

FOREIGN CLAIMS SETTLEMENT COMMISSION  
OF THE UNITED STATES  
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

GILLESPIE & COMPANY  
OF NEW YORK, INC.

Under the International Claims Settlement  
Act of 1949, as amended

Claim No. CU - 3024

Decision No. CU - 5904

PROPOSED DECISION

This claim against the Government of Cuba, filed under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of \$150,180.36, was presented by GILLESPIE & COMPANY OF NEW YORK, INC. and is based upon the asserted loss of stock interests in a Cuban business enterprise and accounts receivable originating from shipments of merchandise to customers in Cuba.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated,

intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Section 502(1)(B) of the Act defines the term "national of the United States" as a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

Evidence of record establishes that claimant was organized in New York State and that at all times pertinent to the claim more than 50% of claimant's outstanding capital stock was owned by nationals of the United States. Such stock was owned by Fred Brummer (13%), a national of the United States since 1935, and the Amsinck Corporation (87%), which was organized under the laws of Delaware. The record also shows that William E.C.V. Ofenheim, a national of the United States since 1948, owned approximately 2.1408% of the shares of Amsinck Corporation and the Etawe Trust, organized in the State of New York, owned approximately 97.9591% of the shares of Amsinck. Further, the evidence discloses that there were eight beneficiaries of the trust; and that 4 of the beneficiaries, or 50%, were nationals of the United States at times pertinent to this claim. The Commission has previously determined that nationality provisions of the Act refer to the beneficial ownership of a trust. (See The Florida National Bank and Trust Company at Miami, as Administrator c.t.a. of the Estate of Francisco Hidalgo Gato, Deceased, Claim No. CU-0587.)

The Commission finds that approximately 57.39% of the outstanding stock of the claimant corporation was owned by nationals of the United States at times pertinent to this claim; and that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

This claim is based upon the loss of the assets of a wholly-owned subsidiary, Comercial Incocusa, S.A., which was organized under the laws of

Cuba and doing business in that country. The record establishes that claimant owned all of the outstanding shares of stock of the Cuban subsidiary on the date of loss. Additionally, claim has been asserted for loss of merchandise shipped by claimant to the subsidiary and other consignees in Cuba.

The evidence establishes that the Cuban subsidiary confined its operations to the purchase and sale of automotive parts, most of the purchases having been made from the claimant. The assets of the Cuban enterprise consisted of inventories, accounts receivable and bank accounts and did not include real property.

Law 568, published in the Cuban Official Gazette on September 29, 1959, further discussed below, precluded the transfer of funds abroad, and effectively operated to block the funds due creditors in the United States or those persons who had left the country. Claimant herein has submitted evidence to show that several accounts were outstanding from both the Cuban subsidiary and other consignees in Cuba. Such evidence includes affidavits and company bookkeeping records showing that all of the Cuban accounts were "written off" on September 30, 1960. The Commission finds that Comercial Incocusa, S.A. was effectively taken on September 30, 1960.

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value, or cost of replacement.

The question, in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant." This phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

The claimant has submitted a recapitulation of all accounts receivable from Cuban consignees, and a balance sheet dated June 30, 1959, prepared by employees of Comercial Incocusa, S.A. for the claimant's records. Such balance sheet purports to show the last known assets and liabilities of the Cuban subsidiary at or about the time it ceased doing business in Cuba and reflects the following:

ASSETS

Current Assets

Cash in Safe & Bank	\$ 2,839.57	
Accounts collectible	44,027.75	
Inventory of Merchandise	72,039.75	
Commissions Anticipated	244.03	
Fees Anticipated Collectible	<u>5.71</u>	\$119,156.81

Fixed Assets

Furniture & Fixtures	\$ 4,121.16	
Automobile	<u>600.00</u>	
	\$ 4,721.16	
Less:		
Reserve for Depreciation	<u>919.52</u>	3,801.64

Other Assets

Insurance	\$ 591.54	
Organization Expenses	<u>415.53</u>	<u>1,007.07</u>
		<u>\$123,965.52</u>

LIABILITIES

Current Liabilities

Accounts & Effects to Pay	\$80,939.29	
Accumulated Expenses to Pay	1,330.49	
Commissions to Pay	1,562.99	
Taxes to Pay	6.42	
Interest to Pay	<u>331.92</u>	\$ 84,171.11

Capital

Capital in Stocks	\$36,000.00	
Plus		
Surplus	<u>3,794.41</u>	<u>39,794.41</u>
		<u>\$123,965.52</u>

Upon consideration of the entire record, the Commission finds that the valuation most appropriate to the property and equitable to the claimant is that shown in the balance sheet as of June 30, 1959, which reflects the

financial condition of such business enterprise at about the time such firm ceased to actively operate in Cuba. Since this was a Cuban enterprise, it is necessary to establish the net worth of this subsidiary and not solely the asset value of such firm.

The Commission finds that the commissions and fees, the receipt of which were "anticipated" by the subsidiary, in the total amount of \$249.74, and organizational expenses in the amount of \$415.53, not otherwise distinguished herein from company expenses, are not appropriately assets and cannot be included as such in these computations. Thus, the Commission finds that the adjusted assets are in the total amount of \$123,300.25, while the liabilities are \$84,171.11, resulting in a net worth of \$39,129.14.

The Commission concludes that claimant herein suffered a loss in the amount of \$39,129.14 within the meaning of Title V of the Act, as a result of the loss of its subsidiary in Cuba.

The claimant has submitted a recapitulation of the amounts due from Cuban consignees for merchandise shipped to such customers by claimant. The total amount due, in the amount of \$110,385.95, includes the sum of \$57,144.52 which is due and payable to claimant by Comercial Incocusa, S.A., the subsidiary of claimant in Cuba, and the remaining sum of \$53,241.43 is the total sum due from seventeen other Cuban enterprises who received automotive equipment or parts from the claimant. Claimant summarizes such accounts due as follows:

Banachea & Bussot	\$ 1,023.88
Roosevelt E. Catasus	527.17
Comercial Incocusa, S.A.	57,144.52
Cia. Imp. & Distrib. Fricom	544.61
Cia. Imp. Sobrin	858.53
Cia. Commercial & Transp., Crespi	10,993.17
Juan P. Fernandez	33.23
Rafael Figueroa	2,878.76
Industrial & Comercial Premier	1,185.08
Celestino Joaristi & Co.	1,893.21
Manuel Landrove Lopez	1,108.02
Gilberto Lopez Vela	2,181.23
V. Mercade & Cia., S.A.	10,430.80
Wilfredo Leon Morales	1,609.16
Musicalia, S.A.	1,450.52
Omnibus Camaguey	623.82
Juan Silva	10,091.76
Transporte Canimar	<u>5,808.48</u>

Total \$110,385.95

The claimant has submitted shipping documents for merchandise forwarded to the subsidiary, Comercial Incocusa, S.A., Musicalia, S.A., as well as to V. Mercade y Cia., S.A. The transactions with the subsidiary, arising mostly in 1958 and early 1959, were on an open account basis, while transactions with other Cuban consignees were by draft. Claimant has submitted correspondence, affidavits and company records to establish that the aforesaid accounts, in the total amount of \$110,385.95, were "written off" by the claimant on September 30, 1960.

The Government of Cuba, on September 29, 1959, published its Law 568, concerning foreign exchange. Thereafter, the Cuban Government effectively precluded not only transfers of funds to creditors abroad, but also payment to creditors within Cuba, by numerous, unreasonable and costly demands upon the consignees, who were thus deterred from complying with the demands of the Cuban Government. The Commission holds that Cuban Law 568 and the Cuban Government's implementation thereof, with respect to the rights of the claimant herein, was not in reality a legitimate exercise of sovereign authority to regulate foreign exchange, but constituted an intervention by the Government of Cuba in the contractual rights of the claimant, which resulted in the taking of American-owned property within the meaning of Section 503(a) of the Act. (See Claim of The Schwarzenbach Huber Company, Claim No. CU-0019, 25 FCSC Semiann. Rep. 58 [July-Dec. 1966]; and Claim of Etna Pozzolana Corporation, Claim No. CU-0049, 1967 FCSC Ann. Rep. 46.)

The Commission finds that the claimant's right to receive payment for the aforesaid shipments was lost as a result of the intervention by the Government of Cuba. The evidence of record establishes that the shipments were made by invoices on open accounts or by drafts, some of which were paid in part to local Cuban banks, although the amount of local payments has not been established by the evidence of record. Claimant has submitted no evidence to establish the exact dates that each account was payable but asserts that it has not received payment for these outstanding accounts.

With respect to the losses arising prior to the effective date of Law 568, including the said account payable by the Comercial Incocusa, S.A., in the amount of \$57,144.52, the Commission finds that such losses arose on September 29, 1959, the date of publication of Law 568. The Commission also finds that with respect to shipments in the total amount of \$53,241.43, made subsequent to September 29, 1959, all accounts were due and payable on September 30, 1960, or on the date when all Cuban accounts were "written off" by the claimant.

In conclusion, the Commission finds that the claimant herein suffered a loss in the total amount of \$149,515.09 within the meaning of Title V of the Act, as a result of the nationalization or other taking by the Government of Cuba of the properties, subject of this claim and more fully described above, on the respective dates of taking.

The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644), and in the instant case it is so ordered, as follows:

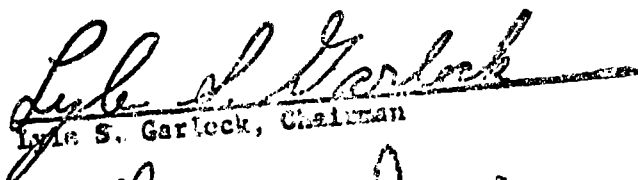
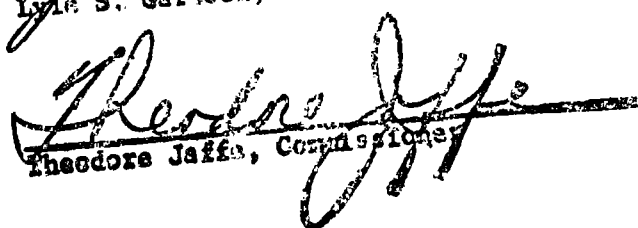
<u>FROM</u>	<u>ON</u>
September 29, 1959	\$57,144.52
September 30, 1960	92,370.57

CERTIFICATION OF LOSS

The Commission certifies that GILLESPIE & COMPANY OF NEW YORK, INC. suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of One Hundred Forty-nine Thousand Five Hundred Fifteen Dollars and Nine Cents (\$149,515.09) with interest at 6% per annum from the respective dates of taking to the date of settlement.

Dated at Washington, D. C.,  
and entered as the Proposed  
Decision of the Commission

28 OCT 1970

  
Lyle S. Garlock, Chairman  
  
Theodore Jaffa, Commissioner

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 1.5(e) and (g), as amended, 32 Fed. Reg. 412-13 (1967).)