealt direct with the manufacturers or wholesalers in order that Breckler Pty. Ltd. might make a profit out of the transaction does not in my opinion prevent the amount which it in fact paid for the purposes of s. 51(1) from being regarded as an outgoing incurred in gaining its assessable income. It seems to me that the contention really is that the taxpayer paid more for its goods than it should have. But 'It is not for the court or the Commissioner to say how much a

taxpayer ought to spend in obtaining his income, but only how much he has spent'."

The next submission of the Solicitor-General is that expenditure may be apportionable where it is incurred for two or more purposes, deduction being allowed in respect of that part which is exclusively incurred in the production of assessable income. There is ample authority in support of this proposition. Previously under the 1900 Land & Income Tax Assessment Act the requirement was that the expenditure must be wholly and exclusively for the purposes of the business, and it would appear that expenditure was not apportionable (see Commissioner of Taxes v. Ballinger & Co. (1903) 23 N.Z.L.R. 188). But the word "wholly" is omitted from the corresponding provisions of the 1923 and 1954 Acts, and it is no longer necessary that the whole of the expenditure should be incurred in the production of the assessable income. Such part of it as is exclusively incurred for that purpose appears to be now the authorised deduction. In Public Trustee v. Commissioner of Taxes [1938] N.Z.L.R. 436 at p. 456, where interest was claimed as a deduction on money borrowed and employed in the production of both assessable and non-assessable income, Sir Michael Myers C.J. answered the question at issue that as a matter of law part of the interest is deductible, that is, the portion of interest payable on money borrowed and employed in the production of assessable income, and that the quantum of such a deduction is a matter of fact and is for the Commissioner to decide. The judgment of Mr Justice Callan at p. 458 is to the same effect.

Other examples of apportionment between expenditure exclusively used for the production of income, and expenditure not so used, are the Ron Pibon Tin case, to which I have referred, the Aspro case, where there was an apportionment, and Omihi Lime Co. Ltd. v. Commissioner of Inland Revenue [1964] N.Z.L.R. 731. There Wilson J. decided that costs of the

unsuccessful claim for damages in regard to the portions of the claim relating exclusively to income were deductible as portion of the loss on the income claimed, but that the costs relating to issues that were common to both capital and income were not deductible.

The last submission of the Solicitor-General is in effect a submission on the facts. He says that applying the law to the facts the expenditure by Europa on petroleum supplies obtained from Gulf and B.P. was incurred for two purposes, (1) for the purpose of securing supplies for Europa and thereby producing assessable income of Europa, and (2) for the purpose of producing a return to Europa through Pan-Eastern and P.T.T. respectively, and such part of the expenditure is not deductible. Again the issue is largely dependent on the purpose of the expenditure, such purpose to be deduced from the happenings which have taken place. I think the same consideration which Lord Pearce adopted in delivering the opinion of the Privy Council in B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia [1966] A.C. 224, 264 indicates the correct approach. He said :-

> "The solution to the problem is not to be found by any rigid test or description. It is to be derived from many aspects, the whole set of circumstances, some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates over vaguer indications in the contrary direction. It is a commonsense appreciation of all the guiding features which must provide the ultimate answer".

In the Regent Oil Ltd. v. Inland Revenue Commissioners [1966] A.C. 295 Lord Reid refers to the further source of difficulty, which has been a tendency in some cases to treat some one criterion as paramount, and to press it to its logical conclusion, without proper regard to other factors in the case. He adopts with approval a statement of Lord Clyde :-

> "So it is not surprising that no one test or principle or rule of thumb is paramount. The

> question is wholly a question of law for the court, but it is a question which must be answered in the light of all the circumstances which it is reasonable to take into account, and the weight which must be given to a particular circumstance, and in a particular case, must depend rather on common sense than on strict application of any single legal principle".

Here, as I have already said, while the parties in negotiating the 1956 contract were at arm's length, the common purpose was to provide Europa with a concession other than one in the form of an ordinary trade discount, and other than one which would have repercussions in the normal trading of either party, Gulf or Europa. With this object in mind Gulf was not prepared to grant Europa an ordinary trade discount on its purchases of gasoline. It insisted on the supply contract being based on posted prices. On the other hand, Gulf recognised that Europa's custom was highly profitable to Gulf if it could secure a long term contract with Europa. Another method had to be found to provide a substantial concession or discount for the benefit of Europa. This was accomplished through the Pan-Eastern - A.M.P. arrangements, and the processing and freight contracts. The substantial discount on posted prices ultimately came to Europa by the indirect route. The profits derived by Pan-Eastern were not derived from any commercial activity or effort on the part of Pan-Eastern. In so far as Pan-Eastern and A.M.P. were concerned, payment was in effect gratuitous. But the inducement to Europa to agree to pay posted prices consisted of three benefits. First, an assured supply of gasoline over a long term period, second such supply at posted prices, and third the benefit of the returns through the Pan-Eastern - A.M.P. link of the concession, directly related to the quantity of gasoline purchased by Europa. The payment at posted prices, in my opinion, was in consideration of the dual benefit, the supply at posted prices and the indirect discount. If the discount had been granted direct to Europa, the net price

would have been an expenditure exclusively incurred for its normal trading operations, and would have been deductible in full. The price paid correlated with the Pan-Eastern concessions cannot, in my opinion, be regarded as exclusively incurred in Europa's ordinary trading operations. It was incurred for the dual purpose, and in my opinion the Commissioner was entitled to apportion the expenditure between the two purposes. This he has done by deducting from the expenditure a sum equivalent to the amount of A.M.P.'s share of the concession received through Pan-Eastern. As I have indicated earlier, the whole series of contracts entered into in 1956 cannot be looked at individually, but are correlated, and are all constituent parts of one complete bargain. The same considerations apply to the 1962 and 1964 series of contracts, and the contract entered into between Europa and the B.P. organisation in 1961. In the last instance it is even more clear that the payment which B.P. agreed to pay to P.T.T. was a commission or discount to Europa on the cost of its purchases.

In my opinion the present case is the converse of the B.P. case (supra). There one of the course adopted by B.P. to reorganise marketing and distribution in a section of the trade was to join with three other oil companies in order to secure sites where their products might in common be sold to the public. In pursuance of this plan B.P. promised to pay a sum of money, in the agreement called "develop allowance" as part of the consideration for the undertaking by the service station proprietor to deal exclusively in the brands of motor spirit approved by B.P. for a fixed number of years. The gallonage factor was a matter for consideration in deciding what sum should be regarded as the maximum amount which might in the particular case be laid out, but it was not the determining factor. It was decided in the Privy Council on the balance of all the relevant considerations

the scales inclined in favour of the expenditure being of a revenue and not a capital nature. The matter was dealt with under the slightly different terms of the Australian statutes, and seems to have been decided on balance, some of the factors being that taking a broad view of the general operation it was made to meet a continuous demand in the trade, and considering many aspects dealing with payments made to customers to secure their custom, the nature of the benefits sought and obtained by B.P. pointed to the expenditure being revenue, rather than capital, and that in considering the manner in which the advantage was to be used, the benefit was to be used in the continuous and recurrent struggle to get orders and sell petrol, and the agreements were the basis of the orders, and made the orders inevitable and merged in and became part of the ordinary process of selling. It seems to me that this might be applicable if I were dealing with the question whether the concessions granted by Gulf were a revenue expenditure, but it does not seem to me to be applicable to the question whether the whole of the purchase cost in New Zealand to Europa was exclusively a revenue expenditure in its New Zealand trading, irrespective of consideration of the other benefits Europa was in fact obtaining in making payments on the basis of posted prices.

In regard to the Cecil Bros. Pty. Ltd. decision (supra) I also think it is distinguishable from the matter which I am at present considering. There the main question at issue was whether the dealings between the taxpayer and the company from whom it was purchasing supplies were sham transactions. It was held that they were genuine transactions, and in no way fictitious or unreal. It was further held that s.260 of the Australian Act, equivalent to our s.108, could not apply to defeat or reduce any deduction otherwise properly allowable under s.51, our s.111. There the Commissioner argued that by virtue of s.51 the full outgoing

should not be regarded as an outgoing necessarily incurred in gaining or producing the taxpayer's assessable income. Owen J. at first instance rejected this submission, and with this rejection Menzies J. agreed in his judgment on appeal. There the benefit of the whole price actually paid for goods pursuant to contracts with an outside company went to the outside company, and it was held that the validity of the agreements remained unaffected. It was an outside arrangement pursuant to contracts, the validity of which remained unaffected. Legal efficacy had to be granted to the agreements. Here, however, I am concerned not with one agreement with an independent party, but related agreements between vendor and purchaser which provide, not independently, but dependent on each other, the concession to the purchaser. Again, in The Timaru Herald Co. Ltd. v. Commissioner of Taxes [1938] N.Z.L.R. 978 it was held (see Myers C.J. at pp.997 and 998) that the two businesses with which the court was concerned were independent businesses, and the appellant had no control over the business and operation of the company to which payments were made. It followed that the payments made to the independent company were regarded as expenditure exclusively incurred in the production of the assessable income. The agreement was a bona fide one, whereby by virtue of the payments the appellant was enabled to earn or ensure larger profits for itself, and on that account the payments were part of its business outlay or expenditure. I do not think the like considerations apply here.

I therefore reject the submission that the whole of the purchase price of Europa was expended exclusively in the production of its assessable income, and I also consider that the Commissioner was entitled to apportion the company's expenditure fairly in part attributable to the production of assessable income in New Zealand, and in part attributable to the second purpose, the concession to

be obtained through Pan-Eastern and A.M.P.

Mr Mahon has raised a subsidiary question relating to estoppel, which I should deal with at this juncture. He submits that the decision of the Commissioner notified to the objector in a letter dated the 27th June 1963 was the exercise of a statutory discretion conferred by ss. 22 and 111 of the Act, and may not be reversed by the Commissioner. This submission can operate only in respect of the years up to and including the 31st March 1964.

The text of the letter of the 27th June 1963 is as follows :-

"Bryan Todd Esq.,
110-116 Courtenay Place,
WELLINGTON C.3.

Dear Mr Todd,

You will recall that in March last we discussed the effect on New Zealand taxation of a number of contracts between Europa Oil (N.Z.) Ltd., Gulf Oil Corporation and Pan Eastern Refining Co. Ltd. I advised then that I would refer the agreements to the Solicitor General for consideration of their validity under New Zealand legislation.

I have now received his advice, with which I am in agreement, and propose to take no action to disturb the present position.

The further question of my obligation to disclose the information to the American Revenue authorities under the double tax agreement with the U.S.A. will be considered when the investigation is complete.

I am arranging for Mr Tyler to return to you the copies of contracts which you made available to him.

Yours faithfully,

"F.R. MACKEN"

Commissioner of Inland Revenue"

Mr Todd answered as follows :-

"CONFIDENTIAL 3rd July 1963.

F.R. Macken Esq.,
Commissioner of Inland Revenue,
Inland Revenue Department,
P.O. Box 2198,
WELLINGTON.

Dear Mr Macken,

I acknowledge receipt of your letter of the 27th June. I am very pleased to have your confirmation that the Solicitor General and yourself are satisfied as to the contracts and that the income generated from the contracts with the Pan Eastern Refining Company Limited does not directly or indirectly constitute assessable income in New Zealand as had been suggested.

Regarding the disclosure to the American Revenue Authorities, I have no doubt that there is no reason on the part of the Gulf Oil Corporation why the American Authorities should not be formally advised by you. However, as I indicated to you, we are concerned lest any of the international oil companies should consider that dealings with Europa Oil (N.Z.) Ltd. would be of a less confidential nature than with other companies who are domiciled overseas. I therefore appreciate the time interval which will allow me to advise the Gulf Oil Corporation of the discussions which have taken place with you here in connection with the contracts.

Yours sincerely,
"BRYAN TODD" "

Mr Mahon concedes that an assessment may be amended if there has been non-disclosure by the taxpayer of information which he is under a duty to communicate, but submits that during the investigation, prior to the letter of the 27th June 1963, the question at issue was not a reconsideration of a return, but an enquiry on behalf of the Commissioner with the purpose of obtaining information whether he should review the earlier assessments.

Mr Mahon further submits that the decision notified in the letter of the 27th June 1963 was acted upon by Europa to its detriment, and the Commissioner is now precluded from contending that the decision can be reversed. The detriment to Europa is said to be that it subsequently used funds, which are now said to be taxable, for distribution to its shareholders, that its shareholders paid dividend tax thereon, and that Europa entered into the 1964 contract, which in its terms is in many respects similar to the 1956 contracts, relying on the Commissioner's decision.

Europa itself has since 1963 been able to earn money to pay tax assessed, but detriment is suffered in that Europa and A.M.P. have been deprived of funds derived from earnings with which to meet the assessments.

The investigation by Mr Tyler, the Inspector of the Department, into the tax affairs of Europa began early in February 1963, and he had various interviews with Mr Smith, the Treasurer of Europa Oil, and also a director of that company, and secretary of A.M.P. The first interview between Mr Smith and Mr Tyler seems to have been on the 13th February 1963, and Mr Tyler then ascertained the registration in the Bahamas of Pan-Eastern Refining Company, in which the shareholding was owned half by Europa's subsidiary and half by Gulf Oil, and it appears that he obtained some information that the profits of Pan-Eastern Refining from 1958 to 1962 approximated £625,000. A further interview with Mr Todd and Dr Lau, a taxation consultant of Europa, took place on the 21st February. Mr Tyler then obtained information indicating that the accumulated profits of Europa's half share in Pan-Eastern since 1st January 1957 had amounted to £2,405,000. It seems clear both from notes made by Mr Tyler and also from notes made by Mr Smith, that Mr Todd emphasised that Gulf sold crude to Pan-Eastern at posted prices, and bought back refined products at posted prices, and that the parties were at arm's length; that transactions were made on the basis of the international market, and the Refining Company paid a standard refining fee of 47.5 cents a barrel, and there was no hidden benefit received by it. It would seem that just prior to the interview with Mr Todd, there had been another interview with Mr Smith, and the 1956 series of contracts, including the supply contract, the processing contract, and the freight contract, had been perused by Mr Tyler in the Europa office, but Mr Tyler had not been authorised to make copies. Right from the outset it is clear that Mr Tyler emphasised that he required information for the purpose of

deciding whether in regard to Europa's purchases from Gulf it was receiving by some means a discount from Gulf.

There was a further interview with Mr Todd, at which Mr Smith was present, on the 21st March, and there does not seem to be any dispute that Mr Todd maintained that no discounts were available in the international oil trade.

On the 20th March Mr Todd forwarded to the Commissioner information which he considered necessary to meet Mr Tyler's enquiries. This contains some general information in regard to the oil industry and the refining business, and Europa's marketing operations in New Zealand. He asserts that Pan-Eastern operates on a conventional refiner's market, that is, the difference between the cost of crude oil and the sales value of the products, less the cost of processing, and refers to the formula contained in the 1956 supply contract as being included for the purpose of cushioning the possible effect of substantial price fluctuations.

In my opinion it is clear that the directors of Europa possessed a considerable amount of relevant information which was not disclosed to Mr Tyler or to the Commissioner prior to the latter's letter of the 27th June 1963. In the first place, when Mr Tyler's February-March discussions with Mr Smith and Mr Todd were taking place, no information was given in regard to the 1962 series of contracts, which had very shortly before been completed with the Gulf group. These were certainly of importance. Furthermore, no mention was made of the B.P. contracts with Europa and Pacific Trading Company, entered into in 1962. No mention seems to have been made until after April 1963 in regard to the 1936 Caltex contracts, and details in regard to these contracts do not seem to have been obtained by the Commissioner until after his letter. The Europa and P.T.T. contracts with B.P. were finally produced to the Commissioner on the 15th December 1964, and later, on the 11th May 1965 the Caltex

1936 contracts, and the Gulf 1964 contracts, were supplied to the Commissioner. From the 1963 interviews, in my opinion, it would be accepted by the Commissioner that the profit obtained by Pan-Eastern was derived on the basis of the formula contained in the 1956 contract, but there was in existence, commencing from January 1958, the amended variations contained in the correspondence between Europa and Gulf Oil Corporation, comprised in Ex. B14 of the Case Stated. As I have said earlier, this resulted in a virtually guaranteed profit to Pan-Eastern of 2.5 cents per gallon on Europa's supply of gasoline. This correspondence seems to have been obtained by the Commissioner as late as the 14th June 1966 in reply to a letter from the Commissioner to Europa asking confirmation that the copies of contracts he had received included all contracts or other documents relating to this matter to which the Todd Group of companies and/or the Gulf Group of companies and/or Pan-Eastern Refining Company Ltd. and/or any associate company were parties.

On some matters of detail in regard to what transpired in the 1963 interviews there is some discrepancy between the evidence of Mr Smith and that of Mr Tyler. I think this is perfectly understandable, as Mr Tyler was on an exploratory expedition, and Mr Smith himself had only the general picture of the set-up, and was not conversant with the purposes of the arrangements or what had transpired in the negotiations for the contracts. I think, however, Mr Tyler's summary dated the 20th March 1963, Ex. 22, for the Commissioner, contains an adequate summary of the conversations as he understood them, and of the information he had received.

There is one matter of importance. It seems beyond dispute that in March 1963 Mr Smith showed some document to Mr Tyler in the nature of a Pan-Eastern balance sheet for the year ending 31st December 1961. Mr Smith has

stated that attached to the accounts for the year ended 31st March 1961 were auditors' statements by Price Waterhouse & Co., the Pittsburg branch of which firm were the auditors of Pan-Eastern. While I agree that Mr Tyler was able to peruse some document purporting to be a balance sheet of Pan-Eastern as at December 31st, 1961, I am certain he did not receive the audited balance sheet Ex. AA, nor the statement of income attached thereto. Mr Tyler at the outset of his investigations informed both Mr Smith and Mr Todd that he suspected some discount arrangements, and the term "volume discounts" seems to have cropped up in conversations at an early date. The audited copy of the 1961 accounts Ex. AA in the statement of income attached shows clearly volume discounts relating to 1960 purchases, and relating to 1961 purchases. This is shown as a volume discount on the crude purchases of Pan-Eastern. Price Waterhouse's note to the financial statements states clearly that voluntary price reductions on crude oil had been granted to the company by Gulf-Iran Company prior to 1961, the effect of such price reductions being recorded in the year subsequent to the year of sale. However, price reductions relating to crude oil purchases in 1961, as well as in 1960, had been reflected in the 1961 accounts. This was the type of information Mr Tyler was seeking. I am certain that if he had been shown a document of this nature he would have seized on it with avidity. It is noteworthy also that neither Pan-Eastern balance sheet of December 31st, 1959, nor the balance sheet of December 31st, 1960, gives any indication of volume discounts. They merely disclose the annual profit and the accumulated profit. The accounts from 1961 on in the annual statement of income do show the volume discounts. These were not supplied to the Commissioner until March 1967. I am satisfied that while Mr Tyler in March 1963 may have seen the 1961 balance sheet alone, he

saw neither the attached statement of income nor the auditor's note thereon. The copy of the 1961 statement of income given to the Commissioner in 1967 also omits the auditor's statement and the note on the balance sheet that the note on the financial statements is an integral part of the statements and should be read in conjunction with it. Although it may well have been unintentional, I am satisfied that the non-disclosure of the matters to which I have referred was of material importance, and the Commissioner was induced by his lack of information to write the letter of the 27th June 1963. I take this view apart altogether from the question whether in any event a letter of this nature was an exercise of a discretion, and the Commissioner was then debarred from re-opening the assessment.

In one other matter there seems to have been at least a misunderstanding in the discussions between Mr Tyler and Mr Todd. Discussions took place on the question whether there were price discounts available to purchasers of products on long term contracts on posted prices. Mr Tyler was considering the matter generally, and Mr Todd assured him that posted prices for all petroleum products other than crude correctly reflected the existing market, and it was just not possible to get a discount on a long term contract, although it was possible to obtain such discounts on spot sales from sellers who temporarily had excess of product which they were finding hard to quit. Mr Todd states that in making this categorical statement he was expressing his view based on the knowledge of the trade in regard to 1956, and was not adverting to the position in 1963, by which time a practice had grown up of granting discounts. Although the parties were primarily considering the 1956 position, I think Mr Tyler's enquiries were intended to cover, and did cover, a wider field, and in this respect the information obtained did not reflect

entirely the true position.

Mr Mahon has emphasised in his submission that the Commissioner's letter of the 27th June 1963 constituted an exercise of a statutory discretion conferred on the Commissioner by s.111 of the Act, and he has referred to two authorities, Wood Bros. v. Commissioner of Taxes 11 G.L.R. 484, and Robinson v. Commissioner of Inland Revenue (1957) 7 A.N.Z. I.T.R. 161. In the former case Denniston J. was concerned with a question of depreciation allowance under s.87 of the Land and Income Tax Act Assessment Act 1908 (now s.113(1) of the 1954 Act) which provides that where depreciation cannot be made good by repair, the Commissioner may, subject to s.113(A) and s.117 of the Act, allow such deduction as he thinks just. Mr Justice Denniston held that the Commissioner with sufficient particulars to enable him to make such allowances had judicially exercised his discretion, and could not recover income tax alleged to have been short-paid in past years. In my view this case is distinguishable in two respects. In the first place the Commissioner when exercising his discretion had sufficient particulars in regard to the allowances claimed, and in effect had full knowledge. In any event, accepting that s.113 empowers the Commissioner to exercise a discretion, I do not think the position is the same in regard to s.111. The decision in Wood Bros'. case is distinguished by Mr Justice F.B. Adams in Robinson's case where he remarks that even accepting the principle that the Commissioner may in some circumstances be estopped from reviewing an exercise of his discretion, he was not satisfied in the Robinson case that there was any previous exercise of discretion. Secondly, in Robinson's case, and I take the same view here, Mr Justice Adams thought that the Commissioner did not know what the appellant was doing, and was not sufficiently informed to enable him to exercise his discretion, and never in fact directed his mind, or was

called upon to direct his mind, to the exercise of the discretion.

Section 22 of the Act empowers the Commissioner from time to time and at any time to make all such alterations in or additions to an assessment as he thinks necessary in order to ensure the correctness thereof, notwithstanding that tax already assessed may have been paid. Section 111 is clear that only any expenditure exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year. I accept Mr Richardson's submission that liability for income tax is imposed by the statute itself, and in his assessing function the Commissioner merely quantifies an existing liability. In Reckitt & Colman (New Zealand) Limited v. Taxation Board of Review & Anor. [1966] N.Z.L.R. 1032 at p.1045, McCarthy J. considers the general scheme of the legislation. He there says :-

> "I agree with Mr Richardson that the general scheme of the Acts is as follows. Liability for tax is imposed by the charging sections, ss. 77 to 79 of the Land and Income Tax Act 1954. The Commissioner acts in the quantification of the amount due, but it is the Act itself which imposes independently, the obligation to pay. The assessment and objection procedures are merely machinery for quantifying: they do not cast liability. If the taxpayer does not object to the Commissioner's assessment within the time stated in the assessment (not being less than 14 days), the amount assessed by the Commissioner becomes incontestably fixed, subject to the Commissioner's express discretionary power to accept a late objection (s.29(2)) and to his additional power to grant relief in the case of serious hardship (s.226). If the Commissioner does not allow an objection received by him, the objector has a period of two months in which to require the objection to be heard by a Board of Review established under the Inland Revenue Department Amendment Act 1960. Again, if he fails to take that step within the period mentioned, the amount stated in the Commissioner's assessment is at that point of time fixed finally and incontestably. If he does require the objection to be heard by the Board of Review and the Board later rejects it, he then has a right of appeal to the Supreme Court; but he must give a notice of appeal within 30 days (s.29 Inland Revenue Department Amendment Act 1960). Once the time limit of 30 days has elapsed, his right of appeal is gone, and

> at that point the assessment, or so much thereof as has been upheld by the Board, becomes unchallengeable. No express power is given the Commissioner to waive this time limit. And so from that point on the taxpayer has no rights. He must pay unless the Commissioner decided to amend his assessment - and thereby create a fresh cycle of rights of objection and appeal - or, in appropriate cases, to grant relief from payment of the full amount".

To the same effect are the remarks of Turner J. in Elmiger v. Commissioner of Inland Revenue [1967] N.Z.L.R. 161 at p.184, where he refers to s.77 of the Act.

In my opinion, the Commissioner cannot waive in particular cases liability for payment of tax. He is under a duty to assess the tax payable, the Act itself imposing independently the obligation to pay. In my opinion the objector in the instant matter cannot rely on any principle of estoppel for the reasons, first, that the Commissioner here was not exercising any discretion when in 1963 he decided that there would then be no re-assessment, and secondly, the Commissioner was deprived of relevant information which was in the hands of the objector. Further, the Commissioner could not bind himself in regard to his future actions. The only bar to an amendment of the assessment is the time limit of four years provided by s.24 of the Act. I do not think that ss.110 and 111 confer on the Commissioner any discretion.

On this aspect of the case there is a further principle which must be considered. "An estoppel must fail, if its establishment must result in an illegality, so it cannot be set up if its establishment results in preventing the performance of a statutory duty". Spencer-Bower & Turner, Estoppel by Misrepresentation 2nd Edition pp.140, 141. The authority for this principle is contained in the judgment of Lord Maugham in Maritime Electric Co. Ltd. v. General Dairies Ltd. [1937] A.C. 610 at pp.619 and 620 as follows :-

> "The Act imposed a duty on the electric company to charge and on the dairy company to pay, at schedule rates, for all electric current supplied

> by the one and used by the other, during the twenty-nine months in question. The specific question for determination here is, can the duty so cast by statute upon both parties to this action be defeated or avoided by a mere mistake in the computation of accounts? In the view of their Lordships the answer to this question in the case of such a statute as is now under consideration must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case - and their Lordships do not propose to express any opinion as to statutes which are not within this category - where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefrom avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships, with respect, to approach the problem from the wrong direction; the court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision".

In my opinion the Commissioner was here under a duty to assess the objector for tax in accordance with the provisions of the Act, and again it is not a case where he was exercising a statutory discretion. In this respect the case is distinguishable from Taranaki Power Board v. Puketapu 3A Block Incorporated [1958] N.Z.L.R. 297. There North J. had to consider s.82(o) of the Electric Power Boards Act 1955, which authorises power boards to sell electricity to any local authority or consumers generally within the district in bulk or otherwise on such terms and conditions as it deems fit. Owing to a defect in the meters, the Board had charged the defendant for less supply than had actually been supplied. North J. held that no offence or breach of a statutory prohibition was committed by the Board in

supplying electricity to the defendants at the amount charged in the monthly statements, and there were, therefore, no obligations imposed by the provisions of the Electric Power Boards Act 1925, and the regulations made thereunder, either on the Board or on the defendant, which prevented the plea of estoppel being raised. The defendant had been led to believe that the monthly accounts were correct, and in so acting on them the defendant did so to its damage.

In making the amended assessments the Commissioner has also relied on s.108 of the Act, that the contracts, agreements, or arrangements made or entered into are absolutely void in so far as directly or indirectly they have or purport to have the purpose or effect of in any way altering the incidence of income tax or relieving Europa from its liability to pay income tax. Mr Richardson points out that there are three ingredients of s.108, (1) whether there is a contract, agreement or arrangement, (2) whether a purpose or effect of the contract, agreement, or arrangement was to alter the incidence of income tax or relieve the objector from liability to pay tax, and (3) what is the result on the facts of the case? Is a taxable situation disclosed?

I have endeavoured carefully to consider the numerous authorities, both in Australia and in New Zealand, in regard to the principles which should be applied in a consideration of the application of s.108. In considering the Australian authorities it must always be remembered that the Australian section is worded somewhat differently from the New Zealand section, although they are in pari materia. The New Zealand section avoids every contract in so far as directly or indirectly it has, or purports to have, the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax. The Australian section (s.260) avoids as against the Commissioner every contract so far as it has or purports to

have the purpose or effect of in any way directly or indirectly (a) altering the incidence of any income tax, (b) relieving any person from liability to pay any income tax, (c) defeating, evading or avoiding any duty or liability imposed on any person by the Act, (d) preventing the operation of the Act in any respect.

I do not need to consider the numerous dicta in the various cases. The two authorities which are relevant are Newton v. Commissioner of Taxation of the Commonwealth of Australia [1958] A.C. 450, and the judgment of the New Zealand Court of Appeal in Elmiger & Another v. Commissioner of Inland Revenue [1967] N.Z.L.R. 161. The effect of the judgment of the Court in the Newton case is conveniently summarised in the judgment of North P. in the Elmiger case at p.177, and Wild C.J. has conveniently extracted the same principles, but adapted them to the language of the New Zealand provision in Marx v. Commissioner of Inland Revenue (26th November 1968, not yet reported). He sets out the following principles which are the same as those summarised in the judgment of North P. in Elmiger's case :-

> "1. The section strikes at real transactions and not merely at shams: Federal Commissioner of Taxation v. Newton (1957) 98 C.L.R. 378, 386 and 655. (Woodhouse J.'s adoption of this view in the Elmiger case [1966] N.Z.L.R. at p.689) was approved by North P. ([1967] N.Z.L.R. at p.179).
>
> 2. The word 'arrangement' in the section is apt to describe something less than a binding contract. It comprehends 'not only the initial plan but also all the transactions by which it is carried into effect' (Newton v. Commissioner of Taxation [1958] A.C. 450, 465).
>
> 3. The word 'purpose' relates not to the motives of the parties but to the end in view. The word 'effect' means the end accomplished. The whole set of words denotes concerted action to the end of altering the incidence of income tax or effecting relief from income tax. (ibid 465).
>
> 4. The purpose and effect is ascertained by examining the overt acts by which the arrangement was implemented. If on that examination it can be predicated that it was so implemented so as

to alter the incidence of or bring about relief from tax then it is within the section (ibid. 466) even if there were other purposes as well. It is enough if that was one of the purposes. (ibid. 467).

5. If it cannot be predicated that the arrangement was implemented in that way so as to alter the incidence of or bring about relief from tax, but it is capable of explanation by reference to ordinary business or family dealing without necessarily being labelled as a means of altering the incidence of or relief from tax, then it is not caught by the section (ibid. 466).

I would add this, that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every contract or arrangement which has the purpose or effect of in any way altering the incidence of income tax or relieving any person from his liability to pay it: (see North P. Elmiger case pp. 177,178).

As Turner J. has stated in the Elmiger case at p.187 :-

"To bring the arrangement within the section you must be able to predicate the arrangement - by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to relieve the taxpayer from liability to pay income tax. If this cannot be predicated, but it must be acknowledged that the transactions are capable of explanation by reference to ordinary business or family dealings without necessity of being labelled as a means of relieving the taxpayer from liability for tax, then the arrangement will not come within the section".

In Mangin v. Commissioner of Inland Revenue (4th February 1969, as yet unreported) Wilson J. has remarked :-

"It is not necessary, as was pointed out by North P. in Elmiger's case (at p.178, citing Newton's case at p.467) that tax avoidance should be the sole purpose or effect - the section can still work if that was one of the purposes or effects. Nevertheless, as far as my researches go, it has not been held sufficient to avoid the arrangement unless it was the predominant purpose or effect".

I do not agree with the criterion that the relief from liability to be taxed must be the predominant purpose or effect. I prefer not to add adjectival expressions to the words used in the section of the Act. As was said both in the Newton case and adopted by North P. in the

Elmiger case, it is immaterial that the avoidance of tax was not the sole purpose or effect of the arrangement. The section can still work if one of the purposes or effects was to avoid liability for tax. The section definitely says "so far as it has the purpose or effect". This seems to import that it need not be the sole purpose.

This case has some resemblance to Cecil Bros. Pty. Ltd. v. Commissioner of Taxation of the Commonwealth of Australia (supra). There the taxpayer purchased some of its stock-in-trade from a family company at prices higher than those which would have been charged to it by its usual suppliers, thereby allowing the family company to make a profit. The Commissioner of Taxation disallowed portion of the company's claim for deduction for stock purchases, and reduced its taxable income by that amount. It was held that the section did not authorise the Commissioner to substitute a different price for that actually paid. It was held upon the facts that there was no contract, agreement or arrangement by which the taxpayer company was a party falling within s.260, but semble s.260 could not apply to defeat or reduce any deduction otherwise properly allowable under s.51 (equivalent to N.Z. s.111). Menzies J. at p.442 remarked that the facts again illustrate that s.260 could not be treated as giving to the Commissioner some power to modify, when its sole function was to destroy.

Considering the facts of this case, it seems to me to be in an entirely different category to the numerous cases which have been before the New Zealand courts in regard to family dealings. The question really at issue to be decided on the facts is whether or not the transactions are capable of explanation by reference to ordinary business or commercial dealings, without necessarily being labelled as a means of relieving the taxpayer from liability within the arrangement. In the Cecil case the transaction was capable of explanation by reference to ordinary business

dealings. The real question at issue was the extent of the applicability of s.51 (our s.111).

The scheme of the Bahamas company was initiated by the Gulf Corporation, and in fact the Gulf Corporation insisted on entering into the contracts through the medium of the Bahamas company, Pan-Eastern. There is no suggestion that the Pan-Eastern contracts had the effect of altering the incidence of income tax or relieving Gulf from any liability for tax. The series of contracts had the purpose, and also had the effect, of facilitating and obtaining increased profitability to Gulf in its trade in fuel oil. It had the purpose of avoiding repercussions in Gulf's trade with other purchasers of refined products, and in its relations under the Gulf-Shell contracts. It had the purpose and effect of avoiding repercussions or difficulties to Europa in its New Zealand trade, both in regard to competition and in regard to Government regulation of retail petrol prices. Probably included in the purposes were the obtaining of facilities and advantages in matters of overseas exchange. A further purpose or effect was the return to Europa by indirect means of a discount on its gasoline purchases, a discount which could not be obtained by direct means, owing to the refusal of Gulf, and the similar refusal by other companies, to give direct discounts either on crude or on the refined product. I do not think that the purpose of the arrangement in its initial stages was to avoid tax liability. In fact, it would be contradictory to my conclusions that the Europa share of Pan-Eastern's profits must be deducted from the cost of Europa's supplies in deciding expenditure deductible for tax purposes, if I were to hold that the effect of the contracts, agreements and subsequent arrangements was to obtain relief. If, on the other hand, it were held that the direct profit or discount to Europa is not exigible for tax under the provisions of ss.110 and 111, it may well

have to be further considered whether the series of contracts are not void as having the effect of relief from tax liability under s.108 in the light of the effect of each contract.

Taking this view, I do not need to consider Mr Mahon's further submissions that s.108 is not applicable for the reason that the income of the Pan-Eastern company was not derived in New Zealand, and Pan-Eastern is a non-resident company, and not controlled in New Zealand. I would, however, express the tentative view that it is the income of Europa with which the Commissioner is concerned, and this income is taxable, even if it is derived from overseas sources. I also do not need to consider the further question of the effect of the annihilation of the contracts if s.108 applies. I think this difficult question should remain to be considered when it is directly in point.

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In furnishing returns of income to the Commissioner for the income years ending on the 31st March 1960 to 1965 inclusive, A.M.P. declared its dividends from Pan-Eastern as non-assessable income, and the Commissioner assessed liability for tax accordingly.

On the 30th March 1965 the Commissioner made an amended assessment of tax in respect of the income derived by A.M.P. during the year ended 31st March 1960, including therein A.M.P.'s share of the Pan-Eastern income as proprietary income of A.M.P. pursuant to s.138 of the Act. A.M.P. on the 7th April 1965 lodged an objection to this assessment, and later to further assessments on this basis in respect of the years ending 31st March 1961 to 1965 inclusive. I am told that the extra liability of A.M.P. to 31st March 1968, if assessments on the basis of proprietary income are upheld, amounts to almost $4,000,000.

The main basis of A.M.P.'s objection is that at the material times Pan-Eastern was not a proprietary company within

the meaning of s.138 and s.2 of the Act. This involves in the main a question of construction of various sections.

The term "proprietary company" is defined by s.138(1)(a) as follows :-

> "The term 'proprietary company', in relation to any income year, means a company which at the end of that year is under the control of not more than four persons".

If Pan-Eastern is a proprietary company within this definition A.M.P. is clearly a "shareholder" (s.138(1)(b)) and Pan-Eastern is an "ordinary proprietary company".

It is convenient at this stage to quote s.138(1)(e), (f), (g), (h) and (i), which it will be necessary to consider :-

> "(e) The term 'non-assessable income' means non-assessable income as defined in section 2 of this Act; and includes non-assessable proprietary income:
>
> (f) The term 'residual taxable income', in relation to any proprietary company and any income year, means the amount by which the taxable income of the company for that year (including taxable proprietary income) exceeds the total amount of the income tax ... payable by the company in respect of income derived by it during that year:
>
> (Provided that, for the purposes of this paragraph, the social security income tax payable by the company shall be calculated as if social security income tax were payable by the company not only on income of the company which is otherwise chargeable under this Act with social security income tax, but also on the taxable proprietary income derived by the company from any other company during that year:)
>
> Provided also that in the application of this section to any shareholder that is a company the residual taxable income of the proprietary company for any income year shall be deemed to be the amount of the taxable income of the proprietary company for that year:
>
> (g) The term 'total income', in relation to any proprietary company and any income year, means the total amount of the residual taxable income and non-assessable income of the company for that year:
>
> (h) The total income derived in any income year by a proprietary company shall be deemed to be income derived in that year from the company by the shareholders of the company. In the case of an ordinary proprietary company the total income shall be deemed to

be derived by the shareholders in the proportions which the numbers of shares held by or on behalf of the shareholders respectively bear to the total number of shares issued by the company. In the case of a proprietary company other than an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in proportions determined in such manner as may be prescribed by regulations made under this Act, or in default of any such regulations or so far as they do not extend, in such proportions as the Commissioner thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in the company:

(i) The term 'proprietary income', in relation to any shareholder in any proprietary company and any income year, means the income deemed under this subsection to have been derived by the shareholder from the company in that year in every case where that income (together with any other income deemed under this section to have been derived by that shareholder in that year) is not less than one-fourth of the total income of the company for that year. The proprietary income derived by a shareholder from any proprietary company in any income year shall be deemed to consist of assessable and non-assessable income in the proportions in which the total income of the company for that year consists of residual taxable income and non-assessable income".

This objection has been fully and ably argued by Mr Pethig for the objector, and Mr Cain for the Commissioner.

Mr Pethig submits that Pan-Eastern is not a proprietary company; for a shareholder to derive proprietary income the proprietary company must be one which is liable for tax under the provisions of the New Zealand statute; and in the context s.138 requires the term "proprietary company" to be limited to exclude companies not within s.166 of the Act or deriving income in New Zealand.

There are numerous cases in which it has been held that statutes passed by a legislative body are prima facie presumed to apply only to persons and objects within the jurisdiction of the particular legislature, although general words are used. In Colquhoun v. Heddon 25 Q.B.D. 129 the question arose whether a right given under the Income Tax Act to deduct from the assessment premiums paid for life insurance was to be limited to premiums paid to

registered English companies, and it was held that the exemption did not extend to life insurances effected with a New York company, although that company was carrying on business in England and had an office in London. In that case Lord Esher makes the following observations on the principles of construction :-

> "Now, supposing the words 'any insurance company' stood alone, and there was nothing else in the section to modify the view which one would take of their meaning, would it or would it not be right to say that those words in an English Act of Parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment standing alone? It seems to me that, unless Parliament expressly declares otherwise (in which case, even if it should go beyond its rights, as regards the comity of nations, the Courts of this country must obey the enactment), the proper construction to be put on general words used in an English Act of Parliament is that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is only so when Parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our Parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and, unless, it does so in express terms so clear that their meaning is beyond doubt, the Courts ought always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of parliament".

This principle of construction was quoted with approval by Sir Robert Stout C.J. in delivering the judgment of the Court of Appeal in In re Adams (1903) 25 N.Z.L.R. 302.

By virtue of s.165 of the Act all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income tax whether it is derived from New Zealand or from elsewhere. Under s.166(2) a company is deemed to be resident in New Zealand if it is (a) incorporated in New Zealand or (b) has its head office in New Zealand. A.M.P. is both incorporated

and has its head office in New Zealand. It is therefore assessable for income tax on all income derived by it, whether such income is derived from New Zealand or elsewhere. Pan-Eastern is a company incorporated in the Bahamas and has its head office in the Bahamas. Its income is not derived in New Zealand. It is not a company resident in New Zealand. It is not within the New Zealand jurisdiction.

By s.2 of the Act "company", unless the context otherwise requires, means any body corporate whether incorporated in New Zealand or elsewhere. But Mr Pethig submits, even so, that a proprietary assessment pre-supposes (s.138) that the proprietary company is a company resident in New Zealand; that the context necessitates the meaning of company in this section to be so restricted.

In my opinion Pan-Eastern is a proprietary company. It is a company, and it is controlled by not more than four persons. "Person" includes a company. Pan-Eastern is controlled by two persons (Propet and A.M.P.) but this cannot decide the question in issue.

Mr Pethig submits that the terms used in s.138 are appropriate only to New Zealand taxation provisions. In s.138(1)(i) "proprietary income" in relation to any shareholders in any proprietary company (here A.M.P.) means the income deemed to have been derived by the shareholder from the company, and is deemed to consist of assessable and non-assessable income in the proportion in which the total income of the Company for that year consists of residual taxable income and non-assessable income.

"Assessable income" (s.2) means income of any kind which is not exempted from income tax otherwise than by way of a special exemption expressly authorised as such by the Act. In other words, the special exemption is one recognised in the Act. The special exemption authorised by the Act cannot apply to Pan-Eastern, as Pan-Eastern is

outside the jurisdiction. Section 88, after enunciating special classes of assessable income, enacts that the assessable income of any person (which includes a company) shall be deemed to include "income derived from any other source whatsoever". Non-assessable income means "(c) Dividends derived from companies and exempt from income tax under s.86C of the Act". Section 86C(1) exempts from income tax dividends derived from companies other than from companies that are exempt from income tax. Pan-Eastern is not a company that is exempt from New Zealand income tax. Before a company can be exempt from income tax it must be a company that would, but for a special exemption in the Act, be subject to taxation in New Zealand: (Australian Mutual Provident Society Ltd. v. Commissioner of Inland Revenue [1961] N.Z.L.R. 491 F.C.; [1962] N.Z.L.R. 449 P.C.). "Taxable income" is defined "(a) in relation to ordinary income tax means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of ordinary income tax". In my view this definition is not apt in regard to a non-resident company. "Ordinary income tax" must have reference to liability for New Zealand tax. "Assessable income" can have reference only to income which is assessable under New Zealand law, that is, the income arrived at after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of ordinary income tax under New Zealand law.

Subsection (h) might be made applicable to an overseas proprietary company in regard to "total income", but again I am faced with the reference to residual taxable income (income subject, in my opinion, to the exigencies of New Zealand tax law) and "non-assessable income" (non-assessable under "the Act") in subs. (g). Subsection (f) refers to the "taxable income" of the proprietary company and "the income tax" payable by the company. In my opinion

these references are applicable only to a New Zealand company.

I agree that s.139 is not applicable to a proprietary company not resident in New Zealand. Section 139 cannot be applied to a proprietary company not resident in New Zealand in the calculation of the taxable income of such company. It has not taxable income in New Zealand. The Commissioner has no jurisdiction over the proprietary company, although he has jurisdiction in regard to the income derived therefrom by a New Zealand resident.

I am primarily concerned with the income of A.M.P. in its position as a shareholder of Pan-Eastern. The matter for consideration is whether A.M.P. is within the tax net in relation to its share in Pan-Eastern's income. But before one can determine the proprietary income of A.M.P. derived by A.M.P. from Pan-Eastern, one must be able to determine the proportion in which the total income of Pan-Eastern consists of residual taxable income and non-assessable income. Pan-Eastern has no residual taxable income. It is not liable to ordinary income tax as referred to in the definition of taxable income (s.2) and the provisions in regard to special exemptions (ibid) are again apt only to a New Zealand taxpayer, a person chargeable with New Zealand land tax or income tax.

The same considerations apply to the use of the expressions "non-assessable income" in s.138(1)(e) "residual taxable income", "taxable income of the company", "the total amount of the income tax" in s.138(1)(f), "total income","residual taxable income" and "non-assessable income" in s.138(1)(g).

While these are in a sense machinery sections, they refer to matters which cannot be determined, and which in my opinion the Commissioner lacks jurisdiction to determine in regard to the income and the subdivision thereof of Pan-Eastern. It seems to me as a corollary that the Commissioner

cannot as a result determine the amount of income of A.M.P. (contd which might be exigible in the hands of A.M.P. for proprietary tax. These matters lead me to the conclusion that it was not the intention of the legislature in enacting s.138 that "company" or "proprietary company" as used therein should include companies other than those resident in New Zealand under the provisions of s.165 and s.166, and that the legislature was intending s.138 to apply only to persons and matters within its jurisdiction, notwithstanding the generality of some of the expressions used.

If the matter is one of doubt, I consider I should apply the special rules of construction which have been recognised as an aid in interpreting tax legislation. A tax act is to be construed in favour of the subject, but if the taxpayer comes within the letter of the law he must be taxed, however great the apparent hardship.

> "It is urged that in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".
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> Cape Brandy Syndicate v. I.R. Commissioners [1921] 1 K.B. 64, 71; [1921] 2 K.B. 403, per Rowlatt J.

> "My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be re-asserted and this is such an occasion".
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> Russell (Inspector of Taxes) v. Scott [1949] 2 All E.R. 1, 5 per Lord Simonds.

> "I cannot think that there can be much doubt as to the proper canons of construction of this taxing section. It is not a penal provision; counsel are apt to use the

> adjective 'penal' in describing the harsh consequences of a taxing provision, but if the meaning of the provision is reasonably clear, the Courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is reasonably capable of two alternative meanings, the Court will prefer the meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the Courts will be unable to regard it as of any effect".
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> I.R. Commissioners v. Ross and Coulter (Bladnock Distillery case) [1948] 1 All E.R. 616, 625, per Lord Thankerton.

Mr Pethig has also referred to s.26 of the Land and Income Tax Amendment Act No. 2 1968, but in view of the provisions of subs. 9 thereof I do not think I am permitted to pray this section in aid in construing the provisions of the principal Act. I am relieved that it now clarifies the future position.

The principle that the provisions of a later Act cannot be taken into account in construing a provision of an earlier Act, except in a limited class of case (obscurity, ambiguity or capability of more than one interpretation in the earlier Act) is stated by Lord Reid in Kirkness v. John Hudson & Co. Ltd. [1955] 2 All E.R. 345 at p. 365 referring to the earlier decision of Ormond Investment Co. v. Betts [1928] A.C. 143 and in particular to the speech by Lord Atkinson at p.164 :-

> "This decision of this House appears to me to afford conclusive and binding authority for the proposition that, in construing a provision of an earlier Act, the provisions of a later Act cannot be taken into account except in a limited class of case, and that that rule applies although the later Act contains a provision that it is to be read as one with the earlier Act. Of course, that does not apply where the later Act amends the earlier Act or purports to declare its meaning: in such cases the later Act operates directly by its own force. But, where the provisions of the later Act could only operate indirectly as an aid to the construction of words in the earlier Act, those provisions can only be used for that purpose if certain conditions apply to the earlier Act when it is considered by itself".

Although I think there is the necessary obscurity in regard to s.138 of the principal Act, and it may be capable of more than one interpretation, I am directed by subs. 9 of s.26 of the 1968 Amendment Act in construing the principal Act to disregard the earlier subsections of s.26. I have therefore put it aside.

There is another difficulty. In making the amended assessments for income tax of Europa for the same years with which I am at present concerned, in regard to A.M.P. assessments, the Commissioner has disallowed as a deduction the amount of Europa's expenditure for gasoline, equivalent to the discount payable to Pan-Eastern on Europa's gasoline purchases. This has been disallowed as not being expenditure exclusively incurred in the production of Europa's assessable income (s.111). I have upheld these assessments. If A.M.P. is not assessable to proprietary income tax on its share of Pan-Eastern profits, the discount received by Europa through Pan-Eastern chain has reduced its expenditure on gasoline purchased. This discount from expenditure equals the whole of the A.M.P. income. I have held this to be the position. If, on the other hand, A.M.P. is liable for proprietary tax, Europa's alternate return by way of discount on its expenditure is reduced by the amount of the proprietary tax payable by A.M.P. In my opinion the Commissioner cannot have two bites at this luscious cherry.

The same position applies if the proportion of Europa's expenditure must be disallowed under the provisions of s.108 of the Act. Then, in my view, s.141 would apply. A.M.P. and Europa consist substantially of the same share-holders, or are under the control of the same persons. The Commissioner may treat the companies as though they were a single company, and assess them jointly. The Commissioner, it seems to me, has already in effect done this; by his reduction in allowable expenditure of Europa by an

amount equivalent to the profits obtained through Pan-Eastern and A.M.P.

If A.M.P. is liable for proprietary tax it seems to me the same fund is being taxed twice, as income of A.M.P. received through its shareholding in Pan-Eastern, and as additional income of Europa through the disallowance of portion of the expenditure incurred in the purchase of gasoline for its trading operations, such disallowance being equated with the profit return through Pan-Eastern and A.M.P. as equivalent to a discount on the posted cost price of such gasoline.

In my opinion the Commissioner had an election. There was a choice between two alternatives. In deciding to disallow portion of Europa's expenditure either under s.111 or s.108 he necessarily excluded the taxation of the same sum in the hands of A.M.P. Furthermore, A.M.P. distributed these funds to its shareholder Europa by way of dividend. The Commissioner pursued one of two courses open to him (Spencer-Bower & Turner on Estoppel 2nd Edit. 312, 313). The Commissioner has in the first place founded, and still founds, his case on Europa's liability. It seems to me in fairness to the associated companies he must make his choice.

I therefore answer the question posed in the Europa Case Stated para. 23 in the negative, and the question posed in the A.M.P. Case Stated in the affirmative. No argument has been addressed to me in relation to the quantum of the assessments, the calculations therein or the figures on which the assessments are based. Therefore I have not discussed these matters, and any issues of such nature, if necessary, are reserved.

The hearing of the cases has occupied seventeen days. I am greatly indebted to all counsel engaged. A great number of subsidiary questions of fact have been discussed. I have considered all the submissions, but I have considered

it preferable not to encumber my judgment with too many matters of detail which might result in somewhat clouding the broader considerations. I am prepared to hear counsel on the question of costs.

Solicitors for Objectors:

Morison, Taylor & Co., WELLINGTON.

Solicitors for Respondent:

Crown Law Office, WELLINGTON.

Supreme Court
No. 3
Formal Judgment
8 May 1969

JUDGMENT OF THE SUPREME COURT

Before the Honourable Mr Justice McGregor

8th day of May 1969

UPON READING the Case Stated by the abovenamed Respondent herein dated the 23rd day of November 1967 AND UPON HEARING Mr P.T. Mahon and Mr R.F. Pethig of Counsel for the abovenamed Objector and Mr J.C. White Q.C., Mr I.L.M. Richardson and Mr G. Cain of Counsel on behalf of the abovenamed Respondent THIS COURT HEREBY ORDERS that the questions for determination by this Court namely whether the Respondent acted incorrectly in making the assessments in respect of the income for the years ended on the 31st day of March 1961, 1962 and 1963 referred to in Paragraph 9 of the said Case Stated and in respect of income for the years ended on the 31st day of March 1960 and 1964 referred to in Paragraph 11 of the said Case Stated and in making the assessment in respect of the income for the year ended on the 31st day of March 1965 referred to in Paragraph 11 of the said Case Stated, be answered in the affirmative and this Court HEREBY FURTHER ORDERS that the amended assessments and assessment be and the same are hereby severally cancelled AND THAT the question of costs be reserved.

By the Court,

T.J. SHARKEY

REGISTRAR

Court of Appeal
No.4
Notice of Motion on Appeal

IN THE COURT OF APPEAL OF NEW ZEALAND NO. C.A.33/69

BETWEEN THE COMMISSIONER OF INLAND REVENUE

Appellant

AND ASSOCIATED MOTORISTS PETROL COMPANY LIMITED a Wellington holding company

Respondent

NOTICE OF MOTION ON APPEAL

TAKE NOTICE that this Honourable Court will be moved by Counsel for the abovenamed Appellant on Monday the 25th August 1969 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard on appeal from the whole of the judgment of the Supreme Court delivered by the Honourable Mr Justice McGregor at Wellington on the 8th day of May 1969 on a case stated under section 32 of the Land and Income Tax Act 1954 wherein the Respondent was Objector UPON THE GROUND that such judgment is erroneous in fact and in law.

DATED at Wellington this 26th day of June, 1969.

G. CAIN
Solicitor for Appellant

TO:
The Registrar of the Court of Appeal of New Zealand
The Registrar of the Supreme Court of New Zealand at Wellington
The Respondent

REASONS FOR JUDGMENT OF NORTH J.

An appeal from the judgment of McGregor J. on a case stated pursuant to s.32 of the Land and Income Tax Act 1954 as a result of objections lodged by Associated Motorists Petrol Company Limited to assessments of income tax in respect of the years ending 31 March 1960 to 31 March 1965 inclusive.

This case is closely linked with Europa Oil (N.Z.) Limited v Commissioner of Inland Revenue where the facts are recorded in detail. It is therefore unnecessary for me to cover again a great deal of the background referred to in that case.

Associated Motorists Petrol Company Limited (which for convenience of reference I will refer to as A.M.P.) is a private limited liability company incorporated in New Zealand and having its registered office at Wellington. It operates as a holding company its shares at all material times being wholly owned by Europa Oil (N.Z.) Limited. In 1956 Europa reached an agreement for a long term supply contract with the Gulf Oil Corporation of America, one of the terms of which was that a company to be known as Far-Eastern Refining Company Limited was to be formed in the Bahama Islands with a capital of £100.000. divided into 100 000 £1 shares of which 50.000

shares were to be subscribed for by three persons on behalf of Gulf and the remaining 50,000 shares were to be subscribed for by three persons on behalf of Europa. This company was duly incorporated on the terms just referred to and at the relevant time half the shares were held by A.M.P. and the remaining half by Propet Limited, a subsidiary of Gulf Oil Corporation.

In the years in question, very large profits were made by Pan-Eastern from a processing contract made between Gulf and Pan-Eastern, the broad terms of which were that Pan-Eastern was entitled to share in the refiner's calculated margin on the quantity of crude oil required to supply Europa's requirements of gasoline It is common ground that Pan-Eastern being an overseas corporation earning profits abroad is in no way subject to the revenue laws of New Zealand. Nevertheless the Commissioner, having investigated the circumstances surrounding the formation of Pan-Eastern, reached the conclusion that Pan-Eastern is a proprietary company within the meaning of s 138 of the Land and Income Tax Act 1954 with the result that A.M.P's half share in the profits of Pan-Eastern constituted proprietary income derived by A.M.P in each of the years in question and accordingly these profits were subject to income tax in New Zealand In the Court below McGregor J. rejected the contention of the Commissioner and accordingly held that the Commissioner had acted incorrectly in making the amended assessments in each of the years in question. The Commissioner now appeals from that judgment.

Mr Cain, who argued the case for the

Commissioner. submitted that the appeal involved a consideration of two principal questions: (i) whether Pan-Eastern is a proprietary company as defined in s.138, and (ii) whether A.M.P derived proprietary income from Pan-Eastern within the meaning of s 138. He submitted that both these questions should be answered in the affirmative In developing his argument Mr Cain submitted that McGregor J. had found that Pan-Eastern was a proprietary company but that A.M.P. had not derived proprietary income from Pan-Eastern within the meaning of s.138. Mr Iethig, for A.M.P. on the other hand, submitted that both these questions had been answered by the learned Judge in the Court below in favour of A.M.P. I think I should say at the outset that I am not satisfied that Mr Cain is right in his submission that McGregor J. did hold that Pan-Eastern was a proprietary company It is true that in an early passage in his judgment he did say "In my opinion Pan-Eastern is a proprietary company" but as I read his judgment I think he meant no more at this stage than that as a matter of definition Pan-Eastern could fall within the meaning attributed to the term "proprietary company" in s.138 for his final conclusion was expressed in these terms:

> "These matters lead me to the conclusion that it was not the intention of the legislature in enacting s.138 that "company" or "proprietary company" as used therein should include companies other than those resident in New Zealand under the provisions of s.165 and s.166 and that the legislature was intending s.138 to apply only to persons and

matters within its jurisdiction, notwithstanding the generality of some of the expressions used."

However this may be, the question whether Pan-Eastern is or is not a proprietary company is a question of law dependent wholly on the true interpretation of s.138 read in the light of the various definitions contained in s 2 and accordingly it now falls to this Court to determine the question.

Section 138 is a very long and complicated provision, the full terms of which I do not think it is necessary to record. The scheme of the section appears to be as follows:

(1) (a) The term "proprietary company" in relation to any income year means a company which at the end of that year is under the control of not more than four persons.

(b) The term "shareholder" in relation to any company and any income year means a person by whom or on whose behalf shares in the company are held at the end of that year.

(c) The term "debenture holder" in relation to any company and any income year means a person by whom or on whose behalf debentures issued by the company (being debentures of the kind referred to in section 142 of this Act) are held at the end of that year.

(d) The term "ordinary proprietary company" means a proprietary company, the issued capital of which consists wholly of ordinary shares each of which has the same nominal value and is paid up to the same extent as and ranks in all respects equally with every other share, and which is not a company that has issued

debentures of the kind referred to in section 142

(e) The term "non-assessable income" means non-assessable income as defined in section 2 of this Act and includes non-assessable proprietary income.

(f) The term "residual taxable income" in relation to any proprietary company and any income year means the amount by which the taxable income of the company for that year (including taxable proprietary income) exceeds the total amount of the income tax payable by the company in respect of income derived by it during that year There is, however, a proviso to paragraph (f) that in the application of this section to any shareholder that is a company the residual taxable income of the proprietary company for any income year shall be deemed to be the amount of the taxable income of the proprietary company for that year.

(g) The term "total income", in relation to any proprietary company and any income year means the total amount of the residual taxable income and non-assessable income of the company for that year.

(h) The total income derived in any income year by a proprietary company shall be deemed to be income derived in that year from the company by the shareholders of the company. In the case of an ordinary proprietary company, the total income shall be deemed to be derived by the shareholders in the proportions which the numbers of shares held by or on behalf of the shareholders respectively bear to the total number of shares issued by the

company. In the case of a proprietary company other than an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in such manner as may be prescribed by regulations made under this Act or in default of any such regulations or so far as they do not extend in such proportions as the Commissioner thinks just and reasonable having regard to the nature and relative importance of the interests of the shareholders in the company.

(i) The term "proprietary income", in relation to any shareholder in any proprietary company and any income year, means the income deemed under this subsection to have been derived by the shareholder from the company in that year in every case where that income (together with any other income deemed under this section to have been derived by that shareholder in that year) is not less than one-fourth of the total income of the company for that year The proprietary income derived by a shareholder from any proprietary company in any income year shall be deemed to consist of assessable and non-assessable income in the proportions in which the total income of the company for that year consists of residual taxable income and non-assessable income.

(2) The proprietary income derived by any shareholder in any income year shall be deemed to be assessable income or (as the case may require), non-assessable income for that year and, where a proprietary assessment is made, shall be included in that assessment accordingly. The ordinary income tax payable for any year by any shareholder

shall be either -

(a) The ordinary income tax assessed for that year in a proprietary assessment made on the shareholder, after -

(i) Making the deduction provided for by paragraph (c) of subsection (3) of this section; and

(ii) Where the shareholder is a company that is not resident in New Zealand, allowing a rebate of a sum equal to five per cent of the amount of any taxable proprietary income included in that assessment; or

(b) The ordinary income tax assessed for that year in a non-proprietary assessment made on the shareholder -

whichever amount of ordinary income tax is the greater, and the shareholder shall be assessable and liable for ordinary income tax accordingly.

(3) The following provisions shall apply with respect to every proprietary assessment made under this section in respect of income derived by any shareholder during any income year:

(a) No portion of any loss incurred by any taxpayer (being a loss of the kind referred to in section 137 of this Act) shall be deducted from or set off against his proprietary income:

(b) All deductions from the assessable income by way of special exemption shall to the extent of the portion of the assessable income that is not proprietary income, be made from that portion and the balance (if any) shall be deducted from the assessable proprietary income:

(c) Where the proprietary income of the shareholder or any portion thereof is taxable under this section and that income is also taxable in the same year of assessment as being income derived by a proprietary company there shall be deducted from the ordinary income tax payable by the shareholder a sum equal to the ordinary income tax payable by the company in respect of that income.

(4) The assessment of any shareholder of a proprietary company in accordance with the provisions of this section shall not affect the assessment or liability for tax of that proprietary company.

So far as I am aware there is no similar provision in force in other parts of the Commonwealth. As I understand the matter, the mischief sought to be cured by the section when it was first introduced was to reduce the taxation benefit being enjoyed by sole traders and partnerships who (whether because of the benefit or not) had converted their businesses into limited companies thereby splitting the income into two parts to attract lower rates of tax. This is how the object of the section is described in the leading New Zealand work on Taxation Laws of New Zealand of which the late Dr W.J.Cunningham was the original author: see third edition at page 165. Mr Cain agreed that the object of the section, when it was first enacted, was as I have just stated.

The original provision was contained in s.23 of the Land and Income Tax Amendment Act 1939 This provision made no distinction between shares held by individuals and those held by companies and this continued to be the position when the Land and

Income Tax Act 1954 was enacted But it requires to be noticed that in the following year the scope of s.138 was limited to cases where the person sought to be taxed was a company. Thus individual taxpayers are no longer caught by the provisions of s.138. Rather unfortunately, so it appears to me, the draftsman did not consider it necessary to recast the provisions of s.138 to meet the new position. In result some of the provisions of s.138 still refer to matters relating to assessments made in respect of individual shareholders; see particularly paragraph (f) and s.s.(3). Nevertheless it was not contended by Mr Cain that the ambit of the section has been widened by amendments made in subsequent years.

It is common ground that the present case is the first occasion where the Commissioner has attempted to apply s.138 to an overseas company which derives its income outside New Zealand. Nevertheless Mr Cain in a careful and detailed argument, submitted that there was no reason why the section should not apply to Pan-Eastern even although that company derives its income from a source outside New Zealand. He pointed to the fact that s.138(a) spoke of "a company" and accordingly when regard is had to the definition contained in s.2 of the Act it was immaterial that Pan-Eastern was incorporated in the Bahama Islands. It is quite true that the definition in s.2 defines "a company" to mean "any body corporate whether incorporated in New Zealand or elsewhere", unless the context otherwise requires, but, when regard is had to the provisions of ss.165 and 166, it is apparent that the revenue authorities in New Zealand for many years have asserted their right to levy

income tax on overseas companies which carry on business in New Zealand. Therefore, the definition of "company" necessarily required to be expressed in terms which would embrace such companies. Moreover, it is to be noticed that the same definition of "company" appeared in the Land and Income Tax Act 1923 long before the conception of a "proprietary company" was introduced. Sections 165 and 166 read thus:

"165.(1) Subject to the provisions of this Act, all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income tax, whether it is derived from New Zealand or from elsewhere.

(2) Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income tax, whether the person deriving that income is resident in New Zealand or elsewhere.

(3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax.

166. (1) A person other than a company shall be deemed to be resident in New Zealand within the meaning of this Part of this Act if his home is in New Zealand.

(2) Subject to subsection (2) of section 148 of this Act (which relates to banking companies), a company shall be deemed to be resident in New Zealand within the meaning of this Part of this Act if it -

(a) Is incorporated in New Zealand; or

(b) Has its head office in New Zealand

(3) For the purposes of this Act, the head office of a company means the centre of its administrative management."

Mr Pethig invited the Court to pay particular attention to the provision contained in s 165(3) which makes it clear that, subject to any special provision to the contrary, no income which is neither derived from New Zealand nor derived by a person resident in New Zealand, shall be assessable for income tax.

Now the principle for the construction of statutes, where general words are used, is well established. The leading English case is Colquhoun v. Heddon (1890) 25 Q.B.D.129, where Lord Esher said (p.134-135):

"Now, supposing the words 'any insurance company' stood alone, and there were nothing else in the section to modify the view which one would take of their meaning would it or would it not be right to say that these words in an English Act of Parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment standing alone? It seems to me that, unless parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is that parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that

parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction."

The principle laid down by Lord Esher in this case was adopted by this Court in In re Adams (1905) 25 N.Z.L.R. C.A.302 310. But Mr Cain argued that while this principle of construction would undoubtedly stand in the way of any attempt being made by the New Zealand revenue authorities to extract income tax from overseas companies which derive their income outside New Zealand s.138 did not attempt to achieve that result, for, in his submission, it is aimed at shareholders in a proprietary company and not at the company itself. Accordingly, in his submission, as A.M.P. is a New Zealand shareholder in Pan-Eastern, there is no reason at all why it should not be called upon to pay proprietary income tax under s.138. Superficially, this may sound a tenable argument but, in my opinion it is open to the objection that his argument overlooks the fact that the term "shareholder" is also a defined term and means and includes any member of a company If then the term "company" referred to in s 138(1)(a) includes an overseas company not itself liable to New Zealand income tax, then it seems to me consistency requires that the term "shareholder" should be given the same wide meaning and accordingly s.138 would as a matter of definition, apply alike to both the shareholders in Pan-Eastern, namely, Propet Limited and A.M.P. Mr Cain, of course, made no submission that s.138 had any application so far as Propet Limited is concerned for so to hold would be quite contrary to the provisions of s.165(3) I think

then that Mr Cain's submission must be treated with some reserve and accordingly the only safe approach is to consider whether the whole tenor of s.138, viewed in the light of its history, indicates that the section is aimed exclusively at companies within the jurisdiction of the New Zealand revenue authorities In my opinion, the whole scheme of this section pre-supposes that the proprietary company is itself subject to New Zealand income tax. The references to "assessable" and "non-assessable" income "residual taxable income" and "total income" and the other provisions relating to special exemptions and the like, all point in this direction and accordingly I am of opinion that McGregor J was right in the view he took as to the construction of s 138. Mr Cain is no doubt correct that McGregor J was not quite right in the reference he made to "special exemptions" for, as he pointed out now that the section applies only to companies which are shareholders in a proprietary company, the provisions made in the statute for special exemptions no longer apply. But there are a number of provisions in the statute which do make provision for deductions in calculating "assessable income" which apply to companies as well as to individuals: see ss 114 to 120. Furthermore the special provision made in respect of proprietary companies which have issued debentures under s 142, in my opinion pre-supposes that the debentures have been issued in New Zealand Likewise the provision made in s 137 for the carrying forward of losses which may be set off against future profits are stated not to be deducted or set off against a shareholder's proprietary income This again is

essentially a New Zealand provision. Then, s 139 contains a special provision entitling the Commissioner to disallow excessive remuneration paid by a proprietary company to a shareholder, director or relative "in calculating the assessable income" of the proprietary company. Finally, s.140 makes provision for temporary relief in the case of proprietary companies establishing new industries in New Zealand. Neither of these sections can have any application to a proprietary company not resident in New Zealand.

In my opinion then it must be accepted that s.138 does not apply to Pan-Eastern and accordingly the whole basis for the assessments issued by the Commissioner falls down For these reasons I am of opinion that the judgment in the Court below is right and that this appeal should be dismissed.

The members of the Court being unanimously of that opinion the appeal accordingly is dismissed. The question of costs is reserved.

REASONS FOR JUDGMENT OF

TURNER AND McCARTHY J.J.

This is an appeal from a judgment of McGregor J. given at Wellington on May 8th last, in which he held against the Commissioner on his reassessment of respondent company for income tax as on proprietary income derived by Pan Eastern Refining Co. Ltd., a company domiciled and resident in the Bahama Islands, in which respondent owned one half of the shareholding. The case turns on the same set of facts as were before this Court in Europa Oil (N.Z.) Limited v. Commissioner of Inland Revenue, in which we have just given judgment. We do not find it necessary therefore in this case to restate the narrative which formed the factual foundation of our judgments in the earlier one.

Pan Eastern Refining Co. Ltd. (to which company we shall in this judgment refer as "Pan Eastern") was a company specially incorporated in the Bahama Islands for the purposes which appear in the judgments in the earlier case. It had a capital of £100,000 divided into 100,000 ordinary shares of £1 each, of which 50,000 were held by respondent company and the other 50,000 by Propet Co. Ltd., a subsidiary of Gulf Oil Corporation. Propet Co. was incorporated and registered abroad and has never resided in New Zealand, or derived income from this country. By the processes referred to in the earlier judgments Pan Eastern rapidly acquired very substantial profits.

Indeed it would appear that in the five years March 31st 1961 to March 31st 1965 inclusive this company derived profits of something like £1 million per year from the notional operations which (on paper) it conducted. It is the contention of the Commissioner in this case that because respondent company holds half of the shares in Pan Eastern, and because the latter is a company under the control of not more than four persons, Pan Eastern is a proprietary company for the purposes of Section 138 of the Land and Income Tax Act 1954, and that a share of its income proportionate to the shareholding of respondent company is, notwithstanding that Pan Eastern is resident in the Bahamas and has never derived income from New Zealand, taxable as in the hands of Associated Motorists as proprietary income, whether it is brought to New Zealand or not, and whether it comes into the hands of respondent company or not.

McGregor J. rejected this contention, and the Commissioner appeals before us accordingly.

The matter appears to be one of the construction of the statute. The provision under which the Commissioner makes his reassessment is section 138(1) of the Land and Income Tax Act 1954. This is in the following terms:

> "The following provisions shall apply for the purposes of this section, namely:
> (a) The term "proprietary company", in relation to any income year, means a company which at the end of that year is under the control of not more than four persons, or

a company which at the end of that year is being or has been wound up and was at the commencement of the winding up under the control of not more than four persons. For the purposes of this paragraph all the members of any partnership shall be deemed to be one person and all the persons interested in the estate of any deceased person (whether as trustees or as beneficiaries) shall be deemed to be one person:

(b) The term "shareholder", in relation to any company and any income year, means a person by whom or on whose behalf shares in the company are held at the end of that year or, as the case may be, at the date of the final distribution of the assets of the company during that year; and includes a debenture holder:

(c) The term "debenture holder", in relation to any company and any income year, means a person by whom or on whose behalf debentures issued by the company (being debentures of the kind referred to in section 142 of this Act) are held at the end of that year or, as the case may be, at the date of the final distribution of the assets of the company during that year:

(d) The term "ordinary proprietary company" means a proprietary company the issued capital of which consists wholly of ordinary shares each of which has the same nominal value and is paid up to the same extend as and ranks in all respects equally with every other share, and which is not a company that has issued debentures of the kind referred to in section 142 of this Act:

(e) The term "non-assessable income" means non-assessable income as defined in section 2 of this Act; and includes non-assessable proprietary income:

(f) The term "residual taxable income", in relation to any proprietary company and any income year, means the amount by which the taxable income of the company for that year (including taxable proprietary income) exceeds the total amount of the income tax ... payable by the company in respect of income derived by it during that year:

Provided that, for the purposes of this paragraph, the social security income tax payable by the company shall be calculated as if social security income tax were payable by the company not only on income of the company which is otherwise chargeable under this Act with social security income tax, but also on the taxable proprietary income derived by the company from any other company during that year:

Provided also that in the application of this section to any shareholder that is a company the residual taxable income of the proprietary company for any income year shall be deemed to be the amount of the taxable income of the proprietary company for that year:

(g) The term "total income", in relation to any proprietary company and any income year, means the total amount of the residual taxable income and non-assessable income of the company for that year:

(h) The total income derived in any income year by a proprietary company shall be deemed to be income derived in that year from the company by the shareholders of the company. In the case of an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in the proportions which the numbers of shares held by or on behalf of the shareholders respectively bear to the total number of shares issued by the company

In the case of a proprietary company other than an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in proportions determined in such manner as may be prescribed by regulations made under this Act, or in default of any such regulations or so far as they do not extend, in such proportions as the Commissioner thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in the company:

(i) The term "proprietary income", in relation to any shareholder in any proprietary company and any income year, means the income deemed under this subsection to have been derived by the shareholder from the company in that year in every case where that income (together with any other income deemed under this section to have been derived by that shareholder in that year) is not less than one-fourth of the total income of the company for that year. The proprietary income derived by a shareholder from any proprietary company in any income year shall be deemed to consist of assessable and non-assessable income in the proportions in which the total income of the company for that year consists of residual taxable income and non-assessable income:

(j) The term "proprietary assessment", in relation to any taxpayer and any income year, means an assessment which includes, in addition to any other income, the whole of the proprietary income derived by the taxpayer in that year:

(k) The term "non-proprietary assessment", in relation to any taxpayer and any income year, means an assessment which does not include any of the proprietary income which the taxpayer has derived in that year:

(l) Where pursuant to section 141 of this Act the Commissioner treats as a single company two or more companies any one or more of which holds shares in another company, the companies so treated as a single company shall be deemed to be one shareholder of that other company, and, for the purpose of paragraph (a) of this subsection, to be one person:

(m) Where two or more companies (in this paragraph referred to as the holding companies) which are under the control of the same persons hold such shares or debentures in any other company that if the holding companies were a single company the other company would be a proprietary company from which that single company would derive proprietary income, the other company shall be deemed to be a proprietary company and the income derived therefrom by the holding companies shall be deemed to be proprietary income of the holding companies:

(n) Where a proprietary company derives proprietary income, either directly or through any intermediate proprietary company or companies, from another proprietary company, and that other proprietary company also derives proprietary income from the proprietary company first mentioned, whether directly or through any intermediate proprietary company or companies, the Commissioner may, notwithstanding anything in paragraph (g) of this subsection, exclude from the total income of any of the proprietary companies concerned such portion of the proprietary income derived by that company as he determines and may allocate to the shareholders of that company such portion of the total income derived by that company as he thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in that company."

It will be seen (the question which was put to us as crucial being for the moment placed on one side) that where in New Zealand a company is under the control of not more than four persons, it is a "proprietary company". Where any particular shareholder holds at least one fourth of the shareholding a part of the income derived by the company proportionate to the shareholding of that shareholder is "proprietary income", and, subject to adjustments for income tax paid by the company and other matters included in the section, the general effect of the provision is that such proprietary income is deemed to be derived by the shareholder, and is taxable accordingly, although in fact such shareholder may never derive or receive the income actually, and although it may remain in the hands of the company by which it was actually derived.

It may perhaps be noticed here that at the time when the legislation was originally passed, it applied to all shareholders whether real or artificial persons; since then it has been restricted so as to apply only to shareholder-companies; but nothing in the present case turns on this amendment to the original provisions.

The above being indisputably the effect of the legislation where the two companies - "proprietary" company and shareholder company - are both New Zealand companies, the question crucial to the decision in the present case is: Is this legislation applicable to the case where, the shareholder company being resident in New Zealand, the company which it is sought to deem a "proprietary" company is incorporated

outside New Zealand, resident outside New Zealand, and has never derived income from New Zealand? Counsel for the Commissioner contended before McGregor J., and before us, that the legislation was wide enough to catch such a case. To the opposite effect Mr Mahon and Mr Pethig argued that the legislation was plainly designed to catch only the case where the "proprietary" company was within the jurisdiction, either by virtue of residence in New Zealand, or through deriving income from New Zealand.

As we have indicated, the matter resolves itself into one purely of construction. The provisions are, so we are informed by Counsel, without useful parallel in other jurisdictions, and we are therefore required to walk in untrodden territory. The provisions first appeared in New Zealand in section 23 of the Land and Income Tax Amendment Act 1939. Before that year there had been no legislation at all in this country dealing with "proprietary companies", and for ourselves we think it useless to look for guidance as to the limits of the legislation then introduced in any survey of the situation as it existed before that legislation was passed. We decline to speculate in this way, and for ourselves have not found it possible, on this topic, to be sure of more than that the legislature wished to amalgamate, for taxation purposes, the whole income really derived by individual taxpayers, whether derived personally or by companies in which the taxpayers held all or a large proportion of the shares.

It does not seem to us that so general a conclusion as to the purpose of the legislature can be of much assistance in deciding the question posed in the present case, which is whether, in enacting provisions dealing with the kind of situation which we have described, the legislature contemplated, or did not contemplate, that its legislation should extend to a case where the company deriving the income was outside the jurisdiction, never came within it, and derived all its income outside this country.

The statutory provisions passed in 1939 have, of course, been amended on a number of occasions since their original enactment; but again we do not think that these amendments can be significant in deciding the question which is before us. Indeed, it has seemed to us desirable, if not absolutely essential, in attempting to discern the intention of the legislature as to the limits of the provisions, to put aside the successive amendments made to their original text. For none of them (except for the amendment of 1968, which cannot affect this case) can possibly be regarded as indicating any intention of the legislature to broaden, as from its date, the scope of the original provisions, so as to include companies resident abroad which were not included by the original provisions. And this being palpably so, it seems to us the safest course, and indeed the best test of the intention of the legislature, to examine the provisions as they were originally enacted, and to see whether they were then applicable to companies such as Pan Eastern, which neither reside in New Zealand nor derive income from this country. If the provisions were not then

wide enough to catch such companies, nothing which has happened since 1939 can be thought to have widened them; and indeed Mr Cain did not so submit.

The argument for the Commissioner, attractively presented by Mr Cain, was a simple one. He said that there was nothing to be found in the words of section 138 of the Act of 1954. or in the original section 23 of the Act of 1939, by which the provisions of these sections could be said to be expressly limited to New Zealand companies. A proprietary company, he said, is defined by the Act simply as one of which the control is vested in not more than four persons, and nothing whatever is said in the Statute as to where that company must be resident or domiciled. The companies, therefore, which fit the definition in the section, are proprietary companies, notwithstanding that they are resident out of New Zealand and have never carried on business in New Zealand or derived income from this country. Mr Cain pointed out that the Statute does not purport to impose any duties upon proprietary companies as such; that it simply defines them. The liabilities which the Act imposes in the section dealing with proprietary companies, he said, are imposed not upon the proprietary companies themselves, nor yet upon all their shareholders, but merely upon those shareholders who derive proprietary income from them and are assessable for tax in New Zealand by reason of their residence here. It need consequently occasion no surprise, said Mr Cain, nor can it be regarded as in any way extraordinary or unlikely to have been intended by the legislature, that such shareholders should be held liable for tax on income earned

by such proprietary companies abroad; for the provisions of the Act do no more than place shareholders in the same position as they would have been in if the income had been derived by a partnership of which they were members, instead of by a company in which they are shareholders.

Mr Cain submitted as part of his argument that McGregor J. had in terms held, in the first part of his judgment, that Pan Eastern was a proprietary company, and had later inconsistently held to the contrary. We do not so read McGregor J.'s judgment, and we agree with the President that all that the learned Judge intended to say was that Pan Eastern might be regarded as a company whose income could be covered by the provisions of section 138, if for the moment the point now raised in argument were left on one side.

Mr Pethig did not contest the submission that the section contains no express provisions limiting its operation to the taxation of shareholders' incomes derived from companies resident in New Zealand or deriving income from this country. He conceded, as we understood him, that the section contains no such express limitation, and further that the section does not purport to impose any duty on any "foreign" company - by which loose term we are referring here to a company which does not reside in or derive income from New Zealand. Mr Pethig admitted that the section goes no further than to assess the New Zealand shareholders of a proprietary company for tax. But he said, though the validity of all these submissions of Mr Cain be conceded, yet that the provisions of the section, though they do not in

terms exclude "foreign" companies, lead inevitably by implication to the same result. In this submission is crystallised what we conceive to be the crux of the whole case before us, and on the resolution of this simple argument must depend, in our opinion, the destination of well over £1,000,000 for which the Commissioner contends that respondent company is liable for proprietary tax.

We have come to the conclusion that Mr Pethig's argument should be accepted. Having read the section in a frame of mind in which we were, we hope, open to the suggestion that the New Zealand shareholders of Pan Eastern should be taxed on their share of the income which that company had derived, we have been unable to construe it so as fairly to include, as one to which the provisions as to proprietary companies apply, a company which neither resides in New Zealand nor derives income from New Zealand. We shall now try to set out simply the reasons by which Mr Pethig's argument has brought us to this view.

It will perhaps be helpful if we repeat here the provisions of subsection 1(h) and 1(i) of section 138, which are in the following terms:

> "(h) The total income derived in any income year by a proprietary company shall be deemed to be income derived in that year from the company by the shareholders of the company. In the case of an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in the proportions which the numbers of shares held by or on behalf of the shareholders respectively bear to the total number of shares issued by the company. In the

> case of a proprietary company other than an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in proportions determined in such manner as may be prescribed by regulations made under this Act, or in default of any such regulations or so far as they do not extend, in such proportions as the Commissioner thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in the company:
>
> (i) The term "proprietary income", in relation to any shareholders in any proprietary company and any income year, means the income deemed under this subsection to have been derived by the shareholder from the company in that year in every case where that income (together with any other income deemed under this section to have been derived by that shareholder in that year) is not less than one-fourth of the total income of the company for that year. The proprietary income derived by a shareholder from any proprietary company in any income year shall be deemed to consist of assessable and non-assessable income in the proportions in which the total income of the company for that year consists of residual taxable income and non-assessable income:"

These appear to us to be the crucial operative sub-sections. It is by their provisions that someone is made liable for tax, which he would otherwise not have had to pay. By subsection 1(h) it is provided that in the case of a proprietary company the total income of that company shall be deemed to be derived by the shareholders in certain proportions. The shareholders, then, of a proprietary company, being deemed to derive income which they may not in fact have derived, are taxed upon income upon which, if the company were

not a proprietary one, they would not be taxable. But they are not made to pay tax on all the income which they are deemed by the section to derive. For it is provided by subsection 1(i) that for assessment purposes the proprietary income which the shareholder is deemed to derive shall be deemed to consist of assessable and non-assessable income in the same proportions as the income of the proprietary company. And the shareholders pay tax upon this calculated assessable proportion of the income which they are deemed to have derived.

It should be added at this point that the provisions of sub-subsections 1(h) and 1(i), cited above, do not differ, except in insignificant detail, from those originally enacted as sub-subsections 1(g) and 1(i) of section 23 of the Amendment Act of 1939. The proportion of the income of the company which the shareholder must derive was increased from one-fifth in the original provision to one-quarter in 1954, but this amendment can have no relevance as regards the matter which we are now considering.

Now what is the income upon which shareholders become taxable by virtue of the provisions? It is the assessable part of their share of the <u>total income</u> of the proprietary company in which they are shareholders. If the words "total income" had not been specifically defined by the legislation, and if they were to be read as meaning simply the <u>whole income</u> derived by the proprietary company, such a provision might not be decisive on the question whether by a "proprietary company" was meant a New Zealand company, or a company in any part of the world. But the term

"total income" is specifically defined. By subsection 1(g) of section 138 of the Act of 1954 it is now provided that:

> "The term 'total income', in relation to any proprietary company and any income year, means the total amount of the residual taxable income and non-assessable income of the company for that year."

In the Act of 1939, however, in which the provisions were first enacted, the words "total income" had a slightly different meaning, given to them expressly by one of the provisions then passed into law. By section 23(1)(f) it was provided:

> "The term 'total income' means taxable income and non-assessable income".

It was therefore necessary, at the date of the original legislation, if the section were to be applied in any given case, to ascertain the total income, as above defined, of any proprietary company whose shareholders were to be affected by such application, and, in order to ascertain its total income, to ascertain its taxable income and its non-assessable income.

Since 1939 the conception of residual taxable income has been introduced into the test of the section; but we put the introduction of this term on one side for two reasons. First, though imported into the section by section 5 of the Amendment Act of 1941., it has now ceased to have any relevance; for by virtue of subsection 11 of section 138 of the 1954 Act the provisions of that section now apply only to the case of company shareholders of proprietary companies, and by the second proviso to sub-subsection

1(f) of section 138 it is provided that in the application of the provision to company shareholders the residual taxable income of the proprietary company shall be the taxable income of the company. Second, because the section must, as regards the point which we are now considering, be construed as it was when it was first enacted; it cannot be thought that the incorporation into it in 1941 of the conception of residual taxable income, later abandoned, can have had the effect of widening the essential scope of the provisions.

It seems to us impossible to make any sense out of attempting to carry out, in regard to a company which neither is resident in New Zealand nor derives income from New Zealand, the calculation of its "total income" as defined by section 23 of the Act of 1939 - i.e. to ascertain and add together its "taxable income" and its "non-assessable income". Non-assessable income it may have, for by this term is to be understood, not simply income which is not assessable, but income of one or more of the special categories expressly defined in the Act. But taxable income, so it seems to us, is something that such a company cannot have. Taxable income is defined by the Act of 1954 as:

> "... the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of ordinary income tax".

By the Act of 1923 (the Act in force when the Amendment Act of 1939 was passed into law) it was defined as

> "The residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled".

By virtue of section 165(c) of the 1954 Act

> "... no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax".

It seems to us inescapable that if a company neither is resident in New Zealand, nor derives income from New Zealand, it derives no income assessable for tax. This is merely another way of saying that it derives no assessable income. Not deriving assessable income, it can derive no taxable income, for taxable income is only the residue of assessable income. Deriving no taxable income, it cannot have a total income, unless by straining the provisions of the section so as to catch companies which derive only unassessable income. If it has no total income, it is impossible to apply to it the provisions of section 138. This is the process of reasoning which has brought us to accept the submissions of Mr Pethig for the respondent.

Mr Cain, in attempting to answer the logic of this reasoning, replied that it depended upon considerations of machinery and not of substance. He cited authority to support the contention that the substantive parts of a statute are not to be controlled by implication drawn merely from machinery provisions set up to carry that statute into effect. We think that the considerations which Mr Pethig advanced are much more than machinery considerations. The provisions which we have been considering in detail are not provisions in which any one section or group of sections substantively provides that certain persons are to be liable for tax, and then in another section or group of sections the machinery

for assessment is established. In such a case it might be argued, with more or less success according to the circumstances of the case, that the first provisions were substantive, the second procedural, and that the latter should not be allowed unduly to circumscribe the limits of the former. But where - as here - liability and the machinery for its assessment are prescribed uno flatu, and not only the method of assessment, but the imposition of liability and its limits, are set out in the same subsection, indeed almost in the same sentence, it is impossible to regard the whole as a mere machinery provision. It is a substantive provision, without which no liability at all is imposed. It seems to us to go to the essence of the conception of a proprietary company, and to the foundation of the liability of its New Zealand shareholders. Because we so conclude as to the merits of the rival arguments, we think that respondent should succeed on this appeal.

We cannot accept the argument that because the shareholders of Pan Eastern would have been liable for income tax, if they had been partners one with another, instead of shareholders in a company, they ought therefore to be held liable as such shareholders. This seems to us to be an illogical argument. The fact that they chose to constitute themselves as shareholders in a company, rather than as partners, led to certain differences in legal result; and one of these differences was a difference in exigeability. We would dismiss the argument based on a comparison with partnership as untenable.

McGregor J. came to the same conclusion as ourselves, on an examination of the section rather more general than the one which we have been at some pains to make, but by what may fairly be described as a parallel process of reasoning. We are in agreement with the conclusion to which he came, and have only one additional comment to make upon his judgment; it is to his reference to the doctrine of election. He said:

> "If A.M.P. is liable for Proprietary tax it seems to me the same fund is being taxed twice, as income of A.M.P. received through its shareholding in Pan-Eastern, and as additional income of Europa through the disallowance of portion of the expenditure incurred in the purchase of gasoline for its trading operations, such disallowance being equated with the profit return through Pan-Eastern and A.M.P. as equivalent to a discount on the posted cost price of such gasoline.
>
> In my opinion the Commissioner had an election. There was a choice between two alternatives. In deciding to disallow portion of Europa's expenditure either under s.111 or s.108 he necessarily excluded the taxation of the same sum in the hands of A.M.P. Furthermore, A.M.P. distributed these funds to its shareholder Europa by way of dividend. The Commissioner pursued one of two courses open to him ... The Commissioner has in the first place founded, and still founds, his case on Europa's liability. It seems to me in fairness to the associated companies he must make his choice."

We should not ourselves have thought that the doctrine of election was applicable to the case before us. It

seems to us to be available only where a person has made a choice between two courses of action one of which, but not both, is open to him, and then to be available only to one who has been affected by the choice so made. But, on the facts which McGregor J. was considering, the choice between assessing Europa for tax and not doing so was not a matter on which the Commissioner had a free choice at all; it was a matter upon which the statute directed him. And further, it was not a matter which directly affected Associated Motorists at all. Europa and Associated Motorists, though connected by shareholding, were different legal entities. No assessment which the Commissioner was required by the law to make in assessing Europa for tax in accordance with the statute could in our opinion affect or limit his quite separate assessment of Associated Motorists, even though one of these companies might hold all the shares in the other. If we had concluded that Pan Eastern was a company liable by virtue of section 138 to be deemed a proprietary company, we would not have allowed the application of the doctrine of election to deflect us from holding respondent company liable for the tax which then would have been leviable consequently upon that conclusion. The consequences of a judgment holding respondent company liable as shareholder of a proprietary company must then follow from the provisions of the statute, modified only by the exercise of any discretion which the Commissioner might properly exercise empowered by the terms of the statute itself.

In conclusion we would wish to add this. There can, of course, be no doubt but that the provisions of section 138(1) are applicable to the income of companies resident in New Zealand which fit the definition of proprietary companies set out in that section, and this whether they derive their income from New Zealand or from abroad. We have held in this judgment that the section is not apt to deal with the income of companies not resident in New Zealand, if such companies not only do not reside in New Zealand, but also do not derive income from this country. What the position may be in the intermediate case - that of the income of companies which, though not resident in New Zealand, yet derive some of their income from this country, we do not here decide. It may well be that such income as such companies derive from New Zealand is caught by the section; but this question seems to us not to be entirely without difficulty, and, not being obliged to consider it in the present case, we leave it for another.

For the reasons which we have endeavoured above to express, which seem to us to do little more than record the lucid argument of Mr Pethig, we would dismiss this appeal.

FORMAL JUDGMENT OF COURT OF APPEAL
DISMISSING APPEAL

In the Court of Appeal No. 6 Formal Judgment dismissing appeal 21 November 1969

Friday the 21st day of November, 1969.

BEFORE:

THE RT. HON. SIR ALFRED NORTH, PRESIDENT
THE RT. HON. MR JUSTICE TURNER.
THE RT. HON. MR JUSTICE McCARTHY.

UPON READING the Case on Appeal filed herein and UPON HEARING the Solicitor-General Mr J.C. White and with him Mr I.L.M. Richardson and Mr G. Cain of Counsel for the Appellant and Mr P.T. Mahon and with him Mr R.F. Pethig of Counsel for the Respondent IT IS ORDERED that the Commissioner acted incorrectly in making the assessments in question and that this appeal therefore be dismissed AND IT IS FURTHER ORDERED that the question of costs be reserved.

By the Court

[L.S.]

G. J. GRACE
Registrar

No. 6.

In the Court of Appeal
No. 6
Formal Judgment as to costs
2 February 1970.

FORMAL JUDGMENT OF COURT OF APPEAL AS TO COSTS.

Monday the 2nd day of February, 1970.

BEFORE:

THE RT. HON. SIR ALFRED NORTH, PRESIDENT.
THE RT. HON. MR JUSTICE TURNER.

THIS COURT having by judgment delivered on the 21st day of November 1969 dismissed this appeal and reserved the question of costs UPON HEARING Mr G. Cain of Counsel for the Appellant and Mr R.F. Pethig of Counsel for the Respondent on the question of costs IT IS ORDERED by consent that the Appellant do pay to the Respondent the sum of $1000 for costs in the Supreme Court and the sum of $1000 for costs in this Court, making in all the sum of $2000.

By the Court

[L.S.]

G. J. GRACE
Registrar

No. 7

In the Court of Appeal No. 7 Order granting final leave to appeal 2 February 1970.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

Monday the 2nd day of February, 1970.

BEFORE:

THE RT. HON. MR JUSTICE NORTH, PRESIDENT
THE RT. HON. MR JUSTICE TURNER.
THE HON. MR JUSTICE HASLAM.

UPON READING the Notice of Motion of the Appellant dated the 30th day of January 1970 and the Affidavit of Max Bertuch AND UPON HEARING Mr G. Cain of Counsel on behalf of the Appellant and Mr R.F. Pethig of Counsel on behalf of the Respondent THIS COURT HEREBY ORDERS that final leave to appeal to Her Majesty in Council from the judgment of this Honourable Court delivered on the 21st day of November 1969 be and the same is hereby granted to the Appellant.

By the Court

[L.S.]

G. J. GRACE

Registrar

P A R T I I

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD

I, GERALD JOSEPH GRACE, Registrar of the Court of Appeal of New Zealand DO HEREBY CERTIFY that the foregoing 160 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing: AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this ~~3rd~~ 12th day of ~~February~~ March, 1970.

G. J. GRACE

L.S.

Registrar