Judgment 35/2005 **Administrator of Income Tax v. Cachemar Limited – Royal Court (Civil action file 884) – 13 June, 2005**

Income Tax (Guernsey) Law, 1975 – investment company – Tax Tribunal held the company was entitled to deduct a 'management fee' as 'permissible management expenses' – Administrator's appeal by way of case stated – approach taken by the Tribunal – 'permissible management expenses' to be given a fairly wide meaning – Administrator's appeal dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 13th day of June, 2005 before Patrick John Talbot Esquire, Lieutenant Bailiff; sitting alone

In the matter of:

THE ADMINISTRATOR OF INCOME TAX

(Appellant)

and

CACHEMAR LIMITED

(Respondent)

Whereas on 7th and 8th March, 2005, the Lieutenant Bailiff considered an appeal by the Administrator of Income Tax by way of case stated against the decision of the Guernsey Tax Tribunal made in writing on 8th June, 2004 after an oral hearing conducted on 19th April, 2004 and heard thereon Advocates R McMahon and P. T. R. Ferbrache, Counsel for the Appellant and Respondent respectively

The Lieutenant Bailiff this day gave judgment in the terms attached hereto and DISMISSED the appeal. Costs were awarded on a recoverable basis to the Respondent.

S. M. D. ROSS
Her Majesty's Deputy Greffier

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Approved Text

IN THE ROYAL COURT OF GUERNSEY (ORDINARY DIVISION)
(Lieutenant- Bailiff Patrick John Talbot Q.C.)

IN THE MATTER OF AN APPEAL BY WAY OF CASE STATED UNDER SECTION 80 OF THE INCOME TAX (GUERNSEY) LAW, 1975, AS AMENDED

B E T W E E N:-

THE ADMINISTRATOR OF INCOME TAX

Appellant

- and –

CACHEMAR LIMITED

Respondent

Advocate Richard McMahon for the Appellant
Advocate Peter Ferbrache for the Respondent

J U D G M E N T

Introduction

1. This is an appeal by the Administrator of Income Tax ("the Administrator") by way of Case Stated under section 80 of the Income Tax (Guernsey) Law, 1975, as amended, ("the Law"), against the decision of the Guernsey Tax Tribunal ("the Tribunal") made in writing on 8 June 2004 after an oral hearing conducted on 19 April 2004, allowing an appeal by Cachemar Limited ("the Company") from the decision of the Administrator to disallow a claim made by the Company in respect of the income tax year of charge 2001 to be entitled to deduct from its assessable income for that year a sum of £14,994-00 as "permissible management expenses" within the meaning of Part XIV of the Law.

2. The claim for deduction was made in relation to a "management fee" paid or incurred by the Company in that year pursuant to a Discretionary Management Agreement dated about 19 January 1998 and made between (1) Singer & Friedlander (Isle of Man) Limited, an Isle of Man company, (defined there as "S & F (IOM) Ltd", a term which I shall also use to describe that company,) and (2) the Company ("the Management Agreement"). I shall refer to the Management Agreement in more detail below.

3. The reasons given by the Tribunal for reaching its decision to allow the Company's appeal were set out in a document comprising 55 paragraphs, which was handed down on 8 June 2004 ("the written reasons"). The substantive parts of the Case Stated comprise the written reasons.

4. The Case Stated was submitted to the Royal Court on about 3 November 2004, and the Bailiff duly appointed me to hear the appeal. The oral hearing of the appeal took place on 7 and 8 March 2005.

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5. The hearing of the appeal before the Tribunal was agreed between the parties to be the hearing of a "test case" brought by the Company, as taxpayer, following an exchange of memoranda and correspondence dated between 22 January 2001 and 5 July 2002, between (i), on behalf of taxpayers in a similar position to that of the Company, (including the Company,) The Guernsey Society of Chartered and Certified Accountants ("the GSCCA") and the Company's accountants, and (ii) the Administrator.

6. These documents were referred to in paragraphs 3 and 4 of the Statement of Agreed Background Facts placed before the Tribunal, ("the Agreed Facts").

7. The Agreed Facts comprised most of the evidence before the Tribunal. But Mr M.J. Fattorini, a chartered accountant and one of the two directors of the Company, also gave oral evidence before the Tribunal, the content of which was collated in paragraph 15 of the Case Stated.

8. Since the appeal to the Tribunal was in the nature of a test case, the parties informed the Tribunal, in the opening paragraph of the Agreed Facts, that the case was of much wider application than the Company's actual appeal. Accordingly, although the facts relating to the Company's claim to be entitled to deduct the management fee as a permissible deduction from its assessable income for the tax year in question were obviously central to the instant claim for deduction, the GSCCA and the Administrator both agreed that it was appropriate to bring the appeal before the Tribunal as a test case in order that a decision could be obtained on the legal issue at the centre of this appeal.

9. There was no real dispute before the Tribunal as to the facts. It is, however, I believe, important to point out that there was no expert evidence, or indeed any lay evidence, directed to the "ordinary commercial principles applicable to the computation of profits", a phrase used in section 7 of the Law, which might be of some relevance to the question at the centre of the appeal.

10. The legal issue at the centre of the appeal related to the scope of a claim by "an investment company", (as defined in section 169 of the Law,) to be able to deduct from its assessable income as "permissible management expenses", (as defined under the same section of the Law,) management fees of investment managers charged from time to time to the taxpayer company in respect of investment management services laid out or incurred by the investment company. This is regarded by both the GSCCA and the Administrator as a question of some importance and it is to be noted that an appeal to this Court by the losing party before the Tribunal was always thought likely (paragraph 2 of the Case Stated). The issue, therefore, now comes before me on appeal from the Tribunal.

11. Before I further set out the material background to this appeal, I shall deal with one procedural matter relating to the hearing of the appeal before the Tribunal.

12. The hearing was, as I have stated, an oral hearing; and the Tribunal had had the advantage, as I have also had, of reading both written skeleton arguments from the Advocates, with appended authorities, and the Agreed Facts. They also heard oral submissions from the Advocates, and then reserved their decision until they were in a position to deliver it in writing.

13. It was agreed between Counsel before me, (both of whom were Counsel at the hearing before the Tribunal,) that after the oral hearing on 19 April 2004 the Tribunal appeared to have carried out some legal research, and some research in dictionaries, of their own, without thereafter informing the parties of the results of that research or that this research had led the Tribunal to include within the written reasons a legal analysis of two well-known cases (paragraphs 37 and 38 of the Case Stated) and a dictionary

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analysis of the meaning of a word of considerable importance to this case, namely, "management", (paragraph 43 of the Case Stated).

14. There can, in my view, be no criticism directed to the Tribunal for having done this research on its own after the oral hearing. Indeed, a judge would often do this himself when writing a draft judgment if a point was concerning him which he thought might be relevant to the case, but which had not been addressed by Counsel in written or oral argument.

15. But it is only rarely appropriate, in my judgment, for either a lay tribunal or a judge to include, and rely upon, the results of such research in its written reasons or his reserved judgment without first having told the parties and their Advocates of the results of the research and then having invited further submissions from the parties and the Advocates, if so desired, on any cases or other material discovered, before delivering the reasons or judgment. This procedure is required so that the parties shall have a full and fair hearing and an opportunity to address argument on any point which the tribunal in question may have raised of its own motion.

16. Since the Tribunal did not take this course, and delivered their decision without having heard either party on the results of their own research, their decision is, in my judgment, open to some criticism on this ground. I consider that, after carrying out its own research, the Tribunal should have asked each party's Advocate whether he wished to address any further argument, either orally or in writing, and should then have heard any such argument. I would encourage the Tribunal to take this course in any future appeals, and I would encourage the Clerk to the Tribunal to remind the members of the Tribunal of the suggested course in any appropriate case.

17. But, fortunately, both Advocates have had the opportunity in the hearing before me to deal with the points raised as a result of the Tribunal's own research, and, in my view, no injustice has been caused to either party.

The Material Factual Background to the Appeal

18. On 4 January 1994 the Company was incorporated in Guernsey as an investment company and it is resident in Guernsey for the purposes of income tax.

19. Part XIV of the Law is headed "SPECIAL PROVISIONS AS TO INVESTMENT COMPANIES RESIDENT IN GUERNSEY..." and contains most of the sections of the Law, to which this appeal relates.

20. The Company is an investment company within the definition of such a company in section 169 of the Law, as amended with effect from 1 January 1993, which:

> "means a company which is resident in Guernsey within the meaning of section four of this Law and [whose activities consist] wholly or mainly in the making of investments and the principal part of whose income is derived therefrom..".

21. As set out in paragraph 8 of the Case Stated in relation to the Company:

> "Its objects, as set out in its Memorandum of Association, are standard for many such companies and permit it "to carry on the business of an investment holding company and for that purpose to invest the capital and other moneys of the Company in the purchase or upon the security of shares, stocks, debentures...of any kind issued by any company, corporation or undertaking of whatever nature and wheresoever constituted...whether at home or abroad."

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22. At a directors' meeting of the Company held on 29 January 1994, the directors resolved that the Company should enter into a discretionary management agreement with S & F (IOM) Ltd in its standard form of agreement and this appears to have taken place very soon thereafter. The agreement in force between late January 1994 and the making of the Management Agreement on about 19 January 1998 was on very similar terms to the Management Agreement. The Management Agreement was the agreement in force for the tax year in question on this appeal.

23. Under the Management Agreement, S & F (IOM) Ltd agreed to manage a portfolio of assets (including uninvested cash), ("the Fund"), entrusted to it by the Company on the terms therein set out. S & F (IOM) Ltd agreed to provide discretionary investment management services and other services to the Company and the Company agreed to pay management fees and commissions, as set out in an attached Charges Schedule. The management fees were agreed to be charged every six months in arrears, based on the market value of the portfolio of assets including the net cash balance at the end of the six months period. The sum of £14,994 claimed as a permissible management expense in this case represented the total of two management fees charged by S & F (IOM) Ltd to the Company in the calendar year 2001.

24. Under the Management Agreement, S & F (IOM) Ltd was granted complete discretion in managing the Fund, including power to buy and sell investments and to make deposits and to act in any way which it judged "appropriate in relation to the management and investment of the Fund."

25. The governing law of the Management Agreement was agreed to be the laws of the Isle of Man. There was no evidence before the Tribunal about Isle of Man law and so, as was agreed by both Counsel, a presumption of fact was raised, and not rebutted, that Isle of Man law relating to the construction of the provisions of the Management Agreement is the same as the law of Guernsey. I shall, therefore, apply the law of Guernsey to the construction of the Management Agreement.

26. In the Investment Instructions Schedule, which formed part of the Management Agreement, the director of the Company, who signed on behalf of the Company, Mr M.J. Fattorini, chose on its behalf a balance between income and capital growth as the criterion on which the investment management of the Fund was agreed to be based, by ticking the appropriate box in the Schedule.

27. In the Charges Schedule, which also formed part of the Management Agreement, the yearly rate of the management fee was agreed at 0.625% of the value of the Fund up to £2,000,000, with the fee rate reducing if the value of the Fund exceeded that value, and the six-monthly fee payable by the Company was agreed in the body of the document as half of the amount arrived at by applying the formula in the Charges Schedule. The Charges Schedule also set out the rates of commissions payable on transactions in relation to securities within the Fund.

28. For the sake of completeness, I should mention that, with effect from 1 July 2002, that is to say, after the relevant tax year for present purposes, the investment manager of the Fund changed from S & F (IOM) Ltd to Singer and Friedlander Investment Management (IOM) Limited.

29. The evidence given to the Tribunal by Mr M.J. Fattorini was summarised in paragraph 15 of the Case Stated as follows:

> "(i) [S & F (IOM) Ltd] had always managed the [Company's] investment activities and the costs of this were allowed prior to 2001. [S & F (IOM) Ltd] selects the portfolio and buys and sells shares, collects and accounts for

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dividends and submits accounts. One of its representatives makes occasional visits to Guernsey to get the feel of the shareholders' requirements. [S & F (IOM) Ltd] in fact does everything to ensure an easy life for the Directors. The commissions charged on the purchase of shares are included within the price of the shares. The management fee of £14,994 does not include acquisition costs. The investment management expenses were revenue in the hands of [S & F (IOM) Ltd].

(ii) The instructions to [S & F (IOM) Ltd] were to maintain a balanced portfolio and the revenue had been fairly static. The management fee is based on the capital value of the assets. Dividends were not paid by [the Company] but the beneficial owner received income through a loan account. No fees were charged for specific transactions other than through the commissions."

The Issue on the Appeal

30. The sections in the Law relevant for present purposes are sections 2, 7, 17, 18, 160, 162 and 169.

31. By section 2, it is provided that:

> "Income in respect of which tax is chargeable shall be income of one or other of the following classes namely –
>
> (1) income from businesses;
> (2) income from offices and employments;
> (3) income from the ownership of lands and buildings;
> (4) income from other sources;
>
> and the income for any year of charge in respect of which tax is chargeable (in this Law referred to as "assessable income") shall in the case of each particular class be computed in such manner and by reference to such year of computation or other period as is mentioned in this Law."

32. Chapter II of the Law deals with the "COMPUTATION OF INCOME". Sections 7, 17 and 18 form part of Part II.

33. Section 7 provides as follows:

> "7. (1) Subject to the succeeding provisions of this section, the amount of the profits of any business for any year of computation shall be computed in accordance with the ordinary commercial principles applicable to the computation of profits of that business.
>
> (2) No deduction shall be permitted in respect of –
> (a) any capital expenditure;
> (b) any item of expenditure or charge except so far as it is laid out or expended wholly and exclusively for the purposes of the business;
> ....."

34. Section 17 is in these terms:

> "17. (1) The assessable income from sources not covered by sections seven, eight or nine of this Law shall be the income arising or accruing from such sources after deduction of any expenditure not being:
> ....
> (c) in the nature of capital expenditure or personal expenses
>
> wholly and exclusively incurred for the purpose of earning such income."

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35. By section 18, in so far as it applies to this appeal, it is provided that the onus of proof that any expenditure is an allowable deduction from profits or income for the purposes of the Law lies on the taxpayer.

36. I have already referred to Part XIV of the Law in general terms in paragraph 19 of this Judgment and I have also set out in paragraph 20 the definition of "investment company" contained in section 169.

37. Other parts of Part XIV are important for the purposes of this appeal. Section 160 is in these terms:

> "For the avoidance of doubt it is hereby declared that, subject as hereinafter provided in relation to the expenses of management of investment companies, the assessable income arising or accruing to an investment company from the ownership of land and any building situate in Guernsey shall be determined in accordance with the provisions of sections nine to sixteen of this Law, and the assessable income arising or accruing from any other investment shall be determined in accordance with the provisions of sections seventeen of this Law."

38. Section 162 provides:

> "A deduction from the income arising or accruing to an investment company for any year of charge may be permitted by the Administrator in respect of sums disbursed as permissible management expenses in the year of computation if a claim for deduction is made in writing simultaneously with a return as to income submitted in the form and manner required by the Administrator in accordance with the provisions of section sixty-eight of this Law."

39. The terms "investment company" (see paragraph 19 above) and "permissible management expenses" bear, in Part XIV of the Law, the meanings assigned to them in section 169. The term "permissible management expenses" is defined as meaning, in the case of an investment company,

> "... such items of expenditure as are laid out or expended wholly and exclusively for the purpose of managing the company as would be permissible deductions in accordance with such provisions of this Law as relate to the computation of the profits of a business if the profits of the company fell to be computed in accordance with those provisions, but does not include:-
>
> (a) any item of expenditure which may be deducted or taken into account under any provision of this Law which does not relate specifically to expenses of management; or
> (b) any expense of management which may be taken into account for the purpose of determining the amount of any additional deduction which may be claimable under the provisions of section thirteen of this Law.
>
> "

40. The definition of permissible management expenses requires an acute degree of attention to find its meaning, mainly, I believe, because of the considerable amount of cross-referencing needed to other provisions of the Law. I have found it best to approach the question in the order in which Mr McMahon, for the Administrator, made

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his submissions and this reflected the order in which the Tribunal dealt with the matter in their written reasons, which, of course, form the basis of the Case Stated.

41. It was submitted by Mr. McMahon that the principal task of the Tribunal was to ascertain whether the sum claimed fell within the definition of "permissible management expenses" in section 169 of the Law or not and that the task faced by the Court was the same task. This is correct.

42. The structure of the definition of the phrase is first to exclude two categories of expenditure, i.e. those set out in paragraph (a) and paragraph (b), as permissible expenses in order to prevent double relief. As Viscount Simon said at p.402 in ***Withers v Nethersole*** [1948] 1 All ER 400:

> "… It is … necessary to have primary regard to the statutory words themselves and to their proper judicial construction."

43. Mr. McMahon next submitted that Part XIV of the Law provided a different tax treatment for investment companies than that which affects ordinary businesses or trading companies, whose profits are calculated in accordance with section 7 of the Law. He submitted that the use of the words in the definition in section 169 "as would be permissible deductions in accordance with such provisions of this Law as relate to the computation of the profits of a business" meant nothing more than that an investment company cannot claim an item of expenditure as "permissible management expenses" if such an item would not be capable of being claimed as a deduction by a business. I approve this approach, which seems to me to be required by the wording of the Law. He gave as an example the types of expenditure listed in section 7(2) of the Law.

44. There are, therefore, limits on the categories of expenditure laid out or expended by an investment company which can amount to "permissible management expenses". Although I doubt that the use of the phrase "the expenses of management of investment companies" in section 160 relating to the computation of income of such companies requires a different definition from "permissible management expenses" in the definition in section 169, it is important, having primary regard to the terms of the Law itself, to construe the phrase "permissible management expenses", and not any other words.

45. Whilst, to my mind at least, there can be no real difference of meaning between a "management expense" and an "expense of management", the definition in section 169 relates to "permissible management expenses", and that is the phrase which I must construe.

46. The essence of Mr. McMahon's primary submission was that not everything an investment company does involves management and that the costs of those parts of its

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activities which did not comprise management were not deductible from its income as "permissible management expenses". Steps taken, he argued, as a result of management decisions are not necessarily activities in the nature of management.

47. In my judgment, the essential question at the heart of this appeal raises the question, did the fees charged to the Company by S&F (IOM) Limited in the Year of Charge in question amount to items of expenditure laid out or expended wholly and exclusively for the purpose of managing the company. There is no doubt that the amount of management fees claimed as a deduction by the Company were laid out or expended; so no question arises on the amount claimed as management fees. And whilst a point arises as to whether or not they were laid out or expended wholly and exclusively for the purpose of managing the company, I doubt if there is much in that point, which I shall address further later.

48. The central question, in my judgment, is, Was the purpose for which the management fees were laid out or expended by the Company the purpose of managing the company or not?

49. Mr McMahon submitted that the Tribunal had construed the relevant phrase too broadly so as to encompass the Company's everyday activities, with the result that practically every function of the Company would come within the definition as permissible management expenses, which seems to me to amount to a variety of the "flood-gates" argument. I do not have to rule on this submission, since I am only dealing with one claim for deduction, namely, the claim of the Company to be entitled to deduct the management fees under the Management Agreement.

50. In his written submission Mr. McMahon argued further that:

> "The words should mean no more than the process of taking decisions about the management of the company and not participating in putting those decisions into effect as part of the company's day-to-day affairs."

51. Mr. McMahon accepts that the Law has accepted that expenses wholly and exclusively associated with the choice of individuals to hold investments through an investment company should be capable of deduction from the income of the company under Part XIV of the Law. But I doubt if this acceptance on his part really takes the matter very much further, and I expressly eschew construing any words other than the words used in the Law.

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52. Mr McMahon submitted that the words of the definition had the following effect, and no more. Although not wanting to limit himself precisely to such matters, Mr. McMahon submitted that what the definition encompasses primarily are corporate acts of managing the company, like fees relating to audit, sealing documents and filing fees, and other fees relating to the corporate steps which a company must take from year to year, and especially an investment company must take, in order to remain in corporate existence. Generally speaking, one would expect to find such a limitation on the applicability of a definition of a phrase like "permissible management expenses" in the definition itself, but there are no such express limitations contained in it. In my judgment, it would be wrong, in the absence of such express words, to construe the definition as being subject to any such limitation, and I, therefore, do not do so.

53. Although it is not binding upon the Royal Court and is not, at least in the technical sense, of persuasive value since the wording in the UK taxes statutes is not identical to that used in the definition in section 169 of the Law, some help on the meaning of the phrase "expenses of management" can be found in the decision of the House of Lords in ***Sun Life Assurance Society v Davidson*** [1958] AC 184, where the House of Lords rejected a claim by the Society to deduct, as expenses of management, sums paid as brokerage fees and stamp duty on the sale and purchase of investments. A helpful passage, in my view, is to be found in the speech of Lord Reid, in relation to the phrase "expenses of management", where he said, at p.205:

> "… it appears to me that the phrase has a fairly wide meaning, so that, for example, expenses of investigation and consideration whether to pay over money … [for] acquisition of an investment must be held to be expenses of management. …".

The Tribunal mentioned, (at paragraph 39 of the Case Stated,) that other English tax cases have supported the observation of Lord Reid, "while drawing a clear distinction between expenses which are part of the cost of acquisition of investments and other expenses". The Tribunal were right to remind themselves of this distinction and it is not, in my view, either necessary or helpful for me to refer to any other English authorities on this point. It is the words of the Law, which I have to construe, and not similar, but not identical, words in an English statute.

54. Although in paragraph 40 of the Case Stated the Tribunal did not refer to "permissible management expenses", but referred to "expenses of management", they were, in my

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view, correct to interpret the phrase in question in this case as having a broad meaning or, in the words of Lord Reid, a fairly wide meaning. In other words, I consider that the words "laid out or expended wholly and exclusively for the purpose of managing the company" as comprehending management in a broad sense, and not in a limited sense.

55. In paragraph 41 of the Case Stated the Tribunal began to deal with the point at the heart of this appeal. They concluded, in my judgment correctly, that the use of the words "wholly and exclusively" in the definition of "permissible management and expenses" in section 169 of the Law did not narrow the meaning of the words "items of expenditure as are laid out or expended … for the purpose of managing the company". In saying this, I mean that the words "wholly and exclusively" do not, in my view, narrow the definition of the stated purpose itself. The purpose remains that of "managing the company". As the Tribunal concluded in paragraph 41:

> "The use of the words 'wholly and exclusively' means simply that expenses which are not entirely for exactly the stated purpose must be excluded on a strict basis: they do not operate to narrow the definition of the stated purpose itself."

I agree with this conclusion of the Tribunal, and do not think it necessary to add anything to it.

56. In my judgment, the concept of "managing" cannot be artificially restricted unless there is a statutory context, which requires such a conclusion. If it were necessary for me so to conclude, I would agree with the decision of the Tribunal (see paragraph 43 of the Case Stated,) that management often includes administration, but I doubt whether the point adds much in the instant case.

57. Turning then to the heart of the appeal, in paragraph 46 of the Case Stated the Tribunal said:

> "The Tribunal was clear that at least some of the expenses qualified since they fell within Lord Reid's test as being 'expenses of investigation'. If, however, only some of the management fees are considered as expenses of management, then it is clear that they fail the 'wholly and exclusively' test. The question is therefore: do all of these fees qualify as expenses of management? …"

58. I respectfully agree with the way in which the Tribunal has asked itself the central question in the case. The Tribunal analysed the question in considerable depth, and with much care, in paragraphs 48-52 of the Case Stated.

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59. Mr. McMahon submitted in his oral address that the totality of services covered by the Management Agreement extended beyond what is properly defined as items of expenditure laid out or incurred for the purposes of managing the company so as to include expenses relating to its activities, including the expenses relating to putting managerial decisions into operation as to the sale or retention of assets within the fund. In this part of his oral submissions Mr. McMahon carried out a precise and careful critical analysis of the Case Stated. He rightly reminded me that the phrase under consideration was "permissible management expenses" and not "expenses of management". But, with respect to Mr. McMahon's argument, that does not, in my judgment, take the matter very much further; for one is seeking the meaning of the phrase "laid out or expended wholly or exclusively *for the purpose of managing the company*", (the italics are mine,). The analysis undertaken by the Tribunal in paragraphs 48-52 of the Case Stated concentrated on management, as the Tribunal understood the term.

60. Whilst I agree with the conclusion of the Tribunal, which rightly reminded itself that one of the matters to be taken into account included the concept of "ordinary commercial principles", a term used in section 17 of the Law, I do not agree with their conclusion in paragraph 49 of the Case Stated that the inclusion of this concept can only broaden the meaning of "permissible management expenses" or "expenses of management", a summary term which they had defined in the last sentence of paragraph 41 of the Case Stated.

61. But I do consider that, in paragraphs 50-52 of the Case Stated, the Tribunal concentrated on the correct question. For example, I think they were right to ask, as part of that question, Did any of the management fees charged by S&F (IOM) Limited to the company cover the cost of acquiring the assets, which would not generally be deductible expenses? On the evidence before it the Tribunal rightly concluded, in my judgment, that the management fees did not cover such costs. They found as facts that additional fees were chargeable under the Management Agreement for such matters; commissions were chargeable over and above the management fee. As the Tribunal said in paragraph 50 of the Case Stated:

> "… the management fee was earned irrespective of the number of transactions and was thus severable from the cost of acquiring investments."

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62. Bearing in mind the requirement that to be deductible such expenditure had to be laid out or expended "wholly and exclusively" for the purpose of managing the company, the Tribunal rightly reminded themselves of this limitation and addressed it in paragraph 52, where they asked the question, "Was any element of the management attributable to non-management tasks?" They then reached the following conclusion:

> "[The management] Agreement specifies those tasks as discretionary investment management, including dealing in investments, the provision of nominee services, safe custody and ancillary services including the settlement of transactions, the collection of income and the effecting of administrative actions, together with the provision of valuation and statements of account."

63. The Tribunal concluded that such tasks, in its view, fell within a broad definition of management as regards a portfolio of investments and, taking into account, the fact that commission was earned separately on transactions and charged as part of the cost of investments and changes of investments, concluded that the expenses of the management fees were wholly and exclusively expenses of management of the Company and allowed the claim for deductions made by the Company. In my judgment, the reasoning of the Tribunal in reaching such a conclusion was, to a large part right. I agree with the conclusion which they reached.

64. In accepting that the phrase "managing the company" should be given a fairly wide meaning I consider that, within the context of "managing the company", would come the management of the activities of the company and that, where the company in question is an investment company, money laid out or expended in paying the management fees of corporate or other investment managers under investment management agreements would, generally, amount to "permissible management expenses". It is, as I understand it, either quite common or very common for investment companies to use such investment managers to perform most of the activities necessary to ensure, so far as possible, that the investments held by the investment company do the best they can in the interests of the company's shareholders. It is, to my mind, just as much part of "managing the company" to appoint investment managers to manage the investments of the investment company, and to pay them periodic management fees for doing so, as it is to deal with matters relating to employees of the investment company or matters relating to its statutory affairs, including its corporate affairs. In reaching this conclusion, I am aware that I am giving the phrase a fairly wide meaning; in my judgment the words of the statutory definition require me to do so.

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65. The appeal of the Administrator is, therefore dismissed.

66. In conclusion, I wish to express my considerable thanks to Advocates McMahon and Peter Ferbrache for their assistance and valuable submissions.

Patrick John Talbot QC
Lieutenant Bailiff
13 June 2005

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