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James v. Pope (H.M. Inspector of Taxes)

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*Income tax, Schedules D and E—Back duty—Fraud or wilful default—Unexplained increases of capital—Whether prima facie case of wilful default—Income Tax Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 10), s. 47(1) proviso.*

B

*The Appellant carried on an ironmongery business for many years until 31st October 1956, when it was transferred to a family company of which he was a director until 1961. In 1965 on his instructions his then accountant informed the Inspector of Taxes that the profits of the business might have been understated. Capital statements prepared with the co-operation of another accountant appointed by the Appellant in 1966 showed that in the years 1946–47 to 1960–61 he had received a total of some £14,000 the source of which had not been explained. The Appellant had had a minor stroke in 1964, and his physical and mental condition rendered him unfit to attend an appeal meeting. Both accountants stated that they had found him most co-operative but that owing to ill-health he had difficulty in recollecting past events.*

C

*On appeal against assessments made out of time under Schedule D for the years 1946–47 to 1956–57 in respect of his ironmongery profits and under Schedule E for the years 1956–57 to 1960–61 in respect of his remuneration from the company, the Appellant contended, inter alia, that the onus of establishing fraud or wilful default for each year of assessment was on the Revenue and had not been discharged, and that there was no evidence that the amounts in question represented taxable income or, so far as assessed under Schedule E, had been voted to him by the company as remuneration. The General Commissioners found that there had been wilful default on the part of the Appellant for each of the years in question.*

D

E

*Held, (1) that in the circumstances no inference could be drawn from the failure of the taxpayer's recollection after 1964, but subject to that the case had to be decided on the evidence as it stood at the time of the decision; (2) that the Commissioners' decision was justified.*

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*Hudson v. Humbles (1965) 42 T.C. 380 considered and explained.*

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CASE

Stated under the Taxes Management Act 1970, s. 56, by the Commissioners for the General Purposes of the Income Tax for the Division of Kemes in the County of Pembroke for the opinion of the High Court of Justice.

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1. At a meeting of the Commissioners for the General Purposes of the Income Tax acting in and for the Division of Kemes in the County of Pembroke held at the Guildhall, Cardigan, on 6th, 7th and 8th May 1970, William Herbert

A James (hereinafter called "the Appellant"), of Highbury, 41 Mags Barrow, West Parley, Ferndown, Dorset, appealed against the following additional assessments to income tax made upon him under Schedule D of the Income Tax Acts:

	<i>Year of assessment</i>						<i>Profit as ironmonger</i>
							£
B	1946-47	..	..	..	..	..	5,000
	1947-48	..	..	..	..	..	5,000
	1948-49	..	..	..	..	..	5,000
	1949-50	..	..	..	..	..	5,000
	1950-51	..	..	..	..	..	5,000
C	1951-52	..	..	..	..	..	5,000
	1952-53	..	..	..	..	..	5,000
	1953-54	..	..	..	..	..	5,000
	1954-55	..	..	..	..	..	5,000
	1955-56	..	..	..	..	..	5,000
	1956-57	..	..	..	..	..	5,000

D And against the following assessments to income tax made upon him under Schedule E of the Income Tax Acts:

	<i>Year of assessment</i>						<i>Remuneration</i>
	1956-57	..	..	..	..	..	£500
	1957-58	..	..	..	..	..	£1,000
E	1958-59	..	..	..	..	..	£1,000
	1959-60	..	..	..	..	..	£1,000
	1960-61	..	..	..	..	..	£1,000

2. The questions for our determination were as follows:

(i) Whether certain moneys amounting to £14,869 or any part thereof were (so far as the Schedule D assessments were concerned) profits or gains of the Appellant's trade of ironmonger or (so far as the Schedule E assessments were concerned) remuneration arising to the Appellant as director of a company known as W. H. James & Son Ltd.;

(ii) whether any form of fraud or wilful default had been committed by or on behalf of the Appellant within the meaning of the proviso to s. 47 (1) of the Income Tax Act 1952 or alternatively (in relation to the assessments under Schedule E) whether he had been guilty of neglect within the meaning of s. 51 of the Finance Act 1960.

3. The Appellant did not attend the hearing but was represented by Mr. Graham Aaronson of Counsel. Evidence was put before us (which we accepted) that the Appellant's physical and mental condition rendered him unfit to attend.

4. (i) Apart from the medical evidence the following persons gave evidence before us: Mr. T. S. Wilson F.C.A. ("Mr. Wilson"), a partner in Peat, Marwick, Mitchell & Co., chartered accountants; Mr. M. J. Burridge A.C.A. ("Mr.

Burrige”), of Wheatley, Pearce & Co., chartered accountants; Mr. V. K. Robinson, a Senior Inspector of Taxes in the Inland Revenue Enquiry Branch. A

(ii) Seven bundles of documents marked A–F and H were also exhibited before us as follows:

A—General correspondence;

B—Accounts and related correspondence;

C—Returns of income and correspondence;

D—Messrs. Wheatley, Pearce & Co.’s report of 1st October 1968 and associated documents; B

E—Capital statements;

F—Bank documents;

H—Loan account between the Appellant and W. H. James & Son Ltd.

Such of the documents as are not attached to this Case are available for inspection by the Court. C

5. We accepted as proved the following evidence given by Mr. V. K. Robinson:

(i) The Appellant had for many years carried on his own ironmongery business at Crymmych, Pembrokeshire, until 31st October 1956, when a family company called W. H. James & Son Ltd. (“the company”) was formed, in which the Appellant was a director and the holder of 6,000 out of 15,000 shares issued by the company, the other shareholders being his wife, son and daughter. D

(ii) At all material times until March 1966 the accounts, first of the business and later of the company, were prepared by Mr. Wilson. Mr. Wilson had acted first on his own account and then as a partner in a firm which was subsequently amalgamated with his present firm. After March 1966 Mr. Burrige dealt with the Appellant’s tax affairs. E

(iii) In 1951 and 1953, at the request of the Revenue, the Appellant certified to the Revenue that no part of his business receipts for the three years to 31st August 1949 had been diverted to any private bank accounts, either of himself, his wife or his children, which had not been disclosed to Mr. Wilson, his accountant. F

(iv) In June 1953, at the request of the Revenue, the Appellant certified to the Revenue that he had provided the Revenue with a list of all banking accounts in the name of himself, his wife or his nominees (exhibit B40). That list did not appear to include a private current account at Lloyds Bank Ltd., Cardigan.

(v) In September 1965 (exhibit A15) Mr. Wilson, on the instructions of the Appellant, disclosed that certain moneys received by the Appellant in 1950 may have included business takings which may not have been included in the accounts submitted to the Revenue for taxation purposes. G

(vi) In November 1965 (exhibit A17) Mr. Wilson sent to the Revenue a copy of a private current account of the Appellant at Lloyds Bank Ltd., Cardigan, showing cash lodgments totalling £4,500 in 1950 and cheques totalling £1,900 in 1956. No explanation as to the source of these sums had been given to the Revenue then or at any other time. H

(vii) With the co-operation of Mr. Burrige the Revenue prepared capital statements for the period 1946 to 1961 (exhibit E). From these statements it can be inferred that the Appellant had received during that period a total sum

A of £14,869 the source of which had not been explained. Certain adjustments had, however, subsequently been made without prejudice, reducing the total to £12,299.

6. We accepted as proved the following evidence of Mr. Wilson:

B (i) The Appellant adopted a single-entry bookkeeping system. This system was normal for the area, double-entry bookkeeping being exceptional. The single-entry system, although quite accurate, was by its nature prone to some degree of error. An error of 0.3 per cent. on a turnover of £100,000 (i.e. £300) was reasonable and might be unnoticed. An error of 1 per cent., however, should show up. Although one might expect the error to go both ways and cancel itself out, it was quite possible that the error might go predominantly one way. It depends on precisely how the error came about.

C (ii) The accuracy and completeness of accounts depended upon the records kept. The Appellant's records would be classed as incomplete. This, however, was quite normal in that type of business in that area of the country. In view of the searching enquiries made by the Revenue in the early period covered by the assessments he had made through tests of the records and had found them correct, and he was satisfied in submitting each set of accounts to the Revenue D that they were accurate.

(iii) In submitting the Appellant's accounts he was unaware of the existence of the private current account at Lloyds Bank Ltd., Cardigan, and he would not have submitted the accounts if he had been so aware without investigating the origin of the sums therein. Had he been aware of that bank account, he would have assumed the business accounts to be incomplete, but not reckless E or fraudulent.

(iv) The list of the Appellant's bank accounts submitted to the Revenue in June 1963 had been drawn up by Mr. Wilson and written by him in his own hand. While he himself was not aware of the Lloyds Bank personal current account at Cardigan, and did not intend to include such an account in the list, he agreed that the first entry relating to Lloyds Bank accounts was ambiguous F and could have been taken by the Appellant to include the personal current account.

(v) The letters of disclosure in 1965 had been made by Mr. Wilson with the Appellant's full consent.

G (vi) Despite thorough investigations, the origin of the Lloyds Bank private current account moneys (i.e. £4,500 in 1950 and £1,900 in 1956) could not be traced. Throughout the investigation into this the Appellant had offered the fullest co-operation, but he was unable to recollect the events of 1950 and 1956. The Appellant was at that time, in 1965, in failing health.

(vii) Generally, in his practice he tended to sense fraud or recklessness. Throughout the period of the assessments in this case he had sensed nothing of that nature.

H 7. Mr. Burridge, a partner in the firm of Wheatley, Pearce & Co., chartered accountants, Poole, also gave evidence, and we accepted the following as proved:

(i) Throughout the period since 1965, when he started to act for the Appellant, he found the latter to be most co-operative. The Appellant, due to his ill-health, had difficulty in recalling events of many years ago.

I (ii) The Appellant had refused to agree that a sum of £500 lodged in his wife's account was a gift. Although such an agreement would have been to his benefit, the Appellant would not make a statement to that effect because he was unable to recall if it was true.

(iii) An error of 0·3 per cent. in a single-entry bookkeeping system could, from his experience, go unnoticed. He could recall an instance of errors accumulating in one direction only. A

8. It was contended on behalf of the Respondent Inspector of Taxes:

(i) that on the admitted facts the sum of £14,869 had found its way to the Appellant over the period covering the assessments under appeal and that the existence of this sum had never been disclosed to the Revenue; B

(ii) that the only explanation suggested, which was that the sum might have arisen from bookkeeping errors, was not one which ought to be accepted;

(iii) that in the absence of any satisfactory explanation the Commissioners were entitled to infer that the sum in question represented income assessable to tax;

(iv) that the fact that the Appellant had admittedly given false certificates and had failed to disclose the existence of the Lloyds Bank account was evidence of fraud or wilful default; C

(v) that the Crown has discharged the onus of proof, and established a *prima facie* case of fraud or wilful default, to which no answer had been made;

(vi) that as regards the period of trading by the company the Revenue was entitled to assess the "unidentified income" on the Appellant under Schedule E as an alternative to making Schedule D assessments on the company; D

(vii) that the appeals should be dismissed.

9. It was contended on behalf of the Appellant:

(i) that the onus of establishing fraud, wilful default (or, for the relevant years, neglect) was on the Revenue, and that it must be satisfied in respect of each year of assessment; E

(ii) that for all the years except 1950 and 1956 any discrepancies were due to the margin of error inherent in the single-entry bookkeeping system adopted;

(iii) that in relation to the years 1950 and 1956 no evidence could be produced to explain the lodgments in the Lloyds Bank, Cardigan, current account because of the Appellant's inability to recall the events of these years;

(iv) that in relation to that bank account the non-disclosure to the Revenue was the result of Mr. Wilson's ambiguous entry in the list of bank accounts which he prepared; F

(v) that in relation to the lodgments in that bank account there was no evidence that they represented taxable income;

(vi) that there was no evidence of fraud or wilful default for any of the years of assessment; G

(vii) that there was no evidence that the sums covered by the Schedule E assessments had been voted to the Appellant by the company as remuneration, and that, accordingly, if he received them he held them as trustee and was not assessable to tax in respect thereof;

(viii) that the appeals should be allowed.

10. The following cases were referred to: *Deacon v. Roper* (1952) 33 T.C. 66; *Rosette Franks (King Street) Ltd. v. Dick* (1955) 36 T.C. 100; *Barney v. Pybus* (1957) 37 T.C. 106; *Amis v. Colls* (1960) 39 T.C. 148; *Wellington v. Reynolds* (1962) 40 T.C. 209; *Woodrow v. Whalley* (1964) 42 T.C. 249; *Hudson v. Humbles* (1965) 42 T.C. 380; *Hillenbrand v. Commissioners of Inland Revenue* (1966) 42 T.C. 617; *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247; *Salmon v. Havering Commissioners* (1968) 45 T.C. 77; *Rose v. Humbles* page 103 *ante*; [1970] 1 W.L.R. 1061. H I

A 11. We, the Commissioners who heard the appeal, having considered all the evidence and the contentions, found that there had been wilful default on the part of the Appellant for each of the years 1946-47 to 1960-61. Accordingly we dismissed the appeals. Following a short adjournment we were informed that it had been agreed between the parties that the assessments should be adjusted in accordance with our decision to the following figures:

B	Schedule D assessments					
	<i>Year</i>					<i>Amount</i>
						£
	1946-47	..	..	..	..	Nil
	1947-48	..	..	..	..	Nil
	1948-49	..	..	..	..	1,396
C	1949-50	..	..	..	..	1,154
	1950-51	..	..	..	..	1,067
	1951-52	..	..	..	..	1,909
	1952-53	..	..	..	..	565
	1953-54	..	..	..	..	793
	1954-55	..	..	..	..	260
D	1955-56	..	..	..	..	Nil
	1956-57	..	..	..	..	1,202
	Schedule E assessments					
	1956-57	..	..	..	..	377
	1957-58	..	..	..	..	745
	1958-59	..	..	..	..	829
E	1959-60	..	..	..	..	840
	1960-61	..	..	..	..	845

and we adjusted the assessments accordingly.

F 12. Immediately upon our determination set out above dissatisfaction therewith was formally expressed on behalf of the Appellant as being erroneous in point of law, and we were in due course required to state a Case for the opinion of the High Court under s. 56 of the Taxes Management Act 1970, which Case we have stated and do sign accordingly.

G 13. The question of law for the opinion of the High Court is whether on the facts found by us and hereinbefore set forth we were entitled to find that the unexplained moneys hereinbefore mentioned represented income of the Appellant assessable under Schedule D and (in the appropriate years) under Schedule E and whether we were entitled to find that the Appellant had committed wilful default in relation to all the years under appeal.

D. J. Bowen } Commissioners for the General Purposes  
 F. H. Alderson } of the Income Tax for the Kemes  
 B. B. E. Davies } Division of the County of Pembroke.

H 9th September 1971

The case came before Ungoe-Thomas J. in the Chancery Division on 15th, 16th and 17th March 1972, when judgment was reserved. On 29th March 1972 judgment was given in favour of the Crown, with costs.

Graham Aaronson for the taxpayer.

H. Major Allen Q.C. and Patrick Medd for the Crown.

I The following cases were cited in argument in addition to those referred to in the judgment:—*Deacon v. Roper* (1952) 33 T.C. 66; *Amis v. Colls* (1960) 39 T.C. 148; *Woodrow v. Whalley* (1964) 42 T.C. 249; *Lloyde v. West Midlands Gas Board* [1971] 1 W.L.R. 749; *Rex v. Smith* (1915) 11 Cr. App. R. 229; 114 L.T. 239; *Manchester Brewery Co. Ltd. v. Coombs* (1900) 82 L.T. 347; *Attorney-General v. Nottingham Corporation* [1904] 1 Ch. 673; *Rosette Franks*

(*King Street Ltd. v. Dick* (1955) 36 T.C. 100; *Rose v. Humbles* page 103 *ante*; A [1972] 1 W.L.R. 33; *Frowd v. Whalley* (1965) 42 T.C. 599.

**Ungoed-Thomas J.**—This appeal by the taxpayer raises the question whether the General Commissioners were entitled to find (1) that unidentified receipts of the taxpayer according to certain capital statements represented income of the taxpayer assessable to income tax under Schedule D in respect of the years 1946–47 to 1956–57 inclusive and under Schedule E in respect of the years 1956–57 to 1960–61 inclusive; (2) that the taxpayer had committed wilful default in making his tax returns in respect of those years. B

The General Commissioners are “entitled to find” as they did unless the Court concludes that “the true and only reasonable conclusion contradicts the determination”: *per* Lord Radcliffe in *Edwards v. Birstow*<sup>(1)</sup> 36 T.C. 207, at page 229. That is the test by which the appeal succeeds or fails. Wilful default is relevant for the purpose of enabling the Revenue to go back more than six years to make these assessments: s. 47(1), Income Tax Act 1952, and particularly its proviso. Wilful default for this purpose was expressed by Wilberforce J. as “some deliberate or intentional failure to do what the taxpayer ought to have done, knowing that to omit to do so was wrong”. D He added: “And what the taxpayer’s duty was, in such a case as this, was to make a true and correct return in relation to Income Tax to the best of his judgment and belief”: *Wellington v. Reynolds* (1962) 40 T.C. 209, at page 215.

I will now summarise the main facts, so far as I understand them to be undisputed, leading up to these proceedings. Other facts will more appropriately be dealt with in the course of considering the submissions. During the years until 1956 the taxpayer carried on in South Wales the business of a dealer in agricultural implements under the name of W.H. James & Son. In that year he formed a family company, W. H. James & Son Ltd., whose capital consisted of 15,000 issued shares of which he held 6,000 and the rest of which were divided between his wife, son and daughter. It is common ground that throughout he was “the driving force” in the business. The company flourished, and its turnover of £70,000 in 1947 rose to £112,000 in 1948, £145,000 in 1949 and thereafter settled very roughly at between £120,000 and £140,000. I am told that in 1961 the taxpayer had differences with his wife, and that in that year he severed all connection with the business. In 1964 he had coronary thrombosis, a minor stroke, hardening of the blood vessels and high blood pressure. On 17th September 1965 Mr. Wilson, the partner in the firm of chartered accountants who acted for him until March 1966, wrote to the Inspector of Taxes: E F G

“Some time ago we were instructed by our client to make a voluntary declaration to you that certain monies received by him in 1950 may have included takings of his business . . . and that such takings may not have been included in the accounts submitted for taxation purposes . . . Enquiries are being made by us with a view to ascertaining the origin of these monies.” H

On 11th November 1965 Mr. Wilson sent to the Inspector of Taxes a copy of a private current account of the taxpayer at Lloyds Bank Ltd., Cardigan, showing cash payments in of £2,479 and £21 in April 1950 (totalling £2,500) and £2,000 in May 1950, and payments in of cheques totalling £1,900 in 1956; and that in May 1961 all the moneys so paid in were paid out by two cheques of £4,000 and £2,400 leaving nothing in the account. I

(<sup>1</sup>) [1956] A.C. 14.



(Ungoed-Thomas J.)

- A Subsequently the Revenue, with the co-operation of Mr. Burridge, a member of a firm of chartered accountants who in March 1966 replaced Mr. Wilson and his firm as accountants dealing with the taxpayer's tax affairs, prepared the capital statements which I have mentioned. These statements, in accordance with the Revenue's common practice in certain types of investigation, are of the taxpayer's receipts and expenditure for each of the relevant
- B periods corresponding to those of the business accounts (that is, of the taxpayer's business for the years ending 31st August 1947 to 31st August 1955 and for the 14 months to 31st October 1956; and of the company's business for five months to 31st March 1957 and for the years ending 31st March 1958 to 31st March 1961). Such a statement may produce a figure for unidentified receipts, and the statements in our case have produced such figures, amounting to a
- C total of £14,869 for 1946-47 to 1960-61 inclusive. These statements form the basis of the Revenue's claim. The statements are admitted by the taxpayer as accurate, subject to the observations made before me that the items resulting in the unidentified receipts contain substantial amounts which were estimates, and that the taxpayer's failure of memory precluded him from providing explanations which might otherwise have been forthcoming. It is not suggested,
- D however, that the statements are other than perfectly fair, or that they are not the best that can be made. They are, of course, subject to error, but such error might be expected to go in either direction in respect of each of the estimated amounts: and it would seem reasonable to presume that over 16 years the error would not always go in the same direction. So it seems to me that the capital statements must not only be accepted as being the best
- E that can be devised, but as being at any rate substantially accurate. The taxpayer's defect of memory does not affect this conclusion, and I will deal with it in the context to which it appears to me to be relevant.

- It was submitted for the Crown that capital statements (for years before the six-year period) establishing unexplained receipts (not included in the taxpayer's income tax returns) raise a *prima facie* case of undisclosed income and of wilful default in making the income tax returns, thus entitling the Revenue to make additional assessments in respect of the unexplained receipts. (In fact, in our case compromise figures have been agreed in the event of the Crown succeeding.) For the taxpayer this submission was contested, and it was submitted that the Revenue had to prove that the unexplained receipts were income receipts. Wilful default, which is coupled with fraud in the proviso
- G to s. 47(1), is reprehensible conduct, as indeed is recognised in the observations quoted from the judgment of Wilberforce J.<sup>(1)</sup> It is not an allegation to be lightly inferred, even though one cannot realistically ignore that there might be persons less strict in their behaviour to the Revenue than to individuals. The burden of establishing an allegation corresponds to its seriousness, because, as a matter of common sense, the more culpable what is alleged the less likely
- H it is to have occurred. This consideration I bear in mind throughout.

- The Crown's contention, at any rate as submitted at one stage of the case, was propounded in general terms. Thus it appeared capable of applying to any capital statement in respect of however short a period, however small the unexplained receipt and whatever the circumstances precluding explanation. The authorities to which I was referred are naturally directed to their own
- I particular facts. The crucial case relied on by the Crown for its proposition was *Hudson v. Humbles* (1965) 42 T.C. 380, a decision of Pennycuik J. In that case additional assessments under Schedule E were made under the proviso

(1) *Wellington v. Reynolds* 40 T.C. 209, at p. 215.



**(Ungoed-Thomas J.)**

to s. 47(1) of the Income Tax Act 1952 upon the taxpayer in respect of his remuneration corresponding to unexplained receipts in the capital statements, varying in amount from £736 to £6,206 over six years and totalling £17,584; but those varying and amounting to £14,854 over the first four years were treated as decisive. No evidence was given by or on behalf of the taxpayer. The General Commissioners decided in favour of the Crown (with some modifications of the assessments) and the taxpayer appealed. For the taxpayer it was submitted that to establish a *prima facie* case of wilful default the Revenue had to prove that the unexplained receipts were income receipts from a particular source. Pennycuik J. decided that there was nothing in the proviso which restricts the nature of the evidence required to establish a *prima facie* case of wilful default, and that therefore it was not necessary for the Revenue to show the particular quality or source of the receipts. I respectfully agree. It follows that the taxpayer's contention that the Revenue has to establish that the unexplained receipts are income receipts fails. But of course this does not exclude the possibility that cases in which there is the identification of the unexplained receipts with income receipts, or even income receipts from a particular source, might not, in the light of all the evidence available when the existence of a *prima facie* case has to be established, be helpful or even crucial to establish that *prima facie* case. It was decided in *Hudson v. Humbles*<sup>(1)</sup> that the unexplained receipts appearing in the particular capital statements before the Court raised a *prima facie* case of wilful default, and that in the absence of evidence on the part of the taxpayer, who was in a position to know the full facts, the General Commissioners were entitled to find wilful default; and the appeal failed. I respectfully agree: I would have little difficulty in arriving at the same conclusion. It seems to me that the judgment is meshed with references to the facts of that particular case and has those facts very much in mind; and that when it says<sup>(2)</sup>, "it seems to me that a statement of the kind which the Inspector produced in this case is sufficient to raise a *prima facie* case", it was not dealing with capital statements in the abstract as part of some wide general proposition but with a statement which in all relevant respects was to the same effect as the statement before the Court. In that case relevant considerations, in my view, included the amount of the unexplained receipts, the period over which they were spread and the unexplained failure of the taxpayer to explain acceptably sources of receipts which he, but not the Revenue, was in a position to explain. The unique feature of the case before me is the taxpayer's medical incapacity to remember the sources of the unexplained receipts. The evidence of the incapacity was referred to in detail, but its substantial effect is as I have stated, and no material limitation to it was pursued.

"*Prima facie* case" may in the present context be used in the sense of a case which requires explanation on the part of the taxpayer of the unexplained receipts or, alternatively, in the sense of a case which requires either such explanation or explanation why such explanation cannot be given. None of the authorities so far as known made the second alternative relevant: they were all directed on their facts to the first of the alternatives only. But just as capital statements may vary significantly, and perhaps decisively, so may the circumstances in which they are drawn up. They do not come into existence out of a void, and evidence of relevant circumstances generally, if not invariably, accompanies evidence producing the capital statements, as it accompanied it in our case. And it seems to me that it is in accordance with ordinary principles that it has to be decided, on the evidence as a whole at the moment

<sup>(1)</sup> 42 T.C. 380.      <sup>(2)</sup> *Ibid.*, at p. 386.

(Ungoed-Thomas J.)

- A of decision, which side is entitled to succeed—and this applies whether the evidence is given on the part of the taxpayer or not. Thus the Crown's proposition, if understood in wide general terms, seems to me, with great respect, to be somewhat unrealistic. It invites a demand for particulars. The significance of the evidence of the taxpayer's incapacity to remember then falls into place. It goes to establish that the lack of explanation of the unexplained receipts is not due to failure to state what was within his recollection. Thus no inference against the taxpayer can be drawn from his failure to recollect. But, subject to this observation, the decision has to be made on the evidence as a whole as it stands at the time of decision. I for my part would not limit this by the creation of any rule in general terms with regard to capital statements, even if most capital statements, with their accompanying evidence in support, be sufficient to entitle the Revenue to succeed in the absence of evidence to the contrary.

I come now to particular aspects of the evidence. Lord Radcliffe observed, in the paragraph from which I have already quoted in his speech in *Edwards v. Bairstow*<sup>(1)</sup>, "in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur". The Crown's case before me was—and rightly, in my view—founded upon the evidence as a whole, rather than on the evidence with regard to any particular matter: or, if I may put it in another way, upon the accumulation of matters, all inviting explanation and capable perhaps of separate different explanations, but all explicable by the single explanation of wilful default.

- E The taxpayer adopted a single-entry bookkeeping system for his business, as was normal in his area. The Inspector of Taxes knew as early as 1950 that this was the taxpayer's system, and he took no exception to it. The accepted evidence was that a 0·3 per cent. error in income (i.e. £300 on a turnover of £100,000) might be unnoticed, but that an error of 1 per cent. should show up; and that the error might go predominantly one way, depending on how the error came about. The records were incomplete, as normal in the taxpayer's type of business in his area; but they were correct. During the nine years ending in the years 1947 to 1955 respectively and the 14 months ending in 1956 there were unidentified receipts in each of the ten periods; of amounts below 0·3 per cent. of turnover in four cases and of amounts between 0·3 per cent. and 1 per cent. in the other six cases. But this statement is subject to the qualification that, if unexplained sums of £4,500 and £1,900 paid into the taxpayer's Lloyds Bank account in 1950 and 1956 respectively were included, then they would increase the amounts for two of the six periods from lying between 0·3 per cent. and 1 per cent. to over 1 per cent., and would substantially raise the percentage of unexplained receipts for each period if they were spread over the periods preceding and including the year of payment into the account.
- H Thus, if the £1,900 paid into the Lloyds Bank account in the year ending in 1956 was spread over that and the five preceding years since the £4,500 was paid into that account, then all the unidentified receipts except one would fall between 0·3 per cent. and 1 per cent. of the turnover, and that one would amount to some £360—some £54 less than the 0·3 per cent. figure. These payments into Lloyds Bank are therefore of substantial significance. Indeed, it was conceded—and in my view rightly—that if it were established that there was wilful default in not including in the income tax returns those payments into Lloyds Bank, then the conclusion that wilful default applied throughout

(1) 36 T.C. 207, at p. 229.

**(Ungoed-Thomas J.)**

the years was irresistible. They are clearly not explicable by the single-entry margin of error, unless perhaps they had been accumulated over years, which would in itself be odd and call for further explanation. No such further explanation, however, would be called for if they were explained as part of wilful default. And the disclosure of the payments in 1965 was sufficient to put Mr. Wilson on inquiry about the correctness of the business records. On the other hand, they are comparatively large sums in round figures paid into the bank account six years apart from each other, and the taxpayer admittedly had substantial capital which he turned over and whose proceeds could not be identified in any available documents or from the taxpayer's recollection. And the payment of undisclosed taxable moneys into an account in the bank branch where the taxpayer kept his other accounts might suggest that they were not taxable rather than that the taxpayer did not contemplate their disclosure. If these payments in stood on their own, it might well be that the correct conclusion would be that they were capital sums rather than undisclosed income. But, like so much of the evidence, it falls to be considered as part of the evidence as a whole.

In June 1953 the taxpayer signed a certificate, submitted to the Revenue, of the full list of all the banking accounts in which he or his wife was interested for the period 1st September 1949 to 31st August 1952. Six accounts were disclosed. Apart from the account first mentioned in the certificate, to which I shall return, the list consisted of three of his own accounts at Lloyds Bank Ltd., Cardigan (namely, a current account, a current (farm) account and a deposit account); a deposit account of his wife's at the same bank, described as "Lloyds, Cardigan, deposit" account; and a deposit account of his wife's described as "N.P., Cardigan, deposit (transferred to Lloyds)". It might well be thought that the account described in the list as the wife's "Lloyds, Cardigan, deposit" account was her deposit account transferred to Lloyds from the National Provincial Bank, if only because there was no reason for supposing that the taxpayer's wife had any occasion for two separate deposit accounts at the same time and the list was to be a full list of all the bank accounts within a period of three years. This brings me to the first entry, which is the entry which has made the list material. It is an entry of the taxpayer's bank account as "N.P., Cardigan, current" account. Exactly as in the case of the wife's N.P. deposit account, the first entry also has added "(transferred to Lloyds)". The second entry was of the taxpayer's "Lloyds, Cardigan, current" account. Do these first two entries in fact indicate, and were they intended by the taxpayer to indicate, that the second account was that transferred from the National Provincial Bank or that there was, after the transfer indicated by the first entry, a further current account at Lloyds, being that transferred from the National Provincial Bank? The question is raised because in fact after the transfer the taxpayer had three current accounts at Lloyds (including the farm account), not two (including the farm account), and one of those three is the account with the 1950 and 1956 payments in, with which I have already dealt. So on the answer to this question depends whether or not the taxpayer disclosed, and whether or not he intended to disclose, all his accounts, as he certified, including in particular the account with the 1950 and 1956 payments in, and therefore whether he disclosed or intended to disclose or conceal in his certificate an account whose disclosure was required for the investigation of his income tax returns.

The first entry might well be thought to refer to the second entry as being the current account resulting from the transfer to Lloyds mentioned in the first entry, particularly if in the parallel entries of the wife's deposit accounts

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- A the entry of her Lloyds deposit account referred to her account transferred from the National Provincial. But, to whichever conclusion one may incline, the first two entries are clearly ambiguous, as the General Commissioners apparently accepted (Case Stated, para. 6(iv)). The certificates were drawn up by Mr. Wilson, though signed by the taxpayer. Mr. Wilson was in fact unaware of the existence of the Lloyds Bank current account into which the
- B 1950 payments had been made. And he was unaware of it when submitting the taxpayer's accounts to the Revenue, so that he must have been unaware of it over a period; and it would certainly not be an unreasonable inference that he was never told of it. Therefore, the reference in the first entry to "(transferred to Lloyds)" was intended by Mr. Wilson to refer to the transfer resulting in the account disclosed by the second entry. When the taxpayer signed the
- C certificate he was a successful business man of middle age, when he would be expected to be at the height of his powers. So the questions are raised, Why did he not realise that Mr. Wilson was unaware of the account—indeed, particularly if it contained only payments from capital resources, which would be good reason for not having told Mr. Wilson of the account? And why did he not appreciate that there was an ambiguity in the certified entries of
- D the account? The Crown submits that the taxpayer must have realised that he had not told Mr. Wilson of the account, and that he signed it knowing it could not have been intended by Mr. Wilson to refer to it. There is force in this submission.

- I come now to the period from the beginning of November 1956, when the business belonged to the company. The capital statements for this purpose
- E show unidentified receipts of £419 for five months to 31st March 1957 and £929, £1,630, £882 and £887 for 1957 to 1961. These receipts are relevant to the general question whether unidentified receipts came to the taxpayer from the company and, further, whether there was wilful default in failing to disclose such receipts. These figures are distinguishable in the following respects
- F from the unidentified receipts for the years when the business belonged to the taxpayer. They are appreciably bigger, apart from the payments into Lloyds Bank, even if the 1956 £1,900 payment is spread over the years since the 1950 payments in of £4,500; they are all of much the same order apart from the £1,630; nor was it suggested that they are to be accounted for to any degree by the single entry system; and it was not suggested—nor, perhaps, could it very convincingly be suggested, having regard to the regularity in
- G quantum—that they came from the turnover of items of capital. It seems to me that it was reasonable for the General Commissioners to conclude that the company was the source of these unidentified receipts. The question then arises whether they were remuneration. If they were not remuneration, then, as the assessments with regard to them are as remuneration, tax is not payable in respect of them as assessed, as the Crown acknowledges. But if wilful
- H default is established then the onus lies on the taxpayer to establish that the unidentified receipts were not remuneration: Income Tax Act 1952, s. 47(1) proviso and s. 52(5). I will first consider the question whether the payments were remuneration or not, independently of onus.

- Reference was made in this context, with regard to the pre-company period, to para. 6(ii) and (vii) of the Case Stated, accepting Mr. Wilson's
- I evidence to the effect that the company's records were incomplete but correct; that Mr. Wilson was satisfied, when he submitted the accounts to the Revenue, that they were accurate; and that he had not sensed fraud or recklessness. It was sought to found on this evidence the submission, not merely that Mr. Wilson was unaware of the taxpayer obtaining remuneration beyond that

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disclosed in the income tax returns (which is not disputed), but also that it establishes that there could not have been such additional remuneration. A  
But of course Mr. Wilson's accepted statement is that knowledge of the Lloyds Bank account would have been sufficient to prevent him submitting the accounts without investigating the origin of these amounts: Case Stated, para. 6(iii). B  
And these capital statements, with their unidentified receipts, were of course not before Mr. Wilson when he submitted the accounts to the Revenue. There is no evidence of the company's articles or minutes, or even whether the company had a bank account; of how the taxpayer became entitled to remuneration—whether, for example, directly under the articles or by agreement, or by a directors' or shareholders' vote or otherwise—or of how the remuneration was quantified. C  
The only positive submission made by the taxpayer to account for the unidentified receipts was that they were the company's moneys which were not entered in the company's records and were innocently misappropriated, and that in the circumstances this could have happened when the business was the company's in much the same way as before. But, as already indicated, the differences in the amounts of the unidentified receipts for the periods before as compared with the periods after the company took over can in my view not unreasonably suggest that, even though both sets of receipts came from the company, yet they are not to be explained in the same way; D  
and that the unidentified receipts during the company's ownership may be acceptably explained as remuneration from the company.

On 17th November 1965 Mr. Wilson wrote to the Inspector the letter from which I have already quoted at the beginning of this judgment. The General Commissioners found that this letter, indicating that certain moneys received by the taxpayer in 1950 may have included business takings and not been included in the income tax returns, had been written "with the Appellant's full consent": though there is no evidence how such consent came to be given. E  
The moneys referred to are of course those paid into the Lloyds Bank account. Though the letter was written after the taxpayer's affliction in 1964, it was urged for the Crown that, if the taxpayer was conscious of his own probity, he would have said that the payments did not come from his own business. F  
But the consequence does not necessarily follow from the premise—he may just have been muddled in his recollection or in his handling of business moneys. Yet it does raise a question from which the Revenue's answer cannot be eliminated from consideration with the case as a whole.

In considering the evidence as a whole, it is pertinent to bear in mind, not only that no inference can be drawn from the taxpayer's failure of recollection since his affliction in 1964, as I have earlier concluded, but also that during the investigation since his tax returns in 1965 he was "most co-operative"; and that he would not make a statement that £500 paid into his wife's account was a gift. But the investigation period is open to the observation that it is not the period regarding which his conduct is in question, and that he was during the last mentioned period a healthy business man in full enjoyment of his faculties. Having regard to these considerations and to the onus of establishing wilful default, is the evidence sufficient to establish that "the true and only reasonable conclusion contradicts the determination" of the General Commissioners? G  
H

My conclusions on the different elements of evidence are that, although I  
no inference can properly be drawn from the taxpayer's failure of recollection, yet the remarkable absence over years of any significant documentary evidence or of any evidence from anyone engaged in the business or the accounts which

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- A satisfactorily explains any of the considerable number of unexplained receipts would justifiably be the subject of adverse comment; that the single-entry system is insufficient to explain the unexplained receipts; that the completely unexplained 1950 and 1956 payments into Lloyds Bank justify doubt whether they were justifiably omitted from the income tax returns; that the ambiguity in the certificate of the bank accounts is reasonably explicable as an act of
- B wilful default on the part of the taxpayer in the sense expressed in Wilberforce J.'s judgment<sup>(1)</sup>, though perhaps not in isolation sufficient to discharge the onus of establishing wilful default; and that the unexplained receipts during the company's period are sufficient of themselves, and *a fortiori* in conjunction with the other elements of evidence, to entitle the conclusion reasonably to be made both that there was wilful default in omitting these from the income
- C tax returns and, particularly in view of the consequential shifting of the onus to the taxpayer, that the unexplained receipts were remuneration. All or at any rate the overwhelming material proportion of the evidence, including the 1965 letter, is to my mind consistent with wilful default and with the unexplained receipts being assessable as claimed; and, considering the evidence as a whole as just summarised and the evidence as a whole in the light of the passage
- D quoted from Lord Radcliffe's speech<sup>(2)</sup>, my conclusion is that "the true and only reasonable conclusion" does not contradict the General Commissioners' determination. In my view the General Commissioners could reasonably decide, and were entitled to decide, as they did.

- In justice to the taxpayer, I must make it perfectly clear that my conclusion does not mean that the General Commissioners' decision is the only reasonable
- E decision, or that the very opposite decision might not also be reasonable, or that this Court, in the General Commissioners' place, would come to the same conclusion. My conclusion means no more and no less than I have said; namely, that the General Commissioners could reasonably decide, and were entitled to decide, as they did.

- Medd**—In those circumstances, I would ask your Lordship to order that
- F the appeal should be dismissed, and I ask for that dismissal with costs, my Lord.

**Aaronson**—My Lord, I cannot oppose that.

**Ungoed-Thomas J.**—Very well.

[Solicitors:—Amphlett & Co.; Solicitor of Inland Revenue.]

<sup>(1)</sup> Wellington v. Reynolds 40 T.C. 209, at p. 215.  
at p. 229.

<sup>(2)</sup> Edwards v. Bairstow 36 T.C. 207,

