HIGH COURT OF JUSTICE (CHANCERY DIVISION)—24TH, 25TH, 26TH AND 27TH JUNE, AND 31ST JULY, 1957

COURT OF APPEAL—13TH, 14TH, 15TH AND 16TH JANUARY, 21ST FEBRUARY AND 12TH MARCH, 1958

HOUSE OF LORDS—15TH, 16TH, 20TH, 21ST AND 22ND JULY, AND 5TH NOVEMBER, 1959

Commissioners of Inland Revenue *v.* Whitworth Park Coal Co., Ltd. (in liquidation) Commissioners of Inland Revenue *v.* Ramshaw Coal Co., Ltd. (in liquidation) Commissioners of Inland Revenue *v.* Brancepeth Coal Co., Ltd. (in liquidation)(1)

Surtax—Investment company—Computation of actual income—Finance Act, 1922 (12 & 13 *Geo.* V, *c.* 17), *Section* 21 *and First Schedule, Paragraph* 6 ; *Finance Act,* 1927 (17 & 18 *Geo.* V, *c.* 10), *Section* 39 (2) ; *Finance Act,* 1939 (2 & 3 *Geo.* VI, *c.* 41), *Section* 14.

Income Tax—Annual payment—Payments by Crown—Interim income under Coal Industry Acts, 1946 *and* 1949*—Whether payable under deduction of tax—Income Tax Act,* 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Paragraph* 1 (*b*) *and Cases* III *and* VI, *and General Rules, Rule* 21.

Income Tax, Schedule D—When income arises—Income Tax Act, 1918, *Schedule D, Case* III, *Rule* 2, *and Case* VI, *Rule* 2 ; *Finance Act,* 1922, *Section* 17.

In consequence of the vesting of its trading assets in the National Coal Board the first Respondent Company was entitled under the Coal Industry Acts, 1946 *and* 1949, *to receive from the Minister of Fuel and Power, out of moneys issued from the Consolidated Fund, " interim income " for the period from* 1*st January,* 1947, *to the date when the compensation was fully satisfied. In the years* 1948–49 *to* 1950–51 *it received in satisfaction of this right, at irregular intervals and in respect of varying periods,* (a) *" revenue payments " under the* 1946 *Act, computed by reference to past profits and liable to eventual adjustment ;* (b) *further revenue payments under the* 1949 (*No.* 2) *Act, similarly computed and liable to repayment in respect of any excess over an amount equal to interest at rates prescribed by the Treasury for the corresponding period on the eventual compensation ;* (c) *amounts added to money compensation for stocks and stores equal to interest*

(1) Reported (C.A.) [1958] Ch. 792; [1958] 2 W.L.R. 815; 102 S.J. 346; [1958] 2 All E.R. 91; 225 L.T. Jo. 217; (H.L.) [1959] 3 W.L.R. 842; 103 S.J. 938; [1959] 3 All E.R. 703; 228 L.T. Jo. 253.

thereon at rates so prescribed. These payments were made under deduction of tax at the standard rate in force at the time of payment, and were correspondingly treated as income of the year of receipt in apportionments of the Company's actual income among the members made by virtue of automatic Surtax directions for the years in question under Section 14, *Finance Act,* 1939. *No interim income was received by the Company in* 1947–48 *and no direction was given for that year.*

On appeal against the apportionments and consequential sub-apportionments the Companies contended that the payments were chargeable to Income Tax under Case VI *of Schedule D only and were income of the periods in respect of which they were paid. For the Crown it was contended,* inter alia, *that they were annual payments chargeable under Case* III *of Schedule D and were properly made under deduction of tax as aforesaid; alternatively, that if chargeable under Case* VI *they were income of the year of receipt. The Special Commissioners held that all the payments were chargeable under Case* VI *as income of the periods for which they were stated to have been paid, accruing from day to day.*

Held, *in the Court of Appeal, that the payments were chargeable under Case* VI, *and that income arose, within the meaning of Rule* 2 *of Case* VI, *when it was received.*

Held, *in the House of Lords,* (1) *that Rule* 21 *did not apply to payments by the Crown out of moneys provided by Parliament;* (2) (*Lord Radcliffe dissenting*) *that the payments were annual payments within Case* III, *Rule* 1 (*a*), *and were income arising at the date of receipt.*

Grey *v.* Tiley, 16 T.C. 414, Lambe *v.* Commissioners of Inland Revenue, 18 T.C. 212, *and* Dewar *v.* Commissioners of Inland Revenue, 19 T.C. 561, *approved.*

CASES

Commissioners of Inland Revenue v. *Whitworth Park Coal Co., Ltd.* (*in liquidation*)

CASE

Stated under the Income Tax Act, 1952, Section 64, 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 28th July, 1955, Whitworth Park Coal Co., Ltd. (hereinafter called "the Company"), appealed against directions made upon it under the provisions of Section 21 of the Finance Act, 1922, as extended by Section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the Company made for each of the said three years in consequence of the said directions.

2. (*a*) The sole question for our determination was whether, in computing the actual income of the Company for the purpose of the said apportionments, interim income received by the Company under the provisions of the Coal Industry Nationalisation Act, 1946 (hereinafter called "the 1946 Act"), and the Coal Industry (No. 2) Act, 1949 (hereinafter called "the 1949 Act"), should be included in the actual income of the year in which it was received or, as the Company contended, of the year

or period in respect of which it is paid, it being, for the purpose of the hearing before us, conceded by the Company that authorities binding on us would preclude us from holding that the sums received were of the nature of capital and should not be included in the Company's actual income at all.

(*b*) The facts proved or admitted before us are set out in paragraphs 3 to 6 hereof.

3. The Company carried on the trade of colliery proprietor until 1st January, 1947, when its colliery assets vested in the National Coal Board under the provisions of the 1946 Act. At all material times the Company was one to which Section 21 of the Finance Act, 1922, applied and was an investment company within the meaning of Section 20 (1) of the Finance Act, 1936.

4. (1) The Company received from time to time payments from the Ministry of Fuel and Power (hereinafter called "the Ministry") for or in respect of interim income under the provisions, in the case of some of such payments, of the 1946 Act and, in the case of others of such payments, of that Act and of the 1949 Act. The said payments are set out in tabular form below, and were made under deduction of Income Tax; each payment was accompanied by a letter from the Ministry and a certificate of deduction of Income Tax in the form of, or in a form similar to, the letter and certificate both dated 26th January, 1949, copies of which are annexed hereto, marked "A1" and "A2" respectively, and form part of this Case[1]. The other letters and tax deduction certificates which were produced to us are not annexed hereto but are available for reference if required. Each such letter states that the payment relates to a claim by the Company for interim income for a stated period.

Serial number	*Date of receipt*	*Gross amount of payment*	*Net amount paid*	*Period for which it is stated to be paid in accompanying letter*
		£	£	
(1)	7th August, 1948	9,068	4,987	18 months ended 30th June, 1948
(2)	26th January, 1949	2,733	1,503	Half-year ended 31st December, 1948
(3)	12th September, 1949	68	37	From 1st January, 1949, to 12th September, 1949
(4)	28th March, 1950	1,837	1,011	Year ended 31st December, 1949
(5)	14th July, 1950	1,616	889	Half-year ended 30th June, 1950
(6)	11th August, 1950	5	3	From 1st July, 1950, to 11th August, 1950
(7)	13th November, 1950	7	4	From 1st July, 1950, to 13th November, 1950
(8)	21st February, 1951	1,519	835	Half-year ended 31st December, 1950
(9)	25th May, 1951	1,343	705	Two years ended 31st December, 1948
(10)	9th August, 1951	810	425	Half-year ended 30th June, 1951

[1] Not included in the present print.

(2) The payments numbered 3, 6 and 7 in the above table were payments of the interest addition under Section 22 (2) (*a*) of the 1946 Act made on the occasions of payment under Section 21 (1) (*b*) of the 1946 Act of partial compensation for transferred assets. No special arguments were addressed to us concerning these payments, and neither party to the appeal sought to distinguish them from the other payments in question.

(3) The payments numbered 1 and 2 in the above table were made under Section 22 (3) of the 1946 Act, after deductions of £7 and £86 respectively in respect of adjustments for compensation already satisfied made under the provisions of Regulation 21 of S.R. & O. 1947 No. 1946. The accompanying letters state, in the case of payment no. 1,

> "It should be noted that the gross amount allowed is an instalment subject to audit. Any adjustment necessary will be made in a future payment",

and in the case of payment no. 2,

> "It should be noted that the gross amount allowed is a provisional instalment subject to audit of the Statutory Revenue Payment. Any adjustments in respect of overpayments or underpayments will be payable forthwith to or by the Minister."

An adjustment to the said two payments was made by deducting a sum of £1,394 in calculating the gross amount of payment no. 4. This deduction, referred to as an "overpayment (provisional)", was based on an estimate of the comparable ascertained revenue, and a further and final adjustment was made by payment no. 9, the accompanying letter to which states that the comparable ascertained revenue had been approved by the Minister.

(4) The payments nos. 4, 5, 8 and 10 in the above table were made under the 1949 Act. In the case of nos. 4, 5 and 8 the accompanying letters show that the payments were calculated with reference to a provisional calculation of the comparable ascertained revenue, and each such letter states:

> "It should be noted . . . that where the amount now payable is based on provisional comparable ascertained revenue, any necessary adjustment will be made later, after the comparable ascertained revenue has been finally approved by the Ministry".

Payment no. 10 was based on the comparable ascertained revenue as approved by the Ministry.

(5) The payments nos. 4, 5, 8 and 10 were each expressed to be subject to the provision contained in Section 1 (5) of the 1949 Act to the effect that, if the said payments should exceed the interim income towards satisfaction of which they were paid, the excess would be repayable by the Company.

(6) The letter accompanying payment no. 5 (dated 14th July, 1950, and in respect of the half-year to 30th June, 1950) shows that in arriving at the gross sum of £1,616 a deduction was made in respect of interest at 3 per cent. per annum for the half-year in respect of compensation satisfied before 30th June, 1950. A footnote to the letter states that

> "Any necessary adjustments as a result of S.I. 1950, No. 967, dated 12th June, 1950, which prescribes an interest rate of 3 per cent. per annum for the period 1st January, 1949, to 30th June, 1949, and 3½ per cent. p.a. for the period 1st July, 1949, to 30th June, 1950, will be made at a later date".

Adjustments were duly made in computing payment no. 8.

5. The Company's accounts were made up to 31st March in each year.

In the accounts for the year ended 31st March, 1948, there appears on the credit side of the revenue account the item "Interim income provision (gross) £6,050 0*s*. 0*d*."

In the accounts for the year ended 31st March, 1949, there is credited to the revenue account "Interim income (net) £2,500 7*s*. 3*d*."

In the accounts for the year ended 31st March, 1950, there is credited to the revenue account " Interim income (net) £37 4*s.* 11*d.*"

In the accounts for the year ended 31st March, 1951, there is credited to the revenue account " Interim income (net) £2,741 11*s.* 8*d.*"

The accounts referred to above were put in evidence before us. They are not annexed hereto but are available for reference if required.

6.—(*a*) For the purposes of the apportionments under appeal each of the payments set out in paragraph 4 above was treated as forming part of the actual income of the Company of the year in which such payment was received by the Company.

(*b*) The said payments made by the Ministry were not payable out of profits or gains brought into charge to Income Tax.

7. It was contended on behalf of the Commissioners of Inland Revenue :

(1) that the payments received by the Company set forth in paragraph 4 of this Case were annual payments chargeable to Income Tax under Case III of Schedule D of the Income Tax Act, 1918, and Income Tax had properly been deducted therefrom at the time the payments were made at the standard rate of tax then in force ;

(2) that accordingly, by virtue of Section 39 (2) of the Finance Act, 1927, the said payments were income of the Company for the years in which each of them was received by the Company ;

(3) alternatively, that the said payments were chargeable to Income Tax under Schedule C of the Income Tax Act, 1918 ;

(4) alternatively, that if the said payments were chargeable to Income Tax under Case VI of Schedule D then they were to be regarded as income of the Company for the year of receipt ;

(5) that by virtue of Paragraph 6 of the First Schedule to the Finance Act, 1922, each of the said payments formed part of the actual income of the Company for the year in which it was received by the Company ;

(6) that the actual income of the Company was correctly computed and that the directions should be confirmed.

8. It was contended on behalf of the Company :

(1) that the said payments were not chargeable to Income Tax under Schedule C nor were they annual payments chargeable under Case III of Schedule D ;

(2) that the said payments, if chargeable to Income Tax at all, were chargeable under Case VI of Schedule D ;

(3) that each of the said payments was income of the period in respect of which it was paid, and that the actual income of the Company should be computed accordingly ;

(4) that the actual income of the Company had been wrongly computed and should be adjusted accordingly.

9. We, the Commissioners who heard the appeal, held that the payments in question were chargeable to Income Tax under the provisions of Case VI of Schedule D of the Income Tax Act, 1918, and were not chargeable under Case III of the said Schedule nor under Schedule C. We further held that the said payments formed part of the actual income of the Company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods.

We confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income, as agreed between the parties in accordance with our decision, of £5,422 14*s*. for 1948–49, £3,453 15*s*. for 1949–50 and £2,949 3*s*. for 1950–51.

10. The Commissioners of Inland Revenue immediately upon our determination of the appeal expressed their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

11. The point of law for the opinion of the Court is whether, in view of the facts hereinbefore set forth, our decision set forth in paragraph 9 of this Case is correct.

R. A. Furtado
N. F. Rowe
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

18th September, 1956.

Commissioners of Inland Revenue v. *Ramshaw Coal Co., Ltd.* (*in liquidation*)

Commissioners of Inland Revenue v. *Brancepeth Coal Co., Ltd.* (*in liquidation*)

These appeals concerned the sub-apportionment of income of the Whitworth Park Coal Co., Ltd., the subject of the apportionment for 1948–49 in issue in the first case, among the members of the Ramshaw Coal Co., Ltd., a member of the Whitworth Park Company, and among the members of the Brancepeth Coal Co., Ltd., a member of the Ramshaw Company. The appeals were allowed by the Special Commissioners following their decision in the first case.

The cases came before Harman, J., in the Chancery Division on 24th, 25th, 26th and 27th June, 1957, when judgment was reserved. On 31st July, 1957, judgment was given in favour of the Crown, with costs.

Mr. John Pennycuick, Q.C., Sir Reginald Hills and Mr. E. B. Stamp appeared as Counsel for the Crown, and Mr. F. N. Bucher, Q.C., and Mr. Peter Rowland for the Companies.

Harman, J.—These are appeals by the Crown against decisions of the Special Commissioners signed on 18th September, 1956, in favour of the Respondents on a question connected with receipts by the Whitworth Park Coal Co., Ltd., between August, 1948, and August, 1951, of sundry moneys connected with the compensation payable to the Company by the Ministry of Fuel and Power under the Coal Industry Acts, 1946 and 1949. The question is in a narrow compass. The Company does not dispute that all these payments are of an income nature and ought to be included as part of the Company's actual income under Section 21 of the Finance Act, 1922.

(Harman, J.)

The dispute is whether these receipts are chargeable to Income Tax under Case III or Case VI of Schedule D of the Income Tax Act, 1918. If the former Case be the right one it is further admitted that the payments must be treated as assessable for the year in which they were received: this is the Crown's claim. If the latter Case be appropriate there is a further dispute whether the payments should be spread over the years or periods in respect of which they were paid, as the taxpayers claim, or whether in this case also the dates of receipt are to be regarded. The Commissioners, without giving any reasons, decided both points in favour of the taxpayer and the Crown appeals.

Section 21 of the Finance Act, 1922, provided, broadly speaking, for the imposition of Surtax on companies to which the Section applied on actual income of the company left undistributed. It is admitted that the Section applies to this case and the actual income, whatever it is, must be apportioned among the members for the purpose of assessing them to Surtax. Under Paragraph 6 of the First Schedule to the 1922 Act the income is to be computed on Income Tax principles. This apportionment was, by Section 14 of the Finance Act, 1939, made a matter of course in the case of investment companies—that is to say, companies not having any trading activities, as this Company admittedly had none after 1st January, 1947, when its colliery business was compulsorily acquired under the Coal Industry Nationalisation Act, 1946. In fact the Commissioners made no direction under the 1922 Act in respect of the year 1947–48, and it is admitted by the Crown that it is too late to make such a direction now. Therefore the years to be considered are those of 1948–49, 1949–50 and 1950–51. The question, therefore, to be considered is what was the actual income of the Company during each of the three years in question. The receipts and the dates of them and the periods for which the payments were made are stated in paragraph 4 of the Case and I need not repeat them here. The payments numbered 1, 2 and 9 were made under the provisions of the 1946 Coal Act and those numbered 4, 5, 8 and 10 under the Act of 1949, while numbers 3, 6 and 7 represent interest on compensation made to the Company by way of cash payments for transferred assets. This last category was treated before the Commissioners as differing in no way from the other payments, although it did in fact differ, being, as I have said, interest on cash payments and not income-compensation in respect of compensation to be satisfied in stock.

It is therefore necessary to consider the relevant parts of the two Coal Acts. By Section 5 of the 1946 Act the colliery assets of all the coal mining companies of Great Britain vested in the National Coal Board on the primary vesting date, which was 1st January, 1947, and compensation became due on that date subject to determination of its amount: see Section 19. It was, however, foreseen that this determination might be a lengthy business and consequently, by Section 19 (2), a right to interim income was given to be satisfied in accordance with Section 22. This interim income was of two kinds: firstly, under Section 22 (2) (*a*), interest at a rate to be settled by the Treasury on payments made in cash (here numbered 3, 6 and 7); and secondly, "revenue payments", as they are styled, (see Section 22 (3) (*b*))

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in respect of the years 1947 and 1948 (here numbered 1, 2 and 9). These revenue payments were to be calculated on the supposed profit-earning capacity of the colliery. They did not bear any relation to the cash addition calculated as interest on the eventual amount of compensation, nor if they turned out to exceed such interest were they repayable to the Minister, but so far as they went they were to be taken in satisfaction of interest addition: see Section 22 (4).

The nature of these revenue payments was much discussed by both the Court of Appeal and the House of Lords in *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.*(1), [1955] Ch. 453; [1957] A.C. 32. There the question related to Profits Tax, so that the decision is not relevant here, but at [1955] Ch. 485(2) Jenkins, L.J., said this:

> "The Act of 1946 studiously avoids describing the interim income as interest on or income of the compensation, even when the interim income is to be satisfied in the way provided by section 22 (2) (*a*), the formula there used being 'the said right' (that is to say, the said right to interim income) . . . 'shall be satisfied . . . by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation . . . a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . .'; and these additional payments are referred to elsewhere in the Act as 'additions' to the compensation. Under the provisions of section 22 (3) as to revenue payments (which, in effect, were to be made for the calendar years 1947 and 1948 in lieu of the above-mentioned 'additions' in all cases in which they would be larger than such additions), these payments were to be calculated by reference to the past earnings of the concern, and bore no relation at all to the amount of the compensation. In continuing the revenue payments in modified form the Act of 1949, in effect, made them as regards 1949 and subsequent years subject to adjustment by repayment to the Minister of any amount whereby they were found to exceed the interim income which would have been payable for the same period according to the method of calculation provided for by section 22 (2) (*a*) of the Act of 1946, but, subject to such adjustment, the right given is still a right measured by reference to past earnings. I find it difficult to hold that the interim income payable under these Acts, defined and measured in the way it is, can properly be described as income of the compensation; and there is, I think, much to be said for the view that, albeit itself in the nature of income, it is not income of the compensation but rather 'income-compensation'"

—Jenkins, L.J., puts a hyphen between the two—

> "if I may use that expression, that is to say, a series of periodical payments, an independent right to which is conferred by the Act by way of compensation for the loss of income sustained in respect of the period between the primary vesting date and the ascertainment and satisfaction of the capital compensation."

In the House of Lords, Lord Radcliffe described the payments thus, [1957] A.C., at page 57(3):

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

(1) 36 T.C. 411. (2) *Ibid.*, at pp. 437-8.
(3) *Ibid.*, at p. 449.

(Harman, J.)

By the Coal Industry (No. 2) Act, 1949, provision was made for making further revenue payments in respect of the years after 1948 during which the compensation should not have been satisfied. These are numbered 4, 5, 8 and 10 here. There was this difference that the Company became liable to the Minister for any excess of the revenue payments over the cash additions to stock when issued; otherwise these revenue payments seem to be of the same nature as those under the Act of 1946 covering the first two years.

This then being the nature of the payments in question, it remains to consider under what Rule of Schedule D they are assessable to tax. The Crown points to Schedule D of the Income Tax Act, 1918, Paragraph 1 (*b*), and says they are "other annual profits or gains" not otherwise charged. It refers further to Case III and the words

> "other income described in the rules applicable to this Case"

and to Rule 1 (*a*), where the words are:

> "any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods".

If this be right so far, the argument proceeds, then these are payments made by the Minister out of moneys provided by Parliament and therefore never brought into charge to tax, and being so payable there is a duty to deduct the amount of the tax

> "at the rate of tax in force at the time of the payment":

see General Rule 21, where the relevant words once again are

> "any interest of money, annuity, or other annual payment".

The taxpayer, with whom the Commissioners agreed, rejected the view that these were "other annual payments" and referred them to Case VI, which, as is well known, is the sweeping-up provision under this Schedule. Mr. Bucher in an able argument said that these were payments *sui generis*, echoing Lord Radcliffe, and fell naturally into Case VI, lacking as they did, he said, certain qualities necessary to qualify them for Case III. His first objection was that in order to obtain compensation the taxpayer was bound to incur expense and that therefore the income when received was not "pure income" (as to which see In re *Hanbury*, 20 A.T.C. 333, at page 335(1)), but was analogous, he said, to a trading receipt and not therefore within Rule 21. I do not accept this. The fact that the payee has to go to some expense, as for instance by maintaining an accounting clerk, in order to receive income does not, in my judgment, make it the less pure income when received. Mr. Bucher's second objection was that some of the money paid might have to be repaid to the Minister, and he pointed to Regulation 21 of S.I. 1947 No. 1946, made by the Minister under Sections 19 to 22 of the 1946 Act, providing for certain adjustments on the final ascertainment of the revenue payments. This in fact happened in the present case by

(1) *See* p. 590 *post*.

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means of a deduction from payment 4 in respect of overpayments made under 1 and 2. For myself I cannot see that this makes the payments the less annual payments.

His third objection was that the income was not the yield of any income-bearing asset or chose in action, nor did it derive from any source other than the Act, not being, as he pointed out, income of the compensation. I confess I do not follow this objection. An income payment may be none the less annual and within Case III because it derives, for instance, from an Order of the Court, as in *Smith* v. *Smith*, [1923] P. 191, or directly from a Statute, as in the case of the payment in the *Epping Forest* case, *Commissioners of Inland Revenue* v. *City of London*(1), [1953] 1 W.L.R. 652, where the City of London was under an obligation, by virtue of the Epping Forest Act, 1878, to make contributions to the conservators of the forest, and these were held to be annual payments. Lord Normand said this, at page 661(2):

> "The payment in question is an annual payment hardly distinguishable from an annuity. The matter has to be looked at both from the payees' point of view and from the respondents' point of view. Regarded as a payment it is a sum paid under a legal obligation and it makes no difference that the obligation is statutory and not under covenant. It has the characteristic of recurrency. It is true that unlike an ordinary annuity it fluctuates from year to year but that is immaterial (*Moss' Empires Ltd.* v. *Inland Revenue Commissioners*(3))."

Mr. Bucher's next point was that the amount was variable at the will of the payer. This was a reference to the fact that the rate of interest was variable and could be fixed by the Treasury. But a payment may be an annual payment though discretionary in nature and uncertain in amount, as in the last case cited and in *Cunard's Trustees* v. *Commissioners of Inland Revenue*, 27 T.C. 122, where a payment was held to be an annual payment though it was payable at the discretion of trustees who were empowered to make up a lady's income to enable her to live in a certain residence in a certain degree of comfort if the income of the residue were insufficient for those purposes. This payment was thus discretionary in amount and in the fact of payment but was held nevertheless to be annual within Case III. The same considerations apply to Mr. Bucher's next objection, namely, that no date was prescribed for payment. Next, he argued that the payments were not made by a person capable of being charged with tax, but I cannot see why this is necessary. Rule 21 merely says that the annual sum is to be "not payable . . . out of profits or gains brought into charge", and the payments satisfy those words.

Lastly Mr. Bucher objected that these were payments made by a public officer out of public revenue and were much more analogous to payments under Schedule C, an argument under which the Crown had abandoned, and he said that Case III ought not to be stretched when the arms of Case VI were ready to receive the payments. I agree that Case III should not be stretched. What then is necessary to make a payment an annual payment? Lord Maugham in his speech in *Moss' Empires, Ltd.* v. *Commissioners of Inland Revenue*, [1937] A.C. 785, at page 795(4), says this:

> "It is, I think, to be noted that we are not concerned here with the case of annual profits or gains arising from a trade, as to which the decision in *Martin* v. *Lowry*(5) would be decisive to show that in that context 'annual' means 'in any one year'. In r. 21 'annual' must be taken to have, like interest on money or an annuity, the quality of being recurrent or being

(1) 34 T.C. 293. (2) *Ibid.*, at pp. 321–2. (3) 21 T.C. 264.
(4) *Ibid.*, at p. 299. (5) 11 T.C. 297.

capable of recurrence. The payments we are concerned with were to continue for five years, subject to their being required to make up the guaranteed annual dividend, and were plainly payments intended to supplement so far as necessary the income of the recipients during each of the years in question. In these circumstances I am of opinion that they had the necessary quality of recurrence and are within the terms of r. 21."

I was troubled by the fact that in Rule 1 of the Rules applicable to Case III, which I have already read, there appears to be an enumeration of the annual payments coming within the Rule so as to exclude payments such as these not within the express words, but it has been laid down that it is not necessary that the payment should fall within any of the actual words. This appears from *Smith* v. *Smith,* [1923] P. 191, where Lord Sterndale, M.R., at page 197, says this:

> "Unless therefore there is something in the nature of this particular payment which leads to an opposite conclusion it seems to me clearly within the Schedule. It is a personal allowance made by the husband to his wife under the order of the Court: *Watkins* v. *Watkins*(1); it is inalienable: *Watkins* v. *Watkins* and *In re Robinson*(2); and it is liable to alteration or termination by order of the Court. It is true that voluntary allowances are not in practice taxable, though I do not know of any case which lays down the principle on which they are exempted; it may be because as suggested by Warrington, L.J., in his judgment, to be delivered directly, such allowances are considered as a series of gifts and not annual payments at all. At any rate this is not a voluntary allowance, and therefore does not come within the principle, whatever it is. The fact that it is inalienable does not seem to me to be important; many inalienable payments are taxable, for example, inalienable pensions, and I do not see that the fact that it can be increased, reduced or terminated by the Court makes it less a taxable annual payment so long as it continues. Lastly the words 'whether such payment' down to the word 'contract' in the Schedule do not seem to me to exclude from taxable annual payments all payments that cannot be brought within those particular words."

Warrington, L.J., at page 201, says this:

> "The fact that the obligation to pay is imposed by an order of the Court, and does not arise by virtue of a contract, does not in my opinion exclude the payment from the operation of the Income Tax Acts. The words in Case III, 1 (*a*), 'whether such payment' and so forth do not in my opinion limit the annual payments to those there mentioned, but merely provide that they at all events shall be included."

I must, of course, follow those opinions.

Lastly, on this aspect of the case it seems to me that, if the words "other annual payments" must be *ejusdem generis* with the words "interest of money or any annuity"—as to which see *Hill* v. *Gregory,* 6 T.C. 39, *per* Hamilton, J., at page 47, and *Howe* v. *Commissioners of Inland Revenue,* 7 T.C. 289, at page 303—these payments, notwithstanding their odd nature, as described in the *Butterley* case(3), are sufficiently like interest of money to pass the test.

In my judgment, therefore, payments made under the Acts of 1946 and 1949 are "other annual payments" being made in respect of periods of a year and capable of recurrence. As for payments 3, 6 and 7, they are, I think, interest of money, being in fact interest on money compensation although described in the Act as additions to the compensation. If this be

(1) [1896] P. 222. (2) 27 Ch. D. 160. (3) 36 T.C. 411.

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right the Crown succeeds on its primary contention and it is unnecessary for me to consider the further point arising if Case VI be applicable. I allow the appeal.

Sir Reginald Hills.—Will your Lordship say that the appeal will be allowed with costs and the cases will be remitted to the Special Commissioners to adjust the apportionments in accordance with your Lordship's judgment?

Harman, J.—Is that agreed?

Mr. Peter Rowland.—Yes.

Harman, J.—So be it.

The Companies having appealed against the above decision, the cases came before the Court of Appeal (Jenkins, Romer and Ormerod, L.JJ.) on 13th, 14th, 15th and 16th January, 1958, when judgment was reserved. On 21st February, 1958, judgment was given unanimously in favour of the Crown. On 12th March, 1958, after further argument, costs were awarded to the Crown.

Mr. F. N. Bucher, Q.C., and Mr. Peter Rowland appeared as Counsel for the Companies and Mr. John Pennycuick, Q.C., Mr. E. B. Stamp and Mr. Alan Orr for the Crown.

21*st February,* 1958

Jenkins, L.J.—The first of these three appeals is brought by the Whitworth Park Coal Co., Ltd., from a judgment of Harman, J., dated 31st July, 1957, whereby, reversing the determination of the Special Commissioners, he decided in favour of the Crown a question concerning the computation of the actual income of the Company for the years 1948–49, 1949–50 and 1950–51 for the purposes of directions and consequential apportionments of the actual income of the Company amongst its members given and made with respect to the Company under the provisions of Section 21 of the Finance Act, 1922, as amended by Section 14 of the Finance Act, 1939.

Down to 31st December, 1946, the Company, which was under the control of not more than five persons and consequently a company to which the provisions of Section 21 of the Finance Act, 1922, applied, carried on the business of a colliery proprietor. So long as the Company continued to trade, the position, to put it very shortly, was that the giving of directions and making of consequential apportionments with respect to the Company under Section 21 depended upon the discretion of the assessing Special Commissioners, such discretion being exercised in the event of it appearing to them that the Company had not distributed a reasonable part of its actual income so as to make the amount distributed income of its members for Surtax purposes.

By virtue of the provisions of the Coal Industry Nationalisation Act, 1946 (which we will for brevity term "the Coal Act of 1946"), the colliery assets of the Company were on 1st January, 1947 (the "primary vesting date" fixed pursuant to Section 5 of the Act), compulsorily transferred to the National Coal Board, and the Company became entitled in respect of the assets so transferred to compensation, which became due on the

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same date subject to the determination of the amount thereof, and also to "interim income" for the period between that date and the date on which such compensation should be fully satisfied.

The Company accordingly became as from the primary vesting date an investment company within the meaning of Section 20 (1) of the Finance Act, 1936, because it had ceased to trade and no longer had any income other than the "interim income" to which it was entitled under the Coal Act of 1946, with certain modifications later introduced by the Coal Industry (No. 2) Act, 1949 (hereinafter referred to as "the Coal Act of 1949"), which would not, if the Company had been an individual, have been earned income as defined in Section 14 (3) of the Income Tax Act, 1918. Accordingly, by virtue of Section 14 of the Finance Act, 1939, to put it very shortly, the whole of the actual income of the Company was to be deemed to be the income of its members irrespective of the amounts of any distributions made, and the assessing Special Commissioners were enjoined to put into operation with respect to the Company the machinery of direction and apportionment contained in Section 21 of the Finance Act, 1922.

There is no dispute as to the applicability of Section 21 of the Finance Act, 1922, and Section 14 of the Finance Act, 1939. It is, moreover, accepted by the Company that the interim income to which it was entitled under the nationalising legislation was for tax purposes income and not capital. But the assessing Special Commissioners in making their apportionments for the three years under appeal treated each sum received by the Company in respect of interim income as income of the Company for the year in which it was actually so received, and Harman, J., has held that they were right in so doing. The Company contends that this method of computation was wrong and claims that, as held by the Special Commissioners who tried the case, each amount received in respect of interim income should be treated as accruing from day to day over the period in respect of which it was paid, and that the proportion of any such amount attributable to each of the three years under appeal should be ascertained on that footing.

That is the sole question in the appeal. The competing contentions in regard to it are these. (A) For the Commissioners of Inland Revenue it is said: (i) that the payments made in respect of interim income were annual payments within the meaning of Rule 1 (*a*) of Case III of Schedule D in the Income Tax Act, 1918, and consequently payable (as they were in fact paid) under deduction of tax at the standard rate in force at the time of payment, as provided by Rule 21 of the General Rules in that Act, with the result that by virtue of Section 39 (2) of the Finance Act, 1927, each such payment was to be deemed to be income of the year in which it was paid; and (ii) that even if, contrary to their first contention, Case III of Schedule D is inapplicable and recourse must be had to the sweeping up provisions of Case VI, the same result follows, that is to say, each payment in respect of interim income must be treated as income of the year in which it was paid. (B) For the Company it is said: (i) that while the result of applying Case III of Schedule D and Rule 21 of the General Rules would be as claimed by the Commissioners of Inland Revenue, those provisions are not applicable to the payments here in question because (*a*) their character

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was not such as to make them annual payments within the meaning of Rule 1 (*a*) of Case III of Schedule D and Rule 21 of the General Rules; and (*b*) even if they could in other respects properly be regarded as annual payments within the meaning of those provisions, the application to them of those provisions is excluded by the circumstance that the payer was the Crown as represented by the Minister of Fuel and Power; and (ii) that the appropriate head of charge was Case VI of Schedule D, and that proper assessments under that head would attribute to each year only such proportion of any payment in respect of interim income as would be appropriate on the footing that the amount of such payment was income of the period in respect of which it was paid and accrued from day to day during that period.

In order to do justice to these contentions it is necessary to refer to the provisions of the Coal Act of 1946, and also to those of the Coal Act of 1949, relating to the right to interim income and the ways in which that right was to be satisfied. By Section 5 (1) of the Coal Act of 1946 the assets compulsorily acquired were to vest in the Board on such date as the Minister (i.e., the Minister of Fuel and Power) should by order appoint. That date, as we have already mentioned, was fixed by the Minister as 1st January, 1947. By Section 19 of the same Act:

> "(1) Compensation in respect of a transfer of transferred interests or of an overhead expenses increase shall be due on the primary vesting date, subject to determination of the amount thereof. (2) For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of section twenty-two of this Act. (3) Provision may be made by regulations for authorising the partial satisfaction of such compensation before the determination of the amount thereof has been completed."

By Section 21 of the same Act compensation in respect of the assets transferred was to be satisfied by the issue of Government stock, with certain exceptions (the only one applicable here being, we think, the value attributable to stocks of colliery products and consumable or spare stores), where it was to be satisfied by a money payment. By Section 22 of the same Act,

> "(1) The right conferred by subsection (2) of section nineteen of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section. (2) Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned,—(*a*) the said right conferred by subsection (2) of section nineteen of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury; . . . (3) The following provisions of this subsection shall have effect as to the making to colliery concerns, and to subsidiaries within the meaning of the First Schedule to this Act of such concerns, of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(*a*) a colliery concern or such a subsidiary shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern, or of the subsidiary, as the case may be, attributable to activities thereof for which the transferred interests thereof were used or owned; (*b*) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments', and shall be money payments."

Then paragraph (*c*) provides a method of computing comparable ascertained revenue by reference to one of two alternative periods to be selected, to put it shortly, by the company concerned. Then I think we can go to Sub-section (4):

"(4) The provision made by the last preceding subsection shall be deemed, in the case of any colliery concern or of any such subsidiary, to be in substitution for the provisions of subsection (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern or subsidiary, except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern or subsidiary. (5) The Minister may by regulations make such provision supplementary to or consequential on the provisions of this section as appears to him to be necessary or expedient, and in particular, but without prejudice to the generality of this subsection, provision may be made by regulations made thereunder for making adjustments requisite for giving effect to the last preceding subsection and for making good any underpayment or overpayment to a colliery concern or such a subsidiary which may occur in consequence of the making of additions or revenue payments under this section before all the facts relevant for giving effect to the last preceding subsection have become ascertainable."

I think we can now pass to Section 1 of the Coal Act of 1949, which provides:

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

Then there is a provision about the rate of interest, and there is reference to provisions about that in the Act of 1946 to which I have already referred. Then:

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

Then Sub-section (5) gives the Minister power to make regulations

"making such provision supplementary to or consequential on the foregoing provisions of this section as appears to him to be requisite or expedient, and in particular, but without prejudice to the generality of this subsection, provision may be made by regulations made thereunder for requiring the repayment to the Minister of any amount by which a payment made under this section in respect of any year to a colliery concern or subsidiary may exceed the aggregate towards satisfaction of which that payment is under subsection (3) of this section to be treated as being made, and as to the manner of recovery

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of that amount and the disposal of sums recovered in or towards satisfaction of repayment thereof: Provided that in a case where provision is made for recovering the excess or any part thereof by way of deduction from compensation in respect of transfers of transferred interests of the concern or subsidiary, provision shall be made for setting off against the deduction the aggregate of—(*a*) an amount which bears to the amount of the deduction the same proportion that the amount of income tax ultimately borne by the concern or subsidiary for the income tax year the beginning of which falls within the year in respect of which the excess arises bears to the amount which its total income for income tax purposes for that income tax year would be if it were computed without regard to any relief or deduction in respect of profits tax; and (*b*) an amount which bears to the amount of the deduction the same proportion that the amount of profits tax ultimately borne by the concern or subsidiary (as determined in accordance with rules laid down by the regulations) in respect of the aggregate (as so determined) of its profits which are attributable to the year in respect of which the excess arises bears to that aggregate. (6) Nothing in the last foregoing subsection or in regulations made thereunder shall be construed as implying that a payment made under this section to a colliery concern or subsidiary, or a part of any such payment, is for any purpose anything but a payment of income to the concern or subsidiary, or as precluding the distribution as income of a payment so made."

It will be seen that these provisions prescribe three methods of satisfying the right to interim income, viz., (i) under Section 22 (2) (*a*) of the Coal Act of 1946, by making in respect of the period from the primary vesting date to the time of payment or satisfaction of any compensation, in addition to the compensation then paid or satisfied, a money payment of an amount equal to interest for that period on that amount of compensation at the rate or rates prescribed by the Treasury; (ii) under Section 22 (3) of the same Act, in respect of each of the calendar years 1947 and 1948, by a revenue payment equal to one-half of the comparable ascertained revenue of the concern attributable to the activities thereof for which the transferred interests thereof were used or owned, this mode of providing for interim income being by Sub-section (4) in substitution for the provisions of Sub-section (2) so far as regards additions thereunder for those two years in respect of like subjects of compensation, except as to the excess of the aggregate amount of such additions over the aggregate amounts of the revenue payments made in the same case; and (iii) under Section 1 (2) of the Coal Act of 1949, in respect of the year 1949 and subsequent years, by making, in respect of each year down to the year in which the relevant compensation was satisfied in full, a modified form of revenue payment consisting of an amount equal to the excess of one-third of the comparable ascertained revenue over an amount equal to interest for the year in question (at the rate or rates referred to in Section 22 (2) (*a*) of the Coal Act of 1946) on the aggregate amount of that compensation satisfied before the end of that year, payments under Section 1 (2) of the Coal Act of 1949 in respect of any year being treated (by Sub-section (3) of the same Section) as made towards satisfaction of the proportions attributable to that year of the additions in respect of interim income falling to be made under Section 22 (2) (*a*) of the Coal Act of 1946 to compensation paid or satisfied after the end of that year, with power for the Minister under Section 1 (5) of the Coal Act of 1949 to provide by statutory instrument, *inter alia*, for the repayment to him of any amount whereby a payment under that Section exceeded the aggregate towards satisfaction of which such payment was under Sub-section (3) to be treated as being made.

The right to interim income and the three methods of satisfying it under the Coal Acts of 1946 and 1949 being as above described, the first matter for consideration is whether payments made towards satisfaction of such right in the three ways prescribed or any of them were of such a nature that, apart

from the fact that the payer was a Minister of the Crown, they can properly be classed as annual payments within the meaning of Rule 1 (*a*) of Case III of Schedule D.

The Income Tax provisions directly relevant to this point appear to be: (i) Paragraph 1 of Schedule D in the Income Tax Act, 1918, which provides that:

> "Tax under this Schedule shall be charged in respect of . . . (*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax".

(ii) Paragraph 2 of the same Schedule, which provides that:

> "Tax under this Schedule shall be charged under the following cases respectively; that is to say . . . Case III.—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case . . . and subject to and in accordance with the rules applicable to the said Cases respectively."

(iii) Rule 1 of the Rules applicable to Case III of Schedule D, which provides that:

> "The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods".

(iv) Rule 1 of the Miscellaneous Rules applicable to Schedule D, which provides that:

> "Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged."

(v) Rule 21 (1) of the General Rules, which provides that:

> "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

Reference should also be made to Paragraph 6 of the First Schedule to the Finance Act, 1922, which provides that:

> "In computing the actual income from all sources of a company for any year or period,"

for the purposes of Section 21 of that Act,

> "the income from any source shall be estimated in accordance with the provisions of the Income Tax Acts relating to the computation of income from that source; except that the income shall be computed by reference to the income for such year or period as aforesaid and not according to an average of more than one year or by reference to any year or period other than such year or period as aforesaid."

So far as we are aware there has been no reported case concerning the assessment to Income Tax of interim income under the Coal Acts of 1946 and 1949, but the relevant provisions of those enactments have been the subject of close consideration in this Court and the House of Lords in *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.*(1), [1955] Ch. 453;

(1) 36 T.C. 411.

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[1957] A.C. 32, in relation to Profits Tax. The effect of that decision will be sufficiently indicated by the following citation from the headnote, [1957] A.C., at page 32:

> "*Held*, that these sums were not to be included in the computation of the company's profits for the purposes of assessment to profits tax. To bring a payment within the scope of profits tax as 'profits arising in each accounting period from any trade or business' it was not enough that it should be income derived from the property of the company without regard to the question whether it arose from a trade or business carried on by the company during the relevant period. The payments, though income, were not 'income received from investments or other property' within the meaning of Sch. IV, para. 7, to the Finance Act, 1937. Neither was the capital asset (viz., the right to receive compensation) an asset so related to any trade or business carried on by the company that it fell within paragraph 7, nor (if it were) were the payments in question 'income' of that asset."

Mr. Bucher, for the Company, cited a number of passages from the judgments and speeches in this Court and the House of Lords in the *Butterley Co.'s* case[1]. It will suffice to refer to the following observations from the speech of Lord Radcliffe, [1957] A.C., at page 57[2]:

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

At page 62[3] Lord Radcliffe said:

> "I said before that I regard these payments as sui generis. The main feature of them which impresses me is that they were not income which arose from any disposable source under the respondents' control."

There have been many judicial pronouncements as to the scope of Rule 1 (*a*) of Case III and the following propositions can be regarded as established.

(i) To come within the Rule as an "other annual payment" the payment in question must be *ejusdem generis* with the specific instances given in the shape of interest of money and annuities: see *Hill* v. *Gregory*, 6 T.C. 39, *per* Hamilton, J., at page 47; *Earl Howe* v. *Commissioners of Inland Revenue*, 7 T.C. 289, *per* Scrutton, L.J., at page 303. Mr. Bucher submitted that this requirement could not well be fulfilled by the interim income here in question consistently with Lord Radcliffe's description of it in the *Butterley Co.'s* case as "*sui generis*". He said in effect that if interim income under the Coal Acts of 1946 and 1949 was in truth *sui generis* it could not be *ejusdem generis* with any other form of payment, and that the natural home of *sui generis* income was Case VI of Schedule D. We can attach no great weight to this line of argument, for Lord Radcliffe was, as we think, directing himself to the peculiarity of interim income as income not arising from any trade or business or from any contractual obligation or from any income-bearing asset, but payable simply because, as he put it at page 58[2], "the nationalisation Statute decreed that" it "should be paid." The fact that it is *sui generis* in these respects does not appear to us to preclude its inclusion in Rule 1 (*a*) of Case III if it possesses the essential characteristics on which the application of the Rule depends, which are in effect those appearing from the further propositions stated below.

(ii) The payment in question must fall to be made under some binding legal obligation as distinct from being a mere voluntary payment: see *Smith*

(1) 36 T.C. 411. (2) *Ibid.*, at p. 449. (3) *Ibid.*, at p. 453.

v. *Smith,* [1923] P. 191, *per* Lord Sterndale, M.R., at page 197, and Warrington, L.J., at page 202. That requirement is clearly satisfied in the present case.

(iii) The fact that the obligation to pay is imposed by an Order of the Court and does not arise by virtue of a contract does not exclude the payment from Rule 1 (*a*) of Case III.

"The words in Case III., 1 (*a*), 'whether such payment' and so forth do not in my opinion limit the annual payments to those there mentioned but merely provide that they at all events shall be included",

per Warrington, L.J., in *Smith* v. *Smith,* at page 201, and Lord Sterndale, M.R., to the same effect, at page 197. We should add a reference to *Commissioners of Inland Revenue* v. *Corporation of London (as Conservators of Epping Forest),* 34 T.C. 293, where a payment made under an Act of Parliament in the shape of the Epping Forest Act, 1878, was held to be an annual payment within Rule 1 (*a*) of Case III. It would seem to follow that the interim income in the present case is not excluded from the application of the Rule by the circumstance that the obligation under which it is paid is a statutory obligation.

(iv) The payment in question must possess the essential quality of recurrence implied by the description "annual". But that description has been given a broad interpretation in the authorities. For example, in *Smith* v. *Smith,* at page 201, Warrington, L.J., said

"Again the fact that the payment is to be made weekly does not prevent it being annual provided the weekly payments may continue beyond the year."

See also the case in the House of Lords of *Moss' Empires, Ltd.* v. *Commissioners of Inland Revenue*(1), [1937] A.C. 785, where the payment in question fell to be made under a guarantee by the appellants of the payment of a fixed preferential dividend at a specified rate on the ordinary shares of another company, and were therefore in their nature contingent. At pages 793–4(2), Lord Macmillan said:

"At your Lordships' Bar it was argued for the appellants that the payments were not annual payments inasmuch as they were casual, independent, not necessarily recurrent, and throughout subject to a contingency. This argument commended itself to Lord Moncrieff, but I am unable to accept it. There was a continuing obligation extending over each and all of the five years to make a payment to the trustees for the shareholders in the event of the company earning no profits or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments. Rule 21 is not primarily a charging section, but is part of the machinery of collection. The charging enactment is to be found in r. 1 of Case III, Sch. D, whereby tax is imposed on 'any interest of money whether yearly or otherwise or any annuity or any other annual payment . . . payable . . . as a personal debt or obligation by virtue of any contract.' I am of opinion that the payments in question fall within these words."

At pages 795–6(3), Lord Maugham said:

"It is, I think, to be noted that we are not concerned here with the case of annual profits or gains arising from a trade, as to which the decision in *Martin* v. *Lowry*(4) would be decisive to show that in that context 'annual' means 'in any one year.' In r. 21 'annual' must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence. The payments we are concerned with were to continue for five years, subject to their being required to make up the

(1) 21 T.C. 264. (2) *Ibid.*, at p. 298. (3) *Ibid.*, at p. 299.
(4) 11 T.C. 297.

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> guaranteed annual dividend, and were plainly payments intended to supplement so far as necessary the income of the recipients during each of the years in question. In these circumstances I am of opinion that they had the necessary quality of recurrence and are within the terms of r. 21. In so deciding I apprehend that your Lordships are not travelling in any way beyond the existing decisions with regard to 'annual payments' in that rule."

Having regard to these authorities we cannot view the revenue payments in the present case as lacking in the necessary quality of recurrence. Those falling to be made under Section 22 (3) of the Coal Act of 1946 were expressly required to be made " in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively ", and it is plain that the amount of the revenue payment in respect of each of those two years was to be the same. Those falling to be made under Section 1 of the Coal Act of 1949 were expressly required to be made in respect of the year 1949 and subsequent years. It seems to us that the requirement of recurrence is amply satisfied here. We feel more difficulty as regards the interim income payable under Section 22 (2) (*a*) as an addition to the compensation satisfied on any occasion and comprising a sum equal to interest at the prescribed new rate or to the compensation then payable, and will return to that relatively small matter later in this judgment.

(v) The payment in question must be in the nature of a " pure income " profit in the hands of the recipient. By way of authority for this proposition we need only refer to *Earl Howe* v. *Commissioners of Inland Revenue*, 7 T.C. 289, at page 303, where Scrutton, L.J., said :

> " It is not all payments made every year from which Income Tax can be deducted. For instance, if a man agrees to pay a motor garage £500 a year for five years for the hire and upkeep of a car, no one suggests the person paying can deduct Income Tax from each yearly payment. So, if he contracted with a butcher for an annual sum to supply all his meat for a year, the annual instalment would not be subject to tax as a whole in the hands of the payee, but only that part of it which was profits ",

and to In re *Hanbury*, 20 A.T.C. 333, at page 334[1], where Lord Greene, M.R., said :

> " There are two classes of annual payments which fall to be considered for income tax purposes."

Then I think there is a misprint. I think it should read:

> " There is, first of all, that class of annual payment which the Acts regard and treat as being pure income profit of the recipient "

—and those words are repeated by mistake—

> " undiminished by any deduction. Payments of interest, payments of annuities, to take the ordinary simple case, are payments which are regarded as part of the income of the recipient and the payer is entitled in estimating his total income to treat those payments as payments which go out of his income altogether. The class of annual payment which falls within that category is quite a limited one. In the other class there stand a number of payments, none the less annual, the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are."

We should add that the payments held in *Earl Howe* v. *Commissioners of Inland Revenue* not to be within the provisions corresponding to Rule 1 (*a*) of Case III of Schedule D and Rule 21 of the General Rules consisted of premiums covenanted to be paid on certain policies of insurance effected in connection with a mortgage and that the payments similarly excluded in In re *Hanbury* were payments in respect of the use of certain

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(1) *Post*, p. 588 at p. 590.

chattels. It seems to us that the interim income payments in the present case were what Lord Greene, M.R., termed " pure income profit " in In re *Hanbury*. Mr. Bucher argued the contrary on the ground that the Company was put to expense in the shape of the cost of the work necessary to be done by or on behalf of the Company in connection with the quantification of the compensation. But we do not see why this expense should prevent the interim income from being " pure income profit " in the sense intended by the Master of the Rolls in that case. So far as attributable to the interim income as distinct from the compensation itself, it was expense incurred in fixing the amount of the annual payment to be made, and not expense to be set against the annual payment as representing the cost of earning it, so as to convert it from an annual payment within Rule 1 (*a*) into a mere element in the ascertainment of a balance of profit. If a continuing partner agreed to pay an outgoing partner an annuity based on the average profits of the partnership business for the last three years, the outgoing partner to pay the cost of ascertaining the amount, we apprehend that the outgoing partner could not claim that the annuity was prevented by his expenditure in ascertaining its amount from being in his hands pure income profit.

Mr. Bucher raised various other points, in addition to those already indicated, against the inclusion of interim income under the Coal Acts of 1946 and 1949 in the category of annual payments within Rule 1 (*a*) of Case III of Schedule D. He said no time was fixed for payment save in so far as payments under Section 22 (2) (*a*) of the Coal Act of 1946 fell to be made at the same time as the payment or satisfaction of the relative compensation. We do not regard this as material. The revenue payments under both Acts were to be made in respect of each of the years to which the relevant provisions of the Acts respectively applied. An obligation to pay a given sum in respect of each of a series of years implies, in the absence of some provision to the contrary, that the payment in question is to be made yearly, and an obligation in those terms would to our minds clearly possess the quality of recurrence required by the Rule. In *Cunard's Trustees* v. *Commissioners of Inland Revenue*, 27 T.C. 122, payments made from time to time under a discretionary power conferred on trustees were held to fall within Rule 1 (*a*) of Case III of Schedule D. Mr. Bucher further took the point as to the payments to be made under Section 22 (2) (*a*) of the Coal Act of 1946 that their amount was variable at the will of the payer, inasmuch as the Treasury was to prescribe the rate or rates of interest by reference to which those payments were to be quantified. We think this point is met by *Cunard's Trustees* v. *Commissioners of Inland Revenue,* where the amounts of the payments depended on the discretion of the trustees.

Mr. Bucher also submitted that the revenue payments under the Coal Act of 1949 were not annual payments within the Rule because under that Act the recipient might be called upon to repay some part of the amounts received in the event of his turning out to have received more than the prescribed aggregate amount. We think *Williamson* v. *Ough,* 20 T.C. 194, is, so far as it goes, against him, but it dealt with provisions in a will for the recoupment to capital of payments made thereout to beneficiaries on account of income which in the view of the House of Lords did not impose on the beneficiaries a personal obligation to repay. Obviously a mere series

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of loans would not be annual payments within the meaning of the Rule, but we hardly think a contingent obligation to repay such as we are concerned with here would suffice to exclude the payments in question from the operation of the Rule. However that may be, we think this point is concluded against Mr. Bucher by Section 1 (6) of the Coal Act of 1949, which with reference (*inter alia*) to the provisions as to repayment contained in Sub-section (5) says this, and I have already referred to it :

> " Nothing in the last foregoing subsection or in regulations made thereunder shall be construed as implying that a payment made under this section to a colliery concern or subsidiary, or a part of any such payment, is for any purpose anything but a payment of income to the concern or subsidiary, or as precluding the distribution as income of a payment so made."

We do not think the provisions of Section 22 (5) of the Coal Act of 1946 as to repayment, which are confined to overpayments made owing to mistakes of fact, affect the matter.

Returning to the interim income provided for by Section 22 (2) (*a*) of the Coal Act of 1946, we would observe that this interim income, though calculated as a sum equal to interest at the prescribed rate on the compensation to which it is added, is not described as interest of, or interest on, the compensation, and was held by the House of Lords in the *Butterley Co.'s* case[1] not to be such. It cannot therefore well be brought within Rule 1 (*a*) of Case III of Schedule D as " interest of money ". Accordingly, we do not think it is covered by the case of *Riches* v. *Westminster Bank, Ltd.*[2], [1947] A.C. 390, where interest on damages, although paid *uno flatu* with them, was within the Rule as being " interest of money ". If it is not interest of money, is it at all events an " annual payment " for this purpose? With some doubt we conclude it is not. It is true that it is calculated at an annual rate, but the Section requires it to be paid, as regards each item of compensation with reference to which it is payable, at the same time as and by way of addition to the compensation in question. We find difficulty in discerning here the relevant quality of recurrence, and therefore conclude that this relatively small part of the interim income with which this case is concerned is a proper subject of tax under Case VI of Schedule D.

For the reasons we have endeavoured to state we conclude that apart from the question whether Rule 1 (*a*) of Case III of Schedule D and Rule 21 of the General Rules have any application at all where, as here, the payer is a Minister of the Crown, the revenue payments received by the Company under the Coal Acts of 1946 and 1949 would be taxable as annual payments under Rule 1 (*a*) of Case III of Schedule D and subject accordingly to Rule 21 of the General Rules, whereas the payments of interim income received by the Company under Section 22 (2) (*a*) of the former Act are taxable under Case VI.

The next point for consideration is whether a payment made by a Minister of the Crown can fall within Rule 1 (*a*) of Case III of Schedule D and Rule 21 of the General Rules. I have already referred to paragraph 1 of the Rule. Paragraphs (2), (2A) and (2B), added to Rule 21 of the General Rules in the Income Tax Act, 1918, by the Finance Act, 1927, Section 26, are in these terms:

> " (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person. (2A) The Special Commissioners

(1) 36 T.C. 411. (2) 28 T.C. 159.

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may, where any person has made default in delivering an account required by this Rule, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment, and if any person neglects or refuses to deliver an account so required, he shall forfeit the sum of one hundred pounds over and above the tax chargeable. (2B) All the provisions of the Income Tax Acts relating—(*a*) to persons who are to be chargeable with income tax and to income tax assessments; (*b*) to appeals against such assessments; (*c*) to the collection and recovery of income tax; (*d*) to cases to be stated for the opinion of the High Court, shall, so far as they are applicable, apply to the charge, assessment, collection and recovery of income tax under this Rule, and the Special Commissioners shall, for the purpose of an assessment under this Rule, have any powers of a surveyor, and, for the purpose of the representation of the Crown before the Special Commissioners on any appeal under this Rule, any person nominated in that behalf by the Commissioners of Inland Revenue shall have all such powers as a surveyor has at and upon the determination of an appeal."

It will be observed that under paragraph (2) the person by or through whom the relevant payment is made is enjoined to deliver an account of the payment and of the tax deducted thereout, and the Special Commissioners are enjoined to assess and charge the payment of which an account is so delivered on that person. It will be observed further that under paragraph (2A) the Special Commissioners may make an estimated assessment on any person who has made default in delivering the prescribed account, and any person who neglects or refuses to deliver the prescribed account is to forfeit £100 over and above the tax chargeable. Finally, it will be observed that the provisions of the Income Tax Acts as to the collection and recovery of tax applied by paragraph (2B) to tax under the Rule include Section 169 (1) of the Income Tax Act, 1918, which provides that

"Any tax charged under the provisions of this Act may be sued for and recovered from the person charged therewith in the High Court as a debt due to the Crown . . ."

In view of these provisions we cannot construe the word "person" in Rule 21 as including the Crown. The obligation to deduct tax imposed by paragraph (1) and the other obligations and penal provisions laid upon the person by or through whom the payment is made by paragraphs (2), (2A) and (2B) seem to us to show quite clearly that the word "person" in the Rule is not to be construed as including the Crown. This conclusion we think accords in its result with the views expressed in the House of Lords in *Boarland* v. *Madras Electric Supply Corporation, Ltd.*, 35 T.C. 612. The actual decision in that case was that the words "If at any time . . . any person succeeds to any trade . . . which until that time was carried on by another person" in Rule 11 (2) of Cases I and II of Schedule D included the case of succession by the Crown because the Rule did not operate to charge the person succeeding with any tax. But the principles underlying the immunity of the Crown from tax imposed by any Statute were discussed, and there was some divergence of opinion amongst their Lordships on that subject. Lords Reid and MacDermott preferred the view that the word "person" in a provision imposing tax on the "person" referred to should as a matter of construction be held not to include the Crown, but that there was no reason for denying the word "person" its ordinary meaning (which would include the Crown) in a provision which did not operate to impose any tax on the person referred to. Lord Keith, on the other hand, preferred the view that the word "person" must be construed as including the Crown

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even in a charging provision, but that, where the effect of that construction would be to charge the Crown with tax, the royal prerogative operated to exempt the Crown from its application. Lord Tucker said this, 35 T.C., at page 644:

> "My Lords, I am not persuaded that the decision of this appeal calls for an historical investigation of the true nature of the royal prerogative or its precise impact upon parliamentary legislation. It is beyond dispute that the Income Tax Acts do not operate to charge the Crown with payment of tax—in other words, the immunity derived from the prerogative has not been affected by express words or by necessary implication. This being the position I can see no reason why the word 'person' in those parts of the Acts which do not impose a charge to tax should be construed otherwise than in its ordinary and natural meaning, which clearly includes the Crown."

Lord Oaksey said, at page 637:

> "My Lords, I agree with my noble and learned friend, Lord Tucker, that it is unnecessary in this case to decide whether the Crown's admitted immunity from taxation depends upon the construction of the Statute or arises from the prerogative in some other way",

and he concluded his speech thus:

> "The words 'the tax payable for all years of assessment by the person succeeding' must, I think, be construed to mean the tax, if any, and not to deprive the taxpayer of balancing allowances to which he would have been entitled because his successor is not taxable."

Whether the immunity of the Crown is founded upon construction or on prerogative overriding construction, the result appears to us to be the same, namely, that the charging provisions of taxing Acts do not extend to the Crown unless the Crown is included therein by express terms. The only possible difference might be that, if the exemption is assigned to prerogative, it is arguable that the Crown could submit to be bound by waiver. No such argument was, however, addressed to us, and we find it difficult to hold that categorical provisions such as those here in question, couched in language which is in terms appropriate to taxpayers and taxpayers only, are to be considered as binding upon the Crown unless and until the Crown asserts the prerogative, so that the Crown can elect to be bound or not by asserting or refraining from the assertion of the prerogative, and having asserted the prerogative once more become bound by waiving it. We think that whether construction or prerogative is the true basis of the immunity the result must be that the Crown is excluded *ab initio* from the application of provisions such as those now under consideration.

We should add a reference to *Coomber* v. *Justices of Berks*, 2 T.C. 1, where Lord Watson said, at page 21:

> "The exemption of the Crown from the incidence of rating Statutes is a general privilege, and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases when the Crown is not named in the Statute, or, I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication."

In *Constantinesco* v. *Rex*, 11 T.C. 730, the House of Lords, in refusing to entertain the contention that Rule 21 did not apply to the Crown because it had been raised too late, said nothing to suggest that if it had been raised in time it might not have succeeded.

Rules 19 and 21 of the General Rules, on the one hand, and Rule 1 (*a*) of Case III of Schedule D, on the other, are co-extensive, so that everything to which Rule 1 (*a*) applies must also fall within Rule 19 or 21, and nothing can fall within Rule 1 (*a*) unless it falls either within Rule 19 or within Rule 21. Rule 19, which deals with interest, annuities, etc., payable wholly out of profits or gains brought into charge to tax, cannot apply to the Crown, because the

Crown, not being liable to tax, has no profits or gains answering that description. This suggests that the complementary provisions of Rule 21 are similarly limited in their application to persons other than the Crown. Moreover, Rule 21 contemplates that a person to whom it applies may have some profits or gains brought into charge and make payments partly out of such profits or gains and partly otherwise, a position which for the same reason could not arise in the case of the Crown.

It may further be noted that certain payments out of public funds are separately provided for in the Rules applicable to Case III of Schedule D, which indicates that Rule 1 *(a)* was not intended to include them. Reference may also be made, for example, to the special machinery provided in Schedule C to deal with the deduction of tax from various kinds of payments made out of the public revenue. One may also contrast with the Coal Acts of 1946 and 1949 the special provisions as to tax which are to be found in Sections 10 and 23 of the Transport Act, 1947, and Sections 11 and 28 of the Electricity Act, 1947.

For these reasons we conclude that the revenue payments with which this case is concerned, while otherwise possessing the characteristics requisite for their inclusion in Rule 1 *(a)* of Case III of Schedule D, are excluded from that Rule by the circumstance that the payer is the Crown represented by one of Her Majesty's Ministers. It follows in the view we take that the whole of the interim income payments fall within Case VI of Schedule D, and it only remains to consider whether such payments are nevertheless, as contended by Mr. Pennycuick, for the Crown, taxable as income of the years in which they were received, or on the other hand are, as contended by Mr. Bucher, to be treated as accruing from day to day over the period in respect of which they were paid, the amount attributable for tax purposes to each of the three years under appeal being ascertained on that footing.

Case VI of Schedule D comprises

> "Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule".

Rule 2 of the Rules applicable to Case VI provides that:

> "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require".

Mr. Pennycuick relied on the general principle that for Income Tax purposes a payment in the nature of income must be treated as income of the year in which it is received. He admitted that exceptions to the general rule were to be found in cases involving the assessment of the profits of a trade or profession under Case I or Case II but claimed that no similar exception existed where, as here, the receipt in question is in the nature of a pure income profit as distinct from an element to be brought into computation for the purpose of arriving at a balance of profits and gains.

Mr. Pennycuick referred to the judgment of Rowlatt, J., in *Grey* v. *Tiley,* 16 T.C. 414, where the taxpayer had become entitled to a commission in 1920–21 and received only part of it in that year and the balance in subsequent years. Rowlatt, J., held that for the purposes of tax under

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Case VI the income arose when the payments on account of the commission were received. At page 422, he said this:

"Now the position that the Solicitor-General takes up, as I understand it, is this. He does not contend that at the end of the year, in this case 1920–21, there was a right on the part of the Revenue to assess this gentleman to this tax because he earned the money. I take it he does not say that, and it would be very remarkable if that was the law because it would mean that a man was taxed before he had got anything to pay it out of. As I understand the position, and this is what I am addressing myself to all the time, the position taken is this, that if and when the money is paid, then arises the right to assess and that right, then, relates back to the year when the money was earned. I am bound to say, I think, that it strikes one as a somewhat curious proposition, looking at the Special Case which I have referred to, that when the end of the year comes it becomes ruled out and the question is whether the accounts ought to be rectified or anything of that kind. When the end of the year comes is it not the case that a man either has or has not incurred tax for that year? It seems to me that a very great confusion and very great difficulty arises if, as overdue payments of interest on foreign securities or profits of this kind fall due, a series of back assessments in respect of back years are to be made, not because there is a mistake about what ought to have been assessed in that year but because, by relation back, the facts of that year have become different facts afterwards, because that is what it must mean. I do not myself feel that that is right but I think in this case I really am bound, for what it is worth, by my own decision in *Leigh's* case(1). The whole thing may, of course, be opened elsewhere but I think I am really bound by my own decision in that case. That was a clean case. It was the case of a man who had bonds and had bought them, it does not matter whether he bought them or not but he had them, on which there were many years of arrears of interest. They were foreign bonds or colonial bonds but an agent paid them in this country and, therefore, they were not taxed as foreign securities but they were taxed under the special provisions of the Act, which I need not refer to, by a Section dealing with the matter and were liable to suffer deduction of the tax in force at the date of payment. Those six years of arrears were paid at once and the tax was deducted at the rate of the year of payment. That has no significance because, even if they fall into the six Income Tax years by reason of the provisions which I have indicated, the rate of tax ought to be the rate of tax in the year of payment. That is artificially provided for by the Legislature. That does not help the argument, but without the help of that decision I came to say this, that for Super-tax purposes he must be held to have received all those instalments of interest in one year. The struggle in that case was—Mr. King was the struggler—to put them back to the previous years by virtue of the word 'receivable', just as here the struggle is to put them back by virtue of the word 'arising'. I said in that case that 'receivable' did not affect the matter at all, but the substance of the thing was that I thought and held that these receipts must be treated as all appertaining—I used that word—to the year in which they were actually received. I am bound to say that I think I ought to follow that in this case, though I still remain of the opinion independently that in dealing with these matters I want it to be understood that I say nothing more than this, that in dealing with these casual profits coming under Case VI, you must look at the time when the casual profits come in and not go back to the year *ex post facto* in which the contract was made and when the profits subsequently come in."

Mr. Pennycuick also referred to *Dewar* v. *Commissioners of Inland Revenue*(2), [1935] 2 K.B. 351, where tax was claimed upon unpaid interest on a legacy and it was held that inasmuch as the interest in question had not been received it was not chargeable to tax. At page 366(3), Lord Hanworth, M.R., said this:

"Then I come to *Leigh* v. *Inland Revenue Commissioners* in which Rowlatt J., whose experience and knowledge of the Income Tax Acts is quite unrivalled, says: 'It is to be remembered that for income tax purposes "receivability" without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it.' I agree with those words.

(1) Leigh *v.* Commissioners of Inland Revenue, 11 T.C. 590. (2) 19 T.C. 561.
(3) *Ibid.*, at pp. 576–7.

It appears to me that the reason why you make up the return for the particular year is that you look to see in the course of that twelve months what has been received, and it may be that a good debt will be paid in a subsequent twelve months and not in the twelve months in respect of which you are making your declaration, and you cannot anticipate that the money will come in in its proper place in the following twelve months. I think Rowlatt J. was right in saying that for income tax purposes receivability without receipt is nothing."

We need not make further reference to *Leigh's* case([1]), the effect of which is sufficiently indicated in the citations made above. We were also referred to *Johnson* v. *W. S. Try, Ltd.,* 27 T.C. 167, where Lord Greene, M.R., at page 181, after referring to the practice of including in the accounts of a trade for the purpose of computing its profits debts due but unpaid, said this :

"But I venture to think in one sense that is an anomaly, because it is a departure from what I have always understood to be the fundamental conception of Income Tax legislation—that you ascertain your profits in reference to your receipts. The reason why that exception is brought in is that it is in accordance with ordinary commercial practice to treat debts in that way."

Mr. Bucher placed some reliance on *Lambe* v. *Commissioners of Inland Revenue,* 18 T.C. 212, where it was held that interest on certain debentures which was due and payable but unpaid should not be included in the taxpayer's total income for Surtax purposes because it had not been received. That accords with the cases to which we have already referred, and does not help Mr. Bucher. But, at page 220, Finlay, J., used language suggesting that, if and when the interest was in fact paid, it should not be treated as income of the year of payment but should be spread over the years in respect of which it was payable and charged to tax accordingly. But this expression of opinion was unnecessary for the purposes of Finlay, J.'s, decision, and we cannot regard it as outweighing the views to the contrary expressed in the other cases to which we have referred.

Mr. Bucher's argument involves construing the word " arising " in Rule 2 of the Rules applicable to Case VI of Schedule D as meaning " arising in point of entitlement " and treating the interim income as accruing in point of entitlement from day to day. If that were right, then logically the amount arising in each year, in the sense attributed to that expression by Mr. Bucher, although not in fact paid would have been taxable as income of that year. That conclusion seems contrary to the effect of the cases to which we have referred, and Mr. Bucher did not seek to support it. His contention was that the interim income, although arising, in his sense of the expression, year by year, did not become taxable until it was received, and then was not taxable as income of the year of receipt but as income of the years over which it was accruing in point of entitlement. This would involve the reopening of assessments and the raising of additional assessments at any distance of time from the year 1947–48 onwards according to the period taken to work out the compensation provisions under the Coal Acts of 1946 and 1949. We cannot think this is right, and in our view the expression " arising " in Rule 2 of the Rules applicable to Case VI must be construed as meaning " received ".

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Mr. Bucher pointed out the reference to Case VI of Schedule D in Section 35 of the Finance Act, 1926, which by Sub-section (1) provides as follows:

> "Where in the case of any profits or gains chargeable under Case I, Case II, Rule 4 of Case III or Case VI of Schedule D it is necessary, in order to arrive at the profits or gains or losses of any year of assessment or other period, to divide and apportion to specific periods the profits or gains or losses for any period for which the accounts have been made up, or to aggregate any such profits or gains or losses or any apportioned parts thereof, it shall be lawful to make such a division and apportionment or aggregation".

But we take this provision to be directed to cases in which it is necessary to compute profits and losses for the purpose of arriving at a balance of gains, as in the ordinary case of a trade under Case I of Schedule D. That necessity might arise under Case VI when applied to activities analogous to but not actually constituting a trade: compare *Commissioners of Inland Revenue* v. *Forth Conservancy Board,* 16 T.C. 103. Accordingly, we do not think Section 35 (1) of the Finance Act, 1926, advances Mr. Bucher's argument in the present case, where the only income in question is in the nature of a pure income profit.

We should also refer to In re *Sebright,* [1944] Ch. 287, on which Mr. Bucher to some extent relied. The question with which Vaisey, J., was there concerned was at what rate tax should be deducted from arrears of a jointure in the adjustment of the rights of beneficiaries *inter se,* and we do not think it really touches the point at issue in the present case which concerns the years to which the interim income received by the Company should for tax purposes be held to belong.

We are conscious that we have not referred in detail to all the points raised in the exhaustive arguments presented to us, but we hope we have dealt adequately with the essential matters.

For the reasons we have endeavoured to state we conclude that the apportionments under appeal in the first of the three cases should have been made on the footing that the interim income was taxable under Case VI of Schedule D and not under Case III of that Schedule, but that this will not affect the actual result.

The other two cases concern sub-apportionments to the two Companies concerned under the provisions of Section 21 of the Finance Act, 1922, of their appropriate proportions of the total income of the first Appellant Company, and accordingly involve precisely the same question, which must be answered with respect to the second and third Appellant Companies in the same way.

Mr. E. B. Stamp.—Will your Lordships dismiss the appeal with costs?

Jenkins, L.J.—That seems to follow. We venture to differ from Harman, J., as to the applicability of Case VI, but that does not make any difference.

Mr. F. N. Bucher.—Would you allow me one word?

Jenkins, L.J.—Yes.

Mr. Bucher.—A rather odd situation arises because the Company has had its apportionment made on the footing of grossed-up income. Of course, all it has received are net amounts. On the Crown's own view, receivability without receipt is nothing. Your Lordships have held that it was not a case of a gross amount less tax under Rule 21 but was a Case VI case, and

on the Crown's own view the result would be that the apportionments were excessive, though, of course, on your Lordships' judgment we would be wrong in saying it should have been spread back over particular years.

Jenkins, L.J.—I do not actually follow you, how the ultimate result differs. If it is a case of deduction under Rule 1 (*a*) of Case III, then tax at the standard rate is deducted, the balance of the payment is paid, and for Surtax purposes the figure less tax is grossed up to the original gross figure.

Mr. Bucher.—If your Lordship pleases.

Jenkins, L.J.—Is it not the same if it is Case VI—the gross amount is paid in the first instance and then it bears Surtax?

Mr. Bucher.—The gross amount has not been paid, and that is why I am submitting to your Lordship that the Company is not liable on anything more than what it has received.

Jenkins, L.J.—The appropriate amount was deducted and applied in paying the Company's tax.

Mr. Bucher.—Deducted in error on your Lordships' judgment.

Romer, L.J.—That means that they could not charge you again. They have received a claim for the tax, have they?

Mr. Bucher.—May I suppose that £2,000 of interim income was owing to us. The Crown have deducted £1,000 and paid us £1,000. Your Lordships have held that that deduction was wrong in law and that we are assessable in the year of receipt under Case VI. Upon what? On £1,000. Therefore, the apportionments are excessive by 100 per cent.

Jenkins, L.J.—I confess I did not appreciate this was in the case as argued.

Mr. Bucher.—It is not in the contentions.

Romer, L.J.—If the Crown were wrong in deducting it, they would have to pay it to you now and assess you on that. It comes to the same thing.

Mr. Bucher.—One very much hopes so, but we have not got the money yet. I do not know what the Ministry of Fuel and Power will say. On the Crown's own view, subject to my learned friend's comments, until we get the money we ought not to be assessed. It is the basis of Mr. Pennycuick's argument on the second point.

Romer, L.J.—It all ends up in the same way, does it not?

Mr. Bucher.—Not unless we get the money.

Romer, L.J.—Assuming the Crown pay you the tax they wrongfully deducted, the figure would be the same.

Mr. Bucher.—My Lord, it would not, with respect, because on the basis of your Lordships' judgment we are assessable in the year of receipt. My second £1,000 in my example has not yet been received, and therefore the Surtax, which is after all what is in point in the case, will necessarily be less.

Jenkins, L.J.—What do you say about this, Mr. Stamp?

Mr. Stamp.—In my respectful submission, the position is simply that my learned friend has been allowed the amount of tax that has been deducted, and if there was a readjustment then he would have to pay tax—he would receive the money and hand it over to the Crown as Income Tax. It does not affect Surtax liability in the slightest degree. What in fact has happened is that in paying the income to my learned friend's client tax has been deducted and accounted for, and my learned friend has been given credit by the tax collector for that amount of money.

Jenkins, L.J.—Mr. Bucher says that, if the decision of this Court is right that Case VI is the right Case, then this deduction of tax is without any warrant whatever. Supposing the payment to be made was £2,000, of which £1,000 had to be applied to tax on the footing it was Case III of Schedule D, that £1,000 would be misapplied and unpaid because there was no warrant. He says it must be deducted in the year of receipt.

Mr. Stamp.—I say that sum has been applied in paying my friend's Income Tax liability.

Romer, L.J.—We cannot possibly work out the result of this. The only question is on the question of costs.

Mr. Stamp.—If my learned friend is right, the matter would have to go back to the Special Commissioners—*if* he is right. I would submit the only effect would be that the Commissioners would find that the amount of the tax which had been wrongfully deducted and which had been applied in payment of my learned friend's Income Tax ought to have been treated as having been paid to him, when in fact it was paid to the Inspector of Taxes and deducted from his tax liability. That must be the result. If I, being under covenant to pay an annual sum of money, wrongfully deduct Income Tax and account for it to the Crown, then the payee must be treated as having received the full amount for Surtax purposes because I have accounted for the full amount to the Crown and he has notionally received it. I have paid it to the tax collector and it must be treated as paid on his behalf.

Jenkins, L.J.—The case was argued before us on the footing that the competing views were Case III or Case VI, and if it was Case VI there was this further question, in what year. And if you were right in your argument about in what year the distinction would produce no difference.

Mr. Stamp.—Indeed.

Jenkins, L.J.—That is how I understood the argument.

Mr. Stamp.—My learned friend has never suggested it made any difference whether it was Case III or whether we were right in saying assuming it was Case VI you have got to tax in the year of receipt. I do submit that it was not put to your Lordship that it made the slightest bit of difference. In my respectful submission it does not make any difference.

Romer, L.J.—It is very difficult to deal with this now, is it not? We have never had this suggested before.

Jenkins, L.J.—Every conceivable point, I should think, was argued. This possible difference was never touched on at all.

Mr. Stamp.—I respectfully agree. I do submit we ought to have the costs of the appeal because we have won. Our argument has been upheld, and this is at this very moment a new point, I respectfully submit.

(*The Court conferred.*)

Jenkins, L.J.—It appears to us, Mr. Bucher and Mr. Stamp, that the best way of dealing with this new hare which has been raised at this stage will be to postpone the drawing up of the Order for, say, a week, with a view to your clients considering the matter and seeing whether there is really anything, and if so what, in it. If you cannot reach agreement about it, then the case will have to be put in the list again on some convenient day for further argument on this point as to whether it ought to go back to the Commissioners or whether simply the appeal should be dismissed.

Mr. Stamp.—Subject to that, your Lordship may think we should have the costs.

Jenkins, L.J.—We think that the matter had better be mentioned again in any event, but if there is going to be argument it would be a convenience if the Court could be informed, because that will affect the time we fix and allow for it, and when it is mentioned again we will deal with this question of costs. It may or may not depend on what has been arrived at on the other part of it, this new point. I am afraid that is all we can do. I am sorry we cannot dispose of it finally today, but this point is entirely new as far as I am concerned.

Mr. Stamp.—It is new as far as I am concerned.

Mr. Bucher.—It may be that I owe your Lordships an apology on this point. It was inherent, as I thought, in the second point your Lordships dealt with and certainly was not elaborated by me, and I do apologise.

Jenkins, L.J.—I think that is the way we had better deal with it.

Mr. Bucher.—I shall be asking your Lordship at the proper time for your Lordships' leave to appeal to the House. I do not know whether this is a proper time?

Jenkins, L.J.—If the case is going to be mentioned again in any case I think it had better be done then.

Mr. Bucher.—If your Lordship pleases.

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Jenkins, L.J.—In these three cases we delivered a reserved judgment on 21st February, 1958. Immediately after the judgment had been delivered Mr. Bucher raised a point which appeared to myself and my brethren, and also I think to those appearing for the Crown, to be a new point

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which had not been raised previously in the proceedings. In those circumstances we thought it well to allow an adjournment to give the parties an opportunity of investigating further the position arising in view of this new point. We have now heard argument on both sides about it and I will proceed to deal with it to the best of my ability.

Of the three cases involved we are in effect only concerned with that of the Whitworth Park Coal Co., Ltd., the cases of the other companies being clearly governed by precisely the same considerations. The case, which came before Harman, J., by way of Case stated by the Special Commissioners, and before this Court on appeal by the Company from his decision, concerned the treatment of interim income payments under the Coal Acts of 1946 and 1949 in the apportionment of the actual income of the Company amongst its members for Surtax purposes under the provisions of Section 21 of the Finance Act, 1922, as amended by Section 14 of the Finance Act, 1939. The Income Tax situation is somewhat complicated and a number of points were raised. The substantial question was in what years were the interim income payments to be taken into account for the purposes of tax.

The competing views argued before us were these. First, there was the contention of the Crown that these were annual payments under Case III of Schedule D and accordingly payments which ought to be made under deduction of tax. If that view was right, then it was admitted that the income was to be treated as income of the year in which it was received. In fact that view had been acted on, and one finds in the Case Stated a table of these interim income payments shown in one column as gross amounts and in another column as the net amounts paid, the Minister having made what were thought to be the appropriate deductions of tax and paid the net amounts to the Company. The second view, which was contended for by the taxpayer, represented by Mr. Bucher, was that these were not annual payments within Case III of Schedule D, but came under Case VI, the well-known sweeping up provision. He contended that, if he was right so far, the interim income payments received from time to time ought for the purposes of Case VI to be treated as accruing from day to day. Thirdly, the Crown sought to meet Mr. Bucher's argument for the application of Case VI by saying, if, contrary to our contention, the proper case is Case VI and not Case III, it does not make any difference, because the income for the purposes of that Case, as for the purposes of any assessment under Case III of Schedule D, should be treated as income of the year in which it was received.

Those three competing views were argued at great length before us. We held that Case III of Schedule D was inapplicable for the reason that the payer of the annual sums in question was a Minister of the Crown, and that the provisions relating to Case III of Schedule D in its application to annual payments were couched in such terms as to make it to our minds reasonably plain that they had no application where the payer was the Crown. We consequently rejected the Crown's argument that Case III of Schedule D was appropriate and held that the appropriate head of charge was Case VI of Schedule D, but we held further, on various authorities, that nevertheless the sums in question must be treated as income of the year in which they were received and not, as Mr. Bucher contended, on the basis of apportionment from day to day.

These payments had in fact been made under deduction of tax and according to our decision that was the wrong procedure. The gross amounts should have been paid, and the Company then should have paid the

appropriate amounts of tax, on being assessed to them under Case VI. That gives the background of Mr. Bucher's new point, which is this. He says that the amounts deducted by the Minister supposedly in respect of tax were wholly unwarrantable deductions which ought never to have been made at all. He says that according to the decision of the Court this interim income is to be considered as income of the year in which it is paid ; these sums deducted for so-called tax have never been paid ; therefore they have not yet become the income of any year, and if and when they are paid they must be treated as income of the year in which they are received, a year which *ex hypothesi* has not yet arrived. If Mr. Bucher's argument were acceded to there would, so he tells us, be a substantial advantage to the company on the figures and in the resulting computation of the Surtax liability.

After giving the best attention I can to Mr. Bucher's argument, I find myself unable to accede to it. In the first place, it appears to me reasonably plain that the point was never taken in the Stated Case at all. The Case recited all the payments and the deductions made from them in respect of tax, but it is quite plain that no point was made of the amounts deducted for tax as distinct from the gross payments. In fact the Case, as I understand it, was concerned throughout with the gross payments, and the question was to what years should these gross payments be attributed. Also, it appears to me that before this point of Mr. Bucher's could be accepted the facts of the case would require perhaps a considerable amount of further investigation. It is all very well to say that the amounts deducted by the Minister supposedly on account of tax were mere unauthorised deductions which ought to be disregarded altogether, but after all these payments were made in respect of tax so far as the intention went ; the Company knew they were being made and never raised any objection to that course being taken ; and there is no doubt, as I understand it, that the sums shown as deducted were in fact deducted and were in fact applied in discharge of the Company's Income Tax liability. It appears to me that before acceding to Mr. Bucher's contention it would be necessary to investigate the matter somewhat closely, inasmuch as the Crown might well be able to show that by acquiescence or estoppel the Company had authorised or ratified these deductions with the result that in effect they should be considered as paid to the Company when they were applied in discharge of the Company's liability to tax.

Mr. Bucher says that unless his argument is acceded to great injustice will be done. On the face of it it seems to me that there is really little substance in that submission. If the matter is dealt with simply by looking at the gross amounts year by year, and allocating to years in accordance with the principles stated in our judgment, precisely the same result will be reached as if the erroneous deductions of tax had never been made. Mr. Bucher would reject the gross payments and take advantage of the mistaken deductions, treating them simply as parts of the interim income payments which have never in fact been paid. As I see it, that is no more than taking advantage of a mistake. That Mr. Bucher would no doubt be entitled to do, if he could properly do so, but at this stage of the proceedings, and having regard to the course the matter has taken here and below, it

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does not appear to me to be right to hold this point open to Mr. Bucher in all the circumstances.

Accordingly, so far as this application is concerned, I would refuse it.

Romer, L.J.—I entirely agree and have nothing to add.

Ormerod, L.J.—I agree.

Jenkins, L.J.—I would now like to hear from Counsel what, if anything, is required in the way of special directions. What Order, in effect, should be made having regard to what we have said in our judgment?

Mr. J. Pennycuick.—My Lords, the order of the Special Commissioners is in paragraph 9 of the Case Stated. They

> "held that the said payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods."

They adjusted the apportionments accordingly. Harman, J., held that the payments were chargeable under Case III, and by his Order he said:

> "The Court is of opinion that the determination of the said Commissioners is erroneous and allowing this Appeal doth reverse the said determination relating to the consequential apportionments accordingly and doth remit the case to the said Commissioners for the said apportionments to be adjusted in accordance with the Judgment of this Court",

that is to say, to be adjusted on a year of receipt basis, because that admittedly was the appropriate basis under Case III. Your Lordships have held that the head of charge is Case VI and not Case III, but you have held that under Case VI the year of receipt basis is equally the appropriate one. Therefore, I should have thought that no further remission to the Commissioners was necessary, because the apportionments which they have made in accordance with Harman, J.'s Order must still be the right ones.

Mr. F. N. Bucher.—I do not think the apportionment has been made.

Mr. Pennycuick.—Then I beg your Lordships' pardon. If it has not been made, I have got my facts wrong.

Romer, L.J.—Mr. Bucher said that he could bring in some expenses under Case VI.

Jenkins, L.J.—If there is any question on figures outstanding, now is the time to take measures to deal with them.

Mr. Pennycuick.—I am sorry. I was in error on my facts.

Mr. Bucher.—I think I can help here. I think on your Lordships' decision you could simply dismiss my appeal.

Jenkins, L.J.—You are satisfied that no more guidance is required about expenses or anything?

Mr. Bucher.—The result of dismissing the appeal will be the same as the result Harman, J., would have arrived at and that will restore the original apportionment. That is what your Lordships have held to be right. I would be content to accept an Order in that form.

Jenkins, L.J.—Simply dismissing the appeal?

Mr. Bucher.—I think so, my Lord.

Jenkins, L.J.—I suppose that satisfies you, Mr. Pennycuick?

Mr. Pennycuick.—I would agree, my Lord. Your Order would be simply dismissing the appeal, and that leaves Harman, J.'s Order remitting it for the apportionments to be adjusted in accordance with the judgment of this Court and his Order, which are the same for this purpose. I will ask for the costs of this appeal and also of this application.

Jenkins, L.J.—That seems to be right, Mr. Bucher.

Mr. Bucher.—Yes, my Lord.

Jenkins, L.J.—The costs of the appeal and the costs of today.

Mr. Bucher.—Yes, my Lord. Some of my older points appealed to your Lordships. Would your Lordships feel disposed to allow my clients leave to appeal to the House of Lords?

Jenkins, L.J.—Mr. Pennycuick, do you take the usual benevolent view?

Mr. Pennycuick.—I do not say it is benevolent, my Lord. We say nothing.

Jenkins, L.J.—Very well, Mr. Bucher, you may have leave.

Mr. Bucher.—If your Lordship pleases.

The Companies having appealed against the above decision, the cases came before the House of Lords (Viscount Simonds and Lords Tucker, Reid, Radcliffe and Keith of Avonholm) on 20th, 21st and 22nd July, 1959, when judgment was reserved. On 5th November, 1959, judgment was given in favour of the Crown, with costs (Lord Radcliffe dissenting).

Mr. F. N. Bucher, Q.C., and Mr. Peter Rowland appeared as Counsel for the Companies and Mr. John Pennycuick, Q.C., Mr. E. B. Stamp and Mr. Alan Orr for the Crown.

Viscount Simonds.—My Lords, at the conclusion of the argument in this case I found myself in full agreement with my noble and learned friend **Lord Reid.** He thereafter wrote an opinion to which, since I concurred in it at all points, I intended to add nothing. He has, however, been prevented by illness from taking his seat in your Lordships' House in the present Parliament and cannot speak in it. I have therefore, with his permission, adopted his opinion as my own and I will now state it. My noble and learned friend **Lord Tucker,** who is also unable to be here today, has intimated to me that he takes the same view.

My Lords, the first Appellant, which I shall call "the Company", owned and operated a colliery until 1st January, 1947, when its colliery assets were vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946. Thereafter it was an investment company to which the provisions of Section 21 of the Finance Act, 1922, and Section 14 of the Finance Act,

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1939, had to be applied. Directions under these Sections were given to the Company with regard to the years 1948–49, 1949–50 and 1950–51, under which its " actual income " for those years fell to be apportioned among its members so that Surtax would become payable as if the amounts so apportioned were parts of the incomes of the members. When another company is a member of such a company a sub-apportionment has to follow, and the second and third Appellants are only concerned with such sub-apportionments. No separate point arises in their cases ; it is agreed that the decision of the Company's appeal must rule these other cases, and I shall therefore say no more about them.

The " actual income " from any source of a company subject to such a direction is, under Paragraph 6 of the First Schedule to the 1922 Act, the income from that source estimated in accordance with the provisions of the Income Tax Acts. Under some of these provisions the income of the tax-payer for a particular year is the income which he actually receives during that year. Under others that is not so, and it may make a great difference to liability for Surtax if particular income payments are included in the actual income of one year rather than in that of another. For example, if five years' arrears of interest are paid in one year it is clearly to the advantage of the Surtax-payer that these arrears should be spread back so as to be regarded as income of the years when the interest fell due or accrued rather than that the whole sum should be regarded as income of the year of receipt.

The income payments with which this case is concerned are a number of payments made to the Company by the Ministry of Fuel and Power under the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, during the three years which I have mentioned. The contention of the Crown is that all these payments form part of the actual income of the Company for these years, and that is denied by the Company. So it is necessary to decide which provisions of the Income Tax Acts applied to these payments, and that depends on the nature of the payments. Then, having decided which provisions apply, it will be necessary to decide what they mean.

When the 1946 Act was passed it was realised that it would take a considerable time to work out and satisfy the rights to compensation which arose under it, and this Act provided rights to interim income under Sections 19 and 22, of which the relevant parts are as follows:

" 19.—(1) Compensation in respect of a transfer of transferred interests or of an overhead expenses increase shall be due on the primary vesting date, subject to determination of the amount thereof. (2) For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of section twenty-two of this Act. (3) Provision may be made by regulations for authorising the partial satisfaction of such compensation before the determination of the amount thereof has been completed."

" 22.—(1) The right conferred by subsection (2) of section nineteen of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section. (2) Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned,—(*a*) the said right conferred by subsection (2) of section nineteen of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock

then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury . . . (3) The following provisions of this subsection shall have effect as to the making to colliery concerns, and to subsidiaries within the meaning of the First Schedule to this Act of such concerns, of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(*a*) a colliery concern or such a subsidiary shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern, or of the subsidiary, as the case may be, attributable to activities thereof for which the transferred interests thereof were used or owned; (*b*) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments', and shall be money payments; (*c*)[Method of computing comparable ascertained revenue]. (4) The provision made by the last preceding subsection shall be deemed, in the case of any colliery concern or of any such subsidiary, to be in substitution for the provisions of subsection (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern or subsidiary, except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern or subsidiary. (5) The Minister may by regulations make such provision supplementary to or consequential on the provisions of this section as appears to him to be necessary or expedient, and in particular, but without prejudice to the generality of this subsection, provision may be made by regulations made thereunder for making adjustments requisite for giving effect to the last preceding subsection and for making good any underpayment or overpayment to a colliery concern or such a subsidiary which may occur in consequence of the making of additions or revenue payments under this section before all the facts relevant for giving effect to the last preceding subsection have become ascertainable."

Section 22 (2) is comparatively simple. Whenever a part of the compensation is satisfied, the company is to be paid a sum equal to interest on that part from 1st January, 1947, until the date when that part is satisfied. But then Sub-section (3) confers a further right to receive "revenue payments" which are to be equal to half the "comparable ascertained revenue" for the years 1947 and 1948: and Sub-section (4) provides that these are to be in substitution for the provisions of Sub-section (2), at least so far as they go. Then further provision was apparently thought necessary and that further provision is contained in Section 1 of the 1949 Act. All these provisions are extremely complicated, but I think that it is sufficient to say that in effect the 1949 Act provides for further payments, analogous to revenue payments under Section 22 (3) of the 1946 Act, in respect of 1949 and subsequent years. I do not think that a meticulous examination of these provisions is necessary, and I do not propose to quote from the 1949 Act.

I can now turn to the Case Stated, and I would set out the main parts of paragraphs 2 and 4:

"2. (*a*) The sole question for our determination was whether, in computing the actual income of the Company for the purpose of the said apportionments, interim income received by the Company under the provisions of the Coal Industry Nationalisation Act, 1946 (hereinafter called 'the 1946 Act'), and the Coal Industry (No. 2) Act, 1949 (hereinafter called 'the 1949 Act'), should be included in the actual income of the year in which it was received or, as the

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Company contended, of the year or period in respect of which it was paid . . . 4. (1) The Company received from time to time payments from the Ministry of Fuel and Power (hereinafter called 'the Ministry') for or in respect of interim income under the provisions, in the case of some of such payments, of the 1946 Act and, in the case of others of such payments, of that Act and of the 1949 Act. The said payments are set out in tabular form below, and were made under deduction of Income Tax; each payment was accompanied by a letter from the Ministry and a certificate of deduction of Income Tax in the form of, or in a form similar to, the letter and certificate both dated 26th January, 1949, copies of which are annexed hereto, marked 'A1' and 'A2' respectively, and form part of this Case. The other letters and tax deduction certificates which were produced to us are not annexed hereto but are available for reference if required. Each such letter states that the payment relates to a claim by the Company for interim income for a stated period.

Serial number	*Date of receipt*	*Gross amount of payment* £	*Net amount paid* £	*Period for which it is stated to be paid in accompanying letter*
(1)	7th August, 1948 ...	9,068	4,987	18 months ended 30th June, 1948.
(2)	26th January, 1949 ...	2,733	1,503	Half-year ended 31st December, 1948.
(3)	12th September, 1949...	68	37	From 1st January, 1949, to 12th September, 1949.
(4)	28th March, 1950 ...	1,837	1,011	Year ended 31st December, 1949.
(5)	14th July, 1950 ...	1,616	889	Half-year ended 30th June, 1950.
(6)	11th August, 1950 ...	5	3	From 1st July, 1950, to 11th August, 1950.
(7)	13th November, 1950...	7	4	From 1st July, 1950, to 13th November, 1950.
(8)	21st February, 1951 ...	1,519	835	Half-year ended 31st December, 1950.
(9)	25th May, 1951 ...	1,343	705	Two years ended 31st December, 1948.
(10)	9th August, 1951 ...	810	425	Half-year ended 30th June, 1951."

There follow a number of particulars about these ten payments, but again I do not think that in the end these particulars throw light on the present question. It will be observed from the table which I have set out from the Case that, although all these sums were paid during the three years in question, to a large extent the periods for which they were stated to be paid fall outside these three years; accordingly, if the Appellants are right, a considerable proportion of these payments should not be included in the actual income of the Company for these three years.

The only provisions of the Income Tax Acts which could apply to these payments are those of Case III or of Case VI of Schedule D, and it is admitted that one or other of these Cases must apply. The Crown argues that Case III applies and that Rule 21 of the General Rules applicable to all Schedules in the Income Tax Act, 1918, also applies. If that is right, then admittedly the Crown must succeed. The Company, on the other hand, argues that Case III does not apply at all and that the payments fall within Case VI or, alternatively, that even if Case III does apply Rule 21 does not apply. If either of these alternative contentions is right then difficult questions of construction arise.

The Special Commissioners held

"that the payments in question were chargeable to Income Tax under the provisions of Case VI of Schedule D of the Income Tax Act, 1918, and were not chargeable under Case III of the said Schedule nor under Schedule C. We further held that the said payments formed part of the actual income of

the Company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods."

On appeal Harman, J., held that these payments were within Case III and he also held that Rule 21 applied, so he allowed the Crown's appeal. He dealt with Rule 21 so shortly that it would seem that the argument against its applicability cannot have been fully developed before him. The Court of Appeal held that Rule 21 did not apply to these payments and that, as Rule 19 did not apply either, that prevented these payments from falling within Case III. They held that the payments fell within Case VI, but they held that under the Rules applicable to Case VI these payments were income of the years of their receipt. Accordingly they dismissed the Company's appeal.

I must now set out and consider these provisions of the Income Tax Act, 1918.

"Rules applicable to Case III. 1. The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods . . . 2[1].—(1) The tax shall, subject as hereinafter provided, be computed—(*a*) as respects the year of assessment in which the profits or income first arise, on the full amount of profits or income arising within that year; and (*b*) as respects subsequent years of assessment, on the full amount of the profits or income arising within the year preceding the year of assessment . . . (2) Tax shall be paid on the actual amount computed as aforesaid without any deduction."

The remainder of the Rules do not appear to be material for the present purpose.

"Rules applicable to Case VI. 1. The nature of the profits or gains, and the basis on which the amount thereof has been computed, including the average, if any, taken thereon, shall be stated to the commissioners. 2. The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require . . .

General Rules applicable to Schedules A, B, C, D and E . . . 19.—(1) Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. . . .

[1] As amended by the Finance Act, 1922, s. 17.

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> 21([1]).—(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment. (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person. (2A) The Special Commissioners may, where any person has made default in delivering an account required by this Rule, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment, and if any person neglects or refuses to deliver an account so required, he shall forfeit the sum of one hundred pounds over and above the tax chargeable."

It will be convenient first to assume that these payments were annual payments within the meaning of Case III and to consider whether on that assumption Rule 21 can be applied to them. It was argued, I think rightly, that Rule 21 cannot be applied to payments made by the Crown. I do not base my opinion on any presumption or general rule as to applying to the Crown statutory provisions which do not bind it either expressly or by clear implication. In my view an examination of the provisions of Rule 21 shows that these provisions cannot be applied and can never have been intended to apply to the Crown. Rule 19 deals with annual payments, etc.,

> " payable wholly out of profits or gains brought into charge to tax ",

and Rule 21 deals with payments

> " not payable, or not wholly payable, out of profits or gains brought into charge ".

Neither expression appropriately describes payments out of moneys provided by Parliament, and moreover in all ordinary cases the Crown has other authority for deducting tax in making income payments. It can only be in a most exceptional case that the Crown would have to rely on Rule 21 as its only warrant for deducting tax. It is plain that between them Rule 19 and Rule 21 are intended to cover all cases of annual payments, etc., made by a taxpayer. Under both there is provision for deducting tax when making the payment, but the purpose is quite different according to whether or not the money which is paid has already borne tax. If it has, then the Crown has no interest because the same money is not to be taxed twice. The authority to deduct tax is for the purpose of enabling the taxpayer to recoup himself when he has already paid tax on the money which he has now to pay away, and the payee has to submit to this deduction of tax because it ought in the end to fall on him. But if the money has not borne tax, then the Crown has an interest because the money becomes on payment a part of the taxable income of the payee. So the payer is bound to deduct tax and to pay it to the Revenue. Rule 21 operates, not as an authority to deduct tax, but as an obligation to do so and to account to the Revenue for the tax deducted, and the whole purpose of Rule 21 appears to me to be to enable the Revenue to recover from the payer tax which is really due by the payee. That, I think, appears even more clearly from the orginal form of Rule 21, which first appeared as Section 24 (3) of the Customs and Inland Revenue Act, 1888. Before then a payer of interest, etc., out of money which had not borne tax was under no obligation to deduct tax, and the tax was payable by the payee ; but provisions authorising the payer

([1]) As amended by the Finance Act, 1927, s. 26 (1).

to retain tax out of money which had already borne tax so as to recoup himself go back to 1842. Section 24 (3) of the 1888 Act provided that upon payment of interest, etc., not payable or not wholly payable out of profits brought into charge the payer

> "shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly".

In my opinion it would need not interpretation but complete redrafting to turn that provision or its modern equivalent into an authority to the Crown to deduct tax when making payments out of moneys provided by Parliament.

Two questions now arise. Can Case III apply to payments which do not come within either Rule 19 or Rule 21, and, if it can, is the nature of the payments in this case such that Case III should be applied to them? The Court of Appeal answered the first of these questions in the negative. But they gave no reasons, and I do not see why Case III cannot be applied if the nature of the payment is such that, apart from this point, they would come within the scope of that Case. I would agree with the Court of Appeal if direct assessment were impossible under Case III, either because the Rules of Case III are inadequate or for any other reason, but it was not argued that there can never be direct assessment under Case III. Moreover, Rules 19 and 21 are not linked with Case III in the Act; they appear among the General Rules applicable to all Schedules. It is true that all but the most unusual cases under Case III, Rule 1 (*a*), do fall within either Rule 19 or Rule 21, but that does not seem to me to mean that these Rules must be held to control the applicability of Case III, Rule 1 (*a*). So I pass on to consider whether the nature of these payments is such that Case III cannot apply to them.

It was argued that the decision of this House in *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.*(1), [1957] A.C. 32, showed that these payments are unique in character and that therefore they cannot be annual payments within the meaning of Case III. "Annual payment" must, it is said, be read in its context and must in some way resemble or be *ejusdem generis* with interest or annuities, but these payments are *sui generis*. That argument appears to me to be no more than a play on words. One must look at the true nature of the payments. It is well recognised that many payments which in the ordinary sense of the words might well be called annual payments do not come within Case III. One limitation is that Case III only applies to payments received as pure profit income; that is because no deductions are permitted under Case III. And further, the payments must recur or at least be of a recurring character. I think that the payments in this case comply with both these requirements.

An argument was submitted to the effect that these payments were not received as pure profit income of the company because there ought, on proper accounting principles, to be an allowance in respect of deductions, that is, expenses necessary to "earn" or achieve these payments. But any such argument must be based on facts, and there are no facts in the

(1) 36 T.C. 411.

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Stated Case to support it. On the contrary, paragraph 2 of the Case, which I have already quoted, clearly shows that this point was never raised before the Commissioners. In my opinion we cannot do otherwise in this case than regard these payments as pure profit income.

On the matter of recurrence the Court of Appeal drew a distinction between those payments which were made under Section 22 (2) of the 1946 Act and the others, but I do not think that there is room for any such distinction. All the payments were payments of "interim income" under Section 19 of the 1946 Act, and they should in my view be regarded as a single series of payments although their amounts were determined by different provisions of the 1946 and 1949 Acts. Otherwise I agree with the opinion of the Court of Appeal that the requirements of Case III are satisfied in the case of these payments.

If I am right so far, the decision of this case depends on the proper interpretation of Case III, Rule 2, which enacts the method of assessment of Case III payments. Under that Rule the income of any year of assessment is the "income arising" during either that year or the previous year, and I may add that if the payments were held to fall within Case VI substantially the same question would arise because there the words "profits or gains arising" would have to be construed. To my mind the most difficult question in this case is to determine the meaning of these two words "income arising". Do they include only money which has been received, or do they also include money which is due and payable but has not yet been received, or money which has accrued but is not yet payable?

Most of the argument on this point turned on the meaning of the word "arising", but I do not think that that is the most important word. No income can arise before there is any income, and as soon as there is income the income has arisen. The word "income" appears to me to be the crucial word, and it is not easy to say what it means. The word is not defined in the Act and I do not think that it can be defined. There are two different currents of authority. It appears to me to be quite settled that, in computing a trader's income, account must be taken of trading debts which have not yet been received by the trader. The price of goods sold or services rendered is included in the year's profit and loss account although that price has not yet been paid. One reason may be that the price has already been earned and that it would give a false picture to put the cost of producing the goods or rendering the services into his accounts as an outgoing but to put nothing against that until the price has been paid. Good accounting practice may require some exceptions—I do not know—but the general principle has long been recognised; and if in the end the price is not paid it can be written off in a subsequent year as a bad debt.

But the position of an ordinary individual who has no trade or profession is quite different. He does not make up a profit and loss account. Sums paid to him are his income, perhaps subject to some deductions, and it would be a great hardship to require him to pay tax on sums owing to him but of which he cannot yet obtain payment. Moreover, for him there is nothing corresponding to a trader writing off bad debts in a subsequent year, except perhaps the right to get back tax which he has paid in error. The case has often arisen of a trader being required to pay tax on something which he has not yet received and may never receive, but we were informed that there is no reported case where a non-trader has had to do

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this, whereas there are at least three cases to the opposite effect: *Lambe* v. *Commissioners of Inland Revenue*(1), [1934] 1 K.B. 178, *Dewar* v. *Commissioners of Inland Revenue,* 19 T.C. 561, and *Grey* v. *Tiley,* 16 T.C. 414; and I would also refer to what was said by Lord Wrenbury in *St. Lucia Usines and Estates Co., Ltd.* v. *Colonial Treasurer of St. Lucia,* [1924] A.C. 508. I certainly think that it would be wrong to hold now for the first time that a non-trader to whom money is owing but who has not yet received it must bring it into his Income Tax return and pay tax on it. And for this purpose I think that the Company must be treated as a non-trader, because the *Butterley* case(2) makes it clear that these payments are not trading receipts.

I would not put it that there is any general or universal principle that sums not yet paid must or must not be brought into assessment to Income Tax. There are two quite different cases. Traders pay tax on the balance of profits or gains and bring money owed to them into account in striking that balance, but ordinary individuals are not assessable and do not pay tax until they get the money because until then it is not part of their income. There may well be difficult borderline cases which do not clearly fall into either of these classes, and I do not attempt to foresee how they should be decided, but the payments in this case being pure profit income and not being trading receipts must, I think, be put in the second of these classes. Part of these sums accrued during the years 1946–47 and 1947–48, but in my view the Company could not have been assessed and required to pay tax on amounts which accrued during those years but had not been paid when the assessment was made, even if the exact amount which had accrued could have been determined.

But then it was argued that, although payment of tax could not have been demanded before the sums were received, now that they have been received they can be spread back over the years during which they were accruing. I would willingly accede to that argument if I saw anything in the Income Tax Acts which I thought would warrant it. In a case where the whole or parts of money received during one year had become due and payable in one or more earlier years there is much to be said for the view that, although no part of it can be taxed until it is received, it ought when taxed to be spread back and regarded as income of the year or years when it became due: a debtor ought not to be able to alter his creditor's liability for Surtax by delaying payment of his debt. There is some authority for holding that that was the effect of Section 5 (3) (*c*) of the Income Tax Act, 1918. But that has now been superseded. On one view Section 39 (1) of the Finance Act, 1927, achieves the same result in the case of payments to which Rule 19 applies. But in the case of payments to which Rule 21 applies spreading back has clearly been excluded by Section 39 (2) of the 1927 Act. It was not argued that the Appellants could in the present case derive any advantage from Section 34 of the 1927 Act. And there appears to be no provision expressly dealing with payments to which neither Rule 19 nor Rule 21 applies. In the present case it appears to me that any authority for spreading back these payments would have to be inferred from the terms

(1) 18 T.C. 212. (2) 36 T.C. 411.

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of the Rules of Case III. I have already stated my view that in this case no income arose until the money was received, and I cannot see how receipt of the money can alter the meaning of "income arising" so as to make it possible after receipt to hold that income arose not at the date of receipt but at some earlier date. And if the income had not arisen in the earlier year I can find no ground for taxing it as part of that earlier year's income.

But even if it were possible to spread income back to the years when it became due and payable that would not cover the present case. In the present case the income can be regarded as accruing during the earlier years, but I do not think that it can be regarded as having become due and payable then in the sense that the Company could have demanded payment then. I can find nothing on which to base an inference that income, once it has been received, can be regarded as having arisen not only before it was received but even before it was payable and while it was merely accruing. For these reasons I must hold that these payments were income arising at and not before the dates when they were received by the Company and therefore these appeals should be dismissed.

Lord Radcliffe.—My Lords, these appeals raise two questions as to the determination of income for the purposes of the Income Tax Acts. One seems to me to be mainly of technical or administrative significance; the other is of considerable general importance.

The first question is whether the various sums of money paid to the Appellants under Section 22 (2) (*a*) or Section 22 (3) of the Coal Industry Nationalisation Act, 1946, or Section 1 (2) of the Coal Industry (No. 2) Act, 1949, were assessable under Case III or Case VI of Schedule D. It is not in dispute that they are taxable income under one or other of those heads. Following upon a decision between these two Cases certain arguments are developed for or against the substantial question in issue, whether for the purpose of the Surtax direction which has been made under Section 21 of the Finance Act, 1922, as extended by Section 14 of the Finance Act, 1939, the income of the Appellants is to be computed on the basis that each payment forms part of the income of the revenue year in which it was received or, alternatively, is to be written back, when received, over the years in respect of which it was paid.

Under Rule 1 of the Rules applicable to Case III the subject of charge is

> "any interest of money, whether yearly or otherwise, or any annuity, or other annual payment".

The payments with which we are concerned are payments of what the Statute calls "interim income": they take the form either (1) of a "revenue payment" for each of the calendar years 1947 and 1948 equal to one-half of the comparable ascertained revenue of the concern before nationalisation, or (2) of a payment for 1949 and subsequent years of a further calculated sum based on the amount by which one-third of the comparable ascertained revenue might exceed interest on any sum of compensation satisfied before the end of the year, or (3) of a sum "equal to interest" from the vesting date (1st January, 1947) to the date on which any compensation was paid or satisfied, so far as not covered by the other two forms of interim income.

I do not think it necessary or useful to dwell upon the details of these complicated and barely intelligible provisions. It is sufficient to say that all the payments made represented some form of compensation in the form of interim income for the fact that as from 1st January, 1947, the concern had

been dispossessed of its assets, the use and benefit of which passed to the Crown, and until compensation in money or stock was provided had been left without the means of earning an equivalent income from the employment of the compensation. Nor do I think it useful to distinguish between the various forms which these payments of interim income took according to the different statutory rules which were their warrant. None of them, in my view, constituted "interest of money" or an "annuity" for the purpose of Case III of Schedule D. It is much more difficult to say whether any of them constituted an "other annual payment" under this Case.

Neither the Acts nor the Courts have supplied any definition of these words, "other annual payment". There is authority for saying that the "category is quite a limited one": In re *Hanbury,* 20 A.T.C. 333, at page 335([1]). There is ample authority for saying that not all payments that are made annually are annual payments under Case III: *Earl Howe* v. *Commissioners of Inland Revenue,* 7 T.C. 289; *Hill* v. *Gregory,* 6 T.C. 39. The reason for limitation lies in the fact that for the Courts Case III annual payments have been inseparably associated with payments from which tax is deductible in accordance with General Rules 19 or 21, and it has been thought to be inconsistent with the idea of tax being deducted at the source at the standard rate to allow within the Case payments that are likely to be gross receipts of the payee and not "pure income profit". Although this distinction may be a good general guide in determining the scope of Case III, it does not in all circumstances throw a very certain light upon the duty of the payer, who is not necessarily in a position to know whether or not the sum he pays will be treated as "pure income" or a gross receipt in the computation of the payee's tax. That in itself perhaps argues for a restricted interpretation of the words "annual payment".

The word "annual" has not been found to admit of any significant interpretation. To the Courts it means no more than "recurrent": see, for example, *Moss' Empires, Ltd.* v. *Commissioners of Inland Revenue,* 21 T.C. 264—or even "capable of recurrence". That may be so, but I think that it would be both bad logic and bad law to deduce that merely because a payment is in fact recurrent or capable of recurrence it is therefore to be treated as an annual payment.

In the end the question of what is or is not such a payment is a question of judgment formed in the light of the considerations that I have alluded to. On the whole, I should not regard these payments as coming within the description. Although they could and were indeed likely to recur in the sense that several payments might well be so called for before full compensation was provided, they were essentially the temporary product of an exceptional measure of State expropriation. The income provided was in that respect casual. Such temporary and casual incomes appear to me to fit less naturally into Case III, with its interest of money, annuities and other annual payments, than into Case VI, which has always been regarded as the Case that covers what I may call the oddities of Schedule D. To my mind this interim income presents itself as just one of these oddities, and in any choice between the claims of Case III and Case VI I would favour the claims of the latter.

([1]) *Post*, p. 588, at p. 590.

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There is another independent reason for preferring Case VI. That is the reason which determined the judgment of the Court of Appeal on this point. Your Lordships are at one, I believe, in holding that neither Rule 19 nor Rule 21 of the General Rules is so expressed as to be capable of requiring or authorising the deduction of tax from these payments made by the Crown. I agree with that, and I need not recite my reasons separately. If so, not only are the payments not income " chargeable with income tax by way of deduction ", with the consequence that Section 39 (2) of the Finance Act, 1927, has no application at all and provides no rule to determine the year to which they are to belong as income ; but also there is at any rate strong *prima facie* ground for saying that payments for which the tax scheme provides no deduction at source are not annual payments within the meaning of Case III. For, as is indicated by the decisions to which I have referred, the Courts have tended to treat liability to deduction at source as affording a distinguishing mark of a Case III annual payment ; and if here the freedom from deduction would be due not so much to the nature of the payment as to the accident that it is made by the Crown itself and not by a subject, that circumstance serves only to reinforce the point already made that these interim payments are an exceptional form of income for which the regular scheme of the Income Tax Acts has made no provision.

I turn now to the important question whether the sums paid are bound by law to be treated as income of the revenue year in which they were received, regardless of the fact that some or all of them were avowedly paid by the Crown as income of periods preceding the revenue year of receipt. It is sufficient to take as illustration payments 1, 2 and 9 itemised in paragraph 4 (1) of the Case Stated. These payments cover the interim income to which the Appellants were entitled in respect of the calendar years 1947 and 1948 : they were made under Section 22 (3) (*a*) of the 1946 Act, which itself describes the payments as due " in respect of " those two years, and in each case they were accompanied by an official letter identifying the period to which they related. In the most obvious sense they represented income of the three revenue years 1946–47, 1947–48 and 1948–49, and were due to be apportioned between those years accordingly. Yet because the first payment (in respect of the 18 months to 30th June, 1948) was not made until 7th August, 1948, nor the second payment (in respect of the half-year ended 31st December, 1948) until 26th January, 1949, the Crown claims that these two payments must be allocated wholly to the revenue year 1948–49 ; and because the third payment was made on 25th May, 1951 (as a further payment in respect of the two years ended 31st December, 1948), it is similarly claimed as income of the revenue year 1951–52, with which, if I may be pardoned for begging the question, it has nothing in the world to do.

Only one or two further points need to be noticed. Neither the 1946 nor the 1949 Act fixed a date of payment for the compensation due by way of interim income. It was left to the Crown to make its payments as and when it could or would, due allowance being made for the vast administrative task involved in ascertaining and checking the multifarious compensation claims to which nationalisation gave rise. Secondly, if the argument of the Crown on this appeal is well founded, the dates actually selected for payment have led to the most unfortunate " bunching " of assessable income for the purposes of Surtax, no income at all, for instance, being attributable to the revenue year 1947–48. Surtax is a steeply progressive tax and in connection with it bunching of income is always to be regretted, since it is much to the detriment of any taxpayer with a high marginal rate.

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I do not make any apology, therefore, for saying that I should be sorry if I thought that the Crown's claim was well founded in law.

I am of opinion that it is not. I think that it is both right in principle and in accordance with previous authority to attribute these various payments to the years or parts of years in respect of which they were paid. To take one instance, I think that the first payment of £9,068 (wrongly paid net of Income Tax) should be distributed between the three years 1946–47, 1947–48 and 1948–49. It is not easy to give an account of my reasons for this conclusion without burdening the House with an opinion of altogether immoderate length. I believe, however, that the substance of them can be conveyed by the following propositions, for whose brevity of statement I apologise:

1. In computing profits or gains or other income chargeable under Schedule D for any year the basis of computation is the income that "arose or accrued" during that year. The year in which a payment is actually received is not necessarily the year in which the income which it represents arose or accrued.

2. There is no fundamental or general principle of Income Tax law that the year in which a payment is made must be taken to be the year to which the assessable income belongs. On the other hand, there may be special statutory rules that do secure just this result, as, for instance, the provision made by Section 39 (2) of the Finance Act, 1927, that, in estimating total income, income chargeable with tax by way of deduction at the standard rate in force for any year is to be deemed to be income of that year. This rule could be very injurious to the taxpayer, but it was evidently intended that it should not operate to the injury of the payer of Super-tax or Surtax, since by Section 34 of the same Finance Act (see now Section 238 of the Income Tax Act, 1952) he is allowed to spread any income affected by the rule as if it accrued from day to day. Nevertheless, where the rule applies, *cadit quaestio*. But then there arises this dilemma: if this would have been the legal result anyway according to general principle, why introduce the rule in 1927 with regard to the special class of payments made under deduction? And why, if there was such a principle, had Rule 19 of the General Rules provided, until Section 39 (1) was enacted, that tax was to be deducted

> "at the rate or rates of tax in force during the period through which the said payment was accruing due"?

Lastly, does Section 34 of the 1927 Act represent a principle or an exception from a principle?

3. Subject to the operation of any such special rules, when a payment is received in one year and it can be clearly seen that it ought to be treated as income arising in another year, the law not only permits but requires that it should be attributed to that other year. This principle has been frequently acted upon in the case of traders: see *Isaac Holden & Sons, Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 768; *Lambert Bros., Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 1053; *Ensign Shipping Co., Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 1169; and has twice received the endorsement of this House: see *Commissioners of Inland*

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Revenue v. *Newcastle Breweries, Ltd.*, 12 T.C. 927 ; *Commissioners of Inland Revenue* v. *Gardner Mountain & D'Ambrumenil, Ltd.*, 29 T.C. 69.

4. In the case of trading income the ordinary test for determining the year to which a payment "belongs" is to ascertain the year in which it was "earned" or in which entitlement to the payment arose. As Viscount Cave, L.C., said in the *Newcastle Breweries* case[1]:

> "The rum was taken in 1918, and the right to some payment arose at once, though there was delay in ascertaining the amount to be paid."

The present case reproduces that situation precisely ; but it is so much the clearer as to the date of entitlement in that the Nationalisation Act itself prescribed the date from which the right to payment arose and the periods of time to which each payment of income was to relate.

5. The principle applied in the cases I have just mentioned is not attributable to any special quality of trading income or other income chargeable under Case I or Case II. There is no relevant distinction involved in the fact that Case I income is computed on the "balance" of the profits or gains. What distinction could that be? To put it in its simplest form, the balance is merely the gross receipts less the expenses, and it is the excess of those receipts that is brought to charge. Case II income is not described as computable on the "balance". Yet if a professional income is computed on the basis that debts are receipts, as nearly all such incomes are today, is not the same principle to be applied?

6. Neither is it a relevant distinction that in computing Case I income trade debts are habitually treated as receipts. The suggestion which appears in *Johnson* v. *W. S. Try, Ltd.*, 27 T.C. 167, at page 181, that this practice, which governs a very considerable slice of the total tax yield, is somehow an anomaly, because a departure from a fundamental conception of Income Tax legislation that profits are ascertained in reference to receipts, is, with great respect to Lord Greene, M.R., who made it, a misconception. For this purpose trade debts are receipts. The truth, as I understand it, is that very long ago it was accepted by traders that to measure receipts by trade debts rather than by cash incomings gave a truer measure of the year's profit income. I hope that it is not pedantic to point out that in our economy there are few payments that amount to anything more than transfers of debts. I do not think that appreciation of the fact that some debts are equivalent to receipts need be confined to traders or professional men, but obviously such a method of computation can have only a limited application to other forms of income : see, for example, *Lambe* v. *Commissioners of Inland Revenue*[2], [1934] 1 K.B. 178. I should myself have thought that Crown debts created by Statute were a sufficiently solid category and that we need not look for an allowance for bad debts. But no part of this interesting question is directly in point here.

7. The proof of what I have said lies, I think, in the fact that in none of the cases in which the principle of "writing back" was applied was this principle based by the Court on any practice of computing income that was peculiar to traders or even on the supposition that at the close of the year in which the profit was held to have arisen anything could have been entered as a receipt in respect of the right to or the expectation of the future payment which ultimately matured. Such a point is simply not noticed as relevant. It was relevant, of course, that the payment made had its origin in a trading transaction or a transaction analogous to

(1) 12 T.C., at p. 953. (2) 18 T.C. 212.

trade, because otherwise the receipt would not have been taxable at all. But that is a different point. In fact, in two of the cases there was no debt, merely an uncovenanted payment: see, for example, Rowlatt, J., in the *Isaac Holden* case, 12 T.C. 768, at page 772:

> "It was uncertain whether they ever would receive more at that time: they certainly had no right to demand more",

and the remarks of Viscount Simon, L.C., in the *Gardner Mountain* case, 29 T.C. 69, at page 93. In my opinion, therefore, it is not only safe but necessary to treat these decisions as directed wholly upon the general principle of relating back payments made in one year to the year or years in which the income which they represent can be seen to have arisen. They are decisions upon the meaning or rather upon the application of the word "arising" in connection with Schedule D.

8. There have been other decisions which have more or less bearing on the present issue. In *Hawley* v. *Commissioners of Inland Revenue,* 9 T.C. 331, Rowlatt, J., decided a Super-tax appeal relating to two payments covering several years' income in accordance with the principle of "spreading"; in *Grey* v. *Tiley*, 16 T.C. 414, he decided a case, not obviously distinguishable, in accordance with the principle of "bunching". The latter case was settled by the Crown before it was heard by the Court of Appeal. His decision in *Grey* v. *Tiley* was, he thought, required by his own earlier decision in *Leigh* v. *Commissioners of Inland Revenue,* 11 T.C. 590, a case which in fact turned on the meaning of the word "receivable" in Section 5 (3) (*c*) of the Income Tax Act, 1918, the Section which was repealed to make way for new provisions in 1927. But *Leigh's* case contains a passage, at page 595, about "receivability without receipt for the purpose of Income Tax" being "nothing at all", which is in my view too widely expressed. In any event the proposition is of no assistance when the situation is reached that money has been received and the question has then to be answered in which revenue year it should be treated as arising. It is not then of any significance to ask whether there could have been an assessment on some debt or estimated claim at the close of the earlier year. Lastly, in *Commissioners of Inland Revenue* v. *Earl of Haddington,* 8 T.C. 711, the converse case of a single deductible payment out of income was treated by the Court of Session as due to be "spread" over the two years to which it related. This, too, was a decision which turned primarily on the meaning of the word "payable" in the tax legislation relating to Scotland.

9. It is evident to me that in some cases the argument against "spreading" has been thought to rest upon or be supported by a supposed principle of Income Tax law that at the close of the year of charge the taxpayer is entitled to "know where he is" and to expect a final clearance of tax according to the ascertained results of the year: see *Johnson* v. *W. S. Try, Ltd.,* 27 T.C. 167, at page 181; *Grey* v. *Tiley,* 16 T.C. 414, at page 422. I can make little of this general principle anyway under a system which allows additional assessments, and less of it in relation to the realities of current practice in dealing with the complexities of industrial, commercial and personal incomes in the modern economy. But, however that may be, I imagine that this solicitude would readily be forgone by a taxpayer in favour of getting his true income fairly distributed over the appropriate

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tax years, and he would think his peace of mind bought at altogether too dear a price if the cost of it proved to be a quite fortuitous surcharge on his tax bill.

I am in favour of allowing the appeals.

Lord Keith of Avonholm.—My Lords, I would place the payments here in question within Case III of Schedule D of the Income Tax Act, 1918, as coming under the description of "other annual payment" in Rule 1 (*a*) of the Rules applicable to that Case. The fact that they owe their origin to statutory enactment, which is not a source specifically recognised by the Rule, does not, for the reasons stated by Harman, J., and the Court of Appeal, exclude them from coming within the Rule: *Smith* v. *Smith*, [1923] P. 191; *Commissioners of Inland Revenue* v. *Corporation of London (as Conservators of Epping Forest)*(1), [1953] 1 W.L.R. 652. The nature of the payments as prescribed by Sections 19 and 22 of the Coal Industry Nationalisation Act, 1946, and Section 1 of the Coal Industry (No. 2) Act, 1949, brings them, I think, easily under the Rule. They are expressly described in Section 19 of the 1946 Act as "interim income". Section 22 fixes the measure by which that interim income is to be quantified. It is clear that that income was going to be paid for at least two years. Its complete and final quantification, and so its full satisfaction, might have to be postponed, but there would at least be substantial payments to account. I can draw no distinction between the payments under Sub-section (2) and Sub-section (3) of Section 22. They are complementary to one another, and in certain events Sub-section (2) may not be invoked at all. Where both are invoked, each makes its respective contribution to the interim income provided for by Section 19 of the Act. The "revenue payments" under Section 22 (3) (*a*) of the 1946 Act may be regarded as an instalment to account of the money payment calculated under Section 22 (2) (*a*), although for the years 1947 and 1948 there was to be no recoupment in the event of the "revenue payments" being found to have exceeded the sum calculated under that Sub-section as satisfying the right to interim income. It may be true to say, as the Court of Appeal have said, that it is difficult to discern the quality of recurrence in the payment made under Sub-section (2) (*a*), but, as the Sub-section is part of the machinery for fixing the "interim income" and filling any deficiencies of amount resulting after payment of the "revenue payment" under Sub-section (3), I think the payment made under it should be regarded as part of an annual payment. The circumstances here seem to me to be every bit as potent to bring these payments under the words of Rule 1 (*a*) of Case III as were the circumstances in *Moss' Empires, Ltd.* v. *Commissioners of Inland Revenue*, [1937] A.C. 785; 21 T.C. 264, to make the payments under guarantee in that case so chargeable. With this qualification I would agree with the Court of Appeal that these payments have the characteristics required of "other annual payments" under Rule 1 of Case III. There is nothing, in my opinion, in the decision of this House in *Commissioners of Inland Revenue* v. *Butterley Co., Ltd.*(2), [1957] A.C. 32, to preclude that conclusion.

If then these payments came under Rule 21 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, there would be a simple end to this case. Tax would be deducted from the payments at the rate of tax in force at the time of the payments as being annual payments charged with tax under Schedule D and not payable out of profits or gains brought

(1) 34 T.C. 293. (2) 36 T.C. 411.

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into charge. By Section 38 of the Finance Act, 1927, the tax deducted would be tax at the standard rate, and by Section 39 (2) of the same Act the payments would be treated as income of the year in which the deduction was made, that is of the year in which the payments were received by the Company. The appeal of the Company would be dismissed and the Order of Harman, J., reversing the determination of the Special Commissioners would stand affirmed.

The contention, however, of the Company is that Rule 21 does not apply to the Crown and that accordingly the payments, being payments by the Crown, do not come under the Rule. Rule 21 stems from Section 40 of the Income Tax Act, 1853, which "entitled" and "authorised" the payer to deduct the tax at the time of payment. Had the rule continued in this form I can see no reason why the Crown, equally with the subject, should not have deducted tax from such payments. The Section did not, however, compel the deduction of tax, and Lord Macnaghten in *London County Council* v. *Attorney-General*(1), [1901] A.C. 26, also thought that it did not compel the payer to account to the Crown for the tax if deducted, though Lord Davey in the same case took, I think, a different view on this point. The rule, though not expressly repealed, was in effect replaced by Section 24 (3) of the Customs and Inland Revenue Act, 1888, which directed that

> "the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly".

The rule as so modified was carried into the Income Tax Act, 1918 (which also repealed the 1853 Act and Section 24 of the 1888 Act). The Finance Act, 1927, made certain amendments for reinforcing the machinery for recovery of tax so deducted, and it is in its amended form that the Rule is now under consideration. One, if not the main, reason for the amendment was to place a direct assessment on the payment and so secure priority of ranking in bankruptcy or liquidation which would not have been available to a mere debt due to the Crown. My Lords, it seems strange that a rule which in its original form would, I think, have entitled the Crown to deduct tax, should, when strengthened for the protection of the Crown by improving the machinery for the recovery of the tax, cease to apply to the Crown. Much, I think, might be said for the view that what was compulsory on the subject was permissive to the Crown, and that if the Crown deducted tax the other directives of the Rule became clearly inoperative because the circumstances for their operation could never arise. But I find it unnecessary to pursue this line further as your Lordships take the view that Rule 21 cannot be invoked by the Crown. I am content to proceed on this view.

It is then contended by the Company, Rule 21 being out of the way, that the payments fall to be attributed to the years in respect of which they were paid. As the Commissioners made no direction in respect of

(1) 4 T.C. 265.

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the year 1947–48 no question in respect of that year now arises. The directions in issue are directions in respect of payments in the years 1948–49, 1949–50 and 1950–51, with reference to which the dispute is whether the year of receipt or the period of accrual is to count. By Rule 2 of the Rules applicable to Case III, in its original form under the Income Tax Act, 1918, and in its form as amended by the Finance Act, 1922, tax is to be computed on the amount of income "arising" in a particular year. The word "arising" is to be found in various contexts in the Income Tax Acts. By Schedule C of the Act of 1918 tax is charged

> "in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue".

It is difficult to see how this can mean anything other than that tax shall be charged on profits from the receipt of interest, etc. If interest is not received there can be no profits. Passing over for the moment the opening Paragraph of Schedule D, we find in the Rule applicable to Case II of that Schedule that the tax shall extend, *inter alia,* to

> "all profits and earnings of whatever value arising from employments".

"Arising" here might reasonably be taken as referring to the source of the profits and earnings, as also in Rule 2, the proviso to Rule 4 (1) and Rule 5 of the Rules applicable to Cases I and II. Under Case III, which is the material Case here, Rule 2 originally provided that the tax should be computed "on the full amount arising" within a particular year. As amended in 1922 the Rule provides that the tax shall be computed "on the full amount of the profits or income arising within" certain specified years. As we are concerned here only with tax on the items in Rule 1 (*a*) of the Case,

> "any interest of money, whether yearly or otherwise, or any annuity, or other annual payment",

I think that, as in Schedule C, the natural reading of Rule 2 is to apply it, in the case of income, to income received in the specified years. Rule 1 of Case IV, as amended by the Finance Act, 1926, yields, I think, a similar inference. It is suggested that the Rule shows a clear differentiation between income arising and income received. I can see no such distinction. We are faced here again with a computation "on the full amount" of the income arising in the year preceding the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom to certain deductions and allowances. Here, also, I think that income arising means income received, which in this case means received abroad, and that income received in the United Kingdom is income remitted in some form to the United Kingdom, which could only be from income already received abroad. The same construction falls, in my opinion, to be given under Case V to "income arising from stocks, shares or rents" and "income arising from possessions".

More careful consideration, I think, must be given to the words in Rule 2 of Case VI, which does not refer to "income arising" but to "the profits or gains arising in the year of assessment". This is a sweeping-up Case charging tax

> "in respect of any annual profits or gains not falling under any of [Cases I to V] and not charged by virtue of any other Schedule"

(see Schedule D, Paragraph 2). It is frequently applied to what are called casual profits or to isolated transactions, but is not necessarily so confined: see *Forth Conservancy Board* v. *Commissioners of Inland Revenue,* [1931]

A.C. 540 ; 16 T.C. 103. While it does not cover the profits of any concern "in the nature of trade", which come under Case I (see definition of "trade" in Section 237 of the Act of 1918), it can be invoked to cover the profits of transactions analogous to trade and other transactions which require the striking of a balance of profits or gains. In such cases the method of assessment may differ from that applied in the case of receipt of a pure income profit. Under Case VI the words "profits or gains arising in the year of assessment" will be apt to cover both. Reference was made for the Appellants to Section 35 of the Finance Act, 1926. This Section provides for apportionment of profits or gains chargeable under Case I, Case II, Rule 4 of Case III or Case VI. The purpose of this Section is, I think, clear. It is to provide for the apportionment of profit over a series of years when that has been earned not by activities conducted in one year but by activities continued over a number of years. This may happen in the exercise of a trade or profession or a business of cattle or milk dealers curiously brought under Case III by Rule 4. By association it would seem reasonably clear that the profits and gains under Case VI covered by the Section are similar profits and gains of analogous activities assessed under this Case.

The word "accruing", with reference to income or profits or gains, is of infrequent use in the Income Tax Act, 1918. Paragraph 1 (*a*) of Schedule D provides that tax shall be charged in respect of annual profits or gains arising or accruing to persons

> "from any kind of property whatever"

and

> "from any trade, profession, employment, or vocation".

Paragraph 1 (*b*) makes no reference to profits or gains arising or accruing. It charges tax directly on all

> "interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax".

In this respect it follows closely Section 2, Schedule D, of the Income Tax Act, 1853. To take up at once the matter of taxation of the profits of a trade, profession or vocation, it is familiar law that under Cases I and II, with which I think may be classed some instances under Case VI, where profits or gains are ascertained on an earnings basis, a receipt can be related back, for purposes of assessment to tax, to a year prior to the year of receipt. In such case the receipt is itself not income subject to tax but a payment to be brought into computation for the purpose of striking a balance of profits or gains of the earlier year. It may in effect result in a pure profit to the trader or professional or other earner, but that is only if all his expenses have already been allowed for in assessing the profits or gains brought into charge for tax. This practice is not, I think, based in any way on the use of the word "accruing" in Paragraph 1 of Schedule D, which it may be noted is not used in Cases I and II of that Schedule, but on a recognition of the method by which traders and others are accustomed to ascertain their profits for any year. This is no argument for applying such a rule to receipt of a pure income profit.

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The only other references in the 1918 Act to accrual of income are in Section 5 (3) (*c*), dealing with Super-tax, and Rule 19 of the General Rules. Section 5 (3) (*c*) may have been introduced to avoid any difficulties arising from the language of Rule 19 in the matter of assessment to Super-tax. It does not apply any principle of accrual, but rather supersedes it. It has been considered in some cases to which I refer later, and for the moment I pass to Rule 19. This Rule in the Act of 1918 authorises deductions from payments of any yearly interest of money, annuity or other annual payment

"at the rate or rates of tax in force during the period through which the said payment was accruing due".

That does not help the Appellants. The deduction is not an assessment to tax. The Rule expressly says so. The Rule has an ancient origin dating back to 1803 (43 Geo. III, c. 122, s. 208), when there was only one rate of deduction. The deduction authorised by the 1918 Act dates from the Revenue (No. 1) Act, 1864, and remained until changed by Section 39 (1) of the Finance Act, 1927, to the form which at present obtains, authorising deduction

"at the standard rate for the year in which the amount payable becomes due".

In either form it is, in my opinion, of no assistance to the Appellants and is in contrast with Rule 21, which requires deduction of tax at the rate in force at the time of payment.

Mr. Bucher, for the Appellants, submitted that the general principle (if any) of the Income Tax Acts is to charge income, when received, in the period in which it was earned or arising. It is for that reason that I have examined in some detail any provisions of the 1918 Act that may be thought relevant. I have been unable to extract from them any such principle. The inferences indeed I think point in the opposite direction. The Appellants would seem to be in something of a dilemma. Either they must say that income arising means "income accruing", in which case it should be taxed during each year of accrual, whether received or not; or that it only arises when received and thereafter should be taxed for the years in which it has accrued. The first alternative might be productive in many cases of great hardship and injustice to the taxpayer. The second alternative ignores the two-fold difficulty that, if receipt fixes the date of the income arising, the Act says it shall be charged with tax on the amount of that income in the following year and that there is no statutory provision for spreading the income received over the years of accrual. Special provision was made by Section 34 of the Finance Act, 1927, in a case of assessment to Super-tax, now to Surtax, for relief in such a case, but that does not touch the present issue and no reference was made to this Section in the course of the argument.

Several cases were cited touching the meaning of "income arising" under the Income Tax Acts. The one decision which is directly in point on the issue here is the decision of Rowlatt, J., in *Grey* v. *Tiley,* 16 T.C. 414, a case of commission earned in one year and partly paid in two instalments in subsequent years. The learned Judge held in a case of assessment under Case VI that the instalments fell to be charged in the years of receipt as profits or gains arising in these years. In so holding he applied the reasoning expressed by him in the earlier case of *Leigh* v. *Commissioners of Inland Revenue,* [1928] 1 K.B. 73; 11 T.C. 590. The question there was a different one, being concerned with the measure of liability to Supertax under Section 5 (3) (*c*) of the Act of 1918. The ratio of these judgments was followed in *Lambe* v. *Commissioners of Inland Revenue,* [1934] 1 K.B.

178; 18 T.C. 212, by Finlay, J., and in *Dewar* v. *Commissioners of Inland Revenue*, [1935] 2 K.B. 351; 19 T.C. 561, by the Court of Appeal. While these latter cases merely decided that interest which was accruing but had not been received could not be charged to tax, the necessary correlative follows that income assessable to tax only arose when it was received.

Against this view some reliance was placed on the judgments in *Simpson* v. *Executors of Bonner Maurice,* 14 T.C. 580, and *Commissioners of Inland Revenue* v. *Earl of Haddington,* 1924 S.C. 456; 8 T.C. 711. The first of these cases creates, in my opinion, no difficulty. The assessments were there made under Cases IV and V on the income arising from securities and stocks and shares belonging to a naturalised and domiciled British subject which had been paid into certain German banks during the 1914–18 war. None of this income was received in England till 1923. It was held by the Special Commissioners, Rowlatt, J., and the Court of Appeal that the income arose when it was received by the German banks on behalf of the stockholder or his representatives.

The *Earl of Haddington's* case calls for rather more consideration. Rowlatt, J., thought it was in conflict with his decision in *Leigh's* case(1), as did Finlay, J., in *Lambe's* case. Some of the expressions of opinion by the Judges in the case would lead to that conclusion. But the case was a very special case. The Earl had succeeded his grandfather as heir of entail in possession to the estate of Tynninghame. His father, Lord Binning, who would have succeeded to the estate, had died some five months earlier, on 12th January, 1917. On the occasion of his marriage Lord Binning had, by virtue of the Entail Acts, burdened the entailed estate with a liferent annuity of £2,125 in favour of his widow and also with a provision in favour of the younger children of the marriage. On Lord Binning's death it was found that the estate was burdened by these provisions to a greater extent than was permissible under the Entail Acts, and after his succession to the entailed estate the Earl brought a petition to restrict the annuity of Lord Binning's widow to the sum of £1,627 14*s*. 1*d*. and the younger children's provisions to £7,234 5*s*. This application was granted by an Interlocutor of the Court dated 27th November, 1918, and a bond and disposition in security to secure the children's provisions was granted by the Earl. The position thus was that there had been, since the death of Lord Binning on 12th January, 1917, an effective liferent annuity belonging to his widow and secured on the rents of the entailed estate and provisions to the children secured by bond and disposition in security as from the same date. There was no question of Lord Binning's widow or children having waived their rights or of the Earl being unable to satisfy them. The widow and children were in possession of their provisions from the death of Lord Binning with all the rights attached to them by Statute. As Lord Ormidale put it, the right to the provisions had vested at the death of the heir-apparent. The widow and children might be said to be *domini* of the sums in question as they became due, to use an expression used by Lord Hanworth, M.R., and Maugham, L.J., in *Dewar's* case at pages 362 and 372(2). The question in the case was whether, under Section 66 (2) of the

(1) 11 T.C. 590. (2) 19 T.C. 561, at pp. 573 and 580.

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Finance (1909–10) Act, 1910 (the precursor of the original Section 5 (3) (*c*) of the Income Tax Act, 1918), the sums in question were payable in each year as they accrued or in the year in which they were in fact paid. Owing to the proceedings for restriction which had been taken by the Earl, the first two years' payments were not made till the second fiscal year after Lord Binning's death. He sought to deduct the whole of these payments from his income of that year in order to reduce the Super-tax exigible from him in that year. The Court held that he could only deduct one-half of the payments, as the other half must be held to have been payable in the previous year. Rowlatt, J.'s view in *Leigh's* case[1] was that "payable" was the correlative of "receivable" in the same Section of the Act, and that as there was no receivability without receipt there could be no payability without payment. The case is no direct authority on the meaning of "income arising" under any of the Cases, but in *Grey* v. *Tiley*[2] he clearly regarded the principle of that case as applicable to the meaning of "profits or gains arising" under Case VI. For the reasons I have given it may be possible to reconcile the *Earl of Haddington's* case[3] with *Leigh's* case. But in any event, looking to its specialties, I could not regard it as an apt precedent in support of the Appellant's case.

Reliance was also placed by Counsel for the Appellants on the case of *Hawley* v. *Commissioners of Inland Revenue,* 9 T.C. 331. I find difficulty in discovering the ratio of the decision of Rowlatt, J., in that case. But as the same learned Judge in *Grey* v. *Tiley* had his previous decision in *Hawley* before him, which he found himself able to distinguish, I must assume there is no conflict between the two decisions. His reasoning and decision in *Grey* v. *Tiley* are perfectly clear and in my opinion entirely applicable to the case now under appeal. Other cases were cited, but except for the decision of the Privy Council in *St. Lucia Usines and Estates Co., Ltd.* v. *Colonial Treasurer of St. Lucia,* [1924] A.C. 508, I find them of little help on the point at issue here. The *St. Lucia* case was decided on the words "income arising or accruing" in a colonial Ordinance. It was held that no income arose or accrued until receipt. This decision is in line with the reasoning of Rowlatt and Finlay, JJ., and the Court of Appeal in the cases already cited.

In the result I have come to the opinion that the payments received by the Company were income of the year in which they were received and as such were subject to direction and apportionment under Section 21 of the Finance Act, 1922.

The Court of Appeal took the view that the payments fell within Case VI of Schedule D. That was mainly because they thought that the only annual payments to which Case III, Rule 1 (*a*), could apply were payments from which deduction of tax could be made under General Rules 19 or 21. They also pointed out that certain payments from public funds were separately provided for in Case III. I do not find these considerations compelling. If the payments are of the character that would bring them under Rule 19 or Rule 21 if made by any person or body other than the Crown, I do not see how they lose their character by the accident that the person liable to pay happens to be the Crown. The payments from public funds dealt with in Case III are small payments not exceeding 50*s*. and interest on Exchequer bonds and other securities issued under the authority of the Treasury or under the War Loans Acts during the 1914–18 war from which tax was not deducted at the source. Special considerations applying

(1) 11 T.C. 590. (2) 16 T.C. 414. (3) 8 T.C. 711.

to such payments which have put them into Case III and not into Schedule C seem to me to have no bearing on the question of what is the appropriate Case for the payments here under the Coal Industry Nationalisation Act. But this difference of view is in my opinion immaterial. Treated as coming under Case VI they would still in my opinion, for the reasons I have tried to express, be income arising in the year of payment.

It is said, however, that as the Company has not received the tax deducted the deductions cannot, on the view that income only arises when received, be held to be the income of the Company. This submission is more ingenious than sound. Income for the purpose of the Income Tax Acts is gross income, whether paid with or without deduction of tax. If Rule 21 had applied to the tax deducted here the income that arose would still have been the gross income. It is because it is the taxpayer's income that tax is deducted from it. The same in my opinion applies here. This contention was rejected, and I consider rightly rejected, by the Court of Appeal.

I would dismiss these appeals.

Questions put:

That the Orders appealed from be reversed.

The Not Contents have it.

That the Orders appealed from be affirmed and the appeals dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Tamplin, Joseph & Flux, for Darling, Heslop & Forster, Darlington.]