
COURT OF APPEAL—4, 5, 6, 7, 8 AND 27 FEBRUARY 1980

HOUSE OF LORDS—14 MAY 1981

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Commissioners of Inland Revenue v. Garvin⁽¹⁾

Commissioners of Inland Revenue v. Rose⁽¹⁾

Income tax and surtax—Transactions in securities—Tax advantage—Counteraction—Sale of shares in property companies—Subsequent payments of abnormal dividends by property companies—Whether relevant circumstances present—Whether sale of shares transactions “whereby” another person received abnormal dividends—Whether purchase price of shares received “in connection with” re-acquisition by vendors of shares of assets of property companies—Whether property companies were at material time companies to which para D of s 461 applies—Insufficient evidence in Case Stated—Whether onus on taxpayer or Crown—Whether tax advantages obtained—Income and Corporation Taxes Act 1970, s 460, paras C and D of s 461, proviso to para D(2) of s 461, s 466 and s 467(2).

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The taxpayers, together with the brother of Mr. J. J. Rose, owned five property companies (ABCFS) and entered into a professionally devised tax avoidance scheme comprising, *inter alia*, the following transactions:

(1) On 3 April 1969 they sold their shares in ABCFS for a total consideration of £471,998 payable by annual instalments of £150 (i.e. £50 to each) over 200 years, with a final instalment of £451,898 payable on 3 April 2170, and interest at 10¼ per cent. on the outstanding instalments—thus, by virtue of para 14, Sch 6, Finance Act 1965, virtually avoiding liability to capital gains tax.

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(2) On 14 April 1969 they sold the right to receive the instalments of the purchase price of the shares for £471,848 (a transaction which did not attract capital gains tax).

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(3) On 14 April 1969 they lent £471,848 to another of their companies (Central) as part of the finance required to acquire the property portfolios of ABCFS for £989,095.

The company which had on 3 April 1969 purchased the shares in ABCFS (Excalibur) was controlled by the devisers of the scheme. On 8 April 1969 ABCFS had disposed of their property portfolios on leases at premiums payable by instalments over 999 years, resulting in distributable profits of some £558,000 and—by virtue of elections under s 80(6), Income and Corporation Taxes Act 1970—negligible liability to corporation tax. About one year later ABCFS paid dividends of £555,000 to Excalibur.

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⁽¹⁾ Reported (Ch D) [1979] STC 98; (CA) [1980] STC 295; 124 SJ 277; (HL) [1981] 1 WLR 793; [1981] STC 344; 125 SJ 398.

- A On 31 July 1974 the Commissioners of Inland Revenue issued notifications under s 460(6) specifying (i) the sale of the shares in ABCFS, (ii) the sale of the right to the instalments of the purchase price of the shares and (iii) the payment of the abnormal dividends by ABCFS to Excalibur. The taxpayers made statutory declarations and the Commissioners prepared a counter-statement, on the basis of which the Tribunal determined that there was a *prima facie* case for proceeding. On 27 March 1975 the Commissioners issued notices under s 460(3) specifying the same transactions as the notifications and proposing adjustments resulting in income tax and surtax assessments for 1968–69 in the sums of £235,941 (Mr. Garvin) and £117,971 (Mr. Rose and his brother).

- C Before the Special Commissioners the Crown relied on the circumstances in para C of s 461, Income and Corporation Taxes Act 1970, and reserved the right to rely on para E in a higher tribunal. The Special Commissioners found that the taxpayers were not parties to any scheme which involved the subsequent payment of abnormal dividends by ABCFS, and held that accordingly the consideration for the sale of the issued share capital of ABCFS was not received by the taxpayers in consequence of a transaction “whereby” Excalibur subsequently received an abnormal amount by way of dividend. D They held that the circumstances in para C were not present and they therefore cancelled the notices and quashed the consequential assessments.

On appeal to the High Court the Crown served notice of a new point under RSC Ord 91, r 4, and sought to rely on the circumstances in para D as well as those in para C.

- E The Chancery Division, dismissing the Crown’s appeals, held that the circumstances in s 461, were not satisfied.

- F *Per curiam*: in relation to s 460, the general burden of showing that the necessary circumstances are present is on the Crown. No evidence had been laid before the Commissioners to show whether, at the time their profits were distributed, ABCFS were companies to which para D applied, since they were controlled by Excalibur, as to the status of which there was no evidence. The Crown appealed.

The Court of Appeal, dismissing the Crown’s appeal, (Templeman L.J. dissenting), held that the circumstances in s 461 were not satisfied.

- G *Per Donaldson L.J.*: in applying para D, the burden of proof is not always on the Crown. It was for the Crown to prove that at the relevant time ABCFS were controlled by Excalibur, and for the taxpayer to prove that Excalibur was itself not a company to which para D applied (see s 461D (2) (a) and (b)). The Crown appealed.

Held, in the House of Lords, unanimously dismissing the Crown’s appeal, that the circumstances in s 461 were not satisfied for the following reasons:

- H 1. In para C it is not enough in order to constitute a transaction “whereby” the relevant person has received an abnormal dividend that the declaration of the dividend would not have been made but for the transaction in question; in the present case the degree of connection between the transaction and the declaration of the dividend was insufficient on the basis of the Special Commissioners’ findings of fact.

2. In para D the date for determining whether the company is one to which the paragraph applies is that of the distribution of profits and accordingly para D did not apply. A

Per curiam: the taxpayers had obtained a tax advantage within s 466 but it was uncertain whether that advantage other than £150 had been obtained in 1968–69 or 1969–70.

CASE

Stated under s 56, Taxes Management Act 1970, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 10, 11, 12, 13 and 14 May and 29 and 30 July 1976 Louis Garvin (hereinafter called “the Respondent”) appealed against a notice issued to him by the Commissioners of Inland Revenue (hereinafter called “the Board”) under s 460(3), Income and Corporation Taxes Act 1970 (“the Act”), and against a surtax assessment made on him for the year 1968–69 in accordance with the adjustments specified in the said notice. We, the Commissioners who heard the appeals, regarded ourselves as also having jurisdiction in respect of an income tax assessment made on him for the year 1968–69 in accordance with the adjustments specified in the said notice. C D

2. Briefly stated, the question for our consideration was whether in any such circumstances as are mentioned in s 461 of the Act, and in consequence of a transaction in securities, or the combined effect of transactions in securities, the Respondent was in a position to obtain or obtained a tax advantage as defined in s 466 of the Act. The Board’s representative contended before us that the circumstances mentioned in para C of s 461 existed; and, as a point not previously taken on behalf of the Respondent was for the first time put forward during the opening of the appeal before us—namely, that the Respondent obtained a debenture from Central London Residential Properties Ltd.—he also wished to keep open the point, without developing any argument on it before us, that the circumstances mentioned in para E of s 461 existed. E F

3. The following persons gave evidence before us: the Respondent; Philip Edward Rose (“Mr. Philip Rose”); John Jacob Rose (“Mr. John Rose”); Godfrey Michael Bradman (“Mr. Bradman”), a chartered accountant and at the material time senior partner in the firm of Messrs. Godfrey Bradman & Co. of 53 Queen Anne Street, London W.1. G

4. The following documents were proved or admitted before us:

- (1) Agreement dated 3 April 1969 for sale of shares—see para 5(3) below.
- (2) Agreement dated 3 April 1969 for sale price of shares to be paid by instalments—see para 5(3).
- (3) Accounts and draft accounts referred to in para 5(5) (exhibit 1).
- (4) Agreement for lease, and lease, both dated 8 April 1969—see para 5(4). H
- (5) Assignment dated 14 April 1969 of right to receive instalments of purchase price of shares—see para 5(7)(c).

- A (6) Three summaries prepared by the Board and amended by us in red in the light of Mr. Bradman's evidence; the first setting out the transactions described in para 5 below, the second showing the movement of cash resulting from those transactions, and the third showing the transactions concerned with the transfer of the rights and obligations relating to the payment of instalments (exhibit 2).
- B (7) Notification dated 31 July 1974 under s 460(6) of the Act—see para 5(13).
- (8) Statutory declaration by Respondent—see para 5(14) (exhibit 3).
- (9) Notice dated 27 March 1975 under s 460(3) of the Act—see para 5(15).
- (10) Income tax and surtax assessments made on the Respondent and on Mr. Philip Rose and Mr. John Rose—see para 5(16).
- C Copies of such of the above as are not annexed hereto as exhibits are available for inspection by the Court if required⁽¹⁾.

5. As a result of the evidence both oral and documentary adduced before us we find the following facts proved or admitted:

- (1) In this Case, (a) the Respondent, Mr. Philip Rose and Mr. John Rose are referred to collectively as "the three notified persons"; Bernard Faber, a chartered accountant and at the material time a partner in the said firm of Messrs. Godfrey Bradman & Co. is referred to as "Mr. Faber"; Nassan Halle, a certified accountant and at the material time a partner in the firm of Messrs. Bradman Halle & Co. of 53 Queen Anne Street, London, W.1, as "Mr. Halle"; Alan Anthony David Wiseman, a solicitor and a partner in the firm of Messrs. Brecher & Co., as "Mr. Wiseman"; and David Walsh, a solicitor and at the material time employed by Messrs. Brecher & Co., as "Mr. Walsh"; (b) Agonaut Properties Ltd. is referred to as "Agonaut"; Bastille Properties Ltd. as "Bastille"; Carat Properties Ltd. as "Carat"; Foremost Properties Ltd. as "Foremost"; Suburban Residential Properties Ltd. as "Suburban"; these five companies collectively as "ABCFS"; Central London Residential Properties Ltd. as "Central"; Excalibur Property Co. Ltd. is referred to as "Excalibur"; F Geltan Property Trading Co. Ltd. as "Geltan"; County Industrial Land Ltd. as "County"; Greave Property Co. Ltd. as "Greave"; Hurricane Investment Co. Ltd. as "Hurricane"; Lekos Investment Co. Ltd. as "Lekos"; and Metallic Property Trading Co. Ltd. as "Metallic".

- (2) Evidence, which was incomplete in some cases, was before us about the ownership, control and description of various companies. The evidence, which G we accepted, was to the following effect:

- (a) Prior to 3 April 1969 ABCFS were all owned and controlled by the three notified persons. The issued share capital of each of these companies was owned beneficially as to 50 per cent. by the Respondent and as to 25 per cent. each by Mr. Philip Rose and Mr. John Rose. The three notified persons were directors of each company. With the exception of Bastille, which was an H investment company, the business of these companies was property dealing, and at the material time the five companies owned freehold and leasehold properties of substantial value.

(b) Central is a property dealing company, and at the material time it was owned and controlled by the three notified persons.

⁽¹⁾ Not included in the present print.

(c) Excalibur, Greave and Hurricane are all investment companies. At the material time Mr. Bradman, Mr. Faber and Mr. Walsh were all directors of each company and Mr. Bradman held shares in Excalibur (or its parent company). A

(d) Geltan is a property dealing company. At the material time one of its directors was Mr. Halle. Mr. Bradman was not a shareholder or director.

(e) County is a property dealing company. At the material time Mr. Wiseman and Mr. Walsh were directors. Mr. Bradman was not a shareholder or director. B

(f) Lekos is an investment company, which at the material time was a wholly owned subsidiary of Metallic, and had as its sole directors Mr. Bradman and Mr. Faber.

(g) Metallic at the material time had as its sole directors Mr. Bradman and Mr. Faber. C

(3) On 3 April 1969 under a written agreement, the three notified persons sold their shares in ABCFS to Excalibur for a total consideration of £471,998. This is transaction 1 in the first summary in exhibit 2: it was admitted on behalf of the Respondent that there was a scheme down to (and including) transaction 8, coupled with the loan (referred to in sub-para (6) below) of the sum of £471,848 to Central. The purchase consideration for the issued capital of ABCFS payable to the three notified persons was as follows: D

	£	
Agonaut	50,680	
Bastille	152,010	
Carat	57,328	
Foremost	133,595	E
Suburban	78,385	
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	471,998.	
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Under the agreement the £471,998 was payable by 200 yearly instalments of £150 (i.e. £50 to each of the three notified persons) the first instalment payable at once, and the final payment of £451,898 on 3 April 2170, with interest at 10¹/₄ per cent. per annum on the amount from time to time outstanding. The consideration was payable to the three notified persons in proportion to their respective shareholdings in ABCFS, viz. F

	£	s.	
Mr. Garvin	235,999	0	G
Mr. Philip Rose	117,999	10	
Mr. John Rose	117,999	10	
	<hr/>		
	471,998	0.	H
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In agreeing the price of £471,998 the directors of Excalibur took into account the assets and liabilities of ABCFS and of their intention to arrange that those companies should dispose of their assets in such a way as to defer for very many years the resulting liability to corporation tax: they regarded the terms of the purchase as the best bargain they could obtain. The three notified persons for their part took into account the assets and liabilities of ABCFS, the fact that I

A Mr. Bradman required a discount on the net asset value of those companies in arriving at the purchase price of the shares and the prospect that the resulting liability to capital gains tax on the disposal of the shares in those companies would be deferred for very many years: they relied heavily on their professional advisers. At the time of the sale the directors of Excalibur intended that the properties owned by ABCFS should be sold. Pursuant to the admitted scheme
 B both they and the three notified persons hoped and expected that the latter would reacquire the properties but there was no agreement to that effect. At the time of the sale of the shares the directors of Excalibur had not decided whether to procure the payment of a dividend by those companies: it remained an open question for about a year—a decision being reached only in the spring of 1970 when a dividend was paid (see sub-para (10) below). None of the three
 C notified persons was aware at the time of the sale of his shares of any tax avoidance scheme intended to be carried out by the purchaser and no such scheme was discussed between the purchaser and the professional advisers of the three notified persons. But we infer from the amount of the sale price that the professional advisers knew that Excalibur intended in some way to avoid corporation tax.

D (4) On 8 April 1969 ABCFS each executed an agreement to grant a lease of all its properties to Geltan for premiums amounting in aggregate to £982,862, of which £133,386 was payable to Agonaut. Under these agreements the premiums were payable by instalments as follows: £10 on 8 April 1970, £10 on 8 April of each subsequent year for 997 years and the balance on 8 April 2968. Interest at 10¼ per cent. per annum was payable on the part of the
 E premiums outstanding. The leases were executed on the same day as the agreements, 8 April 1969. Only one lease was granted by each company, and was for a term of 999 years, except where the interest subject to the lease was itself held by ABCFS for a term of less than 999 years. All the properties in the Agonaut lease were granted for a term of 999 years. Each lease, however, contained a 49 year landlord's "break clause", thus bringing it within the
 F definition of a lease not exceeding fifty years in s 80(1) of the Act (see s 84(1)(a) of the Act).

(5) The accounts of ABCFS other than Suburban for the period ended 25 March 1968, the draft accounts of ABCFS for the period ended 3 April 1969, and the accounts of ABCFS for the year ended 14 April 1969 are annexed hereto as exhibit 1⁽¹⁾. The revenue reserves are shown therein as follows:

G	At 25 March 1968	At 3 March 1969	At 14 April 1969	
	£	£	£	
	Agonaut	29	34,662	58,246
	Bastille	2,592	2,823	172,035
	Carat	22,437	47,302	73,944
	Foremost	20,888	72,559	165,144
H	Suburban		19,107	89,611
		<hr/>	<hr/>	<hr/>
		45,946	176,453	558,980.

(6) On 14 April 1969 ABCFS sold the (freehold and leasehold) reversions of their properties to County, for £100 in each case. On the same day
 I County, into whose hands the five above-mentioned leases had come (thus

(1) Not included in the present print.

effecting a merger of the leases with the reversions) sold all the properties concerned to Central for £989,095 in cash. Central found its money by borrowing £236,000 from the Respondent, £118,000 from Mr. Philip Rose, £118,000 from Mr. John Rose (i.e. the cash received by the three notified persons on the same day from Greave, as described at sub-para (7)(c) below) and the balance of £517,095 from other sources. A

(7) Other transactions carried out on 14 April 1969 were: B

(a) Geltan paid Excalibur £982,862 in consideration of Excalibur's taking over the obligation to pay the instalments of the premiums on the five leases granted by ABCFS on 8 April 1969.

(b) Excalibur lent £472,000 to Greave to finance the transaction next mentioned.

(c) Greave acquired from the three notified persons the right to receive the instalments of the purchase price of their shares in ABCFS for a cash payment of £235,949 in the case of the Respondent and £117,949.10s. each in the case of each of Mr. Philip Rose and Mr. John Rose, making a total of £471,848 (i.e. the full purchase price of £471,998 less the first instalment of £150 paid on 3 April 1969). C

(8)(a) The following loans were made by Excalibur to Hurricane: D

	£
On 14 April 1969	313,000
On 9 September 1969	120,000
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	433,000.

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Hurricane repaid this sum on 13 April 1970.

(b) The following loans were made by Hurricane to such of ABCFS as are indicated below:

	£
On 14 April 1969 (to BCFS)	312,998
On 9 September 1969 (to A & S)	195,890
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	508,888.

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These loans were repaid as follows:

	£
On 11 September 1969 (by BCF)	76,345
On 13 April 1970 (by ABFS)	432,543
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	508,888.

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(c) On 2 May 1969 Excalibur lent a further £6,000 to Greave. On 3 April 1970 Greave repaid £150 of this loan, and on 13 April 1970 Greave repaid the £472,000 which it had borrowed from Excalibur on 14 April 1969. H

(9)(a) On 3 April 1970, Excalibur paid Greave £150 representing the second instalment of the purchase price of the shares in ABCFS.

A (b) On 8 April 1970 Excalibur paid £50 to ABCFS as the first instalment of the premiums on the leases granted by ABCFS.

(10) On 13 April 1970 ABCFS paid dividends (to Excalibur) for the period 15 April 1968 to 14 April 1969 amounting in aggregate to £554,000. It is common ground that these dividends were abnormal in amount within the meaning of s 467(3) of the Act.

B (11) On 13 April 1970 Lekos acquired from Greave for a consideration of £471,000 the right to receive the instalments of the purchase price of the shares. On the same day Lekos acquired from ABCFS for a consideration of £981,650 the right to receive the instalments of the premiums.

(12) Also on 13 April 1970 Excalibur paid Metallic £471,998 to assume the obligation to pay the remaining instalments of the purchase price of the shares.

C On the same day Excalibur paid Metallic £981,650 to assume the obligation to pay the instalments of the premiums.

(13) On 31 July 1974 the Board issued notifications under s 460(6) of the Act to the three notified persons. The transactions specified in the notification issued to the Respondent were:

D "1. In accordance with an agreement dated 3 April 1969 the sale by you to [Excalibur] of your holding of shares of [ABCFS] for a total consideration of £235,999 payable in instalments of £50 per annum from 3 April 1969 to 3 April 1969 inclusive and a final payment of £225,949 on 3 April 1970.

E 2. The disposal by you to [Greave] on or about 14 April 1969 of the right to receive future instalments of the consideration mentioned in 1. above for a cash consideration of £235,924.

3. The declaration and payment to [Excalibur] by [ABCFS] of dividends for the period 15 April 1968 to 14 April 1969 in the amounts shown:

F	[Agonaut]	£ 57,500
	[Bastille]	£171,000
	[Carat]	£ 73,750
	[Foremost]	£163,000
	[Suburban]	£ 88,750."

G The notifications issued to Mr. Philip Rose and Mr. John Rose were in the same terms except that in para 1 the sums of £118,000 and £107,950 were substituted for £235,999 and £225,949 respectively, and in para 2 the sum of £117,962 was substituted for £235,924.

H (14) Each of the three notified persons made and sent to the Board a statutory declaration under s 460(6) of the Act. The declaration made by the Respondent is annexed hereto as exhibit 3⁽¹⁾. The Board, proceeding under s 460(7) of the Act, sent these declarations to the tribunal constituted under s 463 of the Act, together with the statutory certificate and a counter statement, and the tribunal determined that there was a *prima facie* case for proceeding.

(¹) Not included in the present print.

(15) On 27 March 1975 notices were issued to the three notified persons under s 460(3) of the Act specifying the same transactions previously set out in the notifications and proposing the following adjustments: A

(a) *Income tax (Schedule D, Case VI) assessments for the year 1968-69.* The Respondent £235,941 (tax at the standard rate £97,325.33); Mr. Philip Rose £117,971 (tax at the standard rate £48,663.03); Mr. John Rose £117,971 (tax at the standard rate £48,663.03) being the income tax which would have been payable by ABCFS on distributions to the three notified persons of £235,941, £117,971 and £117,971 respectively. B

(b) *Computation (or recomputation) of surtax liability for 1968-69.* To include the above-mentioned sums of £235,941, £117,971 and £117,971 as part of the total income of the three notified persons respectively.

(16) Income tax and surtax assessments in accordance with the proposed adjustments were made and the three notified persons appealed against the notices under s 460(3) of the Act and against the said assessments. C

6. The following was common ground between the parties:

(a) In consequence of the sale by the three notified persons of their shares in ACFS (but not Bastille, being an investment company) each of them received a consideration, which represented the value of the trading stock of ACFS, namely the purchase consideration under the agreement described in para 5(3) above, or alternatively the cash received by them from Greave on 14 April 1969 as described in para 5(7)(c) above. D

(b) Excalibur subsequently received from each of those four companies abnormal amounts by way of dividend.

(c) Each of the three notified persons so received the said consideration in such a way that he did not pay or bear tax on it as income. E

7. It was contended on behalf of the Respondent that:

(i) the facts recited in para 5(8), (9), (11) and (12) were irrelevant to the appeal proceedings;

(ii) the transaction numbered 2 in the notice recited in para 5(13), viz. the acquisition by Greave of the right to receive future instalments of the purchase price of the Respondent's shares in ABCFS was not a transaction in securities; F

(iii) the Respondent did not in consequence of a transaction in securities or of the combined effect of two or more such transactions obtain or become in a position to obtain a tax advantage within the meaning of s 466 of the Act because: (a) the receipt of a sale price for shares cannot be compared with the receipt of dividends from the companies whose shares are sold unless there is an arrangement that the sale price shall come from the assets of such companies. There was no such arrangement in respect of the Respondent's sale of his shares in ABCFS; and (b) in the alternative, looking at the scheme as a whole (viz. the totality of the transactions to which the Respondent was privy) the Respondent upon completion of all the transactions merely possessed a debt owing to him by Central. A tax advantage is neither obtained nor obtainable by becoming entitled to a debt owing or a debenture; G H

(iv) if contrary to the contention at (iii) a tax advantage was obtained or obtainable by the Respondent it was not so obtained or obtainable in any such circumstances as are mentioned in s 461 of the Act, and, in particular, with regard to para C of that section: (a) the transaction of purchasing the shares of

- A ABCFS was not one “whereby” Excalibur subsequently received an abnormal amount by way of dividend from each of the companies, since it was not by that purchase but by the independent action of the companies after they had been acquired by Excalibur that the dividends were paid; and (b) in the alternative, in relation to the consideration received by the Respondent for the sale of his shares in Bastille, an investment company, such consideration did not represent assets available for distribution by way of dividend nor trading stock of the company and was not received in respect of future receipts of the company;

(v) the notice issued to the Respondent under s 460(3) of the Act should be cancelled and the assessments made in accordance with such notice quashed;

- C (vi) we had no jurisdiction to uphold the income tax assessment made upon the Respondent at all or to uphold the surtax assessment upon him until the notice under s 460(3) of the Act is finally affirmed.

8. It was contended on behalf of the Board that:

- D (1)(i) it should be inferred from the facts admitted or proved that (for the purposes of ss 460–468 of the Act) there was an integral scheme to which the three notified persons, Mr. Bradman and the companies referred to in para 5(5)(c) to (g) above were parties; (ii) alternatively, that there were two separate schemes so closely interconnected that they amounted to one single composite scheme;

- E (2)(i) the Respondent avoided possible assessments to income tax and surtax on the sale of his shares in ABCFS, or, alternatively, on the receipt of the cash consideration paid to him by Greave for the assignment of the right to receive the future instalments of the purchase price of his shares; (ii) the Respondent obtained, or was in a position to obtain, a tax advantage in consequence of a transaction in securities, namely the sale of his shares in ABCFS; (iii) the Respondent obtained, or was in a position to obtain, a tax advantage within the meaning of s 466(1) of the Act notwithstanding that the relevant “receipts accruing” were not paid or provided by ABCFS;

- F (3) the circumstances in para C of s 461 of the Act were present, and that in particular (i) the consideration for the Respondent’s shares in Bastille (which was not a trading company) was received in respect of future receipts of that company; (ii) the sale of the Respondent’s shares in ABCFS was a transaction “whereby” Excalibur subsequently received an abnormal amount by way of dividend;

(4) accordingly, the Respondent obtained—or was in a position to obtain—a tax advantage in the circumstances of para C, and in consequence of a transaction in securities, and therefore s 460 of the Act applied to him;

- H (5) the notice under appeal should be upheld, and that the consequential income tax and surtax assessments should be upheld in principle, and that the appeal should be adjourned for the agreement of figures.

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

We have before us appeals by Mr. Louis Garvin, Mr. John Jacob Rose and Mr. Philip Edward Rose (whom together we call the Appellants) against notices issued by the Board of Inland Revenue under s 460, Income and

Corporation Taxes Act 1970 and also their appeals against consequential surtax assessments for the year 1968–69 made to counteract alleged tax advantages. The question also arises as to jurisdiction in respect of consequential income tax assessments made for similar reasons. The appeals are all on the same basis except that Mr. Garvin's stake is twice the amount of that of each of the other two Appellants. A

The substantive question which arises is whether s 460(1) applies to the Appellants in respect of transactions described in notices under s 460(3) issued by the Board to each of them on 27 March 1975. The Appellants have not sought to escape from the s 460 net by alleging that the transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as its object or one of its main objects to enable tax advantages to be obtained; and it is clear from the facts that any such claim could have no hope of success. What they do say, however, quite simply, is that the provisions of s 460(1) do not in terms apply to them. Broadly speaking, s 460(1) applies to a person where in such circumstances as are mentioned in s 461 and in consequence of the effect of transactions in securities he obtains or can obtain a tax advantage as defined in s 466. B
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D

We therefore consider first whether the circumstances mentioned in s 461 exist. The Board contends that those described in para C of that section exist. It also wishes to keep open the point that the circumstances described in para E also exist. The Board did not make any formal contention in relation to the circumstances in para E, the reason for this being, as we understand it, that the facts on which such a contention could be based and the point to which any such contention was a possible answer were first disclosed to the Commissioners during the opening of the appeals before us. The Board had therefore not warned the Appellants' professional representatives that it might be taking this point, and Counsel for the Appellants protested that the Crown was introducing a new point (i.e. one not already canvassed in the Board's counter statement). We find this a most unsatisfactory state of affairs but in the absence of any formal contention by the Crown we disregard para E and examine only the possible application of para C. E
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We look at para C first in relation to the sales by the Appellants to Excalibur of their shareholdings in four property dealing companies, Agonaut, Carat, Foremost and Suburban—excluding for the moment their sales of their holdings in the property investment company Bastille. The following is common ground: G

(a) In consequence of such sales each Appellant received a consideration, namely the consideration for the sale of the shares which represented the value of trading stock of Agonaut, Carat, Foremost and Suburban as the case may be.

(b) Excalibur subsequently received from each of those four companies abnormal amounts by way of dividend. H

(c) Each Appellant so received the said consideration that he did not pay or bear tax on it as income. Thus to bring the Appellants within para C all that it remains for the Board to show is that the sales of the shares were transactions "whereby" Excalibur received abnormal amounts by way of dividend.

The meaning of the word "whereby" in its context here is therefore vital. As to this, giving the words in s 460 and the group of sections comprised in I

A Chapter I of Part XVII the wide construction which was approved of by Lord Wilberforce in *Commissioners of Inland Revenue v. Joiner*⁽¹⁾ [1975] 1 WLR 1701, at page 1706, the Board contend that “whereby” means “by virtue of which” or “in consequence of which” or “in connexion with which” and that it is apt to say that the abnormal dividend was received by virtue of the sale of shares or in consequence of or in connection with the sale.

B While we have no doubt that the Board is correct in arguing that the words of Chapter I should be given a wide interpretation, we are equally in no doubt that s 460 is only to apply where the wording, albeit interpreted widely, fits the particular facts. In the context in which we find the word “whereby” in para C, we think that the word imports some causal connection. If that is the case it is not in our opinion an ordinary use of the word “whereby” to say that the sales were transactions whereby Excalibur received the dividends. On the face of the matter, the sale and the payments of dividend were separate transactions and the sale could have taken place without abnormal dividends ever having been paid.

D We consider second, therefore, whether the particular facts of the case provide a setting which justifies a wider construction of the word. In this connection it is common ground that any acts of or knowledge by the Appellants’ agents who acted for them must be imputed to the Appellants themselves. It is also common ground that there was a scheme involving the Appellants on the one hand and Mr. Bradman and his empire on the other and that one element in this scheme was the expectation that the Appellants should re-acquire the property portfolios of Agonaut, Bastille, Carat, Foremost and Suburban. But was there a more comprehensive scheme under which both sides contemplated the further transactions which in fact ensued—including the payments of abnormal amounts by way of dividend? The Board does not challenge the assertions of each of the Appellants that he personally knew nothing of any scheme that those five companies should pay such dividends or indeed anything at all about any tax schemes to be carried out within the bounds of Mr. Bradman’s empire. What the Board does say, however, is that looking at all the facts including the price obtained for the shares in the five companies, it must have been obvious to the Appellants’ agents, who were most experienced in tax matters, that the success of Mr. Bradman’s side of the scheme depended on the payment of the large dividends and that such payments were inevitable; that the Appellants’ agents were not called to give evidence of the negotiations is something that in the Board’s submission reinforces this suggestion. We cannot draw this inference. Mr. Bradman gave evidence before us that there was no discussion with the Appellants’ agents as to what should be done with the five companies after their purchase by Excalibur and Mr. Bradman said that it was not known with any certainty until about one year later that such dividends would be paid. We accept Mr. Bradman’s evidence on the point; we conclude therefore that there was no scheme or undertaking to which the Appellants or their agents were parties involving the payments of such dividends or indeed knowledge by them that this might happen. In our opinion, therefore, there is no warrant for construing the word “whereby” against the setting of the particular facts so as to bring para C of s 461 into operation. We express no opinion, however, as to what degree of involvement by the Appellants might have caused us to take a different view. Our decision is on grounds that apply to Bastille as well as to the other four companies and it therefore covers the sale of the Bastille shares.

(1) 50 TC 449, at p 480.

On the grounds that the necessary circumstances specified in s 461 do not exist we hold that s 460 does not apply to the Appellants in respect of the transactions. It is therefore unnecessary for us to consider the cogent and carefully reasoned argument addressed to us by the Board's representative on whether the Appellants were in a position to obtain or have obtained a tax advantage. It is also unnecessary for us to consider whether we have jurisdiction to uphold the consequential assessments. The appeals succeed and in accordance with s 462(4) we cancel the notice and we quash the surtax and income tax assessments. A B

10. The Board, immediately after the determination of the appeal, declared to us its dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to s 56, Taxes Management Act 1970, which Case we have stated and do sign accordingly. C

11. The question of law for the opinion of the Court is whether, on the facts found by us, we were correct to allow the appeal, cancel the notice and quash the income tax and surtax assessments.

J. G. Lewis {Commissioners for the Special Purposes of
B. James {the Income Tax Acts D

Turnstile House
94-99 High Holborn
London WC1V 6LQ

23 August 1977

The case came before Slade J. in the Chancery Division on 10, 11 and 12 July 1978 when judgment was reserved. On 28 July 1978 judgment was given against the Crown, with costs. E

John Vinelott Q.C. and *Brian Davenport* for the Crown.

C. N. Beattie Q.C. for the taxpayers.

Commissioners of Inland Revenue v. Brown 47 TC 217; [1971] 1 WLR 1495 was cited in argument in addition to the cases referred to in the judgment. F

Slade J.—These are two appeals by the Crown by way of Cases Stated against decisions of the Special Commissioners whereby they quashed certain surtax and income tax assessments made in reliance on s 460 of the Income and Corporation Taxes Act 1970 (“the Act”). The respective Respondents to the appeals are Mr. Louis Garvin and Mr. John Jacob Rose. They were shareholders in a number of companies together with Mr. Philip Edward Rose. I understand that the Special Commissioners also quashed surtax and income tax assessments made against him on a similar basis and that there has been a similar appeal by the Crown in relation to his case. He has, however, recently died and I understand that the Crown's appeal against him has been taken out of the List. Nevertheless I shall for convenience refer to him and the two Respondents collectively as “the taxpayers”. The history of the matter is a G H

A complicated one and the full details are to be found in the Case Stated relating to Mr. Garvin, which I will henceforth call "the Case Stated". I shall, however, set out what appear to be the most material facts.

Immediately before 3 April 1969, when the relevant arrangements began to be carried into effect, the taxpayers were the only shareholders in five companies respectively known as Agonaut Properties Ltd., Bastille Properties Ltd., Carat Properties Ltd., Foremost Properties Ltd. and Suburban Residential Properties Ltd. I will call them respectively "Agonaut", "Bastille", "Carat", "Foremost" and "Suburban" and I will refer to them collectively as "ABCFS", as they are referred to in the Case Stated. Before 3 April 1969 each of ABCFS had a very small issued share capital (100 shares in the case of Bastille, four shares in the case of each of Agonaut, Foremost and Suburban and two shares in the case of Carat). Mr. Garvin held 50 per cent. of the issued share capital of each company; Mr. Philip Rose and Mr. John Rose each held 25 per cent. of such share capital. In the case of Carat, one of the issued shares was held by Mr. Garvin and the remaining shares by the Messrs. Rose jointly. The taxpayers were directors of each of ABCFS. Bastille was an investment company. The business of the other four companies was property dealing. At the material time each of ABCFS as at 3 April 1969, as appearing in their respective draft accounts annexed to the Case Stated, totalled about £500,000. It appears that the aggregate market values of their properties totalled about £1,000,000, though their book values as shown in the accounts of ABCFS, which represented their acquisition costs, were a much smaller sum than this. In these circumstances there was clearly a substantial element of undistributed profits resting in each of ABCFS, which *prima facie* would have been available for distribution by way of dividend, if necessary *in specie*. Any such distribution, however, would have subjected the taxpayers to heavy liability for income tax and surtax.

Against this background the taxpayers entered into certain arrangements through the medium of a property dealing company known as Central London Residential Properties Ltd. ("Central"), which they owned and controlled at the material time, and with the co-operation of various other persons and bodies. The essential object of the scheme, the Crown submits, was to put the properties of ABCFS into Central, with their values uplifted to full market value, the "equity" in the properties (that is to say, the true market value of the properties less the indebtedness of ABCFS) being replaced by loans by the taxpayers to Central. Central would take further loans from third parties to an amount equivalent to the true indebtedness of ABCFS. The result would be, so it is submitted, that no liability for tax would arise, either when Central sold the properties or when it paid back the loans to the taxpayers. This situation, so advantageous to the taxpayers, should, it is submitted by the Crown, be contrasted with the alternative methods by which, disregarding tax, precisely the same objective could have been achieved. ABCFS for example could have sold the properties for full market value to Central. They could then have paid off their indebtedness. Central could have borrowed a corresponding amount from third parties and the balance from the taxpayers. ABCFS could then have paid a dividend representing in amount the difference between the true market value of the properties less the former indebtedness of ABCFS. The practical result for the taxpayers of such a transaction, it is said, would have been precisely the same as that of the scheme which was in the event adopted, with one crucial exception, namely that very substantial tax would have been

payable on the distribution. The opinion of Lord Wilberforce in *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141, at pages 178–9, shows that in the context of s 28 of the Finance Act 1960 (now s 460 of the Act) a comparison falls to be made, in relation to the receipts of the taxpayer, between the actual case where these accrue in a non-taxable way and the hypothetical case of a possible accruer in a taxable way, for the purpose of determining whether a person is in a position to obtain or has obtained a “tax advantage” within the section. On making this comparison in the present case, the Crown submits that the scheme actually adopted has enabled the taxpayers to receive benefits not subject to tax, which would have been so subject if it had been effected in another way. Briefly, I understand, these are the reasons which have prompted the Crown to assert that the taxpayers have obtained “tax advantages” within the meaning of s 460 of the Act and to rely on that section.

I now revert to the details of the relevant transactions, which, as I have said, involved a number of other persons and bodies. Prominent among these other persons was Mr. Godfrey Michael Bradman (“Mr. Bradman”), who was at all material times senior partner in a firm of chartered accountants known as Messrs. Godfrey Bradman & Co. Two other partners in that firm at the material time were Mr. Bernard Faber and Mr. Nassan Halle. Two other individuals who feature in the story are Mr. Alan Anthony David Wiseman, a partner in a firm of solicitors, Messrs. Brecher & Co., and Mr. David Walsh, a solicitor who was at the material time employed by that firm. One or more of the five last named persons were at the material time concerned with seven companies not yet mentioned, namely Excalibur Property Co. Ltd., Geltan Property Trading Co. Ltd., County Industrial Land Ltd., Greave Property Co. Ltd., Hurricane Investment Co. Ltd., Lekos Investment Co. Ltd. and Metallic Property Trading Co. Ltd. I will refer to these seven companies respectively as “Excalibur”, “Geltan”, “County”, “Greave”, “Hurricane”, “Lekos” and “Metallic”. Excalibur, Greave and Hurricane are all investment companies. At the material time Mr. Bradman, Mr. Faber and Mr. Walsh were all directors of these three companies and Mr. Bradman held shares in Excalibur or its parent company. Geltan is a property dealing company. At the material time Mr. Halle was one of its directors. Mr. Bradman was not a shareholder or a director. County is also a property dealing company of which at the material time Mr. Wiseman and Mr. Walsh were directors. Mr. Bradman was not a shareholder or a director. Lekos is an investment company, which at the material time was a wholly owned subsidiary of Metallic and had as its sole directors Mr. Bradman and Mr. Faber. Metallic at the material time had as its sole directors Mr. Bradman and Mr. Faber. Its status does not appear from the Case Stated.

On 3 April 1969 there occurred the first of the chain of transactions, which is relevant in the present case. These are conveniently set out in 25 stages in exhibit 2 to the Case Stated, subject to some minor agreed amendments. I propose to set them out similarly, adding observations from time to time in passing:

(1) On 3 April 1969, under a written agreement, the taxpayers sold the whole of the issued shares of ABCFS to Excalibur for a total consideration of £471,998 apportionable as follows: Agonaut £50,680, Bastille £152,010, Carat £57,328, Foremost £133,595 and Suburban £78,385. The consideration was payable to the taxpayers in proportion to their respective shareholdings in ABCFS as follows: Mr. Garvin £235,999, Mr. Philip Rose £117,999 10s., Mr.

(1) 43 TC 396, at pp 441–2.

- A John Rose £117,999 10s. Under contemporaneous written agreement the £471,998 was payable by 200 yearly instalments of £150, i.e. £50 to each of the taxpayers, the first instalment payable at once and the final instalment of £441,898 on 3 April 1970 with interest at 10¼ per cent. per annum on the amount from time to time outstanding. Paragraph 5(3) of the Case Stated sets out as follows the findings of the Commissioners as to the matters which the directors of Excalibur, for their part, and the taxpayers, for their part, took into account in agreeing the price:

C “In agreeing the price of £471,998 the directors of Excalibur took into account the assets and liabilities of ABCFS and of their intention to arrange that those companies should dispose of their assets in such a way as to defer for very many years the resulting liability to corporation tax: they regarded the terms of the purchase as the best bargain they could obtain. The three notified persons for their part took into account the assets and liabilities of ABCFS, the fact that Mr. Bradman required a discount on the net asset value of those companies in arriving at the purchase price of the shares and the prospect that the resulting liability to capital gains tax on the disposal of the shares in those companies would be deferred for very many years: they relied heavily on their professional advisers. At the time of the sale the directors of Excalibur intended that the properties owned by ABCFS should be sold. Pursuant to the admitted scheme both they and the three notified persons hoped and expected that the latter would reacquire the properties but there was no agreement to that effect. At the time of the sale of the shares the directors of Excalibur had not decided whether to procure the payment of a dividend by those companies: it remained an open question for about a year—a decision being reached only in the spring of 1970 when a dividend was paid (see sub-para (10) below). None of the three notified persons was aware at the time of the sale of his shares of any tax avoidance scheme intended to be carried out by the purchaser and no such scheme was discussed between the purchaser and the professional advisers of the three notified persons. But we infer from the amount of the sale price that the professional advisers knew that Excalibur intended in some way to avoid corporation tax.”

- G In the light of these findings and of the other available figures, the Crown submits that the figure of £471,998 represented the value of the assets of ABCFS after deducting their liabilities and after allowing for a discount which, it infers, Mr. Bradman required on behalf of Excalibur as the price of its entering into the transaction. The respective draft accounts of ABCFS for the period 26 March 1968 to 3 April 1969 had shown respective revenue reserves totalling in the aggregate £176,453. The accounts of ABCFS for the year ended 14 April 1969 showed revenue reserves amounting to £558,980. The Crown submits that this figure is a fair reflection of the value of the assets of ABCFS less the amount of its liabilities, at the date of the sale to Excalibur.

- I (2) On 8 April 1969 each of ABCFS executed an agreement to grant a lease of all its properties to Geltan for premiums amounting in the aggregate to £982,862. Under these agreements the premiums were payable by instalments of £10 on 8 April 1970 and £10 on 8 April of each succeeding year for 997 years and the balance on 8 April 1968. Interest at 10¼ per cent. per annum was payable on the part of the premiums outstanding. The leases were executed on the same day as the agreements, 8 April 1969. Each company only granted one lease, which was for a term of 999 years, except where the interest subject to the lease itself held by the grantor was for a term of less than 999 years. Each

lease, however, contained an important 49 year landlord's break clause, thus rendering it a lease not exceeding 50 years for the purpose of s 80(1) of the Act. The result was that each of ABCFS had the right under s 80(6) of that Act in effect to elect to pay corporation tax on the instalments as and when received. ABCFS had none the less made a commercial profit which is reflected in the figure of £558,980 already mentioned which appears in their accounts. A

(3) On 14 April 1969 ABCFS sold the freehold and leasehold reversions of their properties to County for £100 in each case. B

(4) Also on 14 April 1969 Geltan assigned the leases of these properties which had been granted to it by ABCFS to County for £986,595, thus effecting a merger of the leases with the reversions.

(5) Also on 14 April 1969 County sold all these properties to Central for £989,095. Central found this money by borrowing £236,000 from Mr. Garvin, £118,000 from each of the other taxpayers and the balance of £517,095 from other sources. By this stage, therefore, Central had acquired the properties at full market value and had done so by borrowing a total of £472,000 from the taxpayers. It will be seen that the moneys which the taxpayers themselves afforded by way of loans in this manner had been obtained by them by means of sales of their respective rights to receive the instalments of the purchase price of their shares in ABCFS, as described in (8) below. C D

(6) Excalibur then, on 14 April 1969, took over from Geltan the obligation to pay the instalments of the premiums on the five leases granted by ABCFS on 8 April 1969, in consideration of a payment of £982,862 made to it by Geltan.

(7) Excalibur then lent £472,000 to Greave (7) to finance the transaction (8) below. E

(8) Also on 14 April 1969 the taxpayers sold to Greave the right to receive the instalments of the purchase price of their shares in ABCFS for a cash payment of £235,945 in the case of Mr. Garvin and £177,949 10s. each in the case of Mr. Philip Rose and Mr. John Rose, making a total of £471,848. This sum represented the full purchase price of £471,998 paid by Excalibur for the taxpayers' shares in ABCFS less the first instalment of £150 paid on 3 April 1969. It was used by the taxpayers to make the loans of £472,000 to Central referred to in (5) above. F

I pause to observe that it was admitted on behalf of the taxpayers before the Special Commissioners that there was a scheme down to and including transaction (8), to which I have just referred, coupled with the loan of the sum of £472,000 to Central by the taxpayers. I now turn to list the remaining transactions on what may be called "the Bradman side", the purpose of which appears to have been to get the realised profit locked up in the ABCFS companies out of those companies, while attracting the minimum of tax. There was no similar finding by the Special Commissioners linking these transactions with the earlier ones. G

(9) Also on 14 April 1969 Excalibur advanced £313,000 to Hurricane by way of loan. H

(10) Also on 14 April 1969 Hurricane advanced £312,998 to Bastille, Carat, Foremost and Suburban by way of loan.

(11) On 2 May 1969 Excalibur lent a further £6,000 to Greave.

(12) On 9 September 1969 Excalibur lent a further £120,000 to Hurricane.

A (13) Also on 9 September 1969 Hurricane lent £195,890 to Agonaut and Suburban.

(14) On 11 September 1969 Bastille, Carat and Foremost repaid £76,345 of the loan referred to in (10) above.

(15) On 3 April 1970 Excalibur paid £150 to Greave, being the second instalment of the purchase consideration for the shares in ABCFS.

B (16) Also on 3 April 1970 Greave paid the sum of £150 to Excalibur in part repayment of the loan of £6,000 made to Greave.

(17) On 8 April 1970 Excalibur paid £50 to ABCFS as the first instalment of the premiums on the leases granted by ABCFS.

(18) On 13 April 1970 Lekos acquired from ABCFS for a consideration of £981,650 the right to receive the premiums under the leases.

C (19) Also on 13 April 1970 Agonaut, Bastille, Foremost and Suburban repaid £432,543 to Hurricane, being the balance outstanding of the loans referred to in (10) and (13) above.

(20) Also on 13 April 1970 Hurricane repaid £433,000 to Excalibur. This represented the amount of the loans referred to in (9) and (12) above.

D (21) Also on 13 April 1970 ABCFS paid dividends of £555,000 to Excalibur, of which £554,000 were for the period 15 April 1968 to 14 April 1969 and £1,000 for the period 11 April 1970 to 10 April 1971. It is common ground that the amounts of the dividends for the first period were "abnormal" within the meaning of s 467(3) of the Act.

E (22) Also on 13 April 1970 Excalibur paid £981,650 to Metallic to assume the obligation to pay the remaining instalments of the premiums under the leases.

(23) Also on 13 April 1970 Excalibur paid Metallic £471,998 to assume the obligation to pay the remaining instalments of the purchase price of the shares.

(24) Also on 13 April 1970 Lekos acquired from Greave for a consideration of £471,000 the right to receive the instalments of the purchase price of the shares, which Greave itself had acquired from the taxpayers under (8) above.

F (25) Finally, also on 13 April 1970 Greave repaid to Excalibur the £472,000 which it had borrowed from it on 14 April 1969.

The result of all these transactions was to leave the taxpayers with £471,998 additional cash and Excalibur with £78,014 additional cash.

G On 31 July 1974 the Board issued notifications under s 460(6) of the Act to each of the taxpayers notifying him that it had reason to believe that s 460 of the Act might apply to him in respect of transactions specified in the notification. The transactions so specified in the notification issued to Mr. Garvin were:

H "1. In accordance with an agreement dated 3 April 1969 the sale by you to [Excalibur] of your holding of shares of [ABCFS] for a total consideration of £235,999 payable in instalments of £50 per annum from 3 April 1969 to 3 April 2169 inclusive and a final payment of £225,949 on 3 April 2170. 2. The disposal by you to [Greave] on or about 14 April 1969 of the right to receive future instalments of the consideration

mentioned in 1. above for a cash consideration of £235,924. 3. The declaration and payment to [Excalibur] by [ABCFS] of dividends for the period 15 April 1968 to 14 April 1969 in the amounts shown: A

[Agonaut]	£ 57,500	
[Bastille]	£171,000	
[Carat]	£ 73,750	
[Foremost]	£163,000	B
[Suburban]	£ 88,750."	

The notifications issued to Mr. Philip Rose and Mr. John Rose were in the same terms except that in para 1 the sums of £118,000 and £107,950 were substituted for £235,999 and £225,949 respectively and in para 2 the sum of £117,962 was substituted for £235,924.

Each of the taxpayers made and sent to the Board a statutory declaration under s 460(6) of the Act, to the effect that in his opinion the section did not apply to him and stating the facts and circumstances upon which his opinion was based. The Board however, having received these declarations, still saw reason to take further action in the matter. Accordingly, proceeding under s 460(7), they sent the declarations to the Tribunal constituted under s 463 of the Act, together with the statutory certificate to this effect and counter-statements. The Tribunal then, having taken into consideration the declarations, the certificates and the counter-statements, determined that there was a *prima facie* case for proceeding in each matter. C D

On 27 March 1975 notices were issued to the taxpayers under s 460(3) of the Act specifying the same transactions as had been set out in the notifications and proposing the following adjustments: (a) Income tax (Schedule D) Case VI assessments for the year 1968-69: Mr. Garvin £235,941 (tax at standard rate £97,325.33); each of Mr. Philip Rose and Mr. John Rose £117,971 (tax at standard rate £48,663.03). This represented the income tax which would have been payable by ABCFS on the distributions to the taxpayers of £235,941, £117,971 and £117,971 respectively. (b) In the computation (or recomputation) of surtax liability for 1968-69 it was proposed to include the three last mentioned sums as part of the total income of the taxpayers respectively. Income tax and surtax assessments in accordance with the proposed adjustments were made and the taxpayers appealed against the notices under s 460(3) of the Act and against the assessments to income tax and surtax made pursuant to them. The Special Commissioners allowed the appeals and, in accordance with s 462(4), cancelled the notices and quashed the surtax and income tax assessments. The Crown, in the cases of Mr. Garvin and Mr. John Rose, now appeals from those decisions of the Special Commissioners. E F G

I now turn to the relevant statutory provisions, reading from the Act as it stood before its amendment by the Finance Act 1973. Section 460(1) of the Act, so far as material for present purposes, reads:

"460.—(1) Where—(a) in any such circumstances as are mentioned in section 461 below, and (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of H I

A their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions: . . .”

Section 460(3), so far as material, provides:

B “(3) Where this section applies to a person in respect of any transaction or transactions, the tax advantage obtained or obtainable by him in consequence thereof shall be counteracted by such of the following adjustments, that is to say an assessment, the nullifying effect of a right to repayment or the requiring of the return of a repayment already made (the amount to be returned being chargeable under Case VI of Schedule D and recoverable accordingly), or the computation or recomputation of profits or gains, or liability to tax, on such basis as the Board may specify by notice in writing served on him as being requisite for counteracting the tax advantage so obtained or obtainable.”

C Section 460(4) of the Act provides:

D “(4) Subject to section 468(3) below, an assessment under subsection (3) above to counteract a tax advantage consisting of the avoidance or reduction of an assessment to income tax which would be payable by a company under section 232(2) of this Act (Schedule F) in respect of a distribution may be made under Case VI of Schedule D on a person other than the company, and may be so made in addition to any assessment to counteract a tax advantage in respect of surtax. An assessment so made on a person other than the company may be of an amount arrived at without regard to any set-off to which the company would have been entitled under Schedule 9 to this Act.”

E Section 461 sets out the circumstances mentioned in s 460(1) under five headings contained in paras A, B, C, D and E, which are expressed to be alternatives. I will revert to them hereafter. Section 466(1) defines “tax advantage” as meaning

F “. . . a relief or increased relief from, or repayment or increased repayment of, tax, or the avoidance or reduction of an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains.”

G Section 467(1) of the Act contains (*inter alia*) a definition of “securities” as including shares and stock and a definition of “transactions in securities” as including

“transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities.”

H The sales by the taxpayers to Excalibur of their shares in ABCFS clearly constituted “transactions in securities”, within this definition.

Section 467(2)(a) of the Act provides that in s 461 references to profits shall include “references to income, reserves or other assets”. Section 467(2)(b) provides that in s 461 references to “distribution” include references to “transfer or realisation (including application in discharge of liabilities)”.

I Thus in s 461 references to “distribution of profits” include (*inter alia*)

references to transfer of income, reserves or other assets; in effect therefore they are wide enough to include any transfers of any assets: (see, for example, *Commissioners of Inland Revenue v. Cleary*⁽¹⁾ [1968] AC 766). A

Section 467(3) of the Act contains a definition of amounts received by way of dividend which are to be treated as “abnormal” for the purposes of s 461. I need not refer further to this since it is common ground that the amounts of the dividends paid by ABCFS for the period 15 April 1968 to 14 April 1969 were “abnormal” within this definition. B

Before examining the application (if any) of these various statutory provisions, it will be appropriate to refer to certain principles which recent decisions of the House of Lords have shown should be applied in the interpretation of statutory provisions whose expressed purpose is to deal with specified forms of tax avoidance. C

As Lord Wilberforce pointed out in *Commissioners of Inland Revenue v. Joiner*⁽²⁾ [1975] 1 WLR 1701, at page 1706, such statutory provisions call for a different method of interpretation from that traditionally used in regard to taxing Acts. In his words:

“For whereas it is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or ambiguities, Lord Reid made it clear that the scheme of the sections, introducing as they did a wide and general attack on tax avoidance, required that expressions which might have been cut down in the interest of precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which judges would normally desire to stop.” D

Lord Reid in *Greenberg v. Commissioners of Inland Revenue*⁽³⁾ [1972] AC 109, in the context of s 28 of the Finance Act 1960, had said (at page 137): E

“We seem to have travelled a long way from the general and salutary rule that the subject is not to be taxed except by plain words. But I must recognise that plain words are seldom adequate to anticipate and forestall the multiplicity of ingenious schemes which are constantly being devised to evade taxation. Parliament is very properly determined to prevent this kind of tax evasion and, if the courts find it impossible to give very wide meanings to general phrases, the only alternative may be for Parliament to do as some other countries have done, and introduce legislation of a more sweeping character which will put the ordinary well-intentioned person at much greater risk than is created by a wide interpretation of such provisions as those which we are now considering.” F G

Throughout the consideration of the statutory provisions relevant in the present case, I recognise that expressions which might otherwise have been cut down in the interest of precision should be given a wide meaning, if such wide meaning is what the legislation evidently intended.

The pattern of s 460(1) according to its terms is clear. Three conditions precedent have to be satisfied before the section can apply at all. First, the taxpayer must be in a position to obtain or must have obtained a “tax advantage”. Secondly, this must be in any such circumstances as are mentioned in s 461. Thirdly, this must also be in consequence of a “transaction in securities” or of the combined effect of two or more such transactions. Even if H

(1) 44 TC 399.

(2) 50 TC 449, at p 480.

(3) 47 TC 240, at p 272.

A all these conditions precedent are fulfilled, the taxpayer still has a let-out under the subsection if he can show first that the relevant transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments and secondly that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained.

B The primary question which arose before the Special Commissioners, upon which they decided the case in favour of the taxpayers, was whether s 460(1) applies to the taxpayers in respect of the three transactions described in the notices under s 460(3) issued by the Board to each of them on 27 March 1975, that is to say: (1) the sale by the taxpayers of their shares in ABCFS to Excalibur by the agreement dated 3 April 1969; (2) the disposal by the taxpayers to Greave on 14 April 1969 of the right to receive future instalments of the purchase price of the last mentioned shares; (3) the declaration and payment to Excalibur by ABCFS of dividends for the period 15 April 1968 to 14 April 1969 in the amounts already mentioned.

C As appears from para 9 of the Case Stated, the Respondents did not before the Special Commissioners seek to escape from s 460 by relying on what I have described as the "let-out" under subs (1) and alleging that these transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments or that none of them had as its main object or as one of its main objects to enable tax advantages to be obtained. Nor did the Respondents put forward any such contention before me. Their case before the Special Commissioners, as it has been before me, was simply that the conditions precedent set out in s 460(1) were not satisfied. The Commissioners found that the necessary circumstances specified in s 461 did not exist and allowed the taxpayers' appeals on this ground. They accordingly found it unnecessary to consider the argument addressed to them on behalf of the Crown on whether the taxpayers were in a position to obtain or had obtained a tax advantage. I turn now to consider the circumstances specified in s 461.

D Before the Special Commissioners no reliance whatever was placed by the Crown on paras A, B and D of that section. Its contention was that the circumstances mentioned in para C existed. When it became apparent at that hearing that the taxpayers were for certain purposes going to take the point that they had obtained a debenture from Central, Counsel appearing for the Crown told the Special Commissioners that he wished to keep open the point, without developing any argument on it before them, that the circumstances mentioned in para E of s 461 also existed. In their decision the Special Commissioners stated what they understood to be the reason why the Crown did not make any formal contention in relation to the circumstances described in para E. Counsel for the Crown appearing before me has told me that the reasons attributed by the Special Commissioners to the Board for not making such formal contention are inaccurate and I propose to disregard such reasons. The relevant points are, I think, that before the Special Commissioners the Crown relied on para C alone of the paragraphs mentioned in s 461; it purported to reserve the right to rely on para E, so far as necessary and appropriate, in a higher tribunal, but did not rely on paras A, B and D at all.

E Before me the Crown, while not relying on paras A and B, which can accordingly be disregarded for present purposes, has sought to rely on paras C, D and E in the alternative. Mr. Beattie, on behalf of the Respondents, has

not disputed the Crown's right so to rely, subject to the important qualification that in his submission any such reliance must be based exclusively on the findings of fact made by the Special Commissioners and embodied in the Case Stated. A

I now turn to circumstance C mentioned in s 461 which, so far as relevant, reads as follows:

"C.—(1) That the person in question receives, in consequence of a transaction whereby any other person—(a) subsequently receives, or has received, an abnormal amount by way of dividend; or (b) subsequently becomes entitled, or has become entitled, to a deduction as mentioned in paragraph B(1) above, a consideration which either—(i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend, or (ii) is received in respect of future receipts of the company, or (iii) is, or represents the value of, trading stock of the company, and the said person so receives the consideration that he does not pay or bear tax on it as income." B C

In the context of circumstance C, as is recorded in the Case Stated, three points were common ground before the Special Commissioners, namely: (a) in consequence of the sales by the taxpayers to Excalibur of their shareholdings in the four property dealing companies (Agonaut, Carat, Foremost and Suburban) each of the taxpayers received a consideration which was or represented the value of trading stock of the company concerned (within the meaning of para C(i)(iii); (b) Excalibur subsequently received from each of those four companies "abnormal amounts by way of dividend" within the meaning of para C(1)(a); (c) each of the taxpayers so received the said consideration that he did not pay or bear tax on it as income, within the meaning of the closing words of para C(1). D E

Before the Special Commissioners, the Crown was not relying on circumstance D referred to in s 460 and it was in this context that the first of the three concessions to which I have just referred was made on behalf of the Respondents. Mr. Beattie on their behalf, however, has explained that, now that circumstance D is also relied on, he wishes to withdraw this concession and this he has done without objection from Mr. Vinelott on behalf of the Crown. Accordingly the question whether the taxpayers received consideration of the nature referred to in para C is now at large. F

In the context of circumstance C the Crown's case is, as it was before the Special Commissioners, that the Respondents received a consideration of the nature referred to in para C "in consequence of a transaction whereby" another person, that is Excalibur, received an abnormal amount by way of dividend. As I have said, it is common ground that Excalibur did receive an abnormal amount by way of dividend. Accordingly, logically the next question that arises in the context of para C is whether the Respondents received a consideration of the nature referred to in that paragraph, which I will henceforth call "tainted consideration". The consideration received by the taxpayers which the Crown asserts is tainted consideration consists of the purchase prices received by them on the sales of their shares in ABCFS. There has been substantial debate before me on the question whether those purchase prices represented tainted consideration. This debate has been fairly wide ranging, extending to an examination of the accounts and assets of each of ABCFS and questions of law, such as the extent of the powers (if any) of trading companies to revalue their stock at market value, when such exceeds the acquisition cost, and to pay a G H I

- A dividend out of the resulting profit. For reasons which will appear, however, I do not find it necessary to decide whether the purchase prices represented tainted consideration. Even on the assumption that they did, still, if para C is to apply, the transaction relied on by the Crown in this context, namely the sale of the shares in ABCFS by the taxpayers to Excalibur, must have been a transaction “whereby” Excalibur received an abnormal amount by way of dividend from ABCFS on 13 April 1970. The meaning of the word “whereby” in this context thus becomes a question of crucial importance. The decision of the Special Commissioners shows that they had two approaches to this question, of which the first, as stated in their decision, was as follows:

- C “While we have no doubt that the Board is correct in arguing that the words of Chapter I should be given a wide interpretation, we are equally in no doubt that s 460 is only to apply where the wording, albeit interpreted widely, fits the particular facts. In the context in which we find the word ‘whereby’ in para C, we think that the word imports some causal connection. If that is the case it is not in our opinion an ordinary use of the word ‘whereby’ to say that the sales were transactions whereby Excalibur received the dividends. On the face of the matter, the sale and the payments of dividend were separate transactions and the sale could have taken place without abnormal dividends ever having been paid.”

- E In this passage, as I understand them, the Special Commissioners were in effect saying that the sale of the shares in ABCFS by the Respondents could properly be described as a transaction “whereby” Excalibur received the abnormal amount by way of dividend only if the payment of the abnormal dividend was a necessary consequence of the sale, so that there was a causal connection between the two. The Special Commissioners, however, proceeded secondly to consider whether the particular facts of the case provided a setting which justified a wider construction of the word “whereby”. They continued as follows:

- F “We consider second, therefore, whether the particular facts of the case provide a setting which justifies a wider construction of the word. In this connection it is common ground that any acts of or knowledge by the Appellants’ agents who acted for them must be imputed to the Appellants themselves. It is also common ground that there was a scheme involving the Appellants on the one hand and Mr. Bradman and his empire on the other and that one element in this scheme was the expectation that the Appellants should re-acquire the property portfolios of Agonaut, Bastille, Carat, Foremost and Suburban. But was there a more comprehensive scheme under which both sides contemplated the further transactions which in fact ensued—including the payments of abnormal amounts by way of dividend? The Board does not challenge the assertions of each of the Appellants that he personally knew nothing of any scheme that these five companies should pay such dividends or indeed anything at all about any tax schemes to be carried out within the bounds of Mr. Bradman’s empire. What the Board does say, however, is that looking at all the facts including the price obtained for the shares in the five companies, it must have been obvious to the Appellants’ agents, who were most experienced in tax matters, that the success of Mr. Bradman’s side of the scheme depended on the payment of the large dividends and that such payments were inevitable; that the Appellants’ agents were not called to give evidence of the negotiations is something that in the Board’s submission reinforces this suggestion. We cannot draw this inference. Mr. Bradman gave evidence before us that there was no discussion with the Appellants’

agents as to what should be done with the five companies after their purchase by Excalibur and Mr. Bradman said that it was not known with any certainty until about one year later that such dividends would be paid. We accept Mr. Bradman's evidence on the point; we conclude therefore that there was no scheme or undertaking to which the Appellants or their agents were parties involving the payments of such dividends or indeed knowledge by them that this might happen. In our opinion, therefore, there is no warrant for construing the word 'whereby' against the setting of the particular facts so as to bring para C of s 461 into operation. We express no opinion, however, as to what degree of involvement by the Appellants might have caused us to take a different view. Our decision is on grounds that apply to Bastille as well as to the other four companies and it therefore covers the sale of the Bastille shares."

Mr. Vinelott on behalf of the Crown submitted, in effect, that the Commissioners' first line of approach to the construction of the word "whereby" was an example of a failure to give a wide meaning to a general phrase in a section designed to deal with tax evasion, such as Lord Reid referred to in his opinion in *Greenberg v. Commissioners of Inland Revenue*⁽¹⁾ [1972] AC 109, at page 137 E-F, in the passage which I have already cited. He referred to the definition of the word "whereby" contained in the Oxford English Dictionary reproduced at page 3753 of the Compact Edition (1971) in which two (among many) of the meanings attributed to the word are "by means of" or "by the agency of". Excalibur, he submitted, received the abnormal dividend by means of purchasing the shares in ABCFS; that is enough, he submitted, to show that the sale was a transaction "whereby" Excalibur received the abnormal dividend. He pointed out that, having regard to the use of the phrase "subsequently received" in para C, it matters not that an interval of time may elapse between the relevant transaction and the receipt of the dividend. In contrast, Mr. Beattie on behalf of the Respondents perhaps not surprisingly submitted that, in the context of s 460, the word "whereby" can be given no meaning other than "by which".

I do not doubt that in certain contexts the word can properly bear the meaning "by means of which" and should be given that meaning. But my approach to the present problem is a simple one. In the context of s 461, the strength or weakness of the Crown's and Respondents' respective submissions may be tested by formulating the three questions which fall to be asked in any case where para C is invoked by the Revenue, having regard to the actual wording of that paragraph. The first question must be: "Has the taxpayer, who is being attacked under s 460, received tainted consideration?" The second question must be: "What was the transaction in consequence of which the taxpayer received the tainted consideration?" There can, I think, be no dispute as to the formulation of those two questions. The dispute would revolve around the third. If the Respondents are right, the third question must be: "Did some other person *by* that same transaction receive an abnormal amount by way of dividend?" If the Crown were right, however, the third question would be "Did some other person *by means of* that same transaction receive an abnormal amount by way of dividend?" While, as will appear hereafter, I think that the word "transaction" should be given a broad interpretation in this context, I do not think that the language of para C, however broadly interpreted, would justify the formulation of the third question in the latter form. It would, I think, involve reading words into the paragraph which are not there and do not have to be inserted by judicial interpretation to produce a sensible result. I would

(1) 47 TC 240, at p 272.

A add that in his recent decision in *Anysz v. Commissioners of Inland Revenue*⁽¹⁾ [1978] STC 296, at page 316, Browne-Wilkinson J., though he did not have to decide the point, expressed a preference for the taxpayer's argument in that case that the word "whereby" in para C means "by which". This is my own clear view.

B In answer to the first and second of these three relevant questions, I will assume in favour of the Crown (Mr. Vinelott has submitted in a forceful and detailed argument on this point) that the taxpayers received tainted consideration in consequence of the transaction consisting of the sale of the shares in ABCFS. No other transaction, I think, is relied on by the Crown for this purpose before me. Nevertheless, however broadly the language of para C is read, however, I find it impossible, in answer to the third relevant question, C to hold that the other person involved, namely Excalibur, received the relevant dividend in 1970 by that same transaction. The Special Commissioners accepted Mr. Bradman's evidence that it was not known with any certainty until about one year after the transaction of sale and purchase, even on Excalibur's side, that any such dividends would be paid. They further expressly D found that there was no scheme or undertaking to which the taxpayers or their agents were parties involving the payments of such dividends, or indeed any knowledge by them that this might happen. In these circumstances, to suggest that Excalibur received the relevant dividends by the transaction of sale and purchase would seem to me to involve a complete distortion of language. I accept that, as Mr. Vinelott pointed out, the actual declaration of the dividend must in any case be the transaction by which, in the most immediate sense, a E shareholder will receive his dividend. In my judgment, however, para C would be quite capable of extending in a proper case to an instance where the parties to the relevant transaction had, as a term of the arrangement, bargained for the subsequent declaration of a dividend. Simply for example, it might cover the case where a vendor of shares in a company, carrying large undistributed F profits, knew that his purchaser was intending to put in operation a scheme which would involve the receipt of an abnormal amount by way of dividend and demanded, as part of the consideration for the sale, a share of any tax saving that might be achieved, if and when the abnormal dividend was declared. In such a circumstance it might, I think, be fairly said that the receipt of the relevant dividend constituted part and parcel of the original transaction of purchase (when the broad meaning is given to the word "transaction" which G should be given to it) and that such transaction was accordingly one "whereby" the dividend was received. Assuming slightly different hypothetical facts, however, I would not think that it could properly be said an abnormal dividend had been received by a sale and purchase transaction consisting of the sale and purchase of shares, within para C, merely because the vendor knew that the purchaser intended to arrange for the payment of such a dividend. Still H less would I conclude that the relevant dividend had been received by the transaction of sale and purchase where, as in the present case, the vendor merely knew or believed that the purchaser would carry out some tax avoidance scheme, but had no knowledge of the details. In short, to construe the word "whereby" in the context of para C as meaning "by means of which" would, in my judgment, involve an unjustified extension of statutory language I by judicial interpretation. The crucial question which the paragraph postulates is not: "Has the other person received the abnormal amount by way of dividend by means of the relevant transaction?" The question is: "Has he received it by the relevant transaction?" On the facts of the present case the answer to this

(1) 53 TC 601, at p 624.

question can in my judgment only be "No". I therefore join the Special Commissioners in concluding that para C has no application to this case. A

It was submitted on behalf of the Crown that the construction which I have placed on the paragraph might enable a number of "dividend-stripping" schemes to escape the net of s 460. I have two comments to make in this context. First, in many cases where "backward dividend-strips" are involved, the purchaser of the relevant shares, or members of the group of which he forms part, may himself or themselves be wide open to attack under s 460, even though the vendor may escape the net. Secondly, as Mr. Beattie pointed out, the five circumstances set out in s 461 are set out in minute detail, not for the assistance of the Crown but for the protection of the subject, in the context of a preceding section of a penal nature. In the circumstances, as Lord Wilberforce said in *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141, at pages 176-7, "We must take this Act as we find it and endeavour to see what it fairly covers. But we need not be surprised if it turns out that the attack is confined to a limited sector of the front." B C

I now turn to circumstance D. Paragraph D of s 461 reads as follows:

"D.—(1) That in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in paragraph C(1) above such a consideration as is therein mentioned. (2) The companies to which this paragraph applies are—(a) any company under the control of not more than five persons, and (b) any other company which does not satisfy the condition that its shares or stocks or some class thereof (disregarding debenture stock, preferred shares or preferred stock), are authorised to be dealt in on a stock exchange in the United Kingdom, and are so dealt in (regularly or from time to time), so, however, that this paragraph does not apply to a company under the control of one or more companies to which this paragraph does not apply. (3) Subsections (2) to (6) of section 302 of this Act (definition of control) shall apply for the purposes of this paragraph." D E

In relation to circumstance D, the Crown's case, as I understand it, has been briefly as follows: the taxpayers, it was said, received tainted consideration on the sale of their shares in ABCFS. Such receipt, it was submitted, was "in connection with the distribution of profits of" ABCFS. In this context Mr. Vinelott pointed to the definitions in s 467(2) of the Act under which references to "distributions of profits" are wide enough to include "transfers of assets". He submitted that ABCFS transferred assets when they granted leases of their properties to Geltan on 8 April 1969 and when they sold the reversions of their properties to County on 14 April 1969. He submitted that the taxpayers had plainly received the tainted consideration "in connection with" the grant of the leases and sales of the reversions, bearing in mind the admission on behalf of the taxpayers before the Special Commissioners that there was a scheme down to and including transaction (8) above, coupled with the loan of the sum of £471,848 to Central. Since the sale by the taxpayers of their shares in ABCFS and the grant of the leases by ABCFS and sales of the reversions by ABCFS were all part of one scheme, he submitted that the taxpayers plainly received the purchase price under the first of these three transactions "in connection with" the second and third. In this context he referred me by way of analogy to a passage from the judgment of Browne-Wilkinson J. in *Anysz v. Commissioners of Inland Revenue*⁽²⁾ [1978] STC 296, at page 317. F G H I

(1) 43 TC 396, at p 440.

(2) 53 TC 601, at p 625.

- A On the assumption in favour of the Crown that the proceeds of their shares in ABCFS received by the taxpayers represented tainted consideration, so far the submission of the Crown in the context of para D would appear to me well-founded. It is, however, still necessary to consider whether the relevant distribution was one of "profits of a company to which this paragraph applies". The Crown submitted that the relevant date for the purpose of determining
- B whether para D applies to any company is the date when the person in question receives the tainted consideration, being the date when he receives the relevant tax advantage. On this basis it submitted that the relevant date in the present case was 3 April 1969 when the taxpayers received the proceeds of sale of the ABCFS shares. As at that date, it was pointed out, according to the evidence appearing in the Case Stated, each of ABCFS was under the control of not
- C more than five persons, namely, Mr. Garvin, Mr. John Rose and Mr. Philip Rose. 3 April 1969, it was submitted, was the date when the taxpayers obtained or were in a position to obtain the relevant tax advantage and thus is the date on which attention should be focussed.

- I cannot accept this argument on the construction of para D(1). In my judgment the relevant date for the purpose of determining whether the
- D company is one to which the paragraph applies must be the date of the relevant distribution of profits. The phrase "to which this paragraph applies" is merely a convenient method of importing into para D(1), by reference, the lengthier provisions of para D(2). If, therefore, effect is to be given to the intention of the Legislature as expressed in para D, para D(1) in my judgment falls to be read in an expanded form as follows: "That in connection with the distribution of
- E profits of a company under the control of not more than five persons or of any other company which does not satisfy the condition etc., etc." The mere fact that the company by which the distribution of profits is made may have been a company falling within para D(2) at an earlier date (for example when the tainted consideration was received) is, I think, irrelevant under the language of the paragraph.

- F Thus in my judgment 8 April and 14 April 1969 (being the dates of distribution of profits relied on by the Crown) are the relevant dates for the purpose of determining whether ABCFS are companies to which para D applies. The evidence, as appearing in the Case Stated, shows that at those two dates they were under the control of Excalibur. The difficulty, however, is that there is absolutely no evidence as to the manner in which the shareholdings in
- G Excalibur itself were held at those two dates, beyond the bare statement (in para 5(2)(c) of the Case Stated) that "at the material time . . . Mr. Bradman held shares in Excalibur (or its parent company)". Correspondingly there is no evidence that as at 8 April or 14 April 1969 Excalibur itself was a company to which para D applied. Accordingly it is quite possible, I put it no higher, that para D does not apply to any of ABCFS on the grounds that as at such dates
- H they were under the control of a company, namely Excalibur, to which para D did not apply. This, according to the final sentence of para D(2), would prevent the paragraph from applying to any of ABCFS. This evidentiary gap has given rise to a major controversy before me between the Crown and the Respondents, relating to onus of proof, a controversy which I think must have wide implications in many cases where s 460 is concerned. Was the onus on the
- I Crown (as the taxpayers contend) to adduce all the evidence before the Special Commissioners necessary to establish that para D applied? Or was the onus on the taxpayers, as the Crown contends, to adduce any evidence necessary to show that para D did not apply?

It is common ground that where there is an appeal to the General Commissioners or the Special Commissioners against an *assessment* the burden falls on the taxpayer to produce evidence to displace the assessment rather than *vice versa*. This follows from s 50(6) of the Taxes Management Act 1970 (the descendant of s 137(4) of the Income Tax Act 1918) which provides as follows:

“(6) If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment, the assessment shall be reduced accordingly, but otherwise every such assessment shall stand good.”

The effect of s 137(4) of the Income Tax Act 1918 was and the effect of s 50(6) of the Taxes Management Act 1970 is to place the onus on a taxpayer appealing against an assessment to produce evidence in the first instance to displace the assessment: (see *Commissioners of Inland Revenue v. Transport Economy Ltd.* 35 TC 601, at page 607, *per* Upjohn J.). However, though the Crown submits that the principle embodied in s 50(6) should be applied by analogy, it is common ground that the subsection has no direct application to the facts of the present case, where no assessment is involved. There are other instances of taxing provisions contained in statutes which have specifically imposed on the taxpayer the onus of showing that he is not caught by them: (see, for example, s 412(3) of the Income Tax Act 1952, the operation of which was illustrated in *Philippi v. Commissioners of Inland Revenue*⁽¹⁾ 47 TC 75). In the present instance, however, there is no such clear guidance in the relevant statute.

It is significant that in at least two sets of circumstances where no assessment has been involved and the relevant statute has said nothing about the onus of proof the Courts have held that the onus lay upon the Crown to adduce sufficient evidence before the Commissioners to justify a claim for tax. These circumstances are surtax directions and directions for the purposes of excess profits tax. In *Dixon & Gaunt, Ltd. and James Hare, Ltd. v. Commissioners of Inland Revenue* 29 TC 289, at page 292, Atkinson J. had to consider s 35(1) of the Finance Act 1941, which provided:

“Where the Commissioners are of opinion that the main purpose for which any transaction or transactions was or were effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability for excess profits tax as they consider appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.”

At least superficially, therefore, the subsection bore distinct resemblances to s 460 of the Act and the Court's approach to its construction might be expected to afford some guidance to the proper approach to the construction of s 460. In that case, the Inland Revenue, being of the opinion that the main purpose for which a transfer by one taxpayer company of 7,000 shares in the other taxpayer company had been effected was as stated in s 35(1), directed, by virtue of the powers conferred on them by that subsection, that the excess profits tax liability of the first company should be computed on the basis of its continuing to be treated as a subsidiary company of the second company, within the meaning of s 28 of and Sch 5 to the Finance Act 1940. On the appeal coming on for hearing before the Special Commissioners, the two appellant companies contended that the onus lay upon the Board of Inland Revenue to justify the

⁽¹⁾ [1971] 1 WLR 1272.

A making of the direction and that it was accordingly for the Inland Revenue's representative to open and establish the facts necessary for that purpose. The Special Commissioners ruled that it was for the appellants to open in the first instance and to establish on the evidence a *prima facie* case in support of their appeal. On counsel for the appellants electing to call no evidence, but to stand on the submission that the Inland Revenue had not discharged the onus which
B lay upon it, the Special Commissioners confirmed the direction. Atkinson J., in allowing the taxpayers' appeal, held that, contrary to the view of the Special Commissioners, the onus lay upon the Inland Revenue to put before them facts sufficient to justify the direction. Having come to this conclusion he said (at page 298):

C "At Common Law, in the King's Bench Division, the question of the burden and the right or duty to begin frequently arises. It does not mean that the plaintiff has always to begin. One asks the question: If no evidence is given, who wins? That settles the question of the burden of proof. It seems to me, on these authorities, the answer to the question is clear, namely, if no evidence is given the Appellant must win, because the result of the giving of no evidence is that there are no facts before the Special
D Commissioners to enable them to form any view. In this case there was no material before them which could justify their confirming the direction."

A little later on he said (at page 299):

E "Supposing some evidence had been called, and supposing on that evidence the Special Commissioners had confirmed the direction and there was an appeal, the question would still be: Was there sufficient evidence upon which they could properly come to that decision? *A fortiori*, if there is no evidence the result must be the same. Therefore I think the appeal succeeds."

In *Commissioners of Inland Revenue v. Transport Economy Ltd.* (35 TC 601, at page 604) the Special Commissioners had made a direction, under s 21 of the Finance Act 1922, in respect of the income of the respondent company for the year ended 31 March 1949. The wording of s 21 gave the Special
F Commissioners the power by notice in writing to a company to direct that for the purposes of assessment to super-tax its income should for the year or other period specified in the notice be deemed to be the income of its members, in a case where "it appears to the Special Commissioners that" the company in question has not done certain things stated in the subsection. At the hearing of
G an appeal to the Special Commissioners against a direction made under the section, counsel for the company submitted that the onus of showing that it was justified upon the facts lay on the Crown and that it was for the Crown to open its case and call evidence in support. The Commissioners accepted this submission. The Crown's representative thereupon intimated that he did not intend to call any evidence and the Commissioners accordingly discharged
H the direction. The Crown thereupon demanded a Case, which came before Upjohn J. for decision. The question was whether the Crown was right in its contention that the onus was upon the company to satisfy the Commissioners that the direction ought not to have been made and that accordingly it was for counsel for the company to open his case and call evidence in support. Upjohn J. (at pages 606-7) rejected a submission by the Crown that the
I incorporation of the provisions of the Income Tax Acts relating to appeals necessarily incorporated s 137(4) of the Income Tax Act 1918 and that this necessarily threw the right and duty to begin on the company. He also specifically rejected (at page 607) the Crown's submission that, as the

proceedings before the Special Commissioners were by way of “appeal” from the assessing Commissioners, the company should open the appeal as in the case of other appeals. Applying the principle laid down in *Thomas Fattorini (Lancashire) Ltd. v. Commissioners of Inland Revenue*⁽¹⁾ [1942] AC 643 and following *Dixon & Gaunt, Ltd. v. Commissioners of Inland Revenue*⁽²⁾ (*supra*), he held that the Crown’s contention that the company had to open its case was ill-founded and that the Special Commissioners’ decision was correct. On further appeal by the Crown, the Court of Appeal held that, as the Crown conceded that the admitted facts were not sufficient to sustain the direction and that it was not proposed to call evidence, there was no issue outstanding between the parties; it therefore declined to pronounce upon the point upon which judgment had been given by Upjohn J. No subsequent authority cited to me, however, suggests that the decision of Upjohn J. on the question before him was an erroneous one. He followed the decision himself in *Commissioners of Inland Revenue v. White Bros. Ltd.* 36 TC 587.

Apart from the cases of surtax directions and directions for the purposes of excess profits tax, which he termed “exceptional cases”, Mr. Vinelott, on behalf of the Crown, submitted that there was only one other circumstance in which the burden of proof falls on the Crown in a tax case, that is to say where it is seeking to make an assessment after the normal limitation period of six years, on the grounds that there has been fraud or wilful default on the part of the taxpayer: (see *Hudson v. Humbles* 42 TC 380). He reminded me of the machinery laid down by s 460 in respect of notices under that section. It has to be set in motion by the Revenue giving a notice under subs (6) to the taxpayer that it has reason to believe that the section may apply to him in respect of a transaction or transactions specified in the notice. The taxpayer is then at liberty, but is under no obligation, within 30 days of the issue of the notice to make a statutory declaration to the effect that the section does not apply to him and stating the facts and circumstances upon which his opinion is based. The Revenue on receiving such statutory declaration may decide to take no further action. If, however, it does see reason to take further action, s 460(7) obliges it to send the statutory declaration, together with any counter-statement which it chooses to put in, to the special tribunal, set up in accordance with s 463 of the Act, for the tribunal to decide whether there is or is not a *prima facie* case for proceeding in the matter. If the tribunal decides that there is no such case, the section does not apply to the taxpayer and that is an end of the matter. If, but only if, the tribunal decides that there is a *prima facie* case, the Board is at liberty to serve a written notice on the taxpayer pursuant to s 460(3). Mr. Vinelott submitted that, according to the very terms of subs (3), the notice thereunder itself operates to counteract the relevant tax advantage, by means of making an adjustment of such one of the alternative natures specified in the subsection as may be appropriate in the circumstances. On the true construction of the section, he submitted, the notice itself, when given under subs (3), substitutes a new basis of assessment. True it is that the taxpayer then has a right of appeal against the notice, under s 462. On such appeal, however, it was said, he has to show that the notice should not have been given. In accordance with the test suggested by Atkinson J. in the *Dixon & Gaunt* case, Mr. Vinelott submitted that one should ask the question: “If no evidence was given before the Commissioners on an appeal relating to a s 460 notice, who would win?” Having regard to the terms of the section, he submitted, the answer must be that, in this contingency, victory would rest with the Crown.

(1) 24 TC 328.

(2) 29 TC 289.

- A I accept that this is the proper test to be applied, but cannot accept the conclusion which the Crown would seek to draw on its application. The crucial point seems to me to be that the power conferred upon the Crown to serve a notice under s 460(3) is, according to the terms of the very subsection itself, only exercisable in a case “where this section applies to a person in respect of any transaction or transactions”. True it is that there are certain additional
- B practical hurdles which the Revenue first has to surmount if it is to invoke the subsection by serving a notice thereunder, in particular the hurdle of satisfying the tribunal that there is a *prima facie* case, in any instance where a statutory declaration has been sent to the Board by the taxpayer under subs (6). The mere fact, however, that the Board may have surmounted these preliminary hurdles does not, in my judgment, alter the essential legal position, namely that
- C the notice under subs (3) can only properly be given in a case where “this section applies to” the taxpayer in respect of the transaction or transactions relied on. In these circumstances, since it is common ground that this is not a case to which s 50(6) of the Taxes Management Act 1970 applies so as to place the burden of proof on the taxpayer, the case is in my judgment on all fours with the *Dixon & Gaunt*⁽¹⁾ and the *Transport Economy*⁽²⁾ decisions.
- D Mr. Vinelott pointed out that the relevant statutory provisions in the former case empowered the Commissioners to make the requisite direction where they were “of opinion that the main purpose for which” the relevant transaction was as stated in the relevant statute, and that in the latter case the relevant statute conferred the relevant powers on the Special Commissioners where “it appeared to them” that the company concerned had not done certain
- E stated things. In such circumstances, it was suggested on behalf of the Crown that it was logical that the burden should be placed on the Inland Revenue of justifying its “opinion” or justifying what it stated had “appeared” to it. Section 460 in contrast is prefaced by different words. With respect to this argument, I think that it involves the making of a distinction which is without any real difference relevant for present purposes. Under the express opening words of
- F s 460(3), it is a condition precedent to the exercise of the Board’s powers to serve a notice in writing of the nature therein mentioned, that the section “applies” (that is to say actually applies) to the recipient of the notice in respect of the transaction or transactions relied on by the Revenue. This difference in the wording seems to me if anything to render the ratio of the *Dixon & Gaunt* decision and of the *Transport Economy* decision applicable *a fortiori*. If, for
- G example, in the former case the onus fell on the Revenue to show that its “opinion” as to the relevant matters was well founded, *a fortiori* the onus falls on the Crown to show that s 460(3) “applies” (that is to say actually applies) to the taxpayer under attack in respect of the specified transaction or transactions. The mere fact that the special tribunal may have, indeed has in the present case, determined that there is a *prima facie* case for proceeding in the matter cannot
- H in any way effect the incidence of the burden of proof, if and when the taxpayer seeks to challenge a notice served under s 460(3), on appeal to the Special Commissioners. The taxpayer is not even entitled to be heard when the tribunal is deciding whether or not there is a *prima facie* case for the Revenue proceeding in the matter under s 460: see *Wiseman v. Borneman*⁽³⁾ [1971] AC 297. The mere fact that the tribunal may, in the absence of the taxpayer, have concluded that there is such a *prima facie* case cannot in my judgment affect the incidence of the burden of proof, when the matter first falls to be heard *inter partes* on an appeal from the Commissioners. It was submitted on behalf of the Crown that such a conclusion would place the Crown at a great disadvantage in

(1) 29 TC 289.

(2) 35 TC 601.

(3) 45 TC 540.

attacking tax avoidance schemes of the nature which the Legislature had in mind in enacting s 460, on the grounds that it has none of the relevant information while the taxpayer has all of it. I do not find this point a compelling one, bearing in mind the powers to obtain information expressly conferred on the Revenue by s 465 of the Act which are exercisable in any case "where it appears to the Board that by reason of any transaction or transactions a person may be a person to whom section 460 above applies". It seems reasonable to assume that the Revenue will not serve a notice under s 460(3) on a taxpayer before it has obtained evidence sufficient at least to satisfy itself that there is a reasonably strong case for saying that the section applies.

Finally, in the context of the burden of proof, I regard it as being of little importance that the phraseology of s 462(1) gives to the recipient of a notice under s 460(3) the right to "appeal" to the Special Commissioners. This point is, I think, sufficiently covered (*mutatis mutandis*) by a passage from the judgment of Upjohn J. in *Commissioners of Inland Revenue v. Transport Economy Ltd.* 35 TC 601, at page 607:

"Then, on the second point, it was said that, as the proceedings before the Special Commissioners were by way of 'appeal' from the assessing Commissioners on general principles, the company should therefore open the appeal, as in the case of other appeals, e.g., to the Court of Criminal Appeal, although in the end, when all the evidence was before the Court, the burden was upon the Crown. With all respect, that submission is based on a fallacy, for there is nothing in the nature of a hearing before the assessing Commissioners; the company is not heard or even present when the assessing Commissioners consider the matter. Further, as was stated to be the fact in this case by Counsel before the Special Commissioners, the company is often unable to obtain from the assessing Commissioners any statement of the grounds upon which they sought to justify the direction. So there is no hearing and no reasoned judgment, but only a direction. It is impossible to apply to an appeal from such a proceeding the rules which apply to appeals from judicial hearings in the ordinary sense."

Similarly, I understand there is nothing in the nature of a hearing by the Commissioners of Inland Revenue before they issue a notice under s 460(3); the taxpayer is not heard or even present when they consider the matter. Furthermore they give no reasoned judgment, but only a direction. In this context, therefore, it is in my judgment impossible to apply to an appeal from such a proceeding the rules which apply to appeals from ordinary judicial hearings.

For all these reasons I conclude that on an appeal by a taxpayer to the Special Commissioners under s 462 of the Act, on the grounds that s 460 does not apply to him in respect of the transaction or transactions in question, the onus of proof falls on the Crown to show that (a) in any such circumstances as are mentioned in s 461 and (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, the taxpayer is in a position to obtain or has obtained a tax advantage. If, once these matters have been established by evidence, the taxpayer then wishes to rely on the exemption contained in s 460(1) by showing that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments and that none of them had as their main object or one of their main objects to enable tax advantages to be obtained, the onus then, according to the express wording of the subsection, falls on the taxpayer to show that he comes within the ambit of such exemption by appropriate evidence. I was told by Counsel for the Crown that in practice,

A on appeals to the Special Commissioners, the taxpayer always begins, which might appear inconsistent with any onus of proof falling on the Crown. I attach little weight to this point. Before the decision of Upjohn J. in the *Transport Economy* case it had apparently been the usual practice for the taxpayer to open appeals against surtax directions. I echo the words of Upjohn J. in that case (35 TC, at page 608):

B “In conclusion, I would add that, though I have indicated what in my judgment is the strict procedure, there will, as Mr. Tucker himself said, be many cases where it will be more convenient to follow what has hitherto been the usual practice; that is to say, for the company to open its case and call evidence and then for the Crown to do so. Where both the company and the Crown think that is the convenient course, then nothing in this judgment is to be taken as rendering it in the least degree improper for the Special Commissioners or the Board of Referees as the case may be to assent to that course if in their discretion they think fit to do so. Nevertheless, at the end of the day, when all the evidence has been heard, the onus still remains upon the Crown to justify its direction.”

D My conclusion as to the onus of proof under s 460 is merely one illustration of what I would regard as a general principle of English law. This is that where the Crown seeks to tax a subject by virtue of a statute then, except in so far as that statute or other legislation otherwise expressly provides, it is for the Crown to show that the subject is caught by the statute rather than for the subject to show the contrary. *A fortiori* this principle should be applied where, as in the present case, the relevant statutory provision can fairly be regarded as being of a penal nature.

F After this long digression, I return to para D of s 461 of the Act. For reasons already given, I think that the onus has at all material times fallen on the Crown to show that para D applied to each of ABCFS at the relevant dates 8 April and 14 April 1969. Since there is no evidence as to the control of Excalibur at these dates, I do not think that this evidentiary burden has been discharged. As a subsidiary point, it was submitted on behalf of the Crown that, even if the general burden of proof fell on it to show that para D applied, such onus would shift when once the Crown had shown that the companies in question were companies of the nature referred to in sub-para (2)(a) or (b) and that it would be for the taxpayer then to show that the paragraph did not apply, because the companies were companies “under the control of one or more of the companies to which this paragraph does not apply”, within the concluding words of para D(2). Though I recognise that the onus of proof may shift from one party to another in many instances in the course of a case, it cannot in my judgment be split up or move around for the purpose of para D. If the Revenue wishes to rely on para D (or indeed any other paragraph of s 461) for the purpose of showing that the condition set out in s 460(1)(a) is satisfied, then it must in my judgment adduce all the appropriate evidence which is required to satisfy the Special Commissioners that the event specified in the paragraph relied on has happened.

I Mr. Vinelott, on behalf of the Crown, stated that, if I were to decide this appeal in favour of the Crown on the footing that 8 April or 14 April 1969 was the relevant date for the purpose of determining whether ABCFS are companies to which para D applies, but that the onus fell on the Respondents to adduce evidence as to the control of Excalibur at those dates if they wished to rely on the final qualifying words appearing at the end of para D(2), the

Crown would be prepared to agree to the matter being remitted to the Special Commissioners, if the Respondents requested such remission, for the purpose of enabling them to adduce evidence as to the control of Excalibur at the relevant dates. On the hypothesis on which it was granted, this was I think a very proper concession on the part of the Crown, bearing in mind that before the Special Commissioners para D had not been relied on at all by the Crown and the taxpayers would have had no reason to suppose that the Crown regarded it as relevant. In my judgment, however, the very fact that it is treated by the Crown as a concession is another illustration of the essential fallacy of its submission in regard to the onus of proof in this context. If such submission were right, it would follow that, on any appeal by a taxpayer from a s 460 notice, unless the Crown had expressly disclaimed any intention to rely on specified paragraphs of s 461, the onus would, strictly, fall upon the taxpayer to adduce before the Special Commissioners evidence sufficient positively to disprove the existence of each and every one of the circumstances mentioned in s 461, notwithstanding that the Crown had evinced no intention of relying on certain paragraphs of that section and notwithstanding that the Crown did not in the event rely on such paragraphs at the hearing before the Special Commissioners, but just in case it might seek to rely on them on a subsequent hearing before the High Court by way of appeal. The boot, in my judgment, is on the other foot. The Crown having omitted to rely on para D before the Commissioners, and thereby having made it unnecessary for the relevant evidence in relation to that circumstance to be gone into, cannot now successfully rely on it in the absence of the relevant evidence. Likewise it could not itself ask for a remission to the Special Commissioners for the purpose of supplementing its own evidence and relying on para D: see *Timbrell v. Lord Aldenham's Executors* 28 TC 293, at page 306, per Lord Greene M.R., and *Woodhouse v. Commissioners of Inland Revenue* 20 TC 673. I should add that in fact no such remission has been requested by any party to these proceedings.

I now consider briefly the circumstances set out in para E of s 461. Paragraph E(1) reads:

“E.—(1) That in connection with the transfer directly or indirectly of assets of a company to which paragraph D above applies to another such company, or in connection with any transaction in securities in which two or more companies to which paragraph D above applies are concerned, the person in question receives non-taxable consideration which is or represents the value of assets available for distribution by such a company, and which consists of any share capital or any security (as defined by section 237(5) of this Act) issued by such a company.”

Though there are three further sub-paragraphs of para E which amplify or qualify sub-para (1), I need read no further. I have already decided that the relevant date for the purpose of determining whether a company is one to which para D applies, for the purpose of para D itself, is the date of the relevant “distribution of profits” of such company, referred to in that paragraph. By parallel reasoning, I conclude that, in applying para E, the relevant date for the purpose of determining whether the company concerned is a company to which para D applies is the date of the “direct or indirect transfer of assets” of such company to another such company which is relied on by the Revenue or alternatively the date of the relevant “transaction in securities” so relied on. It seems fairly clear that any “direct or indirect transfer of the assets” of any of ABCFS, on which the Crown might seek to rely in the present case, could only be a transfer which occurred after 3 April 1969. Likewise it would appear that any “transaction in securities” in which two or more of ABCFS might be said

A to have been concerned could only be a transaction in securities effected after 3 April 1969. Accordingly, in the absence of evidence that any of ABCFS were companies to which para D applied after 3 April 1969, I can see no way in which the Crown can be in a position before me to rely on circumstance E.

For these reasons I have, like the Special Commissioners, come to the clear conclusion that the Crown has not surmounted the first hurdle which it has to surmount if it is successfully to invoke s 460 against the Respondents, that is by showing circumstances such as are mentioned in s 461. This makes it unnecessary to consider the second hurdle which it also would have to surmount for this purpose, that is by showing that the Respondents were in a position to obtain or had obtained in the relevant fiscal year 1968-69 a "tax advantage" within the meaning of s 460. I do not think it will be helpful to prolong this judgment by canvassing the careful and interesting arguments which I have heard on this point. It will suffice to say this. Since the relevant assessments were for the fiscal year 1968-69 and since the only relevant transaction in securities that had occurred before 6 April 1969 was the sale of the issued shares of ABCFS to Excalibur, the Crown has to contend and does contend that the Respondents were in a position to obtain or had obtained a tax advantage in consequence of this sale immediately upon its completion. One possible difficulty in its path is that apart from the first instalment of a trivial amount (£150) payable at once, the succeeding 199 yearly instalments of the purchase price would be payable long after the fiscal year in question. Can it correctly be asserted that the Respondents were in a position to obtain or had obtained a tax advantage simply by the creation in their favour of this debt and before such debt was realised? The answer to this question may depend at least in part on an analysis of the conflicting judgments of the House of Lords in *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141, a case which was considered but distinguished by Browne-Wilkinson J. in *Anysz v. Commissioners of Inland Revenue*⁽²⁾ [1978] STC 296, at page 320. This is clearly an area of the law which could benefit by further judicial exposition, but I do not think it appropriate to attempt this task *obiter*.

In the result I reach the same conclusion as the Special Commissioners, namely that s 460 does not apply to the Respondents in respect of the relevant transactions on the grounds that none of the necessary circumstances specified in s 461 exist or have been proved by the Crown, upon which in my judgment the onus of proof lies. I must therefore dismiss these appeals.

G *Appeals dismissed, with costs.*

The Crown's appeal was heard in the Court of Appeal (Buckley, Templeman and Donaldson L.JJ.) on 4, 5, 6, 7 and 8 February 1980 when judgment was reserved. On 27 February 1980, judgment was given against the Crown (Templeman L.J. dissenting), with costs.

H *D. K. Rattee Q.C.* and *C. H. McCall* for the Crown.
C. N. Beattie Q.C. for the taxpayers.

The following cases were cited in argument in addition to those referred to in the judgments:—*Addy v. Commissioners of Inland Revenue* 51 TC 71;

⁽¹⁾ 43 TC 369.

⁽²⁾ 53 TC 601, at p 628.

Williams v. Commissioners of Inland Revenue 54 TC 257; *Wiseman v. Borneman* 45 TC 540; [1971] AC 297; *Commissioners of Inland Revenue v. Brown* 47 TC 217; [1971] 1 WLR 1495; *Clark v. Commissioners of Inland Revenue* 52 TC 482; [1979] 1 WLR 416. A

Buckley L.J.—These are two appeals by the Commissioners of Inland Revenue (“the Board”) from a judgment dated 28 July 1978 of Slade J. dismissing two appeals from the Special Commissioners for the purposes of the Income Tax Acts who had allowed two appeals by taxpayers, named Garvin and Rose, against notices issued to them respectively by the Board under the Income and Corporation Taxes Act 1970, s 460(3), and against surtax assessments for the year 1968–69 based thereon. The facts of the two cases are in essentials the same, though the figures differ. The decision of one appeal must govern the fate of the other. In this judgment I propose to discuss the appeal in Mr. Garvin’s case. The facts which the Special Commissioners found to have been proved or admitted are set out in para 5 of the Case Stated. I shall not recapitulate them in any detail. B C

The salient features are that immediately before 3 April 1969 Mr. Garvin, Mr. Rose and Mr. Rose’s brother between them owned all the shares in five companies referred to in the Case as ABCFS. On 3 April 1969 they sold all the shares in those five companies to a company called Excalibur, in which they had no interest, for £471,998 payable by 200 yearly instalments of £150 and a final instalment of £441,898 payable on 3 April 2169 with interest at 10¼ per cent. per annum on the amount from time to time outstanding in the meantime. ABCFS owned freehold and leasehold properties of substantial value, upon the realisation of which substantial profits could have been obtained which would have been available for distribution by way of dividends. These sales were the first step in an admitted scheme comprising the transactions numbered 1 to 8 in annexure 2 to the Case and a loan of £472,000 by the three vendors to a company called Central, of which they were the only shareholders. D E

Paragraph 5(3) of the Case contains the following important findings by the Special Commissioners: F

“At the time of the sale the directors of Excalibur intended that the properties owned by ABCFS should be sold. Pursuant to the admitted scheme both they and the three (vendors) hoped and expected that the latter would reacquire the properties but there was no agreement to that effect. At the time of the sale of the shares the directors of Excalibur had not decided whether to procure the payment of a dividend by those companies: it remained an open question for about a year—a decision being reached only in the spring of 1970 when a dividend was paid . . . None of the three (vendors) was aware at the time of the sale of his shares of any tax avoidance scheme intended to be carried out by the purchaser and no such scheme was discussed between the purchaser and the professional advisers of the three (vendors). But we infer from the amount of the sale price that the professional advisers knew that Excalibur intended in some way to avoid corporation tax.” G H

On 8 April 1969 ABCFS leased all their properties to a company called Geltan for the term of 999 years for premiums amounting to £982,862 payable by small instalments over 997 years and a very substantial final instalment payable in April 2968 with interest in the meantime at 10¼ per cent. per annum I

A on the balance from time to time outstanding. Each lease, however, contained a break clause under which the lessee could determine the lease at the end of 49 years of the term. This was intended to avoid a liability to corporation tax. On 14 April 1969 ABCFS sold the reversions on the leases to a company called County in consideration of £100 payable to each of the five companies. On the same day Geltan sold and assigned the leases to County for valuable
B consideration, thus effecting a merger of the long leasehold terms. County on the same day sold the properties, free from the leases, to Central for £989,095. Also on 14 April 1969 Excalibur for consideration assumed the obligation to pay the instalments of the premiums due to ABCFS, and a company called Greave, out of moneys lent by Excalibur, bought from Mr. Garvin, Mr. Rose and Mr. Rose's brother the right to receive the instalments of the purchase
C price of the shares at the price of £471,848. Central borrowed the £989,095 as to £472,000 from Mr. Garvin, Mr. Rose and Mr. Rose's brother and as to £517,095 from other sources.

In the outcome (a) Mr. Garvin, Mr. Rose and Mr. Rose's brother sold their shares in ABCFS to Excalibur for £471,998 payable by instalments, which were converted into £471,848 received from Greave; (b) ABCFS sold
D their properties for £982,862, payable by instalments, and £500 paid for the reversions; (c) Central bought all the properties for £989,095, part of which was provided by Mr. Garvin, Mr. Rose and Mr. Rose's brother lending £472,000 to Central. Before the inception of the scheme Mr. Garvin, Mr. Rose and Mr. Rose's brother owned ABCFS, who owned all the properties, but
E Mr. Garvin, Mr. Rose and Mr. Rose's brother could not get any money out of ABCFS except by way of dividends which would attract tax. At the close Mr. Garvin, Mr. Rose and Mr. Rose's brother owned Central who owned all the properties; ABCFS no longer owned any of the properties, but had received £983,362 for them, payable mainly by very small instalments and a long delayed final payment; Mr. Garvin, Mr. Rose and Mr. Rose's brother were creditors of
F Central in a sum of £472,000 which they could recover from Central on demand and which Central would or could raise out of the properties. The only transactions comprised in the scheme to which Mr. Garvin, Mr. Rose and Mr. Rose's brother were parties, either directly or through Central, were (1) the sale of the shares, (2) the sale to Greave of the right to the instalments of the purchase price, (3) the purchase by Central of the properties, and (4) the loan to Central, but they were participants in the scheme as a whole.

G It is common ground that the other bodies concerned in the scheme, namely, Excalibur, Geltan, County and Greave, are part of a group of companies controlled or operated by a Mr. Bradman, and that he or his companies must have been, or thought themselves to be, in a position to put some kind of tax avoidance scheme into operation in relation to their affairs by means of further transactions which were of some considerable complexity, as
H appears from para 5(7)–(11) of the Case and annexure 2, items 9–25. It has not been suggested that Mr. Garvin, Mr. Rose and Mr. Rose's brother, or any of them, were in any way concerned with any of these transactions or with any such scheme as last mentioned or that they had any knowledge of the nature of any such scheme.

I The only further fact that I need mention is that on 13 April 1970 ABCFS paid dividends amounting in the aggregate to £555,000 to Excalibur. It is conceded that these were dividends of abnormal amount within the meaning of s 467(3) of the Act.

It is clear that the scheme was highly artificial, as is common with tax avoidance schemes. The Special Commissioners did not, however, find, nor has the Board suggested, that the scheme or any part of it was a sham. That a transaction is a sham must be a question of fact. In this jurisdiction the function of determining the facts of the case belongs exclusively to the Commissioners. We cannot treat as a sham any transaction which the Commissioners have found to have taken place and which they have not found to be a sham. A taxpayer remains free to arrange his affairs and, in the course of doing so, to enter into any transactions which are genuine and legal in such a manner as to avoid or reduce liability to tax. If he does so, it is only if the facts of the case satisfy the requirements of some statutory power conferred on the Revenue to go behind the legal form of the way in which the taxpayer has conducted his business and to adjust his tax liability so as to counteract the fiscal consequences of his actions that the form of his transactions and their legal consequences can be disregarded. Accordingly, in my judgment our duty is to proceed to discover whether the facts of the present case fit the requirements of ss 460 and 461, taking the several transactions upon which Mr. Garvin embarked or in which he participated at their face value, however clearly any of those transactions may have been directed to avoiding liability to tax. I must add, however, that anyone who creates a series of 999-year leases in the knowledge that they are to be determined within a week, or is privy to such an arrangement, or who accepts a purchase price upon terms that much the greater part of it will not be payable for 200 years in the knowledge that within a fortnight he will receive a substantial capital sum as the price of all future instalments of the delayed payments, seems to me to run a very real hazard of being held to enter into a sham transaction. However, no such finding was made in this case.

Mr. Beattie stated that the vendors of the ABCFS shares in fact had no intention of avoiding income tax or surtax, but he concedes that they did seek to avoid capital gains tax. There is, however, no finding about this and, in any case, for the reasons I have just given, it is, in my view, of no consequence. Avoidance of capital gains tax is, in any event, irrelevant to the sections which we have to consider.

Part XVII of the Act is entitled "Tax Avoidance". Chapter 1 of that Part is headed "Cancellation of Tax Advantages from certain Transactions in Securities". Section 460(1) provides:

"Where—(a) in any such circumstances as are mentioned in section 461 below, and (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions."

I need not read the proviso. Where the section applies the tax advantage obtained or obtainable may be counteracted under subs (3) in various appropriate ways on such basis as the Board may specify by a notice served upon the taxpayer. It was against a notice served under that subsection that Mr. Garvin appealed to the Special Commissioners. The escape provision in s 460(1) does not apply in this case.

The questions for consideration are (1) whether any of the circumstances mentioned in s 461 exists in this case; (2) whether, if any such circumstance

A does exist, Mr. Garvin was in a position to obtain, or has obtained, a tax advantage. There is no doubt that the sales of the ABCFS shares were transactions in securities. The circumstances referred to in s 461 are set out in five paragraphs, A, B, C, D, and E. We are not concerned with paras A, B or E. The Appellants contend that either para C or para D applies.

Section 461, para C(1), is in the following terms:

B “That the person in question receives, in consequence of a transaction whereby any other person—(a) subsequently receives, or has received, an abnormal amount by way of dividend”—I can omit sub-para (b)—“a consideration which either—(i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend, or (ii) is received in respect of future receipts of the company, or (iii) is, or represents the value of, trading stock of the company, and the said person so receives the consideration that he does not pay or bear tax on it as income.”

C I need not read sub-para (2). Three questions arise upon this paragraph: (1) did the person in question (i.e. the person to whom s 460 is sought to be applied) receive a consideration of any kind described in sub-paras (i), (ii) and D (iii); (2) did he receive it in consequence of a transaction “whereby any other person subsequently receives, or has received, an abnormal amount by way of dividend”; and (3) did he so receive it that he did not become liable to pay or bear tax on it as income?

E To answer these questions one must first construe the paragraph and then see whether it applies to the facts of this case. A statutory provision aimed at restricting tax avoidance is not to be construed in the way which is traditionally adopted in construing charging provisions in taxing statutes. In *Commissioners of Inland Revenue v. Joiner* [1975] 1 WLR 1701, at page 1706, Lord Wilberforce said in relation to the very sections with which we are concerned⁽¹⁾:

F “More than this, it appeared from the opinion of Lord Reid in *Greenberg v. Inland Revenue Commissioners*⁽²⁾ that the sections called for a different method of interpretation from that traditionally used in taxing Acts. For whereas it is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or ambiguities, Lord Reid made it clear that the scheme of the sections, introducing as they did a wide and general attack on tax avoidance, required that expressions which might otherwise have been cut down in the interest of G precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which judges would normally desire to stop.”

H This, as I understand it, does not mean that a court should officiously strive to construe a section in its widest possible significance in order to give it the widest possible operation, but that one must look for the meaning evidently intended by the language used bearing in mind the object of the section, and apply that section accordingly without giving either the taxpayer or the Revenue the benefit of any doubt or ambiguity.

To satisfy para C the consideration must fall within either sub-para (i) or sub-para (ii) or sub-para (iii). This does not, it seems to me, import that the whole of the consideration receivable in respect of any particular transaction

(1) 50 TC 449, at p 480.

(2) 47 TC 240; [1972] AC 109.

must be brought wholly and exclusively within one of these sub-paragraphs. The paragraph refers to receipt of "a consideration". In so far as any part of the total consideration receivable in respect of a particular transaction is found to fall within sub-paras (i), (ii) or (iii) the requirement as to the nature of the consideration is satisfied to the extent of that part of the consideration, and if the other requirements of para C are satisfied, the relevant circumstances are shown to exist *pro tanto*. For example, the consideration might in part represent the value of assets available for distribution by way of dividend and in part represent the value of trading stock. If these two parts made up the whole and the other requirements of para C were satisfied, the case would, in my opinion, fall within para C.

At the date of the scheme (3 April 1969) ABCFS had substantial revenue reserves. These were mainly invested in immovable properties but there were other assets such as loans on mortgage, bank balances and sundry debtors. Four of the companies, namely ACFS, were property dealing companies and their assets in the form of immovable properties constituted their stock-in-trade. B was a property investment company whose assets consisted preponderantly of immovable properties. The revenue reserves—i.e. accumulated profits—of the five companies as at 25 March 1968, 3 April 1969 and 14 April 1969, as shown in their books, are tabulated in para 5(5) of the Case. At 3 April 1969 their aggregate book value was £176,453, but at that stage the immovable properties were very considerably undervalued. In the accounts as at 14 April 1969, when the long leases had been granted, the aggregate of the revenue reserves of the five companies was £558,980, represented almost entirely by sums due to the companies. These consisted, at any rate to much the greatest extent, of the premiums payable in respect of the long leases. It has not been suggested that these premiums were unrealistic.

Before the Special Commissioners it was common ground that the consideration received by the vendors of the shares represented the value of the trading stock of the four property dealing companies but that is no longer the case, nor was it before Slade J.

Before us it has not been suggested that the assets of ABCFS, so far as they did not consist of cash or its equivalent such as a credit at a bank, were not "available for distribution by way of dividend". The argument has proceeded upon the basis that for the purposes of para C(1)(i) assets in excess of what would be required for the discharge of the companies' debts and for repayment of paid-up share capital should be regarded as available for distribution by way of dividend and that the assets of ABCFS should be treated as having been of a value reflected by the prices obtained by ABCFS for their disposal. I therefore do not embark on a discussion of how far unrealised appreciation in the value of assets can accurately be described as available for distribution by way of dividend. The paid-up capital of ABCFS amounted to no more than £114. Mr. Beattie, appearing for Mr. Garvin, has submitted that the purchase price paid for the shares did not represent the value of the companies' assets available for distribution by way of dividend because the price also included an element of payment for the paid-up share capital of the companies. I take, to illustrate Mr. Beattie's argument, the figures relating to company A. At 3 April 1969 that company's draft accounts showed paid-up capital £4 and revenue reserves £34,662. As at 14 April 1969 the revenue reserves had grown to £58,246. Mr. Beattie said that if the paid-up capital of the company had been £10,000 and the revenue reserves had been £48,000 instead of £58,000, it would be fallacious to say that the consideration for the sale of the shares represented the value of the revenue reserves. It would undoubtedly be wrong to say that

- A the total purchase price represented the value of the revenue reserves, but, in my opinion, it would be perfectly accurate to say (assuming that the revenue reserves were all available for distribution by way of dividend) that to the extent of 48/58ths of the total consideration the vendors received a consideration representing the value of assets available for distribution by way of dividend. Having regard to the minute amount of the paid-up share capital of the five companies in the present case, I think that the element in the value of the shares of those companies represented by paid-up capital can be disregarded as minimal.

- It seems to me that the vendors must be taken to have sold, and Excalibur must be taken to have bought, the share capitals of ABCFS at a price arrived at by reference to the net asset values of the companies. The price did not represent the full net asset value, for it is common ground that Excalibur, in the person of Mr. Bradman, required and obtained a substantial discount of the order of £80,000 on the net asset values in arriving at the purchase price for the shares. If in fact the agreed price represented the net asset values of the companies less a discount, this cannot, in my opinion, make it less true to say that it represented assets available for distribution by way of dividend than if it represented net asset value without the deduction of any discount. In my view, therefore, the consideration given by Excalibur for the shares of ABCFS comes within para C(1)(i). It may, to some extent at least, also fall within para C(1)(iii) as representing the value of trading stock. The learned Judge⁽¹⁾ found it unnecessary to decide this point because of the view which he took of the meaning of the word “whereby” in para C(1), to which I shall now turn.

- E The Special Commissioners in their decision expressed the view that the word “whereby” here must import some causal connection. The learned Judge took a similar view. In his judgment he contrasted two possible paraphrases of the expression “a transaction whereby”, viz., “a transaction by which” and “a transaction by means of which”. This may only lead one into further semantic difficulties about the meaning of the phrase “by means of which”.
- F It appears to me that Slade J. was using it in a sense which did not import any causal connection, but signified merely that the “other person” would not have received the abnormal dividend but for the transaction in question. By substituting “by” for “whereby”, he was certainly importing a causal connection, but not, I think, quite so straitly restricted a causal connection as the use of the word “by” is apt to suggest. I am clearly of the view that the word “whereby” in the context imports a causal connection, but I am inclined to think that the transaction in question need not itself be so direct a cause as the substitution of the word “by” might suggest.

- In none of the authorities to which we have been referred has the meaning of the word “whereby” in this context arisen for decision, but in *Anysz v. Commissioners of Inland Revenue*⁽²⁾ [1978] STC 296 Browne-Wilkinson J., without deciding the point, (at page 316 g) indicated that he favoured the view that it was necessary to find a causal link. Having regard to the observations in the House of Lords in *Greenberg v. Commissioners of Inland Revenue*⁽³⁾ and *Commissioners of Inland Revenue v. Joiner*⁽⁴⁾, to which I have already referred, it seems to me that it would be unwise to try to define too narrowly the significance of the word “whereby”. I think that in every case the court must determine whether a sufficient causal link exists between the transaction under

⁽¹⁾ Page 47 *ante*.
⁽³⁾ 47 TC 240.

⁽²⁾ 53 TC 601, at p 624.
⁽⁴⁾ 50 TC 449.

consideration and the subsequent receipt of an abnormal amount by way of dividend. In the present case, in view of the findings which I have earlier read from the Case Stated, I find it impossible to hold that there was a sufficient causal link between the sale of the shares and the declaration of the dividend. Excalibur might have decided not to extract the profits from the companies. It might have decided to capitalise those profits. It might perhaps have decided to employ them in some other way, not involving any distribution of those profits. I do not feel able to accept the view that the fact that the purchaser of shares acquires the whole of the share capital of, or a controlling interest in, a company which has large undistributed profits can by itself afford a sufficient ground for holding that such acquisition was the cause of a subsequent distribution of those profits by way of dividend. Nor, in the face of the Commissioners' express findings which I have read, can we, in my view, regard the declaration of the dividend as having been a foregone conclusion: it "remained an open question". For these reasons, in my judgment, the learned Judge reached the right conclusion in holding that the present case does not fall within the terms of para C of s 461.

I move on to para D of s 461. I am willing to accept for the purposes of this judgment that the sale of Mr. Garvin's shares in ABCFS to Excalibur and the subsequent declaration of dividends by those companies were "in connection" with one another and that accordingly Mr. Garvin received the purchase price "in connection with" the distribution of profits of ABCFS. I read the words "so receives as is mentioned in paragraph C(1) above" as referring back to the tail-piece to para C(1), i.e. to "so receives the consideration that he does not pay or bear tax on it as income". So the point upon the word "whereby" in para C(1) does not in my view arise in respect of para D(1).

I have already held that the purchase price for the shares was such a consideration as is mentioned in para C(1)(i). There remains the crucial question whether the distribution of profits, i.e. the dividends declared by ABCFS, was a distribution of profits of companies to which para D applied. Before the sale and the transfer of the shares to Excalibur, ABCFS were under the control of not more than five persons. After the sale and transfer ABCFS were under the control of Excalibur. In consequence of the fact that para D was not relied on before the Special Commissioners, the question whether Excalibur was itself a company to which para D applied was not investigated. Neither party wants the case to be remitted to the Commissioners to investigate and make a finding about this, and the Board concedes that, having regard to the course which the case has taken, they cannot insist on the burden of proof in this respect resting on the taxpayer. So, if the question whether ABCFS were companies to which para D applied fell to be decided on the facts existing before the sale of the shares took effect, they were such companies, but if that question fell to be decided on the facts existing after the sale took effect, it has not been established that they were such companies. In the former alternative the circumstances required by para D would have existed; in the latter alternative it would not have been shown that those circumstances existed. In my judgment, the words "the distribution of profits of a company to which this paragraph applies" inescapably indicate that the character of the company must be ascertained at the date of distribution, not at some earlier date such as immediately before the sale and transfer of the shares. It must, I think, be borne in mind that the draftsman of s 461 was clearly attempting to cover a very wide field of possible contingencies. It would, in my opinion, be wrong to construe the section in the light of the circumstances of a particular case on the assumption that the draftsman must have had in mind that the provisions of the section should cover such a case. Paragraph D seems to me to focus in this

- A respect upon the close control of the company which distributes the profits. The conclusion must be the same if one substitutes for "distribution of profits" the words "realisation of assets" (see s 467(2)). In the present case the relevant realisation of assets would have been the granting of the leases to Geltan and the sales of the freehold reversions, all of which took place after Excalibur had acquired the shares. For this reason, in my judgment, para D does not apply in the present case.
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- It follows from the fact that, in my view, the case does not fall within either para C or para D of s 461, that s 460 does not apply to it. On that ground, in my judgment, this appeal fails, but in case the matter should go further I must express my view on the remaining question whether, on the assumption that s 460(1)(a) does apply, Mr. Garvin became in a position to obtain, or did obtain, a "tax advantage". The meaning of "tax advantage" is defined in s 466. It includes the avoidance of an assessment to tax, or of a possible assessment to tax, effected by receipts accruing in such a way that the recipient does not pay or bear tax on them.
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- The Board contends in the present case that Mr. Garvin obtained a "tax advantage" because he received the proceeds of sale of his shares free of income tax, thus avoiding a possible assessment to tax to which he would have been liable if the profits had been extracted from ABCFS in the form of dividends. A vendor selling a capital asset for a sum of money could not in normal circumstances be regarded as thereby avoiding an assessment to income tax. The transaction would have nothing to do with income. One capital asset would be exchanged for another. Mr. Beattie says that that is what occurred here. Mr. Garvin sold his shares in ABCFS for a capital sum payable over a period of 200 years. No tax advantage was obtained, because the purchase price coming from Excalibur could not in any circumstances have attracted an assessment to tax. Mr. Beattie submits that a receipt in a capital form cannot involve a "tax advantage" for the purposes of s 460 unless what is received by the taxpayer comes to him from the company which has distributable profits and comes from that fund of distributable profits.
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- In *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141 a company which had accumulated profits capitalised some of them in 1953 by paying up debentures which were allotted to the shareholders, including the taxpayer in that case, credited as fully paid-up. Eight years later the company redeemed the debentures. The cash then received by the debenture holders came from the fund of what had at the outset been accumulated profits. It was held that the taxpayer had obtained a "tax advantage". In *Commissioners of Inland Revenue v. Cleary*⁽²⁾ [1968] AC 766 the appellant and her sister owned the whole share capital in two property holding companies, G.D. Ltd. and M.J.G. Ltd., in equal shares. The issued share capital of M.J.G. Ltd. was represented by 50,000 shares of £1 each. G.D. Ltd. had a balance on profit and loss account of £180,000, of which £130,000 was represented by cash at the bank. Each sister sold 22,000 shares in M.J.G. Ltd. to G.D. Ltd. for full consideration and received £60,500 in cash from G.D. Ltd. It was held that the transaction was such as to avoid payment of tax which would have been payable if the sum received by the appellant had been distributed as a dividend, so that the appellant had obtained a "tax advantage". In both these cases the cash
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(1) 43 TC 396.

(2) 44 TC 399.

received by the taxpayer did in fact come from the company in which the taxpayer held shares and which was replete with profits, and was cash which, apart from the transaction in question, could have been distributed in dividend. A

In *Greenberg v. Commissioners of Inland Revenue*⁽¹⁾ [1972] AC 109 the same was not the case. There the taxpayer, Mr. Greenberg, owned shares in a company which had accumulated profits. The company increased its capital by creating 100 preferred shares of £1 each carrying, in effect, the right to receive all dividends for the ensuing five years. The company capitalised £100 of reserves and issued the shares credited as fully paid-up to its two shareholders, one of whom was Mr. Greenberg. On the same day the shareholders entered into an agreement to sell the new shares to F.S. Ltd. for £20,100. The shareholders were to be entitled to call for payment of the purchase price to the extent that dividends on the preferred shares were paid to F.S. Ltd. from time to time. The payments to the taxpayer were actually made out of moneys advanced to F.S. Ltd. by their bankers and credited to a separate account. In that case the sums received by the taxpayer were not received by him from the company which created the preferred shares. The sums received by him were, however, precisely geared to the dividends received by F.S. Ltd. upon those shares. It may be said that in reality, although indirectly, those payments came from the company which created the shares, although in law they came from F.S. Ltd. As authority, *Greenberg* is not binding in respect of the point now under discussion because in that case it was not in dispute that the taxpayer had obtained a “tax advantage”, that point having been conceded. B C D

Mr. Beattie placed reliance upon what was said by Lord Wilberforce in *Parker*, at page 178. Referring to the definition of “tax advantage” contained in the Finance Act 1960, s 43(4) which was in the same terms as the corresponding definition in the Income and Corporation Taxes Act 1970, Lord Wilberforce said⁽²⁾: E

“Can these words fairly be applied to debentures? In my opinion they cannot. The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made; that the taxpayer is in a position to resist the assessment by saying that *the way in which he received what it is sought to tax* prevents him from being taxed on it; and that the Revenue is in a position to reply that if he had received what it is sought to tax *in another way* he would have had to bear tax. In other words, there must be a contrast as regards the ‘receipts’ between the actual case where these accrue in a non-taxable way with a possible accruer in a taxable way, and unless this contrast exists, the existence of the advantage is not established.” F G

Lord Wilberforce then went on to apply those observations to the case before him and said that as regards the receipt in 1961 of the cash applied in redeeming the debentures there was no difficulty. He went on, at page 179C, as follows⁽³⁾:

“But if one seeks to apply paragraph (g) to the 1953 transaction, a different result follows. It is impossible, in my opinion, to say that the respondent at that point received profits of the company in a non-taxable form or in any way at all. The basis of the decision of this House in *Inland Revenue Commissioners v. Fisher’s Executors*⁽⁴⁾, following (as it was H

(1) 47 TC 240.

(2) 43 TC 396, at p 441.

(3) *Ibid*, at p 442.

(4) 10 TC 302; [1926] AC 395.

A thought logical to follow) *Inland Revenue Commissioners v. Blott*⁽¹⁾, I understand to be that by a decision of the company, effective against all the world including the Revenue, the character of divisible profits had been taken away from the capitalised sums. The shareholders, instead of receiving their share of those profits, received a right, enforceable at the time and in the manner defined by the resolution creating the debentures to participate in the company's capital. Nothing (and this is, I think, crucial for the present case) passed from the company—'out of the company's coffers', to use the words of Viscount Cave⁽²⁾—to the shareholders: they were merely given a right, a chose in action over the company's capital assets."

B He pointed out that a debenture is not a taxable subject-matter, not because it is received in a particular way but because it is a debenture, that is, a right over a portion of the company's capital. There was no way in which the company could issue paid-up debentures of its own in such a way as to be taxable, because the issue presupposed a capitalisation of profits. So he reached the conclusion that in *Parker*⁽³⁾ there was no "tax advantage" in 1953 when the debentures were issued credited as fully paid-up. Mr. Beattie relies strongly upon the observation that nothing passed from the company "out of the company's coffers".

C Lord Dilhorne in the same case (at page 162G⁽⁴⁾) expressed a similar view, which he summed up at page 163 in these words⁽⁴⁾:

E "In my opinion the short answer to the respondent's contention is that he did not in 1953 receive any part of the profits of the company. There was at the time no receipt by him of anything which, if it had been given him in another way, would have been liable to tax."

F Lord Guest was of a different opinion, saying (at page 173G⁽⁵⁾) that there was a good deal to be said for the view that the respondent was in a position to obtain a "tax advantage" in 1953; but he did not think this of significance because, nevertheless, the respondent had clearly obtained a "tax advantage" in 1961. Lord Hodson, with whom Lord Morton agreed, held that the respondent had obtained a "tax advantage" in 1953 when the debentures were issued.

G In *Cleary* Lord Dilhorne (at page 782B⁽⁶⁾) cited the paragraph which I first read from Lord Wilberforce's speech in *Parker* and said that the definition of "tax advantage" did not require the contrast of like with like as Pennycuik J. had held in *Cleary*. Lord Dilhorne said:

"That the appellant received £60,500 in such a way that she did not pay or bear tax on it is not disputed. It could have been distributed to her by way of dividend and, if it had been, she would have been liable to tax. There is thus in this case the contrast to which Lord Wilberforce referred."

H Lord Morris reached the same conclusion for similar reasons and Lord Guest and Lord Devlin agreed with Lord Dilhorne. Lord Upjohn summed up his views on the "tax advantage" point in these words⁽⁷⁾:

"The sisters have managed, by a perfectly fair transaction, to extract cash from the company without declaring a dividend and thereby they

(1) 8 TC 101; [1921] 2 AC 171.

(2) 8 TC 101, at p 135.

(3) 43 TC 396.

(4) *Ibid*, at p 432.

(5) *Ibid*, at p 438.

(6) 44 TC 399, at p 423.

(7) *Ibid*, at p 428.

avoided a possible assessment upon them which would have been made had a dividend been declared. Accordingly, in my judgment, this point fails.” A

Commissioners of Inland Revenue v. Wiggins⁽¹⁾ [1979] 1 WLR 325 was in essence a straightforward sale for cash of the share capital of a company which was replete with profits or potential profits. At page 335C Walton J. said: “The scheme represented an alternative method of distributing profits, so that, whatever force those words may be intended to have, I would regard the opening words of paragraph D as undoubtedly satisfied in the present case.” He rejected a submission that, where the receipt by the person in question was a monetary payment, the comparison formulated by Lord Wilberforce must be made between an actual and a notional payment made by the same person or company, and held that in that case the vendor had obtained a “tax advantage”. B C

In *Anysz v. Commissioners of Inland Revenue*⁽²⁾ [1978] STC 296 the owner of the share capital of a company, K. Ltd., replete with profit, exchanged their shares in K. Ltd. for the whole issued share capital of P.K. Ltd., which was allotted and issued to them credited as fully paid-up. They received the shares in P.K. Ltd. in circumstances which gave rise to no liability to tax. K. Ltd. subsequently declared a dividend of abnormally large amount which was received by P.K. Ltd. free of tax by reason of the provisions of the Income and Corporation Taxes Act 1970, s 256(1). P.K. Ltd. lent the amount of the dividend to another company in the shareholders’ group of companies. The shareholders received no cash: what they received was their shares in P.K. Ltd. Browne-Wilkinson J. (at page 319 *d* and *j*⁽³⁾) held that the shareholders had obtained a “tax advantage” because they could have obtained their shares in P.K. Ltd. in a taxable way, viz., if K. Ltd. had used its available profits to buy the shares of P.K. Ltd. and had then distributed those shares to its shareholders by way of a dividend *in specie*. So viewed, the position seems to me to be exactly analogous to a sale of the capital of a profit-bearing company for cash. In the latter case the comparison is between cash received from a purchaser and cash received from the company by way of dividend. In *Anysz* the comparison was between shares received from the purchaser and similar shares distributed by way of dividend by the company. D E F

Of the five cases which I have referred to, two (*Parker*⁽⁴⁾ and *Cleary*⁽⁵⁾) were cases in which the taxpayer received money directly from a company replete with profits, but of these one was a case in which the money was paid for full consideration (the shares in M.J.G. Ltd.) so that the company cannot be said to have been stripped of any assets. In a third case (*Greenberg*⁽⁶⁾) the taxpayer received from a purchaser a price in money for a part of his interest in the company. The fact that that price was to be paid by instalments in step with the dividends received by the purchaser from the company may be said to emphasise the true nature of the scheme distinguished from its legal form, but otherwise to have been irrelevant. In the remaining two cases (*Wiggins* and *Anysz*) the taxpayer received from a purchaser of his shares in a company replete with profit, cash or paid-up shares of the purchaser company. In neither of these cases did anything reach the shareholder directly or indirectly from the company, the shares of which he sold. The common features of all these cases are (a) that a taxpayer owning shares in a company replete with profits so arranged his affairs, either on his own or in co-operation G H I

(1) 53 TC 639, at p 659.

(2) 53 TC 601.

(3) *Ibid*, at pp 627–8.

(4) 43 TC 396.

(5) 44 TC 399.

(6) 47 TC 240.

- A with others, that he received something in such a way that the receipt did not attract income tax; (b) that the value of what he received was at least in part attributable to the accumulated profits of the company; (c) that he could have so arranged matters that he received the same subject-matter from the company by means of a distribution in cash or in kind of its accumulated profits which would have attracted income tax; and (d) that consequently the way
- B in which he arranged his affairs was advantageous to him as regards income tax. These four features are, in my judgment, together sufficient to satisfy the definition of "tax advantage" contained in s 466. That definition does not require that the advantage shall accrue from the fact that receipts have come from any particular source. The language used in the speeches in *Parker*⁽¹⁾ must be read in the light of the facts and problems of that case. *Parker* is not a decision that what is received by the taxpayer must have come from the company which has accumulated profits. In the present case the purchase price of Mr. Garvin's shares was received in such a way that he was not liable for income tax upon it, and consequently he avoided assessment to tax which he would have been liable to pay had the profits with which ABCFS were replete when Mr. Garvin sold his shares to Excalibur been distributed by way of dividend.
- C In my judgment Mr. Garvin did obtain a "tax advantage" within the meaning of the Statute but, since in my view none of the circumstances referred to in s 461 existed in this case, the Revenue has no power to counteract that advantage under s 460(3).
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For these reasons I would dismiss both appeals.

- Templeman L.J.**—Three taxpayers held all the issued share capital of five companies known in these proceedings by their initials, ABCFS. The five companies owned properties worth at least £989,095. If these properties were sold, the companies would pay corporation tax on any balance of realised capital gains. Profits of the companies, amounting to £558,980 at least, would be available on such a sale for distribution by way of dividend, but any dividend would be taxable as part of the total income of the taxpayers. The taxpayers agreed to purchase a scheme which avoided these potential tax liabilities. The scheme was provided by Mr. Bradman, a well-known inventor and purveyor of tax avoidance schemes, and his fee was £80,000, payable on the implementation of the scheme.
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- On 3 April 1969 the taxpayers sold their shares in ABCFS to Excalibur, a company controlled by Mr. Bradman, for £471,998 payable by 200 annual instalments of £150 and a final instalment of £441,898 payable in April 2170. Interest at 10¼ per cent. per annum was payable on the amount of the sale price from time to time outstanding. On 8 April 1969 ABCFS, then controlled by Mr. Bradman through Excalibur, leased their properties to Geltan, another company controlled by Mr. Bradman, for 999 years at premiums amounting in the aggregate to £982,862 payable by 997 annual instalments of £50 and a final instalment of £932,962 in April 2968. Interest at 10¼ per cent. per annum was payable on the amount of the premiums from time to time outstanding. The grant of the leases did not attract corporation tax because the lessees were given a right to determine the leases after 49 years, so that ABCFS were able to make elections under s 80(6), Income and Corporation Taxes Act 1970. On 14 April 1969 the taxpayers, for £471,848, sold to Greave, another company controlled by Mr. Bradman, the right to the future instalments, amounting to £471,848, of the sale price of the shares in ABCFS. On 14 April 1969 the
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(1) 43 TC 396.

taxpayers loaned £472,000 to Central, a company in which the taxpayers held all the shares in the same proportions as they had formerly held the shares of ABCFS. Central was designed to replace ABCFS. On 14 April 1969 County, another company controlled by Mr. Bradman, purchased for £100 the reversions to the leases granted by ABCFS and took assignments of the leases and merged the leases in the reversions. On the same day County sold the former properties of ABCFS, unscathed, to Central for £980,095. Central no doubt replaced ABCFS as debtor of commercial third party debts to banks and others. On 13 April 1970 ABCFS paid an abnormal dividend of £554,000 for the period 15 April 1968 to 14 April 1969 to Excalibur. Provided that an election has been made under s 256(1) of the Income and Corporation Taxes Act 1970, the payment of a dividend by a subsidiary company to a parent company does not attract tax. By means of this dividend and other book entries Excalibur, as Slade J. found, ended up with £78,014 additional cash.

No money was required for the scheme and its unravelling, save for Mr. Bradman's fee and costs. The remainder of the moneys mentioned in the scheme documents were book entries which were necessary to create and destroy fantasies such as a sale of shares for £441,898 payable in the year 2169 by a company of Mr. Bradman, then long deceased, and agreements to lease for premiums of £932,962 payable in the year 2968 by a company of Mr. Bradman, then long forgotten. The sale of the shares and the grants of the leases were never intended to be carried through in the manner which they professed to provide and had no effect on the taxpayers, save to substitute shares and a loan in Central for shares in ABCFS. The scheme only created rights and liabilities in order that those rights and liabilities might be destroyed. The 999 year leases were created and destroyed in six days. In the space of eleven days the duties to pay, and the rights to receive instalments of purchase price and premiums, were devoured by Mr. Bradman's companies, a faithful and well-trained pack of hounds. Mr. Bradman laid his pack on the trail of a non-existent fox; the properties used for the drag to provide the scent were taken out by ABCFS and returned by Central; at the end of the day the hounds were secure in their kennels and nothing remained save the Revenue's broken hedges, the subscription of £80,000 and the entries of Mr. Jorrocks in the books and records of the hunt. It is now too late for the Revenue to cry "sham"; instead, the Crown claims that the taxpayers received a tax advantage in the form of a capital loan instead of a prospective income dividend. The Revenue seek to counteract this tax advantage pursuant to s 460 of the Income and Corporation Taxes Act 1970 by assessing to income tax for the fiscal year ending 5 April 1969 the sum of £471,998 which the taxpayers would have received if they had procured the declaration of a dividend of that amount by ABCFS instead of selling their shares in ABCFS, pregnant with dividend, for a capital sum payable by instalments and implementing the scheme which procured them a debt of £472,000 tax free.

Section 460 proclaims that its object is the cancellation of tax advantages. By ss 460, 466 and 467, where circumstances prescribed by s 461 exist, and where *inter alia* in consequence of a sale of shares a taxpayer obtains a tax advantage which consists of the avoidance of an assessment or a possible assessment to income tax, it is the duty of the Revenue to counteract the tax advantage by an assessment to tax. The taxpayers in this appeal are liable to an assessment to tax on the sum of £472,000 which the scheme converted from income to capital in their hands if, but only if, the provisions of ss 460 and 461 on their true construction apply to the taxpayers in the events which happened. The taxpayers contend that the provisions of ss 460 and 461 are not satisfied.

- A Section 460 cannot begin to apply unless the circumstances prescribed by at least one of the paragraphs of s 461 are found to exist. The Crown relies on para C. That paragraph requires that: the person in question (the taxpayers) receives in consequence of a transaction (the sale of shares of ABCFS to Excalibur on 3 April 1969) whereby any other person (Excalibur) subsequently (on 13 April 1970) receives an abnormal amount by way of dividend (£554,000)
- B a consideration (the debt of £471,998 payable for the shares) which represents the value of assets (revenue reserves of ABCFS) available for distribution by way of dividend, or is received in respect of future receipts of the company (profits of ABCFS on realisation of its assets) or is or represents the value of trading stock (assets of the four property dealing companies) and the said person (the taxpayers) so receives the consideration (the debt of £471,998 payable for the ABCFS shares) that he does not pay or bear tax on it as income (the result of the sale).

- On behalf of the taxpayers, Mr. Beattie submitted that the sale by the taxpayers on 3 April 1969 of the shares of ABCFS to Excalibur was not a transaction "whereby" Excalibur received a dividend on 13 April 1970. He argued that para C only applies where a dividend is bound to be declared or is intended to be declared. If Mr. Bradman had agreed with the taxpayers that a dividend would be declared, or if Mr. Bradman intended that a dividend would be declared, then the sale of the shares would be a transaction "whereby" the dividend was declared. There was no such agreement or intention. I cannot reconcile the words of para C with Mr. Beattie's contention that there must be an agreement or intention with regard to the declaration of a dividend. Legislation which counteracts tax advantages must be based on facts and not oblige the Revenue to prove a particular "agreement" or "intention" because, as I have previously had occasion to comment, many tax avoidance schemes generate the suppression of agreements and intentions. In the present case, for example, it is inconceivable that the taxpayers would have parted with their shares in ABCFS for a debt payable in 2169 by Excalibur in the absence of an agreement by Mr. Bradman to procure that the ABCFS assets would be conveyed back to the taxpayers by way of Central. The taxpayers purchased a scheme which was on offer to clients generally and which admittedly included the conveyance to Central and was fully implemented in eleven days. And yet the Special Commissioners allowed themselves to be persuaded that the directors of Excalibur and the taxpayers only "hoped and expected" that the taxpayers "would reacquire the properties but there was no agreement to that effect".

- Failure to declare a dividend sometimes leads to disadvantageous tax consequences. However that may be, Mr. Bradman obligingly told the Special Commissioners that he did not form the intention of declaring a dividend in April 1969. History does not relate whether, and how, Mr. Bradman resists the temptation to form an early and fatal intention in every production of every scheme which he sells. The taxpayers were not told, did not ask, and were careful not to guess. The Commissioners duly found there was no intention. On the view which I have formed of para C the Commissioners' negative findings with regard to "agreement" and "intention" are not material, but they illustrate reasons why the circumstances prescribed by para C do not depend on the oral testimony of the parties seeking to frustrate anti-tax avoidance legislation.

In considering whether the sale of the shares of ABCFS to Excalibur was a transaction whereby Excalibur received an abnormal dividend from ABCFS,

I find that the relevant facts are four in number. Firstly, Excalibur bought 100 per cent. of the shares of ABCFS and were immediately able to secure the declaration of a dividend by ABCFS. Secondly, at the date of purchase ABCFS held profits and property available for payment of an abnormal dividend. Thirdly, the purchase price for the shares reflected the value of the profits and properties available for payment of an abnormal dividend. Fourthly and “subsequently”, Excalibur procured the payment of an abnormal dividend out of those profits and by converting the properties into cash. In my judgment, it follows from these facts that the purchase of the shares in ABCFS was a transaction whereby Excalibur received the abnormal dividend from ABCFS. A purchase of a controlling interest in shares of a company pregnant with dividend is a transaction whereby the dividend is subsequently delivered and received. No other construction of para C is consistent with the express words and object of the paragraph.

It is objected that para C is oppressive if a vendor is made liable to a counteracting assessment under s 460 because the purchaser chooses to procure the declaration of an abnormal dividend. But a vendor who sells controlling shares in a company pregnant with an abnormal dividend knows what he is doing and receives a price which reflects the presence of profit and property available for an abnormal dividend. Such a vendor must take his chance if he is striving for a tax advantage. He is free to contract for indemnities or to forbid the declaration of a dividend if the transaction is a commercial transaction and not part of a scheme. Unless his object is to obtain a tax advantage, he is not liable to an assessment under s 460 in any event.

Mr. Beattie submitted in the alternative that para C did not apply because the purchase price for the ABCFS shares was not apportioned between the value of assets available for distribution by way of dividend and future receipts of ABCFS and the value of trading stock, nor was it apportioned between those items and the paid-up capital of ABCFS. In my judgment, the paragraph does not require any such apportionment. Paragraph C is satisfied if the consideration received by the taxpayer includes “a consideration” which falls within one or more of the categories defined by the paragraph. An apportionment between profits and paid-up capital is necessary, and is not difficult, when the Revenue makes an assessment which counteracts the tax advantage obtained by the taxpayer. The Crown, having made out their case under para C, need not make out an alternative case under para D; but in view of the issues involved and the tax at stake, para D was fully argued. Paragraph D of s 461 is satisfied if “in connection with the distribution of profits” or, *per* s 467(2) “in connection with the realisation of assets” (the leases by ABCFS dated 8 April 1969) of a company “to which this paragraph applies” the taxpayer receives a consideration which represents the value of assets available for distribution by way of dividend or which is received in respect of future receipts of the company or which is, or represents, the value of trading stock of the company (ABCFS) and the taxpayer receives that consideration without liability for tax. By para D(2), the companies to which para D applies are any company under the control of not more than five persons and any other company whose shares or stock or some class thereof, with immaterial exceptions, are not authorised to be dealt in on a domestic Stock Exchange or are not dealt in regularly or from time to time.

The taxpayers received on 3 April 1969, on the sale of their shares in ABCFS to Excalibur, a consideration, namely the debt of £471,998, which represented the value of assets available to ABCFS for distribution by way of dividend and received the purchase price of the shares in a form which was

- A not liable to tax. ABCFS was a company controlled by three persons. The conditions required by para D appear to be satisfied, for Mr. Beattie concedes that the sale of the shares in ABCFS was connected with the subsequent leases which realised assets of ABCFS, because the sale and the leases were part of the same scheme. ABCFS were undoubtedly companies to which para D applied when the taxpayers on 3 April received a consideration which represented the value of assets of ABCFS available for distribution by way of dividend, and the taxpayers thereupon received a consideration which was not liable to tax. Mr. Beattie, however, contends that para D requires that ABCFS be companies to which the paragraph applies not on the date when the taxpayers received their consideration on 3 April, but on the subsequent date, namely 8 April, when ABCFS realised part of their assets by leases in favour of Geltan. It is not known whether ABCFS were companies within para D on 8 April, because that paragraph is expressed not to apply to a company under the control of one or more companies to which the paragraph does not apply. The status of Excalibur, which controlled ABCFS on 8 April, and of any parent or superior company or companies of Excalibur on 8 April for the purposes of para D, was not explored before the Special Commissioners.
- D Paragraph D deals with two events which must be connected, but which do not necessarily take place on the same date or in any particular order. One date is the date when the taxpayer receives what has been called his tainted consideration in respect of a company. The other date is the date when the company distributes profits or realises its assets. Paragraph D does not apply to all companies, but only to companies of a kind which are most inclined to provide the opportunity and the temptation for the shareholders to accumulate taxable profits and to obtain the benefits of those profits in a non-taxable form. It is logical that the status of a company should be judged by its position on the date when the shareholders obtain a profit in a non-taxable form. If the company subsequently changes its status this change is irrelevant. If this were not the case, para D would not apply if the shareholders, by or after obtaining a non-taxable benefit, ensured that their shares were transferred to a company to which para D did not apply. It is impossible that Parliament intended to produce this effect. No difficulties were advanced if the paragraph is construed so as to apply to companies by reference to their status on the date when a non-taxable benefit is obtained. Faced with the choice of two dates, only one of which is consistent with the object of the legislation, I reject Mr. Beattie's submission. If para C or D applies to the present case, then the counteraction provisions of s 460 must apply provided that the taxpayers obtained a tax advantage.
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- Mr. Beattie submitted that there was no tax advantage because ABCFS retained their taxable profits and the taxpayers received their loan capital from Central. This submission ignores the fact that ABCFS sold their birthright for a mess of pottage by converting their assets into a debt payable by Geltan in the year 2968. This transaction was an essential part of a scheme, which was contractual, whereby the properties of ABCFS, including the assets representing their taxable profits, found their way to Central. On 14 April the taxpayers became entitled to be paid by Central on demand £472,000 free of tax. Central held properties formerly available to ABCFS for the distribution of £472,000 subject to tax. The sum of £472,000 became payable out of the same assets by Central instead of ABCFS. There is an obvious tax advantage in a change from possible future dividend subject to tax to certain debt free of tax effected by a transfer of assets from one company to another company otherwise identical in every particular save that of name. Mr. Beattie submitted
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that a tax advantage is not obtained by receipts accruing in a capital form unless the money comes directly or indirectly from the company which it is said could have paid the dividend out of its profits. Mr. Rattee, who appeared for the Crown, answers this submission in three alternative ways. First, the money to pay the taxpayer £472,000 came indirectly from ABCFS in that the assets of ABCFS were transferred to Central and became burdened with payment of that sum. Secondly, and alternatively, s 460 contains no limitation of the kind submitted by Mr. Beattie. Thirdly, such a limitation is inconsistent with the object of s 460. I agree with Mr. Rattee on all three answers. Mr. Beattie relied not on anything to be found in the Statute, but on authority. In *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141 a company issued bonus debentures to its shareholders in 1953. The debentures were only redeemable at the insistence of the shareholders if the company became insolvent. The debentures were little more than redeemable preference shares and therefore the issue made no difference to the company or its assets until 1961, when the company redeemed the debentures and conferred a tax advantage on the shareholders. In the present case the scheme transferred the assets of ABCFS to Central, burdened with a debt of £472,000 payable to the shareholders on demand, thus conferring an immediate tax advantage.

In *Commissioners of Inland Revenue v. Cleary*⁽²⁾ [1968] AC 766 the taxpayer could have procured the payment of a dividend of £60,000. The taxpayer procured the receipt of £60,000 tax free and replaced the £60,000 in the hands of the company with shares worth £60,000. It was held that the taxpayers obtained a tax advantage. In the present case the taxpayer could have procured the payment of a dividend of £472,000. They procured the right to receive £472,000 tax free and they replaced that sum and substantially all other assets of ABCFS by a promise by Geltan to pay ABCFS £982,862. The taxpayers obtained a tax advantage.

The arguments of the Crown seem to me to give full and fair effect to the announced intention and to the express words of ss 460 and 461. The learned Judge in the Court below felt constrained to accept the constructions which the ingenuity of Mr. Beattie suggested on behalf of the taxpayers. In rejecting the submissions of Mr. Beattie I am fortified by the conviction that I am refusing to emasculate the effect of s 460, or to introduce irrelevant criteria, and that I am nullifying the effect of a scheme which, borrowing an expression from the House of Lords, I can moderately describe as a pantomime. In this case the pantomime is of a kind which would render the payment of tax a voluntary exercise by the ignorant, the conscientious, the idle and the generality of taxpayers.

I would allow the appeal.

Donaldson L.J.—There is a certain fascination in being one of the referees of a match between a well-advised taxpayer and the equally well-advised Commissioners of Inland Revenue, conducted under the rules which govern tax avoidance. These rules are complex, the moves are sophisticated and the stakes are high. This has been such a match and the relevant rules are those contained in ss 460 and 461 of the Income and Corporation Taxes Act 1970, discouragingly entitled “Cancellation of Tax Advantage for certain Transactions in Securities”. The essential moves have been described in the judgment of my Lord Buckley L.J. and I need not chronicle them again. The Crown seeks to justify its counteraction under s 460(3) by reference to the circumstances prescribed under paras C and D of s 461.

⁽¹⁾ 43 TC 396.

⁽²⁾ 44 TC 399.

A *Paragraph C.* The circumstances prescribed by para C involve the taxpayer (i) receiving a consideration of a specified kind; (ii) receiving that consideration in such a way that he does not pay or bear tax on it as income; and (iii) receiving that consideration in consequence of a transaction whereby some other person achieves certain specified advantages. The specified kind of consideration is

B “a consideration which either—(i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend, or (ii) is received in respect of future receipts of the company, or (iii) is, or represents the value of, trading stock of the company.”

The Crown relies upon the consideration received by the taxpayers from Excalibur upon their sale of the whole of the issued shares of the ABCFS companies. The sale took place on 3 April 1969 and the sale price was £471,998. However, only £150 was payable immediately, the balance being payable by yearly instalments, with a final payment of £441,898 on 3 April in the year 2170. Nevertheless, the Crown has taken counteraction as if the whole consideration was received by the taxpayers on 3 April 1969.

D The taxpayers take three points. First, they say that on any view only £150 was received before the end of the 1968–69 financial year and that accordingly only this sum can be taken into account. I do not accept this submission. On 3 April 1969 the taxpayers received a chose in action, namely contractual right to payment, which after the receipt of £150 was apparently worth £471,848 only eleven days later. There is no evidence that the value of this chose in action had increased over the period and I infer that it was worth £471,848 plus £150 when the shares were sold.

Second, the taxpayers say that the whole of the consideration must fall into one or other of the three categories. A small part of the consideration represented the paid-up capital of the companies and so did not fall into any of those categories. In my judgment, this does not matter. The consideration for the sale of any shares in a company will to some extent represent or reflect the paid-up capital of the company. If the taxpayer is right, Parliament can never have intended para C to apply to a sale of shares, yet the most superficial glance shows that it must have been so intended. Accordingly, the paragraph must be construed as requiring only that part of the consideration shall be of the specified kind. How much is of that kind is a matter which may affect the quantum of the counteraction which can be justified, but is not material to this appeal.

Third, the taxpayers contend that the consideration must fall into one or other of the categories, but cannot fall into more than one if the paragraph is to apply. In my judgment, despite the use of the words “either . . . or” in the paragraph, Parliament must have intended that the necessary consideration exists where it falls into more than one of the three categories. This paragraph is intended to be an anti-tax avoidance provision and must be construed as such. Yet if the taxpayers are right, the common case of a sale of shares of a company replete with assets available for distribution by way of dividend, of which the present appeal provides a good example, would escape the net whenever those assets consisted partly of trading stock. This cannot have been intended.

I The Crown then proceeds to allege that this consideration was received in circumstances in which the taxpayers did not pay or bear tax on it. This is

common ground. On the part of the Crown it is no doubt a matter for some regret; on the part of the taxpayer a matter for some satisfaction. A

This brings me to the third requirement, namely, so far as this appeal is concerned, that the consideration was received by the taxpayers "in consequence of a transaction whereby any other person subsequently receives . . . an abnormal amount by way of dividend". It is common ground that Excalibur received an abnormal amount by way of dividend when the companies paid it £555,000 on 13 April 1970. The issue between the parties concerns whether it can properly be said that the taxpayers received the consideration for the sale of their shares in consequence of a transaction whereby Excalibur received those dividends. Slade J., agreeing with the Special Commissioners, held that on the facts the Crown failed on this point. The Special Commissioners found as a fact that at the time of the sale of the shares the taxpayers personally knew nothing of any scheme that the five companies should pay such dividends, or indeed of any tax schemes to be carried out by Excalibur or those who controlled it. They also found that there was no scheme or undertaking to which the taxpayers or their agents were parties involving the payment of such dividends or indeed knowledge by them that this might happen. Finally, they accepted evidence that it was not known with any certainty until about a year after the sale of the shares that such dividends would be paid. On these facts both the Special Commissioners and Slade J. held that the Crown was unable to rely upon para C of s 461 and, in my judgment, they were right. B C D

Slade J. thought that two questions were involved. The first was "What was the transaction in consequence of which the taxpayer received the relevant consideration?" The second was "Did some other person *by* that same transaction receive an abnormal amount by way of dividend?" The learned Judge thus equated "whereby" to "by". He expressed the view that for the Crown to succeed the meaning of "whereby" in this context had to be "by means of", so that the second question would read "Did some other person *by means of* that same transaction receive an abnormal amount by way of dividend?" For my part, I doubt whether this is a material distinction. In so far as there is any difference "by" conveys direct instrumentality, whereas "by means of" conveys a somewhat wider concept which could include indirect instrumentality. But both involve some degree of instrumentality or causation. E F

I agree with the learned Judge that two questions have to be answered, but I think that they are two slightly different questions. The wording of the paragraph is somewhat convoluted, and for my part I think that the starting point of the inquiry is not the transaction under which the taxpayer received the relevant consideration, but that whereby the other person received the abnormal amount by way of dividend. My first question would therefore be "What was the transaction whereby" (or "by which" or "by means of which") "some person other than the taxpayer received the abnormal dividend?" My second question would be "Was the taxpayer's receipt of the relevant consideration a consequence of the transaction referred to in Question one?" I accept that the transaction whereby the abnormal dividend was received is not necessarily limited to the declaration of the dividend or to any instruction by Excalibur to the directors of the companies to declare it. But once it is found as a fact that for twelve months after the sale of the shares it was not known to anyone with any certainty that the abnormal dividend would be paid, it seems to me clear that the only connection between the receipt of the consideration and the transaction whereby the dividends were paid (however that transaction is delimited) was that Excalibur would not have received the dividends if it had not previously bought the shares from the taxpayers and G H I

A retained them until the time when the dividends were paid. The purchase of the shares and the associated consideration were conditions precedent to the receipt of the dividend, but there was no other connection. The distinction is between a sequential connection and a consequential connection. And para C of s 461 requires a consequential connection which is wholly absent in this case. Accordingly, in my judgment, the Crown cannot rely upon that paragraph.

B *Paragraph D.* By referring back to para C and forward to s 467(2)(a) and (b), sub-para (1) of this paragraph (that is, para D) which is the operative part, can be expanded into near intelligibility as follows:

C “That in connection with the distribution, transfer, realisation or application in discharge of liabilities of income, reserves or other assets of a sub-paragraph (2) company, the taxpayer received a consideration within the categories mentioned at (i), (ii) and (iii) in paragraph C(1) in circumstances which he did not pay or bear tax on it as income.”

D Although, for reasons which I have expressed, I consider that there was only an historical connection between the sale of the taxpayers’ shares and the distribution of profits by dividend, the same cannot be said of the companies’ disposal of their properties which took place in two stages within eleven days following the sale. The connection required by para D between that realisation of the assets of the companies and the receipt by the taxpayers of the consideration for the sale of their shares is clearly established. This leaves only the question of whether the companies were companies to which para D(2) applies. Although this is the only real issue between the parties under para D, it is crucial. Furthermore, it raises not only a point of construction but also the question of the onus of proof.

E The point of construction can be simply stated. Is the relevant time for purposes of classifying a company as a D(2) company that at which the taxpayer receives the consideration, or that at which the company distributes its profits (in the extended meaning of that phrase)? It seems to me that both the wording and the punctuation of the paragraph point inexorably to the fact that the relevant time is that at which the distribution takes place. The companies were D(2) companies when owned by the taxpayers, but, on the arguments deployed before the Special Commissioners, it was not necessary for them to make, and they did not make, any findings as to whether that status had changed by the time when the “distribution of profits” took place. This explains the importance of the onus of proof. The general burden of proof under ss 460 and 461 lies upon the Crown. If no evidence were called and no facts found, the Crown could not establish as a matter of law that it was entitled to take counteraction under s 460(3). There is an express transfer of this burden to the taxpayer in relation to the protection afforded to transactions for bona fide commercial reasons or in the ordinary course of making or managing investments (see s 460(1)), but no such express provision exists in relation to s 461. Nevertheless we were urged to construe para D(2) as placing this burden on the taxpayer because, it was said, the relevant information was in his possession rather than that of the Crown. The answer to this argument is that the Crown can call upon the taxpayer to provide information in the exercise of its powers under s 465. Furthermore, the relevant information may well only be in the possession of third parties, who can as easily be summoned to give evidence by the Crown as by the taxpayer. Accordingly, I am satisfied that the general burden of proof under para D(2) lies upon the Crown.

In the absence of further findings of fact, this is fatal to the Crown's claim that para D circumstances obtained. However, I must not be taken as being of the opinion that in reaching a decision on the application of para D the burden is always on the Crown. Such a conclusion would ignore the curious construction of D(2), which first provides that para D shall apply to companies which meet the criteria set out at (a) and (b) and then provides that nevertheless it shall not apply to some of those companies. In other words, proof of the first state of affairs produces a *prima facie* applicability of the paragraph, which can be rebutted by proof of the second state of affairs. The paragraph is silent on the burden of proof. Accordingly, the ordinary rule applies that he who must allege must prove. The Crown, which alleges that the paragraph applies, need only prove facts showing *prima facie* applicability. It is for the taxpayer to rebut that *prima facie* case. Applied to the facts of this appeal, it was for the Crown to prove that at the relevant time the companies were controlled by Excalibur and thus by not more than five persons. It was for the taxpayer to prove that Excalibur was itself not a D(2) company.

My conclusion that the Crown has failed to bring the case within either para C or para D of s 461 makes it unnecessary to express any view upon whether the Crown can show that the taxpayers have obtained a "tax advantage" within the meaning of s 460. However, since the point was fully argued, I will state my conclusion briefly. In approaching the construction and application of s 460 I think that it is important to remember what is its purpose and that it is subject to considerable safeguards. Its purpose is to counteract tax avoidance whilst preserving the right of the citizen so to order his affairs that he is not gratuitously exposed to a liability to income tax. The safeguards are two. First, it has no application where there was a bona fide commercial reason for undertaking the transaction, or it was undertaken in the ordinary course of making or managing investments, provided only that a main object was not to enable tax advantages to be obtained. Such transactions can be undertaken in the way which will attract the least tax. Second, the section has no application unless the Crown can prove that the circumstances prescribed in s 461 exist. These are very important safeguards and where, as in this case, a taxpayer is unable to take advantage of the first one, it is because he is indulging in a tax avoidance exercise as such and not carrying out an ordinary transaction in a tax economic way.

It is against that background that the Crown, the Commissioners and the Court have to undertake the classic comparative study explained by Lord Wilberforce in *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141, at page 178. And it is because of this background that it is a not unreasonable construction of the section that the comparison which it contemplates is not necessarily of like with like (see *Commissioners of Inland Revenue v. Cleary*⁽²⁾ [1968] AC 766). And again it is because of this background that I am unable to accept the submission made in this case that both in the case of the actual and the notional receipt by the taxpayer the cash must come directly or indirectly from the same source—in this case the ABCFS companies. A similar argument was put forward and rejected by Walton J. in *Commissioners of Inland Revenue v. Wiggins*⁽³⁾ [1979] 1 WLR 325. It seems to me that the most elementary form of tax avoidance consists of selling shares, whose value reflects in part the accumulated profits of the company available for distribution as dividends, to someone who is content that no dividend should be declared and that the assets of the company should be used in some other way. The vendor then receives cash from the purchaser of the shares constituting capital, instead of a cash dividend from the company constituting income.

(1) 43 TC 396, at p 441.

(2) 44 TC 399.

(3) 53 TC 639.

A This, in essence, is what happened in the present case. It is true that there are sophisticated embellishments. Thus the purchaser, Excalibur, or those who controlled it, thought that they could arrange that the ABCFS companies gave birth to a dividend without tax liability. Perhaps they were right. I know not, and it is not material. Again, the taxpayers thought that by selling for a consideration the payment of which was postponed, apart from token annual
B payments for a period of 200 years, they would escape capital gains tax. The tax advantage to which s 460 referred is of course an income tax advantage. Perhaps the taxpayers were right, but again that is irrelevant. What quite clearly was happening was that the taxpayers were so arranging their affairs that they received a sum taxable, if at all, only as a capital gain instead of being taxable as income. Subject to one point, to which I must now turn, this was a
C considerable tax advantage, and falls within the mischief at which the section is directed.

The taxpayers, however, submit that in so far as they obtained any advantage, it was an advantage limited to the £150 which they received in the 1968–69 fiscal year. Accordingly, if counteraction could be justified, it would only be in respect of the difference between £150 taxed as income and £150 tax free.
D In my judgment, the answer to this contention is that whilst in 1968–69 they actually obtained a tax advantage only to the extent of the tax on £150, they were in a position to obtain a tax advantage on a further £471,848, and it must be remembered that the section applies not only to advantages actually obtained, but to those which could have been obtained.

The factual basis of my conclusion is that which I noted in the context of
E para C, namely, that the contractual right to receive payment over 200 years with interest meanwhile was worth the full amount of the consideration less the £150 already paid, only eleven days later.

The legal basis of my conclusion is the plain meaning of the words of the section, which is not, I think, displaced by the decision of the House of Lords in *Commissioners of Inland Revenue v. Parker*⁽¹⁾ [1966] AC 141. There the
F taxpayers could not control the date when the debenture would be redeemed and the issue was whether the tax advantage arose when the debentures were issued or when they were redeemed. Lord Hodson (page 168⁽²⁾), dissenting, considered that the tax advantage was obtained when the debenture was issued, and Lord Morton of Henryton (page 164⁽³⁾) agreed with him. Viscount Dilhorne (page 163⁽⁴⁾) considered that the taxpayer received nothing by the
G issue of the debenture which could have been taxed in any other way, notwithstanding that he might have sold his rights under the debenture. The tax advantage was obtained on redemption. Lord Wilberforce (page 179⁽⁵⁾) reached a similar conclusion because “there was no way in which the company could issue paid up debentures of its own (the case might be different if they were debentures in another company) in such a way as to be taxable”. Lord
H Guest (page 173⁽⁶⁾) seems to have thought that the taxpayer was in a position to obtain the tax advantage upon the issue of the debentures and obtained it when the debentures were redeemed. The rights obtained by the taxpayers were rights against a third party and thus were equivalent to a debenture in another company. Accordingly, it seems likely that Lord Wilberforce, if faced with this problem in 1966, would have joined Lords Hodson and Morton in
I deciding that the tax advantage was obtained as soon as the taxpayers obtained

⁽¹⁾ 43 TC 396.

⁽²⁾ *Ibid.*, at p 436.

⁽³⁾ *Ibid.*, at p 433.

⁽⁴⁾ *Ibid.*, at p 432.

⁽⁵⁾ *Ibid.*, at p 442.

⁽⁶⁾ *Ibid.*, at p 438.

their rights against Excalibur. Indeed, after 1968 he might, perhaps, have concluded that the basis of his decision in *Parker's* case⁽¹⁾ was that like had to be compared with like, and that this basis had been destroyed by *Commissioners of Inland Revenue v. Cleary*⁽²⁾ [1968] AC 766, to which he was not a party. Lord Guest, it seems, would also have agreed. But whether this be right or wrong, I do not find any binding decision in *Parker's* case which is inconsistent with my conclusion. I am therefore satisfied that the taxpayers were in a position to receive a large tax advantage in the fiscal year 1968–69, in addition to the small advantage which they had in fact obtained.

However, as I am not satisfied that the Crown has brought itself within s 461, I would dismiss the appeal.

Buckley L.J.—Both the appeals will be dismissed.

Appeals dismissed, with costs. Leave to appeal to the House of Lords granted.

The Crown's appeal came before the House of Lords (Lords Wilberforce, Russell of Killowen, Scarman, Keith of Kinkel and Bridge of Harwich) on 14 May 1981 when judgment was given unanimously against the Crown, with costs.

D. K. Rattee Q.C. and *C. H. McCall* for the Crown.

C. N. Beattie Q.C. for the taxpayers.

The following cases were cited in argument in addition to those referred to in the speeches:—*Commissioners of Inland Revenue v. Parker* 43 TC 396; [1966] AC 141; *Cleary v. Commissioners of Inland Revenue* 44 TC 399; [1968] AC 766; *Anysz v. Commissioners of Inland Revenue* 53 TC 601; [1978] STC 296; *Commissioners of Inland Revenue v. Wiggins* 53 TC 639; [1979] 1 WLR 325; *Williams v. Commissioners of Inland Revenue* 54 TC 257; [1980] 3 All ER 321; *W. T. Ramsay Ltd. v. Commissioners of Inland Revenue* 54 TC 101; [1981] 2 WLR 449; *Emery v. Commissioners of Inland Revenue* 54 TC 607; [1981] STC 150.

Lord Wilberforce—My Lords, this case arises under ss 460–468 of the Income and Corporation Taxes Act 1970, a group of sections passed in order to deal with certain types of tax avoidance. These include, broadly, transactions by which individuals holding shares in companies having accumulated profits obtain the equivalent of such profits in a form which does not expose them to income tax. The Crown is empowered in such cases to counteract this “tax advantage” by assessing the individual to income tax. This they have done as regards the respondent, Mr. Garvin, for a sum of £235,949 in respect of the year of assessment 1968–69. Mr. Garvin has appealed against this assessment and he has been successful in all instances up to this House.

The Crown's claim is directed to sums arising under a tax avoidance scheme devised and provided for the respondent by Mr. Bradman, a well-known practitioner in this business. Mr. Garvin, together with two other

(¹) 43 TC 396.

(²) 44 TC 399.

A gentlemen, owned all the share capital in five companies, referred to in the proceedings as ABCFS, which companies owned valuable freehold and leasehold properties capable, if sold, of producing substantial distributable profits. The object of the scheme was to make these profits or part of them available to the shareholders in a tax-free form. The scheme was complicated and involved 25 transactions. Many of these, consisting of circulating money
B round a number of companies in which the taxpayers had no interest, were of concern only to Mr. Bradman and his associates. Those which concerned the taxpayers were summarised by Buckley L.J. in his judgment in the Court of Appeal⁽¹⁾. As I cannot improve upon it, I reproduce this summary verbatim:

“The salient features are that immediately before 3 April 1969 Mr.
C Garvin, Mr. Rose and Mr. Rose’s brother between them owned all the shares in five companies referred to in the Case as ABCFS. On 3 April 1969 they sold all the shares in those five companies to a company called Excalibur, in which they had no interest, for £471,998 payable by 200
D yearly instalments of £150 and a final instalment of £441,898 payable on 3 April 2169 with interest at 10¼ per cent. per annum on the amount from time to time outstanding in the meantime. ABCFS owned freehold and leasehold properties of substantial value, on the realisation of which
E substantial profits could have been obtained which would have been available for distribution by way of dividends. These sales were the first step in an admitted scheme comprising the transactions numbered 1 to 8 in annexure 2 to the Case and a loan of £472,000 by the three vendors to a company called Central, of which they were the only shareholders. Paragraph 5(3) of the Case contains the following important findings by the Special Commissioners: ‘At the time of the sale the directors of Excalibur intended that the properties owned by ABCFS should be sold. Pursuant to the admitted scheme both they and the three (vendors) hoped and expected that the latter would reacquire the properties but there was
F no agreement to that effect. At the time of the sale of the shares the directors of Excalibur had not decided whether to procure the payment of a dividend by those companies: it remained an open question for about a year—a decision being reached only in the spring of 1970 when a dividend was paid. . . None of the three (vendors) was aware at the time of the sale of his shares of any tax avoidance scheme intended to be carried out by the purchaser and no such scheme was discussed between the purchaser and the professional advisers of the three (vendors). But we infer from the amount of the sale price that the professional advisers knew that Excalibur intended in some way to avoid corporation tax.’ On 8 April 1969 ABCFS leased all their properties to a company called Geltan for the term of 999 years for premiums amounting to £982,862 payable by small instalments over 997 years and a very substantial final instalment payable in April
H 2968 with interest in the meantime at 10¼ per cent. per annum on the balance from time to time outstanding. Each lease, however, contained a break clause under which the lessee could determine the lease at the end of 49 years of the term. This was intended to avoid a liability to corporation tax. On 14 April 1969 ABCFS sold the reversions on the leases to a company called County in consideration of £100 payable to each of the five companies. On the same day Geltan sold and assigned the leases to County for valuable consideration, thus effecting a merger of the long leasehold terms. County on the same day sold the properties, free from the leases, to Central for £989,095. Also on 14 April 1969 Excalibur for consideration
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(1) Pages 60–1 *ante*.

assumed the obligation to pay the instalments of the premiums due to ABCFS, and a company called Greave, out of moneys lent by Excalibur, bought from Mr. Garvin, Mr. Rose and Mr. Rose's brother the right to receive the instalments of the purchase price of the shares at the price of £471,848. Central borrowed the £989,095 as to £472,000 from Mr. Garvin, Mr. Rose and Mr. Rose's brother and as to £517,095 from other sources. In the outcome (a) Mr. Garvin, Mr. Rose and Mr. Rose's brother sold their shares in ABCFS to Excalibur for £471,998 payable by instalments, which were converted into £471,848 received from Greave; (b) ABCFS sold their properties for £982,862, payable by instalments, and £500 paid for the reversions; (c) Central bought all the properties for £989,095, part of which was provided by Mr. Garvin, Mr. Rose and Mr. Rose's brother lending £472,000 to Central. Before the inception of the scheme Mr. Garvin, Mr. Rose and Mr. Rose's brother owned ABCFS, who owned all the properties, but Mr. Garvin, Mr. Rose and Mr. Rose's brother could not get any money out of ABCFS except by way of dividends which would attract tax. At the close Mr. Garvin, Mr. Rose and Mr. Rose's brother owned Central who owned all the properties; ABCFS no longer owned any of the properties, but had received £983,362 for them, payable mainly by very small instalments and a long delayed final payment; Mr. Garvin, Mr. Rose and Mr. Rose's brother were creditors of Central in a sum of £472,000 which they could recover from Central on demand and which Central would or could raise out of the properties. The only transactions comprised in the scheme to which Mr. Garvin, Mr. Rose and Mr. Rose's brother were parties, either directly or through Central, were (1) the sale of the shares, (2) the sale to Greave of the right to the instalments of the purchase price, (3) the purchase by Central of the properties, and (4) the loan to Central, but they were participants in the scheme as a whole."

The companies called "Excalibur", "Geltan", "County" and "Greave" were owned or controlled by Mr. Bradman. On 13 April 1970 (viz. about a year later) Excalibur caused ABCFS, which were then wholly owned by Excalibur, to pay dividends amounting to £555,000 to Excalibur. These dividends were made exempt from income tax by s 256 of the Act, and were admittedly abnormal dividends. The Crown's assessment relates to the above-mentioned sum of £471,848, i.e. the sum paid by "Greave" to the taxpayers for the instalments of the purchase price of the shares in ABCFS: the taxpayer's share of this was £235,949. It is based, in the alternative on two of the "circumstances" stated in s 461 of the Act, namely, C or D.

I will deal first with D, since this can be shortly disposed of. The condition for the application of D is that the taxpayer shall have received consideration of a specified kind (and it is not disputable that he did) "in connection with the distribution of profits" of (relevantly) a company under the control of not more than five persons. Distribution of profits is elsewhere (s 467(2)) defined so as to include realisation of assets. The question is as to the date at which the company must be under the control of not more than five persons. The Crown contends that it is sufficient if this control exists at any time in the period covered by the relevant transactions. If this is right, the condition would be satisfied, since it could be applied to ABCFS, all of which were initially controlled by the three taxpayers. The taxpayer on the other hand says that the control must be shown to exist at the date when either there is a distribution of profits or a realisation of assets. If this is so, then the relevant company would be Excalibur. There is, however, no evidence that Excalibur was controlled by not more than five persons, and in the absence of such evidence the Crown must fail. In my opinion, the taxpayer is right on this point. The language

A is plain. The words “in connection with the distribution of profits of a company. . .” must contemplate distribution by that company (and similarly as to realisation of assets), and so inevitably a state of control at that date. It is impossible to relate them to the receipt of the consideration or to any other transaction. I think, therefore, that the claim under para D must fail.

I deal next with para C. In order for the Crown to succeed, it is necessary
B to show that the taxpayer received, in consequence of a transaction whereby Excalibur subsequently received an abnormal amount by way of dividend, a consideration of a specified type, and so received it that he did not pay tax on it as income. It is clear that the taxpayer did receive a consideration of the type specified (*sic* in the purchase price for the shares in ABCFS), that he so received it as not to pay tax on it as income, and that Excalibur did, on 13 April
C 1970, receive an abnormal amount by way of dividend from ABCFS. The first question to ask, then, is what, if any, was a transaction whereby Excalibur received the dividend. Then the second question is whether the taxpayer received the consideration in consequence of that transaction. I do not think that the word transaction can be limited to the immediate cause of the dividend being received, viz. the declaration of the dividend by ABCFS, even if it is
D grammatically capable of bearing such a meaning (see *Greenberg v. Commissioners of Inland Revenue*⁽¹⁾ [1972] AC 109). The word must be capable of including some anterior step in the scheme which led to the declaration being made. The connection between that step and the declaration of the dividend is denoted by “whereby”. This must be the equivalent of “by which” and must connote some causal connection, though—and here I agree with Buckley
E L.J.—this may be of a fairly loose character.

There are only two possible transactions which can be considered as qualifying, namely, (i) the sale by the taxpayer of his shares to Excalibur, or (ii) the realisation by ABCFS of their properties. The first put Excalibur in a position, if and when it so decided, to cause dividends to be declared: the second provided ABCFS with the resources with which to declare and pay
F them. Each of these transactions took place in April 1969, a year before the dividends were declared. Obviously each was something *sine qua non* the declarations would have been made: but is the connection closer than that? I find this a difficult question, but on the whole I come to the conclusion that the majority of the Court of Appeal were right in holding that it is not. I accept, as one must, the finding of the Special Commissioners, that in April 1969 the
G directors of Excalibur had not decided whether to procure the payment of a dividend by ABCFS: “it remained an open question for about a year”. Mr. Bradman and his associates had, no doubt, their own preoccupations as regards tax, and it is clear from an examination of the intervening transactions from April 1969 to 13 April 1970, which were numerous, that a number of decisions had to be made and inter-company adjustments effected before the distribution
H was ultimately made. I cannot detail them, but they are set out in tabular form in exhibit 2 to the Case Stated. From these I feel forced to the conclusion that there is not sufficient connection between either of the events of April 1969 and the declaration of the dividends to satisfy the words “a transaction whereby” even giving a wide meaning to “whereby”. I would add that if I had found it possible to decide that the sale of the shares in ABCFS or the realisation
I of their properties was such a transaction, I should not find much difficulty in reaching the conclusion that the taxpayer received his consideration (substantially on 14 April 1969) in consequence of that transaction, but, on

(¹) 47 TC 240.

the view which I take, this becomes immaterial. In my view, therefore, the Crown fails on para C as well as on para D, and this entails failure of the appeal. A

This makes it unnecessary to decide whether, if either paragraph applied, the taxpayer obtained any tax advantage in the year of assessment 1968–69 (as claimed) other than £150, or any tax advantage at all. However, on the latter point I think it right to express agreement with the conclusion of the Court of Appeal that the taxpayer did, in whichever year, obtain a tax advantage, and disagreement with the argument for the taxpayer that he did not obtain a tax advantage because he never contemplated taking a (taxable) dividend. To limit s 460 in this way would be to emasculate it. Finally, I must comment on one other matter. The relevant sections were first enacted by the Finance Act 1960, i.e. before the creation of the capital gains tax in 1965, and were therefore drafted without regard to possible cumulation of these two taxes. In the present case, it is clear that a charge to capital gains tax might arise. In fact, the taxpayer has been assessed for capital gains tax as regards the sale of his shares. To charge the proceeds of these shares with capital gains tax as disposals of capital assets and also with income tax under s 460, amounts to manifest double taxation—indeed, the total amount chargeable would exceed the amount which the taxpayer received. We were told that, by way of concession, if the Crown succeeded in the present appeal, it would give credit for the capital gains tax paid. This would certainly be fair, but it is not satisfactory that the matter should rest on concession. The interaction of those two taxes seems to require consideration with a view to avoiding double taxation, which should be a right and not merely a privilege. B
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I would dismiss the appeal.

Lord Russell of Killowen—My Lords, others of your Lordships, in agreeing upon dismissal of this appeal by the Crown, have set out the facts of this case in a manner which enables me to be brief. At the outset I would remark that the very multiplicity of transactions, in most of which the taxpayers were not participants, and the apparently nonsensical introduction of moneys payable by relatively small instalments with a final large instalment payable well into the next century, tend to raise suspicions in the mind: but their transactions had as their aim the minimising of corporation (capital gains) tax by a method then successful but subsequently made unsuccessful by later legislation. They do not assist in the solution of this appeal. F

What is required to enable the Crown to take the counteraction which it sought to do in this case? (1) There must be a transaction in securities: this requirement is satisfied by the sale to Excalibur by the taxpayers of the shares in ABCFS companies: and—(2) as a consequence of that transaction the taxpayer is in a position to obtain or has obtained a tax advantage: and—(3) that the circumstances set out in either para C or para D of s 461 exist: and—(4) the tax advantage is such as is defined in s 466 “a relief or increased relief from . . . or the avoidance of a possible assessment [to tax], whether the avoidance . . . is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them. . . .” These references to tax are on income—i.e. to income tax. Such profit as the taxpayers made on the sale to Excalibur of ABCFS would (apart from successful counteraction) be liable only to capital gains tax: and indeed they were assessed on that basis and paid accordingly. To that I will recur. G
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- A I turn at once to consideration of circumstances C and D. If neither embraces the facts in this case that is the end of the Crown's case for counteraction. Under para D the following are the requirements: (i) The taxpayer receives a consideration which either is or represents the value of assets of a company which are available for distribution by way of dividend or is or represents the value of trading stock of the company: the consideration for the sale of the ABCFS shares to Excalibur would fall under one or other of those heads. (ii) The receipt of the consideration must be "in connection with the distribution of profits of a company to which" para D applies—i.e. as a convenient label, a close company. On the facts of this case there can be no doubt that each of them, ABCFS, was a close company when their shares were held by the taxpayers: and I would be prepared to find that there was a "connection" of some sort between the receipt of that consideration and the declaration some time later of the abnormal dividends by those companies. But there is no evidence to show that, at the time of the declarations of dividends, ABCFS were close companies, that question depending on the "make up" of Excalibur. The question must, in my opinion, clearly fall to be resolved in the light of the situation at the time of the distribution of profits, and the Crown adduced no evidence on the point, no doubt because the Crown before the Commissioners never thought of relying on para D. Thus the Crown fails on para D.

- The other circumstance said by the Crown to exist is para C. The requirements of that paragraph are these—(i) The taxpayer receives a consideration which I have summarised under my reference above to D (i). (ii) The receipt of that consideration must be "in consequence of a transaction". (iii) The transaction in question must be "a transaction whereby any other person subsequently receives . . . an abnormal amount by way of dividend". The transaction here in consequence of which the taxpayer received the relevant consideration was the sale of the ABCFS shares to Excalibur. The sole question is whether that transaction was a transaction "whereby" Excalibur subsequently received the abnormal amounts by way of dividend from ABCFS. What is intended by "whereby"? I believe the word to be primarily a version of "by which": it can also be used in the sense of "by means of which". But to treat the word as introducing the concept that all that is required is that the transaction should be a *causa sine qua non* of the subsequent abnormal dividend goes in my opinion too far. Counsel for the Crown was unwilling to say that it could be followed through a succession of sales by Excalibur of the shares and by subsequent purchasers of the shares to a final abnormal dividend reaped by some final purchaser. In the instant case it was no part of the transaction, so far as the taxpayers were concerned, that these abnormal dividends should be distributed: and indeed the evidence was accepted that Excalibur itself at the time of the transaction had not decided at all on such a dividend. The fact that the taxpayers' advisers may well have thought that some saving of corporation tax was a possibility can be referred to the attempt (which largely failed) to spread out consideration for corporation (capital gains) tax purposes. All in all, my Lords, I am of opinion that "whereby" is not satisfied in the present case, and would reject the Crown's case under para C. The result is that the appeal must fail.

- I I do not propose to enter upon the "tax advantage" point, on which I incline to agree with what has fallen from your Lordships. I have previously referred to the fact that the taxpayers have been assessed to capital gains tax—and have paid it—on the consideration received on the sale to Excalibur of the shares in ABCFS. The Crown say that if they were successful in this appeal

they would as a concession bring the amount so paid into credit against the attempted counteraction. However “fair” that would have been I doubt whether such a concession could have been made. After all, the capital gains tax has been levied and paid, and remains perfectly valid. Rather do I venture to doubt the ability of the Crown (according to the taxpayer’s case to this House), having levied a tax on the basis that the transaction was a dealing in capital, then to assert that it can indirectly, by counteraction, be treated as giving rise to taxable income. But no argument was advanced for the taxpayers that the Crown was debarred from thus blowing hot and cold—or perhaps I should say warm and hot—and I say no more on this. I have referred sometimes to “the taxpayers” and sometimes to “the taxpayer”. The appeal concerns only one taxpayer, but the others are in like case. Accordingly I would dismiss the appeal.

Lord Keith of Kinkel—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Wilberforce. I agree with it, and would accordingly concur in the dismissal of the appeal.

Lord Scarman—My Lords, I agree with the speech delivered by my noble and learned friend, Lord Wilberforce. I am troubled by the “double taxation” aspects of the case, to which my Lord refers at the very end of his speech. It is unclear whether the law as it now stands authorises the cumulation of capital gains tax and income tax on the one receipt: and the House heard no argument on the point. The Crown, it seems, takes the view that it does not: the taxpayer alleges that it does. I express no opinion. But, if the taxpayer be right, the law is anomalous.

The figures are disturbing. The assessed income tax and surtax total £214,681·51. If the capital gains tax already paid is added, the total tax exigible would exceed the receipt (£235,941) upon which it is charged. The Crown, very properly, has disclaimed an intention to insist on the payment of the full amount of the income tax in addition to the capital gains tax already paid. But this is a precarious, and therefore unacceptable basis, for the avoidance of double taxation. Those who use the services of an “inventor and purveyor of tax avoidance schemes” (Templeman L.J.’s phrase) can expect no mercy: but they are entitled, like the rest of us, to justice. If the law is such that they are put at the mercy of the Crown (who, through its agent, the Board of Inland Revenue, may, or may not, feel disposed to make a concession), they are denied justice at the hands of the court. I would surmise that, when the capital gains tax was introduced in 1965, its relationship with the income tax avoidance provisions, which s 28, Finance Act 1960, had introduced into the law, was not fully appreciated. Prior to 1965 a capital gain was not taxable. If, therefore, income could be transmuted into a capital gain, no tax was then payable. Since 1965 both types of receipt are taxable: hence the risk, which this case shows is a real one, of double taxation. The law requires review so that the possibility of double taxation is unambiguously excluded. I would dismiss the appeal.

Lord Bridge of Harwich—My Lords, the facts arising for consideration in this appeal are set out in the speech of my noble and learned friend, Lord Wilberforce. I respectfully agree with him that, for the reasons he gives, the Crown cannot successfully invoke the provisions of para D of s 461 of the Income and Corporation Taxes Act 1970, as applicable to the circumstances of this case.

A I have been much troubled by the problem that arises on the construction of para C of s 461. Sub-paragraph (1) of that paragraph provides, so far as material:

“That the person in question receives, in consequence of a transaction whereby any other person—(a) subsequently receives, or has received, an abnormal amount by way of dividend; or (b) . . . a consideration which either—(i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend, or (ii) . . . (iii) is, or represents the value of, trading stock of the company, and the said person so receives the consideration that he does not pay or bear tax on it as income.”

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C It is now well established that the provisions of ss 460–468, being aimed at “the multiplicity of ingenious schemes which are constantly being devised to evade taxation”, should not be construed on the principle that the subject is not to be taxed except by plain words but by giving such a wide interpretation to the language used as may be necessary to give effect to the evident intention of Parliament: see *Greenberg v. Commissioners of Inland Revenue*⁽¹⁾ [1972] AC 109, *per* Lord Reid at p 137; *Commissioners of Inland Revenue v. Joiner*⁽²⁾ [1975] 1 WLR 1701, *per* Lord Wilberforce at pp 1705–6.

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E I do not think it is very difficult to visualise the kind of tax avoidance scheme at which the language of para C which I have quoted above is directed. A and B (“the persons in question”), individual income tax and surtax payers, between them hold all the shares in company X, which has large undistributed profits available for distribution by way of dividend. If X pays a large dividend to A and B, they will incur heavy liabilities to income tax and surtax. If they can find a buyer, company Y (“any other person”), which will be in a position, for one reason or another, having acquired company X, to extract the profits in the form of an abnormal dividend without incurring any tax liability, they may be able to sell their shares for a price which substantially represents the value of the undistributed profits. This will be a capital receipt which, apart from
F para C of s 461 and assuming that no other paragraph of the section applies, will attract no liability to income tax or surtax in the hands of A and B. If the quoted provisions of para C can never apply to counteract the tax advantage which A and B obtain in such circumstances as I have indicated, I find it difficult to see how they serve any useful purpose at all in the scheme of the Act.

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H If I have correctly identified the statutory target, how can the statutory language be construed to give it the intended effect? The difficulty arises from the use of the words “transaction” and “whereby”. In my example, if “transaction” is given its ordinary meaning, the sale by A and B of their shares in company X to company Y is one transaction, the declaration and payment of an abnormal dividend by company X to company Y is quite another. In the context in which it is used in para C, I do not think it is possible to construe the word “transaction” as equivalent to “series of transactions”, or to stretch its meaning to embrace both the sale of shares and the subsequent payment of a dividend in a single transaction. This would introduce more problems than it would solve. If the reasoning is sound so far, it must follow that

⁽¹⁾ 47 TC 240, at p 272.

⁽²⁾ 50 TC 449, at p 480.

“whereby” cannot be used in its narrowest sense, since, on that reading, the only transaction whereby Y receives the abnormal dividend, would be the declaration and payment of the dividend itself. Accordingly, “whereby” must at least be wide enough to denote some kind of causal connection between the transaction of sale and purchase of shares in X, in consequence of which A and B receive a tax-free consideration of the kind to which para C applies, and the subsequent receipt of an abnormal dividend by Y. The kernel of the problem is to determine what kind of causal connection is contemplated. It cannot, in my opinion, be required that one should find that the receipt of the abnormal dividend is a necessary consequence of the share transaction, for this requirement could seldom, if ever, be satisfied. I was at one time much attracted to the view that there was a sufficient causal connection if the purchase of the shares by Y enabled Y to procure the subsequent payment of an abnormal dividend by X. But on further reflection I appreciate that this would make the liability of A and B potentially dependent on an event which was outside their knowledge or control. This can hardly have been intended. Counsel for the taxpayer submitted that the taxpayer could not be liable under para C unless he was a “party” to payment of the abnormal dividend. I do not accept this formula, but I accept, at least in part, what I take to be the idea underlying the submission. To revert to the characterisation used in my example, to establish that the sale of shares by A and B to Y was a transaction “whereby” Y subsequently received an abnormal dividend, it would be necessary, in my opinion, to show that Y’s purpose or one of Y’s purposes, in purchasing the shares was to procure in due course the payment of an abnormal dividend by X to Y, and that A and B were, at the time of the sale, aware of this purpose. These are, of course, matters which will seldom be susceptible of direct proof but will often be plain by inference from circumstances.

In the instant case the Special Commissioners were specifically invited to draw just such inferences as would have satisfied the criteria of causation which I have suggested above, and, perhaps surprisingly, but equally specifically and emphatically, declined to do so. It has never been suggested that the Commissioners’ findings in this regard were open to challenge on appeal. It follows, in my view, that the Crown’s case under para C of s 461 fails. Had the Crown been able to show that para C of s 461 applied, I should have had no doubt that a “tax advantage”, as defined in s 466, was obtained. It is unnecessary to express any opinion on the difficult question as to whether that advantage (leaving aside the instalment of £150 paid on 3 April 1969) was obtained in the fiscal year 1968–69 or 1969–70.

As my noble and learned friend, Lord Wilberforce, has pointed out, the respondent has paid capital gains tax on the gain accruing upon the sale of his shares in ABCFS to Excalibur. The Crown accepted that if they succeeded in this appeal they should give credit against the liability to income tax and surtax for the capital gains tax paid. No issue of estoppel was raised, but it is not clear whether the Board of Inland Revenue’s willingness to treat the taxpayer’s liability in respect of the same receipt to capital gains tax on the one hand and to income tax and surtax on the other hand as alternative rather than cumulative is regarded by them as a matter of concession or a matter of right. I agree with others of your Lordships who have expressed the view that it would be most unsatisfactory that the avoidance of such double taxation should be dependent on a concession. If any doubt on the point is removed by statute, so much the better. But, if an attempt were to be made to levy both taxes in respect of a single receipt—a contingency which can, I hope, be regarded as

A remote—I can see a powerful argument being mounted to the effect that, if a receipt falls to be treated as income and taxed as such under one code, it must, by necessary implication, be exempt from liability to taxation as a capital receipt under another code. I would dismiss the appeal.

Appeal dismissed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Berwin Leighton.]

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