59/254

CR/CF
pl. p.c.

Treasury Chambers, Parliament Street, SW1P 3AG

Mark Addison Esq
10 Downing Street
LONDON

9 April 1985

Dear Mark

ICI CASE

I attach a further report from Inland Revenue on the Judge's decision on this case. It has not yet been shown to the Financial Secretary who is out of the office. However, your press office may find it useful to see the line proposed in paragraphs 9-11, which is unlikely to cause the Financial Secretary any difficulties.

Yours sincerely
Vivien Life

VIVIEN LIFE

cc Christie Wall
and/ discussed
MEA 10/4

FROM: M A HILL

INLAND REVENUE
POLICY DIVISION
SOMERSET HOUSE
DATED: 4 APRIL 1985

FINANCIAL SECRETARY

ICI CASE

1. As indicated in Mr Crawley's 22 November note, there has recently been a further hearing before the High Court Judge to decide whether ICI were entitled to any relief by way of declaration in the light of the judgment delivered last January. Though the actual hearing took place last week (ie 25-27 March), the Judge reserved his decision and gave it only yesterday (3 April).

2. Given the terms of the original judgment, this decision was highly satisfactory from the Government/Revenue point of view. Equally the oil companies themselves (notably Shell and Esso) were well pleased with by the outcome. ICI had been contending for 7 substantive declarations, seeking in particular:

   i. To nullify elections already accepted under the 1982 Act. (ICI they could not of course know whether any such election had in fact been made. But they had inferred that Shell/Esso had made such elections which, if allowed to stand, would determine the

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cc Chancellor of the Exchequer
Chief Secretary
Sir Peter Middleton
Mr Cassell
Mr Robson
Mr Lord
Mr Evans IDT
Mr Ricks (Treasury Sol)
Sir Lawrence Airey
Mr Green
Mr Rogers
Mr Pitts
Mr Painter
Mr Cleave
Mr Elliss
Mrs Hubbard
Miss Hill
Mr J P O Lewis
Mr McManus
PS/IR

tax valuations in respect of Mossmorran until well into the 1990s).

ii. To set out in precise terms the sort of valuation which would be acceptable under any new election.

iii. To reopen the whole EEC issue, by claiming that to allow elections already accepted to continue to have effect would itself constitute a State aid.

3. In the event the only remedy which the Judge was prepared to grant was a single declaration in respect of future valuations. In essence this seeks to ensure that, when considering any such valuatons made in future, the Revenue does not adopt those approaches to the determination of fuel value which the original judgment had found either contrary to the requirements of existing statutory provisions or "Wednesbury unreasonable" (see paragraphs 4-7 of the summary attached to Mr Crawley's 29 January note). In the normal course of events, this means that any valuation under an existing election will be unaffected. The final wording of this declaration was left to be settled between Junior Counsel.

4. After the Judge had delivered this decision in the High Court yesterday, ICI made two further applications. The first related to costs. On this they contended that in the light of the ICI "victory", the Crown should bear the whole of ICI's costs in this case. This application did not succeed: the Judge determined that there should be "no order as to costs". (This means that each side bears its own costs - an outcome which we were going to contend in any event and which we would see as entirely reasonable.) Second ICI renewed their application for discovery - in particular asking for access to documents relating to the discussions between the Government and relevant Departments which ICI alleged had led to assurances

as to the level of valuation which would be determined under the 1982 Act. This application, too, was turned down by the Judge.

Where next?

5. The only way either side can continue the action, therefore, is by way of appeal to the Court of Appeal. Both parties have 28 days (ie until 1 May) to lodge such an appeal. Clearly this is something neither we nor ICI can decide until there has been opportunity to study the transcript of the Judge's decision yesterday and the precise terms of the declaration.

6. Our preliminary assessment, however, is that it would probably not be worth the Crown taking the initiative in appealling. We see the terms of the one declaration which has been granted as giving rise to little difficulty in practice. Any problems which arise are likely to hinge on the wider application of the Judge's findings on the interpretation of our domestic law on the definition of a "sale at arm's length". (This is the potential problem outlined in paragraph 18 of the attachment to Mr Crawley's 29 January note.) But we see no realistic prospect of overturning the Judge's findings in this respect on appeal. Any remedy - if remedy is needed - would have to operate directly on the legislation itself.

7. It is not possible to predict at this stage whether or not ICI will themselves appeal. But if they do, we should probably want to cross-appeal, or at least to serve a respondent's notice. This would then enable us to reargue the points on which the Judge found against us in his judgment. As indicated in paragraphs 14-16 of the attachment to Mr Crawley's 29 January note, we think there could be good grounds for challenging the Judge's findings on valuation - in particular his conclusion that for the Revenue to rely on our expert

witness's third approach would be "Wednesbury unreasonable". And if we <u>were</u> to appeal, we should certainly want to consider further also challenging the decision that ICI has "locus standi" in these proceedings.

8. We will of course keep you in touch with developments on this issue of appeal.

<u>Handling of press enquiries etc</u>

9. Throughout recent weeks, ICI have gone to considerable lengths to present what has happened in this case as a "victory" for ICI - and <u>per contra</u> a "defeat" for the Government/Revenue. Against this background we feel it would be appropriate to take a rather more positive line on press enquiries etc than would normally be the case with issues of this kind.

10. In particular we would propose to stress three of features of the Judge's judgment and subsequent decisions. The first would be to emphasise that the Judge dismissed entirely ICI's original and (until the actual hearing) main contention - ie that the 1982 legislation and its implementation was in some way a State aid requiring notification under the Treaty of Rome. Second, focussing on the recent decision on declarations, we would underline the gulf between the wideranging declarations which ICI were seeking (see paragraph 2 above) and the single declaration the Judge actually granted. Third, we would suggest that ICI's claim to have succeeded in their action should be measured against the fact that the Judge did not award them their costs.

11. If questioned specifically on the <u>issue of appeal to a higher Court</u>, the line must remain as set out in Mr Crawley's 22 March note. In other words we cannot at this stage go further than pointing out that this

is a matter to be considered (by both the Government and ICI) in the light of detailed study of the terms of the decision delivered yesterday.

12. As with previous notes on the ICI case, you may wish to consider sending a copy of this report to the No.10 Press Office.

MAH

M A HILL

ICI Case - Budget?

10 APR 1985