

HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)—1ST AND  
2ND DECEMBER, 1958

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COURT OF APPEAL—7TH, 8TH AND 9TH APRIL, AND 11TH MAY, 1959

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HOUSE OF LORDS—11TH, 12TH AND 14TH JANUARY, AND  
18TH FEBRUARY, 1960

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## Commissioners of Inland Revenue

v.

Hinchy<sup>(1)</sup>

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*Income Tax—Incorrect return—Amount of penalty—Income Tax Act, 1952 (15 & 16 Geo. VI & 1 Eliz. II, c. 10), Section 25 (3).*

*In his return of income for the year 1952–53, the Defendant showed the amount of bank interest received by him as £18 6s. whereas the true amount was £51 5s. 9d. The Commissioners of Inland Revenue instituted proceedings under Section 25 (3) of the Income Tax Act, 1952, for a penalty amounting to £438 14s. 6d., being £20 plus treble the total amount of tax chargeable on the Defendant for the year in question. At the time when the proceedings were commenced, the Defendant had been correctly charged with all the tax for which he was liable for that year.*

*Held, that the words "treble the tax which he ought to be charged under this Act" contained in Section 25 (3) (a) of the Income Tax Act, 1952, denote treble the whole of the tax with which the taxpayer is chargeable for the year of assessment in question.*

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The case came before Diplock, J., in the Queen's Bench Division on 1st and 2nd December, 1958, when judgment was given for £20.

Mr. Alan Orr appeared as Counsel for the Crown, and the Defendant appeared in person.

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**Diplock, J.**—This is an action commenced by writ dated 13th June, 1956, brought by the Commissioners of Inland Revenue against the Defendant, Mr. Hinchy, for penalties under Section 25 (3) of the Income Tax Act, 1952. The circumstances are simple, but the consequences of those circumstances, since they depend upon the construction of a particularly difficult Act, are less simple than the circumstances themselves.

On 19th April, 1952, Mr. Hinchy, like many other people, filled up a form prepared for the purpose by the direction of the Commissioners of Inland Revenue containing a return of income of the year ending 5th April,

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<sup>(1)</sup> Reported (Q.B.D.) [1958] 1 Q.B.D. 327; [1959] 2 W.L.R. 32; 103 S.J. 35; [1958] 3 All E.R. 682; 226 L.T. Jo. 350; (C.A.) [1959] 2 Q.B.D. 357; [1959] 3 W.L.R. 66; 103 S.J. 508; [1959] 2 All E.R. 512; 227 L.T. Jo. 331; (H.L.) [1960] A.C. 748; [1960] 2 W.L.R. 448; 104 S.J. 188; [1960] 1 All E.R. 505; 229 L.T. Jo. 136.

(Diplock, J.)

1952, and a claim for allowances for the Income Tax year 1952-53. In that return he set out the figure of £18 6s. as the interest on accounts and deposits in banks, including Post Office and other savings banks. In truth and in fact the amount of his income from that source with the Post Office Savings Bank during the year of return, the year to be taken into account for the purposes of assessment, namely that ending 5th April, 1952, was £51 5s. 9d.; so that he had understated the amount of his interest by the difference between those two sums.

The explanation that he has given for doing so does not very much matter, except to say that he must have known that the figure which he gave was wrong if he had given any thought to the matter. His explanation was that he had intended to put the money into savings certificates or other tax-free investments. However he was wrong, and as a result, when this matter was discovered—as discovered it was because of the requirement in the Income Tax Act that banks, including the Post Office Savings Bank, must make returns to the Commissioners of Inland Revenue of the amount of interest which they have allotted to customers—an additional first assessment was made upon Mr. Hinchy on 30th November, 1955, for the amount understated, the total tax on which was £14 5s. I may add, although I do not think the date is in fact relevant, that on 9th March, 1956, an assessment was made on him under Schedule E, Schedule E being dealt with as Pay As You Earn, and assessment under Schedule E is not made unless the taxpayer himself requires it.

However, the position at the date of the issue of the writ on 13th June, 1956, was that assessments had been made upon Mr. Hinchy in respect of all the tax to which he was liable for the tax year 1952-53. Those being the relevant facts, the Inland Revenue in this case claimed a penalty in the amount of £438 14s. 6d., that amount being three times the total amount of tax payable by Mr. Hinchy in respect of the tax year 1952-53, plus £20—not, it is to be noted, three times the tax on the amount which he had understated.

The basis of that claim by the Inland Revenue is Section 25 (3) of the Income Tax Act, 1952. That is the Sub-section which I have to construe. I find it a very difficult Sub-section, and I gather that I am not the only one to have done so, because in two of what I understand are the standard textbooks on Income Tax, Simon's Income Tax and Konstam's Income Tax, in the current editions, diametrically opposed views are expressed as to the meaning of this Sub-section so far as quantum of penalties is concerned. Since I am faced with a difficult Sub-section to construe, it would have been of great assistance to me if I had had the point argued by Counsel on each side. Mr. Hinchy has appeared in person, and consequently I have had to rely on Mr. Orr, who appears for the Crown, to give me such assistance as he can on the construction of this difficult Act.

I now turn to the Act. Section 19, with which I must start, provides:

"Every individual, when required so to do by a notice given to him by the surveyor, shall, within the time limited by the notice, prepare and deliver to the surveyor a true and correct return in the prescribed form of all the sources of his income and of the amount derived from each source for the year preceding the year of assessment, computed in accordance with the provisions of this Act except that the computation of income shall be made by reference to the year preceding the year of assessment and not by reference to any other year or period".

Then there is a proviso relating to Surtax, a liability from which Mr. Hinchy was fortunately absolved. What is required therefore is a true and correct

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return of all the sources of income and of the amount derived from each source for the year preceding the year of assessment. In point of fact and as a matter of practice, Section 25 (6) applies in Mr. Hinchy's case, as in most cases. Section 19 deals with a notice given by the Surveyor of a requirement to make the return. Section 25 (6) provides:

"If a person delivers to any surveyor a list, declaration or statement on a form prepared for the purpose by direction of the Commissioners of Inland Revenue, he shall be deemed for the purposes of this section to have been required by a notice under the preceding provisions of this Chapter"

—that is Section 19—

"to prepare and deliver that list, declaration or statement, and the time limited for the delivery thereof shall be deemed for the purposes of this section to have expired on the date of its delivery to the said surveyor."

The form which Mr. Hinchy filled in was the form prepared for the purpose by direction of the Commissioners of Inland Revenue. Section 25 (3), on which the point in this case turns, is in the following terms:

"A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act".

I pause there to note that is a fixed penalty. The Court, if action is brought in Court, can award only that penalty, not less. Then it goes on:

"(b)"

—which in contrast deals with a maximum penalty—

"if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

Mr. Orr contends that those words

"the tax which he ought to be charged under this Act"

mean the total amount payable by the person chargeable for the year of assessment, and the claim in this case is made on this basis. If Mr. Orr is right it means that if a person with an income of a profession or trade or otherwise which renders him liable to Income Tax and Surtax of £20,000 in the year by mistake understates by £1 or less the amount of his income from one source, or if he gives the amount correctly but misdescribes the source, or indeed if he overstates his income by any amount however large or small, he is liable to a penalty of £60,020. I suppose also—Mr. Orr indeed concedes this—having regard to Section 30 of the Act, that he is liable to the like penalty if he makes a mistake in the list of his employees which he is required to make under Section 27 of the Act.

It is right that, in considering that consequence of the construction for which Mr. Orr argues, one should bear in mind the provisions of Section 55 of the Act which excuse a person from penalties if he remedies timeously his default. It provides by Sub-section (1) that:

"A person who has delivered a statement or schedule and discovers any omission or wrong statement therein may deliver an additional statement or schedule rectifying the same, and shall not thereafter be liable to any proceeding by reason of his omission or wrong statement."

Sub-section (2) provides similarly in respect of non-delivery of a statement; Sub-section (3) provides that if proceedings have already been started before the General Commissioners, and it is proved to their satisfaction that no

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fraud or evasion is intended, they may, but not must, stay the proceedings, and so in the case of a certificate from the Commissioners the Court may also stay the proceedings. Apart from that relief, which may be available in appropriate cases, the consequences which I have indicated follow—follow I think inescapably—from the construction for which Mr. Orr has contended. If that is what Parliament meant by Section 25 (3) I must of course apply it, but the consequences seem to me to be absurd and unjust, and if there is some other possible construction consistent with the words which leads to results less absurd and unjust, I should be inclined, and I think rightly inclined, to adopt it.

I think there is an alternative construction. As Lord Dunedin pointed out in *Whitney v. Commissioners of Inland Revenue*<sup>(1)</sup>, [1926] A.C. 37, at page 52, there are three stages in the imposition and collection of tax: the first stage a general declaration of the liability of the subject, which is made by Section 1 of the Income Tax Act, 1952, and the appropriate Section in the annual Finance Act; stage two, quantification of that liability by means of assessment by the Commissioners in accordance with the provisions of the Act; and stage three, the recovery of the tax. While the phraseology of the Income Tax Act, 1952, is by no means uniform, Part II appears to use the expression “chargeable” in relation to persons, property and profits and tax during the first stage, that is to say before the liability has been quantified by assessment. It appears to treat tax as having been charged on the person assessed when, and only when, the assessment has been made. Section 25 (3) imposes a liability of treble the tax which he, that is the person proceeded against, ought to be charged under this Act, an expression which, having regard to the terms of Section 148, means in relation to Schedule D the tax which ought to be charged upon him.

It is to be noted that the expression is “ought to be charged”, not “ought to have been charged”. It seems to me that a reasonable meaning of the expression is the tax to which he ought to be charged, that is to say duly assessed, but to which he has not been charged or duly assessed by reason of the default: that is to say the increased tax which, when one looks at the latter part of the Sub-section, is to be added to the assessment. Sub-section (4) appears to me to support this construction. It reads as follows:

“The Commissioners shall also ”

—a significant word—

“proceed to assess or cause to be assessed every such person who makes default as aforesaid ”,

that is to say they shall charge on him the tax which ought to be charged. This seems to me to assume that the result of the default has been a failure to assess, as also seems to be implicit in the use of the expression “increased tax” which in Sub-section (3) is said shall be added to the assessment.

The assessment to which the Commissioners must proceed under Section 25 (4), where as in this case there has already been a first assessment, will take the form of an additional first assessment under Section 41 (1) (ii), where it is to be observed a similar expression is used. It is provided that “the Additional Commissioners shall make an assessment on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged”.

Such an assessment is an assessment of the tax to which he ought to be duly assessed but has not been by reason of the default.

<sup>(1)</sup> 10 T.C. 88, at p. 110.

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The phraseology of Section 25 (3) is to be contrasted with that of Section 48, which deals with the penalties which can be exacted in cases of fraud. It reads as follows:

“Where a person who ought to be charged with tax, as directed by this Act, is not duly assessed and charged by reason that he has”

—then there are four kinds of fraudulent conduct set out—

“such person shall, on proof thereof to the General Commissioners for the division in which he has been charged, or, if he has not been charged, then for any division in which he is chargeable, be assessed and charged treble the amount of the charge which ought to have been made upon him: Provided that, if any charge has been made, but that charge is less than the charge which ought to have been made, such person shall be assessed and charged, over and above the former charge, treble the amount of the difference between the charge which was made and the charge which ought to have been made, such amount to be added to the assessment.”

I draw attention to the use of the past tense

“the amount of the charge which ought to have been made”

in Section 48, as contrasted with the use of the present tense

“the tax which he ought to be charged under this Act”

in Section 25 (3). Section 48 seems to me to express in clearer and lengthier language what is intended to be conveyed by the elliptical expression in Section 25 (3),

“the tax which he ought to be charged”.

This construction of the Sub-section leads to the difficulty in determining at what point of time one must ascertain the amount of tax which he ought to be charged. The answer must I think be the date at which the proceedings, whether before the Court or the General Commissioners, are brought. I am supported in this view by the provisions of Section 55, to which I have already referred, which prohibit proceedings being brought if the matter has been remedied before the proceedings are started, but if proceedings are started before the matter has been remedied leaves it to the discretion of the General Commissioners or the Court, as the case may be, as to whether the proceedings are then stayed.

In the present case the proceedings were started on 13th June, 1956, after the Defendant had been charged with all the tax for which he was liable. There was therefore at the date of the proceedings no tax remaining which he ought to be charged under the Act, nor was there any increased tax which could be added to the assessment had proceedings been brought before the General Commissioners instead of before the Court. On the construction of Section 25 (3) which I have indicated appeals to me, the only amount recoverable under the Sub-section in this case would be the fixed penalty of £20.

Is there any authority which prevents me from adopting the construction which I have indicated is the one I think the better of this difficult Sub-section? Mr. Orr has referred me to *Attorney-General v. Till*, reported in the Court of Appeal at [1909] 1 K.B. 694 and in the House of Lords at 5 T.C. 440. That was a case brought under the corresponding Section of the Income Tax Act, 1842, Section 55. The relevant distinction between that Section and the present Sub-section (3) of Section 25 is that the words are in this form:

“If any person who ought by this Act to deliver any list, declaration, or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice”,

etc., then he shall be liable to a penalty of £50 if prosecuted in any of Her Majesty's Courts, and before the Commissioners,

“forfeit any sum not exceeding twenty pounds, and treble the duty at which such person ought to be charged by virtue of this Act”.

(Diplock, J.)

Therefore so far as the penalty before the Commissioners is concerned they were substantially in the same terms as under the present Act, the other difference between the two Acts being that instead of there being an express reference to a true and correct return there are the words "as aforesaid". In the Court of Appeal<sup>(1)</sup>, the view was taken by their Lordships that the words "as aforesaid" should not be construed as referring to a true and correct return, that is to say as introducing the words "true and correct" before "list, declaration or statement". The reasoning which appealed to the Court of Appeal in coming to that conclusion was an examination of the consequences which would follow if the Section applied to cases where there had been an error, however slight or however innocent, in a return. For that reason the Court of Appeal came to the conclusion that on the true construction of Section 55 the words "as aforesaid" did not introduce into the Section the qualification "true and correct". The decision was reversed by the House of Lords<sup>(2)</sup>, but, as Mr. Orr has pointed out, two of the members of the Court of Appeal, Sir Herbert Cozens-Hardy, M.R., and Fletcher Moulton, L.J., did express the view that the penalty exactable before the Commissioners, expressed in the terms

"treble the duty at which such person ought to be charged by virtue of this Act",

did mean the whole of the tax payable by that person. I think the Master of the Rolls must have taken that view because he points out that the penalty is greater than the penalty for fraudulent statements, and that was three times the tax on the difference. Fletcher Moulton, L.J., said in terms that that is the view he took as to the meaning of the penalty Section, and it was because, among other reasons, they thought the penalty was so largely exorbitant and so inappropriate in a case where there had been a minor error in a return that they came to the conclusion that the words "true and correct" were not introduced. The House of Lords reversed that decision and they held that the words "as aforesaid" did introduce the words "true and correct" as qualifying the return. Since the proceedings were proceedings for a penalty before the Courts, it was limited to £50; it was not necessary for their Lordships to express any view as to the maximum amount of the penalty which could be recoverable before the Commissioners, and accordingly no such view is expressed.

Mr. Orr however points out that none of their Lordships expressed any dissent from the view which the Court of Appeal had expressed as to what penalty was recoverable before the Commissioners, but it was not of course necessary for their Lordships to do so. He has also drawn attention to a number of other passages in the speeches in which various of the members of the House of Lords draw attention to the high penalty which is exacted. I do not think however that I can find in that case any express indication that any of their Lordships have considered the possible alternative views as to the amount of the penalty.

I am therefore left with the opinions expressed in the Court of Appeal decision. They are I apprehend *obiter*, and it was because of the absurd consequences of construing the Section as imposing such a penalty that the Court of Appeal felt compelled to hold that it did not apply to the sort of case where there had been an omission. What the same members of the Court of Appeal would have held was the true amount of the penalty, once they were constrained by the decision of the House of Lords to hold that

(1) [1909] 1 K.B. 694.

(2) 5 T.C. 440.

(Diplock, J.)

the Section did apply to a case of a minor omission, I do not know; but I think it is clear that any Court approaching a penalty Section, and approaching a penalty Section, as I must approach it, on the view that it does apply to a minor omission such as Mr. Hinchy made in this case, must construe it in favour of the subject and against the size of the penalty if the words are reasonably capable of such a meaning. I do not think therefore that there is any authority which constrains me to hold that the meaning for which Mr. Orr contends is to be preferred to the meaning which I have indicated, and which has the result of making the penalty more rational in relation to the default than the construction which Mr. Orr has put forward. I bear in mind the warning which has been given so many times, and which was given indeed in the House of Lords in *Attorney-General v. Till*<sup>(1)</sup>, against being too hopeful of finding any rationality in the scheme set out under the Income Tax Act. It does seem to me however that if there is a construction which makes the scheme less irrational than another, it is one which I would prefer.

In my view, in the circumstances of this case, the Crown is entitled to recover only the sum of £20.

**Mr. Alan Orr.**—My Lord, I do not know what Order your Lordship would think appropriate as to costs. I am instructed to ask for costs. I have recovered of course a small sum in relation to the claim, though I did indicate to your Lordship earlier on that the Crown were not proposing to ask for the whole of that sum. I shall submit the Crown are entitled here to some costs.

**Diplock, J.**—The present regulations are that if you recover less than £75 you get no costs. This could have been done in the County Court, could it not?

**Mr. Orr.**—My Lord, it could.

**Diplock, J.**—Why should I make any exception to the general rule?

**Mr. Orr.**—I have made my submission. If your Lordship takes that view, I say no more.

**Diplock, J.**—Then there will be judgment for £20.

**Mr. Orr.**—If your Lordship pleases.

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The Crown having appealed against the above decision, the case came before the Court of Appeal (Lord Evershed, M.R., and Ormerod and Harman, L.JJ.) on 7th, 8th and 9th April, 1959, when judgment was reserved. On 11th May, 1959, it was held unanimously that the tax with which the Defendant "ought to be charged" was limited to the tax appropriate to the undisclosed income, and judgment was given for £62 15s.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. John Pennycuik, Q.C., and Mr. Alan Orr appeared on behalf of the Crown, and the Defendant appeared in person.

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(<sup>1</sup>) 5 T.C. 440.

**Lord Evershed, M.R.**—The judgment which I am about to read is the judgment of the Court.

The question arising on this appeal is apparently short and simple enough; it is the meaning of a few words in Section 25 (3) (a) and (b) of the Income Tax Act, 1952—

“ . . . treble the tax which he ought to be charged under this Act ”.

But the full arguments of the Attorney-General and Mr. Pennycuik have at least made clear that not only the Sub-section but the whole fasciculus of Sections 18 to 30 inclusive, which form part of Chapter II of the Act, and which in large measure trace their descent through the Income Tax Act, 1918, from that of 1842, has in the course of 117 years and in greatly changed circumstances acquired an obscurity, and in some respects an artificiality, quite remarkable even in a taxing Statute. As long ago as 1909 Sir Herbert Cozens-Hardy, M.R., described the prototype of the Sub-section under review, Section 55 of the 1842 Act, as “ ungrammatical and almost unintelligible ”<sup>(1)</sup>. The language of that Section has nevertheless been reproduced, substantially unchanged, in the two consolidating Statutes of 1918 and 1952. We shall in the course of this judgment have occasion to refer to more than one of the problems which the present Sub-section and its fellows present, problems which (if they are soluble at all) it is fortunately unnecessary for us to solve.

It is the contention of the Crown that the words we have cited mean “ treble the taxpayer’s whole properly assessed tax for the relevant year ”. If that view be right, results and anomalies of an extravagant kind follow. Yet it is clear that the Court, unlike the General Commissioners, has no dispensing power under the Sub-section. The remedy in the last resort, according to the Crown’s argument, is found in the power of the Commissioners of Inland Revenue or the Treasury (for example, under Section 500) to mitigate or remit the penalty before or after judgment. It has indeed been urged upon us that the Crown’s practice has been consistent for over a century and that we should give judicial sanction to it, relying upon the Treasury in the exercise of its statutory discretion to avoid harshness or injustice. We have no warrant to suggest that the Treasury’s discretion has not at all times been most fairly and properly exercised, and certainly in the present case we can see no ground for sympathy with the Respondent, who, being an officer in the Department of Customs and Excise, deliberately failed to make true and correct disclosures over many years of one source of untaxed income of his wife and himself, namely the Post Office Savings Bank. Nevertheless we venture to think that the results of the Crown’s contention, particularly at a time when present rates of taxation may swell the penalty for a trifling mistake to almost astronomical figures, are most unsatisfactory, however well the Treasury’s discretion be exercised; and we express the hope accordingly that Parliament may find time to review the Sections in question.

The facts of the case are themselves not free from obscurity but for the purpose of this appeal they may not greatly matter. We have said that the Respondent was and is a servant of the Crown employed in the Customs and Excise Department. His salary as such was taxable under Schedule E, and tax was levied at the source under P.A.Y.E. For the tax year 1952–53 this levy was £125 6s. 6d. He had for the same year disclosed in his Income Tax return the sum of £18 6s. for Post Office Savings Bank interest received by himself and his wife. It is not now in doubt that the true amount of such interest was £51 5s. 9d. As we have said, he had made similar understatements for a number of previous years. He has now been duly assessed

(1) [1909] 1 K.B. 694, at p. 700.



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for the year 1952-53 in the full sum of £51 5s. 9d. According to the writ in the action, the full tax assessment for the year is £139 11s. 6d., namely £125 6s. 6d. Schedule E tax in respect of his employment and £14 5s. Schedule D tax in respect of untaxed interest. In an earlier paragraph of the writ reference is made to the amount of £18 6s. which the Respondent had disclosed. But the sum of £14 5s. represents arithmetically 9s. 6d. in the £ on £30—9s. 6d. being the appropriate rate of tax. From one of the documents in the case, containing a computation by the Crown of the amount of tax properly due from the Respondent in respect of the difference between the sums received for Post Office Savings Bank interest and the sums disclosed, there appears against the year 1952-53 the item for bank interest "Assessed, say £21", a sum less by £30 than the true amount of such interest; and £14 5s. is shown as the amount of tax (at 9s. 6d. in the £) on this figure of £30. In the circumstances, it must, we suppose, be assumed for the purpose of this case that the Respondent had been assessed and taxed in respect of Post Office Savings Bank interest on the sum of £21 but that, as later appeared, the true and correct amount of such interest for the year was £30 more, namely £51.

Even so, however, the claim made by the writ appears to be entirely at variance with the Crown's so-called practice, according to which he should now be charged the treble penalty not only on the P.A.Y.E. tax and not only on the tax on the excess income of £30, but on the full amount of the Post Office Savings Bank interest, £51 odd—let alone on certain other income which appears from his return. For the purposes of this case, however, and in view of the conclusion which we have formed, it is sufficient to say that £14 5s. must be taken to represent the tax (at 9s. 6d. in the £) on the undisclosed amount of bank interest, namely £30. It is nevertheless to be observed that the Crown's view of the true construction of the Sub-section which forms the second ground of appeal stated in the notice in the present case is inconsistent with the claim in the writ at least in two respects: first, the claim was not confined to sums charged by direct assessment as it included P.A.Y.E. levy; second, £14 5s. was not the tax on the whole Post Office Savings Bank interest but only on the balance of £30 undeclared.

We return now to the question of construction of Section 25 (3). The view of the learned Judge was that the Crown's claim must be limited to £20 only. He was of opinion that since before the issue of the writ the Respondent had been assessed in the sum of £139 11s. 6d., namely £125 6s. 6d. under Schedule E plus £14 5s., it could no longer be said that, at that date, there was any tax which the Respondent "ought to be charged under the Act". It was also the Judge's view, though this is not reflected in his decision, because of the opinion above referred to, that the essential phrase "the tax which he ought to be charged" is limited to the tax for which he should be charged but was not in fact charged upon his Income Tax return as a result of his incorrect statement therein of the amount of bank interest—that is, in figures, £14 5s. Upon this third view the Crown would be entitled to judgment (in addition to the sum of £20) for three times £14 5s., or £42 15s. The Crown's dissent from this view forms its first ground for the present appeal, as the notice shows.

We propose to consider the question first as a matter of construction of the Act, without reference to any decided cases; and then to see whether the conclusion at which we so arrive is affected by any decision binding upon this Court. It is necessary first to refer at some length to the group of Sections

**(Lord Evershed, M.R.)**

to which we have already alluded. Section 18 is the first of a series of Sections under Chapter II with a cross-heading "Returns and Assessment". The Section reads :

"(1) It shall be the duty of every person who is chargeable to income tax for any year of assessment to give notice to the surveyor that he is so chargeable at or before the end of that year".

I can pass over the proviso.

"(2) If any person, without reasonable excuse, fails to give such a notice as aforesaid, he shall—(a) if proceeded against by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

**Section 19 :**

"Every individual, when required so to do by a notice given to him by the surveyor, shall, within the time limited by the notice, prepare and deliver to the surveyor a true and correct return in the prescribed form of all the sources of his income and of the amount derived from each source for the year preceding the year of assessment, computed"

as therein provided; and again I can pass over the proviso.

Section 20 contains a similar provision relating to the current year's chargeable income, and I need not read that; or the supplemental provisions in Sub-sections (2), (3) and (4); but I should perhaps add that there is at the end of Sub-section (4) a proviso as follows:

"Provided that the penalty inflicted upon any person proceeded against for not complying with this provision who proves that he was not chargeable to tax shall not exceed five pounds for any one offence."

**Section 21 :**

"(1) Every person acting in any character on behalf of any incapacitated person or person not resident in the United Kingdom who, by reason of such incapacity or non-residence in the United Kingdom, cannot be personally charged under this Act, shall, whenever required to do so by a notice given to him by the surveyor, within the time limited by the notice and in any division in which he may be chargeable on his own account, deliver such a statement as in the last preceding section is described of the profits or gains in respect of which tax is to be charged on him on account of that other person, together with the prescribed declaration. (2) Where two or more such persons are liable to be charged for the same person—(a) one statement only shall be required to be delivered which may be made by them jointly, or by any one or more of them";

and then there is a second provision, (b), which I need not read. Section 22 is a somewhat similar provision, which I think I can summarise by saying that it involves the obligation to deliver a list by persons in receipt of taxable income belonging to others containing a true and correct statement of all income and the names and addresses of the persons concerned, etc. Section 23:

"Every person, when required so to do by a notice served on him by the surveyor, shall, within the time limited by the notice, prepare and deliver to the surveyor a list, in writing, containing to the best of his belief—(a) the name of every lodger or inmate resident in his dwelling-house; and (b) the name and ordinary place of residence of any such lodger or inmate who has any ordinary place of residence elsewhere at which he can be assessed".

Section 24 I can, again, summarise as being related to returns as to the annual value of land. I come to Section 25:

"(1) Any such lists, declarations, statements and returns as are provided for by the preceding provisions of this Chapter shall be in such form as the Commissioners of Inland Revenue shall prescribe, and in prescribing forms under

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this subsection the Commissioners shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom."

Sub-section (2) I think I can pass over, as it provides for a general declaration as regards profits under Schedules A, B, D or E. Sub-section (3), which is the vital Sub-section for the purposes of this appeal, reads:

"A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

It will be noticed that these penal provisions are *ipsis verbis* the same as those already once stated in Section 18. Sub-section (4) of Section 25 reads:

"The Commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid."

Sub-section (5) provides for some relief, for it contains a provision that if a person required to deliver a list (etc.) states the reasons for his inability to have done so he shall not be liable to the penalty if the Commissioners are satisfied with his reasons and if he delivers within a further time

"as perfect a list . . . as the nature of the case permits."

I leave out Sub-sections (6) and (7). Section 26 also I can summarise, as it relates to returns by persons coming to reside in a particular division. Section 27 I must read more fully.

"(1) Every employer when required to do so by notice from the assessor, shall, within the time limited by the notice, prepare and deliver to the assessor a return containing—(a) the names and places of residence of all persons employed by him; and (b) the payments made to those persons in respect of that employment"

—as provided in the rest of the Sub-section. I need not read the further provisions of that Sub-section, and I pass to Sub-section (2), which provides:

"Any director of a company, or person engaged in the management of a company, shall be deemed for the purposes of this section to be a person employed";

and Sub-section (3):

"Where the employer is a body of persons, the secretary of the body, or other officer (by whatever name called) performing the duties of secretary, shall be deemed to be the employer for the purposes of this section: Provided that where the employer is a body corporate, that body corporate shall be liable to a penalty for failure to deliver a return in pursuance of this section as well as the said secretary or other officer."

Section 28, having been repealed, I do not read. Section 29:

"(1) Every person carrying on a trade or business who, in the ordinary course of the operations thereof, receives or retains money in such circumstances that interest becomes payable thereon which is paid or credited without deduction of income tax, and, in particular, every person carrying on the trade or business of banking, shall, if required to do so by notice from a surveyor, make and deliver to the surveyor, within the time specified in the notice, a return of all interest paid or credited by him as aforesaid during a year specified in the notice in the course of his trade or business or any such part of his trade or business as may be so specified, giving the names and addresses of the persons to whom the interest was paid or credited and stating, in each case, the amount of the interest".

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I can pass over the proviso to that Sub-section; and I can also omit a reading of the remainder of the Section. Section 30 (which is the last of this series of Sections) reads:

“The provisions of section twenty-five of this Act with respect to the failure to deliver lists, declarations, statements and returns”

—and I interpose by way of reminder that that is the Section with the provisions of which we are now concerned—

“shall apply to returns under the three last preceding sections.”

Having regard to the repeal of Section 28, that should, of course, now read “sections 27 and 29”—the obligation to deliver lists of employees and what I for convenience call compendiously the bankers’ obligation.

Whatever other epithets the language of the Sections or any of them may invite, it is impossible to acquit them of a considerable degree of repetition or overlapping and inelegance. The two parallel and independent penalties exigible by the General Commissioners on the one hand and by the Court on the other which are found in Section 25 (3) are found also in Section 18 (relating to the failure of persons chargeable to tax to give notice of chargeability); these same penalties are expressed in Section 25 (3) to be exigible on default in delivering a “true and correct . . . statement or return” as required by any of the Sections 19 to 24 inclusive; further, by Section 30 the penalties under Section 25 are made applicable to the returns required by Sections 27 and 29. Much more curious is the phrase at the end of Section 18 (2), repeated at the end of Section 25 (3):

“and the increased tax shall be added to the assessment.”

To no part of the Sub-section was the use of the adjective “unintelligible” by Sir Herbert Cozens-Hardy, M.R., more appropriate than to this baffling sentence. It was strongly contended by the Attorney-General that by the words “increased tax” was meant the amount of treble the tax (or less) which the Commissioners are by Sections 18 (2) and 25 (3) (b) entitled to forfeit. The argument finds support in the submission that otherwise the provisions of Section 25 (4) (at least in cases of proceedings before the Commissioners) would be otiose, notwithstanding the use therein of the word “also”; but perhaps more forcibly in the old statutory provisions (see, for example, Section 21 (6) of the Taxes Management Act, 1880) that penalties exacted by the Commissioners should be recoverable by way of their being made the subject of assessment. But the contention involved the Attorney-General in the concession that the word “penalty” in the penultimate lines of Section 18 (2) and of Section 25 (3) meant only the fixed sum of £20—a concession very difficult to accept on more grounds than one, including the use of the same word “penalty” in Section 25 (5), where it would be virtually impossible so to confine it. But the difficulties of interpretation of this perplexing sentence are much enhanced by the circumstance that Section 25 (3) might well, and Section 18 (2) almost inevitably would, apply to cases in which there had previously been no assessment at all. We have, however, come to the conclusion that the solution, if possible at all, of this particular problem cannot materially assist in providing the answer to the instant question. We therefore confine ourselves to observing that the difficulty created by the sentence mentioned may well illustrate the justice of the comment made in the Irish case<sup>(1)</sup> later mentioned that amendments and additions have been made in the course of time to the original enactment without any proper appreciation of their effect; and certainly reinforces

(<sup>1</sup>) Attorney-General (Irish Free State) v. White (*See page 666 post.*)

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our earlier plea that Parliament should find time to consider the advantage of making penal provisions of a taxing Statute reasonably intelligible to those who may be affected by them.

We return once more to the essential formula for present purposes, “. . . the tax which he ought to be charged under this Act”. We do not at all deny that the words are capable of the meaning which the Crown attributes to them, namely the tax (that is the entire amount of tax) which ought to be charged, as distinct from the (smaller) amount, if any, which has in fact been charged by reason of the deficiency of the taxpayer's return. This, however, is not in truth the meaning attached to it by the Crown, which in practice omits income not taxed by direct assessment but by deduction, with an exception, illustrated in this case, of income deducted under P.A.Y.E.—see the second ground of appeal. Moreover no reference is made in the Sub-section to the year of assessment. The Crown seeks to overcome this difficulty by observing that any return must in the nature of things be related to a year; and if this were the only difficulty the answer might, we will assume, suffice. But there are other and far graver difficulties, for it is not in doubt, nor has the Attorney-General sought to deny or excuse it, that the Crown's contention involves anomalies so extravagant as to be shocking in a penal provision. We do not attempt an exhaustive list, but observe that the penalty is one which the Court, according to the Attorney-General, is bound to exact without remission or mitigation and is so bound notwithstanding that the offence may be relatively trivial or even adverse to the taxpayer's interest. It is first to be noted that “tax” will include Surtax as well as Income Tax at the standard rate—though Surtax in any year is commonly payable in respect of a different year of assessment from Income Tax. It is true that the intrusion of Surtax, not dreamt of in 1842, presents, on the third view above formulated, an inescapable difficulty in any case; for if “the tax which he ought to be charged” be limited to tax evaded by the incorrect return, such “tax” would include Surtax; and there is no indication which year is intended nor whether the undisclosed income should, for penalty purposes, be treated as that part of the income which in the particular case attracts the highest rate of Surtax.

We will next refer to the effect of the Crown's contention upon a case arising under Section 21 (and similarly under Section 22) where one or more persons (and commonly it will be more than one) are bound to make returns of the taxable income of a third party. The Attorney-General expressly conceded that in such a case, where a statement incorrect in some respect had been made, each of the persons liable to make such a return would be liable to a penalty including a sum equivalent to three times his own personal tax liability—a penalty which would be liable to vary enormously as between one such person and another, both equally at fault, according to their own respective incomes. An escape from so apparently absurd and unjust a conclusion might be found by relating the tax penalty to that of the person on whose behalf the return was made; but this means of escape was not embraced by the Attorney-General.

In this connection the Attorney-General informed us, and the stated ground of appeal shows, that, according to the practice of the Treasury, “the tax which [the taxpayer] ought to be charged” excluded tax deducted at the source other than P.A.Y.E.—by way of distinction from cases arising under Paragraph 4 of the Sixth Schedule to the Act, to which we later refer. With all respect to the Attorney-General, we have failed to find

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any justification in the Statute for the distinction; but assuming it to be well founded, it follows that a startling anomaly arises in point of liability between a taxpayer whose income is wholly or substantially directly taxable and one whose income is substantially derived from sources attracting tax deduction at the source—an anomaly which might well be thought to run quite contrary to ordinary justice, giving (as it does) an immense advantage to the taxpayer whose income is wholly or substantially unearned.

Even more startling are the anomalies arising under Sections 23, 27 and 29; for failure to return accurate lists under any of these Sections will expose the defaulter to penalties wholly unrelated to the extent of the default but calculable by reference to his own tax liability, albeit fully discharged. Thus, in an extreme, though not extravagant, case, a company which failed to return an accurate list of employees would be liable to a penalty equivalent to three times its own tax liability, which might run into hundreds of thousands of pounds; and not only so, but the secretary of the company (who might be the person in fact responsible for the default) would also be liable for a penalty calculated on his own personal tax assessment—a sum enormously less than the corresponding liability of his employer.

Nor is this by any means all. In the present case the Crown has expressly disclaimed any allegation of fraud against the Respondent. Yet had the case been otherwise—that is, had the default of the Respondent been treated as dishonest—then *prima facie* Section 48 of this Act would have been applicable. Sub-section (1) of that Section provides:

“Where a person who ought to be charged with tax, as directed by this Act, is not duly assessed and charged by reason that he has—(a) fraudulently changed his place of residence or fraudulently converted, or fraudulently released, assigned or conveyed any of his property; or (b) made and delivered any statement or schedule which is false or fraudulent; or (c) fraudulently converted any of his property, which was chargeable”

in the way there indicated;

“or (d) been guilty of any falsehood, wilful neglect, fraud, covin, art or contrivance whatsoever, such person shall, on proof thereof to the General Commissioners for the division in which he has been charged, or, if he has not been charged, then for any division in which he is chargeable, be assessed and charged treble the amount of the charge which ought to have been made upon him: Provided that, if any charge has been made, but that charge is less than the charge which ought to have been made, such person shall be assessed and charged, over and above the former charge, treble the amount of the difference between the charge which was made and the charge which ought to have been made, such amount to be added to the assessment”;

and Sub-section (2) contains a provision rendering a third party abetting or aiding such a fraudulent disclosure liable to a penalty of £500. It is to be noticed that the relevant words in Section 48 differ somewhat from those in Section 25 (3); for the words in the former case are “. . . the amount of the charge which ought to have been made upon him”. It was the contention of the Crown that these words have, in effect, the same meaning as the language in Section 25 (3)—“tax which he ought to be charged”. None the less, the proviso in Section 48 makes it clear that, in cases under that Section, only what we will for brevity call the excess tax is to be taken into account in assessing the liability. On that view it is, at the least, a startling proposition that the taxpayer's penal liability in cases of fraud is very much less than his liability in the absence of fraud; the result being that it would be an advantage to the Crown to treat the rogue as an honest man. Dishonesty, it seems, is plainly indicated as the best policy for the taxpayer.

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It is convenient here to refer to two other provisions of the Statute. The first is Paragraph 4 of the Sixth Schedule, applicable again to fraud—in this case in relation to a claim for tax relief. Sub-paragraph (1), so far as relevant, is as follows :

“A person who, in making a claim for or obtaining any relief to which this Schedule relates, or in obtaining any certificate as aforesaid—(a) is guilty of any fraud or contrivance; or (b) fraudulently conceals or untruly declares any income or any sum which he has charged against or deducted from, or was entitled to charge against or to deduct from, another person; or (c) fraudulently makes a second claim for the same cause, shall forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income as if such claim had not been allowed”;

and again there is a sub-paragraph relating to a person abetting. It will be noticed that once again there is a variation in language—in this case it is “the tax chargeable in respect of all the sources of his income . . .”, a formula plainly apt (as the Scottish Court of Session has in fact held in *Lord Advocate v. McLaren*<sup>(1)</sup> later mentioned) to cover the total tax liability, without any exception for tax deducted at the source.

Our second reference is to Section 49, applicable to a case where an increased assessment has been properly made and there has been “any fraud, covin, art or contrivance” on the taxpayer’s part; in which case his penal liability is “treble the amount of the tax on the amount of the excess”—a phrase which we assume to be intended as synonymous with the third possible construction above mentioned of the relevant words in Section 25 (3).

We make no attempt to answer the question why there should be so much variation in the penal consequences of defaults—why fraud in one case (under Section 48) should be so much more lightly punished than fraud in another (under the Sixth Schedule), and what is the exact place of Section 49 in relation to Sections 19 to 24. There is, of course, much force in the Crown’s argument that if in Section 25 (3) Parliament had intended to limit the penal tax liability to what we have called the excess tax it could or would naturally have resorted to the language used in Section 49 or the qualifying proviso of Section 48. On the other hand, the numerous and illogical variations in penalty produce in our view the result that no safe assistance can be got from the language of other Sections of the Act in construing the words of Section 25 (3).

We do not think it necessary or useful to refer to the corresponding provisions and the corresponding anomalies in the earlier legislation, save in one respect. Until the year 1923 and the passing of the Finance Act of that year, which by Section 23 (2) introduced what is now paragraph (a) of Section 25 (3), the penalty which the Court had to exact if proceedings were brought before it instead of the General Commissioners was the fixed sum of £50 only. It is obvious, therefore, that the worst of the anomalies to which we have above referred did not arise before 1923; for even if the phrase “treble the tax which he ought to be charged” were construed as the Crown suggests, the Commissioners were not bound to exact its full measure. The startling feature of the present legislation is that, however extravagant the result, the Court is now bound to forfeit the full penalty and the Crown may to that end invoke Section 25 (3), even though the more appropriate Section, according to the facts of the case, might appear to be Section 48 or Section 49—neither of which exacts, even though the

(1) 5 T.C. 110.

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case be one involving fraud, anything like so extreme a forfeit. The remedy of the subject is left to the power of the Treasury (or the Commissioners of Inland Revenue) to mitigate the penalty or stop the proceedings under Section 500 or Section 55. As we have earlier said, we cannot think the result either just, sensible or satisfactory, however well and conscientiously the discretions be exercised.

These then being the consequences of the Crown's contention upon the construction of the Sub-section, are there other possible interpretations less extravagant in their results? Diplock, J., avoided what he called the absurd and unjust consequences of the Crown's contention by holding that once the defaulting taxpayer had been duly and properly assessed (as was the case with the Respondent before the issue of the writ) then it could no longer be said that he "ought to be charged" with the tax for which he had been assessed; in other words that by the assessment he had been charged and there was accordingly at the relevant date nothing left undone which ought to be done. We do not think that this can be right. It appears to us that the offence is committed either when the false return is received by the Commissioners or when the time for making the return has expired. Subsequent events, whether assessment or payment, are irrelevant. In order to arrive at the correct figure which has to be multiplied by three, assessment is a necessary preliminary, and therefore if the Judge be right the penalty, apart from the £20, could never be levied because there would never come into existence the basis for it. We add that, in the (unreported) case in the Irish Supreme Court of *Attorney-General v. White*<sup>(1)</sup>, decided on 3rd March, 1931, the learned Judges adopted this view and held accordingly that the proceedings to recover the penalty of £20 plus treble the tax under the corresponding legislation in Ireland were premature where there was no final assessment of the tax.

There remains the Judge's interpretation of the relevant words (the third view above indicated), namely that "the tax which he ought to be charged" means what we have called the excess tax—that is the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. Where there has been failure to make any return at all, the "tax which he ought to be charged" will of course be the total of his tax liability for the relevant period. But where, as in the present case, the taxpayer's default lay in an understatement of one of his sources of income, then the tax which he ought to be charged will, on this interpretation, mean the tax which he ought to be charged (but was not charged by reason of his default) on the undisclosed income.

It is no doubt true that if you speak of the "sum I ought to be charged" for an article which you have bought, you may be supposed to be referring to the true price of the article in contrast to the amount of the bill which you have in fact received. But where you have already had a bill (and more particularly when you have paid it) it would, we think, be more natural if you wished to refer to the true price to speak of "the sum I ought to have been charged"; and these, be it noted, are the words used in Section 48. So in a case arising under Section 25 where (as must not uncommonly be the case) the taxpayer has already been charged an assessed sum of tax and paid it and then, later, an undisclosed item of income is revealed, it would surely be more natural if the total tax liability was intended to refer to the tax which "he *should have been charged*".

<sup>(1)</sup> See page 666 *post*.



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We do not forget that the word is "charged", not "assessed". On the other hand, the phrase is "ought to be charged" and not "is chargeable". Mr. Pennycuik was disposed to concede that, if in ordinary speech you refer to your bills which ought to be paid or the letters which you ought to write, you are in each case referring to those things only which at the time of speaking you have left undone. So as a matter of English it seems to us at least a legitimate interpretation of the phrase "tax which he ought to be charged" to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return; in other words, the tax appropriate to the undisclosed income.

We agree that, if such had been the intention, Parliament might have been expected to use the formula adopted in Section 49. We observe, however, that the provisions of Section 49 differ materially from those of Section 127 of the Act of 1842, which was its original ancestor, in that, as we understand the latter Section, the taxpayer was relieved from any forfeit in the absence of any fraud, covin, art, or contrivance, etc. At least it may equally be said that, on the Crown's view, recourse could have been had to the language found in Paragraph 4 of the Sixth Schedule; for, with all respect to the Attorney-General and the so-called practice of the Treasury, we find difficulty in apprehending the justification for excluding tax (or certain tax) deducted at the source from the penal consequences of Section 25 (3). We have referred already to the, as we think, significant, though slight, variation in language between Section 25 (3) and Section 48. But in any case, as we have earlier stated, we do not think that any sufficiently safe guide to the construction of the relevant Sub-section can be extracted from the language of other parts of what has been called (in the Income Tax Codification Committee Report, Cmd. 5131) the "flotsam and jetsam" of the penal provisions of the Act.

There is, however, one final matter which seems to us of some significance. It will be observed that, though (according to the Crown's contention) the tax referred to in the Sub-section means the entire tax liability (with the exception conceded) for the relevant year, there is in the Sub-section no reference whatever to the year or to any period of assessment. The Attorney-General's answer was that all the relevant Sections must be treated as related to statements or returns for a particular tax year. But the answer is not, we think, satisfactory. A case may well be supposed in which an undisclosed item of income received in a particular year is revealed, say, two or three years later, when the taxpayer has long since discharged his liability, calculated on his defective return, for the year in which the undisclosed income was received. If the Crown's contention were correct you would, as we think, at least expect some language specifying the relevant year. We do not refer again to the Surtax difficulty. But the point we are making is, we venture to think, more striking if applied to cases of failure to deliver lists of lodgers or of employees; for in those cases the taxpayer penalised will not have failed at any stage to pay all the tax for which he is chargeable. In such cases, which, then, is the relevant year—the year to which the list of lodgers or employees was intended to relate or the year in which the default in delivering the list occurred? If the interpretation which we are now suggesting be the true interpretation, then the absence of any reference to time or to any year of assessment is natural and appropriate; for the tax referred to is the tax in relation to a specific item or number of items not disclosed at a date or dates when disclosure should have been made.

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But over and above all these considerations we take, we confess, strongly the view that the interpretation now put forward most closely conforms to sense and justice. If an amount of tax has been evaded, then upon disclosure the taxpayer is bound to pay it and is liable to a penalty of three times the amount of such tax. Where no tax has been evaded by the defaulting party, there is certainly no logic in relating the penalty to the tax liability he has faithfully discharged; and at least if the default persists, new demands may presumably be repeated with penal results on each occasion of default. We do not say that all anomalies are avoided, but we do say that they lose their absurd and extravagant character. Treating the matter, then, as *res integra*, we would conclude that the phrase "tax which he ought to be charged" has the limited significance which we have for brevity called "the excess tax". It remains to consider whether we are constrained to a different conclusion by authority binding upon this Court.

There has been no decision of any Court directly upon the point which we have to decide. It is said by the Attorney-General that the construction for which he contends has so far always been assumed; and if that is so, then it may fairly be said of those responsible that the way in which the discretions vested in the Treasury have been exercised has been such that the Crown's view has been generally accepted. The assumption was undoubtedly made by Rowlatt, J., in *Attorney-General v. Johnstone*, 10 T.C. 758; but the Attorney-General concedes that he cannot for present purposes further rely upon the *dictum* of that learned and experienced Judge. Support for the Crown's view may also be derived from the text books—see, for example, Simon's *Income Tax*, Second Edition, Volume 1, page 290, paragraph 417; though a contrary opinion is found in Konstam's *Income Tax*, Twelfth Edition, paragraph 383. We have already referred to the Scottish case of *Lord Advocate v. McLaren*, 5 T.C. 110, but that was concerned with the different language of Paragraph 4 of the Sixth Schedule. In this paucity of authority there remains, however, the case of *Attorney-General v. Till*, reported in the Court of Appeal at [1909] 1 K.B. 694, and in the House of Lords<sup>(1)</sup> at [1910] A.C. 50, and upon this case, and most particularly upon certain language of Sir Herbert Cozens-Hardy, M.R., and Fletcher Moulton, L.J., in this Court, the Crown has most strenuously relied.

It is first necessary to observe that *Till's* case arose under Section 55 of the Income Tax Act of 1842, when the penalty exigible by the Courts was limited to £50. The question, therefore, before the Court and the House of Lords in *Till's* case was confined to this—whether Mr. Till was liable to forfeit £50. The relevant facts were that, having married a lady in whose favour the firm of solicitors of which he was the sole member had covenanted to pay an annuity of £200, Mr. Till had omitted in his relevant Income Tax return to include that annuity. Mr. Till's contention was, and it was the sole issue in the case, that Section 55 applied only to cases where the taxpayer had made no return for tax at all and did not therefore cover the case where, a return having been made, it later appeared not to have been a true and correct return. The considerable argument, as reported, turned upon the effect of the words "as aforesaid", which are found in Section 55. It was, however, one of Mr. Till's main contentions in support of his denial of liability (upon which, as Lord Loreburn, L.C., observed in the House of Lords<sup>(2)</sup>, he had the misfortune to persuade not only himself but the Court of Appeal) that a contrary conclusion involved the absurd and extravagant result that the Commissioners, though not the Court, would be able to impose

(1) 5 T.C. 440.

(2) *Ibid.*, at p. 453.

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upon a taxpayer who had made one omission, however insignificant, in his return, a penalty including treble his entire tax liability for the year. Since that view of the corresponding powers of the Commissioners coincided with the consistent interpretation and practice of the Inland Revenue Department, Counsel for the Crown were not concerned to challenge it either in the Court of Appeal or the House of Lords; and it was therefore assumed in argument throughout. The Court of Appeal accepted Mr. Till's argument and dismissed the action. In the course of his judgment Sir Herbert Cozens-Hardy, M.R., in support of the view which he took, said, at page 700<sup>(1)</sup>:

"The Act imposes a penalty on a false or fraudulent statement which is less severe than that which, on the other hypothesis, is imposed upon an honest mistake".

Fletcher Moulton, L.J., said, at page 702 :

"It seems a very startling proposition that the slightest inaccuracy in a statement should make its delivery a nullity. It is not in accordance with ordinary legislative usage, and I am of opinion that if the Legislature had intended that this penal clause should have so far-reaching an effect it would have used very different language to express its intention. Moreover, the nature of the penalty raises a presumption that it relates to an absolute non-delivery and not to errors in the statement delivered. It will be seen that the amount of the penalty is 'treble the duty at which such person ought to be charged', or, in other words, treble the duty on the whole assessment. That the measure of the penalty should be based on the duty on the whole assessment may be necessary and proper where there is a total failure to make any return whatever, but all justification for this course disappears when a return has been made and the only complaint is that it contains an inaccuracy."

If the matter had rested with the Court of Appeal decision, it might fairly be said that the acceptance by two of the Judges of the Crown's present contention formed part of their *rationes decidendi*, though the decision would have been fatal to the Crown in the present case upon other grounds. But the decision of the Court of Appeal was reversed in the House of Lords. It is true that none of the noble Lords expressed any dissent from the views expressed in the Court of Appeal on the words "duty at which such person ought to be charged", and Lord Atkinson certainly may be said expressly to have endorsed them when, at page 54<sup>(2)</sup>, he said :

"With all respect to the Court of Appeal, it would appear to me that, finding themselves confronted with this contention, they allowed themselves to be too much influenced by the quite natural repugnance which one must necessarily feel against adopting a construction of these enactments which would render the subject liable to those very heavy penalties if, while honestly endeavouring to furnish a correct statement according to his lights, he made some mistake or was guilty of some error in estimating what his gains and profits amounted to."

It is, however, plain that such views could by no possibility be regarded as constituting a ground for the decision of the House. The validity of those views was, as we have said, assumed throughout; and their only relevance in the House was whether, assuming their validity, they sufficed to defeat the Crown's claim. In the circumstances, these views cannot, in our judgment, have any binding authority. At best they are *dicta*, deserving due weight as such.

This view of the present effect in the circumstances of the opinion expressed by Sir Herbert Cozens-Hardy, M.R., and Fletcher Moulton, L.J., (above quoted) is supported by the case in this Court of *In re Hodson's Settlement*, [1939] Ch. 343. In that case Farwell, J., at first instance had felt

(<sup>1</sup>) [1909] 1 K.B.

(<sup>2</sup>) [1910] A.C.; 5 T.C., at p. 454.

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himself bound by the decision of this Court in an earlier case of *Attorney-General v. Lloyds Bank, Ltd.*, 151 L.T. 268, in the course of which this Court had held that a still earlier case in the House of Lords of *Adamson v. Attorney-General*, [1933] A.C. 257, had laid down certain principles which, when applied to the deed with which the Court was concerned (as the Court construed it) in the *Lloyds Bank* case, produced a result which he, Farwell, J., thought it his duty to follow in *Hodson's* case. But in the case last mentioned, this Court pointed out that the construction of the relevant deed in the *Lloyds Bank* case which this Court had accepted had been shown by later cases in the House of Lords to have been incorrect: "and that means", as Clauson, L.J., observed in reading the judgment of the Court, [1939] Ch., at pages 358-9,

"that the principles enunciated in the judgments in this Court, though entitled no doubt to the most serious consideration, have been formulated in regard not to the correct but to a hypothetical and in fact erroneous view of the meaning and effect of the material deed. In our judgment this circumstance leaves it open to this Court to refuse to accept the stated principles as necessarily correct."

So in the present case it is equally open to the Court not to accept as necessarily correct the views expressed in *Till's* case<sup>(1)</sup> of the construction of the formula "the tax which he ought to be charged" which were applied to support the erroneous conclusion of the effect of Section 55 of the 1842 Act. And in assessing the weight of these views it is essential to bear in mind that the question of construction with which we are concerned was not an issue in the case; not only so, but it was never argued at any stage, the interpretation which was assumed being adopted by both sides, for different reasons, as that most suited to their respective interests.

There is therefore, in our judgment, no authority which requires us to reject the interpretation of the relevant language of Section 25 (3) which, independently of authority, we regard as the right one. The result is that the contention which the Crown has put forward on the appeal must, in our judgment, be rejected. But, since we have been unable to accept the construction most favourable to the Respondent on which the learned Judge founded his judgment, we think the Order made by him should be varied by substituting for the sum of £20 the sum of £62 15s. As we understand that the Crown has agreed in any event to pay the costs of the appeal, there will be an Order to that effect also.

**Mr. Alan Orr.**—My Lords, as regards the issue on which your Lordships have decided against the Crown I am instructed to ask for leave to appeal to the House of Lords, if the Crown, on considering your Lordships' judgment, should desire to take that course. I apprehend that it is not a case in which your Lordships would give leave other than on terms as to costs, and I am instructed to say that if your Lordships were disposed to grant leave the Crown would not only not seek an Order for costs in the House of Lords, but would pay Mr. Hinchy's costs, as between solicitor and client, in that House.

**Lord Evershed, M.R.**—I do not know whether, if they were going to do that, they would consider—though Mr. Hinchy would no doubt have to agree—getting somebody who could assist the House. It might be an advantage—although litigants in person have been rather successful of late!

**Mr. Orr.**—That offer was made as regards the hearing in this Court, and it will certainly be available again.

(1) (C.A.) [1909] 1 K.B. 694; (H.L.) 5 T.C. 440; [1910] A.C. 50.

**Lord Evershed, M.R.**—It is a highly technical matter. However, that, I think, is a matter which you will have to consider. Mr. Hinchy, on those terms have you any reason to oppose the grant of leave by us to go to the House of Lords?

**Mr. Hinchy.**—No, my Lord.

**Lord Evershed, M.R.**—Then, Mr. Orr, you having stated that the Crown will in fact pay the costs, we give leave; and what I have suggested is a matter which I think must be left to others.

**Mr. Orr.**—It will be borne in mind, my Lord.

**Lord Evershed, M.R.**—Thank you.

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The Crown having appealed against the above decision, the case came before the House of Lords (Viscount Kilmuir, L.C., and Lords Reid, Radcliffe, Cohen and Keith of Avonholm) on 11th, 12th and 14th January, 1960, when judgment was reserved. On 18th February, 1960, judgment was given unanimously in favour of the Crown.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. John Pennycuik, Q.C., and Mr. Alan Orr appeared for the Crown. The Defendant did not appear and was not represented.

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**Viscount Kilmuir, L.C.**—My Lords, this is an appeal from an Order of the Court of Appeal (Lord Evershed, M.R., and Ormerod and Harman, L.J.J.) in England, allowing in part an appeal by the Crown from a judgment of Diplock, J., on the trial of an action for penalties under the Income Tax Act, 1952. Diplock, J., held that judgment should be entered for the Crown for the sum of £20 without costs, while the Court of Appeal substituted a judgment in favour of the Crown for £62 15s. The Court of Appeal thus added to the sum of £20 treble the tax on the amount which would have escaped taxation had a return made by the Respondent formed the basis of assessment.

The facts are that on 19th April, 1952, the Respondent filled up the prescribed form containing a return of income and claim for allowances for the Income Tax year 1952–53. In that return he set out the figures of £18 6s. as the bank interest. In fact the correct amount of his income from that source in the year ending 5th April, 1952, was £51 5s. 9d.

In order to appreciate the basis of the judgments of the Courts below it is material to observe that no assessment was ever made on Mr. Hinchy on the basis of his incorrect return, that the only assessment made on him for the relevant year was made after the correct amount had been discovered, and that this assessment in respect of all the tax for which he was liable for that year was made before the issue of the writ on 13th June, 1956.

These facts raise the question of the construction of Section 25 (3) of the Income Tax Act, 1952, which provides:

“A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against

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by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

The argument for the Crown which was developed before Diplock, J., and later before the Court of Appeal, may be summarised as follows. The penalty imposed by the said Section 25 (3), in the case of proceedings by action in a Court, is a fixed penalty which the Court (unlike the General Commissioners, in proceedings brought before those Commissioners) has been given by the Legislature no power to mitigate but which the Commissioners of Inland Revenue or the Treasury may mitigate under Section 500 of the Act. The said penalty has been applied by the Legislature to a very wide variety of defaults. It embraces cases in which no return has been delivered at all, cases in which an incorrect return has been delivered, and cases (as under Section 27, requiring the delivery by employers of lists of their employees) where a duty is cast upon one person to deliver a document relating to the tax liability of another, and where default in performing such duty can have no bearing on the ascertainment of the defaulter's own liability to tax. It applies irrespective of whether there has been fraud on the part of the defaulter and to cases where there has been a serious, trivial, or even no direct loss of tax to the Revenue. But the penalty applied to all these cases is a single penalty, and on the true construction of the relevant words in Section 25 (3) (which must, it was submitted, be given the same construction as the corresponding words applied to proceedings before General Commissioners in Section 55 of the Income Tax Act, 1842) such penalty is a penalty of £20 and treble the total tax to which the defaulter is chargeable by direct assessment for the year of assessment in question; the words "ought to be charged" limiting the ambit of the penalty to such tax as could be directly assessed on the defaulter, and there being in this respect a material difference in the wording of Section 25 (3) and the wording

"treble the tax chargeable in respect of all the sources of his income"

of Paragraph 4 of the Sixth Schedule of the Income Tax Act, 1952. It was further contended that the penalty could not be made to work in all the cases to which it is made applicable if it were construed as limited to treble the tax avoided by the default; and that if the Legislature had intended the Sub-section to bear this meaning it would have used the phraseology to be found in Section 48 of the Act. The Crown's construction of the words had not, so far as was known, ever been challenged in the period of over a century which had elapsed since the enactment of the Income Tax Act, 1842.

Diplock, J., took the view that the consequence of the construction of Section 25 (3) contended for by the Crown seemed to him to be absurd and unjust, and if there was some other possible construction, consistent with the words, which led to results less absurd and unjust, he would be inclined to adopt it. In his view there was such an alternative construction, for it seemed to him that the reasonable meaning of the words "the tax which he ought to be charged under this Act" was the tax to which the taxpayer ought to be duly assessed but to which he had not been duly assessed by reason of the default; that is to say, the increased tax which, when one looked at the latter part of the Sub-section, was to be added to the assessment. In this respect he thought that Section 48

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of the Income Tax Act, 1952 (dealing with penalties for fraud) expressed in clear and lengthier language what was intended to be conveyed by the elliptical expression in Section 25 (3).

This construction raised the question of determining at what point of time one must ascertain the amount of tax which the taxpayer ought to be charged, and Diplock, J., gave the answer of the date at which the proceedings, whether before the Court or the General Commissioners, are brought. As, therefore, in the present case the proceedings had been commenced after the Respondent had been charged with all the tax for which he was liable, there was at the date of the commencement of the action no tax with which he ought to be charged under the Act and the only amount recoverable was the fixed penalty of £20.

Like the Court of Appeal, I regret that I am unable to accept this view as to the point of time. Its result would be that, if the error were discovered before the assessment was made, the making of the correct assessment would eradicate that portion of the penalty arrived at by multiplying the tax. I cannot accept this. The liability to the penalty must, in my view, arise when the offence is committed, that is, when no return is made, when the time for making a return has expired, or, where an incorrect return has been made, when such a return has been received by the Commissioners.

The Court of Appeal did, however, approve of the antecedent reasoning of Diplock, J., and the gist of their view is expressed in the following quotation<sup>(1)</sup>:

“So as a matter of English it seems to us at least a legitimate interpretation of the phrase ‘tax which he ought to be charged’ to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return; in other words, the tax appropriate to the undisclosed income.”

The difficulty of the view of the Court of Appeal is that this expression appears to predicate that there has been an assessment by which the taxpayer has been charged with the lesser amount by reason of his defective return, and that this forms the basis of the penalty under Section 25. It is unfortunate that the Court of Appeal do not seem to have appreciated that there had been no assessment on the Respondent on the basis of the incorrect return which could play its part in the quantification of the penalty. In this case, as in many others, there is not, to use the language of the Court of Appeal, “tax with which . . . he [the taxpayer] has not been charged by reason of his defective return”. He has not been charged because the time for charging him has not yet arrived. When that time does come, *non constat* that the return will have any causative effect on his assessment. The latter may be based on other information and in the case of income under Schedule E must be based on his income in the current and not the past year. It is an essential constituent of this problem that, at the time of the commission of an offence under Section 25, assessment may be in the future, whereas under Section 48 (the fraud Section) assessment must be in the past.

Nevertheless, although the concluding reasoning of the Court of Appeal does not in my opinion fit the facts of this case or the general procedure of taxation, it would be wrong to ignore what the Attorney-General termed the “underlying thought of that judgment”. They considered that the

(1) See page 641 *ante*.

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penalty provisions produced minimum penalties wholly unrelated to the extent of the default, so extravagant as to be shocking in a final provision, and at least one anomaly which might well be thought to run quite contrary to ordinary justice. They considered that the penalties were so unfair and unjust and contained variations so numerous and illogical as to produce in their view the result that no safe view could be got from other Sections of the Act, in the attempt to construe Section 25. Although they did not use the words of Lord Loreburn, L.C., in *Attorney-General v. Till*<sup>(1)</sup>, [1910] A.C. 50 at page 52, that the penalties were "unreasonable or oppressive", yet they clearly considered these to be of that nature. I asked Mr. Pennycuik what was his submission as to the law which should guide the Court in construing provisions which appeared to be oppressive and unreasonable. His answer was that if there were any ambiguity the Court would prefer that construction which did not lead to an oppressive and unreasonable conclusion, but if the words were clear then they had to be given full effect whether or not that effect was unreasonable or oppressive. He submitted that there was no ambiguity in this case.

Bearing this in mind and also the fact that the Respondent was not represented, I have tried to formulate an argument implicit in the words of the Section. I remind myself that the effect of the decision of this House in *Attorney-General v. Till* was to rewrite this Section in the sense: "A person who neglects to deliver any return or who delivers a return which is not correct is liable to the penalty." As the Section can look to the future, can the words creating the penalty be extended distributively and respectively so that the penalty becomes the sum of £20 and treble the whole tax which he ought to be charged under this Act where he neglects to deliver a return, and in the case of an incorrect return, the sum of £20 and treble the tax on the amount which would have escaped taxation if the incorrect return made by the Respondent had formed the basis of assessment? I cannot give this meaning to the words. So to do would entail the making of an artificial assessment on the basis of the return, the making of the true assessment and the subtracting of the one from the other. I do not pause to speculate on the hypothetical difficulties of policy and procedure which might arise. I am content to say that to add the necessary words would in my opinion be legislation and not construction.

I also tried to consider whether, on the assumption of an ambiguity, I could gain assistance from the fact that the element of treble tax was attached to penalties after proceedings in Court, by Section 23 (2) of the Finance Act, 1923, which also changed the penalty for abettors of fraud in what is now Section 48 of the Income Tax Act, 1952. Again I could find nothing to drive me to a recondite second meaning. I cannot ignore the fact that a multiplier of the tax with which he ought to be charged was made a constituent of the penalty for the equivalent of this offence by Section 118 of the Income Tax Act of 1805. I cannot believe that, in the year of Trafalgar and Austerlitz, Parliament was considering such a refinement as the present argument entails. The more, however, I consider the piecemeal additions of the last 150 years, the more glad I am of the assurance of the Attorney-General that the penalties are being reconsidered.

Moreover, although the present point was not argued, it was assumed that "treble the tax which he ought to be charged under this Act" meant treble the whole tax for the relevant year by two members of the Court

(1) 5 T.C. 440, at p. 452.



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of Appeal and by Lord Atkinson in *Attorney-General v. Till*, by Rowlatt, J., in *Attorney-General v. Johnstone*, 10 T.C. 758, at page 762, inferentially by the Court of Session in *Lord Advocate v. McLaren*, 5 T.C. 110, and by the High Court and Supreme Court of what was then the Saorstát Éireann in the unreported case of *Attorney-General v. White*<sup>(1)</sup>. It is impossible in my view to give the words a different meaning in that part of the Sub-section which applies to proceedings before the Commissioners from that which applied to proceedings in Court, although in the case of the Commissioners it is a maximum and not a fixed penalty.

I have therefore come to the conclusion that the words must bear their ordinary meaning and that this appeal must be allowed.

At the request of the Crown there will be no order for costs.

**Lord Reid.**—My Lords, if the Crown are right in their main contention, any taxpayer who makes a mistake in his annual Income Tax return and has not discovered and rectified it must, if he is sued, be subjected by the Court to a penalty of £20 and treble the whole tax which he ought to be charged for the year; that penalty is in addition to the tax which he normally has to pay. It does not matter how innocent the mistake may have been or how large the penalty may be, the Court has no power to modify or reduce the penalty, although such a penalty, with the modern rates of Income Tax, would be ruinous to most taxpayers with moderate or large incomes. The Commissioners of Inland Revenue maintain that the only remedy lies with them and that it is for them in their sole and unfettered discretion (unless the Treasury chooses to interfere) to determine what they think would be a proper penalty in each case and to reduce the penalty imposed by the Court accordingly.

The Commissioners have in fact exercised this power for a long time, and it is no doubt a tribute to the way in which they have exercised their discretion that this appears to be the first time that the extent of their power has been challenged in Court and that it has been possible to delay for so long the revision of the penalty provisions in the Income Tax Acts, although the need for such revision had long been evident.

The incongruities and anomalies in these penalty provisions have a very long history. Some had their origins in the Income Tax Acts of 1799, 1803 and 1806, and even in the 1842 Act there were already serious anomalies. But in those days the rate of tax was low and penalties based on the total amount of tax payable were probably not oppressive. And this is not the only chapter of the law in which ill-conceived provisions introduced by temporary Acts with limited application have long survived without any radical revision and have to be applied in circumstances very different from those which existed at their origin.

This case turns on the proper construction of Section 25 (3) of the Income Tax Act, 1952:

“(3) A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds

(<sup>1</sup>) See page 666 post.

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and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

In a somewhat similar provision in the 1799 Act the penalty was simply £20. Then, after some amendments, Section 55 of the 1842 Act provided:

"55. And be it enacted, that if any person who ought by this Act to deliver any list, declaration or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice, or shall under any pretence wilfully delay the delivery thereof, and if information thereof shall be given, and the proceedings thereupon shall be had, before the Commissioners acting in the execution of this Act, every such person shall forfeit any sum not exceeding twenty pounds, and treble the duty at which such person ought to be charged by virtue of this Act, such penalty to be recovered as any penalty contained in this Act is by law recoverable, and the increased duty to be added to the assessment, . . . and every person who shall be prosecuted for any such offence by action or information in any of Her Majesty's courts, and who shall not have been assessed in treble the duty as aforesaid, shall forfeit the sum of fifty pounds."

In the Act as printed by the Queen's Printer there is a comma after "twenty pounds" in the passage "shall forfeit any sum not exceeding twenty pounds, and treble the duty . . .". An argument was submitted that this comma showed that "not exceeding" only governed "twenty pounds" and did not apply to "and treble the duty" so that the General Commissioners only had power to reduce the twenty pounds and had no power to reduce that part of the penalty which consisted of treble duty. But before 1850 there was no punctuation in the manuscript copy of an Act which received the Royal Assent and it does not appear that the printers had any statutory authority to insert punctuation thereafter. So even if punctuation in more modern Acts can be looked at (which is very doubtful) I do not think that one can have any regard to punctuation in older Acts; and omitting the comma I would hold that the whole of the penalty was subject to modification under the 1842 Act. There is now no comma in Section 25 (3) (b) and in my view if proceedings are now taken before the General Commissioners they are entitled to reduce the penalty of treble tax.

In 1842, if the matter was taken before a Court, there was a fixed penalty of £50: with the low rates of tax then in force £50 was presumably thought at least comparable with £20 plus treble tax. Under the Income Tax Act, 1918, Section 107, the penalty which a Court could impose was still only £50, but the rise in the rates of Income Tax made that an inadequate penalty in many cases, and the provision which now appears in Section 25 (3) (a) was introduced by the Finance Act, 1923, Section 23 (2).

Before dealing with the crucial question in this case, the proper construction of Section 25 (3) (a), there are several matters which it may be convenient to deal with at this stage. The Crown submitted that this Sub-section is governed by Section 25 (2) so that it only applies if the return or other statement was not true and correct to the best of the judgment and belief of the person making it. We were informed that the Commissioners never take action under this Section unless they think that the declaration required by Sub-section (2) was not truly made, but I can find no basis in law for it being a defence to an action to prove that the return or statement was made to the best of the judgment and belief of the defendant. The offence is not delivering a true and correct return, and if in fact it is not true and correct the penalty follows as a matter of course.

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Then it was said that whatever be the true meaning of "the tax which he ought to be charged under this Act", it cannot include either Surtax or tax deducted at source by those who pay dividends, etc. It is not necessary to decide those matters in this case, and I will only say, particularly with regard to Surtax, that I am not convinced that these are excluded and that in any revision of this and other provisions this ought to be made clear.

In determining the proper construction of Section 25 (3) one must bear in mind that the Sub-section applies to other things as well as a return of the taxpayer's own income: it applies to any list, etc., which he is required to deliver under a number of other Sections. Under Section 21 he may be required in certain cases to make a return of another person's income and to submit to being charged to tax in respect of it. Under Section 22 he must render a statement of money received by him on behalf of another person. Under Section 23 he must deliver a list of lodgers and inmates of his dwellinghouse. And Section 30 applies the provisions of Section 25 to lists of employees (Section 27) and commissions (Section 28) and interest paid to others (Section 29).

I do not propose to examine the other penalty provisions in the 1952 Act. It is no doubt true that every Act should be read as a whole, but that is, I think, because one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of other clauses and attributes to Parliament a comprehension of the whole Act. But where, as here, quite incongruous provisions are lumped together and it is impossible to suppose that anyone, draftsman or Parliament, ever considered one of these Sections in the light of another, I think that it would be just as misleading to base conclusions on the different language of different Sections as it is to base conclusions on the different language of Sections in different Acts. As an example of incongruity I need only refer to the admitted fact that the penalty in Sections dealing expressly with fraud is less than the penalty under Section 25 (if the Crown's construction of Section 25 is right) for errors which may only be due to mistake.

I can now state what I understand to be the rival contentions as to the meaning of Section 25 (3). The Crown contends that "treble the tax which he ought to be charged under this Act" means treble his whole liability to Income Tax for the year in question (less Surtax and tax deducted at source as I have already explained). It is not so easy to state the contrary contention briefly and accurately. Unfortunately the Respondent was not represented in this House. That was due to no fault of the Crown, and the Attorney-General very properly drew your Lordships' attention to points on which Counsel for the Respondent might have relied, but that is not altogether an adequate substitute for an argument for the Respondent.

Broadly the contention is that it cannot have been intended that that which would have been chargeable in any event on the inaccurate return which was sent in should enter into the computation of the penalty, that the penalty must have been intended to have some relation to the offence, and that the tax which he ought to be charged must be the additional tax which he ought to be charged by reason of the discovery of the true state of affairs. Otherwise the penalty will often be grossly and extravagantly disproportionate to the offences. A man might be properly chargeable to

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£5,000 on his actual return and properly chargeable to £5,100 tax on the correct return. If the Crown are right the penalty would be £15,320: if the other view is right it would only be £320. And even more extravagant cases could arise when the taxpayer's omission was not in respect of his own income. If he fails to return a correct list of lodgers or employees or money collected for or interest paid to others the penalty would have no relation to that failure—it would be treble his own Income Tax, although he had made a correct return of his own income and paid the full tax due on it. And an even more difficult case might arise under Section 21: under that Section he is chargeable both in respect of his own income and in respect of income belonging to another. If one of the returns which he makes is inaccurate, is the penalty treble the whole tax which he ought to be charged, that is, the tax on both his own and the other income, or can something be read in, even if the Crown are right, so as to base the penalty on something less than the whole tax which he ought to be charged under the Act?

Difficulties and extravagant results of this kind caused Diplock, J., and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the Crown's contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences and however strongly we may suspect that this was not the real intention of Parliament.

The Court of Appeal found it possible to adopt a secondary meaning for the crucial words. Their conclusion appears to be summed up in a sentence<sup>(1)</sup>:

“So as a matter of English it seems to us at least a legitimate interpretation of the phrase ‘tax which he ought to be charged’ to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return; in other words, the tax appropriate to the undisclosed income.”

I agree with the Court of Appeal that if it is possible to infer the meaning which they attach to these words that should be done. One is entitled and indeed bound to assume that Parliament intends to act reasonably and therefore to prefer a reasonable interpretation of a statutory provision if there is any choice. But I regret that I am unable to agree that this case leaves me with any choice. When I look at the way in which the provisions of Section 25 (3) (a) were brought into the Income Tax Acts, and at the way in which those provisions must be applied in circumstances other than those contemplated by the Court of Appeal, I find myself unable to hold that the crucial words are capable of the interpretation which they have adopted.

The Act of 1952 is a consolidating Act, and one must presume that such an Act makes no substantial change in the previous law unless forced by the words of the Act to a contrary conclusion. Therefore in interpreting a consolidating Act it is proper to look at the earlier provisions which it consolidated. The previous law was contained in

<sup>(1)</sup> See p. 641 *ante*.

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Section 107 of the Income Tax Act, 1918, and Section 23 (2) of the Finance Act, 1923, to which I have already referred. Section 107 gave the Court no power to impose a treble tax penalty and it did not require the General Commissioners to impose the maximum penalty: they could modify the penalty to any extent they might think just. The Attorney-General was unable to point to any provision in force before 1923 which required the maximum penalty to be imposed even in cases where there was no fraud: there were certain provisions imposing the maximum penalty if fraud was established. Section 23 (2) of the 1923 Act is in the same terms as Section 25 (3) (a) of the 1952 Act. If the Crown's construction is right then Parliament imposed for the first time in 1923 an obligation to inflict the full treble tax penalty even on innocent, though negligent, offenders, and did this at a time when the rate of tax (then 4s. 6d.) made such a penalty oppressive in most cases.

It is so contrary to the practice of Parliament to commit in effect unlimited discretion to a branch of the Executive as to the amount of penalties to be imposed on persons guilty of no more than negligence that I would not easily hold that this was made in 1923; but I am forced to the conclusion that this was then done and it is idle to speculate whether Parliament, or indeed any Member of Parliament, understood the full effect of the enactment. I refer to the Commissioners of Inland Revenue as a branch of the Executive because Section 1 of the Inland Revenue Regulation Act, 1890 (which does not appear to have been amended or repealed) provides that they

“shall in the exercise of their duty be subject to the authority, direction, and control of the Treasury, and shall obey all orders and instructions which have been or may be issued to them in that behalf by the Treasury.”

It is proper to add that the present practice appears to be to confine such orders and instructions within narrow limits.

I find it impossible to hold that the words “not exceeding twenty pounds and treble the tax which he ought to be charged under this Act” in Section 107 (1) (a) of the 1918 Act meant anything other than treble the whole tax which he ought to be charged for the relevant year. The argument for the more limited meaning adopted by the Court of Appeal is based almost entirely on the extravagant consequences which flow from giving the words in the present Act their natural meaning. But that argument loses almost all its force when applied to the 1918 Act. Under that Act the General Commissioners, an independent body, had full discretion to modify the penalty, and all that could then be said was that, owing to the increase in the rates of tax, the maximum penalty had become so high as to be extravagant in the great majority of cases. But there was no obligation under the 1918 Act to inflict the maximum penalty in cases where it was disproportionate to the offence.

In 1923 the same words were inserted in Section 107 (1) (b) but with the omission of the vital words “not exceeding”. Why these words were omitted I do not know, but their omission creates the present difficulty. Normally it would be impossible to hold that, when the same words as those already in one Sub-section are later inserted in another Sub-section of the same Section, they can be given a meaning different from the meaning of the words which were there already. I do not find it possible in this case to hold either that the words in the original 1918 Act had a limited meaning or that they were given a limited meaning by the 1923 Act or

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that after 1923 the same words in Sub-section (1) (a) and (b) had different meanings. I cannot avoid the conclusion that these words did not have a limited meaning before 1952 and that therefore they do not have a limited meaning now when they are reproduced in the 1952 consolidating Act.

My Lords, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend, Lord Radcliffe. I am in general agreement with it, and in particular I agree with his account of the methods of tax administration and of the way in which this case has been dealt with, so I need not add further to my own speech, already perhaps too long.

In my judgment this appeal must be allowed.

**Lord Radcliffe.**—My Lords, in my opinion we are bound to allow this appeal.

It has not been in dispute that in 1952 Mr. Hinchy committed a breach of the obligation imposed upon him by Section 19 of the Income Tax Act, 1952. He did not, when required so to do, deliver to the Inspector of Taxes a true and correct return of all the sources of his income and of the amount derived from each source for the year preceding the year of assessment, 1952–53. In fact the signed return which he did deliver on 19th April, 1952, stated incorrectly that his income for the year 1951–52 from interest on bank deposits, including Post Office and other Savings Bank deposits, had been £18 6s., whereas his true income from that source had been £51 5s. 9d.

Further, it has not been in dispute that by virtue of Section 25 (3) of the same Act he thereby forfeited, if proceeded against in a Court of law, the sum of £20 and treble the “tax which he ought to be charged” under the Act. Such a forfeiture is imposed by the Section upon anyone who “neglects or refuses to deliver, . . . or wilfully makes delay in delivering, a true and correct . . . return”.

It was decided by this House in *Attorney-General v. Till*<sup>(1)</sup>, [1910] A.C. 50, that a person who, though not failing to make a return at all, nevertheless makes an incorrect return is within the description that I have quoted above. I am bound to say, looking back, that I think that that decision might well have been otherwise and, if it had been, the problem that we are now faced with would not have arisen. But, since it went the way it did, we must now take it that Mr. Hinchy was a person who neglected to deliver a true and correct return. The whole question, therefore, is what penalty is attached to his default by the words “the tax which he ought to be charged under this Act”.

The Crown say that the meaning of these words is that the defaulter incurs, apart from the £20, a penalty of three times his total Income Tax bill in respect of all sources of income directly assessable for the year in which the offence is committed. They say that this is the way in which the words have been understood and applied ever since they first appeared in an Income Tax Act (the first use of them in this context was in Section 118 of the Income Tax Act of 1805); that whenever their import has been noticed judicially, as in *Attorney-General v. Till*, [1909] 1 K.B. 694, and in *Attorney-General v. Johnstone*, 10 T.C. 758, the same meaning has been attributed to them; and that the Income Tax Codification Committee itself,

(<sup>1</sup>) 5 T.C. 440.

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which in the years before 1939 laboured with so much intelligence and devotion to no eventual result, clearly assumed this to be the correct meaning. All this, I think, is true; and these considerations are persuasive. But, having regard to the extreme severity which might attend such a penalty under present scales of taxation and the fact that in this very case the Court of Appeal have found it possible to impute another and less onerous meaning to the words, I think it better to approach the question of construction without giving any weight to this consideration that, if the Court of Appeal are right, they have discovered in the phrase a significance that has long lain unobserved, and so lain after many persons, it is fair to suppose, have had cause to scrutinise them with somewhat anxious attention.

What, then, are the alternative readings which have been suggested? Diplock, J., before whom this action came in the High Court, took the view that (1) the point of time at which there should be ascertained the amount of tax which a defendant "ought to be charged" was the date of the initiation of the proceedings for the penalty, and (2), if at that date there had been a correct assessment on the full chargeable income, there was no tax with which it could be said that the defendant ought to be charged and nothing therefore recoverable except £20. In my opinion this view is wrong in its initial assumption. The date at which any penalty incurred is to be ascertained must be the date when the offence is committed: assessment or payment after that cannot affect the liability. Otherwise, every time, an error being detected, a correct assessment is made in order to determine the true tax liability for the year, the penalty by way of multiplied tax automatically disappears. I agree with the learned Master of the Rolls when he says in the judgment delivered in the Court of Appeal<sup>(1)</sup>:

"We do not think that this can be right."

In the Court of Appeal itself a different interpretation prevailed. It was based on the general idea that, when there has been an incorrect return, the tax which the maker of it "ought to be charged" in treble is something which can be called the "excess tax". This is variously described as<sup>(1)</sup>

"the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income"

and as<sup>(2)</sup>

"that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return; in other words, the tax appropriate to the undisclosed income."

My Lords, I do not think that the words of Section 25 (3) which are in question give any hint of an intention to measure the tax penalty by a computed excess of this sort. It can be done if an appropriate formula is used. Section 48, for instance, does apply such a formula, where the conditions are such that an assessment, though an inadequate one, has been made. Again, Section 49 allows treble the excess tax where a false return of Schedule D income has led to under-assessment or would have led to it if undetected. But no such formula is used or indicated in the Section that we have to consider. Moreover, there is another and fundamental obstacle to the introduction of this "excess tax" idea which the Court of Appeal judgment imports into the meaning of the Section.

<sup>(1)</sup> See page 640 *ante*.

<sup>(2)</sup> See page 641 *ante*.

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Their definition depends essentially on the existence of a first incorrect assessment, such as they believed to have been made in this case, which assessment can then be compared with the corrected true assessment which emerges when the full facts are known. We were assured by the Attorney-General in the course of his argument that in this case there had been no such assessment for 1952-53, and, as this misunderstanding contributed to the Court of Appeal's view of the admissible interpretation of Section 25 (3), I think it necessary to set out exactly what did apparently happen, because, so far as I can see, the order of events followed here is as likely as not to be typical of the order that will be observed in any other case of untrue or inaccurate returns.

In April, 1952, Mr. Hinchy made a return purporting to set out all the sources of his income for the year 1951-52 and of the amount derived from each source. This return would afford, of course, valuable information for the purposes of the assessment to be made on him for the year 1952-53, though, in so far as the basis of assessment is the current year's income, not that of the preceding year, such a return can be informative only and there is no inherent connection between the figures it shows and the figures that should be used for the true assessment. It also affords, I suppose, a means of checking by its figures the assessments which have been made for the previous year on that year's current income.

No assessment for 1952-53 was ever made on Mr. Hinchy on the basis of his statement that his income (I include in this the income of his wife) from Savings Bank interest for 1951-52 had been £18 6s. The only assessment that was ever made on him for 1952-53 was made after the true figures had been established. There was then an assessment for each Schedule, Schedule D and Schedule E, under which he derived assessable income, and these assessments have been put in evidence. The Schedule D assessment on untaxed interest is not intelligible unless the Schedule E assessment is first looked at.

The Schedule E assessment relates directly only to Mr. Hinchy's income from his employment in H.M. Customs and Excise. But, owing to the practice of "coding in" for the purpose of P.A.Y.E. deductions, two small items of income which really belonged to Schedule D were taken into account (see Part III of the assessment form) for the purpose of arriving at the code number appropriate to the operation of P.A.Y.E. By this means £21 of the Savings Bank interest and £19 of "excess rents" income were taken to reduce by £40 the £396 of allowances which would otherwise have been taken into account in allotting the P.A.Y.E. code number and, ultimately, in computing the Schedule E assessment. The result was that £21 of the untaxed interest was, in effect, taxed under Schedule E and recovered through P.A.Y.E.; and the deduction of £21 from the full amount of £51 "untaxed interest" in the Schedule D assessment is merely a recognition of this arrangement, designed to prevent the £21 from being taxed twice over. It does not mean that Mr. Hinchy's assessments, when they came to be made, were on anything less than the full sum of £51 for untaxed interest. Considering the way that the matter is dealt with in more than one letter in the correspondence exhibited, I do not wonder that the Court of Appeal took the facts to be otherwise. I still do not know why the figure of £21 was taken for the purpose of adjusting the P.A.Y.E. code number. It is quite possible that it was related to the £18 6s. shown in the inaccurate return of April, 1952; but, even so, P.A.Y.E. is no more than provisional retention of tax. It is not assessment.



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It appears, therefore, that in this case there was never any failure to charge the taxpayer with the true amount of his tax for the year or any inadequate lower assessment induced by his wrong return. There never was any sum, therefore, that could be computed by comparing the tax charged by such a first assessment with the total tax liability when ascertained, nor was there any figure attributable to an additional assessment. As I see no reason to suppose that what happened here represents an unlikely sequence of events, I am afraid that I regard the successive failures of Diplock, J., and the Court of Appeal to find a maintainable interpretation of "treble the tax which he ought to be charged under this Act" that escapes the onus of trebling the whole tax bill for the year as a very strong indication that there are really no means of escape open. I do not wish, however, to accept this conclusion without giving some attention to another possible interpretation which is indicated by that phrase of the Court of Appeal, "the tax appropriate to the undisclosed income". Can one fairly regard the words of the Section as enacting in some disguised way that the basis of computation is to be the difference between what would be the tax on the figures actually shown by a man in his return, whether or not there has been any assessment, and the tax on what he ought to have shown if he had made a full and correct return? This is a device applied by Section 49 to certain cases, but it is noticeable that it there applies only to Schedule D income.

I find it impossible to penetrate this disguise. With all respect to those who may think otherwise, the contents of even a completely full and correct return are no measure of the proper assessment of a man's income for the year in which he makes it. The assessing authority is not under so much as a presumptive duty to make an assessment according to the return: how could it be when, except for Schedule D, the basis of assessment is the current year, which is not dealt with by the return, not the past year, which is? Assessments can be made even where there is no return. They can be made, whatever a return shows. The contents of a return can be queried and further, more reliable, information extracted. They can be cross-checked and the results amended in consequence of extraneous information available to the surveyor. In other words, the relationship of the figures of the return to the proper assessment of the year is so tenuous that I do not find it possible to suppose that the "tax which he ought to be charged under this Act" can ever have been intended to mean the amount of tax which a person would escape if his inaccurate return were accepted as providing final figures for the purposes of assessment. The basic facts of the administration and collection of tax do not admit any reality to such a conception.

I come back, therefore, to the only construction which is, I believe, open to a Court of law. When a man does what Mr. Hinchy did, sends in what is not a true and correct return, he commits an offence and the measure of his penalty must be ascertained as the situation is at that date. At that date he will neither have been assessed nor will he have paid any tax for the year except, it may be, some provisional deduction under P.A.Y.E. The question, what tax he ought to be charged under the Act, seems to me to be, in these terms, a simple one. It is the sum of tax for which he will become liable for that year when assessment properly carried out under the Act has imposed liability upon him. It could not be anything else when the offence consists of failing or refusing to make

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a return at all, and I do not see how the meaning of the words can change if the offence takes the form of not making a full return.

I appreciate that the view to which the Court of Appeal felt entitled to come was largely encouraged by certain general considerations as to the result of accepting the Crown's contention in cases of this kind. Personally, I do not find any of these considerations compulsive, in the sense that they can alter the meaning of the words that Parliament has used; but, as I am as well not altogether in agreement with the cogency of some of the things that have been said, I ought perhaps to make a brief allusion to them.

The first point made related to the way the Crown's claim was computed, which was said to be inconsistent with its own construction of the Section. It was said, for instance, that if the measure was the full tax payable by direct assessment in the year, tax levied by deduction being omitted, it was anomalous to include Schedule E tax collected under P.A.Y.E. This is not, I think, a valid criticism. Schedule E income remains liable to direct assessment at the instance either of the Crown or of the taxpayer, though assessment can be dispensed with, and the P.A.Y.E. deductions are only provisional payments of tax in advance. In this respect income subject to P.A.Y.E. is quite different from, for instance, dividend income which is not directly assessable to Income Tax. Then, it was said that the treble tax claimed on the Savings Bank interest had in fact been computed only on the undisclosed portion instead of on the whole. This criticism arises from a misunderstanding of the two assessments and the way they worked out, and I have already explained what the actual circumstances were. Lastly, the comment was made that, to be consistent, Surtax ought to be included in the basic computation as well as Income Tax. Mr. Hinchy was not a Surtax payer, so the point does not arise here. All that need be said is that, if it does have to be decided at any time, there are arguments for treating the assessment and collection of Surtax as carrying their own history and their own penalties and Section 25 (3) as not including Surtax in the "tax" to be computed. In any event the point has no bearing on what we have now to determine.

Secondly, it is, of course, very true that the penalty provision, as interpreted by the Crown, may not only impose fines which for some taxpayers would require payment of tens of thousands of pounds but also presents striking anomalies when its effect is contrasted with the effect of other penalty Sections in the same Act. I do not think it necessary to dwell upon these or to illustrate them, because the opportunities of doing so are almost inexhaustible. What I do not perceive, however, is how these considerations can alter the interpretation of the words used by the statute. If it is said that Parliament could not have intended to impose such onerous fines for breaches which in some cases may not be blameworthy in any degree, I can only point out that Parliament has imposed just the same penalty where the default is neglect to make any return at all, and yet none of the suggested interpretations of the Section achieves any penalty short of treble the whole direct assessment in those cases where there has been neither return nor assessment. Personally, I do not see any marked distinction in degrees of blame between mere carelessness which results in not making a return and that form of carelessness which leads to a return being made which misleadingly appears to be complete when it is not.

Again, whatever we managed to say about the meaning of the words in this case, there is no doubt that Section 18 of the Act would still impose a penalty of treble the whole tax when a person without just excuse

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fails to give a notice of his liability to tax; that Paragraph 4 of the Sixth Schedule would impose what may be the still more onerous burden of treble the tax on all income from all sources, if there is fraud in claiming a relief; and that Sections 48, 49 and 441 would contain provisions which in certain cases involve a charge of three times the full tax.

When it is said, therefore, that we ought to search for a more rational meaning of the words of Section 25 (3) than that which is offered by the interpretation supported by the Crown, I think that much depends upon what you regard as rational in this setting. Most of these penalty clauses have their origin in the Tax Acts of 1803-06, if not in the earlier Act of 1799. Income Tax administration in those years was not the huge and efficient system to which we are now accustomed. If the purpose of Parliament at that time was, as I suspect, to impose heavy penalties for any kind of evasion, primarily as a deterrent, there is no reason for surprise that the various penalties are neither adjusted harmoniously to each other nor in themselves proportionate to degrees of blame or threatened losses of revenue. It was as rational to hit out blindly and heavily at anyone who was caught as to maintain savage and indiscriminate punishments under the criminal code until an effective police force had been established. What is more surprising is that, apart from the small changes made in the Finance Act, 1923, nothing has been done by Parliament ever since to review the whole unsatisfactory set of penalty Sections and remodel them in the light of conceptions appropriate to the present day. Such a review has been called for both in the Report of the Income Tax Codification Committee (see Cmd. 5131, paragraphs 173-183) and in the Final Report of the most recent Royal Commission on Income Tax (see Cmd. 9474, Part VII, Chapter 33), and the recommendation has no doubt reached the destination usually reserved for advice invited by governments from such committees.

**Lord Cohen.**—My Lords, I had commenced writing a full judgment in this case, but, before I had completed it, I had the privilege of reading the opinion which has just been expressed by my noble and learned friend, Lord Radcliffe. I agree so entirely with his conclusions and with the reasons he gives for thinking this appeal must be allowed that I shall only detain your Lordships long enough to say that I prefer not to express any opinion as to whether Surtax enters into the calculation of treble tax until that point arises.

I would allow the appeal.

**Lord Keith of Avonholm.**—My Lords, the judgment of the Court of Appeal would seem to have proceeded on a false premise, namely, that after the false return was made by the Respondent he was assessed on the return so made and that there was a balance of income undisclosed on which he had not been assessed. But that was not the position. The discovery by the Crown of the undisclosed income was made after the return had been made and before any assessment was made. Mr. Hinchy was then assessed, after deduction of due allowances, on the full amount of income subject to assessment, including the Post Office Savings Bank interest which he had failed to disclose. Thereafter proceedings were taken for recovery of penalty in respect of the incorrect return. The Court of Appeal, in my opinion correctly, say that the offence is committed when the false return is received by the Commissioners. The liability to penalty necessarily arises at the time of the offence. It is a case of a false return

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with which we are here concerned, and it will be convenient to set out the relevant and material dates.

The return, which was in respect of the Income Tax year 1952-53, was dated 19th April, 1952. It disclosed as arising in the year ended 5th April, 1952, untaxed interest on accounts and deposits in banks, including Post Office and other savings banks, of £18 6s. In fact the Post Office Savings Bank interest credited to Mr. Hinchy and his wife in that year was £51 5s. 9d. After several years' correspondence an assessment was made, on 30th November, 1955, of £30 in respect of untaxed interest, tax on which at 9s. 6d. in the pound came to £14 5s. This amounted to tax on the whole £51 of Post Office Savings Bank interest, for £21, part of his personal allowance, was deducted from the £51, leaving a net sum of £30. On 9th March, 1956, a Schedule E assessment was issued in respect of Mr. Hinchy's employment amounting, after allowances, to £427 on which tax was computed of £125 6s. 6d. These two assessments, apart from some Schedule A assessment otherwise settled, I think, by allowances, constituted Mr. Hinchy's whole tax liability for the tax year 1952-53. It may be noted that liability in respect of a Schedule E assessment was computed on income arising in the tax year and was subject of direct assessment. It is not income, as the Court of Appeal seem to have thought, from which tax is deducted at the source. The liability in respect of the Savings Bank interest on the other hand fell to be computed on the income arising in the preceding year, 1951-52. Mr. Hinchy's total liability to tax for the year 1952-53, as so assessed and charged, was thus £139 11s. 6d., the sum of £14 5s. and £125 6s. 6d. The next material date to be noted is 13th June, 1956, the date of the issue of the writ for penalties. The claim made by the writ is for £438 14s. 6d. being penalty, under Section 25 (3) of the Income Tax Act, 1952, of £20 and treble the tax on £139 11s. 6d.

On one view of the Court of Appeal's judgment it might appear that, if the true facts and sequence of events had been appreciated, they might have decided this case in favour of the Crown. I quote only one passage from the judgment where they say<sup>(1)</sup>:

"There remains the Judge's interpretation of the relevant words (the third view above indicated), namely that 'the tax which he ought to be charged' means what we have called the excess tax—that is the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. Where there has been failure to make any return at all, the 'tax which he ought to be charged' will of course be the total of his tax liability for the relevant period. But where, as in the present case, the taxpayer's default lay in an understatement of one of his sources of income, then the tax which he ought to be charged will, on this interpretation, mean the tax which he ought to be charged (but was not charged by reason of his default) on the undisclosed income."

It would seem clear from this passage that the Court did not, as I have said, appreciate the true facts of the case. If the Court had dealt with the true situation I am not clear what result they would have reached. There is much in the train of thought in the judgment which suggests that they might still have held that the proper penalty was only £20 and treble tax on the amount which the taxpayer failed to disclose on his return. As the Respondent was not represented on the appeal and no Case was lodged on his behalf, it is only right that any point that can be advanced on his behalf should be considered. It is partly, I understand, because of the difficulties and uncertainty which the Crown conceive this judgment has created for them in their enforcement of the penalty provisions of the Act that they have brought this appeal.

<sup>(1)</sup> See page 640 *ante*.

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The claim here is made under Section 25 (3) of the Income Tax Act, 1952. The point in issue is a short one, namely, what is meant by the words in Sub-section (3),

“treble the tax which he ought to be charged under this Act”.

There are a number of penalty Sections under the Act, all of which were referred to in the course of the argument. They do not provide any coherent or intelligible code and in the confines sometimes of even a single Section apparent anomalies can be discovered. It will be convenient to consider these Sections in three groups according to the variation of language by which the penalty is imposed.

In the first group I place Sections 18 and 25, omitting for the time being the Sections to which Section 25 applies; in the second group Sections 48 and 49; and in the third group Paragraph 4 of the Sixth Schedule.

Section 18 and Section 25 read as follows:

“18.—(1) It shall be the duty of every person who is chargeable to income tax for any year of assessment to give notice to the surveyor that he is so chargeable at or before the end of that year: Provided that no such notice need be given by any person as respects any year for which he has delivered a statement of his profits and gains in accordance with the provisions of this Act. (2) If any person, without reasonable excuse, fails to give such a notice as aforesaid, he shall—(a) if proceeded against by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment.

25.—(1) Any such lists, declarations, statements and returns as are provided for by the preceding provisions of this Chapter shall be in such form as the Commissioners of Inland Revenue shall prescribe, and in prescribing forms under this subsection the Commissioners shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom. (2) Any statement of annual value or profits or gains to be charged under Schedule A, Schedule B, Schedule D or Schedule E shall include a general declaration declaring the truth thereof and that the same is fully stated on every description of property, or profits or gains, included in the Act relating to the tax, and appertaining to the person returning the statement, estimated to the best of his judgment and belief, according to the provisions of this Act. (3) A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of twenty pounds and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment. (4) The Commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid. (5) If any person who is required to deliver a list, declaration, statement or return on behalf of any other person delivers an imperfect list, declaration, statement or return and declares himself unable, within the time limited, to deliver a more perfect list, declaration, statement or return and states the reasons for his inability, he shall not, if the General Commissioners are satisfied with his explanation and grant further time for delivery, be liable to the penalty prescribed by this section if he delivers, within the further time granted, as perfect a list, declaration, statement or return as the nature of the case permits. (6) If a person delivers to any surveyor a list, declaration

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or statement on a form prepared for the purpose by direction of the Commissioners of Inland Revenue, he shall be deemed for the purposes of this section to have been required by a notice under the preceding provisions of this Chapter to prepare and deliver that list, declaration or statement, and the time limited for the delivery thereof shall be deemed for the purposes of this section to have expired on the date of its delivery to the said surveyor. (7) Any list, declaration, statement or return required by the preceding provisions of this Chapter to be delivered to the surveyor shall be made available to the General, Additional or Special Commissioners and their respective clerks, and, whenever necessary, to the assessors for the preparation and making of assessments."

The provisions of Sections 18 (2) and 25 (3) are in identical terms, apart from the introductory words indicating the nature of the offence struck at by the penalty provision. Section 18 deals with concealment of chargeability to tax for any year of assessment, a reference back to Section 1 of the Act. The offence presumably will be committed if the potential taxpayer allows the year of assessment to run out without disclosing his chargeability. Section 25 relates to persons who are known to the surveyor of taxes and are required to make one or other of the returns in Sections 19 to 23 of the Act, including persons required (Section 19) to deliver true and correct returns of all sources of their income. I can see no ground for placing any different construction on the words

"treble the tax which he ought to be charged under this Act"

in Section 25 (3) from the meaning they have in Section 18; or for saying that they have one meaning where the taxpayer neglects or refuses to deliver any return within the stipulated time as required by the Act, and a different meaning when he wilfully makes delay in delivering a true and correct return of his income as similarly required. The decision of this House in *Attorney-General v. Till*<sup>(1)</sup>, [1910] A.C. 50, is binding authority that delivery of an incorrect return is breach of this requirement. The question of the construction of these words may to some extent be resolved, I think, by asking how is it to be ascertained what tax the defaulter ought to be charged under the Act. The only way, in my opinion, is through the machinery of assessment set up by the Act. The Court cannot take upon itself this task. It was so held, I think rightly, in an unreported Irish case, *Attorney-General v. White*<sup>(2)</sup> (3rd March, 1931), under corresponding Income Tax provisions in Ireland, judgments in which were made available to your Lordships. Can it be said that the words have an ambulatory meaning, so that, if the taxpayer makes an incorrect return, the tax which he ought to be charged under the Act is limited to tax on the amount of the undisclosed income? This is the view, I think, taken by the Court of Appeal. I find it impossible to put such a construction on words which seem to me to be quite unambiguous. So limited, the tax would be only part of the tax which he ought to be charged under the Act. It was conceded by the learned Attorney-General that the penalty is to be measured only by tax on income which is the subject of direct assessment, a concession which I am disposed to think could not be withheld. Income from which tax is deducted under Schedule D is not income charged to tax in the hands of the recipient. Nor is it contended for the Crown that the tax to be charged includes Surtax, for reasons which I do not find it necessary to examine. It may be noted also in passing that the non-fraudulent offender has a method of escape from the stringency of the penalties under Section 55 of the Act, which gives opportunity for rectification of returns and other relief.

(<sup>1</sup>) 5 T.C. 440.

(<sup>2</sup>) See page 666 post.

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Sections 48 and 49 of the Act are as follows :

“ 48.—(1) Where a person who ought to be charged with tax, as directed by this Act, is not duly assessed and charged by reason that he has—(a) fraudulently changed his place of residence or fraudulently converted, or fraudulently released, assigned or conveyed any of his property; or (b) made and delivered any statement or schedule which is false or fraudulent; or (c) fraudulently converted any of his property, which was chargeable, by altering any security relating thereto or by fraudulently rendering it temporarily unproductive, in order not to be charged for the same or any part thereof; or (d) been guilty of any falsehood, wilful neglect, fraud, covin, art or contrivance whatsoever, such person shall, on proof thereof to the General Commissioners for the division in which he has been charged, or, if he has not been charged, then for any division in which he is chargeable, be assessed and charged treble the amount of the charge which ought to have been made upon him: Provided that, if any charge has been made, but that charge is less than the charge which ought to have been made, such person shall be assessed and charged, over and above the former charge, treble the amount of the difference between the charge which was made and the charge which ought to have been made, such amount to be added to the assessment. (2) A person who knowingly and wilfully aids, abets, assists, incites or induces another person to make or deliver a false or fraudulent account, statement, or declaration, of or concerning any profits or gains chargeable, or the yearly rent or value of any lands, tenements, hereditaments or heritages, or any matters affecting any such rent or value, shall for every such offence forfeit the sum of five hundred pounds.

49.—(1) If the Additional Commissioners or the General Commissioners—(a) have made a charge to tax under Schedule D in respect of a sum in excess of the amount contained in either the statement or the schedule of a person to be charged; or (b) discover, from the information of the surveyor, or otherwise, that a charge to tax in respect of a sum in excess of either such amount ought to be made, and an assessment is made, at any time within the year of assessment or within three years after the expiration thereof, they may, unless the person to be charged proves to their satisfaction that the omission by him did not proceed from any fraud, covin, art or contrivance or any gross or wilful neglect, charge that person, in respect of such excess, in a sum not exceeding treble the amount of the tax on the amount of the excess. (2) If the person to be charged has neglected or refused to deliver a statement or schedule, the said Commissioners may charge him in a sum not exceeding treble the amount of the tax with which, in their judgment, he ought to be charged, and such sum shall be added to the assessment and applied in the same manner as other increased charges are applied.”

The proviso to Section 48 (1) clearly limits the penalty to treble the tax on the amount of income undisclosed where a charge has already been made on the disclosed amount. There may be observed, however, several new features in the matter of penalty. There is no £20 penalty. There is no provision for proceedings for penalty in a court. The penalty is a fixed penalty of treble tax, not a maximum within which the Commissioners have a discretion to operate. Lastly, if the fraud is discovered before any tax is imposed, the penalty is treble tax. Only where tax has already been charged does the taxpayer escape with treble tax measured by what he has fraudulently concealed. It may be doubted whether this Section shows any leniency to the fraudulent taxpayer as contrasted with the treatment accorded to a neglectful taxpayer under Section 25. The restricted penalty imposed by the proviso, limited though it be by the amount fraudulently undisclosed, may be a very heavy penalty, as compared with the discretionary penalty that the Commissioners are entitled to impose under Section 25. Only in contrast with the penalty imposed by a Court under Section 25 can it be said that the fraudulent taxpayer who comes under the proviso may escape relatively lightly. That is undoubtedly an anomaly. But it would seem to be no greater an anomaly than that accorded to two fraudulent taxpayers under Section 48 itself, according

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as an assessment has already been made on one and not on the other, a difference in treatment which I confess I find it difficult to understand. Whatever anomalies exist between Sections 25 and 48 these provide no ground for reading into Section 25 (3) (a) the proviso of Section 48 (1), as the Court of Appeal in effect would seek to do, with the result incidentally of repeating in the case of neglectful taxpayers the anomaly already observed to exist as between fraudulent taxpayers. The reference in the Section to "the charge which ought to have been made" as contrasted with the words "the tax which he ought to be charged" in Section 25 (3) raises another question which seems to me to lead nowhere. It would, I think, make no real difference if the words of Section 25 were substituted for the words in Section 48 so far as the meaning of Section 48 was concerned.

Section 49 provides another variation of a penalty clause. It applies only to charges to tax under Schedule D. The words "not exceeding" reappear in this Section. The penalty in the circumstances to which the provisions of the Section apply is a sum not exceeding treble tax on the amount the taxpayer has omitted to return. Again there is no question of a £20 penalty.

Lastly I come to Paragraph 4 of the Sixth Schedule. It runs as follows:

"4.—(1) A person who, in making a claim for or obtaining any relief to which this Schedule relates, or in obtaining any certificate as aforesaid— (a) is guilty of any fraud or contrivance; or (b) fraudulently conceals or untruly declares any income or any sum which he has charged against or deducted from, or was entitled to charge against or to deduct from, another person; or (c) fraudulently makes a second claim for the same cause, shall forfeit the sum of twenty pounds and treble the tax chargeable in respect of all the sources of his income as if such claim had not been allowed. (2) a person who knowingly and wilfully aids or abets any person in committing an offence under this paragraph shall forfeit the sum of five hundred pounds."

Here your Lordships find a further variation of penalty in cases of fraudulent claims for relief, reflecting often relatively small results in the matter of tax liability. The penalty here is the severest of all. The £20 penalty makes its appearance again; treble tax is mandatory; and it is imposed

"in respect of all the sources of his income as if such claim had not been allowed."

It is thus not limited, as in Sections 18, 25 and 48, to income subject to direct assessment.

I have referred to these Sections because they all disclose in the circumstances to which they apply a variety of penalties which present no intelligible pattern and which in relation to one another seem often highly inequitable. Nor does the general power of mitigation vested in the Commissioners of Inland Revenue and the Treasury by Section 500, in my opinion, really affect this result. The survey of these Sections has, I think, this relevance to the subject-matter of this appeal. It shows that it is impossible to argue from one penalty Section to another or to infer because of illogicalities between different Sections, or inequitable results that may follow from a particular construction, that therefore the Legislature cannot have meant what the words of Section 25 (3) plainly say. I would add that these Sections have an ancient lineage dating back more than 150 years and show very little essential change in that period. Section 25 (3) shows a greater number of changes evolved during that period, but in spite of opportunities thus afforded Parliament has not thought fit to make any substantial change, apart from quantum of penalty, in the form of language by which the penalty was imposed from at least 1805.



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In conclusion, I would say a word about the effect of Section 25 on certain Sections of the Act to which it applies. These are notably Sections 21 to 23 and 27 to 29 inclusive. The results on the view of the Court of Appeal were so startling as to play a large part in their reaching a construction of Section 25 (3) that would enable them to escape the rigour of a literal construction of its words. For the reasons I have given I think, on any view of its effect on the Sections in question, that escape would be impossible. But it is a question whether any talk of escape is necessary. In any case in which it was necessary to consider the matter I would wish to hear argument on two points. First, whether the impact of Section 25 on Sections like 21 and 22 affects tax on the income of any person other than the constituent in respect of whose income a return is made by a person in a representative or quasi-representative capacity. Secondly, whether when a return is made under such Sections as 23, 27 or 29, which are not concerned with returns of income but with lists of names of persons who may be chargeable to tax in respect *inter alia* of payments made by the person responsible for the return, there is any basis for a penalty under Section 25 other than that of the fixed penalty of £20. In other words, whether there is any income covered by the subject-matter of the return in respect of which it can be said that the person making the return "ought to be charged to tax under this Act". These are incidental matters which cropped up in the course of the argument before this House and which, on the view taken by the Court of Appeal of resulting personal chargeability, seem to have weighed heavily with the Court. I say no more about these two questions which on any view can, in my opinion, have no effect on this case.

I agree that the appeal should be allowed.

*Questions put :*

That the Order appealed from be discharged and that it be declared that the words "treble the tax which he ought to be charged under this Act" contained in Section 25 (3) (a) of the Income Tax Act, 1952, denote treble the whole of the Income Tax to which the defaulter is chargeable by direct assessment for the year of assessment in question.

*The Contents have it.*

That there be no costs of the appeal to this House.

*The Contents have it.*

[Solicitor:—Solicitor of Inland Revenue.]

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