

COURT OF APPEAL—8TH, 9TH, 10TH AND 11TH FEBRUARY, AND 10TH MARCH,  
1955

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HOUSE OF LORDS—14TH, 15TH, 19TH AND 20TH MARCH, AND 19TH APRIL, 1956

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## Commissioners of Inland Revenue

v.

### Butterley Co., Ltd.(<sup>1</sup>)

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*Profits Tax—Computation of profits—Company carrying on a number of trades—Nationalisation of colliery undertaking—Interim income payments under Coal Industry Acts, 1946 and 1949—Finance Act, 1937 (1 Edw. VIII & 1 Geo. VI, c. 54), Sections 19 and 20 (1) and Fourth Schedule, Paragraph 7; Finance Act, 1947 (10 & 11 Geo. VI, c. 35), Section 32 (1).*

*The Respondent Company carried on a number of trades, including coal-mining; none of these trades was exclusively ancillary to the Company's main trade of ironfounding. On 1st January, 1947, the colliery trade ceased and its assets were vested in the National Coal Board under the terms of the Coal Industry Nationalisation Act, 1946. Under this Act and the Coal Industry (No. 2) Act, 1949, the Company became entitled to compensation for the assets so transferred and to certain "revenue payments" and "interim income" for the period between the vesting date and the date on which the compensation was fully satisfied.*

*On appeal to the Special Commissioners against assessments to Profits Tax for the chargeable accounting periods from 1st January, 1947, to 31st December, 1950, in amounts which included the interim payments, it was contended on behalf of the Company that the payments were not income but part of the compensation payable; alternatively, that the payments were not profits of the trades or businesses carried on by the Company during the relevant chargeable accounting periods; or, alternatively, that the payments were not "income received from investments or other property" within the meaning of Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, as amended by Section 32 (1) of the Finance Act, 1947. The Commissioners rejected the Company's first contention but upheld the other two and allowed the appeals.*

*Held, that the Commissioners' decision was correct.*

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(<sup>1</sup>) Reported (Ch. D.) [1954] 1 W.L.R. 1199; 98 S.J. 590; [1954] 3 All E.R. 69; 218 L.T.Jo. 108; (C.A.) [1955] Ch. 453; [1955] 2 W.L.R. 785; 99 S.J. 257; [1955] 1 All E.R. 891; 219 L.T.Jo. 195; (H.L.) [1956] 2 W.L.R. 1101; 100 S.J. 359; [1956] 2 All E.R. 197; 221 L.T.Jo. 245.

## CASE

Stated under the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the Chancery Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 10th June, 1953, the Butterley Co., Ltd. (hereinafter called "the Company"), appealed against the following assessments to Profits Tax, viz.:

Chargeable accounting period					
1. 1.47 to 31.12.47	...	...	...	...	£62,300
1. 1.48 to 31.12.48	...	...	...	...	£63,450
1. 1.49 to 30. 9.49	...	...	...	...	£48,750
1.10.49 to 31.12.49	...	...	...	...	£19,000
1. 1.50 to 31.12.50	...	...	...	...	£44,000

on the grounds that in computing its profits for the purposes of Profits Tax certain sums received by the Company under Section 22 (2) and (3) of the Coal Industry Nationalisation Act, 1946 (hereinafter called "the Coal Act, 1946"), and under Section 1 (2) of the Coal Industry (No. 2) Act, 1949 (hereinafter called "the Coal Act, 1949"), were wrongly included by the Commissioners of Inland Revenue.

2. At the hearing of this appeal evidence was given before us by Mr. E. F. Wright, chairman and managing director of the Company, and by Mr. L. R. Honeywill, director and chief accountant of the Company.

The following documents were produced in evidence before us, and are attached to and form part of the Case stated by us<sup>(1)</sup>;

Statement of compensation received by the Company under the Coal Acts, 1946 and 1949	...	...	...	Exhibit A
Directors' report and accounts of the Company for the year ended 31st December, 1947	...	...	...	Exhibit B1
Directors' report and accounts of the Company for the year ended 31st December, 1948	...	...	...	Exhibit B2
Directors' report and accounts of the Company for the year ended 31st December, 1949	...	...	...	Exhibit B3
Directors' report and accounts of the Company for the year ended 31st December, 1950	...	...	...	Exhibit B4

The memorandum and articles of association of the Company was put in evidence before us and may be referred to if necessary as part of this Case.

The facts found by us on this evidence or agreed between the parties are as stated in the following paragraphs numbered 3 to 10 inclusive.

3. The Company was formed on 9th April, 1888, to carry on, and did in fact carry on thereafter, a number of trades including coalmining, ironfounding, structural steel manufacturing, wagon building, wrought iron production, brickmaking, civil engineering and dairy farming. The said trades were none of them carried on exclusively as ancillary to the Company's main trade of ironfounding, and in particular, although the ironfounding trade used as much of the coal acquired in the Company's colliery trade as it required, a large surplus of coal remained and was sold to outside customers of the Company.

(1) Not included in the present print.

4. On 1st January, 1947, the colliery trade of the Company ceased entirely and the assets of this trade vested in the National Coal Board under the terms of the Coal Act, 1946 (exhibit B1). Certain assets ancillary to the collieries, including some brickworks, railway wagons, land and houses, also vested in the National Coal Board on that date. The Company, however, continued after 1st January, 1947, to carry on all the other trades, except that of colliery proprietors, mentioned in paragraph 3 above, and since that date has acquired other engineering businesses as well as further brickworks and quarries. The Company's balance sheet at 31st December, 1947 (exhibit B1), shows that out of total assets of £4,474,332, a sum of £2,071,746 represented assets owned by the Company on 31st December, 1946, but vesting, subject to compensation, in the National Coal Board on 1st January, 1947; the balance of £2,402,586 represented assets of the trades still carried on by the Company after 1st January, 1947.

5. The profits of the various trades carried on by the Company before and after 1st January, 1947, have always been brought together into one profit and loss account of the composite business carried on by the Company, and one assessment to Income Tax and Profits Tax was made upon the total profits of the Company derived from all its separate trades. For Income Tax purposes, however, it was admitted at the relevant time that the trade of colliery proprietors was a trade separate from its other trades, and the provisions of Section 31 (1) (a), Finance Act, 1926, were applied when that colliery trade ceased to be carried on by the Company on 1st January, 1947. At the hearing before us it was, however, contended on behalf of the Crown that only one part of the Company's business ceased on 1st January, 1947, and that the said provisions of Section 31 (1) (a), Finance Act, 1926, were wrongly applied at that time. As appears from our decision in paragraph 12 below, we accepted the evidence of the chairman and chief accountant of the Company, which was not challenged on behalf of the Crown at the hearing of this appeal, that the colliery concern of the Company constituted a trade separate from its other trades and that that trade ceased entirely on 1st January, 1947.

6. The Coal Act, 1946, reached the Statute Book on 12th July, 1946, and by Section 5 (1) the assets of the Company hitherto employed in its colliery undertaking vested in the National Coal Board on the "primary vesting date" appointed by the Minister, which, as stated in paragraph 4 above, was 1st January, 1947. Compensation in respect of the assets so transferred on 1st January, 1947, was provided for by Sections 10 to 25 of the said Act; and by Section 19 was declared to be

"due on the primary vesting date, subject to determination of the amount thereof".

By Section 19 (2) there was provided, in the following terms, a right to interim income:

"For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of section twenty-two of this Act."

7. (i) The Company received from the National Coal Board, in addition to compensation payable under Sections 10 to 17 of the Coal Act, 1946, interim income as provided under the said Section 19 (2), satisfied in accordance with the provisions of Section 22. These payments are set out in the tabular statement exhibit A (in addition to compensation paid under Sections 10 to 17 of the Coal Act, 1946, not otherwise material to this Case), and arose to the Company mainly under the provisions of Section 22 (2) and (3).

## (ii) Section 22 (2) (a) is as follows:

"Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by subsection (2) of section nineteen of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury".

(iii) Under the said Section 22 (2) (a) the Company received on 14th January, 1949, £415 13s. 6d., net £228 12s. 5d.; on 15th February, 1950, £64 3s. 5d., net £35 5s. 11d.; on 17th March, 1950, £353 7s. 2d., net £194 6s. 11d.; on 5th July, 1950, £27,123 5s. 8d., net £14,917 16s. 1d.; and on 2nd January, 1951, £1,882 18s., net £1,035 11s. 11d. (items 6, 7, 8, 10 and 11 in tabular statement A). These payments were all in respect of a broken period from the end of the year down to the date when compensation under Sections 10 to 17 of the Coal Act, 1946, was paid, and represented amounts equal to interest at rates prescribed by the Treasury varying between 2½ and 4½ per cent. per annum.

8. (i) The relevant provisions relating to the payments arising under Section 22 (3) are as follows:

"(3) The following provisions of this subsection shall have effect as to the making to colliery concerns . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned".

The payments under the Sub-section were based on the amount of profit earned in the period before the colliery assets vested in the Coal Board. The said payments were for the first two years after the vesting of the assets in the Coal Board, and under Section 22 (4) were

"deemed . . . to be in substitution for the provisions of subsection (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern . . ."

(ii) Under the said Section 22 (3) the company received on 7th January, 1948, a sum of £66,189, net £36,403 19s.; on 26th April, 1948, a sum of £66,189, net £36,403 19s.; on 17th August, 1948, a sum of £66,189, net £36,403 19s.; on 22nd February, 1949, a sum of £84,249 8s. 7d., net £46,337 3s. 9d. (items 1, 2, 3 and 5 in tabular statement A).

The said money payments are described as "revenue payments" by Section 22 (3) (b).

9. (i) Finally, the Company received on 17th March, 1950, a sum of £76,430 6s. 10d., net £42,036 13s. 9d., under the provisions of Section 1 (2) of the Coal Act, 1949 (item 9 in tabular statement A).

(ii) Section 1 of the Coal Act, 1949, is by Sub-section (1) to have effect with respect to

"the making to colliery concerns . . . of payments in respect of the year nineteen hundred and forty-nine and subsequent years towards satisfaction of the right to interim income"

conferred by Section 19 (2), Coal Act, 1946.

(iii) The payment received by the Company, as mentioned in subparagraph (i) above, arose to it by virtue of the provisions of Section 1 (2) of the Coal Act, 1949, which so far as relevant is as follows :

"A colliery concern . . . shall, in respect of the year nineteen hundred and forty-nine and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year."

(iv) Under Section 1 (3), the said payment "shall be treated for the purposes of" Section 22 (2) (a) of the Coal Act, 1946,

"as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern".

(v) Under Section 1 (5), which deals with the repayment to the Minister, in certain circumstances not otherwise material to this Case, of any amount, provision is made for the repayment of a net amount after taking into consideration Income Tax and Profits Tax.

10. It was common ground between the parties in this appeal that the Company was, during the whole of the material period in respect of which assessments to Profits Tax for the chargeable accounting periods set out in paragraph 1 were made, carrying on a trade or business within the meaning of Section 19 (1), Finance Act, 1937. It was also common ground that the functions of the Company did not consist wholly or mainly in the holding of investments or other property within the meaning of Section 19 (4) of that Act. The question for our determination therefore depended upon whether the payments received by the Company under the Coal Acts, 1946 and 1949, and more particularly described above in paragraphs 6 to 9 inclusive, were properly to be regarded as "profits of its trade or business", or in the alternative as "income received from investments or other property" within the meaning of Paragraph 7 (1) of the Fourth Schedule, Finance Act, 1937, as amended by Section 32 (1), Finance Act, 1947.

11. It was contended on behalf of the Appellants, the Commissioners of Inland Revenue:

(1) that the payments received by the Company under the Coal Acts, 1946 and 1949 (described as "interim income" under the provisions of Sections 19 (2) and 22 (1) of the Coal Act, 1946, "revenue payments" under Section 22 (3) of the Coal Act, 1946, and "income payments" under the Coal Act, 1949), were income of the Company proper to be included in the computation of the profits of its trade or business for the purpose of the Profits Tax ;

(2) that under the provisions of Section 19 (1) and (2), Finance Act, 1937, the said payments were part of the profits of the trade or business carried on by the Company in the said chargeable accounting periods commencing 1st January, 1947, and ending on 31st December, 1950 ;

(3) in the alternative, that the said payments, arising from the right to "interim income", "revenue payments" and further "income payments" provided by the Coal Act, 1946, and the Coal Act, 1949,

were, on the true construction of Paragraph 7 (1), Fourth Schedule, Finance Act, 1937, as amended by Section 32 (1), Finance Act, 1947, "income received from investments or other property";

(4) that the said payments were properly included in computing the profits of the Company for the purposes of the Profits Tax for the chargeable accounting periods in question.

12. It was contended on behalf of the Respondent Company:

(1) that the payments received by the Company under the Coal Acts, 1946 and 1949, although described as "interim income" under the provisions of Section 19 (2) of the Coal Act, 1946, and as regards payments arising under Section 22 (3) as "revenue payments", were not income of the Company but part of the compensation payable to the Company for the taking away of its colliery assets;

(2) that in the alternative, the said payments received by the Company under the Coal Acts, 1946 and 1949, were not part of the profits of the trades or businesses carried on by it during the relevant chargeable accounting periods, but arose to it from its colliery concern, which trade ceased entirely on 1st January, 1947;

(3) that in the alternative, the said payments received by the Company under the Coal Acts, 1946 and 1949, were not "income received from investments or other property" within the meaning of Paragraph 7 (1), Fourth Schedule, Finance Act, 1937, as amended by Section 32 (1), Finance Act, 1947;

(4) that in any event the said payments under the Coal Acts, 1946 and 1949, were not properly included in computing the profits of the Company for the purposes of Profits Tax for the said chargeable accounting periods.

13. (i) We, the Commissioners who heard this appeal, allowed the Company's appeal and held that the said payments under the Coal Acts, 1946 and 1949, were not properly included in computing, for the purposes of the Profits Tax, the profits of the Company for the said chargeable accounting periods.

(ii) We held, in view of the language used by Section 19 (2) of the Coal Act, 1946, and by Section 22 (3) (b) in relation to payments received under Section 22 (3), that all the payments in issue, whether under the Coal Act, 1946, or the Coal Act, 1949, constituted income of the Company and we therefore rejected the Company's first contention.

(iii) But we found, on the evidence adduced before us, that the Company's composite trade or business consisted at the material time of a number of separate and severable trades, of which its colliery concern was one, and that that trade ceased entirely on 1st January, 1947.

(iv) We further held that, as a consequence of our finding of fact as set out in sub-paragraph (iii) above, the said payments under the Coal Acts, 1946 and 1949, were not receipts of any trade carried on by the Company during the relevant chargeable accounting periods, because it had ceased to carry on its colliery trade on 1st January, 1947.

(v) We further held that, on a proper construction of Section 19 (2) and Section 22 of the Coal Act, 1946, Section 1 of the Coal Act, 1949, and Paragraph 7 (1) of the Fourth Schedule, Finance Act, 1937, as amended by Section 32 (1), Finance Act, 1947, the said payments were not "income received from investments or other property".

We left figures to be agreed following upon our decision in principle.

(vi) Figures being subsequently agreed in accordance with our decision in principle, we issued our final determination on 24th September, 1953, reducing the assessments to Profits Tax for the said chargeable accounting periods as follows:

Chargeable accounting period

1. 1.47 to 31.12.47	...	...	...	£21,967	10s. tax
1. 1.48 to 31.12.48	...	...	...	£39,524	0s. tax
1. 1.49 to 30. 9.49	...	...	...	£13,728	9s. tax
1.10.49 to 31.12.49	...	...	...	£3,790	3s. tax
1. 1.50 to 31.12.50	...	...	...	£22,933	4s. tax

14. The Commissioners of Inland Revenue 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 the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

A. W. Baldwin, }  
 R. A. Furtado, } Commissioners for the Special Purposes  
 of the Income Tax Acts.

Turnstile House,  
 94-99, High Holborn,  
 London, W.C.1.  
 18th February, 1954.

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The case came before Roxburgh, J., in the Chancery Division, on 27th July, 1954, when judgment was given in favour of the Crown, with costs.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. John Senter, Q.C., and Mr. Desmond Miller for the Company.

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**Roxburgh, J.**—This appeal relates to three categories of payments: first of all, payments received by the Company and described as “interim income” under the provisions of Section 19 (2) and Section 22 (1) of the Coal Industry Nationalisation Act, 1946; secondly, “revenue payments” under Section 22 (3) of that Act, and thirdly, “revenue payments” under the Coal Industry (No. 2) Act, 1949.

I need not set out all the facts, which have been most carefully found by the Special Commissioners, and are there for anybody to read who is concerned with the matter; but, shortly, this Company carried on many distinct trades: it carried on coal mining, and it carried on trades which could not possibly be described as coal mining. On 1st January, 1947, which was the vesting date, its colliery trade was vested in the National Coal Board but, of course, it continued to carry on its other trades, and so there was the cessation of the particular trade, but there was no cessation of trading in general.

The Act of 1946, Section 19 (1), provided that there should be compensation in respect of a transfer of transferred interests—in other words, this Company’s colliery concern—and that it should be due (and I attach

(Roxburgh, J.)

importance to that word) on the primary vesting date, which was 1st January, 1947, subject to determination of the amount thereof. Then Sub-section (2) provides as follows:

"For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of section twenty-two of this Act."

Section 22 is the general provision with regard to interim income. It says:

"(1) The right conferred by subsection (2) of section nineteen of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section. (2) Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned"

—which are important, and I will refer to them later—

"(a) the said right conferred by subsection (2) of section nineteen of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests . . . is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation . . . a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . ."

Then in Sub-sections (3) and (4) are provisions which are restricted to the first two years from the vesting date, and provide for what are called in the Act "revenue payments", which are to be in substitution for the interim income provided for by Section 22. Section 22, apart from an amendment, to which I will refer in a minute, runs on indefinitely until the compensation is satisfied. The revenue payments were confined to the first two years. Then in 1949 another Act was passed, and I can put it quite shortly: its effect was to substitute a revenue payment for the interim income payment in respect of the year 1949. So we get the sequence: revenue payments for 1947 and 1948; revenue payment under the Act of 1949, for 1949, and thereafter we are back again at interim income payments.

The Company received payments under each of these headings, and the first question which had to be determined by the Special Commissioners was whether they were to be treated as taxable income, as distinct from capital. The Commissioners held that they were, and I must confess that I cannot feel any doubt about that aspect of the case, and I do not think it is necessary to elaborate the matter further. But there remains the question that I am really concerned with: the case relates to Profits Tax. Of course, there are differences between Profits Tax and Income Tax.

The Crown contended before the Commissioners that the payments were part of the profits of the trade or business carried on by the Company in the chargeable accounting periods commencing 1st January, 1947, and ending on 31st December, 1950. But the Company contended that the payments were not part of the profits of the trades or businesses carried on by the Company during the relevant chargeable accounting periods, but arose to it from its colliery concern, which trade ceased entirely on 1st January, 1947.

In the view that I take of this case it is not necessary for me to determine whether the finding of the Commissioners, which was in favour of the Company on this point, was well founded or not. I leave it entirely at large, except to mention (because probably this case will go elsewhere) that the



(Roxburgh, J.)

Solicitor-General did argue it strenuously, and only forebore to continue his argument in deference to a request from me. The reason why I dissuaded him from further continuing his argument was because I could not see, and I still cannot see, how the Company can escape from the alternative argument of the Crown: that was, that the revenue payments and the interim income payments were, on the true construction of Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, as amended by Section 32 (1) of the Finance Act, 1947, income received from investments or other property.

First of all let me read that Paragraph. The Act of 1947 made an important alteration in the Fourth Schedule to the Finance Act, 1937, which makes special provisions with regard to what is now called Profits Tax:

“7.—(1) Income received from investments or other property shall be included in the profits . . .”.

There are certain exceptions which nobody suggests are applicable to this case. This is a very short point, and I may be wrong about it, but having reached a clear conclusion upon it, it did not seem to me necessary to pursue the difficult questions which arise under the other contention of the Crown. These sums were certainly received by this Company and they were, as I have said, in my view undoubtedly income, and the question therefore is: Were they received from investments or other property?

Now it is not being contended before me that the words “other property” can be restricted by the application, or attempted application, of the principle of *ejusdem generis* and, indeed, it seems to me that they quite plainly could not. Therefore, the words are “other property”. I do not think that this compensation could be properly regarded as an investment, but I cannot see any reason at all why it is not “other property”.

I turn back to Section 19 of the Act of 1946. Compensation under Section 19 was due on 1st January, 1947, but it was not immediately payable; it was not immediately payable because it had not been determined. In my judgment the Company's right to that compensation was plainly a chose in action; nonetheless a chose in action because it was the creature of statute. Counsel has argued that that may be so, but that the interim income, or the revenue payments (and for my own part I think they must all stand upon the same footing), do not arise from the property—that is to say, the right to compensation—but that they are an additional correlative right. It is a question of how these two words are regarded. But when I look and see that there is a right to interim income, I ask the question: Interim income from what? It is income for a period. True, it is a right conferred by statute, but what is it to be income from? I should have thought as plainly as anything could possibly be: the compensation due, but of which payment was still deferred. In other words, in my view these payments arose from the chose in action, consisting of compensation due but still unpaid, and fall directly within the words “income received from other property” and therefore, by virtue of Paragraph 7, to be included in the profits. Accordingly, on that ground I allow the appeal. What is the consequence of that, Sir Reginald?

**Sir Reginald Hills.**—That the appeal be allowed with costs, and the assessment will be referred to the Commissioners who will revise it in the light of your Lordship's judgment.

**Roxburgh, J.**—You are agreed that that is the right Order?

**Mr. John Senter.**—Yes, my Lord, I am.

The Company having appealed against the above decision, the case came before the Court of Appeal (Sir Raymond Evershed, M.R., and Jenkins and Morris, L.JJ.) on 8th, 9th, 10th and 11th February, 1955, when judgment was reserved. On 10th March, 1955, judgment was given unanimously against the Crown, with costs.

The Hon. Charles Russell, Q.C., Mr. John Senter, Q.C., Mr. Desmond Miller and Mr. Patrick Jenkin appeared as Counsel for the Company, and the Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. Geoffrey Cross, Q.C., and Sir Reginald Hills for the Crown.

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**Sir Raymond Evershed, M.R.**—As Roxburgh, J., observed at the beginning of his judgment, this case is concerned with the claim by the Crown to Profits Tax in respect of sums, now admittedly income for Income Tax purposes, received by the Butterley Co., Ltd., in the years 1947 and following from the Minister of Fuel, of three kinds—namely, (1) revenue payments in respect of the years 1947 and 1948 under Section 22 (3) of the Coal Industry Nationalisation Act, 1946 (which I shall hereafter sometimes call “the Coal Act, 1946”); (2) revenue payments in respect of the years 1949 and 1950 under Section 1 of the Coal Industry (No. 2) Act, 1949 (which I shall hereafter sometimes call “the Coal Act, 1949”); and (3) other sums paid under Section 22 (2) of the Coal Act, 1946—in satisfaction or part satisfaction of the right to interim income conferred by Section 19 (2) of the last-mentioned Act. Although the payments are of the three kinds I have indicated, all of them were in respect of the right to interim income under Section 19 (2) of the Coal Act, 1946. So far as class (3) above is concerned, these were expressly paid towards satisfaction of that right. The revenue payments, on the other hand, are expressed in the Statute to be “in substitution for” what may be called the primary right under the 1946 Act. The revenue payments under the 1949 Act also differed from those under the 1946 Act in that, if the former were found to exceed what would be payable strictly by way of interim income under Section 19 (2) of the 1946 Act for the given year, the recipient would be liable to be made to recoup. Notwithstanding the above differences, it is, to my mind, clear that the Crown’s claim to tax should wholly fail or wholly succeed. There is, in my judgment, no sensible distinction between any of the three types of payment for present purposes, and no suggestion to that effect was made in the course of the argument on either side.

The scheme of the Coal Act, 1946, is well known, and I shall not take time in describing its general nature. It provided for the transfer, on what was called the primary vesting date—a date which was later fixed as 1st January, 1947—to the National Coal Board of the business assets, and other assets called overhead expenses increases, of the component parts then existing of the coal industry. For the assets so transferred compensation was provided under the Act to the components in the industry, of which the Butterley Co. was one.

I can, with that introduction, turn at once to Section 19 of the Coal Act, 1946. Sub-section (1) provides:

“Compensation in respect of a transfer of transferred interests or of an overhead expenses increase shall be due on the primary vesting date”

—that is 1st January, 1947—

“subject to determination of the amount thereof.”

(Sir Raymond Evershed, M.R.)

I pause to state that the method of determining the amount was of a complex nature and made it clear that a considerable time would elapse before it was, in fact, finally determined. Sub-section (2):

“For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of section twenty-two of this Act.”

Sub-section (3):

“Provision may be made by regulations for authorising the partial satisfaction of such compensation”

—that is the principal compensation—

“before the determination of the amount thereof has been completed.”

Section 20 was concerned with the persons to whom the compensation should be transferred, made over or paid; and Section 21 provided for the mode of satisfaction of what I have called the principal compensation, which substantially, though not exclusively, was to be by way of Government stock.

I then come to Section 22, which picks up, it will be recalled, the second Sub-section of Section 19.

“(1) The right conferred by subsection (2) of section nineteen of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section. (2) Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by subsection (2) of section nineteen of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . . (b) the provisions of section twenty of this Act as to the legal and beneficial title to compensation”

—that is, in effect, a reference to the persons who would be the recipients—

“shall have effect in relation to additions to compensation under this subsection”

—with a substitution not material to be read.

Then Sub-section (3) introduces the revenue payments. It is, so far as is material, this:

“The following provisions of this subsection shall have effect as to the making to colliery concerns . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned; (b) the payments to be made under the last preceding paragraph are in this section referred to as ‘revenue payments’, and shall be money payments.”

Paragraph (c) provides for the determination of what is called in (a) “the comparable ascertained revenue”; it is a sum which is to be derived not from the amount of compensation, but from the previous relevant trading activities of the concern. I will pause to state what is perhaps the obvious. Since, as I have already indicated, the amount of the compensation could not

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in the nature of events be finally determined *quoad* any concern for a considerable time, it followed that the amount of interim income under Section 22 (2) was before determination incapable of calculation. The revenue payments were, therefore, plainly devised to fill that gap.

I need not read anything further from Section 22 (3), but Sub-section (4) is important for the language which it uses:

"The provision made by the last preceding subsection shall be deemed, in the case of any colliery concern . . . to be in substitution for the provisions of subsection (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern."

I shall return to that language, but for present purposes it is sufficient to point out that this Section provided that revenue payments would go in satisfaction or towards satisfaction of interim income, but that if it turned out that they exceeded the interim income when properly calculated there was no obligation upon the concern to make repayment.

I go now to the Coal Act of 1949. Section 1 extended, in effect, the provisions for revenue payments, no doubt because, the first two years having passed without the compensation having been finally ascertained, it was thought necessary to fill the further gap which resulted. Sub-section (1) of Section 1 is:

"The following provisions of this section shall have effect with respect to the making to colliery concerns . . . of payments in respect of the year nineteen hundred and forty-nine and subsequent years towards satisfaction of the right to interim income conferred by subsection (2) of section nineteen of the Coal Industry Nationalisation Act, 1946 . . . (2) A colliery concern . . . shall, in respect of the year nineteen hundred and forty-nine and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year."

Then there is a provision for the rate of interest which I shall pass over. Sub-section (3):

"A payment to which a colliery concern . . . is entitled under the last foregoing subsection in respect of any year shall be treated for the purposes of paragraph (a) of subsection (2) of section twenty-two of the principal Act as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern."

I will leave out Sub-section (4). Sub-section (5) contains the power (which I have already anticipated) whereby, if the revenue payments under this Act proved to exceed the interim income properly attributable to the same period, there is a liability to recoup; thus the regulations made by the Minister may provide

"for requiring the repayment to the Minister of any amount by which a payment made under this section in respect of any year to a colliery concern . . . may exceed the aggregate towards satisfaction of which that payment is under subsection (3) of this section to be treated as being made".

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There is then a proviso which has some significance and relates to certain deductions which may be made against the aggregate which I have just mentioned. The second one (for it is convenient to take them in reverse order) is:

"(b) an amount which bears to the amount of the deduction the same proportion that the amount of profits tax ultimately borne by the concern . . . (as determined in accordance with rules laid down by the regulations) in respect of the aggregate (as so determined) of its profits which are attributable to the year in respect of which the excess arises bears to that aggregate."

The previous paragraph (a) relates to an amount in regard to Income Tax calculated by a similar method.

The tax now known as Profits Tax was originally imposed in the year 1937 *sub nomine* the National Defence Contribution. Section 19 (1) of the Finance Act, 1937, stated:

"There shall be charged, on the profits arising in each chargeable accounting period falling within"

—and there is named a period which was subsequently extended—

"from any trade or business to which this section applies, a tax (to be called the 'national defence contribution') of an amount equal to"

the percentage therein named.

I should state now for simplicity hereafter that for present purposes the chargeable accounting periods are from 1st January to 31st December in each year.

Sub-section (2):

"Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

No question has been raised that the business activities of this Company, at all relevant times, were businesses within the scope of the Sub-section which I have just read.

Section 20, relating to computation, provided in Sub-section (1):

"For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of the Fourth Schedule to this Act. For the purpose of this subsection, the expression 'income tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purpose of income tax under Case I of Schedule D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising":

that is, arising from the trade or business.

I now turn to the Fourth Schedule. Paragraph 7 (which subsequently became, by a later amendment, sub-paragraph (1) of Paragraph 7) provided thus:

"Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise".

Then there followed (a) what should be included in the case of the business of a building society or certain other businesses, and (b) what should be included in the case of any other trade or business being a trade or business

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carried on by a body corporate. Putting it quite briefly, the form of the Paragraph in its original shape was that the income from investments should only be included in certain limited cases and otherwise should be excluded.

Paragraph 8 provides:

"Subject to the provisions of the last foregoing paragraph, the profits shall include all such income arising from the trade or business as is chargeable to income tax under Case I of Schedule D, or would be so chargeable if the profits of the trade or business were chargeable under that Case, except"

certain cases there mentioned. That language picks up, it will be recalled, the language which I have read from Sub-section (1) of Section 20.

The tax was renamed Profits Tax by the Finance Act, 1946, and substantially amended by the Finance Act, 1947. Further, by the latter Act, individuals and partnerships (with certain limited exceptions) were wholly exempted from the tax. I will read Section 31 (2) of the 1947 Act, because some emphasis was laid upon certain of its language in the course of the argument; it provided:

"The said section nineteen"

—that is Section 19 of the Finance Act, 1937—

"shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of section twenty-one of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

The reference to the Finance Act, 1922, is a reference to the provisions in that Act which made the individual corporators of certain kinds of company in certain circumstances liable in respect of Super-tax for the income of the company as though it had been wholly distributed among the members.

Paragraph 7 of the Fourth Schedule to the original Act was also amended by Section 32 (1) of the Finance Act, 1947, so that its first sub-paragraph now was, so to speak, reversed in its emphasis. It reads (as amended):

"Income received from investments or other property shall be included in the profits except"

—and there are certain exceptions. So that henceforth all such income was included save in so far as excepted. Paragraph 8 of the original Schedule remained as it had originally been enacted. Finally, whereas the tax in respect of each business of a taxpayer carrying on more than one business had been (it will be recalled) separately computed by virtue of Section 20 (1) of the Act of 1937, the 1947 Act provided, by Section 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 purpose of the enactments relating to the profits tax",

and by Section 47 (1):

"Subject to the provisions of this section"

—which do not affect the present point—

"the provisions of this Part of this Act relating to the profits tax shall have effect with respect to all chargeable accounting periods any part of which falls after the end of the year nineteen hundred and forty-six".

It follows from the two citations which I have just made that, in the case of a body corporate carrying on during the year 1947 and onwards more than one distinct business or trade, all those businesses or trades would be taken together for the purpose of computing Profits Tax. It will be observed that the formula in Section 19 (1)—"profits arising . . . from any trade or business"—which was essential in the case of an individual, so

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as not to subject to the tax profits or income not so arising—was retained after the tax had become limited to the profits of bodies corporate and unincorporated bodies of persons. The formula which appears in Section 31 (2) of the 1947 Act and which I read—"the actual income of the body corporate from all sources"—was not made the basis of the tax in the case of bodies corporate. That point was considerably emphasised on the Company's side during the course of the argument.

During the period before the primary vesting date—that is, 1st January, 1947—the Company carried on in addition to its coalmining business several other business activities of a distinct nature, for example, structural steel manufacturing, brickmaking and dairy farming—all businesses very different the one from the other, but all, in fact, businesses within the ambit of the tax.

The Special Commissioners held that the Company was not liable for the tax claimed in the Case. The basis of the Commissioners' decision was that the Company's various business activities constituted distinct and separate businesses, and accordingly that, since the coalmining business had altogether ceased on and by 1st January, 1947, the sums in question, which were exclusively referable to the discontinued activity, did not arise from any trade or business carried on by the Company during the relevant chargeable years.

I will read the third, fourth and fifth sub-paragraphs of paragraph 13 of the Case Stated:

"(iii) But we found, on the evidence adduced before us, that the Company's composite trade or business consisted at the material time of a number of separate and severable trades, of which its colliery concern was one, and that that trade ceased entirely on 1st January, 1947. (iv) We further held that as a consequence of our finding of fact as set out in sub-paragraph (iii) above, the said payments under the Coal Acts, 1946 and 1949, were not receipts of any trade carried on by the Company during the relevant chargeable accounting periods, because it had ceased to carry on its colliery trade on 1st January, 1947. (v) We further hold that, on a proper construction of Section 19 (2) and Section 22 of the Coal Act, 1946, Section 1 of the Coal Act, 1949, and Paragraph 7 (1) of the Fourth Schedule, Finance Act, 1937, as amended by Section 32 (1), Finance Act, 1947, the said payments were not 'income received from investments or other property'."

Roxburgh, J., based his conclusion in favour of the Crown exclusively on the terms of the amended Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, holding that the sums in question were, on any view, income from property within the meaning of that Paragraph. There was some argument before us whether the learned Judge assumed that, if the sums were caught by Paragraph 7 (1) of the Fourth Schedule to the 1937 Finance Act, they would also and necessarily be profits arising from the Company's trade or business on the basis that the Company was formed as a trading company. I do not think myself that the learned Judge made any such assumption. Argument on the application to the facts of the case of Section 19 (1) of the Finance Act, 1937, was, so I understand, stopped by the learned Judge as irrelevant having regard to the view which he took of the application of Paragraph 7 (1) of the Fourth Schedule. The Judge, therefore, thought, in my view, that whether or not the scope of Section 19 (1) was thereby enlarged, the sums in question were, in any case, "income received from . . . other property", namely, the principal sum of compensation or the stock representing that sum, or, perhaps, the chose in action being the right to get that compensation. He said<sup>(1)</sup>:

"I do not think that this compensation could be properly regarded as an investment, but I cannot see any reason why it is not 'other property'."

(<sup>1</sup>) See page 419 *ante*.

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And then, a few lines further on:

"In my judgment the Company's right to that compensation was plainly a chose in action; nonetheless a chose in action because it was the creature of statute."

And finally, lower down again:

"True, it is a right conferred by statute, but what is it to be income from? I should have thought as plainly as anything could possibly be: the compensation due, but of which payment was still deferred. In other words, in my view these payments arose from the chose in action, consisting of compensation due but still unpaid, and fall directly within the words 'income received from other property' and therefore, by virtue of Paragraph 7, to be included in the profits."

If the question on this appeal was whether the learned Judge was right in the view I have attributed to him, I should, for my part, be inclined to disagree with him. The language of Sections 19 and 22 of the Coal Act, 1946, seems to me carefully and deliberately to avoid the result that the interim income is income from or of the compensation provided for in Section 19 (1); rather it is treated (and, as I think, deliberately treated) as a distinct right, quantified, no doubt, by reference to the amount of the Section 19 (1) compensation, but none the less something in addition to, rather than flowing naturally from, the Section 19 (1) compensation: a distinct compensation for the loss of earnings during the period between the primary vesting date and the payment of the Section 19 (1) compensation. The revenue payments, moreover, were computed without reference to the Section 19 compensation at all; they are in substitution for the interim income right and under the 1946 Act might be retained even though they were in excess of the proper amount of the interim income.

I refer again to the language of the relevant Sections. Section 19 (2) speaks, it will be remembered, of a "right to interim income" to be satisfied in the manner set out in Section 22. Section 22 (2) (a) says that the right shall be satisfied by making, "in addition to the issue of the stock," etc., "a money payment of an amount equal to interest" on it; and in (b) of the same Sub-section the relevant words are "additions to compensation". Finally, it will be recalled that in Sub-section (4) of the same Section there is repeated this somewhat special and elaborate language—

"so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests",

and again later,

"except as to any excess of the aggregate amount of such additions".

In the course of the argument reference was made to other Statutes, and I will refer to one merely for the purpose of emphasising the special character of the language used in the Coal Act, 1946, as distinct from the sort of language which is used in other contexts, when what is clearly intended is neither more nor less than income on a principal sum. I refer to Section 32 (2) of the Transport Act of 1947, which provides:

"Where the compensation payable to any person in respect of a wagon is satisfied by the issue of British transport stock interest on which begins to accrue as from a date later than the date of transfer, the Commission shall pay to him interest on the amount of the compensation, at such rates as the Treasury may determine",

and so on.

I agree that, as Mr. Cross pointed out, all this income compensation is comprised within the terms of Section 19 (2) of the 1946 Act whether the form it took was that of revenue payments or otherwise; but I think that



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that fact is not enough, having regard to the language used, to make the interim income or the revenue payments in reality and substance income arising from, or income of, the Section 19 (1) compensation or arising from the right to receive that compensation conferred by the Statute. In my judgment that view is reinforced by the circumstance, having regard again to the special language used, that the compensation was stated to be due on the primary vesting date.

It is, however, not necessary for me to express a concluded view on this point for, just as in this Court Mr. Russell, for the Company, conceded that the sums in question were in truth income, so Mr. Cross in turn, on behalf of the Crown, conceded that the amended Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, could not enlarge the scope of the formula in Section 19 of that Act; in other words, that if they are to be chargeable to Profits Tax, the sums in question must be profits arising from a trade or business.

Mr. Cross also conceded that Paragraphs 7 and 8 of the Fourth Schedule, when read together, were in their scope of a limiting, rather than an expanding, character. The case of the Crown in this Court, therefore, has been of a two-fold nature. (1) Since the Company is a trading company formed for the exclusive purpose of carrying on business, therefore all receipts in the nature of income must inevitably be—or be brought into account in ascertaining—profits arising from the trade or business. Thus the last-mentioned formula becomes synonymous with profits arising in the course of trade or simply with trading profits. (2) Alternatively, if a company could, by appropriate separation, keep the income of the kind here in question wholly distinct from its other and ordinary trade receipts (for example, as or as part of a first stage in the repayment of capital to its shareholders) that was not done on the facts in this case.

Mr. Cross referred to the printed accounts for the years 1947 and following of the Company. I will take one of these printed accounts as an illustration, namely, that for the year ended 31st December, 1950. It will be observed that the profit and loss account for the Company and its subsidiaries opens with an item of

“ Profits (less losses) on Trading, including provisional revenue payments under the Coal Industry (No. 2) Act ”

—and so on, so much. If you look at the balance sheet of the Butterley Co. itself, it is divided, on the right hand side, under the headings

“ Assets previously owned which vested in the National Coal Board ”

and

“ Assets not vested in the National Coal Board ”.

Under the first heading, which includes freehold and leasehold property less depreciation, there appears an item of deduction of proceeds of sale of Treasury bonds received on account of compensation; but under the second heading “ Assets not vested in the National Coal Board ” you find, brought in as a current asset, compensation for certain vested assets and provisional revenue payments receivable from the Ministry of Fuel and Power, which is clearly a reference to receipts under the Coal Nationalisation Acts. Those instances show that, for the purpose of making up their accounts, revenue sums received from the Ministry were brought into the profit and loss account by the Company, together with the rest of its income and so as to form part, for accounting purposes, of the whole of the Company's income.

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As regards the second or alternative point, Mr. Cross said that there was, in truth, a *lacuna* in the findings of the Commissioners, which I have read from paragraph 13 of the Case Stated. For the question is as to the separate character of the Company's enterprises after and not before 1st January, 1947. Mr. Cross relied also on the terms of Section 43 (1) of the Finance Act, 1947, which provides that, for the purposes of Profits Tax, all trades or businesses should be treated, as from the date mentioned—1st January, 1947—as one in the case of a company carrying on more than one trade or business.

As to this second or alternative point, I think that it is now too late for us to draw any inferences of fact from the accounts. The chairman of the Company and the chief accountant gave evidence before the Commissioners and they were not cross-examined on the point at all. I think we must conclude that the separateness of the various trades was as great after as before 1st January, 1947, and that the Commissioners' findings so intended to state. And such a matter is a question of fact for the determination of the Commissioners: see, for example, the judgment of Rowlatt, J., in *Scales v. Thompson*, 13 T.C. 83.

Further, in regard to the point made on Section 43 (1) of the 1947 Finance Act, the question is of the nature of the sums when received, not what was done with them after receipt. Section 43 (1) treats all the trades of a particular company as one as from 1st January, 1947, for the purposes of the Profits Tax; but, the coalmining business of the Company having then ceased, the sums in question cannot in my judgment thereby—that is, by a mere application of the terms of Section 43 (1)—be made profits of a trade if, in truth, they were not.

Finally, since this was a compulsory acquisition by the State, there is no real room, in the absence of clear evidence, for any intention related to the time before the sums were received. It is not in my view in doubt that the profits of a trade for present purposes must be profits of a trade being carried on during the chargeable accounting period. I think, therefore, that Mr. Cross's second or alternative argument cannot be sustained on the facts as found and that it would not, in the circumstances, be right for us now to refer the matter back to the Special Commissioners.

The question, therefore, comes down to the single point and turns on the first head of the argument on the part of Mr. Cross which I have stated above. On the whole, my conclusion is against the Crown upon this matter. The grounds for my conclusion I can state under four heads.

(1) Even in the case of a trading company the conception that not all income is business earnings appears to be accepted, for example, by the House of Lords in *Commissioners of Inland Revenue v. Gas Lighting Improvement Co.*, 12 T.C. 503, and later in *Commissioners of Inland Revenue v. Tootal Broadhurst Lee Co., Ltd.*, 29 T.C. 352. Those cases related, in fact, in the former case to Excess Profits Duty and in the latter to Excess Profits Tax, and it is no doubt true that the question whether particular items or assets were investments turns on the special provisions of the rules applicable to that duty or tax. Nevertheless it seems to me that the language which I am about to cite from their Lordships' speeches in the *Gas Lighting Improvement Co.* case is of general application and relevant to the point which I have sought to make.

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Thus, Lord Cave, L.C., at page 535 of the report<sup>(1)</sup>, says:

"The expression"

—that is, investments—

"cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of that character could in no case be regarded as capital of the business, and it would be quite unnecessary to direct their exclusion. It must therefore refer to investments connected with the business, and I see no reason why it should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations for which the business was constituted."

Lord Finlay, at page 539, said:

"The Rule"

—that is, Rule 8 of the particular Rules applicable to the Duty—

"must, on the face of it, have been intended to deal with cases in which but for its provisions the income of these investments would have formed part of the profits of the business. The Rule is meaningless if it was intended to apply only to income which formed no part of the profits of the business, as such income would be already outside the scope of the Excess Profits Duty. I do not see how it is possible to escape from the conclusion that Rule 8 includes within its operation cases in which the money, from which the income was derived, was employed in the business of the Company assessed to Excess Profits Duty."

Lord Atkinson agreed entirely with what Lord Finlay had said.

In the *Tootal Broadhurst* case<sup>(2)</sup> the question was whether certain patents ought to be regarded as an investment for the purposes of the tax, the patents being assets from which the company derived, in fact, substantial revenue. I confine myself to one passage from the judgment of Lord Simonds in which, as will be observed, he referred to the *Gas Lighting Improvement Co.* case<sup>(3)</sup>. At page 372, he says:

"It appears to me that the problem may be solved in this way. I would take a schedule of the assets of the trading company concerned and, omitting assets such as stocks and shares to which in view of the decision in the *Gas Lighting Improvement Co.* case the title of investments can in no circumstances be denied, would ask of each other asset: 'Is this an asset which the company has acquired and holds for the purpose of earning profits in, or otherwise for the promotion of, its particular trade or business?' There might be borderline cases in which the answer would be uncertain, but I do not doubt that in the vast majority of cases the answer would be clear cut."

I should, however, refer also to the speech of Lord MacDermott in this case since it was somewhat relied upon by Mr. Cross. Lord MacDermott, at page 376, said:

"If, in the course of carrying on my business, I make active use of a business asset—be it my factory building, a piece of machinery, a patent or my working capital—that asset is not an investment. Whatever else a business investment may have to be, it is an asset for the time being held intentionally aloof from the active work of the business. It is none the less an asset of the business and may have great business value: for instance, it may enable me to survive bad times and take advantage of good, or it may help me to control supplies or competition. And if it produces income that is income of the business. But I do not earn that income by my business efforts. The part I play there is essentially passive."

I cannot, for my part, regard the language of Lord MacDermott as sufficient, having regard to what I have cited from the earlier case and from the speech of Lord Simonds, to dispose of the statement I have made that in

<sup>(1)</sup> 12 T.C.

<sup>(2)</sup> 29 T.C. 352.

<sup>(3)</sup> 12 T.C. 503.

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the case of a trading company not all income arising from assets belonging to the company can be treated as business earnings or income arising from a trade or business.

(2) The formula, which was, I have already stated, deliberately preserved after the amendment of the 1937 Finance Act, was "profits arising . . . from a trade or business". When individuals were liable to the tax this formula had an obvious and necessary significance, so as to exclude income or profits belonging to the individual and derived otherwise than from his business. It should not be said, in my judgment, that the 1947 amendment which, among other things, excepted the individual from the tax had the oblique effect of making the original formula necessarily synonymous with income from all sources.

(3) The Commissioners found as a fact that the various business enterprises of the Company were immediately before 1st January, 1947, separate and distinct. There is, in my view, no basis for saying either (a) that after 1st January, 1947, there was some kind of amalgamation or (b) that the sums here in question, which were in fact derived from a discontinued separate business, became automatically the profits of one or all of the continuing and separate businesses. Section 43 (1) of the Finance Act, 1947, can only operate so that the businesses in fact being carried on after 1st January, 1947, are treated as one for the purposes of the computation of the tax.

(4) If the disposal of the coalmining business had been a voluntary act upon similar or somewhat similar terms, then I conceive that the income receipts might be treated as arising from a trade or business on the ground that the sale had been, and had been intended as, a business transaction; but here the transfer to the National Coal Board was provided by Parliament *in invitum* so far as the Company was concerned, which could do no other than obey the law and receive the sums which Parliament ordained. Such a transaction must have been wholly outside the contemplation of the original corporators and the scope of the Company's memorandum of association. No intention in regard to income for the future can, in my judgment—in the absence, at least, of direct evidence—be attributed to the Company or its directors; to treat the income payments as arising from any trade or business being carried on by the Company is, to my mind, wholly unreal and insensible.

Reference was made to the terms of Section 1 (5) of the 1949 Coal Act as showing that Parliament regarded the revenue payments—at least, under the 1949 Coal Act—as subject to Profits Tax. I cannot for my part attach any significance to this matter. Assuming that Parliament did so contemplate—and the Sub-section, to my mind, is by no means free from doubt in this respect—the Coal Act was not *in pari materia* with the Finance Acts. In these circumstances, and according to well-established principles—see, for instance, *Camille Dreyfus Foundation v. Commissioners of Inland Revenue*<sup>(1)</sup>, [1954] Ch. 672—the language of the Sub-section cannot influence the interpretation of the Finance Act, 1937, in its application to the facts of the present case.

On the other hand, if the question had been asked of the Company, in any of the years 1947 and following: What is your business income?, or, more correctly: What are the profits arising from your business?, I think

<sup>(1)</sup> 36 T.C. 126.

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that a natural answer, contrary to the suggestion put before us by Sir Reginald Hills, would not have taken these income payments into account.

For the reasons which I have attempted to state, I would allow the appeal.

**Jenkins, L.J.**—This is an appeal by the Butterley Co., Ltd., from a judgment of Roxburgh, J., dated 27th July, 1954, allowing an appeal by the Crown from a determination of the Special Commissioners in favour of the Company on an appeal to them by the Company against assessments to Profits Tax for the calendar years 1947 to 1950 inclusive.

Down to 31st December, 1946, the Company carried on a number of trades or businesses including the trade or business of colliery proprietors. As from 1st January, 1947, the Company's colliery undertaking was compulsorily acquired by and vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946, and the Company became entitled to receive in respect of the assets so transferred an unascertained amount of compensation, and also to receive for the period between 1st January, 1947, and the date on which the compensation was fully satisfied periodical payments designated in the Act as interim income and calculated as therein provided.

The question in the case is whether the payments received by the Company in respect of interim income under the compensation provisions of the 1946 Act in each of the calendar years 1947 to 1950 are liable to Profits Tax.

In approaching this question it is material to observe that according to the facts found by the Special Commissioners it appears that, firstly, the colliery concern of the Company constituted a trade separate from its other trades and ceased entirely on 1st January, 1947, the date on which the colliery concern was compulsorily acquired by the National Coal Board; and, secondly, thereafter the Company continued to carry on its various other trades, which conversely were distinct and separate trades from the defunct colliery concern, and included ironfounding, structural steel manufacturing, wagon building, wrought iron production, brickmaking, civil engineering and dairy farming.

The Profits Tax was first imposed under the name of the National Defence Contribution by the Finance Act, 1937. The more material provisions of that Act are these. By Section 19 (1) the tax is

“charged, on the profits arising in each chargeable accounting period . . . from any trade or business to which this section applies”.

I here also refer to various other provisions of the Act of 1937 to which my Lord has already referred: I will not take up time by reading them again *in extenso*. Then by the Finance Act, 1947, Section 31 (1) (a), it was provided that the charge of Profits Tax should not apply to any trade or business unless it was carried on by a body corporate or unincorporated society or other body. By Section 32 (1) the substitution was made in respect of Paragraph 7 of the Fourth Schedule to the Act of 1937, and to that again my Lord has sufficiently referred. By Section 43 (1) of the same Act it was provided that all trades or businesses to which Section 19 of the Finance Act, 1937, applied carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the Profits Tax. By Section 47 (1) of the same Act it was provided, so far as material for the

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present purpose, that these changes in the law relating to Profits Tax should have effect with respect to all chargeable accounting periods any part of which fell after the end of the year 1946.

It is unnecessary to refer at any great length to the complicated provisions of the Coal Industry Nationalisation Act, 1946. So far as material for the present purpose this Act provided by Section 5 for the vesting in the National Coal Board of the assets to be transferred to it. With exceptions not here material such vesting was by Sub-section (1) of Section 5 to take place automatically on such date as the Minister might by order appoint, therein referred to as "the primary vesting date" and in fact fixed by the Minister as 1st January, 1947. By Section 10 (1) compensation was to be made as thereafter provided in respect of the transfer to the Board of the transferred interests. The provisions as to compensation were elaborate, involving as they did the fixing of a global sum representing the total amount of compensation payable in respect of all the assets acquired throughout the country, the apportionment of this sum amongst valuation districts, the allocation of the various transferred interests to compensation units, the valuation of those units, and the rateable apportionment amongst the units in each valuation district according to their respective values of the compensation allocated to such district. It was therefore likely to be a matter of years before the compensation payable in respect of any individual colliery concern could be fully ascertained and satisfied. By Section 21 (1) the compensation in respect of a transfer of transferred interests was with immaterial exceptions to be satisfied by the issue of Government stock, and this stock was by Section 23 subjected to certain restrictions as to the disposal thereof. The provisions chiefly material for the present purpose are those contained in Sections 19 and 22 of the Act. Again, my Lord has just read those Sections; I will not take up time by reading them again.

It will be seen that under Section 22 the right to interim income conferred by Section 19 was as regards the years 1947 and 1948 to be satisfied in effect by whichever of the following sums might be the greater, that is to say, the additions provided for by Sub-section (2) to instalments of compensation satisfied and the revenue payments provided for by Sub-section (3), with no provision for the repayment of any excess of the latter over the former. By the Coal Industry (No. 2) Act, 1949, provision was made for the continuance in a modified form of revenue payments in respect of the year 1949 and subsequent years until the compensation payable in respect of the transferred assets of any concern was fully satisfied. I here refer to the provisions of the 1949 Act which my Lord has already read.

Before the Special Commissioners the contentions advanced on behalf of the Company were to the effect: firstly, that the interim income payments received by the Company under the Acts of 1946 and 1949, whether in the form of additions to instalments of compensation under Section 22 (2) of the 1946 Act or in the form of revenue payments under Section 22 (3) or in the form provided for under Section 1 of the 1949 Act, notwithstanding the statutory description of "interim income" assigned to them in Section 19 (2) of the 1946 Act and elsewhere, were not income of the Company but part of the compensation payable to the Company for the taking away of its colliery assets; secondly, that these interim income payments were not profits of the trades or businesses carried on by the Company during the relevant chargeable accounting periods but arose to the Company from its colliery concern, which trade ceased entirely on 1st January, 1947, and, thirdly, that such payments were not income received from investments or

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other property within the meaning of Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, as amended by Section 32 of the Finance Act, 1947. For the Crown, on the other hand, it was contended: firstly, that such payments were income of the Company; secondly, that such payments were part of the profits of the trade or business carried on by the Company in the relevant chargeable accounting periods, and, thirdly, that such payments were income received from investments or other property within the meaning of Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, as amended.

The Special Commissioners first stated their conclusion that the payments in question were not properly included in computing, for the purposes of the Profits Tax, the profits of the Company for the relevant chargeable accounting periods; secondly, held that such payments were income of the Company and rejected the Company's first contention, and continued the statement of their findings which my Lord has already read. I will not read them again.

Roxburgh, J., found it unnecessary to decide whether the payments received by the Company in respect of interim income were or were not profits arising from the trades or businesses carried on by the Company during the relevant chargeable accounting periods, for in his view whether this was so or not it was at all events plain that these payments were income received from property and as such fell to be included in the profits of the Company for the purposes of Profits Tax, by virtue of the express direction in Paragraph 7 (1) of the Fourth Schedule to the 1937 Act, as amended, that, with exceptions not applicable in the present case, "Income received from . . . property shall be included in the profits". This provision in his view had the effect of bringing the interim income payments into the charge to Profits Tax whether they were or were not profits arising from any trade or business carried on by the Company in the relevant chargeable accounting periods. Accordingly he allowed the Crown's appeal.

In this Court Mr. Russell, for the Company, abandoned the contention that the interim income payments were not income at all, while Mr. Cross, for the Crown, abandoned the contention that the claim to tax could be established merely by showing that the interim income payments were income received from property.

It thus became common ground that the interim income payments, whether they were or were not income received from property, were only chargeable to Profits Tax if they were profits of a trade or business carried on by the Company during the relevant chargeable accounting periods. This must, I think, be the right view. The charging Section, that is to say Section 19 of the 1937 Act, charges the tax on the profits arising in each chargeable accounting period from any trade or business to which the Section applies, and charges nothing other than the profits so arising. Paragraph 7 of the Fourth Schedule to the 1937 Act as originally framed, in providing that income from investments or other property should with the exceptions therein mentioned be excluded from the profits, must be taken to have been referring to investments or other property the income received from which would apart from its exclusion have been included in the profits arising from the trade or business, and not to income from investments or other property which have nothing to do with the trade or business, the exclusion of which would have been wholly unnecessary. Compare *Commissioners of Inland Revenue v. Gas Lighting Improvement Co.*, 12 T.C. 503, per Lord

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Sterndale, M.R., at page 525, Lord Cave, L.C., at page 535, Lord Finlay at page 539, and *Commissioners of Inland Revenue v. Tootal Broadhurst Lee Co., Ltd.*, 29 T.C. 352, per Lord MacDermott at page 376. Similarly I think that the substituted Paragraph 7 (1) of the Fourth Schedule to the 1937 Act introduced by Section 32 of the 1947 Act, in providing that income received from investments or other property should with the exceptions therein mentioned be included in the profits, must be taken as referring to income received from investments or other property the income from which forms part of the profits arising from the trade or business.

In other words, I think the inclusion of income received from investments or other property enacted by the new Paragraph 7 (1) of the Fourth Schedule to the Act of 1937 relates to investments or other property of the same character as those to which the exclusion enacted by Paragraph 7 of that Schedule in its original form related. I cannot construe the new Paragraph 7 (1) as bringing into charge to tax investments or other property which have nothing to do with the trade or business. I think this view is reinforced by the circumstance that until the amendment in this respect introduced by Section 31 of the 1947 Act the charge to tax extended to trades or businesses carried on by partnerships or individuals. The question to be answered being whether profits of a trade or business received in the form of income from investments or other property were to be included in the charge to tax, the old Paragraph 7 gave the answer: No, with certain exceptions, and the new Paragraph 7 (1) gave the answer: Yes, with certain exceptions. Before the amendment the general rule was that income received from investments or other property which would otherwise have been included should be excluded, whereas after the amendment the general rule was that there should be no such exclusion.

Accordingly the argument before us was in effect directed to two questions, that is to say: firstly, whether the interim income payments, considered simply as periodical payments in the nature of income received by the Company under the provisions of the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, were profits arising from any trade or business carried on by the Company in the relevant chargeable accounting periods; and, secondly, alternatively, whether such interim income payments, considered, if they could properly be so considered, as income received from property, in the shape either of a capital sum represented by the compensation when ascertained or of an income bearing asset consisting of the right to receive interim income under the Acts, were profits arising from any such trade or business.

The first of these questions must, I think, clearly be answered in the negative. The Commissioners found as a fact that the colliery concern of the Company constituted a trade separate from its other trades and that that trade ceased entirely on 1st January, 1947. The separate nature of the colliery concern and its cesser are both undoubtedly questions of fact as to which the Special Commissioners' findings are binding upon us. The cesser of the Company's colliery concern was indeed a matter upon which a finding was hardly required, as it followed as a necessary consequence of the application of the provisions of the 1946 Act to that concern, and to be strictly accurate the exact moment of cesser would appear to have been midnight on 31st December, 1946/1st January, 1947. On these findings the interim income payments clearly could not be profits arising from the carrying on of the Company's colliery trade which had wholly ceased. It is equally clear that such payments were not in fact profits arising from any of the trades or



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businesses which the Company continued to carry on after the cesser of its colliery trade. Such payments were received independently of and had nothing to do with any of those other trades or businesses. They would have been received just the same if the Company had never carried on any trade or business other than its colliery concern. In view of the Special Commissioners' finding as to the separate character of the colliery concern, the interim income payments cannot be imputed to the trades or businesses which were continued by the Company on the ground that the colliery concern was merely a branch or department of one entire business, which was continued as a whole with the substitution of the Company's rights under the Acts of 1946 and 1949 for the defunct colliery concern.

I do not think Section 43 (1) of the Finance Act, 1947, as to treating all trades or businesses carried on by the same person as one for Profits Tax purposes can assist the Crown here, for the separate colliery trade in this case ceased contemporaneously with the commencement of the first chargeable accounting period to which that Section applied. The true nature, as I see it, of the interim income payments is that they were not profits arising from any trade or business but were payments in the nature of income made under the Acts of 1946 and 1949 to compensate the Company for the loss of income which it sustained during the period from 1st January, 1947, to the date of final ascertainment and satisfaction of the compensation by reason of the compulsory acquisition and consequent cesser of its colliery trade.

As to the second question, I do not think the case for the Crown is improved by treating the interim income payments as income received from property, whether in the shape of a capital sum represented by the compensation when ascertained or of an income bearing asset consisting of the right to receive interim income under the Acts, for it is, as I have said, common ground that income received from property, in order to be chargeable with Profits Tax, must be profits arising from a trade or business carried on during the relevant chargeable accounting period. I think that income received from property can only answer that description if the property from which it is received can fairly and properly be described as an asset of the trade or business so carried on. In view of the separate character possessed by the Company's colliery concern down to the date of its compulsory acquisition and consequent cesser, it seems to me impossible to hold that the Company's rights under the Acts, whether to the capital compensation when ascertained or to the interim income payments, can fairly or properly be described as constituting assets or income of the trades or businesses carried on by the Company during the relevant chargeable accounting periods, that is to say its trades or businesses other than the separate and defunct colliery concern. These rights and their produce were just as separate and distinct from the continued trades or businesses as the colliery concern had been while it existed.

Mr. Cross sought to meet this difficulty in two ways. First, he said that the Company had in fact dealt with the interim income payments and treated them in their accounts as if they were income of the continued trades or businesses, and had in like manner treated the payments on account of compensation as assets of the continued trades or businesses. Thus, whatever the position might have been if the Company had segregated the interim income payments and the payments on account of compensation from the continued trades or businesses, the Company had in fact chosen to make them income and capital assets respectively of the continued trades

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or businesses, with the result that the interim income payments became part of the profits arising from the continued trades or businesses for the purposes of Profits Tax. Secondly, he said that the *raison d'être* of a trading company being to trade, any income received by such a company must be income of its trade or business. The latter point can, I think, be shortly disposed of. Profits Tax is charged on the profits arising from any trade or business carried on during any given chargeable accounting period, and not on the income from all sources of the person carrying on any trade or business during any given chargeable accounting period. It follows that income received by a trading company is not chargeable to Profits Tax merely on the ground that it is income of a trading company. It must be shown further that such income represents profits arising from some trade or business carried on by that company during the relevant chargeable accounting period.

As to the former point, Mr. Russell did not dispute that the interim income payments and payments on account of compensation were in fact treated by the Company as and when received as if they were respectively income and capital assets of the continued trades or businesses. This indeed appears clearly enough from the post-1946 balance sheets and accounts of the Company annexed to the Case. The interim income payments as and when received were credited to revenue account, while the payments on account of compensation as and when received were, broadly speaking, applied in writing down to the nominal figure of £1 the book values of the assets taken over by the Coal Board and discharging the Company's overdraft, the surplus over such book values being in part carried to reserve and in part applied by way of distribution of capital profits. But, said Mr. Russell, the quality of a given income receipt as being or not being profits of a trade or business carried on by the recipient must be judged and determined at the time of receipt, and if it is not profits arising from such a trade or business when received, it cannot be converted into profits so arising by reason of the fact that it is afterwards treated as if it had been profits so arising. Moreover, while it is no doubt true that, so far as the payments on account of compensation were, as and when received, made part of the capital assets of the continued trades or businesses, any income thereafter derived from them would fall to be brought into the computation of the profits arising from those trades or businesses for Profits Tax purposes, it does not follow that, pending the actual ascertainment and receipt of the compensation for the time being outstanding, the mere right to receive it when ascertained became an asset of the continued trades or businesses, so that the interim income, considered as income of the compensation, became, as income of property which was an asset of those trades or businesses, part of the profits arising from them in the shape of income received from property within the meaning of Paragraph 7 (1) of the Fourth Schedule to the 1937 Act, as amended. That conclusion would be inconsistent with the Special Commissioners' finding that the Company's colliery concern was a separate trade. The right to receive the outstanding and unascertained compensation was a right conferred exclusively in respect of the compulsory acquisition and consequent cesser of that separate trade and had nothing to do with the Company's other trades or businesses. The fact that the stock or cash received in or towards satisfaction of the right was, as and when received, appropriated to the purposes of the continued trades or businesses could not alter retrospectively the character of the right, any more than the appropriation to such purposes of the interim income payments as and when received could alter retrospectively the character of those receipts.

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As appears from the above discussion of the arguments, the two questions into which I divided the matter in issue earlier in this judgment to some extent overlap, and perhaps they would be better described as two ways of approaching the same question. On both questions, or on both methods of approach, I think the argument for the Company should prevail.

If the view I have formed to the effect that the interim income payments in this case are not, upon the true construction of the relevant provisions of the Finance Acts, 1937 and 1947, chargeable to Profits Tax, is right, I find it impossible to hold that the references to Profits Tax in the proviso to Section 1 (5) of the Coal Industry (No. 2) Act, 1949, have made them so chargeable. Those references at most imply an assumption by Parliament that interim income payments under the 1946 Act and that Act were subject to Profits Tax; but an assumption made in a later enactment as to the construction and effect of a given statutory provision is not to be treated as if it were an amendment of the earlier provision. Such legislative assumptions may sometimes be used for the purpose of resolving doubts or ambiguities, but do not alter the law. See the cases on this subject collected in *Camille & Henry Dreyfus Foundation, Inc. v. Commissioners of Inland Revenue*<sup>(1)</sup>, [1954] Ch. 672, and particularly the succinct observation of Lord Radcliffe in *Commissioners of Inland Revenue v. Dowdall, O'Mahoney & Co., Ltd.*, 33 T.C. 259, at page 287, that

"The beliefs or assumptions of those who frame Acts of Parliament cannot make the law."

Moreover, it is to be observed that in the present case the Act in which the assumption as to liability for Profits Tax is made is not directly concerned with Profits Tax, but with the continuation in an amended form of the provisions of the Coal Industry Nationalisation Act, 1946, as to interim income. The incidental references to Profits Tax in the provisions as to the adjustment of payments may thus well have been made merely *ex abundanti cautela* with little or no consideration of the question whether the interim income payments were or were not liable to the tax. Finally *non constat* that there may not conceivably have been cases in which the facts and circumstances were such as to attract Profits Tax on the interim income payments, and the possibility that such cases might exist would suffice to satisfy the references to the tax in the 1949 Act without recourse to the supposition that the Legislature regarded it as exigible in all cases.

The admission made by the Crown to the effect that the new Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, as amended by the Finance Act, 1947, only includes income received from property where such income forms part of the profits of the trade or business, and the view I have formed to the effect that the interim income payments in the present case, even if considered in other respects as income received from property within the meaning of the Paragraph, were not profits of any trade or business carried on by the Company during the relevant chargeable accounting periods, make it unnecessary for me to decide whether these income payments were in other respects income received from property within the meaning of the Paragraph. This seems to me at least open to doubt. The Act of 1946 studiously avoids describing the interim income as interest on or income of the compensation, even when the interim income is to be satisfied in the way provided by Section 22 (2) (a), the formula there used being

"the said right"

(1) 36 T.C. 126.

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(that is to say, the said right to interim income)

“ . . . shall be satisfied . . . by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation . . . a money payment . . . equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . . ”;

and these additional payments are referred to elsewhere in the Act as “ additions ” to the compensation. Under the provisions of Section 22 (3) as to revenue payments (which, in effect, were to be made for the calendar years 1947 and 1948 in lieu of the above-mentioned additions in all cases in which they would be larger than such additions) these payments were to be calculated by reference to the past earnings of the concern and bore no relation at all to the amount of the compensation. In continuing the revenue payments in modified form the Act of 1949 in effect made them as regards 1949 and subsequent years subject to adjustment by repayment to the Minister of any amount whereby they were found to exceed the interim income which would have been payable for the same period according to the method of calculation provided for by Section 22 (2) (a) of the 1946 Act, but subject to such adjustment the right given is still a right measured by reference to past earnings. I find it difficult to hold that the interim income payable under these Acts, defined and measured in the way it is, can properly be described as income of the compensation; and there is, I think, much to be said for the view that, albeit itself in the nature of income, it is not income of the compensation but rather income-compensation, if I may use that expression, that is to say a series of periodical payments an independent right to which is conferred by the Act by way of compensation for the loss of income sustained in respect of the period between the primary vesting date and the ascertainment and satisfaction of the capital compensation.

Mr. Cross's suggestion that at all events the interim income was income of an income bearing asset in the shape of the right to receive it conferred by the Acts strikes me as highly artificial. My doubts are, I think, warranted by some observations of Lord Simonds and Lord MacDermott in the case of *Tootal Broadhurst Lee Co., Ltd. v. Commissioners of Inland Revenue*, 29 T.C. 352, on the meaning of the word “ investments ”. Lord Simonds, at page 372, said:

“ The problem, my Lords, is a different one, not whether these assets, being investments, are within the Paragraph, but whether they are investments at all, and, as I have already said, that is a word whose scope will depend on its context.

It appears to me that the problem may be solved in this way. I would take a schedule of the assets of the trading company concerned and, omitting assets such as stocks and shares to which in view of the decision in the *Gas Lighting Improvement Co.* case<sup>(1)</sup> the title of investments can in no circumstances be denied, would ask of each other asset: ‘ Is this an asset which the company has acquired and holds for the purpose of earning profits in, or otherwise for the promotion of, its particular trade or business? ’ There might be borderline cases in which the answer would be uncertain, but I do not doubt that in the vast majority of cases the answer would be clear cut.”

Then, later on the same page, his Lordship said:

“ Applying this test to the facts of the present appeal I cannot believe that any business man (who may be regarded as the touchstone in such a case) would describe the patent rights here in question as investments of the Appellants or the payments received by them under the licences or agreement as income of their investments.”

(<sup>1</sup>) 12 T.C. 503.

Lord MacDermott said, at page 376<sup>(1)</sup>:

"My Lords, I do not think any business man would describe the income so obtained as 'income received from investments.'"

Then, at page 377:

"It is plain, therefore, that 'investments' refers to some assets and not to others. The statute, however, does not lay down any method of segregation for its purposes and, in the absence of such provision, the proper test must, in my opinion, be related to the limited sphere of trade or business with which the Act is here dealing and founded, accordingly, upon the meaning of the word for the man engaged in trade or business rather than for the man in the street."

It is true that, as Lord MacDermott pointed out, the words to be considered were "income received from investments" without the addition of the words "or other property" which are of wider import. But if it is right to consult the probable views of the business man as to the meaning of investments I see no reason why the same test should not be applied in considering the meaning of the word "property". I therefore ask myself whether any business man would describe the interim income receivable under the Acts of 1946 and 1949 as income received from property, and find it difficult to believe that he would.

It is, however, unnecessary to pursue this question further, and for the reasons I have earlier stated I would allow this appeal.

**Morris, L.J.**—In considering the facts in this case it is necessary to have in mind the precise provisions pursuant to which Profits Tax is charged. The wording of Section 19 (1) of the Finance Act, 1937, provides that:

"There shall be charged, on the profits arising in each chargeable accounting period . . . from any trade or business to which this section applies, a tax".

The wording of Sub-section (2) so far as relevant for present purposes provides that the Section applies to all trades or businesses of any description carried on in the United Kingdom. Section 20 (1) of the Act provides that

"the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of the Fourth Schedule to this Act."

There is the further provision that

"For the purpose of this subsection, the expression 'income tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purpose of income tax under Case I of Schedule D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising."

It is to be noted that the function of the Fourth Schedule is to set out certain adaptations of Income Tax provisions as to the computation of profits for the purpose of the tax. It was not before us contended on behalf of the Crown, nor in my judgment could it validly have been contended, that any of the provisions contained in the Fourth Schedule could enlarge or do enlarge the words contained in the body of the Act by which a charge is imposed. The result is therefore that the tax is charged upon the actual profits arising in a chargeable accounting period from a trade or business which is being carried on and which is not exempt. In computing those profits the provisions of the Fourth Schedule come into play, but they do not come into play so as to extend the scope of the tax. Thus Paragraph 7 of the Fourth Schedule, both in its original form and in the substituted

(1) 29 T.C.

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form introduced by Section 32 of the Finance Act, 1947, refers to "income received from investments or other property". The reference is to investments or other property of the trade or business. When by the Finance Act, 1937, the tax (then called the National Defence Contribution) was imposed it then applied not only to bodies corporate but also to individuals who owned a trade or business. In either case the reference in the Schedule to investments or other property was to such investments or other property as related to or formed part of the trade or business as opposed, particularly in the case of individuals, to those which were unrelated to the trade or business.

The Butterley Co. carried on a number of trades. They included coal-mining, ironfounding, structural steel manufacturing, wagon building, wrought iron production, brickmaking, civil engineering and dairy farming. There is a finding of fact that the colliery concern of the Company constituted a trade separate from its other trades; there is a further finding that that trade ceased entirely on 1st January, 1947.

The position was, therefore, that the Butterley Co. before 1st January, 1947, carried on the trade or business of coalmining (which I will call business A) and various other businesses (which I will call businesses B, C, D and E although, in fact, they were more than four in number). The Commissioners found that what they called the Company's "composite trade or business" consisted at the end of the year 1946 of "a number of separate and severable trades" of which the colliery concern was one: see paragraph 13 (iii). Business A ceased entirely on 1st January, 1947. The Company then had businesses B, C, D and E, and the Company owned the statutory rights to income and capital given by the Coal Industry Nationalisation Act of 1946. When "interim income" payable pursuant to the provisions of that Act was received, the Company could use or apply that income in such way as it decided. But the question now arising is as to the nature and quality of that income at the time of its receipt. This cannot be affected or altered according to how after receipt it was used, applied or spent.

Though the interim income must be regarded as income when received by the Company, the present enquiry is whether it was income arising from a trade or business carried on by the Company in a chargeable accounting period. Business A was no longer being carried on and so Profits Tax could not be charged in reference to it. Businesses B, C, D and E must as a result of Section 43 of the Finance Act, 1947, be treated as one trade or business. But the interim income had no relation to businesses B, C, D and E whether treated as one or whether regarded separately and singly. I do not think that the Crown can successfully assert that these businesses ceased to be separate after the end of 1946. The Stated Case refers (see paragraphs 4 and 5) to the trades carried on after 1st January, 1947. The interim income did not in any way or in any sense arise from the trade or business which I may call "B plus C plus D plus E". In my judgment it would be contrary to the realities of the situation so to hold. It is true that the Company that owned the business of B plus C plus D plus E also owned the rights resulting from the Coal Act, 1946, after business A, which belonged to the Company, had been compulsorily acquired. But the mere ownership of the statutory rights resulting from the acquisition of business A did not on the finding in this case amount to a business in itself (and it is to be observed that no suggestion has been made that the provisions of Section 19 (4) of the Finance Act, 1937, have application in this case) or to a new business to be tacked

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on to businesses B, C, D and E and to be treated as one with them. The Company might have placed all its receipts of interim income to a suspense account. In fact, as the accounts of the Company show, the money when received was employed in the general operations of the Company. As a result it might be that in later years some income which would result from the use of the interim income would be included in the income or profits attracting Profits Tax. But the manner in which the Company employed the interim income which they received is in my judgment not relevant in an enquiry as to whether it arose from a trade or business being carried on in a chargeable accounting period. As it did not so arise, Profits Tax did not, in my judgment, become chargeable upon it. I would allow the appeal.

**Mr. Patrick Jenkin.**—Will the appeal be allowed with costs, my Lord?

**Sir Raymond Evershed, M.R.**—That seems to follow, Sir Reginald?

**Sir Reginald Hills.**—It follows inevitably.

**Sir Raymond Evershed, M.R.**—Well, then, the Order will be: The assessments are discharged. Is that right?

**Sir Reginald Hills.**—No, the assessments are not discharged. They are quite good assessments apart from this.

**Sir Raymond Evershed, M.R.**—The Order that the learned Judge made, of course, was a remission to adjust the assessment.

**Sir Reginald Hills.**—Yes, my Lord.

**Sir Raymond Evershed, M.R.**—I suppose we discharge it. I am not sure what the proper form is.

**Mr. Jenkin.**—I understand that the tax has not been paid.

**Jenkins, L.J.**—These are assessments which include tax on other matters which are not in dispute?

**Mr. Jenkin.**—Yes, indeed.

**Sir Reginald Hills.**—I think your Lordship will find that the figures were agreed on the basis of the Commissioners' decision in favour of my learned friend's clients. Your Lordship will see it in paragraph 13. They are all agreed figures.

**Sir Raymond Evershed, M.R.**—Yes. Well, what would the Order be, Sir Reginald?

**Sir Reginald Hills.**—The appeal would be allowed; the decision below reversed, and, I think, the determination by the Commissioners of the assessments confirmed.

**Mr. Jenkin.**—It appears from the Commissioners' findings that the figures have been agreed.

**Sir Raymond Evershed, M.R.**—Then the Order is that the assessments directed by the Special Commissioners be confirmed.

**Sir Reginald Hills.**—As determined by the Special Commissioners?

**Sir Raymond Evershed, M.R.**—Yes, very good, Sir Reginald. If there is any difficulty about the form of the Order, you will, no doubt, be able to agree with the other side.

**Sir Reginald Hills.**—I am instructed to ask for leave to appeal to the House of Lords. It is a matter, of course, which affects a very large number of applicants.

**Sir Raymond Evershed, M.R.**—What do you say to that?

**Mr. Jenkin.**—I would find it difficult to resist the application in the circumstances, as your Lordships have reversed the decision of Roxburgh, J.

**Sir Raymond Evershed, M.R.**—Yes, Sir Reginald, we give leave.

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The Crown having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Morton of Henryton, Reid, Radcliffe and Somervell of Harrow) on 14th, 15th, 19th and 20th March, 1956, when judgment was reserved. On 19th April, 1956, judgment was given unanimously against the Crown, with costs.

Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. Blanchard Stamp appeared as Counsel for the Crown, and the Hon. Charles Russell, Q.C., Mr. John Senter, Q.C., Mr. Desmond Miller and Mr. Patrick Jenkin for the Company.

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**Viscount Simonds.**—My Lords, this appears to me to be a very clear case, and I have no doubt that this appeal should be dismissed. That does not mean that there have not been questions raised in the course of the argument which may be extremely difficult to decide. They are not, however, necessary for the decision of this case.

The short point for determination is whether the assessment of the Respondent Company to Profits Tax for the accounting periods 1st January, 1947, to 31st December, 1950, ought or ought not to include certain payments made to the Company under the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949. The Company was incorporated in the United Kingdom in the year 1888 and thereafter carried on a number of trades or businesses, amongst them the trade or business of colliery owners. By virtue of Section 5 (1) of the Coal Industry Nationalisation Act, 1946, the colliery assets of the Company became vested in the National Coal Board on 1st January, 1947, and thereupon, as was found in the Case to which I will presently refer, its colliery trade ceased entirely. But it continued to carry on its other trades or businesses. The Coal Industry Nationalisation Act, 1946, which provided for the compulsory transfer of colliery assets to the National Coal Board, provided also for compensation being paid to the former owners. These provisions were of a complicated character, and I will only say of the compensation of a capital nature, first, that it was clear from the outset that a substantial time must elapse before the amount payable could be ascertained, and, secondly, that the compensation was entirely or largely to consist of Government stock which was subject to severe restrictions in regard to disposal. But because there was seen to be this inevitable delay in assessing and paying compensation the 1946 Act provided, by Section 19 (2), that until such compensation was fully satisfied there should be a right to interim income which was to be satisfied as provided by Section 22. The relevant provisions of that Section and of later Sections of the 1946 Act, together with the supplementary provisions of the 1949 Act, and a statement of the



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sums received by the Company under those provisions respectively, are set out succinctly in the Case Stated by the Special Commissioners, and in substance I repeat their statement here.

Section 22 (2) (a) is as follows:

"Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by subsection (2) of section nineteen of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury".

Under this Sub-section the Company received on 14th January, 1949, £415 13s. 6d., net £228 12s. 5d.; on 15th February, 1950, £64 3s. 5d., net £35 5s. 11d.; on 17th March, 1950, £353 7s. 2d., net £194 6s. 11d.; on 5th July, 1950, £27,123 5s. 8d., net £14,917 16s. 1d.; and on 2nd January, 1951, £1,882 18s., net £1,035 11s. 11d. These payments were all in respect of a broken period from the end of the year down to the date when compensation under Sections 10 to 17 of the 1946 Act was paid, and represented amounts equal to interest at rates prescribed by the Treasury varying between 2½ and 4½ per cent. per annum.

The relevant provisions relating to the payments arising under Section 22 (3) are as follows:

"(3) The following provisions of this subsection shall have effect as to the making to colliery concerns . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned".

The payments under this Sub-section were based on the amount of profit earned in the period before the colliery assets vested in the Coal Board. The said payments were for the first two years after the vesting of the assets in the Coal Board and under Section 22 (4) were

"deemed . . . to be in substitution for the provisions of subsection (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern".

Under this Sub-section the Company received on 7th January, 1948, a sum of £66,189, net £36,403 19s.; on 26th April, 1948, a sum of £66,189, net £36,403 19s.; on 17th August, 1948, a sum of £66,189, net £36,403 19s.; on 22nd February, 1949, a sum of £84,249 8s. 7d., net £46,337 3s. 9d. The said money payments are described as "revenue payments" by Section 22 (3) (b).

Finally the Company received on 17th March, 1950, a sum of £76,430 6s. 10d., net £42,036 13s. 9d., under the provisions of Section 1 (2) of the Coal Industry (No. 2) Act, 1949. This payment was made under the

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provisions of Section 1 (2) of the Coal Industry (No. 2) Act, 1949, which so far as relevant is as follows:

"A colliery concern . . . shall, in respect of the year nineteen hundred and forty-nine and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year."

Under Section 1 (3), the said payment was to be treated for the purposes of Section 22 (2) (a) of the 1946 Act

"as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern".

These are the sums which were, as the Appellants claim rightly, and as the Respondents claim wrongly, included in the Company's assessments to Profits Tax for the chargeable accounting periods from 1st January, 1947, to 31st December, 1950. I have set out the relevant statutory provisions with what may seem to be unnecessary elaboration in order that the nature of the payments may be clearly understood.

It is now necessary to refer to the relevant provisions of the Finance Acts of 1937 and 1947, and I summarise them as follows.

Profits Tax was imposed under the title of National Defence Contribution in Part III of the Finance Act, 1937, the title being altered to Profits Tax by Section 44 of the Finance Act, 1946. By Section 19 (1) of the Finance Act, 1937, the tax was charged

"on the profits arising in each chargeable accounting period . . . from any trade or business"

to which the Section applied. By Section 19 (2) the trades and businesses to which the Section applied were

"all trades or businesses of any description carried on in the United Kingdom . . ."

Section 19 (4) provides:

"Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or 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 or society."

Section 20 (1) of the Finance Act, 1937, provides:

"For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of the Fourth Schedule to this Act. For the purpose of this subsection, the expression 'income tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purpose of income tax under Case I of Schedule D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising."

The adaptations of Income Tax principles for computing profits made in the Fourth Schedule include provisions allowing interest, annuities and annual payments out of profits to be deducted (the deduction of which is disallowed

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under the Rules of Case I of Schedule D), and disallowing the deduction in respect of annual value of land which is allowed for Income Tax under those Rules.

With regard to income received from investments or other property, Paragraph 7 of the Schedule, as originally enacted, provided for the inclusion of such income in the profits in the cases therein mentioned only, such as the business of a building society or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property (with certain exceptions in those cases as regards certain dividends or distributions of profits, and as regards income to which the person carrying on the trade was not beneficially entitled). Subject to these and other provisions as to income from investments or other property, it was declared (in Paragraph 8 of the Schedule) that

"the profits shall include all such income arising from the trade or business as is chargeable to income tax under Case I of Schedule D, or would be so chargeable if the profits of the trade or business were chargeable under that Case, except income which is, or would be, exempted from income tax by virtue of section thirty-nine of the Income Tax Act, 1918, or section thirty of the Finance Act, 1921."

By Section 31 (1) of the Finance Act, 1947, it was provided that, subject to certain exceptions, Profits Tax did not apply to any trade or business not carried on by a body corporate, or unincorporated society or other body. By Section 31 (2) of the Finance Act, 1947, it was provided that the charge to Profits Tax in Section 19 of the Finance Act, 1937, should not apply to any trade or business carried on by a body corporate where in the conditions therein prescribed

"the actual income of the body corporate from all sources is apportioned under or for the purposes of section twenty-one of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

By Section 32 of the Finance Act, 1947, the provisions of Paragraph 7 of the Fourth Schedule to the Finance Act, 1937, with regard to investment income and income from property were varied so as to provide that in the case of all trades and businesses such income should be included in the computation of profits subject to the same exceptions as regards dividends and distributions of profits and income to which the person carrying on the trade is not beneficially entitled as were contained in Paragraph 7 aforesaid. By Section 43 (1) of the Finance Act, 1947, it was enacted that all trades and businesses to which Section 19 of the Finance Act, 1937, applies carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the Profits Tax.

The Respondents, having been assessed to Profits Tax in the manner that I have mentioned, appealed against such assessments to the Special Commissioners. It was contended before them by the Appellants (1) that the payments in question

"were income of the Company proper to be included in the computation of the profits of its trade or business for the purpose of the Profits Tax; (2) that under the provisions of Section 19 (1) and (2), Finance Act, 1937, the said payments were part of the profits of the trade or business carried on by the Company in the said chargeable accounting periods . . . ; (3) in the alternative, that the said payments, arising from the right to 'interim income', 'revenue payments' and further 'income payments' provided by the Coal Act, 1946, and the Coal Act, 1949, were, on the true construction of Paragraph 7 (1), Fourth Schedule, Finance Act, 1937, as amended by Section 32 (1), Finance Act, 1947, 'income received from investments or other property'."

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For the Respondents, the first contention, which was afterwards abandoned, was that the payments in question were not income, but, further, they contended, and have since maintained, that the payments were not part of the profits of the trades or businesses carried on by them during the relevant chargeable accounting periods but arose from their colliery concern, which trade ceased entirely on 1st January, 1947, and, further, that they were not "income received from investments or other property" within the meaning of the amended Paragraph 7.

The Commissioners decided in favour of the Respondents, holding that the payments constituted income of the Respondents, but (a) that the Respondents' composite trade or business consisted at the material time (sc., before 1st January, 1947) of a number of separate and severable trades of which their colliery concern was one, and that that trade ceased entirely on 1st January, 1947, and (b) that as a consequence of that finding of fact the payments in question were not receipts of any trade carried on by the Respondents during the relevant chargeable accounting periods, and (c) that on the proper construction of the relevant Statutes the payments were not "income received from investments or other property". The Appellants having expressed dissatisfaction with this determination, the Commissioners stated a Case for the opinion of the Court, which was heard by Roxburgh, J. That learned Judge disposed of the matters in favour of the present Appellants upon the short ground that the payments were income from property, namely, a chose in action consisting of compensation due but not yet paid. The present Respondents thereupon appealed to the Court of Appeal, which unanimously reversed the judgment of Roxburgh, J.

I must at this stage mention a concession made by Counsel for the present Appellants in the Court of Appeal which is thus stated in the judgment of Jenkins, L.J.<sup>(1)</sup>:

"In this Court Mr. Russell, for the Company, abandoned the contention that the interim income payments were not income at all, while Mr. Cross, for the Crown, abandoned the contention that the claim to tax could be established merely by showing that the interim income payments were income received from property. It thus became common ground that the interim income payments, whether they were or were not income received from property, were only chargeable to Profits Tax if they were profits of a trade or business carried on by the Company during the relevant chargeable accounting periods. This must, I think, be the right view."

My Lords, I agree that this must be the right view, for it is just what the Act says, and, in so far as Roxburgh, J., decided that it was enough to bring a payment within the reach of Profits Tax that it should be income derived from property of the Company without regard to the question whether it arose from a trade or business carried on by the Company during the relevant period, he was clearly wrong. But that leaves open the troublesome question what, in view of the provisions of Section 20 of the Finance Act, 1937, and the Fourth Schedule to that Act, as amended by the Finance Act, 1947, are to be regarded as the profits arising from any trade or business carried on in the United Kingdom in the relevant period. This is at best a very artificial conception, and the width of the new Paragraph 7, which was imported by Section 32 of the Finance Act, 1947, may be estimated by the apparent necessity to exclude

"(c) income to which the persons carrying on the trade or business are not beneficially entitled";

(1) See page 433 *ante*.

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and thus colour is given to the view that profits of a trade carried on by the Company have become identified with income of any property of the Company. This, notwithstanding the concession to which I have referred, was in effect the contention of the Appellants. During the relevant periods, they said, the Company carried on a number of trades or businesses: the payments in question were available for the carrying on of those trades or businesses in the same way as the dividends or interest on War Loan or any other capital investment of the Company: therefore the payments were profits arising from the trade. And they fortified their contention by reference to the accounts of the Company in which the payments in question were lumped together with other trading receipts. With this latter aspect of the matter I will deal presently. My present concern is with its broader aspect, in which the source of the income is disregarded if it is available for employment in a trade, which is in effect to say that for the purpose of Profits Tax the income of a company is equivalent to the profits of its trade.

My Lords, while I am satisfied that this is a wholly wrong view of the scope of Profits Tax, I am conscious of the familiar difficulty of drawing the line. That the line must be drawn somewhere is apparent (and the Appellants appeared at one time to concede it) for, fundamentally, the tax is a tax on the profits of a trade or business, whether, as was formerly the case, carried on by an individual or a company or, as now, carried on by a company. And if, artificially, the income of any investments is to be treated as part of the profits of a trade, it can only be those investments which are somehow related to the trade in question. It is not, I think, necessary to state categorically that the provisions of the Schedule cannot enlarge the scope of the charging Section (Section 19 of the 1937 Act), for Section 20, with which the Schedule must be read, can fairly be said to give an artificial meaning to the words of the charging Section. But at least the dominant words, "the profits arising in each accounting period from any trade or business", must not be lost sight of. That is why I use the vague and general words, "somehow related to the trade in question", and, doing so, am well aware that I have not yet drawn the hypothetical line. But I am unwilling to go further than is necessary for the decision of the present case. We have been told that it has been the practice since 1947 to include in an assessment to Profits Tax income derived from investments representing the general reserve of a trading company and having no closer association with its trade than its general availability for the lawful uses of the company, and I would not say anything to affirm or to cast any doubt upon the validity of the practice, which may be said to find its analogue in *Liverpool and London and Globe Insurance Co. v. Bennett*<sup>(1)</sup>, [1913] A.C. 610.

In the present case, however, there are considerations which, if they do not entitle me to say that it is *sui generis*, at least remove it from the generality of cases. As my noble and learned friend Lord Radcliffe said in *Birmingham Small Arms Co., Ltd. v. Commissioners of Inland Revenue*, [1951] 2 All E.R. 296, at page 303, a company

"may, obviously, own capital or assets that are not the capital or assets of . . . its trade or business."

And if it was sought to give a conspicuous example of an asset which was not the asset of a trade or business carried on by a company, I should select

(1) 6 T.C. 327.

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a right to compensation payable at some future date in respect of a trade which it had ceased to carry on. And it is the corollary of this that any income of such an asset cannot be regarded as the income of "investments or other property" within the meaning of the new Paragraph 7. The matter does not, however, rest there. For though the payments in question are conceded by the Respondents to be income for the purpose of the Income Tax Acts, it would be a misuse of language to speak of them as income of an investment or other property. This sufficiently appears from the somewhat lengthy description of their character which I have already given. I concur in the view expressed by the learned Master of the Rolls that the language of Sections 19 and 22 of the Coal Industry Nationalisation Act, 1946, is carefully and deliberately chosen to avoid the result that the interim income is income of or from the compensation provided for in Section 19 (1). It thus appears that neither is the capital asset, namely, the right to receive compensation, an asset so related to any trade or business carried on by the Respondents that it falls within Paragraph 7, nor, if it were, are the money payments in question income of that asset.

It remains to deal with some other contentions of the Appellants. I have mentioned that they have relied on the fact that in their reports and accounts for the relevant years the Respondents aggregated the payments in question with trading receipts. This contention was not raised before the Special Commissioners; no question was asked of the Respondents' chairman of directors or chief accountant who were called as witnesses at the hearing before them; the matter was mentioned only cursorily, if at all, in the Court of Appeal. Your Lordships are therefore without the explanation or guidance that might have been available. But I do not doubt that here first thoughts were right. For if the question is whether certain receipts of a company are profits of a trade carried on by it during a certain period, the determining factor is not what use the company makes of them when received but what is the source from which they are derived. Apart, therefore, from the fact that the reports and accounts would not by themselves and without any explanation justify a conclusion adverse to the Respondents, the argument that has been founded on them proceeds from the same fallacy as the main argument.

Then reliance was placed on Section 43 of the Finance Act, 1947. It will be remembered that this Section provided that all trades and businesses to which Section 19 of the 1937 Act applied, carried on by the same person, should be treated as one trade or business for the purposes of the enactments relating to the Profits Tax. It was not made clear to me how this helps the argument. If the payments in question could not be computed in the profits of any one of the trades carried on by the Respondents after 1st January, 1947, they could not be computed in the profits of all of such trades treated as one trade. I asked in the course of the argument how, if Section 43 had not been enacted, the matter would have been dealt with, that is, to the profits of which of several continuing trades the payments would have to be allocated. I got no satisfactory answer. The enactment of Section 43 does not supply one. Then it was urged that, even if the colliery trade of the Respondents was properly regarded for Profits Tax purposes as a separate trade and as having ceased on 1st January, 1947, the process of ascertaining and getting in the compensation payable to them under the Coal Acts constituted a trade or business carried on by them within the meaning of Section 19 (1) of the Finance Act, 1937, and the payments in question were receipts of that trade or business. This was a contention that had never been raised in any form until it found a place in

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the last formal reason of the case lodged in this House by the Appellants and your Lordships were unanimous in thinking that the Appellants should not be allowed to raise it. I have little doubt that in the shipwreck of their other contentions it would not have availed them as a *tabula in naufragio*.

In the result this appeal should, in my opinion, be dismissed with costs.

**Lord Morton of Henryton.**—My Lords, I agree that the payments now in question, which are admittedly income receipts of the Respondent Company, are not “profits arising from any trade or business” within Section 19 of the Finance Act, 1937. I only desire to add that, even if I had arrived at the contrary conclusion, I should still have thought that they are not profits arising from any trade or business carried on within the relevant period. Assuming that these payments are profits and that they arise from a trade or business, they can only be regarded, in my view, as arising from the trade of colliery proprietors carried on by the Respondent Company until 1st January, 1947. The Special Commissioners have found as a fact that the trade just mentioned constituted a trade separate from the other trades carried on by the Company, and that that trade ceased entirely on 1st January, 1947. On that date the Respondent Company obtained certain rights, including the right to receive the payments in question, as compensation for the loss of that trade and the assets wherewith it was carried on. It follows, to my mind, that the only trade from which the payments in question can have arisen was a trade which was not carried on during any part of the relevant period.

I agree that the appeal should be dismissed.

**Lord Reid.**—My Lords, I concur.

**Lord Radcliffe.**—My Lords, I agree that this appeal ought not to succeed.

In my opinion the determining factor is the very special nature of the receipts involved. The Coal Industry Nationalisation Act, 1946, legislated for a revolution in the coal industry of this country and in the system of ownership, management and working upon which the industry was based. It was inevitable that the far-reaching disturbance of rights which this involved should require a period of several years for the adjustment of its consequences. These interim income payments which are now in question are the product of that disturbance and adjustment, and it does not seem to me at all surprising that they cannot well be related to any of those other kinds of receipt which normally come into the accounts of a company conducting a trade or business. They are *sui generis* and it would, I think, lead to confusion if they were described in any terms except those which are strictly applicable to their own special circumstances.

Thus, they were paid because the nationalisation Statute decreed that they should be paid. They would not have been payable to the Respondents if they had not been conducting a colliery business at the vesting date, and in that sense, of course, they were paid to and received by the Respondents for no other reason than that they had been owners of colliery assets and had been in the colliery trade. Equally of course, the interim income payments that the Respondents got were fixed either as a proportion of the profits which they had been earning in the colliery trade before the date of vesting or by a computation of interest at varying rates upon sums received from time to time by way of capital compensation. But,

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when all that is said, the fact remains that the only identifiable origin of the payments was the Statute which authorised them and at the same time defined their terms and methods of computation.

It is natural enough that moneys paid in this way, described by their instrument of creation as "interim income", should be regarded as inherently of an income nature when the question arises of subjecting them to any tax that bears upon income as a chargeable subject. But I do not think that in any proper use of the words can they be said to arise from a source of income, in the sense that income or profits—for the moment I am not concerned with any difference between the two terms—can be said to arise from a trade or a business or an investment or some other piece of property that admits of use or enjoyment. They cannot arise from the colliery trade, for, as the Case finds, that trade ceased entirely on 1st January, 1947; and, short of special enactment, taxable income cannot arise in one year from a source that ceased to exist in a previous year. Nor did they arise from an investment. There was no investment until the compensation stock was issued, and any payments of interest on that stock, when received, are outside the range of payments with which this appeal is concerned. It is true that so much of the payments made as fell under Section 22 (2) (a) of the 1946 Act was paid as "a money payment of an amount equal to interest for that period" on each amount of compensation that came to be satisfied; but this amount equal to interest on a future sum covering the period until it was paid was not income from an investment or interest on a loan but an indemnity against loss suffered by the deferment of the payment. In fact, the bulk of the money received was received as "revenue payments" under Section 22 (3); and for the years 1947 and 1948, at any rate, these payments remained the property of the recipients without accountability, whatever might prove to be their ultimate amount of compensation or the prescribed rate of interest upon it.

Such payments, then, do not present themselves as natural subjects of the Profits Tax charge. The basic subject of charge consists of

"the profits arising in each chargeable accounting period . . . from any trade or business to which this section applies":

Finance Act, 1937, Section 19 (1). We were rightly reminded that this is not the same thing as a charge on the income or profits of a person or company carrying on a trade or business; on the contrary, it is a charge on the profits properly attributable to a defined source. The only real difficulty that this appeal raises is that it is by no means easy to say what, in the context of Profits Tax, is to be understood by the words "profits arising from any trade or business". I think that they are at any rate of a wider import than might at first sight appear.

Profits Tax uses the same description of the chargeable subject as was used by the Excess Profits Tax: profits arising in any chargeable accounting period from any trade or business. On the other hand, Income Tax, though charging the profits arising from any "trade, profession, employment or vocation", does not, so far as I know, treat a business as such as a source of taxable income. Profits Tax, like Excess Profits Tax, having described the chargeable subject, proceeds to provide in the same general way for the computation of the profits concerned: that is, they are to be computed according to the principles on which the profits arising from a trade are computed for the purposes of Case I of Schedule D or would be so computed if Income Tax were chargeable under that Case in respect



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of such profits, but subject to very considerable adaptations or modifications of those principles set out in a Schedule to the taxing Statute. Both Profits Tax and Excess Profits Tax, therefore, imported conceptions closely related to the conceptions upon which are based assessments under Case I of Schedule D, but each contained departures from those conceptions. In particular, these taxes were able to treat the chargeable subject as a single entity and so escaped some of the complications that are involved in the Income Tax scheme of assessing different items of a taxpayer's total income under different Schedules and different Cases of Schedules and of allowing or requiring deduction of tax at source from annual payments.

Among the adaptations of Income Tax principles for the purposes of Profits Tax which were required by the Fourth Schedule to the Finance Act, 1937, was the rule that dealt with the inclusion in profits of income from investments or other property, Paragraph 7 of that Schedule. The general effect of the Paragraph in its original form was to say that such income should not be included in profits. On the other hand, when the tax was remodelled in 1947, its name being changed from National Defence Contribution to Profits Tax and its ambit confined to corporations, the general effect of the Paragraph was reversed, and in its present form it enacts that

"Income received from investments or other property shall be included in the profits"

except for what is known as "franked investment income" and for income to which the recipient is not beneficially entitled: see Finance Act, 1947, Section 32.

In the High Court, Roxburgh, J., evidently regarded this provision as being conclusive of the case in favour of the Appellants. On the other hand, in the Court of Appeal and before this House, Counsel for both parties concurred in treating Paragraph 7 as referring only to

"income received from investments or other property the income from which formed part of the profits arising from the trade or business"

(I quote from the statement of Jenkins, L.J., of the position in his judgment in the Court of Appeal<sup>(1)</sup>.) My Lords, I have never been able to feel sure that I understand what this proposition is supposed to convey. In one sense it appears to deprive Paragraph 7 in its amended form of any meaning whatever except as a singularly contorted way of exempting franked investment income and non-beneficial income. I think myself that there may still be a good deal to be said for the view that the Legislature, appreciating that the words "profits arising from a trade or business" are by no means self-explanatory, as this case, among others, shows, had it in mind both in 1937 and in 1947 to lay down a positive rule as to the inclusion or exclusion of investment income which would set the question at rest for the purposes of all assessments. But I do not think that it is necessary to come to any final view on that point, because in my opinion the payments that we are now considering were not income of investments or other property, so that Paragraph 7 does not apply to them in any event. I have already explained why they were not income from investments. By a similar process of reasoning they were not, in my view, income from property. It does not clear up the matter to say that the right to compensation—and, for that matter, the right to interim income—was a chose in action.

(1) See page 433 ante.

**(Lord Radcliffe.)**

The interim income payments did not arise from the right to compensation as income arises from income-producing property. They arose from the Statute itself which decreed that they were to be paid.

The Appellants' case does not, however, depend necessarily, or even primarily, on the effect of Paragraph 7. For it is their general position that the Respondents, being a limited company engaged in business both after 1947 and before, received the interim income payments as receipts for the credit of their business and that the payments ought accordingly to be treated as contributing to the profits arising from that business. For this purpose Section 43 of the 1947 Act has the effect of turning the separate continuing trades into one trade, but I do not think that the Appellants' argument on this point is either aided or impeded by that. I do not accept the Appellants' proposition. Strictly, it means that, at any rate where Profits Tax is concerned, every part of the income of a company which is carrying on a business is in law income of that business. That seems to me too arbitrary. I do not think it possible to say that a company cannot own beneficially assets which do not belong to any trade or business which it conducts or that it cannot receive income beneficially which nevertheless is not income of such a trade or business. In other words, a company's business does not embrace the whole activity of being a company. But, that being said, I think it an extremely difficult undertaking to identify by a general description the kinds of income which would be at once income received by the company and not income of any trade or business which it was conducting. It is established law that the income arising from a trade, even for the purposes of an assessment under Case I of Schedule D, can properly include income the source of which is investments having no more immediate connection with the trade than that they are held as a general reserve available for its support: *Liverpool and London and Globe Insurance Co. v. Bennett*, 6 T.C. 327. It may be necessary at some time, but not now, to consider how far this decision depended, or should be treated today as depending, on the special requirements of insurance business. For there is an infinite variety in the purposes for which moneys reserved are translated into investments, and those purposes may range from a temporary obtaining of interest on funds shortly to be reinvested in the active conduct of the business to such special cases as the funding of a pension scheme for employees or a capital redemption reserve fund for redeemable preference shares. But for the purposes of the present appeal a general description is not required.

It is sufficient to say that, if the Appellants' general proposition does not carry them home, the payments which they seek to charge in this case are not in any proper sense receipts of the Respondents' continuing business. They received them while continuing to carry on business. That is true. But what else could they do in the circumstances? They carried them into their profit and loss account as a specified item of their trading profits. In a different situation there might be importance in this. But it was not the Respondents' fault that the Nationalisation Act had divested them of their colliery assets on the vesting date without giving them any means of stating in their accounts what equivalent value they had obtained in exchange or, accordingly, of drawing up a balance sheet or profit and loss account that could present an adequate statement of so abnormal a position. I do not, therefore, attach any significance to the accounts—even if I could, considering that no questions upon them were put to the Company's witnesses when the hearing took place before the Special Commissioners.

(Lord Radcliffe.)

I said before that I regard these payments as *sui generis*. The main feature of them which impresses me is that they were not income which arose from any disposable source under the Respondents' control. I can see that, if income arises from an investment or other kind of property which can be either disposed of or retained, a company which retains the source may at any rate have to meet the challenge: What did you keep it for except for the purposes of your business? But that challenge cannot be issued in this case because the effect of nationalisation had been to leave the Respondents with no option but to take the interim payments which the Statute provided and to wait until they received their compensation to decide, so far as they were allowed to, what use they would make of it in or out of their business. In my opinion that consideration should conclude this appeal.

**Lord Somervell of Harrow** (read by Lord Reid).—My Lords, until 1st January, 1947, the Respondent carried on a colliery undertaking. On that date the assets vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946, and the colliery trade of the Company ceased entirely. Under Section 19 (1) of the Coal Industry Nationalisation Act compensation for the transferred interests was due on that same date. For the period between that date and the date on which compensation, having been assessed, was fully satisfied, a right to "interim income" was given by Sections 19 and 22. There were to be for the first two years revenue payments equal to one-half of the ascertained revenue of the concern. With any instalments of compensation in stock or money there was to be a money payment equal to interest at a prescribed rate. There were provisions for adjustment, and the two years were extended where necessary by the Coal Industry (No. 2) Act, 1949. The details are not relevant. These interim payments were compensation for the delay after the due date in ascertaining and satisfying the principal claim for compensation. It is now admitted by the Respondent that these payments are liable to Income Tax. The question is whether they are "profits" for the purpose of Profits Tax.

The Profits Tax started life under the Finance Act, 1937, as the National Defence Contribution. Its name was changed to Profits Tax as from the beginning of 1947: Finance Act, 1946, Section 44. Although there were many amendments between the Finance Act, 1937, and the Finance Act, 1947, the last Finance Act relevant to this appeal, Section 19 of the earlier Act has remained the Section which charges the tax. It is so described in Section 31 (1) (a) of the Finance Act, 1947.

Under Section 19 of the 1937 Act the tax is to be charged on the profits arising in each chargeable accounting period from any trade or business of any description. Under Section 20 the profits arising in each chargeable accounting period are to be computed on Income Tax principles as adapted in accordance with the provisions of the Fourth Schedule. The adaptations are substantial. The first question, however, to be answered is whether the sums in question can be brought within the words of the charging Section. They must arise from a trade or business carried on in the chargeable accounting period.

One may well ask how the sums arising under the Statute from the appropriation of the colliery undertaking could arise from a trade or business. No one suggested that the Respondent made a business of having its undertakings nationalised. The suggested answer by the Appellants is ingenious. Before and after the vesting date the Respondent carried on other trades which for Income Tax purposes were separate from the trade of the colliery.

**(Lord Somervell of Harrow.)**

It is from the profits of these trades that the interim income payments are said to arise. On the face of it this would seem absurd. It is submitted, however, that any income received by a limited company carrying on a trade is, as a matter of law, a profit from the trade it carries on. It is said to be analogous to income from invested reserves. On the vesting of the colliery undertaking the rights of the Respondent under the Coal Act became an asset, like a block of shares, of the other trades, and any income arising under the compensation provisions of the Act became in law profits arising from the trades being carried on after that date. I agree with Jenkins, L.J., that the point can be shortly disposed of.

“ Profits Tax ”,

he said<sup>(1)</sup>,

“ is charged on the profits arising from any trade or business carried on during any given chargeable accounting period, and not on the income from all sources of the person carrying on any trade or business during any given chargeable accounting period.”

The sums received could be used in the other trades being carried on, but arose from the rights conferred by the Coal Act.

On this basis it becomes unnecessary to consider the question whether these sums were within the words of Paragraph 7 of the Fourth Schedule, as amended by Section 32 of the Finance Act, 1947. Roxburgh, J., had held that these sums were within the words “ income from investments or other property ”, relying on the words “ other property ”. I share the doubt expressed by the Master of the Rolls on this point, but it is unnecessary to decide it.

The Appellants in the alternative sought to rely on the Respondent's accounts as showing that these sums when received were dealt with as profits of the trade. This would not, for reasons which I have stated, make them profits within Section 19.

Questions arose during the course of the argument as to the extent to which the charging words would cover income from the various categories of investment income which might be held by persons carrying on various kinds of trade or business. They do not, however, arise for decision in this appeal.

I would dismiss the appeal.

*Questions put :*

That the Order appealed from be reversed.

*The Not Contents have it.*

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

*The Contents have it.*

[Solicitors:—Solicitor of Inland Revenue ; Thicknesse & Hull.]

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(<sup>1</sup>) See page 436 *ante*.