COURT OF SESSION (FIRST DIVISION)—5TH, 6TH AND 14TH JULY, 1960

HOUSE OF LORDS—5TH, 6TH AND 7TH JUNE, AND 13TH JULY, 1961

Commissioners of Inland Revenue

v.

J. B. Hodge & Co. (Glasgow), Ltd. (in liquidation) ([1])

Profits Tax—Trade or business transferred—Election under Section 36 (4), *Finance Act,* 1947*—Transferor company wound up after selling shares in successor—Distributions exceed paid-up share capital—Whether distribution charge incurred—Finance Act,* 1947 (10 & 11 *Geo.* VI, *c.*35), *Section* 30 (3), 35 (1) (*c*), 36 (4) *and* 43 (1).

The Respondent Company carried on a business of selling and servicing heavy earth-moving equipment from its incorporation until 5th April, 1950, *and during this time obtained relief for non-distribution of profits under Section* 30 (2), *Finance Act,* 1947. *On 5th April,* 1950, *the Company sold its trading assets to a second company in exchange for shares in that company. On 25th September,* 1950, *the companies made a joint election under Section* 36 (4) (*c*), *Finance Act,* 1947.

In 1953 *the Respondent Company sold all its shares in the second company to a third company in exchange for shares in the third company, and part of the latter holding was subsequently sold. The Company went into voluntary liquidation on* 18*th March,* 1955. *The assets distributed in the liquidation exceeded the nominal amount of the paid-up share capital. The Company was therefore assessed to Profits Tax for the chargeable accounting period* 1*st November,* 1954, *to* 18*th March,* 1955, *in respect of a distribution charge.*

On appeal, it was contended on behalf of the Company: (1) *that the Company was not carrying on any trade or business in the period for which the assessment was made;* (2) *alternatively, that the trade or business carried on by the Company before 5th April,* 1950, *was different from that carried on in the period for which the assessment was made, and that, consequently, non-distribution relief given for the earlier period should not be taken into account for the purpose of a distribution charge for the later period;* (3) *that the payments made to the shareholders in the liquidation were not distributions; and* (4) *that, in view of the provisions of Section* 36 (4) (ii), *Finance Act,* 1947, *the non-distribution relief given to the Respondent Company should (except insofar as it had already been taken into account for the purpose of a distribution charge on the Respondent Company) be treated as if it had been given to the successor, and not to the Respondent, company. The Special Commissioners discharged the assessment.*

The Court of Session accepted the Company's fourth contention (but not the others) and unanimously dismissed the Crown's appeal.

In the House of Lords only the second and fourth contentions were argued, and it was held that (i) *Section* 36 (4) *did not relieve the Company of liability to a distribution charge, and* (ii) *the charge fell to be made for the last chargeable accounting period in which any trade or business was carried on.*

([1]) Reported (C.S.) 1961 S.L.T. 361; (H.L.) [1961] 1 W.L.R. 1218; 105 S.J. 681; [1961] 3 All E.R. 172; 232 L.T. Jo. 78; 1961 S.L.T. 361.

CASE

Stated for the opinion of the Court of Session, as the Court of Exchequer in Scotland, under the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 14th May, 1959, for the purpose of hearing appeals, J. B. Hodge & Co. (Glasgow), Ltd. (hereinafter called "the Company"), appealed against an assessment to Profits Tax made upon it for the chargeable accounting period from 1st November, 1954, to 18th March, 1955, in the amount of £63,237 16*s*. (tax). The said tax was described in the notice of assessment as "Distribution Charge", and it was common ground that the assessment was made in pursuance of Section 30 (3) of the Finance Act, 1947.

I. The following facts were admitted or proved:

(1) The Company was incorporated in Scotland in the year 1941 with the name of John Blackwood Hodge & Co., Ltd., and, from the date of incorporation, carried on a trade which consisted in the sale of and service to heavy earth-moving equipment, in the United Kingdom and elsewhere. A print of its memorandum and articles of association is annexed hereto, marked "A", and forms part of this Case [1].

(2) In the course of this trade the Company had, at 5th April, 1950, secured relief for non-distribution from the Profits Tax, in terms of Section 30, Finance Act, 1947, to the following extent:

Chargeable accounting period to		*Non-distribution relief*	
		at 15 *per cent. on*	*at* 20 *per cent. on*
		£	£
31st October, 1947	...	225,407	—
31st October, 1948	...	417,894	—
31st October, 1949	...	164,071	14,914
5th April, 1950	...	—	11,935
		807,372	26,849

(3) On 5th April, 1950, the Company's name was changed to J. B. Hodge & Co. (Glasgow), Ltd., and on the same day a second company was incorporated in England with the name John Blackwood Hodge & Co., Ltd. (hereinafter called "the London company"). A print of the memorandum and articles of association of the London company is annexed hereto, marked "B", and forms part of this Case [1].

(4) By agreement in writing dated 5th April, 1950, made between the Company of the one part and the London company of the other part, the Company sold its trading assets to the London company, the consideration in part consisting in an indemnity against liabilities in terms of the agreement and, as to the residue, of 249,998 ordinary shares of £1 each in the capital of the London company, credited as fully paid (being substantially the whole of the capital of the London company). The said agreement further provided that the transfer of the undertaking and assets to the London company should be deemed to have taken effect at the close of business on 31st October, 1949. A copy of the said agreement is annexed hereto, marked "C", and forms part of this Case [1].

(5) By notice in writing dated 25th September, 1950, addressed to the Inspector of Taxes in Glasgow, the Company and the London company jointly made the election provided for by Section 36 (4) (*c*) of the Finance Act, 1947.

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[1] Not included in the present print.

(6) Subsequent to 5th April, 1950, the Company held or beneficially owned the whole issued share capital of the London company (and no other assets except certain cash), and this position continued unchanged until early in the year 1953 when the Company acquired for cash 1,000,000 shares of 6*d*. each in Leonora Corporation, Ltd. These 1,000,000 shares of 6*d*. each were subsequently converted into 100,000 ordinary shares of 5*s*. each.

(7) On 1st April, 1953, by agreement between the Company and Leonora Corporation, Ltd., the Company sold to Leonora Corporation, Ltd., its shareholding in the London company for a consideration which consisted in 2,059,987 ordinary shares of 5*s*. each and 300,000 6 per cent. preference shares of £1 each, all credited as fully paid, issued by Leonora Corporation, Ltd. On the same date Leonora Corporation, Ltd., changed its name to Blackwood Hodge (Holdings), Ltd. That name has since been changed to Blackwood Hodge, Ltd.

Subsequent to this transaction, as the balance sheet prepared at 31st October, 1953, shows, the principal assets of the Company consisted of 300,000 6 per cent. preference shares of £1 each and 2,159,987 ordinary shares of 5*s*. each in Blackwood Hodge (Holdings), Ltd., with cash at bank, the latter amounting to, at balance sheet date, £189,690.

(8) Accounts and balance sheets of the Company for the years ended 31st October, 1950, 1951, 1952, 1953 and 1954, and balance sheet as at 18th March, 1955, are annexed hereto, marked "D.1", "D.2", "D.3", "D.4", "D.5", and "D.6", respectively, and form part of this Case [1].

(9) The Company sold, for cash, its holding of preference shares in Blackwood Hodge (Holdings), Ltd., as to 210,820 before 31st October, 1953, and as to the balance of 89,180 in the year ended 31st October, 1954. The Company sold, for cash, 50,000 ordinary shares of 5*s*. each, fully paid, in Blackwood Hodge (Holdings), Ltd., before 31st October, 1953, and 10,000 of such shares in the year ended 31st October, 1954.

(10) By special resolution passed 18th March, 1955, it was resolved that the Company be wound up, and a liquidator was duly appointed.

(11) At the date of the resolution for voluntary liquidation the Company held, as its principal asset, 2,099,987 ordinary shares of 5*s*. each in Blackwood Hodge (Holdings), Ltd. The value of these shares at that date is estimated at £2,519,984. At that time, and throughout any period relevant to the present proceedings, the nominal amount of the paid-up share capital of the Company for the purposes of Section 35, Finance Act, 1947, amounted to £56,000.

(12) The assets distributed by the Company in the course of its liquidation exceeded the nominal amount of the paid-up share capital and, by notice of assessment dated 30th March, 1959, a Profits Tax distribution charge amounting to £63,237 16*s*. (tax) was made upon the Company for the chargeable accounting period of four months and 18 days ended 18th March, 1955.

II. It was contended on behalf of the Company that:

(1) the profits assessed arose from a trade which was not carried on by the Company in the period assessed;

(2) by virtue of the notice under Section 36 (4) of the Finance Act, 1947, the profits assessed were not, in any event, chargeable on the Appellant Company;

(3) on either of these grounds the assessment should be discharged.

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[1] Not included in the present print.

III. It was contended on behalf of the Crown that:

(1) between 5th April, 1950, and the date of its liquidation, the Company carried on a trade or business within the charge to Profits Tax under Section 19 of the Finance Act, 1937, and the Company was accordingly within the charge to Profits Tax at all relevant times;

(2) the Company had been properly assessed to Profits Tax under the provisions of Section 30 (3) of the Finance Act, 1947;

(3) nothing in Section 36 (4) of the Finance Act, 1947, prevented the distribution charge to which the appeal related being made upon the Company;

(4) the assessment appealed against should be confirmed.

IV. We, the Commissioners who heard the appeal, gave our decision as follows:

(1) In our opinion, the functions of the Company during the relevant period consisted wholly or mainly in the holding of investments, and accordingly the Company is to be deemed to be carrying on a business during the chargeable accounting period to which the appeal relates.

(2) In our opinion, the proviso to Section 30 (3) of the Finance Act, 1947, which provides that the amount on which a distribution charge is made "shall not . . . exceed the total of the differences in respect of which reductions have been made under subsection (2) of this section for previous chargeable accounting periods" refers to previous chargeable accounting periods of the trade or business on the profits of which tax is being charged, i.e., in relation to the assessment before us, previous chargeable accounting periods of the trade or business carried on by the Company during the period covered by the assessment.

The Company did obtain reductions under Sub-section (2) for chargeable accounting periods of its former trade of dealing in and servicing earth-moving machinery, but inasmuch as it was not carrying on that trade during the period covered by the assessment such reductions have, in our view, no relevance to the assessment under appeal. For these reasons we hold that the Crown's main contention fails.

(3) We are also of the opinion that the alternative contention put to us on behalf of the Company is well-founded. We read the word "already" in paragraph (ii) of Section 36 (4) of the Finance Act, 1947, as referring to the time when the election under that Sub-section is made, and consequently (on this reading) the said paragraph (ii) takes effect in relation to the London company as regards the differences on which non-distribution relief was given to the Company prior to the date of the election. If this view is correct, it seems to us implicit that the said differences, which have to be taken into account as if they had been differences arising in relation to the London company, cannot be taken into account in assessing a distribution charge on the Company.

(4) We hold that the appeal succeeds in principle and we leave the figures to be agreed.

At a later date, following agreement between the parties upon the basis of our decision, we reduced the assessment to Nil.

V. The Crown 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 and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, which Case we have stated and do sign accordingly.

The question of law for the opinion of the Court is whether we were right in deciding that the Company was not liable to the distribution charge made upon it by the assessment appealed against.

R. A. Furtado
W. E. Bradley
Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.
22nd March, 1960.

The case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Carmont, Sorn and Guthrie), on 5th and 6th July, 1960, when judgment was reserved. On 14th July, 1960, judgment was given unanimously against the Crown, with expenses.

The Solicitor-General for Scotland (Mr. D. C. Anderson, Q.C.) and Mr. A. J. Mackenzie Stuart appeared as Counsel for the Crown, and Mr. W. I. R. Fraser, Q.C., and Mr. T. W. Strachan for the Company.

The Lord President (Clyde).—This is an appeal by the Crown against a decision of the Special Commissioners discharging an assessment on the Respondents, J. B. Hodge & Co. (Glasgow), Ltd., who are in voluntary liquidation. The assessment was an assessment to Profits Tax made for the chargeable accounting period 1st November, 1954, to date of liquidation, 18th March, 1955. The assessment was discharged upon two separate and independent grounds, firstly, upon the ground that the profits assessed arose from a trade or business which was held not to have been carried on by the Respondents in the period covered by the assessment. This depends mainly upon a construction of Section 30 (3) of the Finance Act, 1947. Secondly, the Special Commissioners held that the assessment in any event was not leviable on the Respondents because of a notice given under Section 36 (4) of the Finance Act, 1947. The soundness of this ground for discharging the assessment depends upon a construction of the latter Sub-section and, as it raised a quite separate point, I shall deal with it, and the facts relating to it, after I have considered the first point.

The Respondent Company carried on business from its incorporation in 1941 in the selling and servicing of heavy earth-moving equipment until 5th April, 1950. In the course of this trade the Respondents secured relief for non-distribution of profits in terms of Section 30 of the 1947 Act. On 5th April, 1950, the Respondents sold their trading assets to a company which I shall refer to as the London company, the consideration being substantially the whole share capital of the London company. Thereafter the Respondents operated as a holding or investment company until they went into voluntary liquidation on 18th March, 1955. The liquidator proceeded thereafter to liquidate the Company and distribute the assets. The Company's financial year began on 1st November. The assets distributed by the liquidator exceeded the nominal amount of the paid-up capital, and a Profits Tax distribution charge was made upon the Respondents for the chargeable accounting period for 1st November, 1954, to 18th March, 1955. The validity of this charge is the subject-matter of this appeal.

I turn now to the first of the two grounds upon which the Special Commissioners discharged the assessment. It arises in regard to Section 30 (3) of

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the 1947 Act, in virtue of which the assessment is imposed. Before considering the main issue I shall dispose first of all of two preliminary points which were raised. The first was this: to enable the assessment to be made, the Respondents must have been carrying on a trade or business during the period 1st November, 1954, to the date of liquidation. It was argued that they were not so doing. But it appears to me to be clear that during that period the function of the Respondents consisted wholly, or at any rate mainly, in the holding of investments, and must therefore be deemed to be carrying on a business within the meaning of the Profits Tax legislation (see Section 19 (4) of the Finance Act, 1937). If so, the period in question is a chargeable accounting period for the purposes of Profits Tax. The other preliminary point was whether or not, in respect of this chargeable accounting period, the Respondents made a distribution. If they did not, of course, the assessment made upon them would be bad. But the terms of Section 35 (1) (*c*) of the 1947 Act necessarily lead, in my opinion, to the conclusion that a distribution was made in so far as the payments by the liquidator to the shareholders exceeded the nominal amount of the paid-up capital of the Company. It is true that Section 35 (1) (*c*) is not in terms made applicable to a company which is being wound up, but it is well settled that the language in the Sub-section is wide enough to cover such a case (see *Commissioners of Inland Revenue* v. *Pollock & Peel, Ltd.*, 37 T.C. 240, *per* Lord Evershed, M.R., at page 253; *Carpet Agencies, Ltd.* v. *Commissioners of Inland Revenue*, 38 T.C. 223, *per* Harman, J., at page 231). It was argued that the distributions in question were not "distributions" within the definition of that term in Section 36 (1), but I do not read the definition in this latter Sub-section as exhaustive of what is comprised within the term "distribution", but as merely setting out certain things which are deemed to be distributions. These preliminary points do not, therefore, avail the Respondents, and I turn now to the main argument on Section 30 (3) of the 1947 Act.

The Respondents contend that the assessment, to be validly made under Section 30 (3) and the proviso thereto, can only be in respect of profits arising from the trade in which the Respondents were engaged in the chargeable accounting period 1st November, 1954, to the date of liquidation. They therefore contend that, as the assessment took account of profits from the pre-1950 trade of the Company which had been the subject of non-distribution relief, they could not be taken into account in a period when the Respondents were not conducting that trade at all, but were engaged in a different trade or business, namely that of a holding company only. This contention, however, in my opinion, is ill-founded, and proceeds on an erroneous interpretation of Section 30 (3). In its original form when it was known as the National Defence Contribution, Profits Tax was a straightforward tax on the profits of the trading in the chargeable accounting period. But its whole structure was altered in the Finance Act, 1947. This Act sought to discourage the distribution of dividends, and thus devised a method of inducing companies to retain part at least of their profits in each chargeable accounting period by providing a more favourable rate of Profits Tax on the sums so retained (see Section 30 (2)). But the relief so given in respect of retained profits is not permanent, but only suspensive. Under Section 30 (3), if in a subsequent year the retained profits are distributed, these retained profits attract a liability to Profits Tax, subject to the proviso that

> "the amount on which tax is chargeable under this subsection for any chargeable accounting period shall not, when added to the total of the amounts on which tax is charged thereunder for previous chargeable accounting periods, exceed the total of the differences in respect of which reductions have been made under subsection (2) of this section for previous chargeable accounting periods."

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It is thus apparent that after 1947 the profits of each chargeable accounting period are no longer in separate watertight compartments. As Harman, J., said in *Lamson Paragon Supply Co., Ltd.* v. *Commissioners of Inland Revenue*, 32 T.C. 302, at pages 307 and 308, Sub-section (3) of Section 30 merely withdraws in certain cases the relief given in Sub-section (2) of the same Section. After 1947 reliefs given to the trader in previous years may be brought into account in the subsequent years. Section 43 (1) of the 1947 Act provides:

> "All trades or businesses to which section nineteen of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

It is not open, therefore, in my view, to the Respondents to contend that, because the trade in which they were engaged before 1950 and in respect of which they got relief from Profits Tax for non-distribution of profits has been discontinued by them, and because in 1954 and 1955 they were engaged in a quite different trade, the relief they got before 1950 must be excluded from consideration in computing their liability to Profits Tax in the latter period. On the contrary, the words in the proviso to Section 30 (3) are quite general and refer to "previous chargeable accounting periods", not, as the Respondents' contention would require, to "previous accounting periods during which their existing trade is carried on." The Respondents referred to a *dictum* of Lord Morton of Henryton in *Commissioners of Inland Revenue* v. *Butterley & Co., Ltd.*(1), [1957] A.C. 32, at page 57. But that case was concerned with the question whether the payment in question was "profits" within the meaning of these Acts, and has no bearing on the present case. The Special Commissioners construed the proviso to Section 30 (3) in the way contended for by the Respondents. In so doing they were, in my opinion, in error.

That, however, is not the end of the matter, as the second ground for their discharging the assessment still remains to be considered. That ground depends upon the meaning and effect of Section 36 (4). This Sub-section deals with the situation where, as in the present case, the assets of one company (the Respondents) are transferred (as they were in 1950) to another company (the London company). The Sub-section enables certain of the distribution charges which might have fallen on the transferor company to be thrown upon the transferee company (see Lord Evershed, M.R., in *Commissioners of Inland Revenue* v. *Pollock & Peel, Ltd.*, 37 T.C. 240, at page 254). The method provided for is a notice in writing from the two companies to the Commissioners of Inland Revenue. In the present case it is not disputed that the requisite notice was sent on 25th September, 1950, and that the requirements of heads (*a*), (*b*) and (*c*) of Section 36 (4) were satisfied. The question at issue is the meaning and effect of paragraph (ii) of that Sub-section. The Sub-section provides that where there is such an election by the two companies jointly the provisions of this Part of this Act shall apply subject to two modifications. I regard these modifications as two separate and independent exceptions, the second of which is not dependent on the first being applicable. The second one would not have been required if it could only operate where the first was applicable. Admittedly, the first modification does not apply in the present case, and it need not therefore be considered. The second modification, so far as material to the present question, is as follows:

> "in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company . . . shall, except so far as it has already operated to increase a distribution charge on the first company, be

(1) 36 T.C. 411, at p. 449.

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> taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief has been given to that company".

In my opinion, the effect of this modification is that non-distribution relief given to the transferor company before the election is to be taken into account thereafter as effeiring to the transferee company; and the Commissioners of Inland Revenue are directed, in calculating thereafter the distribution charge, if any, payable by the transferee company, to take this factor into account as if the non-distribution relief had been given to the transferee company. If this be sound then it necessarily follows that the transferor company's relief cannot be taken into account after the election in assessing the transferor company to Profits Tax. As the assessments in question in this case are computed on the basis that the transferor company's relief can be taken into account in computing its liability to tax, the assessments fall therefore to be discharged, and on this aspect of the matter I agree with the reasoning and with the conclusion of the Special Commissioners in paragraph (3) of their decision.

The alternative construction of this second modification contended for by the Crown is that the joint election by the two companies does not in itself affect the liability to a distribution charge in the case of the transferor company. The election still leaves it open to the Commissioners of Inland Revenue to make a subsequent distribution charge on the transferor company as they have done in the present case. The election does affect the computation of the distribution charge which may be made in any subsequent year on the transferee company, by enabling the Commissioners of Inland Revenue to take into account in the computation the obligation for a distribution charge which could be made on the transferor company so far as that obligation has not already been operated against the transferor company when the computation is made. This construction of the statutory provision, however, would render largely nugatory the benefit of the election provided in Section 36. For it would be wholly in favour of the Inland Revenue. Moreover, while entitling the Inland Revenue to recover from the transferee company the whole sums payable in respect of non-distribution relief of both companies, it makes no provision for reducing the liability thereafter of the transferor company in connection with a distribution charge upon it. The result would be that the tax could be recovered once from one company and again from the other.

For these reasons I reject the construction of the statutory provision contended for by the Crown, and on the whole matter in my opinion the question put to us should be answered in the affirmative.

Lord Carmont.—In deciding that the Respondent Company is not liable to pay the distribution charge laid upon it, the Special Commissioners proceeded on two grounds: (1) that the profits assessed arose from a trade which was not carried on by the Company during the period specified in the assessment; and (2) that the differences on which non-distribution relief was given fell to be taken into account in relation to the London company, and cannot be taken into account in assessing a distribution charge on the Respondent Company. In my opinion, the Special Commissioners were wrong on the first ground stated and right on the second. A decision in favour of the Respondents on the second point, however, is sufficient for their success in this Stated Case. I shall deal, however, with both points.

First, the carrying on of the business. This point seems to be easy of solution. The business of a limited company lies in carrying on the functions and activities authorised by the memorandum of the company. There is no question, I think, of carrying on two separate trades or businesses, as was suggested —one of dealing in earth-moving machinery and one in holding shares in an-

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other company engaged in similar industrial activities. There was no cesser of the Respondent Company's business when it gave up dealing itself in machinery and confined its business to holding the shares of a subsidiary company. The Respondent was still carrying out the authorised business, and the references in Section 30 of the Finance Act, 1947, to "previous chargeable accounting periods" does not, in the case of the Respondent Company, fall to be differentiated by reference to periods during which the Respondent Company was directly, as opposed to indirectly, dealing with the production of earth-moving machinery.

Turning to the second ground relied on by the Special Commissioners, I find the statutory enactment somewhat obscure. The matter of cardinal importance is, I think, that the Respondent Company transferred in 1949 to the London company its sales and service activities in connection with earth-moving equipment and its trading assets, in consideration for an indemnity against liabilities and an assignment of shares in the London company amounting to almost the whole of the London company's capital. The Finance Act, 1947, makes provision for companies effecting such reconstruction of business jointly, by electing under Section 36 (4) that the provisions of the Profits Tax part of the Act should apply to the state of matters brought about by the reconstruction. It seems plain to me that the purpose of this enactment, Section 36 (4), was to place the burden of Profits Tax, which was already on the shoulders of the transferor company (Glasgow), on to the London company. It is suggested by the Crown that it is not a case of transferring the burden of Profits Tax liability from the one to the other company, but of the Statute making the transferee come under obligation for payment of the tax in addition to and not in substitution for the transferor company. It is quite true that the Sub-section in question does not in terms free the transferor from its Profits Tax obligation, but it is difficult to appreciate why any election should be made that would confer no benefit on the transferor company, and would merely effect the result of giving the Crown additional security for the payment of the tax. Such an interpretation seems to me to be out of harmony with, at all events, one plain effect of Section 36 (4) (ii), for it is provided that, in considering what distribution charge falls to be borne by the transferee company after an election, the transferee company can, at all events, take into account the fact (if it be so) that the transferor company was given the benefit of any difference on which non-distribution relief for chargeable accounting periods before the transfer operated. This points to substitution rather than the adding of one obligant to another so far, at all events, as part of the relief is concerned. So viewing the Sub-section, and even taking the point in isolation, the question put in the Case should be answered in the affirmative.

Lord Sorn.—The Company succeeded in its appeal before the Special Commissioners on both of two distinct grounds. The first ground was that the assessment was not warranted by the terms of the Profits Tax Statutes. The second ground was that, if the assessment was otherwise warranted, the Company's liability had been transferred to the London company as the result of an election in terms of Section 36 (4) of the Finance Act, 1947. I shall deal with each of these grounds in the above order and, as regards the first ground, the simplest method will be to refer in turn to the provisions relied on by the Crown as justifying the assessment and to consider the arguments we heard about them.

First of all, how does it come about that money paid over by the liquidator of the Company can be treated as a relevant distribution? This depends on Section 35 (1) (*c*) of the Act of 1947, which describes what "gross relevant

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distributions" are and, envisaging such a situation as we have here, enacts that they comprise:

"(*c*) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period . . . as is not a distribution of capital".

The Sub-section goes on to explain that this means any distribution in excess of the nominal amount of the paid-up capital. We have not been given the figures, but it is not in dispute that payments in excess of the nominal amount of the paid-up capital have been made. Founding on this Sub-section, the Crown maintain that these payments are gross relevant distributions. To this the Respondents have more than one objection. In the first place, they point to the next succeeding Section, which deals with the meaning of the word "distribution", and claim that payments by a liquidator are not included in the enumeration of the things that are to be deemed to be a "distribution". If the payment by the liquidator is not a "distribution", how can it be a "gross relevant distribution"? But the two Sections have to be read together, and the language of Section 35 (1) (*c*) clearly covers the case of payments made in a winding-up. Rather than frustrate this provision, it is natural to read the word "dividend" occurring in Section 36 (1) as covering such payments or, alternatively, to regard Section 36 (1) as being intended to affix the label of distribution to the doing of certain things, rather than as being intended to provide an exhaustive definition of the word as used in the Act. The next point taken by the Respondents was that the assessment was not warranted by Section 35 (1) (*c*), in respect that it was laid on for a period during which the Company did not carry on a trade or business. The selling of earth-moving equipment had ceased in April, 1950, and since then, it was said, no trade or business had been carried on. I do not, however, find this view acceptable. The character of the trade or business, of course, underwent a change when the Company sold its whole trading assets to the London company in exchange for shares in that company; but, by doing this, the Company turned itself into a holding company, and it seems to be that, thereafter, it carried on business as such. I should arrive at that view apart from anything in the relevant Statutes, but I also think that the case is covered by Section 19 (4) of the Finance Act, 1937, which is in these terms:

"Where the functions of a company . . . consist wholly or mainly in the holding of investments and other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company".

Once the Company had transferred its whole trading assets and truly converted itself into a holding company it can properly be said that its "functions" consisted of holding investments. In this respect the case is distinguishable from cases such as *Carpet Agencies, Ltd.* v. *Commissioners of Inland Revenue*, 38 T.C. 223, and *Commissioners of Inland Revenue* v. *Buxton Palace Hotel, Ltd.*, 29 T.C. 329, and more nearly resembles *Costa Rica Railway Co., Ltd.* v. *Commissioners of Inland Revenue*, 29 T.C. 34. Further, on the mixed question of fact and law to which Section 19 (4) gives rise, we have the finding of the Special Commissioners that the Company was carrying on a business in the period covered by the assessment, and I see no justification for interfering with that finding.

Having established that the payments made by the liquidator were gross relevant distributions and there being, in the circumstances of the case, no adjustment required in order to arrive at net relevant distributions, it followed, according to the Crown, that the amounts paid by the liquidator were net relevant distributions and, since there were no profits in the accounting period,

subject as such to a distribution charge under Section 30 (3) of the Act of 1947. It was here that the Respondents made their final and main challenge, maintaining that the provisions of Section 30 (3) were not applicable. The challenge was based on the fact that the trade or business which had been carried on at the time when non-distribution relief had been given was no longer being carried on in the period of assessment, although the Company was carrying on another trade or business during that period. The scheme of the Profits Tax Statutes, it was said, looks to the profits of a trade or business rather than to the profits of the trader, and, if Section 30 of the Act of 1947 is approached with this in mind, it could be seen that the Section pre-supposes the continuance of the particular trade throughout the course of its operation. Sub-section (2) provides that

> "if, in the case of any trade or business, the net relevant distributions . . . are less than the profits thereof",

non-distribution relief shall be given on the difference. In providing for the delayed collection of the balance of tax on these profits, Sub-section (3) similarly provides that

> "if, in the case of a trade or business, the net relevant distributions . . . are greater than the profits thereof",

a distribution charge shall be levied on the difference. If there were no other provision to consider, and if we had simply to consider the effect of Section 30 alone, occurring as it does in the framework of the earlier Act of 1937 which dealt separately with the profits of each individual trade, there would be much to be said for the Respondents' view. But when the Act of 1947 introduced non-distribution relief and distribution charges, it abolished at the same time the separation between one trade and another, and thus, so far as these innovations were concerned, concentrated its aim rather on the trader. By Section 43 (1) of the Act of 1947 it is provided that

> "All trades or businesses to which section nineteen of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

This, in my view, applies to all businesses carried on by the same person, whether simultaneously or in succession. The earth-moving equipment business was carried on by the Company and the investment holding business was carried on by the Company; and the effect of the Sub-section is that, for all purposes, including the application of Section 30 (3) of the Act, they must be treated as one trade or business. It follows from this that the cesser of one of the trades or businesses carried on by the Company is not material, and that they were properly assessable for a distribution charge under Section 30 (3). We were referred on this branch of the case to *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.*(1), [1957] A.C. 32. In that case a company had received a most peculiar kind of payment, and it was held that the payment was not subject to Profits Tax because it was not a profit of any trade or business carried on by the company. This shows, as the Respondents rightly contended, that the Profits Tax Statutes are concerned only with the profits of a trade or business. But the question in *Butterley's* case was very different from the question here. That case decided that a payment received by a company does not come into the grip of the Profits Tax Statutes unless it emanates from a trade or business carried on by the company. We have no such question here. There is no question but that the profits which gave rise to non-distribution relief, and which are now said to give rise to a distribution charge, came within the grip of the Statutes. The only question is whether the Company is immune

(1) 36 T.C. 411.

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from a distribution charge in respect of those profits because the trade which gave rise to these profits has been discontinued, and, in my opinion, it is not immune, because of the provision contained in Section 43 (1). So far, then, as this ground of decision is concerned, I come to a conclusion favourable to the Crown and different from that arrived at by the Special Commissioners.

I pass now to consider the effect of the election made under Section 36 (4) of the 1947 Act. It is a matter of agreement that the conditions for election were all fulfilled, and the question is as to the effect of it. Having sold the London company shares in exchange for shares in the Leonora company it was not open to the Respondent Company to make use of modification (i), and no question arises under it. It is the effect of modification (ii) that is in question. The Respondents contend that its effect is to transfer from what the Sub-section calls "the first company" to what the Sub-section calls "the second company" all its liabilities with regard to the "differences" on which non-distribution relief has in the past been granted in respect of the transferred trade or business. I think this contention is right. It was suggested by the Crown that the effect was to render the second company liable for the first company's differences without relieving the first company, but, apart from making election appear to be an inexplainably unattractive proposition, this view does not seem to me to consist with the language of the provision. The terms of modification (ii) are mandatory. The differences of the first company "shall" be taken into account in considering what distribution charge is to be made on the second company, and if it were to be open alternatively to assess the first company, and such assessment were made, this would preclude fulfilment of the mandatory instruction. Moreover, if a joint liability had been contemplated, it would have been just as necessary to provide, in arriving at the distribution charge to be made on the first company, for allowance being made for differences which had increased the distribution charge on the second company—and there is no such provision. The Crown attached some importance to the fact that the difference was to be taken into account

> "except so far as it has already operated to increase a distribution charge on the first company"

and argued that, since the computation of the liability of the second company would be a recurrent future event, this suggested the existence of a continuing possibility that the first company would be paying distribution charges. But the words quoted can be given a much simpler meaning by referring them to the time when liability for the first company's differences is transferred to the second company. By taking them to mean that, naturally, it is not the whole aggregate of the differences which the second company takes on its shoulders, but only the differences in so far as the first company has not, so to speak, already honoured them by previous payment of distribution charges. While I believe the Respondents' reading of the Sub-section to be the right one, I recognise that the Sub-section is not free from obscurity. It is noticeable that the modifications do not expressly relieve the first company of liability, but it seems to me that this results by clear implication. Then it was said to us: if the Respondents' interpretation of modification (ii) is correct, what was the need for modification (i)? Strictly speaking it may have been unnecessary, but its presence may not be unconnected with the contents of Sub-section (1) of the same Section. By paragraph (*b*) of that Sub-section, the distribution of assets in kind is expressly made a "distribution" within the meaning of the Act. It may have been thought better, standing that provision, to make it quite clear that, if an election is made, the first company could make that sort of distribution without incurring liability, rather than leave this to rest upon implication from

the terms of modification (ii), which deals primarily with recurrent distributions in the course of carrying on a trade or business. My conclusion is that the decision of the Special Commissioners on the second, or alternative, ground was correct and the question in the case should, accordingly, be answered in the affirmative.

Lord Guthrie.—I concur.

The Crown having appealed against the above decision, the case came before the House of Lords (Lords Reid, Cohen, Guest and Hodson) on 5th, 6th and 7th June, 1961, when judgment was reserved. On 13th July, 1961, judgment was given unanimously in favour of the Crown, with costs.

The Solicitor-General for Scotland (Mr. D. C. Anderson, Q.C.), Mr. Alan Orr and Mr. A. J. Mackenzie Stuart appeared as Counsel for the Crown, and Sir John Senter, Q.C., Mr. Desmond Miller, Q.C., and Mr. Neil Elles for the Company.

Lord Reid.—My Lords, the Respondents carried on a business of selling heavy earth-moving equipment from 1941 to 1950. During that period they were allowed non-distribution relief under Section 30 (2) of the Finance Act, 1947. On 5th April, 1950, they sold that business to another company, and thereafter they carried on business as a holding or investment company. They went into voluntary liquidation on 18th March, 1955. They were assessed in respect of their last chargeable accounting period, 1st November, 1954, to 18th March, 1955, to a distribution charge of £63,237 under Section 30 (3) of the 1947 Act. They maintain that that assessment is invalid on two separate alternative grounds. First, they say that they are relieved of liability by Section 36 (4) of the 1947 Act. Alternatively, they say that, in any event, the assessment is bad because made in respect of the wrong chargeable accounting period. The First Division sustained the first objection but not the second.

Admittedly, Section 36 (4) applies. The former business was sold to another company as part of a scheme of reconstruction, the consideration consisted wholly or mainly of shares of the purchasing company, and the two companies jointly elected that the Section should apply. This Section enacts two "modifications" of the other provisions of the Act, and this first point turns entirely on the proper construction of the second of these modifications. They are:

> "(i) any distribution of those shares to any person in a winding up of the first company shall, notwithstanding anything in subsection (1) of this section, not be deemed for the purposes of the last preceding section to be a distribution to that person; and (ii) in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company or other person assessable to profits tax on the profits of the trade or business of the first company shall, except so far as it has already operated to increase a distribution charge on the first company, be taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief had been given to that company, and shall also be taken into account, in the case of the last chargeable accounting period of the second company, so as to increase the amount which, for the purposes of paragraph (c) of subsection (1) of the last preceding section, is to be treated as not a distribution of capital."

The general scheme of the 1947 Act was to encourage the retention of profits in the business by granting non-distribution relief under Section 30 (2). But if the retained profits were later distributed that relief was withdrawn by means of a distribution charge under Section 30 (3). So a purchaser of a busi-

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ness, not having received relief, would not be liable to pay a distribution charge, but the seller would remain liable in the event of the retained profits being later distributed. The modifications alter this in two respects: the second makes the purchasing company liable to pay distribution charges in future as if it had received the non-distribution relief which the selling company received before the sale, and the first grants a limited exemption from distribution charges to the seller—limited in that it only applies on a liquidation of the selling company and only applies to certain assets of that company, its shares in the purchasing company.

These modifications would be comparatively easy to apply if the selling company went into liquidation soon after the sale. But that did not happen in this case. The selling company, the Respondents, carried on business for a considerable time, and during that time they sold their shares in the purchasing company. Accordingly, modification (i) gave them no benefit. But they maintain that the terms of modification (ii) are such as to relieve them from all liability for distribution charges, and if I had to consider this modification by itself I would agree with the First Division in reaching that conclusion. But if that were right, modification (i) would be unnecessary. No doubt there are cases where an unnecessary provision is inserted in an Act to avoid some possible doubt. But, in the circumstances of this case, I cannot regard that as a possible explanation. I cannot imagine any competent draftsman inserting modification (i) if he intended that every distribution, whether of shares or money and whether in a winding-up or not, should not be deemed for the purposes of Sub-section (1) to be a distribution. But that is said to be the effect of modification (ii). Of course, if the language of modification (ii) were capable of no other interpretation, that would be an end of the matter. But the most that can be said is that it has failed to provide for important matters which clearly ought to have been provided for if the intention was to make the purchasing company liable and also to preserve the liability of the selling company, subject only to the relief given by modification (i). I do not think that, in the circumstances, that is sufficient to turn the scale. The draftsman may have overlooked the possibility that companies would make this election and yet the selling company would not go into liquidation at once: it is difficult to see why companies should make this election otherwise, because the selling company would get no immediate benefit from it, whereas the purchasing company would get an immediate detriment. But, whether or not that is a possible explanation, I find it impossible to dissent from your Lordships' view on this point, though I recognise the strength of the Respondents' case.

The second point is highly technical, and I agree with the decision of the First Division. The Respondents first argue that Section 43 (1) of the 1947 Act does not apply to this case It is in the following terms:

> "All trades or businesses to which section nineteen of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

Under the original 1937 Act, if a person carried on two trades simultaneously these trades had to be dealt with separately. It is argued that the sole purpose of Section 43 is to require that all trades carried on by a person simultaneously shall be treated as one for the purposes of this tax and that it has no application where, as in the present case, a taxpayer first carries on one trade and then, after ceasing to carry it on, he starts another. Then the Respondents go to Section 35 (1) (*c*), which includes in the gross relevant distribution,

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"in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period . . . as is not a distribution of capital".

If Section 43 does not apply, then "*the* trade or business" must, in this case, be the former trade in machinery, because it was in respect of the profits of that trade that the non-distribution relief was granted, and a distribution charge is merely a belated collection of the tax of which payment was postponed by the non-distribution relief. The reasoning in this House in *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.*, 36 T.C. 411, shows that Profits Tax in respect of the profits of any trade can never be assessable except for a chargeable accounting period during which that trade is in fact being carried on. So, it is argued, both the general scheme of the Act and the express terms of Section 35 (1) (*c*) show that any assessment for the purpose of collecting, by means of a distribution charge, the tax of which payment was postponed by non-distribution relief can only be effective if it is made in respect of the last chargeable accounting period in which the trade which yielded the profits sought to be taxed was actually carried on.

If one stops there the argument is attractively logical, but it would lead to strange consequences, and I do not think that it can be reconciled with the scheme of Section 30 (2) and (3), which are in the following terms:

"(2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are less than the profits thereof for that period chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to seven and a half per cent. of the difference. (3) Subject to the provisions of this Part of this Act, if, in the case of a trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition to the other profits tax, if any, chargeable therefor, profits tax at the rate of seven and a half per cent. on the amount of the difference: Provided that the amount on which tax is chargeable under this subsection for any chargeable accounting period shall not, when added to the total of the amounts on which tax is charged thereunder for previous chargeable accounting periods, exceed the total of the differences in respect of which reductions have been made under subsection (2) of this section for previous chargeable accounting periods."

I cannot see how these provisions can properly be applied if a line has to be drawn when a company ceases to carry on one trade and begins another. They appear to me to require that so long as a company is trading at all each year's accounts shall be considered. If, in respect of a particular year, less is distributed than the profits of that year, non-distribution relief is granted under Sub-section (2). The difficulty arises under Sub-section (3). When more is distributed than the profits of the year it authorises a distribution charge which will collect the tax of which payment was postponed by operation in a previous year of non-distribution relief. Suppose a case where, in the course of a previous trade, there was non-distribution relief in respect of £10,000. Then, in some year after that trade ceased and a new trade started, £15,000 more is distributed than the profits of that year. It appears to me to be plain that the Sub-section requires a distribution charge which will withdraw the earlier non-distribution relief. But, if that is so, it completely destroys the Respondents' theory, because the Sub-section requires this charge to be made for the period when the excess distribution was made, whereas the Respondents' theory is that it is incompetent to make a distribution charge of this kind in respect of any period after the cessation of the former trade: the

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former trade yielded the profits in respect of which the non-distribution relief was granted, and that relief can only be withdrawn—so it is said—by an assessment relating to a period during which the trade was still being carried on. The Respondents' theory can be plausibly argued in the present case because the assessment is made in a liquidation. I do not see how it could work if the excess distribution was made by a going concern which continued to carry on the new trade, unless, indeed, some limitation is to be read into Sub-section (3) which would go far to destroy the whole scheme.

The real flaw in the Respondents' argument is, I think, a misconstruction of Section 35 (1) (*c*). If the last chargeable accounting period there referred to is the last period during which any trade or business is carried on, the scheme works perfectly well. But if it is the last period during which a particular trade was carried on it leads to an absurd result: it would require "any distribution" made after that particular trade ceased—which would include distribution of the profits of the new trade—to be included in the gross relevant distributions of the last year of the old trade, and thereby make the whole scheme unworkable. And, further, I think that the argument is based on a misreading of *Butterley's* case [1]. That case decided that you cannot directly assess the profits of any trade in respect of a period after the trade has ceased. But it did not decide that you cannot withdraw non-distribution relief by a distribution charge in respect of a period after the trade has ceased: the plain meaning of Section 30 (3) is that you can.

Now I must return to Section 43 (1). I was at first inclined to think that the Respondents' argument about it was right, but now I am inclined to take a different view. If it means that all trades or businesses, whether carried on concurrently or in succession, are to be treated as one trade or business, then all the difficulties I have been dealing with are avoided. But I do not think it necessary to decide this. Whether I take that simple solution or proceed by considering the inter-relation of Sections 30 and 35, I reach the same result: I am satisfied that this objection to the assessment cannot be sustained. Accordingly, as neither of the Respondents' objections to the assessment is valid, the Crown must succeed.

I therefore move that this appeal should be allowed.

Lord Cohen.—My Lords, before the Special Commissioners and in the Court of Session the issues between the parties were as follows: (i) whether (as contended by the Crown and disputed by the Respondents), on the true construction of Section 30 (3) of the Finance Act, 1947, the Respondents, having in April, 1950, transferred to another company a trade of selling and servicing heavy earth-moving equipment previously carried on by the Respondents and having thereafter carried on a new business of investment-holding, are liable to be assessed, for a chargeable accounting period of such new business, to a distribution charge by reference to non-distribution relief obtained by them in chargeable accounting periods of the said former trade; (ii) whether (as contended by the Respondents and disputed by the Crown) the effect of a notice of election pursuant to Section 36 (4) of the said Act, given by the Respondents as transferors and the said other company as transferees of the said trade, was to free the Respondents from all further liability by way of distribution charge in respect of non-distribution relief obtained by them before the date of the said transfer.

The Special Commissioners decided both the said issues in favour of the

(1) 36 T.C. 411.

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Respondents, and on both grounds allowed the Respondents' appeal against an assessment to Profits Tax made upon the Respondents for the chargeable accounting period from 1st November, 1954, to 18th March, 1955, the date of the voluntary liquidation of the Respondents. On appeal by the Crown to the Court of Session, the First Division held that the Special Commissioners had been in error in deciding the first of the said issues in favour of the Respondents, but upheld the Commissioners' decision on the second issue and accordingly dismissed the appeal.

It will be convenient at this stage to set out the relevant portions of the Finance Act, 1947.

> "30. . . . (2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are less than the profits thereof for that period chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to seven and a half per cent. of the difference. (3) Subject to the provisions of this Part of this Act, if, in the case of a trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition to the other profits tax, if any, chargeable therefor, profits tax at the rate of seven and a half per cent. on the amount of the difference: Provided that the amount on which tax is chargeable under this subsection for any chargeable accounting period shall not, when added to the total of the amounts on which tax is charged thereunder for previous chargeable accounting periods, exceed the total of the differences in respect of which reductions have been made under subsection (2) of this section for previous chargeable accounting periods. (4) The reductions falling to be made under subsection (2) of this section and the charges falling to be made under subsection (3) thereof are hereafter in this Act respectively referred to as 'reliefs for non-distribution' and 'distribution charges.'"

> "36. . . . (4) Where—(*a*) as part of a scheme of amalgamation or reconstruction a trade or business carried on by a body corporate (in this subsection referred to as 'the first company') is transferred to another body corporate (in this subsection referred to as 'the second company'); (*b*) the consideration for the transfer consists wholly or mainly of shares in the second company; and (*c*) the first and second companies jointly so elect by notice in writing given to the Commissioners within six months after the transfer or such longer time as the Commissioners may in any case allow, the provisions of this Part of this Act shall apply subject to the following modifications, that is to say—(i) any distribution of those shares to any person in a winding up of the first company shall, notwithstanding anything in subsection (1) of this section, not be deemed for the purposes of the last preceding section to be a distribution to that person; and (ii) in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company or other person assessable to profits tax on the profits of the trade or business of the first company shall, except so far as it has already operated to increase a distribution charge on the first company, be taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief had been given to that company, and shall also be taken into account, in the case of the last chargeable accounting period of the second company, so as to increase the amount which, for the purposes of paragraph (*c*) of subsection (1) of the last preceding section, is to be treated as not a distribution of capital."

> "43.—(1) All trades or businesses to which section nineteen of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

I need not cite in full any other Sections of the Act. Suffice it to say that it is not disputed that the Respondents built up "reliefs for non-distribution" during the years in which they were carrying on the business of selling and servicing heavy earth-moving equipment, which they ceased to carry on after

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5th April, 1950. Nor is it disputed that, in the accounting period in respect of which the disputed assessment was made, distributions were made in excess of the profits of that period.

So far as the first point in dispute is concerned, the Respondents claim that, since the profits distributed arose from a trade which was not carried on by the Company during the accounting period in respect of which assessment was made, the assessment must be discharged. This contention was upheld by the Special Commissioners because, in their view, the proviso to Section 30 (3) forced them to the conclusion that the Respondents' argument was well founded. I am unable to agree. On the admitted facts it cannot be disputed that during the relevant accounting period the Respondents were carrying on a trade, and made net relevant distributions, as defined in Section 35 of the Act, in excess of the profits of that trade for that period chargeable to Profits Tax. I see nothing in the wording of the proviso which enables me to cut down the plain meaning of the charging Section. I understand there is no question here on the figures of the proviso being called into operation, but I think it right to add that, in my opinion, the proviso would operate notwithstanding that the differences in respect of which reductions had been made under Section 30 (2) had arisen from a trade other than that which was being carried on during the accounting period in respect of which the disputed assessment was made.

The First Division based their decision in favour of the Crown on this point on Section 43 (1). I arrive at my conclusion in their favour without recourse to that Sub-section, but I respectfully agree with the Lord President (Clyde) that the scheme of the 1947 Act was no longer to put the profits of each accounting period into separate watertight compartments, and that Section 43 (1) is more consistent with the conclusion at which he and I have arrived on the first point than with that reached by the Special Commissioners.

Before I leave this part of the case, I ought to mention the decision of this House in *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.* (1), [1957] A.C. 32, which was relied on by the Respondents. That case raised quite a different question from that which is before your Lordships. It was whether certain interim income payments received by the Butterley Company under the Coal Industry Nationalisation Act, 1946, were profits from a trade or business being carried on by the company during the relevant chargeable accounting periods, and therefore had to be included in the return of profits chargeable to tax. It was held that these payments were not profits arising from any trade or business. No question arose as to liability to distribution charges under Section 30 (3). I agree with the Lord President in thinking that the observations of their Lordships in the *Butterley* case throw no light on the point which your Lordships have now to decide.

I turn to the second question. It is common ground that the Respondents and the company to which they had sold their trading assets gave the notice required by Section 36 (4) (*c*) and that in consequence the modifications specified in the Sub-section became applicable. The first modification does not apply, as the Respondents did not distribute in the winding-up the shares it received from the purchasing company. The Special Commissioners held that the word "already" in modification (ii) referred to the date of the election and that the Sub-section impliedly operated to transfer the liability from the first company to the second when the election was exercised. The same view was taken by Lord Sorn. The Lord President took a similar view, though he

(1) 36 T.C. 411.

did not place so much reliance on the word "already". I agree with Lord Sorn that the Section is not free from obscurity, but I have come to the opposite conclusion to that reached by the First Division. In my opinion, the opening words of the modification,

> "in considering what distribution charge, if any, falls to be made on the second company",

decide the moment when the calculations directed by the modification have to be made. They indicate a recurring event, and it seems to follow that, in respect of each accounting period of the second company for which it makes a distribution in excess of its profits of that period, it will be necessary to see what distribution charges have been made on the first company: in other words, "already" refers to the time of consideration directed in the modification, not to the date on which the election was made.

I am fortified in the construction I have placed on the word "already" by the observations of Cross, J., in *Ackland & Pratten, Ltd.* v. *Commissioners of Inland Revenue*[1], [1960] 1 W.L.R. 1117, at page 1131. The learned Judge, dealing with an argument similar to that advanced by the Respondents in the present case, said:

> "In my judgment, that argument, which is an ingenious one, rests on a misconstruction of the word 'already.' This part of section 36 (4) is not dealing with the liability of the first company at all, but simply with the liability of the second company, and the word 'already,' I think, refers not simply to the time before liquidation but to all the time before the question of the amount of any distribution charge on the second company falls to be considered. Consequently, any distribution charge to which the first company becomes subject after liquidation will be taken into account in estimating the liability of the second company, as and when that liability falls to be determined."

There is no express relief of the first company from liability, and it would have been so easy expressly so to provide if that had been the intention. I can well understand that Parliament may have decided not to relieve the first company from liability before the second company had paid. It is said that the effect of the Crown's argument would be to enable them to recover once from one company and again from the other. This does not now arise for decision. Suffice it for the moment to say that, as at present advised, I think, if the Crown recover from the Respondents, they would fail *pro tanto* in a claim against the second company, since the "difference" would already have operated to increase the distribution charge on the Respondents. The construction of Section 36 (4) on which the Crown rely seems to me to accord with the natural meaning of the words used and to give effect to the policy of the part of the Finance Act, 1947, dealing with Profits Tax and distribution charges.

I would allow the appeal.

My noble and learned friend, **Lord Guest,** who is unable to be present today, asks me to say that he agrees with the speech that I have delivered.

Lord Hodson.—My Lords, upon the first point, which concerns the two modifications, I think that the contention of the Crown is right. Section 36 (4) (i) of the Finance Act, 1947, gives an advantage to the first company if in a winding-up it distributes shares it received from the purchasing company. Section 36 (4) (ii) does not purport to give an advantage to the first company, and is directed to the second company. The opening words are:

> "in considering what distribution charge, if any, falls to be made on the second company".

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(1) *See* page 663 *ante*.

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The first company is not expressly, or, in my opinion, by implication, freed from the charge. If it were so freed, modification (i) would be unnecessary. The phrase

> "except so far as it has already operated to increase a distribution charge on the first company"

covers any operation prior to the time of consideration. I cannot accept the argument that "already" means before the date of winding-up or election. If Parliament had meant this it could have said so. The taxpayer's construction was, I think, rightly rejected by Cross, J., in *Ackland & Pratten, Ltd.* v. *Commissioners of Inland Revenue,* [1960] 1 W.L.R. 1117. I agree with the passage in the judgment, to be found at page 1131 (1), which reads:

> "This part of section 36 (4) is not dealing with the liability of the first company at all, but simply with the liability of the second company; and the word 'already,' I think, refers not simply to the time before liquidation but to all the time before the question of the amount of any distribution charge on the second company falls to be considered. Consequently, any distribution charge to which the first company becomes subject after liquidation will be taken into account in estimating the liability of the second company, as and when that liability falls to be determined."

The First Division were impressed by the apparent futility of the election. The election is not futile if the first company is in a position to avail itself of modification (i), which the taxpayers cannot do in the events which have happened. I agree with my noble and learned friend Lord Cohen that it does not seem that any question of double taxation arises; for, as he says, it would appear that, if the Crown recover from the Respondents, they would fail in a claim against the second company, since the difference would have already operated to increase the distribution charge on the Respondents.

Upon the second point, the Respondents contend that, since the profits distributed arose from a trade which was not carried on by the Company during the accounting period in respect of which the assessment was made, the assessment must be discharged. I have felt some difficulty in accepting the solution reached by the First Division, who found the answer to this contention in the language of Section 43 (1) of the Act, which provides:

> "All trades or businesses to which section nineteen of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

The Lord President, construing this Section as applying to trades carried on whether simultaneously or in succession, held that it was not open to the Respondents to contend that, because the trade in which they were engaged before 1950 and in respect of which they got relief from Profits Tax for non-distribution of profits has been discontinued by them, and because in 1954 and 1955 they were engaged in quite a different trade, the relief they got before 1950 must be excluded from consideration in computing their liability to Profits Tax in the latter period. It would seem at first sight that the expression in Section 43 (1), "carried on by the same person", means carried on simultaneously and not whether simultaneously or in succession. On consideration, however, I am not prepared to dissent from the contrary construction of Section 43 (1) adopted by their Lordships of the First Division. Indeed, this construction fits in with the general scheme of the Act.

At the same time, without recourse to Section 43 (1) I would reach the same conclusion upon the reading of Section 30 (2) and (3) of the Act. There is nothing in the proviso which cuts down the effect of the charging provision,

(1) *See* page 663 *ante*.

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and I agree with the noble and learned Lord on the woolsack that these provisions cannot be applied properly if a line has to be drawn when a company ceases one trade and begins another. The plain meaning of Section 30 (3) is that non-distribution relief can be withdrawn by a distribution charge.

I would allow the appeal.

Questions put:

That the Interlocutor appealed from be reversed.

The Contents have it.

That the question of law in the Case Stated be answered in the negative and that the Profits Tax distribution charge of £63,237 16*s*. made upon the Respondents by notice of assessment dated 30th March, 1959, for the chargeable accounting period of four months and 18 days ending with 18th March, 1955, be restored.

The Contents have it.

That the Respondents do pay to the Appellants their costs here and below.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue (England), for Solicitor of Inland Revenue (Scotland); E. P. Rugg & Co., for Dundas & Wilson, C.S., Edinburgh.]