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No. 13 of 1975

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL FROM
THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

EUROPA OIL (N.Z.) LIMITED
Appellant

AND

THE COMMISSIONER OF INLAND REVENUE
Respondent

CASE FOR RESPONDENT

Record

1. In these proceedings both Europa Oil (N.Z.) Limited (the above described Appellant and hereinafter called "Europa Oil") and the Commissioner of Inland Revenue (the Respondent and hereinafter called "the Commissioner") are appealing against the judgment of the Court of Appeal of New Zealand given on 19 November 1974. In that judgment the Court of Appeal allowed an appeal by Europa Oil from the judgment of the
10 Supreme Court of New Zealand given on 22 March 1973 in favour of the Commissioner, but not in full, and remitted the case to the Supreme Court. The appeal of Europa Oil is against the 8076

whole of that judgment; the appeal by the Commissioner is against the judgment insofar as it was ordered and determined that the Commissioner acted incorrectly in making the amended assessments referred to in paragraph 7 of the Case Stated and that the case be remitted to the Supreme Court for that Court to amend the assessments and for that purpose hear any evidence which the parties wish to call. 8075A 8076A 8012

2. The questions raised by the Case Stated in the Supreme Court were whether the Commissioner had acted incorrectly in making the amended assessments referred to in paragraph 7 of the Case Stated in respect of the income years ending on 31 March 1966 to 31 March 1971 both inclusive. The general effect of those assessments, apart from matters not in dispute, was to increase the taxable incomes of Europa Oil for those years by amounts equal to the amount in each year of the income (excluding interest) which Europa Oil derived from its wholly owned subsidiary Associated Motorists Petrol Company Limited because of the latter's 50 per cent shareholding in Pan Eastern Refining Company Limited (hereinafter called "Pan Eastern") set up in the Bahamas by the Gulf Oil Corporation (hereinafter called "Gulf") and Europa Oil. These amounts of income were : 8016 8012

1966	$1,033,528.19
1967	$1,107,874.00

1968	$ 803,785.54
1969	$1,918,448.40
1970	$1,953,832.41
1971	$1,594,751.00

3. These questions gave rise to two central issues before the Supreme Court :

(i) whether certain amounts claimed as the cost of purchases for the income years ending 31 March 1966 to 31 March 1971 were deductions to be made for the purpose of calculating the assessable income of Europa Oil by virtue of s.111 of the Land and Income Tax Act 1954 ("the Act"). This section applied in its original form to the year up to 31 March 1968 and in respect of later years in a varied form.

(ii) whether various contracts and arrangements between Gulf and Europa Oil or companies grouped with them in relation to the supply of petroleum goods constituted an arrangement having the purpose or effect of altering the incidence of income tax of Europa Oil or relieving it of liability to pay income tax, under section 108 of the Act, and if so what were the taxation consequences so far as Europa Oil was concerned.

4. The relevant sections of the Act bearing on the two central issues referred to in the preceding paragraph are for convenience set out below. In respect of the years ending 31 March

March 1966 to 31 March 1968 sections 110, 111, 108 and 92 of the Act were 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.

108. Agreement purporting to alter

incidence of taxation to be void - Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void 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.

92. Income credited in account or otherwise dealt with - For the purposes of this Act every person shall be deemed to have derived income although it has not been actually paid to or received by him, or already become due or receivable, but has been credited in account, or reinvested, or accumulated, or capitalised, or carried to any reserve, sinking, or insurance fund, or otherwise dealt with in his interest or on his behalf.

In respect of the years ending 31 March 1969 to 31 March 1971, section 110 reads :

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 (or the non-assessable income) of any taxpayer.

Section 110A was a new provision inserted in 1968. It reads :

> 110A. Apportionment of expenditure or loss -
>
> (1) Subject to this section, any expenditure or loss which is deductible under this Act and is incurred in gaining or producing assessable income shall be deducted in calculating the assessable income, and shall not be deducted in calculating non-assessable income.
>
> (2) Any expenditure or loss which is deductible under this Act and is incurred in gaining or producing non-assessable income, shall be deducted in calculating the non-assessable income, and shall not be deducted in calculating assessable income.
>
> (3) For the purposes of subsection (4) of this section, assessable income shall be divided into the following classes :
>
> (a) Dividends:
>
> (b) Assessable income other than dividends.
>
> (4) Where in any income year a taxpayer has incurred any expenditure or loss which is deductible under this Act and is incurred in gaining or producing assessable income of either of the classes referred to in subsection (3) of this section, that expenditure or loss shall first be deducted

in calculating the assessable income of that class derived in that income year, so far as that income extends, and any balance shall be deducted in calculating the assessable income of the other class derived in that income year.

Section 111 now reads :

111. Expenditure or loss incurred in production of assessable income - In calculating the assessable income of any taxpayer, any expenditure or loss to the extent to which it -

(a) Is incurred in gaining or producing the assessable income for any income year; or

(b) Is necessarily incurred in carrying on a business for the purpose of gaining or producing the assessable income for any income year -

may, except as otherwise provided in this Act be deducted from the total income derived by the taxpayer in the income year in which the expenditure or loss is incurred.

and Section 108 (until recast in 1974) :

108. Agreements purporting to alter incidence of taxation to be void - Every contract, agreement, or arrangement made or entered into, whether before or after

> the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes 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.

Section 92 was amended in 1968 by making the above quoted section 92 subsection (1) of a new section 92, and adding a subsection (2) which is not relevant for present purposes.

5. Similar questions in respect of the years ending 31 March 1960 to 31 March 1965 were earlier in issue between the parties and a majority of the Judicial Committee, in their opinion given on 21 October 1970 found in favour of the Commissioner in respect of section 111 as it originally stood. The majority did not consider the applicability of section 108. (1971) NZLR 641

6. There are two principal sets of relevant contracts, the 1956 group and the 1964 group. The 1956 group dealt with the provision by Gulf of, principally, gasoline for Europa Oil's requirements in New Zealand. In effect a gross price was paid for the gasoline but a benefit equivalent to 2.5c a gallon reached Europa Oil through the 50 per cent shareholding its subsidiary Associated Motorists Petrol Company

Limited held in Pan Eastern. There was a pricing formula which guaranteed this benefit.

The 1964 group of contracts were executed as of 10 March 1964. The principal contracts in the group were :

(a) A "Feed Stock Supply Contract" for the supply of crude oil and other refinery feed stocks and some other petroleum products if required, at or related to what in the industry are referred to as posted prices. 3112

(b) A "Contract of Affreightment", whereby a Gulf subsidiary agreed at the cost of Europa Oil to transport to New Zealand by tanker the feed stocks and products referred to in sub-paragraph (a). 3149

(c) A "Processing Contract" between Gulf and Pan Eastern which provided for Gulf to supply to Pan Eastern crude oil sufficient to provide the crude oil and other feed stocks and finished products required under the Feed Stock Supply Contract. The Processing Contract provided that having processed crude oil to produce naphtha and other feed stocks and products for Pan Eastern, Gulf would then purchase back the resultant feed stocks and products and the crude oil purchased by Pan Eastern and not refined. Europa Oil obtained through its subsidiary's shareholding in Pan Eastern an amount equal to the difference between the prices paid by it under the Feedstock 3134

Supply Contract and the lower prices for the equivalent goods paid by Pan Eastern under the Processing Contract. The difference in the case of crude was 15% of the posted price. 3138

(d) A "Re-organisation Agreement" the parties to which were Gulf and Todd Participants Limited being the parent company of Europa Refining Limited (hereinafter called "Europa Refining", the functions of which are described later) and not Europa Oil. The agreement provided for the capital reconstruction of Pan Eastern; contained undertakings by Todd Participants as to how Pan Eastern and its shareholders would act; and cl. 6(b) ensured that Europa Oil would benefit fully through Pan Eastern from Europa Refining's purchases from Gulf. Todd Participants could sue Gulf direct for any breach of the Processing Contract and for failure to maintain Pan Eastern's earnings. 3188 3195

In respect of the year ending 31 March 1965, being the last year in dispute in the previous case, both contracts in sub-paragraphs (a) and (c) above were varied by letters dated 16 March 1965 by which, as from 1 April 1964, price reductions in crude oil, naphtha and gas oil were granted to Europa Refining. As a result, the prices to be paid to Pan Eastern by Gulf for those goods were correspondingly reduced. 3130-3132 3147

In respect of the years relevant to the present case the same contracts were made subject to

further adjustments by various later letters, and the prices to be paid to Pan Eastern by Gulf were corresponding adjusted. 8039 to 8066

At the time the 1964 contracts were executed the requirements of Europa Oil had changed. A refinery was being set up in New Zealand at Whangarei. The Europa Group and other oil companies were participants with rights to put feedstock into the refinery and draw off refined products. Europa Refining was formed in which the principal shareholder was Todd Participants Limited. The shareholders in the latter company were basically the same as the shareholders in Todd Investments Limited, the principal shareholder in Europa Oil. 8019, 8020 4 ATR 464 line 30 - 465 line 16

7. In the 1970 case the greater part of the tax years in dispute fell within the operation of the 1956 contracts, there being only a year or thereabouts of operation of the 1964 contracts. No point was made in that case of the effect of the introduction of Europa Refining into the scene and their Lordships held the two sets of contracts to have the same effect so far as the tax liability of Europa Oil was concerned. The benefits reaching Europa Oil from Pan Eastern were in each case held not able to be included in claims for deduction of the cost of purchases. (1971) NZLR 641, 653, line 19.

8. The Case Stated came on for hearing in the Supreme Court by McMullin J. on 12-16, 19-21,

26-28 February and 1 March 1973 and judgment was given on 22 March 1973. 3 ATR 512

McMullin J. took as his starting point the view of the majority of the Privy Council as to the 1956 contracts, i.e. 519 line 30

(i) the integration of Europa Oil's agreement to buy gasoline at posted prices with Gulf's agreement to provide earnings for Pan Eastern, was far too close and too carefully worked out to permit of the isolation of the products contract and treatment of expenditure under it as incurred exclusively in the purchase of trading stock;

(ii) Europa Oil never intended to bind itself to buy gasoline without the benefit of the advantage to be gained, through Pan Eastern, of the processing contract;

(iii) The 1956 contracts pointed to an interdependence of obligations and benefits under a complex of contracts which represented one contractual whole.

He observed that the majority considered this to be true also of the 1964 contracts. He then referred to the Court of Appeal's view in the 1970 case, and to the view of McGregor J. in the Supreme Court, that the situations under 1956 and 1964 sets of contracts were similar. line 51 520 line 6 line 26

He then proceeded to consider certain differences advanced by Europa Oil as being important in the present case. The first difference claimed was that, whereas in the processing contract of 1956 between Gulf and Pan Eastern there was a formula on which profits to be derived from Pan Eastern were to be calculated, and in 1959 amendments were made to this formula to ensure a minimum return to Pan Eastern, the 1964 contracts contained no such formula and no guarantee of refining profits. After reviewing the evidence, His Honour concluded that there was secured to Europa Oil under the 1964 contracts a benefit as real, if not as patent, as that secured for it under the 1956 contracts.

3 ATR 512,519 line 32

522 line 11

The second point of difference claimed was, he observed, a factual one. Europa Oil and in evidence before him and in submissions sought to put upon events which had been traversed in evidence in the earlier case a complexion or interpretation different from that attached by the Courts in that case. He declined to accept any construction of factual situations different from that taken previously, and where the evidence for Europa Oil was in conflict with that given in the first case,he accepted the earlier evidence.

522 line 16

line 35

The third point of difference was that whereas in the 1956 contracts Europa Oil was a contracting party with Gulf, in the 1964 contracts Europa Oil

line 39

was a contracting party with Gulf, in the 1964 contracts Europa Oil was not a party to a single contract; it was Europa Refining which contracted with Gulf and Pan Eastern. After reviewing the evidence on this aspect, he concluded that while Europa Oil was not a party to the 1964 contracts, the whole purpose of those contracts was to give Europa Oil price benefits for products which it would market in New Zealand and the existence of Europa Refining as distinct from Europa Oil did not assist Europa Oil. 3 ATR 542 line 41

McMullin J. next dealt with the ownership of feedstocks supplied by Gulf at the Whangarei refinery, Europa Oil claiming that it purchased refined products from Europa Refining, not feedstocks. After considering the evidence and submissions, he found that Europa Oil's objection to the assessments had always been put forward on the basis that it purchased feedstocks and not refined products from Europa Refining, and that the objection in fact recorded the actual course of dealing between the parties. line 46

He concluded his analysis on the facts with the following observations : 528 line 41

> Just as the Judicial Committee held that the 1956 contracts were a single interrelated complex of agreements under which Europa should be considered as incurring expenditure for a compound consideration

consisting partly of gasoline to be supplied and partly of advantages, i.e. profits to be derived from Pan Eastern ((1971) N.Z.L.R., pp. 651 and 652; 1 A.T.R., pp. 746 and 747) so the 1964 contracts ought to be considered in that light. In my view it would be unreal to take the contracts in isolation and to say that the Objector is not a party to them. They must be looked at as a whole. Their whole purpose was to give Europa Oil price benefits for the products which it would be ultimately marketing in New Zealand, and the distinction in the name of the Europa company which entered into the 1964 contract, viz., Europa Refining, is one without a difference. The only reasonable explanation of the processing contract profits for the purchase and sale back to Gulf of crude was to give Europa Oil a discount on its purchases in Whangarei. Throughout the period Pan Eastern constituted a vehicle to grant a price exchange to Europa Oil outside New Zealand.

His Honour then dealt with the interpretation and application of section 111. As to submissions for Europa Oil that the distinctions between the 1956 and 1964 contracts justified different treatment from that given previously by the Privy Council in applying the section in its old form, his view was that what was said by the majority

3 ATR 529

531 line 13

when Europa Oil and Europa Refining were treated as one, was no less true when account was taken of the fact that Europa Oil was not a party to the 1964 contracts. It was still impossible to overlook the close relationship existing between Europa Refining and Europa Oil which led to the grant by Gulf to Europa Refining of discounts on the supply contract, a grant which met with a contemporaneous reduction in the prices paid by Gulf to Pan Eastern under the processing contract.

He then proceeded to consider the new section 111. He discussed the application of the first limb of the new section and concluded that to the extent that the expenditure was incurred as part of the price of feedstocks, it was deductible, but to the extent that it was paid for benefits over and above feedstocks, it was not deductible. The extra amount paid could not be said to be expenditure incurred in the purchase of feedstocks. Hence Europa Oil had not brought itself within the first limb of section 111.

3 ATR 531 line 45

534 line 15

As to the second limb, he referred to Ronpibon and discussed the significance of the word 'necessarily' in the second limb. He saw no reason to depart from the word 'necessarily'. He asked :

534 line 57

> "Can it be said that the expenditure incurred by Europa Oil which resulted in returns to that company of dividends by way

of A.M.P. was expenditure necessarily incurred in carrying on the business of Europa Oil for the purposes of gaining or producing assessable income?"

He answered the question in the negative.

His Honour made several observations as to the applicability of section 108. The first was of a factual nature. He would have found that the Bahamas as the place where Pan Eastern was to be incorporated could be only reasonably explained in terms of tax avoidance; no satisfactory commercial reasons for registration in that locale had been given. The choice of the Bahamas was made because they represented an umbrella under whose shade Europa Oil might obtain considerable tax advantages. It being beyond argument that the choice of the Bahamas was made for tax considerations, it was not possible to maintain that the Pan Eastern arrangement was an ordinary commercial transaction. 3 ATR 535 line 25

The second point was as to the submission for Europa Oil that if deductions were found to be allowable under section 111, they could not be avoided under section 108. After discussing Australian and New Zealand cases, he found it clear in New Zealand that section 108 may avoid a transaction which provides for a deduction protected by section 111. line 45 536 line 42

Record
3 ATR
536
line 45

Thirdly, it had been submitted that section 108 had no application because the income of Pan Eastern was not derived in New Zealand; that Pan Eastern was a non-resident company and not controlled in New Zealand. He agreed with the tentative view of McGregor J., in the previous case, that it was the income of Europa Oil with with the Commissioner was concerned, and this was taxable even if derived from overseas.

10 He dismissed the objections and confirmed the assessments. line 53

9. Europa Oil appealed to the Court of Appeal against the judgment of the Supreme Court. The appeal was heard on 15-19 October 1973. The Court of Appeal delivered an interim judgment on 12 June 1974; heard submissions from the parties on that judgment on 17 October and delivered final judgment on 19 November 1974. 4 ATR 455 (1975) 1 TRNZ 1

McCarthy P. gave the leading interim judgment.
20 After reviewing the history of the litigation and the decision of McMullin J., he proceeded to deal with various aspects, on which Europa Oil had sought findings. These were lettered as follows:

A. Finding Sought: Notwithstanding that some of the shares in Europa Oil and in Europa Refining and in their respective parent companies may be held by the same persons, those two companies are separate entities. 4 ATR 464 line 31

After considering the evidence and comparing Mr Todd's evidence in the previous case that the two companies had basically the same shareholders, and in the present case that they were substantially different McCarthy P. adopted McMullin's views : 4 ATR 465 line 13

> "I decline to place any construction on factual situations different from that taken previously and, where the evidence for the Objector is in conflict with that given in the first case, I accept that earlier evidence."

B. Finding Sought: Europa Refining is not a subsidiary of Europa Oil. The Court agreed that Europa Refining was not a subsidiary in the sense of a company the shares of which are either wholly owned or dominantly owned by another company. line 19

C. Finding Sought: Europa Oil is not a party to any one of the 1964 contracts with Gulf. The arrangements between it and Europa Refining were separate. McCarthy P. reviewed the evidence and observed: 22 467 lines 10-15

> "...we are of opinion that Europa Oil was a direct party to two letter agreements and an undertaking by Gulf which were contemporaneous with and formed part of the larger complex of the 1964 contracts. We agree that Europa Oil was not a direct party to what we have referred to as the

central contracts in the complex."

and as to the passing of ownership of the cargoes:

> "Whatever the exact position was as to the passing of the ownership of those cargoes, the expenditure incurred by Europa Oil was directly related to cargoes being ordered in terms of that complex. Each order therefore became integrated into the complex and cannot in our view be described as "separate"." 4 ATR 467 line 38

D. Finding Sought: (In relation to the four memoranda forming Exhibit 15 to Case Stated) : line 41

(1) The arrangements or agreements between Europa Oil and Europa Refining are as set out in CS 15 (p 8038) as amended.

(2) CS 15 (p 8038) is the first of the memoranda to be signed by Mr Todd and this memorandum was signed by Mr Todd in 1965 shortly after his return to New Zealand on 31 March 1965.

(3) CS 15 (p 8036) was signed in or about June 1969 as a result of the Finance Companies (Investment) Regulations 1969 (SR 1969/116) which had been made on 26 June.

(4) The CS 15 memorandum (p 8037) to be signed last was signed soon after the second (p 8036) in order to correct a typographical error by deleting the word "payments" which had been inserted by error in the third line of the memorandum.

(5) The arrangements contained in CS 15 (p 8038) were acted upon by Europa Refining and by Europa Oil.

4 ATR 468 line 41

His Honour discussed the evidence and concluded:

> "We believe that the most likely conclusion from the evidence was that Europa Oil was purchasing the feedstock cargoes from Europa Refining but that these feedstocks were charged to the refinery in Europa Refining's name. We are not prepared to make the findings sought by Mr Barton under D(1)- (5)."

468 line 46

E. Finding Sought: Under those arrangements Europa Oil made various advances to or for the benefit of Europa Refining for the purpose of receiving in its coastal terminals finished products ex New Zealand Refinery from feedstocks charged to that refinery by Europa Refining.

52

He commented :

> "This finding necessarily depends upon the Court being willing, which we are not, to make findings asked for as D, supra."

F. Finding Sought: The finished products were either essential for or incidental or relevant to the carrying on of Europa Oil's business as a marketer of petroleum products and consequently the payments made in order to receive those products were expenditures necessarily incurred in

carrying on that business.

The comment :

> "We refuse to make such a finding as it is again consequential on D. Moreover, it raises the correct interpretation and application of s.111 as amended, matters dealt with separately in the judgment of the members of the Court." 4 ATR 469 line 4

G. Finding Sought: Europa Oil carried on its business for the purpose of gaining or of producing income which was assessable within the meaning of the Land and Income Tax Act 1954. line 9

The comment :

> "At first glance the answer to this must be "Yes". The significance of such a finding, is, however, in relation to the language of s.111 (b) of the Land and Income Tax Act 1954 as amended. We refuse to make this finding as it, like E and F, is based on the premise that the arrangements between the two companies were as set out in Mr Todd's memoranda."

H. Finding Sought: (1) The landed cost of the feedstocks imported into New Zealand by Europa Refining under the provisions of the 1964 contracts and charged by it to the New Zealand Refinery has bettered New Zealand Government 469 line 18

benchmarks; (2) There was no other source from which Europa Oil could have satisfied its market requirements on better terms than those obtaining with Europa Refining during the currency of the 1964 contracts.

As to (1) McCarthy P. after discussing the evidence concluded : 4 ATR 469 line 25 470 line 7

> "The evidence seems to establish that after taking into account the alternate freight (as in Exhibit V) the overall landed costs paid by Europa Refining bettered Government benchmarks. But we would point out that on a fob basis only, they did not. And again, on the basis of the actual landed costs as paid by Europa Oil (i.e. with freights at AFRA rates) they did not (see Mr Smith pp 9226-7)."

and as to (2) :

> "...when the combined package of freights and fob prices is taken together, and weight is given to the necessity for a long term contract for special feedstocks for the Marsden Point Refinery to avoid uneconomic "backhauls" of products not required in New Zealand and to the exchange advantages, the finding asked for by Mr Barton in H(2) is justified to the extent of saying that the existence of any such other source is not established. 470 line 46

Record

4 ATR 470 line 52

I. Finding Sought: None of the 1964 contracts is a sham and consequently each of them is to be given effect in accordance with its true interpretation and in accordance with the course of conduct between the parties for carrying out those contracts.

As the Commissioner did not argue to the contrary no positive finding was required.

471 line 10

J. Finding Sought: (1) Under the processing contract the parties stipulated that Pan Eastern should receive as refining profits -

(a) In respect of all naphtha production and part of gas oil production, equivalent to quantities uplifted by Europa Refining, the difference between -

(i) a selling price which was the same price at which the processed products were to be supplied to Europa Refining by Gulfex on the one hand; and

(ii) the cost of production of those processed products on the other.

(b) In respect of all other production the difference between -

(i) a selling price which would return to Pan Eastern a refining profit equivalent to the refining profit under (a) above; and

(ii) the cost of production of those other products.

The amounts specified in clause 4.02 of the Processing Contract as the amounts to be paid by Pan Eastern to Gulf for each barrel of naphtha and gas oil, namely $1.46 and $2.00 respectively (which included the cost of the crude oil, the processing thereof and all other outgoings) were treated by Gulf and accepted by Pan Eastern as the costs of producing each respective barrel of naphtha and gas oil. This is the conventional "refiner's margin".

(2) The profit of Pan Eastern was obtained by the operation of the processing contract and not by a system of "doubling".

The Court reviewed the evidence and as to (1) observed : 4 ATR 474 line 4

"The findings sought by Mr Barton under J (1) cannot be made in the form he asks, nor can we ourselves take the issue further than we have done in our comments under that head. Of course, on the view of the majority of the Privy Council it does not matter what the Pan Eastern profits are called."

Its conclusion as to (2) : 474 line 30

"If...the expression "doubling" is used merely to emphasize the fact that the total

> Pan Eastern profits would always be double the profits made on crude and other products destined for Europa Refining then its use seems to us to be justified. If however "doubling" is used in the sense that all that happens in terms of the contract is that the Europa profit is doubled then its use is inaccurate as it disregards the sale to Gulf of heavy ends and middle distillates."

K. Finding Sought: The purpose of the 1956 and 1964 contracts was not the alteration of or relief from liability to tax of Europa Oil, but ordinary business dealing or sensible commercial arrangements. 4 ATR 474 line 37

The comment:

> "This is relevant to s.108 and could only be answered as a mixed question of fact and law on a careful consideration whether or not that section applies. We leave it aside at this point." Line 40

L. Finding Sought: The 1964 contracts were negotiated "at arm's length" between Mr Todd and Gulf.

McCarthy P. discussed the evidence and concluded: 475 line 28

> "We think having regard to all these considerations that the 1964 contracts were

negotiated "at arm's length" in the sense which we have attributed to that expression."

M. Finding Sought: "Feedstocks" is a generic term and is not confined to the petroleum delivered over the rail of the tanker either direct to the refinery or to storage tanks, but according to context may be used to mean petroleum at any stage in refining to be charged to a unit in the refinery. 4 ATR 475 line 31

The comment : This is based on the evidence of Mr Wookey commencing at p 9264 which was admitted de bene esse by McMullin J. The judge (p 8106) did not reject the view that the term "feedstock" can be used in a wide sense but found the evidence "of no weight", as in the context of the present case he was satisfied that the word was used as referring to the actual feedstock cargoes. There appears to be no reason to reject Mr Wookey's evidence. 475 line 35

N. Finding Sought: At the time Mr Todd negotiated the 1964 contracts he established a contractual base on the understanding that Gulf and Europa Refining would freely negotiate supply terms from time to time and that prices under the feedstock supply contract would be discounted by Gulfex. line 41

The Court concluded as to this 476 line 44

"All in all, we think that Mr Todd's evidence of an understanding with Gulf that prices would be negotiable from time to time should be accepted. But we are not satisfied what the purpose of this really was. Mr Newton had other views. Another purpose could have been to keep fob prices at a level which was acceptable to the New Zealand Government."

O. Finding Sought: There was no guarantee of earnings by Pan Eastern under the 1964 contracts. 4 ATR 476 line 49

The comment: line 51

"This seems mainly a question of law, but there is nothing in the documents which amounts to a guarantee that Pan Eastern would achieve any given level of earnings or any earnings at all. However, under the conditions which existed from time to time during the operation of the contract, the Europa companies always knew whether Pan Eastern would make a profit arising out of any given shipment."

P. Finding Sought: The income derived by Europa Oil through Associated Motorists Petrol Co represented a share in profits from the refining sector and the Pan Eastern profits are such profits. 477 line 3

Record

4 ATR 477 line 7

The Court's comment :

> "As already stated, we take the view that this income (apart from the portion attributable to the purchase and resale of crude oil) was a contractual benefit primarily intended to give Europa the equivalent of an arbitrary share of profits in the refining field. We go no further than that."

Q. Finding Sought: The payments made by Europa Oil were not made for a dual purpose. 477 line 10

The comment :

> "This vital question is dealt with in the individual judgment of members of the Court."

McCarthy P. then returned to his discussion of the argument for Europa Oil based on alleged differences between the situations under the two groups of contracts. 477 line 15

The first difference claimed was that Europa Oil was not a party to the 1964 contracts. After reviewing the evidence, the learned Judge observed: 18

> "Consequently, I do not accept that the separate identity of Europa Refining and the absence of any enforceable contractual rights linking the appellant with Gulf's obligations to Pan Eastern enable us to depart from what was concluded earlier by 480 line 50

the Privy Council concerning the 1964 contracts. In result, this coincides with McMullin J.'s view though the reasoning may be somewhat different."

And as to the second difference :

"The second difference stressed by the appellant is that the 1964 processing contract differed from its 1956 counterpart in that the 1964 contract contained no guarantee of immediate earnings which, as it turned out, were affected by changes in volumes of crude oil and of partly processed products. I am unable to attribute importance to this." 4 ATR 481 line 3

His Honour continued :

"The third difference listed was based on the absence of any legal contractual relationship between Europa Oil and Gulf, and is covered by what has been said earlier. 481 line 29

The fourth difference is that whereas the 1956 contracts contained an agreement between Gulf and Europa Oil under which power was conferred on Europa Oil to rescind the product contract (a point noted by the Privy Council), under the 1964 contracts Europa Oil had no power to rescind any of the contracts because it was not a party to any of them. This difference too, it seems to

me, is really dealt with by what I have already said.

The fifth difference is that whereas under the 1956 contracts Europa Oil became entitled to receive finished products from Gulf, under the 1964 arrangements it became entitled to finished products delivered to its coastal terminals ex the New Zealand Refinery, for which it paid by making advances to or for the benefit of Europa Refining in respect of feedstock fobs and by making further advances for the benefit of Europa Refining to the New Zealand Refining Company for processing fees to cover the manufacture and of distribution to coastal terminals."

After discussing McMullin J.'s view McCarthy P. concluded :

"But it seems to me that if we follow the route which I believe is directed by the Privy Council of inquiring whether, at the time when the stock, whatever it was, was ordered, appellant knew as a result of the process which it thus put in train that it was to receive, pursuant to the existing machinery, an identifiable advantage from Pan Eastern, it is purely a refinement to quarrel about whether the goods received by it came under one description or another and about the precise time at which the

4 ATR 482 line 16

property in those goods passed."

He continued :

> "The sixth difference is that whereas under the 1956 contracts there were fetters on Europa Oil's freedom to secure its supplies from other sources, under the 1964 arrangement it could obtain them from any source, and the seventh is that whereas under the 1956 contracts the payment of invoices might be deferred so long as there were undistributed dividends in Pan Eastern, there was no similar arrangement under the 1964 contracts. Neither of these matters in my view point to changes which can be considered sufficiently material to warrant discussion, much less to bring the Court to the view that it is free to reach a different conclusion in this phase of the case to the Privy Council."

4 ATR 482 line 35

The eighth difference was that whereas there was no yardstick available to measure the performance of the 1956 contracts, in relation to the 1964 contracts Government benchmarks, used for taxation purposes in relation to the importation of petroleum supplies from overseas, provide an absolute measure of reference.

After preferring submissions for the Commissioner on this he concluded :

Record

4 ATR 482 line 48

> "In any event I am not satisfied that the benchmark argument is relevant to the test applied by the Privy Council. McMullin J. thought that it was not, and I am not disposed to differ."

His Honour next turned to a difference which the Commissioner claimed substantially weakened Europa Oil's case. When the 1956 contracts were entered into, Europa Oil had little choice but to pay posted prices and this was a material consideration in moving the Court of Appeal in the previous case to find for Europa Oil. But in 1964 substantial discounts were available to arm's length buyers and McCarthy P. accepted the finding of McMullin J. that this was so. But he did not think the point had much weight now.

482 line 54

483 line 25

line 31

He concluded, as to the effect of all these differences :

line 50

> "The proper course I think is for this Court to hold that the Crown has shown that as part of the contractual arrangement under which Europa Oil acquired its stock, an advantage not identifiable as or related to the production of the assessable income was obtained through Pan Eastern.

McCarthy P. next raised what he regarded as "the problem of apportionment". He held that the

484 line 1

general onus imposed by s.20 of the Inland Revenue Department Amendment Act 1960 remained with the taxpayer to establish that what he claimed to deduct was exclusively incurred in terms of section 111 (as enacted in 1954). He added that the extent to which the expenditure was so incurred was a question of fact. He approved the following method of calculation, proposed by Richmond J. in his judgment : 4 ATR 484 line 50

> Treat f.o.b. payments as having been expended for the combined total of the values of the feedstocks and the Pan Eastern benefits. Divide that expenditure in proportion to those component values, allowing as deductible the amount attributed to feedstocks.

There must, he continued, then be an ascertainment of fair market values. There was no finding in the Supreme Court as to this. The parties could agree, or take Government benchmarks, or arbitrate or have a contested hearing in the Supreme Court. If the parties could not agree on the question, the Court of Appeal would hear them. 485 line 6

McCarthy P. next dealt with the new s.111. He did not agree with the Australian authorities to the effect that "necessarily" incurred meant "clearly appropriate or adapted for". 485 line 15 486 line 18

The previous test based on an "exclusive" character was, he thought, very different from that 487 line 3

which the new limb (b) required. This limb was not concerned with double purpose but with whether the expenditure was necessarily incurred no matter how many advantgaes were in mind.

4 ATR 487 line 33

The Commissioner, in his view, had established that f.o.b. prices paid by Europa Oil were higher than arm's length prices. But the Commissioner had not shown that Europa Oil could have achieved better than market prices. While Europa Oil was required to establish the extent to which its expenditure was necessarily incurred, it was fair to allow it arm's length market prices but not more. He endorsed the proposals of Richmond J. on this point.

487 line 46

As to s.108, McCarthy P. considered that the view of minority of the Privy Council and of the Court of Appeal, both in the previous case, should be decisive; the section did not apply. Finally McCarthy P. said s.110A was raised for the first time in his Court by the Commissioner and he would not entertain argument on it now.

488 line 17

Richmond J. dealt with the separate entities of Europa Oil and Europa Refining and concluded that the fact that Europa Oil did not enter into the 1964 feedstock contracts did not assist it.

493 line 20

493 line 29

He next dealt with the matter of apportionment raised by McCarthy P.

495 line 21

Under the old s.111, Richmond J.'s formula would work this way : Assumption : Say fob prices 8%

in excess of market values. Pan Eastern benefits per Table were about 25% of fob payments. So every $100 of expenditure would purchase $92 of stock plus $25 benefit; total $117. Amount apportionable to benefit and non deductible : 4 ATR 495 line 10

$$100 \times \frac{25}{117} \quad \text{say} \quad \$21$$

Under the new s.111, para. (b), the test was : To what extent were the fob expenditures necessarily incurred as part of the process of obtaining feedstocks. A different approach from the old s.111 was justified. To an extent equivalent to arm's length fob long term market values, the expenditure actually incurred was necessarily incurred in the course of business for the purpose of gaining assessable income under the section. The expenditure should be wholly deductible even though it may also have the purpose of gaining a non-taxable benefit. Instead of disallowing the entire amounts of the Pan Eastern benefits, the Commissioner should have disallowed only the difference between actual fob payments and current market values. 496 line 15 line 37 496 line 47 497 line 12

Beattie J. concurred in the view of the President that the different identities of Europa Oil and Europa Refining did not assist Europa Oil. 497 line 21

Referring to the interpretation of the new section 111 he preferred the interpretation of the Australian Courts; "necessarily incurred" meant "clearly appropriate or adapted for" but as to the old and the new section 111 he agreed with the basis of 500 line 1

apportionment proposed by Richmond J.

10. The parties could not agree on the Court's suggestions. The Commissioner's attitude was that it was for Europa Oil to establish in the Supreme Court not only that the assessments were wrong but also, by how much; it had not done so; nor indeed had it there raised any question as to the method of apportionment adopted by the Commissioner. Europa Oil was willing to have Government benchmarks taken as evidence of market value but the Commissioner did not agree as these were arrived at upon different considerations. Accordingly the parties were again heard by the Court of Appeal.

11. The final judgment of the Court of Appeal was given on 19 November 1974. McCarthy P. delivering the judgment posed the questions at issue as follows : (1975) 1 TRNZ 1

1. Is the Court precluded from directing apportionment by the form of Europa Oil's original objection to the assessments? 1 TRNZ p.3

The Court's answer was "No".

The wording of the objections was sufficient to leave it open to Europa Oil to contend that part of the expenditure was deductible.

2. Is the Court of Appeal precluded from directing an apportionment by the course of the p.3

proceedings in the Supreme Court?

The Court's answer was again "No"; Europa Oil was entitled to some relief and it was excusable of Europa Oil not to tender evidence of market prices. The Court concluded that it was within its powers and in accordance with the best interests of justice that the case should be remitted to the Supreme Court to enable further evidence to be given. 1 TRNZ 6

3. Should the Court revise the views earlier expressed as to the effect of s.111(b)? p.6

The Court first referred to section 110A. It accepted that this section had been advanced in the Supreme Court at the trial, the brevity of the reference being due to the Commissioner's understanding that apportionment was not in issue. The Court then considered the Commissioner's argument made at the hearing following the delivery of the interim judgment and the submissions of Europa Oil. It observed that the matter was not free from difficulty but it preferred the submissions for Europa Oil that the provisions of section 110A(2) could not have application to section 111. The Commissioner had not carried the Court to the point where it would have felt right to depart from its earlier views. These views had relevance only to the last three years in issue; no question of section 110A arose as to the first three years.

The appeal was therefore allowed; in respect of p.8

the first three years the Commissioner had acted incorrectly in disallowing the amounts of the Pan Eastern benefits as a deduction. He should have disallowed a proportion of Europa Oil's fob costs, determined in each year in the ratio which the Pan Eastern benefit bore to the sum total of the benefit and actual arm's length long term market value of the feedstocks.

In respect of the second three years he should have disallowed so much (if any) of the fob costs in each year as exceeded actual arm's length market values of the feedstocks.

The Court directed the case to be remitted to the Supreme Court with a direction that it amend the assessments accordingly, and for that purpose hear any evidence which the parties might wish to call and then determine actual arm's length long term market values.

12. With respect to the appeal by Europa Oil the Commissioner contends:

(A) <u>As to the deduction provisions</u>; That McMullin J. and the Court of Appeal were correct in holding that both under the old section 111 and under the new section 111 the Commissioner was entitled to disallow part of the expenditure incurred by Europa Oil in relation to its trading stock: and in particular

(1)(a) That the test of deductibility under s.111

for the income years ending 31 March 1966 to 31 March 1968 both inclusive is whether the expenditure in question was exclusively incurred in the production of Europa Oil's assessable income.

(b) That while the Commissioner may not challenge the wisdom of an expenditure he may ascertain for what it was in reality incurred, i.e. what was its purpose.

(c) That expenditure is apportionable between what is exclusively incurred in the production of assessable income and what is not.

(d) In determining whether an apportionment should be made the question is whether under the contractual arrangements the taxpayer gained an advantage not identifiable as or related to the production of his assessable income.

(e) That the test in this respect in this class of case was correctly stated in the judgment of the majority of the Judicial Committee in the 1970 case and that a part of the expenditure incurred in relation to the purchase of trading stock may be disallowed where as part of the contractual arrangements under which the trading stock was acquired some advantage not identifiable as or related to the production of assessable

(1971) NZLR 649 line 25

income was gained so that a part of the expenditure which can be segregated and quantified ought to be considered as consideration given for the advantage. There was a sufficient integration and interdependence of the ordering of petroleum supplies with the machinery constructed under which benefits accrued to Europa Oil from the ultimate receipt of profits from Pan Eastern to justify and require apportionment and disallowance.

(g) That the factual differences between the case as advanced in the 1970 case and the case advanced for Europa Oil in these proceedings neither separately nor cumulatively justify departing from the conclusion reached by the majority of the Judicial Committee in relation to the 1964 contracts.

(2) (a) That for the years ending 31 March 1969 to 31 March 1971 both inclusive the new section 111 which is applicable and section 110A contemplate apportionment.

(b) That the first limb of the new section 111 requires that to be deductible the expenditure be incurred in gaining or producing the assessable income of the taxpayer claiming the deduction and this raises the same considerations and calls for a similar approach in this class of case to that taken under the old section 111.

(c) That the second limb of the new section 111 requires that expenditure to be deductible must be necessarily incurred in carrying on a business for the purpose of gaining or producing the assessable income of the taxpayer for an income year and "necessarily" should be given its ordinary meaning.

(d) Alternatively "necessarily" in the second limb of the new section 111 has the meaning of clearly appropriate or adapted for and the phrase means as stated by Dixon J. in Federal Commissioner of Taxation v. Snowden and Willson Pty Limited (1958) 99 C.L.R. 431 :

> "The expenditure must be dictated by the business ends to which it is directed, those ends forming part of or being truly incidental to the business."

(e) That whichever of the two approaches to the second limb of section 111 referred to in subparagraphs (b) and (c) of this paragraph is adopted there was a single inter-related complex of agreements under which Europa Oil should be considered as incurring expenditure for a compound consideration consisting partly of goods to be supplied and partly of advantages to be derived through Pan Eastern so as to justify and require apportionment.

(B) As to the tax avoidance provisions;

(a) That for the provisions of section 108 of the Act to operate (this being the other ground relied on by the Commissioner in support of the amended assessments) there must be found first arrangements made or entered into which directly or indirectly had or purported to have the purpose or effect of altering the incidence of income tax or relieving any person from his liability to pay income tax and secondly a state of affairs such that if so much of the arrangements as gave effect to that purpose or effect are avoided the taxpayer would have derived assessable income.

(b) That under section 108

(i) It is not determinative who receives income under the arrangements or where the income is derived under the arrangements,

(ii) "Purpose" and "effect" are alternatives; the provisions in s.108 may apply both where the purpose exists but has not yet been effected and where the end has been achieved.

(iii) It is immaterial that the arrangements are entered into overseas or are related to foreign operations if the income affected would otherwise be assessable income of a New Zealand

taxpayer.

(iv) Section 108 applies where the arrangement itself gives rise to the income sought to be taxed.

(v) Section 108 applies where under the arrangements the income sought to be taxed never passes through the hands of the taxpayer as his income.

(c) That the provisions of s.108 apply to the arrangements effected in and under the 1964 agreements in that they had the purpose or effect of altering the incidence of income tax or relieving Europa Oil from its liability to pay income tax. In particular the contract for organisation of Pan Eastern, the incorporation of Pan Eastern, the feedstock supply contract of 1964 and the related agreements, the arrangements between Europa Oil and Europa Refining and the carrying out of those contracts agreements and arrangements (to the extent they were carried out) constitute an arrangement having the purpose or effect of altering the incidence of income tax or relieving Europa Oil from its liability to pay income tax.

(d) That following the necessary voiding of those arrangements pursuant to s.108 the circumstances remaining justify the amended assessments made by the Commissioner.

13. With respect to the appeal by the Commissioner the Commissioner contends that the Court of Appeal of New Zealand was precluded from and was wrong in directing that apportionment be on any basis other than that adopted by the Commissioner and in particular

(1) The basis of apportionment of Europa Oil's expenditures adopted by the Commissioner was not put in issue in the objections nor in the contentions of Europa Oil in the Case Stated nor at the hearing in the Supreme Court and should not have been reviewed by the Court of Appeal. In the litigation in the previous case no objection was taken by Europa Oil to the Commissioner's quantification of the non-deductible advantage gained by Europa Oil as an equivalent of the return derived from Pan Eastern and the Judicial Committee confirmed the assessments but the minority in the Judicial Committee expressly raised the question of the correctness of the method of apportionment adopted by the Commissioner in the assessments. The objections in the present case were in similar form to those in the previous case and the Commissioner was entitled to assume that no question of apportionment would be raised.

Moreover the statutory requirement under s.20 of the Inland Revenue Department Act

1960 and s.30 of the Land and Income Tax Act 1954 that on the hearing and determination of an objection the objector is limited to the grounds stated in his objection is not a provision for the benefit of the Commissioner but goes to jurisdiction.

(2) At the hearing in the Supreme Court Europa Oil neither in evidence nor in its submissions specifically challenged the method of apportionment by the Commissioner and there was no suggestion of any alternative basis of apportionment under either the old or the new section 111. Thus the basis of apportionment adopted by the Commissioner was not expressly put in issue in the objections nor in the contentions of Europa Oil in the Case Stated nor at the hearing in the Supreme Court. Accordingly no evidence was called by the Commisssioner specifically directed to the arm's length prices from time to time for petroleum supplies obtained by Europa Oil or otherwise to alternative bases of apportionment which might have been raised. The Court of Appeal is precluded from and was wrong in directing apportionment by the course of the proceedings in the Supreme Court. Europa Oil not having raised any alternative basis of apportionment nor led evidence on it in the Supreme Court could not itself

raise it in the Court of Appeal and did not do so, nor should that Court have done so.

(3) The history of the litigation shows that Europa Oil put its case on an all or nothing basis. The Commissioner is entitled to an end to this litigation on the evidence now in the Record and should not be subjected to a further protracted hearing in the Supreme Court.

(4) If Europa Oil is entitled to have the method of apportionment reviewed and an alternative basis is adopted the matter should be dealt with on the Record and not remitted to the Supreme Court for further hearing.

(5) The Commissioner adopted a proper basis of apportionment in his amended assessments. In return for its expenditure Europa Oil obtained first trading stock and second the benefits through Pan Eastern. The Pan Eastern benefits were equivalent to cash and that cash was the amount of the non-deductible excess. Alternatively, as between the Gulf group and the Europa group the true value of the trading stock was the amount of Europa Oil's expenditure less the amount that came back through Pan Eastern to Europa which because all Pan Eastern's dealings were with Gulf originated with Gulf. In respect

of each order of trading stock the Pan Eastern benefit was worth an immediately quantifiable cash sum to Europa Oil and the difference between the lower amount and what might otherwise be regarded as an arm's length price which has been shifted through Pan Eastern comes back to Europa Oil in which case that part of the expenditure referable to that excess is not itself deductible.

(6) Alternatively if (5) is rejected, the scaling down basis of apportionment adopted by the Court of Appeal in respect of the income years 1966-1968 both inclusive is equally applicable to the 1969-1971 years. The apportionment yardsticks are essentially the same. So far as the second limb of the new s.111 is concerned :

(a) There is no overlap between expenditure deductible under that limb and expenditure incurred in gaining or producing non-assessable income and on that approach s.110A simply reinforces the interpretation of s.111; and

(b) Section 110A(2) clearly makes the expenditure incurred in gaining or producing non-assessable income non-deductible in calculating the assessable income and under s.111 the

allowance of the deduction is expressed to be "except as otherwise provided in this Act" and consequently is expressly subject to s.110A(2); and

(c) Accordingly there is no basis for adopting a different yardstick of apportionment under the second limb of the new s.111 from that taken under the first limb and under the old s.111.

(7) If the bases of apportionment adopted by the Court of Appeal are applied Europa Oil has failed to discharge the onus of proof and in particular has failed to show that the relevant arm's length prices were above the net sums allowed as deductions or by how much they were above those sums.

14. The Commissioner submits that the decision of the Court of Appeal was wrong and should be varied and that the appeal by Europa Oil should be dismissed and that the appeal by the Commissioner ought to be allowed with costs here and below for the following among other

REASONS

(1) Because the factual differences between the case as advanced in the 1970 case and the case advanced in these proceedings neither separately nor cumulatively justify departing from the con-

clusion reached by the majority of the Judicial Committee in relation to the 1964 contracts.

(2)(a) Because the test of deductibility for the income years ending 31 March 1966 to 31 March 1968 both inclusive is whether the expenditure in question was exclusively incurred in the production of Europa Oil's assessable income, that expenditure is apportionable between what is exclusively incurred in production of assessable income and what is not and in determining whether an apportionment should be made the question is whether under the contractual arrangements the taxpayer gained an advantage not identifiable as or related to the production of the assessable income.

(b) Because there was a sufficient integration and inter-dependence of the ordering of petroleum supplies with the machinery constructed under which the benefits accrued to Europa Oil from the ultimate receipt of profits from Pan Eastern to justify and require apportionment and disallowance.

(3)(a) Because for the years ending 31 March 1969 to 31 March 1971 both inclusive, apportionment is contemplated under s.111 and the first limb of s.111 requires that to be deductible the expenditure be incurred in gaining or producing the assessable income

of the taxpayer claiming the deduction which raises the same considerations and calls for a similar approach in this class of case to that taken under the previous s.111 and the second limb of the new s.111 requires that expenditure to be deductible must be necessarily incurred in carrying on a business for the purpose of gaining or producing the assessable income of the taxpayer for an income year.

(b) Because there was a single inter-related complex of agreements under which Europa Oil should be considered as incurring expenditure for a compound consideration consisting partly of goods to be supplied and partly of advantages to be derived through Pan Eastern so as to justify and require apportionment.

(4) Because McMullin J. in the Supreme Court of New Zealand and the Court of Appeal of New Zealand were correct in holding that both under the old s.111 and under the new s.111 the Commissioner was entitled to disallow part of the expenditure incurred by Europa Oil in relation to its trading stock.

(5) Because the provisions of s.108 apply to the arrangements effected in and under the 1964 agreements and in particular there was an arrangement which had the purpose or effect of altering the incidence of income tax or relieving Europa

Oil from its liability to pay income tax and following the necessary voiding of the arrangement pursuant to s.108 the circumstances remaining justified the amended assessments made by the Commissioner.

(6) Because, with respect to the appeal by the Commissioner, the Court of Appeal of New Zealand was precluded from and was wrong in directing that apportionment be on any basis other than that adopted by the Commissioner in the amended assessments and was wrong in remitting the case to the Supreme Court of New Zealand for further hearing.

(7) Because the Commissioner adopted a proper basis of apportionment in his amended assessments.

(8) Because, if (5) and (7) are rejected, the scaling down basis of apportionment adopted by the Court of Appeal of New Zealand in respect of the income years 1966-1968 both inclusive is equally applicable to the 1969-1971 years.

(9) Because, if the bases of apportionment adopted by the Court of Appeal or any alternative bases are applied, Europa Oil failed to discharge the onus of proof and in particular failed to show that the relevant arm's length prices were above the net sums allowed as deductions under the amended assessments or by how much they were above those sums.

(10) Because the decision of McMullin J. in the Supreme Court and the decision of the Court of Appeal except as to the bases of apportionment were right and ought to be upheld and the decision of the Court of Appeal as to the bases of apportionment was wrong and ought to be reversed.

I.L.M. Richardson.

G. Cain.