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No. 1377—High Court of Justice (King's Bench Division)—
16th, 19th, 20th, 21st, 22nd and 26th October, 1942

Court of Appeal—22nd, 23rd, 24th, 25th and 26th
November, and 14th December, 1943

House of Lords—7th, 8th, 12th, 13th, 14th, 15th and
19th February, and 22nd March, 1945

Commissioners of Inland Revenue *v.* F.P.H. Finance Trust, Ltd. (in liquidation) (No. 2) [1]

Sur-tax—Undistributed income of company—Preference shareholders with voting control and rights to all surplus assets in a winding up—Apportionment among members " . . . *in accordance with the respective interests of the "* members . . .*"—Application of Finance Act,* 1928 (18 & 19 *Geo. V, c.* 17), *Section* 18—*Finance Act,* 1922 (12 & 13 *Geo.* V, *c.* 17), *Section* 21 *and First Schedule, Paragraph* 8.

The Respondent Company, which was incorporated in the United Kingdom, was at all material times a trading company. Its capital of £10,000 *in* £1 *shares was, in the early part of* 1936, *held by a company incorporated in Southern Rhodesia, the shares in which were held by Mrs. L. and her two daughters, in approximately equal amounts.*

With a view to avoiding possible liability to Sur-tax which might attach to the shareholders of the Rhodesian company in consequence of certain provisions of the Finance Act, 1936, *the following transactions were carried out :—*

(a) *On 27th November,* 1936, *the share capital of the Respondent Company was reconstituted and increased ; the existing* 10,000 £1 *shares were converted into preference shares, carrying a* 5 *per cent. dividend and the right to surplus assets on a winding up, and* 1,000 *ordinary shares of* £1 *each were created carrying a right to sums declared by way of dividend, but with the right, on a winding up, to repayment of capital and no more. Shareholders of either class were entitled to one vote per share. The* 1,000 *ordinary shares were taken up, at the instance of the Respondent Company, by a public company to which Section* 21 *of the Finance Act,* 1922, *did not apply. Mrs. L's husband was a director of this company and had effective control in its management.*

(b) *In December,* 1936, *the Rhodesian company was wound up and its holding of shares of the Respondent Company was distributed to the members ; the shareholders of the Respondent Company thus became Mrs. L. and her two daughters, holding the* 10,000 *preference shares in, as nearly as possible, equal amounts, and the public company, holding* 1,000 *ordinary shares.*

(c) *On 1st April,* 1938, *the Respondent Company went into liquidation, the public company was repaid* £1,000, *the amount subscribed for its holding of ordinary shares, and the balance of assets was distributed to Mrs. L and her daughters.*

[1] Reported (C.A.) 170 L.T. 119; (H.L.) [1946] A.C. 38.

Up to the end of 1936 *the Respondent Company had distributed no dividends and had accumulated profits exceeding* £900,000. *Under the powers conferred on them by Paragraph* 4 *of the First Schedule to the Finance Act,* 1922, *the Special Commissioners, in May,* 1937, *issued to the Company a formal notice calling for certain statements (as to actual income of the Company, etc.) in respect of each year or period ended after* 31*st March,* 1935. *The Company's accountants furnished certain information on* 5*th October,* 1937, *and stated that an annual general meeting would be held on* 12*th October,* 1937. *At this meeting accounts for the period* 1*st April,* 1935, *to* 31*st December,* 1936, *which showed a profit of* £645,192, *were adopted, and dividends were declared amounting in the aggregate to* £46 11*s.* 6*d. in respect of the period* 27*th November to* 31*st December,* 1936, *on the preference shares and to* £100 *in respect of the period to* 31*st December,* 1936, *on the ordinary shares. The declaration of these dividends was notified to the Special Commissioners on* 8*th February,* 1938. *Copies of the accounts as adopted by the Company were not sent to them, and no indication was given that the Company relied on Section* 18 *of the Finance Act,* 1928.

On 2*nd September,* 1940, *the Special Commissioners issued a direction under Section* 21, *Finance Act,* 1922, *for the period* 1*st April,* 1935, *to* 31*st December,* 1936, *and apportioned the Company's income thus :* £100 *to the public company and the balance in approximately equal amounts to Mrs. L and her two daughters.*

On appeal it was contended on behalf of the Respondent Company that, since the Company had furnished the Special Commissioners with all the information necessary to enable them to consider the Company's position in relation to Section 21 *of the Finance Act,* 1922, *there had been substantial compliance with Section* 18 (1) *of the Finance Act,* 1928, *and as the Special Commissioners had taken no further action within the prescribed period of three months their power to issue a direction under Section* 21 *had lapsed by virtue of Section* 18 (3) *of the Finance Act,* 1928. *It was also contended that the apportionments to Mrs. L and her two daughters were not made in accordance with Paragraph* 8 *of the First Schedule of the Finance Act,* 1922, *because they were made with regard to their rights in a winding up on cessation of the Company's trading, and not by having regard only to the dividend rights of the shareholders while the Company was actively trading. The Appeal Commissioners held that the provisions of Section* 18 *of the Finance Act,* 1928, *did not apply to the case. They also held that the apportionment to Mrs. L and her two daughters could not be sustained.*

Held,

(1) *that the Company had not strictly complied with the requirements of Section* 18 *of the Finance Act,* 1928, *and was not entitled to the benefit of that Section, and*

(2) *that in apportioning income of a company " in accordance with the " respective interests of the members " for the purposes of Section* 21 *(and Paragraph* 8 *of the First Schedule) of the Finance Act,* 1922, *there was no justification for restricting the " interests " which might be taken into consideration to rights in declared dividends ; that the Special Commissioners should have regard to all the different interests of the members, including their rights to undistributed profits in a winding up ; and that in considering these interests and apportioning the income among them the Commissioners may properly be guided by the preamble to Section* 21 *and endeavour to make an apportionment, appropriate to their interest, to those members for whose benefit, in relation to the avoidance of Sur-tax, the distribution of income has been obviously withheld.*

CASE

Stated under the Finance Act, 1927, Section 42 (7), and Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 22nd and 31st July, 1941, F.P.H. Finance Trust, Ltd. (in liquidation) (hereinafter called " the Respondent Company ") appealed against a direction and apportionments made under the provisions of Section 21 of the Finance Act, 1922, and Paragraph 8 of the First Schedule thereto, in respect of the period 1st April, 1935, to 31st December, 1936.

2. The Respondent Company was incorporated on 13th September, 1912, under the style of the Rhoex Development Co., Ltd., with a nominal capital of £100 divided into 100 shares of £1 each.

By extraordinary resolution dated 20th January, 1927, the capital of the Company was increased to £10,000 divided into 10,000 shares of £1 each.

On 4th February, 1927, by special resolution the Company adopted new articles of association.

By special resolution confirmed on 2nd April, 1927, the name of the Company was changed to F.P.H. Finance Trust, Ltd.

3. Annexed hereto and forming part of this Case are copies of the following documents, marked " A ", " B " and " C ". respectively(1) :—

A. Memorandum of association.
B. Articles of association adopted 4th February, 1927.
C. Special resolution relating to change of name.

4. Since its reorganisation in 1927 the Respondent Company has been a trading company, the business of which has consisted mainly in financing and dealing in the shares of gold mining and mining development companies. The Company held a leading position in a group of companies, many of them mining companies, all housed in the same office with a common staff and secretariat, and had sponsored in the course of its business most of the West African mining propositions floated during the period. Mr. H. G. Latilla was the most important personage in the group. It was not an " investment " company " within the meaning of Section 20 (1) of the Finance Act, 1936, Section 14 (3) of the Finance Act, 1937, or Section 15 of the Finance Act, 1939.

5. Prior to 19th March, 1934, the issued capital of the Respondent Company (£10,000) was in the beneficial ownership of Mrs. E. M. Latilla, the wife of Mr. H. G. Latilla. On that date Mrs. Latilla sold her beneficial interest to Marlands Trust, Ltd., a company incorporated in Southern Rhodesia, in exchange for £100,000 debentures in the purchasing company, and on 5th July, 1934, 9,890 of the shares were transferred to Marlands Trust, Ltd. (hereinafter called " the Trust "), the remaining 110 shares being held by that company's nominees. The Trust (the shares in which were held by Mrs. Latilla and her two daughters) retained until 23rd December, 1936, the beneficial interest in the issued capital of the Respondent Company. During that time no dividends were paid thereon and a very large income was accumulated for the benefit of the Trust which was not assessable to Sur-tax. The profit and loss account of the Company for the year ending 31st March, 1934, showed a profit of £152,000, and that for the year ending 31st March, 1935, showed one of £135,000, and the carry-forward to the accounts for the period ending

(1) Not included in the present print.

31st December, 1936, amounted to £293,000. A copy of the accounts of the Company for the period ending 31st December, 1936, is annexed hereto, marked " D ", and forms part of this Case(1).

6. In 1936 Mrs. Latilla and the other shareholders in the Trust became apprehensive that as a result of recent financial legislation the income of the Respondent Company might be regarded as the income of the shareholders of the Trust and become assessable to Sur-tax. With a view to avoiding this it was decided to alter the capital structure of the Respondent Company.

7. Accordingly on 27th November, 1936 :—

(*a*) the capital of the Company was increased to £11,000 by the creation of 1,000 shares of £1 each ;

(*b*) the existing 10,000 shares were converted into preference shares and the new 1,000 shares were ordinary shares ;

(*c*) the preference shares carried the following rights :—

(i) as regards dividends, the right to receive a fixed cumulative dividend of 5 per cent. per annum ;

(ii) as regards assets, the right in a winding up to a distribution of the whole of the surplus assets after payment to the ordinary shareholders of the amounts paid on their shares ;

(*d*) the rights attached to the ordinary shares were :—

(i) as regards dividends, the right to the whole of any sums declared as distributable by way of dividend (subject to the rights of the preference shareholders) ;

(ii) as regards assets, the right in a winding up to repayment of capital and no more.

A copy of the resolution of the Respondent Company authorising these changes is annexed hereto, marked " E ", and forms part of this Case(1).

8. The new ordinary shares were not offered for public subscription but private negotiations were entered into with the National Mining Corporation, Ltd. (hereinafter called " the Corporation ") with a view to their subscribing for the 1,000 ordinary shares in the Respondent Company. The Corporation is a large public company with a considerable number of shareholders and an official Stock Exchange quotation of its shares. There was a close business connection between the Respondent Company and the Corporation, the Company having in 1934 underwritten an issue of fresh capital made by the Corporation and holding a large number (possibly amounting to a majority) of its shares.

Mr. H. G. Latilla had become a director of the Corporation in connection with the underwriting arrangement and had an important influence in its management. He was also a close business associate of Mr. Herbert Guedalla, who was chairman of the board of directors of the Corporation. The board of directors of the Corporation consisted of Mr. Latilla, Mr. Guedalla and two other directors one of whom was nominated by Mr. Latilla. We were satisfied on the evidence before us that Mr. Latilla was in effective control of it.

The negotiations for the acquisition by the Corporation of the ordinary shares of the Respondent Company originated in conversations between Mr. Latilla and Mr. Herbert Guedalla. There were also negotiations between Mr. L. C. Walker (chairman of directors and one of the joint liquidators of the Respondent Company, an incorporated accountant closely associated with the group of companies referred to in paragraph 4 above and the principal witness

(1) Not included in the present print.

before us) and Mr. Herbert Guedalla, the evidence as to which was unsatisfactory. It was, however, clear that the ordinary shares were offered to the Corporation with certain conditions attached.

In the event it was arranged that the Corporation should, and they did in fact, subscribe for at par and were allotted the whole of the ordinary share capital of the Respondent Company, and (as part of the arrangement) the Respondent Company undertook to offer the Corporation 25 per cent. of any underwriting business it undertook thereafter.

The course of the negotiations is further indicated in the bundle of correspondence and minutes which is annexed hereto, marked " F ", and forms part of this Case(1). Mr. Guedalla died in 1940 and Mr. Latilla, though available in this country, did not attend to give evidence before us. Such evidence as we had, however, made it clear that the Corporation did not seek the investment but that they were sought out by the Respondent Company. The arrangement under which the Corporation acquired the shares was fixed up, we were informed, before 29th October, 1936.

It was admitted on behalf of the Appellants that all the shareholders in the Respondent Company, both preference and ordinary, held their shares upon the terms and conditions laid down in the articles of association.

9. On 15th December, 1936, the Trust went into voluntary liquidation, and on 23rd December, 1936, the liquidators distributed their holding of 10,000 preference shares in the Respondent Company as follows :—

To Mrs. E. M. Latilla	3,334 shares
,, Mrs. Edith Mayo	3,333 ,,
,, Mrs. Owen Latilla Campbell	3,333 ,,

(Mrs. Mayo and Mrs. Campbell are daughters of Mr. and Mrs. Latilla.)

10. On 12th October, 1937, the Respondent Company considered and adopted the accounts for the period 1st April, 1935, to 31st December, 1936. These accounts (a copy of which is annexed hereto, marked " D "(1), see paragraph 5 above) showed a profit for the period of £645,192. Payment of £146 11*s.* 6*d.* by way of dividend was authorised.

This amount was apportioned as follows : as to £46 11*s.* 6*d.* in payment of a dividend on the preference shares at the rate of £5 per cent. per annum from 27th November, 1936, to 31st December, 1936, and as to £100 in payment of a dividend of 10 per cent. on the ordinary shares for the period to 31st December, 1936. The balance of the profits was carried forward.

11. The Respondent Company went into liquidation on 1st April, 1938. The Corporation were repaid £1,000, the amount subscribed for their holding of ordinary shares, and the balance of the assets were distributed to Mrs. Latilla and her daughters, the preference shareholders.

12. Between 1937 and 1939 the Special Commissioners were considering whether, in view of the failure to make distribution of dividends, the Respondent Company was amenable to the procedure under Section 21 of the Finance Act, 1922, in respect of the various accounting periods involved, and on 19th September, 1939, they notified the Respondent Company through its accountants that they did not propose to take action under that Section in respect of the period 1st April, 1935, to 31st December, 1936. A copy of the correspondence between the Commissioners and the representatives of the Company is annexed hereto, marked " G ", and forms part of this Case(1).

13. On 2nd September, 1940, the Commissioners informed the Respondent Company that on further information they had now issued a direction under

(1) Not included in the present print.

Section 21 in respect of the period 1st April, 1935, to 31st December, 1936, and had apportioned the actual income of the Company (computed at £858,817) as follows :—

	£	s.	d.
Mrs. E. M. Latilla	15	10	6
Mrs. E. Mayo	15	10	6
Mrs. E. G. Latilla Campbell	15	10	6
Mr. H. G. Latilla	858,770	8	6

No evidence was tendered on behalf of the Commissioners of such further information as aforesaid.

14. On 16th May, 1941, an alternative apportionment under Paragraph 8 of the First Schedule to the Finance Act, 1922, was made as follows :—

	£	s.	d.
National Mining Corporation, Ltd.	100	0	0
Mrs. E. M. Latilla	286,296	5	0
Mrs. E. Mayo	286,210	7	6
Mrs. E. G. Latilla Campbell	286,210	7	6

15. The following contentions were advanced on behalf of the Respondent Company :—

(*a*) that, as prior to 19th September, 1939, the Company had furnished the Special Commissioners with all the information necessary to enable them to consider the position of the Company in relation to Section 21 of the Finance Act, 1922, there had been substantial compliance with the provisions of Section 18 (1) of the Finance Act, 1928 ;

(*b*) that the fact that such information was supplied at the Commissioners' request and not upon the initiative of the Respondent Company was not material ;

(*c*) that the Special Commissioners were by the terms of Section 18 (3) precluded from making the direction and apportionments now under appeal (upon this point reference was made to *Punjab Co-operative Bank, Ltd., Amritsa* v. *Commissioner of Income Tax, Lahore,* [1940] A.C.1055) ;

(*d*) that, as no evidence had been adduced to show that Mr. Latilla was in any way interested in the shareholding of the Respondent Company, the first apportionment was bad and must be discharged ;

(*e*) that, as the second apportionment was made with regard not to the dividend rights of the shareholders while the Company was actively engaged in trading but with regard to their rights in a winding up when trading had ceased, it was not in accordance with Paragraph 8 of the First Schedule to the Finance Act, 1922, and was accordingly bad, and

(*f*) that the Crown in supporting the second apportionment were seeking to apply to a company other than an investment company provisions which, by the terms of Section 14 (3) of the Finance Act, 1937, and Section 15 of the Finance Act, 1939, were applicable only to investment companies.

16. For the Crown it was contended :—

(1) that the Company had failed to distribute a reasonable part of its income for the period ;

(2) that the accounts of the Company and the evidence given showed a very large accumulation of profits, and that a very much larger distribution could have been made than was made ;

(3) that it was an irresistible inference from the facts disclosed that those in charge of the Company, acting in the interests of the members of the Latilla family who held all the so-called preference shares, had arranged a scheme with the concurrence of the Corporation, as holders of the ordinary shares, whereby the profits were to be withheld from distribution by way of dividend and reserved to enlarge the " winding up " rights for the benefit of the preference shareholders ;

(4) that the object of the scheme was to enable the preference shareholders in due course to obtain payment of the accumulated income in a form not susceptible of assessment to Sur-tax, and that there had been a design for the avoidance of Sur-tax which supported the direction ;

(5) that the ordinary shares of the Respondent Company were acquired by the Corporation in pursuance of an agreement that they would receive nominal dividends only, but would receive 25 per cent. of the future business of the Respondent Company ;

(6) that the second apportionment made upon the preference shareholders, namely, Mrs. Latilla and her two daughters, was made as required by Paragraph 8 of the First Schedule to the Finance Act, 1922, " in accordance with the respective interests of the members " inasmuch as by Section 21 (7) of that Act " member " was defined as including one who had " a share or interest in the capital or " profits or income of a company ".

17. No argument was advanced on behalf of the Crown in support of the first apportionment, and we did not call upon the Crown's representative to argue the point raised with regard to Section 18 of the Finance Act, 1928.

18. We, the Commissioners who heard the appeal, gave our decision in the following terms :—

" We hold that the provisions of Section 18 of the Finance Act, 1928, " do not apply to this case and that the notification of 19th September, " 1939, did not preclude the Special Commissioners from reconsidering " their decision.

" The scheme by which the capital structure of the Appellant Company " was reorganised within a month of the end of the accounting period " under review was admittedly designed to continue for the benefit of " Mrs. Latilla and her daughters the immunity from liability to Sur-tax " which they had succeeded in securing under the original evasive design.

" In our view it is inconceivable that such immunity was to be bought " at the price of handing over to the National Mining Corporation, Ltd. " any substantial part of the profits the conservation of which was of the " very essence of the scheme, and we have come to the conclusion, after " considering such evidence as we had before us to a contrary effect, that " there was an understanding that any dividend declared on the ordinary " shares should be so limited as to be ludicrously incommensurate with the " amount of the income available for distribution.

" A dividend was declared in October, 1937, and although the income " out of which that dividend was paid was the income for the whole of the " accounting period (1st April, 1935, to 31st December, 1936) the distribu- " tion was carefully declared to be in respect of the period 27th November, " 1936, to 31st December, 1936. The members of the Latilla family were " by their self-denying acquiescence in the reconstitution of the share- " holding rights debarred from getting any higher dividend than 5 per cent. " for this period. This absorbed £46 11*s.* 6*d.*, leaving a balance " £858,770 8*s.* 6*d.* available for the ordinary shareholder, the National

" Mining Corporation, Ltd. ; of this £858,770 8*s*. 6*d*. the Appellant Company " allocated £100 only to the ordinary shareholder. There was, therefore, " whatever allowance be made for factors which might justify some limit " to a dividend, a failure to distribute anything remotely related to a " reasonable part of the Company's income.

" But in our opinion it is doubtful whether this failure can justify action " under Section 21 of the Finance Act, 1922, inasmuch as any larger " distribution of income would have gone to the National Mining Corpora- " tion, Ltd. and would not in their hands be assessable to Sur-tax.

" However, even if the direction be good, we are of opinion that neither " of the alternative apportionments (without which the directions are " ineffective) could be sustained. The first apportionment was based on " the presumption that Mr. Latilla was beneficially interested in the " Appellant Company but no evidence to justify this presumption was " adduced. The second apportionment was supported on the ground " that, in ascertaining ' the respective interests of the members ' referred " to in Paragraph 8 of the First Schedule, it is permissible to have regard " not merely to the income rights while the Company remains in existence " but also to income accumulating and enuring for the benefit of members " with rights to a distribution of surplus assets on a winding up.

" After considering all the relevant statutory provisions we are unable " to accept this construction.

" We therefore discharge the apportionments."

19. The Appellants immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to Section 42 (7) of the Finance Act, 1927, and Section 149 of the Income Tax Act, 1918, which Case we have stated and do sign accordingly.

C. C. GALLAGHER, } Commissioners for the Special Purposes
G. R. HAMILTON, } of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.

19th June, 1942.

The case came before Wrottesley, J., in the King's Bench Division on 16th, 19th, 20th, 21st and 22nd October, 1942, when judgment was reserved. On 26th October, 1942, judgment was given in favour of the Crown, with costs.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., Mr. Terence Donovan and Mr. F. Heyworth Talbot for the Company.

JUDGMENT

Wrottesley, J.—The decision of the Special Commissioners in this case took a form which left the parties in some doubts as to their position. It has therefore been agreed between the parties that the Case be amended, by leave of the Court, by the addition of the supplementary paragraphs following:—

" 20. The Special Commissioners shall be taken to have dismissed the " Respondent's appeal against the directions made pursuant to Section 21 " of the Finance Act, 1922, and to have confirmed the same, and the

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" Respondent shall be treated as having expressed dissatisfaction with " their determination and as having appealed to the High Court against " such determination upon the grounds stated in paragraph 15, sub- " paragraphs (*a*), (*b*) and (*c*) hereof.

" 21. The following documents have been added to the correspondence " annexed hereto, marked ' G ', and forming part of this Case(1).—

" (i) Notice dated 7th May, 1937, given by the Special Commis- " sioners pursuant to Paragraph 4 of the First Schedule to the Finance " Act, 1922.

" (ii) Letter dated 7th May, 1937, accompanying the said notice.

" (iii) Letter dated 3rd February, 1938, addressed by Special " Commissioners to Respondent's accountants.

" (iv) Letter dated 8th February, 1938, addressed by Respondent's " accountants to Special Commissioners."

In the Finance Act, 1922, Parliament included an enactment, Section 21, the avowed object of which was to prevent the avoidance of the payment of Super-tax through the withholding from distribution of income of a company which would otherwise be distributed. The working of these provisions was entrusted to the Special Commissioners; and they applied only to companies controlled by not more than five persons, not being subsidiary companies or companies in which the public were substantially interested. The important provision is Section 21 (1), the first paragraph of which (as amended by Section 31 (2) of the Finance Act, 1927) is as follows: " With " a view to preventing the avoidance of the payment of super-tax through the " withholding from distribution of income of a company which would otherwise " be distributed, it is hereby enacted as follows—(1) Where it appears to " the Special Commissioners that any company to which this section applies " has not, within a reasonable time after the end of any year or other period " ending on any date subsequent to the fifth day of April, nineteen hundred " and twenty-two, for which accounts have been made up, distributed to its " members in such manner as to render the amount distributed liable to be " included in the statements to be made by the members of the company " of their total income for the purposes of super-tax, a reasonable part of " its actual income from all sources for the said year or other period, the " Commissioners may, by notice in writing to the company, direct that " for purposes of assessment to super-tax, the said income of the company " shall, for the year or other period specified in the notice, be deemed " to be the income of the members, and the amount thereof shall be " apportioned among the members and super-tax shall be assessed and " charged under the provisions of this section in respect of the sum so " apportioned after deducting in the case of each member any amount " which had been distributed to him by the company in respect of the said " year or period in such manner that the amount distributed falls to be " included in the statement of total income to be made by that member for " the purposes of super-tax ".

Six years later, experience had apparently shown that the powers entrusted to the Special Commissioners might be so exercised as to leave companies, to which the provision applied, in uncertainty or suspense as to whether they would be dealt with under the Section. Accordingly, by Section 18 of the Finance Act, 1928, we find a whole code of procedure laid down, the object of which was to enable companies to find out whether or not, in respect of any year or accounting period, the distribution upon which they had resolved at a general meeting was going to be challenged by the Special Commissioners.

(1) Not included in the present print.

(Wrottesley, J.)

And in certain circumstances, unless they acted within a stated period, the powers of the Special Commissioners were absolutely to cease and determine.

The first point I have to determine is whether in the circumstances of this case, and in relation to this Company and the period from 1st April, 1935, to 31st December, 1936, the powers of the Special Commissioners ceased in this way through the operation of Section 18 (3) of the Finance Act, 1928.

The code to which I have referred (of which Sub-section (3) forms only a part) is as follows: " (1) Any company to which section twenty-one of the " Finance Act, 1922, applies, may at any time after the general meeting at " which the accounts of the company made up for any year or other period " are adopted, forward to the Special Commissioners for their consideration " a copy of the said accounts, together with a copy of the report, if any, of " the directors for that year or period, and such further information, if any, " as it may think fit, and the Special Commissioners shall, subject to the " provisions of this section, on receiving the said accounts and other documents, if any, proceed to consider the position of the company in relation " to the said section twenty-one. (2) The Special Commissioners may as " soon as reasonably may be, but not later than twenty-eight days after " the receipt of the said accounts and other documents, if any, call upon " the company to furnish to them within twenty-eight days, or such extended " period as they may subsequently allow, such further particulars as they " may reasonably require: Provided that if the particulars so required are " not furnished to the Commissioners within the period or extended period " allowed for the purpose they may proceed under this section upon the " information before them. (3) Where a company has under subsection (1) " of this section forwarded to the Special Commissioners the accounts of " the company for any year or other period, whether with or without any " other documents, the following provisions shall have effect:—(*a*) unless " within three months after the receipt of the said accounts and other documents, or, if further particulars have been required as aforesaid, within " three months after the receipt of those particulars, or the expiration of " the period within which those particulars are to be furnished, as the case " may be, the Special Commissioners intimate to the company their intention " to take further action in the case of the company under the said section " twenty-one in respect of that year or other period, the power of the Commissioners to take any such further action in respect of that year or other " period shall absolutely cease and determine; and (*b*) notwithstanding that " the Special Commissioners have given such an intimation as aforesaid, " they shall not after the expiration of six months from the date of the " intimation have power in relation to that company to issue a notice under " paragraph (4) of the First Schedule to the Finance Act, 1922, with respect " to that year or period, or, unless such a notice has been issued before the " expiration of the said period of six months, to give a direction in relation " to the company under subsection (1) of section twenty-one of the said Act."

What took place is to be extracted from the correspondence annexed to the Case, and forming part of it, to which the parties have added certain letters in the course of the hearing, necessary for the proper determination of the point in issue.

On 7th May, 1937, the Commissioners wrote the letter of that date, the first paragraph of which is as follows: " Sur-tax. 1. With reference to the " enclosed notice, I am directed by the Special Commissioners to explain that " if it is desired to follow the procedure provided for by paragraph 5 of the " First Schedule to the Finance Act, 1922, as amended by Section 31 (7) of " the Finance Act, 1927, the Directors Statutory Declaration should be

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" forwarded to this office within 28 days of the issue of this notice." The notice was, as its terms imply, one authorised by Paragraph 4 of the First Schedule to the Finance Act, 1922. It called for: " 1. A statement of the " actual income of the said company from all sources for each year or " other period for which the said company's accounts have been made up, " ended on any date subsequent to 31st March, 1935. 2. A copy of the said " company's accounts for each year or other period for which the said " company's accounts have been made up, ended on any date subsequent to " 31st March, 1935. 3. A statement giving full particulars of the manner " in which the income of the company for the periods above referred to has " been dealt with. 4. A statement of the names and addresses and particulars " of the respective interests of all members of the said company for the periods " above referred to."

The procedure referred to in the first paragraph of the letter enabled the directors of the Company, if they were of opinion that there had not been and would not be any avoidance of the payment of Sur-tax through failure to distribute to the members of the Company a reasonable part of its income for the period, to make a statutory declaration to that effect stating the facts and circumstances upon which their opinion was based. In that case the Special Commissioners might stay their hand, or not. But in this case the directors did not avail themselves of this provision, and nothing turns on it.

Five months later the Company's accountants wrote the letter of 5th October, 1937, the terms of which are important. It is, I think, generally speaking, a full statement of all the matters as to which the enquiries in the notice had been made. But instead of a statement giving full particulars of the manner in which the income of the Company for the period had been dealt with, the accountants writing as they did before and not after the annual general meeting, could only say that that meeting would be held on 12th October, and that the dividends would be declared then. I will read the words which appear in paragraph (*b*): " It is proposed to hold the Annual " General Meeting on or about the 12th October, 1937, and the dividends, " if any, on the two classes of shares now in issue, will then be declared."

The special resolutions, details of which were forwarded with the letter, afforded no clue as to the distribution which was going to be effected or withheld at the forthcoming meeting.

On 3rd February, 1938, an enquiry was made by letter from the Special Commissioners as to whether the meeting had been held, and if so, what dividends had been declared. This elicited on 8th February, 1938, an answer to the effect that the meeting had been held and the following dividends paid—the letter is as follows: " With reference to your letter of the 3rd instant ", say Messrs. Allen & Baldry and Holmans, " we beg to advise you that the " Annual General Meeting of the above Company was held on the 12th October, " 1937, when the following dividends were declared:—On the Preference " Shares at the rate of 5 per cent. per annum in respect of the period from the " 27th November, 1936, to the 31st December, 1936, £46 11*s.* 6*d.* On the " Ordinary Shares for the period to the 31st December, 1936, £100 0*s.* 0*d.* " Total dividends declared and paid: £146 11*s.* 6*d.*" This was out of a profit to date of £645,192 0*s.* 6*d.* for the year—including former accumulation of profit, £939,167.

On 1st April, 1938, the Company went into liquidation, paying to the holder of the 1,000 £1 ordinary shares, £1,000, and distributing the balance of the assets to the preference shareholders, members of the family of a Mr. Latilla. This became known to the Special Commissioners, and accordingly there was written on their behalf the letter of 6th September, 1939. The

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Company relies on this and the letter of 7th September, and that of 19th September, 1939. I will therefore read them. The letter of 7th September, 1939, is as follows: " Your letter of the 6th instant addressed to Messrs. " L. C. Walker and A. Burt as Liquidators of the above Company has been " forwarded to us together with your enclosure Form No. 418B/S.C. We beg " to suggest that the Direction may have been issued in the absence of a clear " appreciation of the fact that the Company, throughout its existence, has " actively carried on the business of a financial dealing company, which " functions continued up to the moment of the passing of the Resolution to " wind up when inevitably its trading activities terminated. Up to the 31st " December, 1936, the Company for a series of years earned substantial profits " and the incoming dividends were a relatively small part of its total statutory " income. With the serious decline in Stock Exchange values which occurred " after December, 1936, the Company was involved in heavy trading losses " for the fifteen months up to the date of liquidation, but these losses have " been admitted as a basis of a claim under Section 34, Income Tax Act, " 1918, for the fiscal year 1937/38 with the result that the whole of the tax " on incoming dividends is in process of being repaid. For this period of " fifteen months, therefore, we submit that the definition in Subsection (1), " Section 20, Finance Act, 1936, cannot apply. Turning now to Subsection (6) " of the same Section, a condition precedent to the application of this Sub- " section is the passing of a Resolution ' for the winding-up of an investment " ' company '. The brief answer here is that no ' investment company ' has " been wound up. We have therefore advised the Liquidators that the " Sections referred to in your letter do not apply and consequently they are " not required to comply with the directions issued to them. We should " like to take this opportunity of pointing out that a series of Directions " have been complied with in this case over a period of years, such information " being furnished in response thereto involving considerable trouble and " expense. As the comprehensive particulars which we have been at pains " to furnish have elicited from your office nothing more than formal " acknowledgments, we find it difficult to discern what useful purpose has been " served by the original requests and our compliance therewith. We are " therefore reluctant to supply further information on this occasion unless " and until it is made clear that there is a statutory obligation upon the " Liquidators so to do, and that it will lead to some decision on the matters " that have been outstanding as the result of prolonged inaction by your " Department. We regret all the more to have to address you in this sense " since our experience in this particular case is in such sad contrast to our " extensive experience of your Department in many other cases." Then the letter of 19th September, 1939, which is from the office of the Special Commissioners of Income Tax, says: " Sur-tax, Section 21, Finance Act, 1922. " F. P. H. Finance Trust Ltd. (in liquidation). With reference to your letter " of the 7th September, I am directed by the Special Commissioners to say " that no Directions were made on the Company, but enquiry made under " the provisions of Section 21 of the Finance Act, 1922, was unavoidable " owing to the possibility that considerable income might escape assessment " to Sur-tax. The Commissioners do not propose to take any further action " under the provisions of Section 21 of the above Act as amended, in respect " of the income of the Company for the period ended 31st December, 1936, " the year ended 31st December, 1937, and the period ended 1st April, 1938 " (date of liquidation). In the opinion of the Commissioners the Company " was an Investment Company within the meaning of Section 20 (1) of the " Finance Act, 1936, at the date of going into liquidation and that Directions " will require to be made for the liquidation periods. I am accordingly to

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" request that particulars may now be furnished as requested in the Notice " dated 6th September."

It is unnecessary for me to read the notice of the 6th September, as it is sufficiently referred to in the answer of Messrs. Allen & Baldry and Holmans in their letter of 7th September, 1939. As a matter of fact, a copy of that letter has been taken out of my bundle and I have not got it, or else it never reached me.

By the letter of 19th September, 1939, therefore, the Commissioners announced in terms that they did not propose to take any further action in respect of the Company's income for (*inter alia*) the period ended 31st December, 1936, the income in question in this case. Nevertheless, on 2nd September, 1940, the Special Commissioners wrote the letter to the Company's accountants giving a direction under Section 21, namely, that for purposes of assessment to Sur-tax, the income of the Company for the period 1st April, 1935, to 31st December, 1936, should be deemed to be the income of the members.

From beginning to end there has not been any suggestion that by reason of their announcement of 19th September, 1939, the Special Commissioners are precluded from reconsidering the position, and directing as Section 21 provides. The contention of the Company is that there had been substantial compliance on their part with the provisions of Section 18 (1) of the Finance Act, 1928, and that accordingly by Section 18 (3) the Special Commissioners were precluded from making the direction (and consequent apportionment) now under appeal.

As I understand the attitude of the Company, it is that at any rate by 8th February, 1938, when the Special Commissioners were informed of the distribution (or lack of it) made by the annual general meeting of the Company of the Company's profits, the Special Commissioners had all that Section 18 of the Finance Act, 1928, intended them to have. From that date, therefore, the Commissioners had three months (say to 8th May, 1938) in which either to intimate to the Company their intention to take further action, or else to see their powers to take any further action absolutely cease and determine. No intimation was in fact given during that period, or at all.

On behalf of the Crown, on the other hand, it was contended—at any rate before me, for the Case is silent as to this—that Section 18 of the Finance Act, 1928, would only have applied if the Company had—after the general meeting at which the accounts of the Company made up for the period in question, 1st April, 1935, to 31st December, 1936, had been adopted—forwarded to the Special Commissioners a copy of those accounts, together with a copy of the report, if any, of the directors for that period. This admittedly never was done. And so, said the Solicitor-General, none of the elaborate code contained in Section 18 came into play, least of all the provisions of Sub-section (3), which would cause the Commissioners' powers to lapse. It was, moreover, contended on behalf of the Crown that Section 18 was not applicable to a case where the Company supplied material only in reply to the statutory notice, or in reply to an enquiry by the Commissioners. It applied only where the Company of its own volition, and on its own initiative, sent its accounts to the Commissioners.

At any rate, the Commissioners held that the provisions of Section 18 of the Finance Act, 1928, did not apply to this case, and that the notification of 19th September, 1939, did not preclude the Special Commissioners from reconsidering their decision. I think the Commissioners were right in coming to this conclusion. They have a duty to the public to perform, laid upon

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them by Parliament, namely, to prevent the avoidance of the payment of Super-tax (now Sur-tax) through the withholding from distribution of income of a company which would otherwise be distributed. Nevertheless, if a company chooses to avail itself of the procedure laid down in Section 18 (1) of the Finance Act, 1928, it may, as it were, rule on the Commissioners, and compel them either to give the intimation referred to in Section 18 (3) (*a*), or to forgo for ever their chance of putting into force the provisions of Section 21 of the Act of 1922.

Not only did the Company not at any time after 12th October, 1937, the date of the general meeting when the accounts were adopted, send a copy of the accounts which had been adopted, or of the directors' report; they did not at any time indicate to the Special Commissioners that they were relying on Section 18 at all. My attention has been drawn to the case of *Punjab Co-operative Bank, Ltd., Amritsar* v. *Commissioner of Income Tax, Lahore,* [1940] A.C. 1055, but I am unable to see that the facts in that case, or the reasoning in the judgment of Lord Maugham, have any relation to the facts in this case. If I give full force to every word in Section 18 of the Finance Act, 1928, I am quite unable to see how it precludes the Commissioners from making the direction which in fact they made. The circumstances in which the Section grants relief to the taxpayer, or rather the company, may be narrow and circumscribed. But I can only conclude that Parliament so intended it. Sub-sections (1) and (2) of Section 18 of the Finance Act, 1928, to use the words of Lord Greene, M.R., in the case of *Star Entertainments, Ltd.* v. *Commissioners of Inland Revenue,* 24 T.C. 445 at page 451, " lay down the steps that the taxpayer must take in order to secure the " benefit conferred upon him by Sub-section (3)." There, in one sentence, is the answer to the suggestion that the latter Sub-section can be brought into play by some other means. Nor do I think that Section 18 is intended to apply to a case where the Commissioners of their own motion send the statutory notice under Paragraph 4 of the First Schedule, and receive in answer thereto, *inter alia,* a copy of the Company's accounts and directors' report, if any.

The next point with which I have to deal is one which appears in the Case, but as to which it has not been necessary to present any arguments before me. The Special Commissioners in the course of giving their decision say: " But in our opinion it is doubtful whether this failure ", that is, to distribute a dividend, " can justify action under Section 21 of the Finance " Act, 1922, inasmuch as any larger distribution of income would have gone " to the National Mining Corporation, Ltd. and would not in their hands " be assessable to Sur-tax ", and they go on to use the words: " However, " even if the direction be good, we are of opinion ", etc. But in this part of their decision the Special Commissioners appear to throw doubt on the validity of the direction made or given by the Commissioners, for the reason that the result of it would be that the income would be deemed to be distributed to the National Mining Corporation, the only ordinary shareholder and the only persons to whom the profits could be distributed, as the other shareholders, Mrs. Latilla, Mrs. Mayo and Mrs. G. Latilla Campbell were only entitled to 5 per cent. per annum on their 10,000 £1 preference shares by way of dividend; and of course the National Mining Corporation would not be liable to pay Sur-tax.

The facts on this part of the case are set out in paragraphs 5 to 8 of the Case: " 5. Prior to 19th March, 1934, the issued capital of the Respondent " Company (£10,000) was in the beneficial ownership of Mrs. E. M. Latilla, " the wife of Mr. H. G. Latilla. On that date Mrs. Latilla sold her beneficial

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" interest to Marlands Trust, Ltd., a company incorporated in Southern " Rhodesia, in exchange for £100,000 debentures in the purchasing company, " and on 5th July, 1934, 9,890 of the shares were transferred to Marlands " Trust, Ltd. (hereinafter called ' the Trust '), the remaining 110 shares being " held by that company's nominees. The Trust (the shares in which were " held by Mrs. Latilla and her two daughters) retained until 23rd December, " 1936, the beneficial interest in the issued capital of the Respondent Company. " During that time no dividends were paid thereon and a very large income " was accumulated for the benefit of the Trust which was not assessable to " Sur-tax. The profit and loss account of the Company for the year ending " 31st March, 1934, showed a profit of £152,000, and that for the year ending " 31st March, 1935, showed one of £135,000, and the carry-forward to the " accounts for the period ending 31st December, 1936, amounted to £293,000. " A copy of the accounts of the Company for the period ending 31st " December, 1936, is annexed hereto, marked ' D ', and forms part of this " Case. 6. In 1936 Mrs. Latilla and the other shareholders in the Trust " became apprehensive that as a result of recent financial legislation the income " of the Respondent Company might be regarded as the income of the " shareholders of the Trust and become assessable to Sur-tax. With a view " to avoiding this it was decided to alter the capital structure of the " Respondent Company. 7. Accordingly on 27th November, 1936:—(*a*) the " capital of the Company was increased to £11,000 by the creation of 1,000 " shares of £1 each; (*b*) the existing 10,000 shares were converted into " preference shares and the new 1,000 shares were ordinary shares; (*c*) the " preference shares carried the following rights:—(i) as regards dividends, the " right to receive a fixed cumulative dividend of 5 per cent. per annum; " (ii) as regards assets, the right in a winding up to a distribution of the " whole of the surplus assets after payment to the ordinary shareholders of " the amounts paid on their shares; (*d*) the rights attached to the ordinary " shares were:—(i) as regards dividends, the right to the whole of any sums " declared as distributable by way of dividend (subject to the rights of the " preference shareholders); (ii) as regards assets, the right in a winding up to " repayment of capital and no more. A copy of the resolution of the " Respondent Company authorising these changes is annexed hereto, marked " ' E ', and forms part of this Case. 8. The new ordinary shares were not " offered for public subscription but private negotiations were entered into " with the National Mining Corporation, Ltd. (hereinafter called ' the " 'Corporation') with a view to their subscribing for the 1,000 ordinary shares " in the Respondent Company. The Corporation is a large public company " with a considerable number of shareholders and an official Stock Exchange " quotation of its shares. There was a close business connection between " the Respondent Company and the Corporation, the Company having in " 1934 underwritten an issue of fresh capital made by the Corporation and " holding a large number (possibly amounting to a majority) of its shares. " Mr. H. G. Latilla had become a director of the Corporation in connection " with the underwriting arrangement and had an important influence in " its management. He was also a close business associate of Mr. Herbert " Guedalla, who was chairman of the board of directors of the Corporation. " The board of directors of the Corporation consisted of Mr. Latilla, Mr. " Guedalla and two other directors one of whom was nominated by Mr. Latilla. " We were satisfied on the evidence before us that Mr. Latilla was in effective " control of it. The negotiations for the acquisition by the Corporation of the " ordinary shares of the Respondent Company originated in conversations " between Mr. Latilla and Mr. Herbert Guedalla. There were also

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" negotiations between Mr. L. C. Walker (chairman of directors and one of " the joint liquidators of the Respondent Company, an incorporated " accountant closely associated with the group of companies referred to in " paragraph 4 above "—those companies were companies connected with various West African mining propositions—" and the principal witness " before us) and Mr. Herbert Guedalla, the evidence as to which was " unsatisfactory. It was, however, clear that the ordinary shares were offered " to the Corporation with certain conditions attached. In the event it was " arranged that the Corporation should, and they did in fact, subscribe for " at par and were allotted the whole of the ordinary share capital of the " Respondent Company, and (as part of the arrangement) the Respondent " Company undertook to offer the Corporation 25 per cent. of any under- " writing business it undertook thereafter. The course of the negotiations " is further indicated in the bundle of correspondence and minutes which " is annexed hereto, marked ' F ', and forms part of this Case. Mr. Guedalla " died in 1940 and Mr. Latilla, though available in this country, did not " attend to give evidence before us. Such evidence as we had, however, " made it clear that the Corporation did not seek the investment but that they " were sought out by the Respondent Company. The arrangement under " which the Corporation acquired the shares was fixed up, we were informed, " before 29th October, 1936. It was admitted on behalf of the Appellants that " all the shareholders in the Respondent Company, both preference and " ordinary, held their shares upon the terms and conditions laid down in the " articles of association."

On the above facts the Commissioners appear to have accepted the view contended for but shown to be wrong in the cases of *Penang and General Investment Trust, Ltd.* v. *Commissioners of Inland Revenue* and *Roomwood Investments, Ltd,* v. *Commissioners of Inland Revenue,* 25 T.C. 219.

The true meaning of the words in Section 21 of the Act of 1922, " in such " manner as to render the amount distributed liable to be included in the " statements to be made by the members of the company of their total income " for the purposes of super-tax ", is not to limit the activities of the Commissioners to cases where the result of the direction is to bring about a notional income in persons who are liable to pay Sur-tax. The Section should be read as meaning what Clauson, L.J., said it meant, 25 T.C., at page 234, and therefore the Section should be read as follows: " Where it appears " to the Special Commissioners that any company to which this section " applies has not, within a reasonable time after the end of any year " or other period ", and so forth, " for which accounts have been made up, " distributed to its members in such manner as to render the amount distri- " buted Super-taxable in the hands of a person whose income is Super- " taxable ". The Commissoners, therefore, in doubting the validity of the direction for the reason they gave were relying on a consideration which has been held to be irrelevant. Whatever, therefore, may be said as to the apportionment, the direction was valid.

Next as to the apportionment. The further facts here are to be found in paragraphs 9 to 12 and 14 of the Case. In addition, the following findings of the Special Commissioners are relevant: " The scheme by which the capital " structure of the Appellant Company was reorganised within a month of the " end of the accounting period under review was admittedly designed to " continue for the benefit of Mrs. Latilla and her daughters the immunity " from liability to Sur-tax which they had succeeded in securing under the " original evasive design "— that was payment to a foreign company. Then: " In our view it is inconceivable that such immunity was to be bought

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" at the price of handing over to the National Mining Corporation, Ltd. any " substantial part of the profits the conservation of which was of the very " essence of the scheme, and we have come to the conclusion, after considering " such evidence as we had before us to a contrary effect, that there was an " understanding that any dividend declared on the ordinary shares should " be so limited as to be ludicrously incommensurate with the amount of the " income available for distribution. A dividend was declared in October, " 1937, and although the income out of which that dividend was paid was " the income for the whole of the accounting period (1st April, 1935, to " 31st December, 1936) the distribution was carefully declared to be in " respect of the period 27th November, 1936, to 31st December, 1936. The " members of the Latilla family were by their self-denying acquiescence in " the reconstitution of the shareholding rights debarred from getting any " higher dividend than 5 per cent. for this period. This absorbed £46 11*s.* 6*d.*, " leaving a balance of £858,770 8*s.* 6*d.* available for the ordinary shareholder, " the National Mining Corporation, Ltd.; of this £858,770 8*s.* 6*d.* the Appellant " Company allocated £100 only to the ordinary shareholder. There was, " therefore, whatever allowance be made for factors which might justify " some limit to a dividend, a failure to distribute anything remotely related " to a reasonable part of the Company's income."

In view of these facts and findings, it was contended by the Crown that the proper apportionment of the total undistributed income was to provide 10 per cent. on the £1,000 capital subscribed by the National Mining Corporation, and to divide the balance between Mrs. Latilla and her two daughters in the same proportion as they would in fact receive if it were to be divided amongst them in the liquidation of the Company. Such an apportionment was said below, and here, to be " in accordance with the respective interests " of the members ", and so to comply with Paragraph 8 of the First Schedule to the Finance Act, 1922, the provisions governing the Commissioners in this respect. In announcing their decision the Commissioners said that it was not in their view permissible to have regard not merely to the income rights while the Company was in existence but also to income accumulating and enuring for the benefit of members with rights to a distribution of surplus assets on a winding up. They therefore discharged the apportionments. Against this decision and discharge the Crown appeals.

The question turns on the true meaning, first of all, of Section 21 of the Finance Act, 1922. I have already read the first part of Section 21 (1) as amended by the Finance Act, 1927, Section 31 (2). It contains in addition a proviso obliging the Commissioners to have regard to the company's current and future requirements, when considering whether or not a company has distributed a reasonable part of its income. Nothing, however, turns on this, nor, I think, on any of the rest of Sub-section (1). Sub-section (2) discloses the machinery which is to be set to work to extract the appropriate amount of tax. It says: " Any super-tax chargeable under this section in respect " of the amount of the income of the company apportioned to any member " of the company, shall be assessed upon that member in the name of the " company, and, subject as hereinafter provided, shall be payable by the " company, and all the provisions of the Income Tax Acts and any regulations " made thereunder relating to super-tax assessments and the collection and " recovery of super-tax shall, with any necessary modification, apply to super- " tax assessments and to the collection and recovery of super-tax charged " under this section." Then Sub-section (6) says: " This section shall apply " to any company which is under the control of not more than five persons " and which is not a subsidary company or a company in which the public

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" are substantially interested ", and gives with definitions what is to be deemed to be a subsidiary company. Then Sub-section (7), omitting certain words which were repealed in 1927, is as follows: " In this section the " expression ' member ' shall include any person having a share or interest " in the capital or profits or income of a company." Set out fully, that Sub-section means that a person who has either a share or an interest in any of the three things—capital, profits or income—is a member. (See *Commissioners of Inland Revenue* v. *Tring Investments, Ltd.*, 22 T.C. 679, at page 690—per Macnaghten, J., and per the Court of Appeal at page 695.) Sub-section (8) is as follows: " The provisions contained in the First Schedule " to this Act shall have effect as to the computation of the actual income " from all sources of the company, the apportionment thereof amongst " members of the company, and otherwise for the purpose of carrying into " effect, and in connection with, this section "; and Sub-section (9) is as follows: " The provisions of this section shall apply for the purposes of assess- " ment to super-tax for the year 1923–24 and any succeeding year of " assessment."

This brings me to the First Schedule. I have already drawn attention to Paragraph 4. One of the requisitions which the Special Commissioners may make is for a statement of the respective interests of all the members of the company. Apportionment is dealt with in Paragraph 8, which (as amended by the Finance Act, 1927) reads as follows: " The apportionment of the " actual income from all sources of the company shall be made by the " Special Commissioners in accordance with the respective interests of the " members, and the income as apportioned to each member so far as " assessable and chargeable to super-tax under section twenty-one of this " Act shall, for the purposes of super-tax, be deemed to represent income " from his interest in the company for the year or other period and shall " be included in the statement of his total income or in an amended statement " of total income which the Special Commissioners are hereby authorised " to require and shall be deemed to be the highest part of that income." Then Paragraph 9 of the First Schedule (as amended) says: " The income " apportioned to a member of a company so far as assessable and chargeable " to super-tax under section twenty-one of this Act shall for the purposes " of that tax be deemed to have been received by him on the date to which the " accounts of the company for the year or period were made up or, if an " application in that behalf is made by the company to the Special " Commissioners at any time within the period limited by this Schedule " for giving notice of appeal against the direction to the Special Commissioners, " on such date as those Commissioners determine to be just, having regard " to the dates on which distributions of income have been made by the " company, and so as to avoid, as far as possible, the inclusion for the " purposes of super-tax for any year of income referable to more than one " year."

Now first as to Section 21, there can be no doubt, having regard to the facts and findings, that the Commissioners have here to deal with a case of avoidance of payment of Super-tax, or its modern equivalent Sur-tax, and that is the mischief referred to in the preamble. If, therefore, the words of the Act and Schedule are complied with, the Commissioners should both direct and apportion in accordance with the Section. It has been agreed by Counsel on both sides here that the only question is whether this apportionment is " in accordance with the respective interests of the members ". The members of the Latilla family named in the apportionment were also members of the Company. This too is agreed on all hands. If, therefore, the

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apportionment, proceeding admittedly on the basis of the rights of the three ladies in the liquidation of the Company, is in accordance with their interests, it should be upheld and not discharged.

Some guidance on general lines is to be gained from authority. As Lord Russell said in a recent Revenue case, *Tennant* v. *Lord Advocate,* [1939] A.C. 207, at page 213, "the word 'interest' is a word capable of wide meaning, " and I see no valid reason for limiting its scope in Section 4 (of the Finance " Act, 1894), as was suggested in the course of the argument " in that case. And in outlining the judgment of the Court of Appeal in the *Tring* case in the Court of Appeal, 22 T.C., at page 695, du Parcq, L.J., said, after reading that passage which I have just read from Lord Russell: " There is certainly " nothing in the words of the Finance Act, 1922, to encourage the Courts " to place a restricted meaning upon it. On the contrary, it seems to us to be " plain that the Legislature, by giving an extended meaning to the word " ' member ', was at pains to bring within the scope of its remedial legislation " such a case as this, where a company has so arranged its affairs that the " person who in fact and in law has the most substantial interest in its assets " is nevertheless not a shareholder." Those are particularly pregnant words read in their context, for the context shows that a person who was not a shareholder, not a member of the company within the language of the Companies Act, but was clothed with rights by the exercise of which he could make himself master of the whole of the assets of the company, was a member of the company within the meaning of Section 21 (7), because he had an interest in the capital of that company. This was what Macnaghten, J., had held, and it was this which was in terms upheld by the Court of Appeal. Nor in the judgment of the Court pronounced by du Parcq, L.J., do I find any ground for supposing that the word " interest ", as used in Sub-section (7), had a wider or different context from that in the Schedule.

It is true that in that case Section 14 (3) of the Finance Act, 1937, came into play, which applies only to investment companies and not to trading companies such as the Company in the case before me. This Section expressly empowered the Special Commissioners to attribute to each member an interest corresponding to his interests in the company in the event of a winding up. That case is therefore not an authority for the proposition that the word " interest " in Paragraph 8 of the First Schedule to the Act of 1922 includes an interest which only materialises in the event of a winding up. But it is, I think, a clear authority for this, that the rights enjoyed by Mrs. Latilla and her two daughters in the event of a winding up would by themselves have rendered them members of the Company, even had they not been preference shareholders. For this purpose, rights *in posse,* if I may use the phrase, as well as rights *in esse,* may and ought to come into the picture. In the case before me these rights included the power to force a liquidation whenever they chose, and to secure, *inter alia,* the whole of the undistributed profits in practically equal shares, after repaying to the Corporation the £1,000 which they had paid for their shares, provided that the other assets of the Company were sufficient to satisfy this claim. I am therefore to start from this point, that in Section 21 (7) the rights of Mrs. Latilla and her daughters, in the event of a winding up, were an interest in the capital and profits or income of the Company. So far I believe Mr. Tucker for the Respondent was in agreement with the Solicitor-General for the Crown. In the circumstances of this case it is also, I think, true to say that those rights were an interest in the profits or income of the Company, that is to say, the profits or income of the relative period. It does not appear to me to make any difference that, in order to get hold of them, these ladies might have to take steps which

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would transform them, in the eyes of the law, into capital. For everything distributed in a liquidation has this nature thrust upon it by the Companies Act.

If the word " interest " has this wide meaning in Section 21, the body of the Act, is there any reason to suppose that in the Schedule to the Act it has a different and narrower meaning? Mr. Tucker says it has, and in order to succeed he must establish this. The litigant who contends for this must at least make so startling a proposition good. For it is, I suppose, an elementary rule of construction that in one and the same instrument you will give the the same meaning to the same word, unless the result is something revolting to common sense and reason. I have searched the Act and the Schedule for some inconsistency or absurdity which might flow from apportioning among the persons having an interest in the profits or income of a company, those profits or that income in accordance with the respective interests of those persons, but so far from the result being unreasonable, it would appear to bring about a result well within the preamble to the Section and the operative first paragraph of Section 21 (1).

In a long and careful argument, which ranged widely over the code which Parliament has enacted to prevent the avoidance of the payment of Super-tax and Sur-tax, Mr. Tucker drew my attention to the ingenuity of the tax avoider, and the tenacity with which Parliament had pursued and in some cases even overtaken him.

In the course of this review two things emerged. One was the possibility of injustice which might arise if these provisions were to be applied to what I may, without offence, call ordinary and genuine trading companies, whose structure was adapted for trade and not for tax avoidance. I have no doubt that this danger is latent in these provisions, if applied to the wrong case. But I can find nothing in the construction put by the Crown on the word " interest " in the Schedule, which would be more dangerous to such a company than if the narrower construction contended for by the Respondents were to be adopted. The other matter which emerged from Mr. Tucker's review of this type of legislation was that it consists largely of a tightening up of its provisions, or to use another metaphor, of the throwing more widely of the net, so as to meet and put a stop to new and ingenious devices which defeated the objects of the law as it stood. He contended that if the construction of the Crown in this case was correct, some of that legislation at least was unnecessary, and, in particular, Section 14 (3) of the Finance Act, 1937. More particularly he relied on the fact that this Section, aimed as it is at the very practice which was used in this case, was, even so, not extended to trading companies, but was confined to investment companies. This, therefore, was an indication (it was said) that Parliament never can have intended that this process should be applied to a trading company in respect of a period before the 1937 Act became law.

If this were a sound test to apply in the construction of the Act of 1922, the argument would be a formidable one. But I do not think it is the proper way in which to approach the matter. And I am fortified, as I think, in that view by what was said by Viscount Simon, L.C., in the case of *Thomas Fattorini (Lancashire), Ltd.* v. *Commissioners of Inland Revenue*, 24 T.C. 328, at page 346. This too was a tax case. The passage is as follows: " Mr. " Donovan pointed out that the Legislature has now, in the case of some " investment companies, made it more difficult to escape the burden of " Sur-tax . . . but this is outside the period within which the present dispute " falls, and it must not be assumed as a matter of statutory construction that " earlier provisions have a particular meaning because if so interpreted the " need for the later enactment is elucidated." It is not difficult to imagine

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cases where any such test would be most misleading. A later enactment might be passed in order to clear up doubts, or it might have the object of warning in advance and in precise terms persons who might otherwise be prepared to risk the chances of being caught by a more general provision in the earlier statute. There may, of course, be cases where later Acts of Parliament, by their language, throw light on obscure passages in earlier Acts. But this is not one of those cases. And the meaning of the Act of 1922 is to be sought from its own language, and not from what Parliament enacted in 1937. Moreover, the latter enactment goes somewhat further than the 1922 Act and Schedule, by enabling the Commissioners in a proper case to ignore altogether what I may call income or dividend rights.

I ask myself whether Mrs. Latilla, if asked whether she had any interest in the undistributed profits of this Company, could at any time have said truthfully " I have no interest in those profits." And I feel sure that if she were asked that question, she would have been impelled to say: " No, I " cannot say I have no interest. I have enormous interest in them." That is not, I think, an irrelevant enquiry, for the language of these Acts is to be interpreted in its plain and ordinary meaning, and is not to be bent in favour of or to the prejudice of the taxpayer.

In the result, I can find no reason for saying that the draftsman of the 1922 Act used the word " interest " so as to have one meaning in the body of the Act and another and narrower meaning and context in the Schedule which rounds it off.

However, considerable reliance was placed by Mr. Tucker for the Respondents on the decision of Finlay, J., in *Alexander Drew and Sons, Ltd.* v. *Commissioners of Inland Revenue,* 17 T.C. 140. That was the case of a company which had gone into liquidation, and its shares were held by trustees for certain tenants for life, with remainder to their children. The life tenants claimed that as the amounts received by the trustees in the liquidation became, by operation of law, not income but capital, even though they had been undistributed income, they could not be apportioned to the life tenants; at least, there should be included among the members, the remaindermen, seeing that they would really get the benefit of these amounts. Alternatively, it was suggested that the trustees were the persons to whom these profits should be apportioned.

There is no doubt that in that case Finlay, J., held that the proper way in which to give effect to Section 21 and the Schedule was to apportion the undistributed income of the company among the persons who would have got it, had it been distributed during the period, that is to say, in that case the beneficiaries or life tenants. Nor is there any doubt that if the same method were adopted in the case before me, the result would be to apportion the whole of the undistributed profits to the National Mining Corporation, a company which does not pay Sur-tax. But if the method of apportionment approved by the learned Judge on the facts of that case were adopted in this case, it would completely disregard the fact that the respective interests of the members had been vitally affected by the understanding found by the Commissioners to exist between the Corporation and Mrs. Latilla and her daughters, under which any dividend on the ordinary shares was to be ludicrously incommensurate with the amount available for distribution. To say that if the income had been distributed in fact it must, under the articles and special resolutions as they stood, have gone to the Corporation, leaves out of account not merely the understanding on which the Corporation held these shares, but also the voting power under which these ladies could have asserted their rights and diverted the whole amount into their own purses.

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There is nothing in the case of *Drew*(1) to lead me to suppose that Finlay, J., considered the method he adopted in that case one which he ought to adopt if it did not produce a result which accorded with the respective interests of the members. That is, as I think, the governing consideration. Accordingly, I have come to the conclusion that the Special Commissioners were wrong in thinking that the Act of 1922 precluded them from taking into consideration the rights of Mrs. Latilla and her daughters which arose from their voting power and from their rights in the last resort to a liquidation, in which case the whole of the undistributed profits would pass to them.

Therefore this case will have to go back to the Commissioners for them to make the necessary and proper apportionment.

Mr. Hills.—Of course, your Lordship will take what course you think fit about this matter. It might be more satisfactory if your Lordship simply referred it back to the Commissioners for their determination. The only thing is that it is open to your Lordship to say that the apportionment—

Wrottesley, J.—That is my opinion. I think it is more satisfactory that it should go back.

Mr. Hills.—If your Lordship pleases.

Wrottesley, J.—I have pretty clearly expressed my opinion. The only point left at issue is the question of the 10 per cent. dividend, but I think the proper course is that the case should go back for further consideration, bearing in mind that they are not precluded from considering the rights of these ladies one way or the other, either by their voting power or their rights in a liquidation, to which I refer in my judgment.

In the meantime, I suppose there will have to be an Order as to costs here.

Mr. Hills.—If your Lordship pleases. Substantially, we have won the point on which we came here.

Wrottesley, J.—Yes, there is no doubt about that.

Mr. Hills.—Then the appeal is allowed with costs and the case remitted to the Commissioners.

Wrottesley, J.—Yes.

Mr. Hills.—If your Lordship pleases.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.) on 22nd, 23rd, 24th, 25th and 26th November, 1943, when judgment was reserved. On 14th December, 1943, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. J. Millard Tucker, K.C., Mr. H. Wynn Parry, K.C., Mr. Terence Donovan and Mr. F. Heyworth Talbot appeared as Counsel for the Company, and the Solicitor-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Scott, L.J.—This is an appeal by a Company from a judgment of Wrottesley, J., in a case arising out of a Sur-tax apportionment under Section 21 of the Finance Act, 1922. The Special Commissioners in their

(1) 17 T.C. 140.

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executive office had made a direction upon the Company in respect of the year 1935–36, and followed it up with an apportionment between the shareholders under Paragraph 8 of the First Schedule to the Act. The Company appealed to the Special Commissioners in their judicial capacity against both direction and apportionment. The Company took a preliminary point that Sur-tax proceedings were totally barred by reason of the failure of the executive Commissioners to act within the time limits of Section 18 of the Finance Act, 1928, which it claimed to have brought into operation by certain letters addressed to the Special Commissioners in 1937–38. The judicial Commissioners rejected this contention, and the learned Judge agreed with them. So do I; but as the point was again strenuously argued before us, I will explain my reasons after I have stated very shortly the facts material to the substantive appeal. On that, the main issue, the Special Commissioners (acting judicially) were doubtful as to whether there had been a valid " direction "; but it was agreed before Wrottesley, J., that the Stated Case should be amended so as to confirm the direction. On the issue of apportionment the Commissioners definitely held that the Crown failed, but Wrottesley, J., reversed them and decided in the Crown's favour. The appeal of the Company before us is on both points.

The Company, which assumed its present name in 1927, has since then been a trading company, dealing in the shares of gold mining and mining development companies. The Company held a leading position in the group and Mr. H. G. Latilla was the chief person in the group. In March, 1934, its issued capital of 10,000 £1 shares was in the beneficial ownership of Mrs. H. G. Latilla. In that year she sold her shares to Marlands Trust, Ltd., a company incorporated in Southern Rhodesia, in exchange for £100,000 of debentures in that company, all the shares in the Trust being owned by her and her two daughters, Mrs. Mayo and Mrs. Campbell. No dividends were declared, but the Company, all of whose shares the Trust owned, was making large profits, which by the end of 1936 had accumulated to £293,000(1). On 15th December, 1936, the Trust went into liquidation and on 23rd December, 1936, its liquidators transferred the Trust's 10,000 shares in the Company in equal thirds to Mrs. Latilla and her two daughters in their right as shareholders in the winding up of the Trust. This action was evidently believed to have been rendered safe from the depredations of the tax-gatherer by reason of the following steps previously taken on their behalf. On 27th November, 1936, the Company changed its 10,000 ordinary shares into 5 per cent. cumulative preference shares, with no further dividend rights, but with the exclusive right in a winding up to all surplus assets after paying off the 1,000 new £1 ordinary shares then created. These new ordinary shares became, under the special resolution effecting the change, entitled to get the whole of any dividend declared beyond the 5 per cent. due to the preferences.

The three Latilla ladies thus, as preference shareholders, became entitled as from 27th November, 1936, to receive in a future winding up of the Company, the whole benefit of all profits of the Company (1) accumulated up to that date, and (2) to be earned thereafter; save only such amount as might be declared in dividend on the ordinary shares.

At this point it becomes relevant to see what was done with the 1,000 new ordinary shares. They were allotted to a *public* company—the National Mining Corporation, Ltd. (to whom I will refer as " the Corporation "), whose shares were officially quoted on the Stock Exchange. Therefore, whatever dividend might thereafter be declared by the Company beyond the 5 per cent. on the preferences, would *prima facie* be outside the present picture; but the

(1) In addition to a profit of £645,192 for the period 1st April, 1935, to 31st December, 1936.

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Special Commissioners find as a fact that Mr. Latilla was in effective control of it. In fact what happened was this. The general meeting of the Company to consider the accounts of the Company for the period ending on 31st December, 1936 (which, as an irrelevant matter of fact, was from 1st April, 1935) was held on 12th October, 1937. The period of 21 months showed a profit of £645,192 0*s.* 6*d.* Payment of £146 11*s.* 6*d.* by way of dividend was authorised. It was made up as follows: £100 as a 10 per cent. dividend on the 1,000 ordinaries down to 31st December, 1936; and the small balance as 5 per cent. on the 1,000 preferences for the five weeks from 27th November to 31st December, 1936. The balance was carried forward. On 1st April, 1938, the Company went into voluntary liquidation.

The only other relevant facts are that on 7th May, 1937, the Special Commissioners (in their executive office) gave notice to the Company under Paragraph 4 of the First Schedule to the 1922 Act requiring the Company to furnish them with the information specified in the Paragraph: that on 5th October, 1937, the Company's accountants forwarded all the information asked for except about the dividend, in regard to which they said that the general meeting was to be held a week later. On 3rd February, 1938, the same Commissioners enquired about the general meeting, and on the 8th the Company's accountants replied giving the facts which I have already stated.

In the Stated Case the judicial Commissioners purport to make certain vague findings about the transaction between the Company and the Corporation which resulted in the latter taking up the 1,000 ordinary shares; in particular they say there was an " understanding " or even an " arrangement " between the Company and the Corporation about the latter assenting to a low rate of dividend on its shares in consideration of the Company promising it a 25 per cent. share of future underwriting business; but the findings fall short of an agreement, and I disregard them in reaching my conclusions.

The Company relies on two contentions, (1) a preliminary objection, namely, that the Special Commissioners had lost the executive power conferred on them by Section 21 of the 1922 Act by reason of their failure to take action within the time limited by Section 18 of the Finance Act, 1928, and that consequently the " apportionment " under Paragraph 8 of the First Schedule to the 1922 Act was a nullity; (2) the substantive objection that the apportionment to the three Latilla ladies was not within the terms of Paragraph 8. Both contentions raise questions of importance.

(1) For the purpose of the preliminary point the Company contends that Section 18 of the Finance Act, 1928, had been brought by it into operation and that the Special Commissioners, having failed to act within the time allowed, had lost their power to make either direction or apportionment under the Sur-tax code, because that power had " ceased and determined " in the words of Sub-section (3) (*a*) of that Section. The Special Commissioners, who, the Company contended, might under the Section have taken such action, would have been primarily acting in their executive capacity which might equally be called administrative or ministerial. It is only when Special Commissioners hear an appeal from something done by the Special Commissioners acting ministerially, that they act in a judicial and not an executive capacity. It is one of the anomalies of our Constitution that both functions should *seem* to be assigned to the same body of persons; but in practice they are, as is right, kept quite separate and the same person does not act in both capacities, at any rate in the same matter.

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Wrottesley, J., affirmed the Special Commissioners, who (acting in their judicial capacity), had held that Section 18 had no application in the present case. I agree. I think that he decided rightly, on the facts found on the correspondence included in the Case, that the Section had never been brought into operation at all. I should have been content merely to adopt his judgment on the preliminary point as my own, but for the thoughtful arguments of Mr. Tucker before us, which are entitled to further consideration. Section 21 of the 1922 Act (which for brevity I will call " the basic Section ") leaves it open to the Special Commissioners to take action at any time within the general limit of six years permitted by the Income Tax Acts. Consequently any company, of the kind within the Section, is left exposed to the liability of a charge of Sur-tax avoidance within the code, for years after it has passed and dealt with its income for any given year. It may have distributed some part in dividend so as to constitute its members' income for Sur-tax purposes; or it may have distributed no part in dividend to members, and yet years later it may be shot at under the code. Section 18 of 1928 gave to such a company a certain measure of protection. It was obviously designed to cut down the liberty of the Commissioners of Inland Revenue to hold on to their right of postponed attack, without showing their hand; and, conversely, to alleviate the hardship of suspense resting on such companies and their members, by putting a weapon of defence in their hands. Parliament in effect says to each such company: " We realise that the long duration of this power " of the Inland Revenue to pounce on your past profits may cause you " anxiety; we therefore enable you to end your suspense; let the Special " Commissioners know that you on your side demand to know where you " stand, and what action, if any, they propose to take." That this is the intention of the Section appears to me clear. In the first place Paragraph 4 of the First Schedule to the 1922 Act enables the Special Commissioners at any time to require full information on practically everything relevant to the code, including " the manner in which the (company's) income has been " dealt with ". In the second place Section 18 of 1928 is *expressed* not to operate at all until *after* the adoption of the company's accounts in general meeting, when normally the company's income will have been dealt with. By then the Special Commissioners may be expected already to have received all information to which the Special Commissioners have a right under Paragraph 4 of the First Schedule; and Section 18 presumably contemplates something more than a mere repetition of information already furnished pursuant to a requisition under Paragraph 4, or, as is often the case, voluntarily. For that reason, if the company wants to take the statutory action authorised by Section 18, with its drastic limitations upon the duration of the Special Commissioners' " code " powers, I think the company must somehow bring it to the mind of the Special Commissioners that it is taking action under Section 18. The easiest way to do that is to say so frankly in the letter forwarding the information; but *somehow* that notice must be given; it is, I think, either a condition precedent or a duty, implied by the Section. It is not a self-acting statute of limitation: it is for the company to let the Special Commissioners know that it has set the machinery in motion.

In the present case the Company had been already, on 7th May, 1937, required by the Special Commissioners to send all the information specified in Paragraph 4 of the First Schedule of 1922; and on 5th October, 1937, the Company had complied with the notice, except as to the manner in which the Company's income had been dealt with. On that topic they said that the general meeting was to take place a week later. On 3rd February, 1938, the Special Commissioners wrote to ask what had been done at the meeting, and the Company, on the 8th, duly replied. In those circumstances I agree

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with the finding of the (judicial) Special Commissioners, and with the learned Judge, that Section 18 never operated because the Company never put it into operation. An alternative way of putting that conclusion, which is, for the reasons I have given, in my view equally valid, is that the Company never satisfied the condition precedent to the insistence by them on their statutory rights under Section 18 of making it clear to the Special Commissioners that they were taking the initial step under the Section. For these reasons the preliminary point fails.

(2) On the substantive issue one thing is clear beyond doubt. The whole and sole object of the Company's elaborate arrangements described in the findings of the Commissioners in the Stated Case was to avoid Sur-tax, the very thing against which the preamble of Section 21 was directed: the only question is whether Parliament has, in cases like the present, succeeded in "preventing" such "avoidance". The Special Commissioners acting judicially thought that Parliament had not succeeded. The learned Judge thought Parliament had succeeded. So do I, and I am tempted merely to adopt the learned Judge's judgment; but Mr. Tucker gave us the benefit of a careful and detailed argument, which on this issue alone occupied altogether two whole days; and he is entitled to a reasoned judgment from this Court, although I do not propose to travel over all his ground.

It is conceded by him that the "direction" under Section 21 was validly given; but the reasons why he could not help making that concession throw light on the question about apportionment, on which the appeal turns. Let me explain. Suppose a company within the Section, having only one class of shareholders, in fact earns large profits, which it does not need for any one of the capital purposes excepted by the Section (as amended in 1927 and 1936), but distributes nothing in dividends, in such a case it makes no difference to the Commissioners' power to give a "direction", whether the failure to distribute is due to an exercise of discretion by the company in general meeting, or to a provision in the articles which forbids distribution. It is enough to justify a "direction", that in fact no distribution takes place. If in the present case the Company had created and issued no *new* ordinary shares, but had merely converted its 10,000 ordinary shares into 5 per cent. preference shares, with no rights to distribution except in a winding up, the members of the Company, by that step, taken in advance, would have deprived themselves (unless they amended the articles) of the power of distributing current profits by way of dividend; but, even so, it would not have been open to the Company to contend that the failure to distribute dividend was not a failure within the Section; simply because the Section judges by results. So in the present case the fact, if it be the fact, that the Company might have distributed the whole of the £645,192 in a dividend on the 1,000 ordinary shares owned by the Corporation does not alter the position. The Company simply did not distribute a "reasonable" amount, and, therefore, what the Company *could* have done did not matter; it did not in any way affect the ministerial freedom of the Special Commissioners to give their directions. Even if the preference shareholders had, at the instance of the board, joined with the ordinary shareholders in voting a 1,000 per cent. dividend on the ordinary shares, it would not have prevented the ministerial Commissioners from taking the view that even £10,000 was an unreasonably small distribution. The Section looks at the actual facts of each case. But in considering what amount of income is to be treated as available for distribution, the Section is imperative in its limitation of the right of the company to appropriate to capital purposes. As amended in 1927 (Section 31 (1)) and 1936 (Section 19 (4)) it forbids a company taking into account

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any appropriation of income to capital uses except for *certain specified purposes*. If the total available for distribution is depleted by *other* appropriations to capital uses, with the result that the residue of profits available for distribution falls plainly below the " reasonable " figure, and *a fortiori* if there is *no* distribution, there is, *ipso facto*, a default within the Section, and the penal consequence that a " direction " can be given follows automatically.

This question of the appropriation of income to capital uses has a general bearing upon the fiscal duty of companies within the code and is directly involved both in the right of the Special Commissioners to give a " direction " and in the procedure for " apportionment ", although the relevant provisions in regard to the latter stand on a rather different footing. In one sense the process of apportionment is subsidiary and supplementary to " direction ", but the main object of protecting the Exchequer in accordance with the preamble is as directly concerned at the stage of " apportionment " as at the stage of " direction "; and the prevention of escape at the second stage by the " capital " loophole is just as necessary, and I think, just as clearly expressed in the Section. It will serve no fiscal purpose to " direct " the company, if its members are to escape. It is, therefore, natural to look for suitable provision at the stage of appropriation for stopping up the loopholes of escape by means of conversion of income into capital both for members of the company and for others standing in such a relationship to the company as to be able to get a share in the fruits of the company's undertaking.

In my opinion that is what one does find in Section 21 (7), and I think its language is unambiguous. The natural meaning of the word " capital " includes capital assets; and the burden must be solely on the party which seeks to limit the meaning to share capital. One object of the Sub-section is to extend the category of members proper so as to include those who, whilst not being members, are in a position to enjoy the fruits of the company's working. But another object is to describe the kind of interest in the company possessed by each such member in a way which will afford a basis of comparative valuation for apportionment under Paragraph 8 of the Schedule. The primary objective of the whole of Section 21 is to divide up the income of a company, which has failed to distribute reasonably, in such a way that each member (in the extended sense), will have attributed to him notionally a share of the Sur-tax burden proportionate to his real or resultant interest in the company's actual income from all sources. In a case like the present the only way in which those proportions can be ascertained is by measuring the interest of each in the assets available for distribution in the winding up. That, I think, is what is clearly enacted by the words of Sub-section (7) and Paragraph 8. The Appellants and Respondents, it is true, urge upon us radically opposite interpretations of the relevant provision—Sub-section (7), and to that extent seem to raise some doubt upon its meaning; but difficulty of interpretation is not the same thing as ambiguity of expression. Paragraph 8 of the Schedule is addressed primarily to the ratios in which the total of the putative dividend is deemed to be distributed amongst the " members ". For that purpose it is *the reality* of their interests *in the company and its fruits* with which the Statute is concerned. In order to find the basis of apportionment, or in other words, the ratio of burden which each " member " is to bear to the other " members ", a value has to be put on the " interest " of each " member "; and I cannot imagine why, as Mr. Tucker would have it, any form of proprietary or pecuniary interest, direct or indirect, should be left out of account by Parliament. The individual valuation may involve difficulties of detail in order to get all on a comparable

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plane, but that is no reason for cutting out altogether " members " who get the benefit of the company's profits in a capital form. The relation of the machinery of apportionment to the principal enactment, upon which the Revenue's right of direction is founded, raises a somewhat similar question of statute interpretation as that considered by the House of Lords in the cases of *Lysons* v. *Andrew Knowles & Sons, Ltd.* and *Stuart* v. *Nixon & Bruce,* [1901] A.C. 79, where the House held that the substantive enactment in Section 1 of the Workmen's Compensation Act, 1897, imposing the obligation on the employer to pay compensation could not be treated as excluded by the provisions in the Schedule for ascertaining the *quantum* of compensation, as the Court of Appeal had held. The application of the principle in the present case is less extreme, but the principle has some bearing.

Sub-section (7), in my opinion, construed in accordance with its natural English sense, gives to the word " member " wherever used in the Section that width of meaning which seems to me essential for the purpose of Paragraph 8. The three lady shareholders clearly had an interest in the capital of the Company, as I construe the word " capital "; but I go further; I think that they had an " interest " in the income of the Company, or at any rate in its " profits ", although their interest, as long as the Company was a going concern, was indirect, or only realisable upon the happening of a future event, namely, the winding up of the Company or a change in the articles—either of which was within their power to bring about. That their interest was future or contingent, in my opinion, makes no difference; for one object of Sub-section (7) was to bring into the same position as members of the company presently entitled to participate in a declared dividend all persons who possess, directly or indirectly, an equivalent power of enjoying the fruits of the company, whatever form that power may take. It follows from these premises that the three preference shareholders in the present case were " members " within Paragraph 8, and that their interest in the Company's assets in the winding up affords a proper comparative basis for assessing their interest.

As an alternative to his first argument on the construction of Sub-section (7) and Paragraph 8 taken together, Mr. Tucker wants us to read into Paragraph 8 an implication restricting its application to such " members " as are entitled during the life of the company to participate in dividends. I can see no justification whatever for implying any such limitation. In the first place the wording of the Sub-section is as wide as it could possibly be. In the second place there is no reason for limiting the category of members on whom the Sur-tax burden is to be cast to those who, during the life of the company, have been entitled to participate in dividends. The reasons are all the other way. If an artificial company has been created for the purpose of avoiding Sur-tax, to whom should the Legislature naturally look as the probable artificer? Obviously, to the person or persons who have an interest which gives control over the company, whatever be the form—capital or income—which that interest may have taken. Mr. Tucker's implied condition may well be the only ground on which he could succeed in this appeal, but that is no justification for making the implication; on the contrary if there be any ambiguity at all in either Sub-section (7) or Paragraph 8 of the Schedule, there is ample reason in the whole Section for rejecting his construction and for adopting a wide interpretation as did Wrottesley, J. Mr. Tucker relied for support on one or two chance phrases in the judgment of Finlay, J., in *Alexander Drew and Sons, Ltd.* v. *Commissioners of Inland Revenue,* 17 T.C. 140, and clung to them as to the proverbial straw. But they could keep no such argument afloat. In *Drew's* case the problem with which we have to

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deal, of the persons most deeply interested in the Company and its earnings being debarred by a change in the articles of association of the Company from direct dividend rights, was wholly absent. The life tenant under the settlement whose position was discussed, had, through his trustee, in whose name the shares were registered, an absolute right before the winding up to enjoy the company's dividends: and it is that fact in that case to which Finlay, J.'s phraseology, upon which Mr. Tucker relies so much, is attributable. The decision is no authority on the present case.

There is, however, authority in the House of Lords which is, in my view, amply sufficient to justify Wrottesley, J.'s judgment, and our dismissal of the appeal. The principles laid down by their Lordships in the case of *Penang and General Investment Trust, Ltd.* v. *Commissioners of Inland Revenue,* [1943] A.C.486; 25 T.C. 219, even if not so directly in point as to constitute authority binding on us, are germane to much of the argument on this appeal, and give us direct guidance in the interpretation of Sub-section (7). After referring to the cases of *Blott*(1), *Burrell*(2) and *Sansom*(3), where "capital" questions in relation to Income Tax were considered, Viscount Simon, L.C., added at page 494 (25 T.C., at page 239): "It is not without "significance that these cases arose shortly before the Finance Act, 1922, "was passed." It is inconceivable that the "capital" loophole for Surtax escape should not have been prominently present to the mind of Parliament in 1922, when it passed Sub-section (7) in its present form; and Lord Macmillan in effect said so.

There is only one further argument advanced on behalf of the Company to which I must refer. It was that Sections of a very drastic order were passed in later Finance Acts, which contained detailed provisions for dealing with particular devices for tax avoidance, such as 1927, Section 31 (4); 1936, Section 20 (4) (*a*), (6) (*a*) and (7); and 1937, Section 14 (3). These, Mr. Tucker said, would, at any rate in part, not have been necessary if the arguments for the Crown in the present appeal are sound: but that is not enough, even if well founded. In any event I feel there is much danger in such "retrospective" interpretation. It proceeds on the hypothesis (1) that Parliament knew and understood the law as it stood previously, and was acting on the implied basis of recognising the validity of judicial decisions previously given; and (2) that such particular later provisions, passed by Parliament in order to meet newly discovered evils, may be consulted in order to get light on the true meaning of earlier general provisions. There may be exceptional instances where some light may be got in that way, but it must be very rarely permissible to put an artificial construction on an earlier statutory provision; and if its ordinary English meaning is clear, nothing short of deliberate amendment can suffice. As Lord Simon, L.C., said in *Thomas Fattorini (Lancashire), Ltd.* v. *Commissioners of Inland Revenue,* [1942] A.C. 643, at page 652 (24 T.C. 328, at page 346): "It must not be assumed as a matter of statutory con-"struction that earlier provisions have a particular meaning because, if "so interpreted, the need for the later enactment is elucidated." In the present case, Sub-section (7) is and always was clear, so far as concerns present questions.

In the result I entirely agree with the judgment of Wrottesley, J. The appeal must be dismissed with costs.

MacKinnon, L.J. (read by du Parcq, L.J.)—At the material time F.P.H. Finance Trust, Ltd. was a company with a paid up capital of £11,000, divided into 1,000 ordinary shares of £1 and 10,000 preference shares of £1.

(1) Commissioners of Inland Revenue *v.* Blott, 8 T.C. 101. (2) Commissioners of Inland Revenue *v.* Burrell, 9 T.C. 27. (3) Commissioners of Inland Revenue *v.* Sansom, 8 T.C. 20.

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While the Company remained a going concern the preference shareholders were entitled to a fixed cumulative preference dividend of 5 per cent., and the ordinary shareholders were entitled to such dividend as the Company in general meeting might resolve. On a winding up the holders of the ordinary shares were entitled to be paid £1,000, while the preference shareholders were entitled to have all the rest of the assets distributed among them. The 10,000 preference shares were held as to 3,334 by Mrs. Latilla, as to 3,333 by Mrs. Mayo, and as to 3,333 by Mrs. Campbell. These ladies were the wife and two daughters of Mr. H. G. Latilla. That they were not for the first time assisting Mr. Latilla in his financial devices is apparent from the report of *Latilla* v. *Commissioners of Inland Revenue,* [1943] A.C. 377 (25 T.C. 107). The 1,000 ordinary shares were held by the National Mining Corporation, Ltd. Mr. H. G. Latilla was a director of that company, and in the Stated Case the Commissioners say: " We were satisfied on the evidence " before us that Mr. Latilla was in effective control of it ", that is, of the National Mining Corporation. The Case further finds that as between the preference shareholders and the National Mining Corporation there was "an understanding that any dividend declared on the ordinary shares" (of the F.P.H. Finance Trust, Ltd.) " should be so limited as to be ludicrously " incommensurate with the amount of the income available for distribution." But, having regard to their findings as to the relation of Mr. Latilla to the Corporation and his relationship to the preference shareholders, any such finding as to an " understanding " appears to be superfluous.

Paragraphs 10 and 11 of the Stated Case are as follows:—" 10. On 12th " October, 1937, the Respondent Company considered and adopted the " accounts for the period 1st April, 1935, to 31st December, 1936. These " accounts (a copy of which is annexed hereto, marked ' D ', see paragraph " 5 above) shewed a profit for the period of £645,192. Payment of " £146 11*s.* 6*d.* by way of dividend was authorised. This amount was " apportioned as follows: as to £46 11*s.* 6*d.* in payment of a dividend on the " preference shares at the rate of £5 per cent. per annum from 27th November, " 1936, to 31st December, 1936, and as to £100 in payment of a dividend " of 10 per cent. on the ordinary shares for the period to 31st December, 1936. " The balance of the profits was carried forward. 11. The Respondent " Company went into liquidation on 1st April, 1938. The Corporation " were repaid £1,000, the amount subscribed for their holding of ordinary " shares, and the balance of the assets were distributed to Mrs. Latilla and " her daughters, the preference shareholders."

These being the material facts the Special Commissioners were concerned to consider the duty laid upon them by Section 21 of the Finance Act, 1922, and Paragraph 8 of the First Schedule to that Act. On 16th May, 1941, they issued a direction to the Company under Section 21 that its undistributed income should be deemed to be the income of its members for the purpose of assessment to Sur-tax, and, having computed such undistributed income at £858,817, apportioned the liability of the members as being: National Mining Corporation, £100; Mrs. Latilla, £286,296 5*s.* 0*d.*; Mrs. Mayo, £286,210 7*s.* 6*d.*; and Mrs. Campbell, £286,210 7*s.* 6*d.*

The Company appealed to the Special Commissioners against this direction and apportionment. The Special Commissioners upheld the direction to the Company, but discharged the above apportionment to the members, and stated a Case on which the Commissioners of Inland Revenue appealed. Wrottesley, J., on 26th October, 1942, allowed their appeal, holding that both the direction to the Company and the apportionment to its members were rightly made by the Commissioners under their statutory duty, and

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remitted the case to the Special Commissioners. From this decision the Company appeals to this Court.

The first point made by the Appellants was by way of reliance upon Section 18 of the Finance Act, 1928. That provides by Sub-section (1) that a company to whom Section 21 of the Act of 1922 applies, may make a certain communication to the Special Commissioners; and by Sub-section (3) that, unless the Commissioners, within three months of the receipt of that communication, intimate to the company their intention to take steps under the said Section 21, the power of the Commissioners to take any further action thereunder shall cease and determine. The whole question is whether this Company can predicate that it fulfilled the requirements of Sub-section (1) of Section 18 of the Act of 1928. There is no pretence that they expressly purported to act under that Sub-section, nor can it be said that literally they complied with its terms. The most that can be said is that, in certain correspondence between the Company and the Commissioners, the Company conveyed to them most of the information that would have been afforded if it had expressly and precisely complied with the terms of the Sub-section, and that the remainder of such information was both unimportant and could be assumed or guessed by the Commissioners. I do not think this can avail. It is enough to say that the Company failed to establish any compliance on its part with Sub-section (1), and as a result is not entitled to the benefit of Sub-section (3).

Upon the main question, the Appellants contended that the apportionment above-mentioned was not justified by the provisions of the Act of 1922. Section 21 (8) of that Act directs that the provisions in the First Schedule shall have effect as to the apportionment of the actual income of the company among the members of the company. Paragraph 8 of the First Schedule says that " The apportionment of the actual income . . . of the company " shall be made by the Special Commissioners in accordance with the " respective interests of the members ". It is a melancholy consideration that we had to listen for the best part of four days to arguments as to the effect of those few simple words.

It is argued for the Appellants that " the respective interests of the " members " must be ascertained by reflection of their shareholding and the rights to dividends upon such shares, and only by that consideration. If so, it is said that the rights of the three ladies would only be to receive £500 (being 5 per cent. on £10,000), and the right to all the rest would be that of the National Mining Corporation, which is not subject to Sur-tax. The Commissioners, it was said, are given no power to take into account the fact that on a winding up the Corporation would only get the return of the nominal amount of the ordinary shares, while the three preference shareholders would share the enormous balance.

This argument that " respective interests of the members " can only mean their interests as measured by their rights to dividends seems to me to leave out of account another material provision, that is, Sub-section (7) of Section 21 of the Act. That provides that " the expression ' member ' shall include any " person having a share or interest in the capital or profits or income of a " company ". Lord Macmillan in the case of *Penang and General Investment Trust, Ltd.* v. *Commissioners of Inland Revenue,* [1943] A.C., at page 501 (25 T.C., at page 244), having quoted this Sub-section (7) says: " A company can distribute its profits only among its registered share- " holders " (and he might have added " according to their shareholding " rights ") " but the Special Commissioners in their apportionment " are not so restricted." In Paragraph 8 of the First Schedule " member "

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must have the same meaning. So that when that directs an apportionment " in accordance with the respective interests of the members " that means " in accordance with the respective interests of persons who have any share " or interest in the capital or profits or income of the company ". It seems to me impossible to limit such an interest to the right to receive dividends. And a person who is in a position to wind up a company, and who, on such winding up, is entitled to practically all of its accumulated and undistributed profits, appears to be clearly a person who has " a share or interest in the " capital or profits or income of the company ". As a mere matter of the construction of the Act of 1922, therefore, I think the impugned apportionment was justified.

Much reliance was placed upon the decision of Finlay, J., in the case of *Alexander Drew and Sons, Ltd.* v. *Commissioners of Inland Revenue,* 17 T.C. 140. It is true that, upon the particular facts of that case, it was held that the apportionment of the undistributed income of the company should be to those members who would have received it, and as they would have received it if it had been distributed by the company. But the learned Judge did not purport to lay down any general rule as to the effect of Section 21 (7) and (8) and the First Schedule. I think Wrottesley, J., sufficiently deals with this case on the last page of his judgment.

A further argument was based upon the provision in Section 14 (3) of the Finance Act, 1937. That enacts that where a direction is given under Section 21 of the Act of 1922 with respect to an investment company the Special Commissioners, in determining the respective interests of the members under Paragraph 8 of the First Schedule, " may . . . attribute to each " member an interest corresponding to his interest in the assets of the " company available for distribution among the members in the event of a " winding up." It is argued that this indicates that before this was enacted the Special Commissioners had no such power. I do not think this is a tenable argument. I have said that on the true construction of the Act of 1922 I think they had such a power. The very fact that Mr. Tucker could, at such length and with such plausibility, argue that they had not, may in itself indicate a reason why Parliament thought it desirable in 1937 to make it clear that the argument was not to be open. That the clarification was limited to investment companies and not extended to a trading company may well be, as the Solicitor-General suggested, because an investment company is almost certain to have income coming in after a winding up has begun, whereas a trading company is not so likely.

I think the judgment of Wrottesley, J., was correct, and this appeal should be dismissed with costs.

du Parcq, L.J.—I agree that this appeal should be dismissed.

I wish to add one observation with regard to Section 18 of the Finance Act, 1928. Mr. Tucker suggested that, if his contention were rejected, it would follow that, if the Special Commissioners were first in the field with a request for a copy of the accounts of a company and of the report of the directors, the company, by complying with the request, would lose its rights under the Section. It is as well that it should be stated that no such result will follow from our judgment. If a company is asked to furnish copies of these documents, it is no doubt open to it, when it furnishes them, to make it plain that it is forwarding them, not solely by reason of the request, but in pursuance of Section 18. What is essential is that it should be brought clearly to the notice of the Special Commissioners that the documents are being forwarded with a view to compelling them to perform the duty which is imposed upon them by the Section, namely, the duty of proceeding to

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consider the position of the company in relation to Section 21 of the Finance Act, 1922.

The decision of the main point in the case depends ultimately on the construction of Section 21 (7) of the Finance Act, 1922. This Court has already decided that the word " interest " in the Sub-section must be given, not a restricted, but a wide meaning (*Commissioners of Inland Revenue* v. *Tring Investments, Ltd.*, [1939] 2 K.B. 503, at page 513; 22 T.C. 679, at pages 694–5). Speaking for myself, I do not find it necessary to decide whether Mrs. Latilla and her daughters can be said to have had an interest in the capital of the Company. In the case which I have just cited Macnaghten, J., at page 510 (22 T.C., at page 690), expressed the opinion that the word " capital " in the context might cover " not only share " capital, but also the pecuniary capital of a company, its capital assets." This may be so, but on the other hand it is, I think, undoubtedly true to say that, in common parlance, the " capital " of a company means " the total " sum of the contributions of the shareholders ". I take this definition from the Oxford English Dictionary. I prefer to rest my decision on the fact, which seems to me to be almost beyond dispute, that the ladies concerned had an interest in the profits of the Company. They have in fact shared in its accumulated profits, and, in my opinion, they most clearly had a real financial interest in those profits at the material date, although, as Scott, L.J., has said, the interest was " only realisable upon the happening of a future " event ".

In my judgment Wrottesley, J., came to a right conclusion.

Scott, L.J.—The appeal will be dismissed with costs.

Mr. Tucker.—My Lords, I am instructed to ask your Lordships for leave to appeal to the House of Lords in this case.

Scott, L.J.—Unless the Crown objects we think it a proper case for appeal.

Mr. Hills.—My clients would wish to leave the matter in your Lordships' hands for you to take what course you think fit.

Mr. Tucker.—Then your Lordships will give leave?

Scott, L.J.—Yes.

Mr. Tucker.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lords Russell of Killowen, Macmillan, Porter and Simonds) on 7th, 8th, 12th, 13th, 14th, 15th, and 19th February, 1945, when judgment was reserved. On 22nd March, 1945, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. J. Millard Tucker, K.C., Mr. H. Wynn Parry, K.C., Mr. Terence Donovan and Mr. F. Heyworth Talbot appeared as Counsel for the Company, and the Solicitor-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Russell of Killowen.—My Lords, this appeal is concerned with the provisions of Section 21 of the Finance Act, 1922, as amended by subsequent legislation, dealing with the imposition of Sur-tax upon the income of certain companies which fail to distribute reasonable dividends. The facts of the case

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which are relevant to the determination of the legal questions involved in the appeal must first be stated.

The Appellant Company (which I will refer to simply as " the Company ") was incorporated on 13th September, 1912, under the name Rhoex Development Co., Ltd., with a nominal capital of £100 divided into 100 shares of £1 each. Although its objects, as stated in its memorandum of association, cover innumerable fields of activity, the Company for many years seems to have lived quietly with its modest capital apparently doing nothing in particular. In the year 1927, however, it developed considerable activity. Its capital was increased to £10,000 divided into 10,000 shares of £1 each ; it adopted new articles of association ; it changed its name to F.P.H. Finance Trust, Ltd., and it became a trading company the business of which consisted mainly in financing and dealing in the shares of gold mining and mining development companies. The whole of its capital was issued and belonged beneficially to Mrs. Latilla, the wife of one H. G. Latilla. In the year 1934 Mrs. Latilla sold her shares to Marlands Trust, Ltd. (a company incorporated in Southern Rhodesia) in exchange for debentures in the purchasing company, the shares in which were held by Mrs. Latilla and her two daughters, Mrs. Mayo and Mrs. Campbell. The 10,000 shares in the Company were transferred to the Rhodesian company and its nominees. No dividends were paid on the shares so transferred, but a very large income was accumulated by the Company for the benefit of the Rhodesian company, which was not assessable to Sur-tax. The individuals, however, who owned the shares in the Rhodesian company, became apprehensive in the year 1936, that, as a result of recent financial legislation, the income of the Company might be regarded as income of the shareholders of the Rhodesian company and thus become assessable to Sur-tax. With a view to avoiding the possibility of their thus being called upon to bear a share of the country's taxation, they decided to act.

In pursuance of this decision the capital structure of the Company was altered, and made to represent a state of affairs in which it would seem that the only persons who were beneficially interested in the profits earned by the Company gave up that interest (except to the extent of 5 per cent. upon a capital of £10,000) to new-comers who were prepared to invest in the Company the modest sum of £1,000. Accordingly, on 27th November, 1936, special resolutions of the Appellant Company were passed by which (1) its capital was increased to £11,000 by the creation of 1,000 shares of £1 each ; (2) the existing 10,000 shares became preference shares, the new shares being ordinary shares ; (3) the preference shares became entitled to a fixed cumulative dividend of 5 per cent. and, in a winding up, to the whole of the surplus assets after payment to the ordinary shareholders of the amounts paid up on their shares ; and (4) the ordinary shares became entitled, as regards profits (subject to the rights of the holders of the preference shares), to have distributed among the holders " the whole of any sums declared for distribution as dividends out of " the profits of the Company ", and, as regards assets, the right in a winding up to a priority repayment of £1,000, but with no further or other participation in the assets of the Company. It is, however, to be noted that the voting power was unaltered. It remained as provided in the articles adopted in 1927, namely, a vote for every share, a provision which left complete control of the Company in the hands of the preference shareholders. These, at this stage, were the Rhodesian company and its nominees, they in their turn being under the complete control of Mrs. Latilla and her daughters.

Attention may, I think, properly be called to the unusual type of ordinary share thus created, a share with no interest in surplus assets on a winding up beyond the repayment of the capital paid up on it, and with no interest in the

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profits beyond such a dividend as might be allowed to be declared in its favour by those who by their votes control the Company. It is not, therefore, surprising to find that no offer of these unattractive shares was made to the public. They were, by arrangement, taken up and paid for by the National Mining Corporation, Ltd., a public company with the said H. G. Latilla on its board, one term of the arrangement being that the Company would offer the Corporation 25 per cent. of any underwriting business which it undertook thereafter. The Special Commissioners say in the Case Stated that it is clear that the ordinary shares were offered to the Corporation with conditions attached; they further state that it is clear that the Corporation did not seek the investment but was sought out by the Company, and they add a passage in the following terms: "The scheme by which the capital structure of the "Appellant Company was reorganised within a month of the end of the "accounting period under review was admittedly designed to continue for "the benefit of Mrs. Latilla and her daughters the immunity from liability "to Sur-tax which they had succeeded in securing under the original evasive "design. In our view it is inconceivable that such immunity was to be bought "at the price of handing over to the National Mining Corporation, Ltd. any "substantial part of the profits the conservation of which was of the very "essence of the scheme, and we have come to the conclusion, after considering "such evidence as we had before us to a contrary effect, that there was an "understanding that any dividend declared on the ordinary shares should be "so limited as to be ludicrously incommensurate with the amount of the "income available for distribution."

On 15th December, 1936, the Rhodesian company went into liquidation, and in the same month its 10,000 preference shares in the Company were distributed among Mrs. Latilla (3,334 shares) and Mrs. Mayo and Mrs. Campbell (3,333 shares each). The ladies were entered in the Company's share register as the respective holders of those shares on 2nd February, 1937.

On 12th October, 1937, the Company adopted the accounts for the period of 21 months from 1st April, 1935, to 31st December, 1936, which showed a profit for the period of £645,192, and authorised the distribution of a sum of £146 11*s.* 6*d.* by way of dividends, namely, £46 11*s.* 6*d.* in payment of a dividend on the preference shares at the rate of 5 per cent. per annum from 27th November, 1936, to 31st December, 1936, and £100 in payment of a dividend of 10 per cent. on the ordinary shares for the period to 31st December, 1936. On 1st April, 1938, the Company went into liquidation. In the winding up the Corporation received payment of the £1,000 paid up on the ordinary shares, and the balance of the assets was distributed among Mrs. Latilla and her daughters.

On 2nd September, 1940, the Commissioners issued a direction under Section 21 of the Finance Act, 1922, that for the purposes of assessment to Sur-tax the income of the Company for the period from 1st April, 1935, to 31st December, 1936, should be deemed to be the income of the members; and on 16th May, 1941, they apportioned the actual income (computed at £858,817) as follows: The Corporation, £100; Mrs. Latilla, £286,296 5*s.* 0*d.*; Mrs. Mayo and Mrs. Campbell, £286,210 7*s.* 6*d.* each. An earlier apportionment, which apportioned practically the whole income to the said H. G. Latilla, was not relied on and may be ignored.

On an appeal by the Company against this direction and apportionment, the Special Commissioners discharged the apportionment, but dismissed the appeal against the direction. At the request of the Respondents in your Lordships' House, the Special Commissioners stated a Case for the opinion of

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the High Court. The case was heard by Wrottesley, J., who allowed the appeal, reversed the decision of the Special Commissioners, dismissed a cross-appeal by the Company, and ordered the case to be remitted to the Commissioners for their further consideration and also to make the proper apportionments. An appeal to the Court of Appeal by the Company was dismissed.

These being the relevant facts, I now proceed to consider the provisions of the Finance Acts which are applicable to the case, and the contentions of the parties. Section 21 of the Finance Act, 1922, as originally enacted, only applied to companies which answered the description contained in Sub-section (6), one ingredient of which was registration since 5th April, 1914. It had no application to the Company until a later date. The Section starts with a preamble which states the object of the legislation in the following terms: "With a view to "preventing the avoidance of the payment of super-tax through the with-"holding from distribution of income of a company which would otherwise "be distributed, it is hereby enacted as follows". Sub-section (1) then states the event upon the happening of which the powers conferred by the Sub-section come into operation. The event is thus described: "Where it appears to "the Special Commissioners that any company to which this section applies "has not, within a reasonable time after the end of any year or other period "ending on any date subsequent to the fifth day of April, nineteen hundred "and twenty-two, for which accounts have been made up, distributed to its "members in such manner as to render the amount distributed liable to be "included in the statements to be made by the members of the company of "their total income for the purposes of super-tax, a reasonable part of its "actual income from all sources for the said year or other period". The Sub-section then confers powers upon the Commissioners in the following terms: "The Commissioners may, by notice in writing to the company, direct "that for purposes of assessment to super-tax, the said income of the company "shall, for the year or other period specified in the notice, be deemed to be the "income of the members, and the amount thereof shall be apportioned among "the members". Sub-sections (2) to (6) contain provisions relating to the recovery of the Super-tax in question and to other matters irrelevant to the questions involved in this appeal. Sub-section (7) defines the expression "member" by enacting that it "shall include any person having a share or "interest in the capital or profits or income of a company". Sub-section (8) enacts that: "The provisions contained in the First Schedule to this Act "shall have effect as to the computation of the actual income from all sources "of the company, the apportionment thereof amongst members of the company, "and otherwise for the purpose of carrying into effect, and in connection with, "this section." The provisions of the First Schedule, which relate to apportionment of the said income among members of the company, are contained in Paragraphs 8 and 9 thereof, which run thus: "8. The apportionment of the "actual income from all sources of the company shall be made by the Special "Commissioners in accordance with the respective interests of the members, "and the income as apportioned to each member shall, for the purposes of "super-tax, be deemed to represent his income from his interest in the company "for the year or other period and shall be included in the statement of his "total income or in an amended statement of total income which the Special "Commissioners are hereby authorised to require and shall be deemed to be the "highest part of that income. 9. The income apportioned to a member of "a company under section twenty-one of this Act shall, for the purposes of "super-tax, be deemed to have been received by him at the date to which the "accounts of the company for the year or period were made up."

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By the Finance Act, 1927 (Section 31 (3)), an amendment was made in Sub-section (6) of Section 21 of the Act of 1922, the effect of which was to bring the Company under, and make it subject to, the provisions of that Section. By the same Act (Section 32) provision was made for the case where a member of a company which was subjected to the operation of Section 21 of the Act of 1922 was itself a company. In such a case it was provided that the excess (as therein described) of the amount apportioned to the last-mentioned company should for the purposes of the said Section be deemed to be income of members of that company " and shall be apportioned among them in accordance with " their respective interests in that company ".

The main point at issue between the parties can now be stated. The Company contends that the Commissioners in apportioning the amount of the income in question among the members " in accordance with the respective " interests of the members " are bound to apportion it among those members who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by the Company by way of dividend in accordance with the rights of the members as defined in the memorandum and articles of association of the Company. The result in the present case of an apportionment on those lines would be that a very small part of the fund would be apportioned in substantially equal shares among Mrs. Latilla and her daughters, and that the balance (being substantially the whole of the £858,817) would be apportioned to the Corporation.

On the other hand, the Respondents attribute a wider meaning to the words " the interests of the members ". They contend that the Commissioners must take into consideration all the different interests of the members, including voting power and all shares or interests in the capital or profits or income of the Company as a going concern or in winding up, for the purpose of ascertaining who are the persons who in fact are beneficially interested in the income in question, and in what proportions: in short that the Commissioners should consider the whole position of members under the Company's constitution, including their rights to undistributed profits and otherwise in a winding up.

My Lords, in my opinion the contention of the Company places far too narrow a construction upon the wide and comprehensive words which the Legislature has used, and I can find no language in Section 21 to justify such a construction, but much to justify a broader interpretation. The foundation of the power given by the Section to the Commissioners is the fact that the Company, for an unreasonable time after the end of the period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The Section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as the company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the Commissioners may take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the Section? I can find none. I can conceive many cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases.

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Obviously everyone who falls within the extended definition of member is not necessarily to be included in the apportionment. In my opinion the Commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (1) that they fall within the definition, and (2) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions. Further, I think that, in considering these interests and apportioning the income among members, the Commissioners may properly be guided by the preamble to Section 21 and endeavour to make an apportionment appropriate to their interests to those members for whose benefit, in relation to the avoidance of payment of Super-tax (now Sur-tax), the distribution of income has obviously been withheld. They may well ask themselves the questions, (1) upon whom did it depend whether or not the income should be withheld from distribution, and (2) for whose benefit was the distribution withheld or (in other words) who would avoid payment of Sur-tax by the withholding ? If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question. Other members may also have an interest therein, but to a smaller extent.

Applying this view to the facts of the present case, there should be no doubt about the broad result. Both questions admit of one answer only—namely, Mrs. Latilla and her daughters, whose voting power enabled them (1) to prevent (before liquidation) any distribution to the ordinary shares beyond a nominal percentage, and thus to enforce the " understanding " referred to in the Case Stated ; (2) to wind up the Company at any moment and (subject to the payment of £1,000 to the Corporation) get all the surplus assets (including the fund in question) for themselves, or (3) if ever they wanted the income paid to them as such, to alter the articles of association by special resolution and (notwithstanding article 47) thereby increase the dividends payable on the preference shares to any desired amount.

It was contended that the decision in *Alexander Drew and Sons, Ltd.* v. *Commissioners of Inland Revenue*, 17 T.C. 140, was inconsistent with the contention of the Respondents, but I am unable to agree. In that case the company concerned was a normal trading company which had issued preference and ordinary shares, the interest which each class had in the profits of the company being reflected in the interest which each class possessed in the surplus assets in the event of a winding up (see the judgment of Eve, J., in In re *Alexander Drew & Sons, Ltd.*, [1935] Ch. 93, at page 100). There was no such topsy-turvy structure as existed here. The case was concerned only with the apportionment in relation to blocks of both preference and ordinary shares which had been settled upon tenants for life and remaindermen by two settlements. The shares were registered in the names of the trustees of each settlement, but the apportionments had been made to the tenants for life. The company had gone into liquidation. Finlay, J., affirmed the apportionment, and I think rightly on the facts of that case. It was a difficult position. On the one hand, the tenants for life would normally only be entitled to receive the income produced by the share in the surplus assets in the winding up attributable to the settled shares ; on the other hand, the remaindermen were only entitled to an interest which might only become an interest in possession at some future unpredictable date. The learned Judge solved the problem in the light of Section 31 (4) of the Finance Act, 1927, which provided that the income which was in question in the particular case should for the purposes of Section 21 of the Act of 1922 be deemed to be income available for distribution to the members of the company, and he confirmed the apportionment of the whole

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to the tenants for life, who were the only persons who could be described as beneficially " interested " in any income of the company available for distribution to its members. I am unable to take the view that the decision is inconsistent with the contentions of the Respondents in the present case, or that the learned Judge was concerned with the questions, which, upon the facts of the present case, arise now for your Lordships' consideration.

An apportionment which would result in attributing to Mrs. Latilla and her daughters a minute portion of the fund in question and the balance to the Corporation would be a travesty of the truth ; it would be an apportionment in the inverse ratio to the actual beneficial interest in the fund in question. It would involve the Commissioners closing their eyes to the obvious fact that the persons who owned or controlled all but a nominal interest in the assets and profits of the Appellant Company were the Latilla ladies ; and it would treat as the person overwhelmingly interested in the Company's actual income from all sources for the period in question, the Corporation, whose only interest in fact therein was what the Latilla ladies allowed it to have, an amount which, according to an understanding for which the Latilla ladies had stipulated and which they had the power to enforce, was to be " ludicrously incommensurate " with the . . . income available for distribution." It would be acting upon the ridiculous footing that these ladies, in order to enjoy their income free of Sur-tax, had made a present of it to the Corporation.

Two further arguments on behalf of the Company must be mentioned. Reliance was placed upon the provisions contained in the Finance Act, 1937, Section 14 (3), a Sub-section which runs thus : " Where a direction is given " under subsection (1) of section twenty-one of the Finance Act, 1922, with " respect to an investment company, the Special Commissioners, in determining " the respective interests of the members for the purpose of apportioning " income in accordance therewith under paragraph 8 of the First Schedule " to that Act, may, if it seems proper to them so to do, attribute to each member " an interest corresponding to his interest in the assets of the company available " for distribution among the members in the event of a winding up."

The Company is not an investment company ; but it was said (1) that if the wider construction of the words, " in accordance with the respective interests " of the members ", was the right one, this enactment was unnecessary, and (2) that the restriction of the power to the case of investment companies carried with it an inference that the Commissioners had no such power in the case of other companies. At first sight this would appear to be a formidable argument. But if, as I think it is, the wider construction is the proper one, the Sub-section, on closer consideration, would seem not to be inconsistent with that construction. What the Section does is merely to enable the Commissioners, in the case of investment companies, to disregard all other interests, and look only to interests in the assets on a winding up. An investment company was a very popular ingredient in tax evasion schemes, and the structure of investment companies fulfilling that role was very frequently of a most complicated nature, and the income interests of members were elusive and peculiar. In my opinion all that Section 14 (3) of the Act of 1937 does is to enable the Commissioners to omit all consideration of the state of affairs existing while the company is a going concern, and to apply only the acid test of the interests in surplus assets on a winding up, which would include all interests in undistributed income. There is nothing in the enactment inconsistent with the contention of the Respondents.

The other argument was in the nature of a preliminary objection. It was that, in the circumstances of this particular case, the power of the Commissioners to give any direction or make any apportionment in regard to the Company's income for the period from 1st April, 1935, to 31st December, 1936,

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had absolutely ceased and determined by reason of the provisions contained in Section 18 of the Finance Act, 1928. The relevant provisions of that Section run thus :—

" 18.—(1) Any company to which section twenty-one of the Finance Act, " 1922, applies, may at any time after the general meeting at which the accounts " of the company made up for any year or other period are adopted, forward " to the Special Commissioners for their consideration a copy of the said " accounts, together with a copy of the report, if any, of the directors for that " year or period, and such further information, if any, as it may think fit, and " the Special Commissioners shall, subject to the provisions of this section, on " receiving the said accounts and other documents, if any, proceed to consider " the position of the company in relation to the said section twenty-one.

" (2) The Special Commissioners may as soon as reasonably may be, but " not later than twenty-eight days after the receipt of the said accounts and " other documents, if any, call upon the company to furnish to them within " twenty-eight days, or such extended period as they may subsequently allow, " such further particulars as they may reasonably require : Provided that if " the particulars so required are not furnished to the Commissioners within " the period or extended period allowed for the purpose they may proceed " under this section upon the information before them.

" (3) Where a company has under subsection (1) of this section forwarded " to the Special Commissioners the accounts of the company for any year or " other period, whether with or without any other documents, the following " provisions shall have effect :—(*a*) unless within three months after the " receipt of the said accounts and other documents, or, if further particulars " have been required as aforesaid, within three months after the receipt of " those particulars, or the expiration of the period within which those particulars " are to be furnished, as the case may be, the Special Commissioners intimate " to the company their intention to take further action in the case of the " company under the said section twenty-one in respect of that year or other " period, the power of the Commissioners to take any such further action in " respect of that year or other period shall absolutely cease and determine ".

A few additional facts require to be stated in this connection. The Company did not in fact ever forward to the Commissioners a copy of the accounts for the relevant period adopted at the general meeting, which was held on 12th October, 1937. It is true that in a letter of 5th October, 1937, the Company's accountants sent to the Commissioners a copy of the balance sheet of the Company at 31st December, 1936, and a copy of the profit and loss account for the period ending on that date, but stated that the accounts, though settled by the directors, had not yet been approved in general meeting. Later, in answer to a letter from the Commissioners, the accountants (by letter dated 8th February, 1938) informed them that the general meeting had been held on 12th October, 1937, and that the dividends, already referred to by me, had then been declared. On 19th September, 1939, the Commissioners wrote a letter to the accountants in which they stated that they did not propose to take any further action under Section 21 of the Act of 1922 in respect of the income of the Company for the period ending 31st December, 1936. Subsequently, however, they changed their minds, and gave the direction and made the apportionment of which the Company now complains. It is not suggested, on this part of the case, that the Commissioners could not alter their intention if their powers under Section 21 were still available to them. The point urged is, that as regards the period in question, the powers had ceased because the Commissioners had in fact received the accounts for the period in question and had not within the three months intimated their intention to take further action.

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My Lords, in my opinion, there is nothing in this point. The provisions of Section 18 of the Act of 1928 confer upon companies a means by which, if they comply with the conditions specified, they can secure for themselves the benefit of a short limitation period, upon the expiration of which they will, as regards an accounting period, be freed from the powers conferred on the Commissioners by Section 21 of the Act of 1922. But the provision under which alone this freedom is obtainable (namely, Sub-section (3)) operates only where a company has under the first Sub-section forwarded to the Commissioners the accounts of the company for the period, not the accounts as settled by the directors, but the accounts which have been adopted by the company in general meeting. The specified conditions not having been complied with by the Company, the period of three months never began to run.

For the reasons which I have indicated I would dismiss this appeal with costs.

Lord Macmillan.—My Lords, I am so entirely in agreement with the reasons for the dismissal of this appeal which the noble and learned Lord on the Woolsack has expounded that I need do no more than express my concurrence.

Lord Porter.—My Lords, I also agree with the opinions expressed by the noble and learned Lord on the Woolsack, and concur in the result.

Lord Simonds.—My Lords, I also concur.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and that this appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Birkbeck, Julius, Edwards & Co.]