

22ND, 23RD, 24TH AND 28TH APRIL, 1959

COURT OF APPEAL—10TH AND 11TH MARCH, 1960

HOUSE OF LORDS—14TH AND 15TH NOVEMBER, AND 21ST DECEMBER, 1960

Henry Briggs, Son & Co., Ltd. (in liquidation)

v.

Commissioners of Inland Revenue ⁽¹⁾

Profits Tax—Computation of profits—Dividends received from subsidiary company—Whether profits arising from trade or business carried on by principal company—Whether dividends franked investment income—Finance Act, 1937 (1 Edw. VIII & 1 Geo. VI, c. 54), Section 19 and Fourth Schedule, Paragraph 7.

The Appellant Company owned all the shares in B.C. Ltd., a company which had been formed in 1939 to acquire and carry on the coal mining activities of the Appellant Company and two of its subsidiaries. The Company also owned and operated a brickworks and a quarry, and held agricultural land, a number of leasehold houses (mostly occupied by colliery workers of B.C. Ltd.), and cash and investments. Five of the Company's ten directors were also on the board of B.C. Ltd. and the trades of the two companies were closely integrated. The day-to-day business of B.C. Ltd. was conducted by its own board of directors but important matters had to be referred to the board of the Company. Before the nationalisation of the coal industry, dividends from B.C. Ltd. formed by far the largest item of receipts in the Company's accounts.

On 1st January, 1947, all colliery assets owned by B.C. Ltd. were transferred to the National Coal Board. The colliery trade ceased and a right to compensation accrued to the company. The energies of B.C. Ltd. were thereafter devoted to obtaining the compensation, which it received by instalments; it also received certain payments of interim income under the coal nationalisation legislation out of which dividends were paid to the Company. No effort was made by B.C. Ltd. to embark upon any fresh trade or business. It was always the intention that so soon as B.C. Ltd. had recovered the compensation to which it was entitled it should go into liquidation and it was in fact put into liquidation in October, 1952.

Upon the nationalisation of its colliery interests, the Company considered various ways of employing its resources in different fields, but after 1948 it devoted itself to securing its compensation under the coal nationalisation legislation and ceased to seek for fresh businesses. In March, 1949, 15s. in the £ was returned to shareholders and in July, 1951, after the realisation of its remaining assets, the Company went into liquidation.

Assessments to Profits Tax for chargeable accounting periods commencing on 2nd January, 1947, and ending on 18th July, 1951, were made upon the Company in amounts which included the dividends paid by B.C. Ltd. out of the interim

⁽¹⁾ Reported (C.A.) [1960] 1 W.L.R. 532; 104 S.J. 386; [1960] 1 All E.R. 800; 229 L.T.Jo. 210; (Appeal Committee) [1960] 1 W.L.R. 568; (H.L.) [1961] 1 W.L.R. 68; 105 S.J. 61; [1961] 1 All E.R. 220; 231 L.T.Jo. 38.

income payments. On appeal to the Special Commissioners, it was contended on behalf of the Company (a) that its trade or business (in so far as it consisted in the ownership and management of a colliery undertaking) ceased on 1st January, 1947, and the dividends were not therefore profits arising from any trade or business carried on by it during the relevant chargeable accounting periods, and (b) that the dividends were exempt from Profits Tax as franked investment income, the functions of B.C. Ltd. after 1st January, 1947, having consisted wholly or mainly in the holding of property. The Commissioners rejected the Company's contentions, deciding that the Company was throughout a company whose business consisted wholly or mainly in the holding of investments or other property and that the dividends related to that trade or business; and that the dividends were not franked investment income because from January, 1947, B.C. Ltd. carried on no trade or business within the meaning of Section 19, Finance Act, 1937.

Held, in the Chancery Division, that the first part of the Commissioners' decision was primarily a finding of fact and there was evidence on which they could reach their decision.

Held, in the House of Lords, that the functions of B.C. Ltd. did not consist wholly or mainly in the holding of investments or other property and that accordingly the dividends were not franked investment income.

CASE

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

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 30th September and 1st and 2nd October, 1957, Henry Briggs, Son & Co., Ltd. (hereinafter called the "parent Company"), appealed against various assessments made upon it to Profits Tax for chargeable accounting periods commencing on 2nd January, 1947, and ending on 18th July, 1951, at which latter date the parent Company went into liquidation. The question for our decision was whether the parent Company was liable to include in the computation of its profits for the purposes of Profits Tax certain dividends received from a wholly-owned subsidiary, Briggs Collieries, Ltd. (hereinafter called "Briggs"), such dividends being received by the parent Company from Briggs at various dates from 30th September, 1946, to 20th April, 1951.

2. The following facts were proved or admitted:

(a) The parent Company was incorporated on 5th April, 1865, as a company limited by shares with a capital of £135,000. By special resolutions from time to time passed the capital was altered, and ultimately (at 18th July, 1951), the issued share capital was 710,000 5s. shares. The objects for which the Company was established according to its memorandum of association were those of a colliery company. A copy of the memorandum and articles of association is hereto attached, marked "A" (1). On incorporation, the parent Company took over the trade of coal mining previously carried on at Whitwood, near Leeds, and elsewhere by a partnership under the name of Henry Briggs & Son.

(1) Not included in the present print.

(b) The parent Company held shares in a number of subsidiary companies acquired in the manner following:

- (i) The Whitwood Chemical Co., Ltd. (hereinafter called "Whitwood"), was incorporated in 1883 by the parent Company and certain other persons to carry on a trade of manufacturing coke, gas and other by-products from coal. In or about the year 1940 the parent Company purchased from such other persons the remainder of the issued share capital.
- (ii) Crawshaw & Holiday, Ltd., was incorporated in 1932 by the parent Company with certain other persons to acquire the share capital in Robert Holiday & Sons, Ltd., and Crawshaw & Warburton, Ltd., two companies each engaged in the trade of coal mining. The parent Company held just over half the ordinary share capital of Crawshaw & Holiday, Ltd., until 12th September, 1945, at which date these shares were transferred to Briggs.
- (iii) Ledston, Ltd., the shares in which were acquired by the parent Company in 1937. This company held the entire share capital in a company called the Micklefield Coal & Lime Co., Ltd. (hereafter called "Micklefield"), which owned and operated two collieries and a lime quarry.

(c) In 1939 the parent Company, Micklefield, and Ledston, Ltd., promoted a scheme under the Mining Industry Act, 1926, the Coal Mines Act, 1930, and the Coal Act, 1938, for the amalgamation of the trade carried on by them and for the formation of a new company, to be called Briggs Collieries, Ltd., to acquire and carry on the coal mining activities of the three companies. A copy of the scheme is hereto attached, marked "B" (1).

(d) In conformity with the scheme Briggs Collieries, Ltd. (i.e., Briggs), was incorporated on 1st July, 1939, with a share capital of £1,200,000 divided into 1,000,000 ordinary shares of £1 each and 200,000 6 per cent. non-cumulative redeemable preference shares of £1 each, all of which were issued fully paid to the parent Company. By the memorandum of Briggs it was provided that the objects for which it was incorporated were to acquire the colliery undertakings of Henry Briggs, Son & Co., Ltd., the Micklefield Company and the Ledston Company. A copy of the memorandum and articles of association of Briggs is hereto attached, marked "C" (1).

(e) On 1st July, 1939, which was the "appointed day" under the scheme, Briggs acquired the colliery undertakings owned by the parent Company and by Micklefield together with all property and assets owned and used in connection therewith, and carried on such undertakings thereafter.

(f) Subsequent to 1st July, 1939, the parent Company owned and operated a brickworks, a lime quarry and (until 1940) a gasworks. It also held 1,500 acres (more or less) of agricultural land originally acquired for the more convenient working of its collieries, with approximately 400 leasehold houses. Such houses were previously occupied by its colliery employees, but subsequent to July, 1939, were occupied mainly by the colliery employees of Briggs.

(g) Subsequent to 1st July, 1939, the Company also owned all the £1,200,000 share capital of Briggs and held amongst its current assets general investments, tax reserve certificates and cash of upwards of £963,932.

(h) There is attached hereto, marked "D" (1), a copy of the balance-sheet and profit and loss accounts of the parent Company and its subsidiary, Briggs, for the year ended 30th June, 1946, from which can be obtained an impression

(1) Not included in the present print.

of the parent Company's functions and activities at that time. The issued share capital appears, as previously mentioned, at £710,000. It had a general reserve of £562,468 and a contingency reserve of £435,808. Among its assets appears the above-mentioned shares in Briggs at £848,169 and the shares in the Whitwood Chemical Co., Ltd., at £25,146. Among its current assets are investments at £778,608, tax reserve certificates at £100,000, and cash at bank and in hand of £78,066. The lime and brickworks appear at £3,163 and £1,000, respectively. It appears from the profit and loss account that, out of total receipts amounting to £136,980, net dividends of £119,592 were received from Briggs, the balance presumably including dividends on its other investments and profits of its lime and brick works. By far the largest item, therefore, of its receipts were the dividends from Briggs.

(i) The trade or trades of the parent Company and of Briggs were closely integrated. Thus the parent Company acquired all coal used in its brickworks and in its lime quarry from Briggs. Approximately one-third of the bricks produced at the parent Company's brickworks were sold to Briggs for use in the collieries. The leasehold houses owned by the parent Company were almost entirely occupied by colliery officials and workmen employed by Briggs, and the minerals underlying the land owned by the parent Company were worked by Briggs.

(j) Of the ten members of the board of directors of the parent Company at this time, six were members of the board of Briggs; and of the nine members of the board of Briggs, six were members of the board of the parent Company. Such six common members were persons skilled in mining and matters connected therewith. The chairman of the parent Company, Mr. D. H. Currer Briggs, was a member of the board of Briggs and was also general manager of Briggs. Of the six common members, five were employed full-time by Briggs in various positions and were paid directors' fees by the parent Company only. They received no directors' fees for their position as directors of Briggs.

(k) The day-to-day business of Briggs was managed by the board of directors of Briggs, which had informal conversations every day and a formal board meeting every month. Such formal meeting was held at 9.30 a.m. and was followed the same morning by a board meeting of the parent Company. Although the board of Briggs had the normal powers and duties of a board of directors, it was instructed by the board of the parent Company to obtain the prior consent of the latter before it incurred expenditure upon any item of plant or otherwise amounting to more than £10,000 for one item, and, if a question had arisen as to the acquisition of further seams of coal contiguous to those belonging to Briggs and the taking of leases for the working of such seams, the ultimate decision would have rested with the board of the parent Company. In addition to the six common members, the board of the parent Company had on it four persons who had no experience of mining but who had wide experience in the field of commerce. In regard, therefore, to any question upon which the board of Briggs had to obtain the consent of the board of the parent Company, the common members, who had already voted in favour of such expenditure, were in effect required to have their judgment considered and ratified by persons of wide experience outside mining.

(l) Such being the position in 1946, on 1st January, 1947, the Coal Industry Nationalisation Act, 1946, which, together with its amending legislation and regulations, is hereinafter called "the Coal Acts", came into force. Under its provisions all colliery assets owned by Briggs were transferred to the National Coal Board. A right to compensation in respect of the assets so

vested accrued to Briggs under the Coal Acts, and a like right accrued to the parent Company in respect of the leasehold land still vested in it. Such land appeared in the balance-sheet of the parent Company at £80,318. The assets of Briggs so vested in the National Coal Board had appeared in its balance-sheet at £1,003,359. The brick making and lime making activities of the parent Company were unaffected by the Coal Acts, and the parent Company has continued to carry them on thereafter.

(m) With the vesting of its assets in the National Coal Board on 1st January, 1947, the colliery trade of Briggs ceased, and the cessation provisions of the Income Tax Acts, at that date contained in Section 31, Finance Act, 1926, were applied. The board was reduced to four persons. Three of the directors who resigned from the board did so to take up posts with the National Coal Board, and a member who left the board in 1947 also took up employment with the National Coal Board. All executive and managerial staff below board level were transferred to employment under the National Coal Board on or shortly after 1st January, 1947. No effort was made by Briggs to embark upon any other trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to which it was entitled under the Coal Acts. This process was long and arduous, involving the furnishing of many particulars and the making of extensive valuations. There is attached hereto, marked "E"⁽¹⁾, a statement of the compensation received by Briggs under the Coal Acts, from which it will be seen that the first payment of lump sum compensation under Sections 10 to 21 of the Coal Industry Nationalisation Act, 1946, was made in May, 1948, and the final payment in June, 1955. Payments of interim income received under Section 22 of the 1946 Act and Section 1 (2) of the 1949 Act were received from time to time, the first payment being in October, 1947, and the last payment in August, 1955. The company paid dividends out of such interim income from time to time to the parent Company. It was always the intention that so soon as Briggs had recovered the compensation to which it was entitled under the Coal Acts it should go into liquidation, and it was in fact put into liquidation on 17th October, 1954.

(n) The directors of the parent Company realised by August, 1946, that their subsidiary, Briggs, would shortly lose all its trading assets and that, with the exception of the comparatively small activities of lime burning and brick making carried on by it, the parent Company would possess no trading activity and be in possession of a very considerable amount of investments. Accordingly, in August, 1946, they issued to their shareholders a circular, a copy of which is hereto attached, marked "F"⁽¹⁾, in which they pointed out the position to their shareholders. They stated in the circular that when the subsidiary, Briggs, had obtained its compensation and paid it over, the parent Company would find itself substantially in the position of an ordinary investment holding company, a position which they considered far removed from the original business for which the Company was formed. They added that they were advised that to conduct the business of an investment holding company would not be within the legal powers of the Company, being outside the objects set out in its memorandum of association. They therefore invited the shareholders' consideration of a scheme of re-organisation of the Company under which it would amalgamate with a trust company in which over 75 per cent. of the shareholders in the parent Company were already interested, such amalgamated company becoming an investment holding company. At the same time they pointed out that, in the event of some such scheme being adopted, the opportunity might later present itself of applying the resources of the Com-

(1) Not included in the present print.

pany, or some of them, in the enlargement of the present commercial activities of the parent Company not taken over by the Coal Board, or in some new activity. A questionnaire was enclosed with this circular asking for the views of shareholders. In the years 1947 and 1948 the directors of the parent Company examined the prospects of purchasing three possible businesses, each of which was in some way connected with mining and in regard to which the mining skill and experience of the directors would be of value, but in the end none of those three businesses was found to be suitable. After this the directors found that the preparation and prosecution of the claims for compensation under the Coal Acts were of such complexity, and demanded so much time, that they felt that they should devote all the time and energy of the small number of personnel remaining in the service of the Company towards these objects, and that they should cease to seek for fresh businesses. By the beginning of 1951 it was felt that some part of the large amount of liquid assets in the possession of the Company should be returned to shareholders, and under a scheme sanctioned by the High Court in April, 1951, 15s. in the £ was returned to shareholders. In February, 1951, the Company sold its brickworks and quarry, and during the latter months of 1950 and the first three months of 1951 the parent Company proceeded to realise its investments. On 18th July, 1951, the parent Company went into liquidation.

(o) By election of the parent Company made in 1948, pursuant to Section 22, Finance Act, 1937, the profits of the parent Company and of Briggs were amalgamated for Profits Tax purposes. This treatment was withdrawn by the Inland Revenue in 1953 following on a decision of the Special Commissioners promulgated in another case.

3. The following documents were in evidence before us. They are available to the Court if required:

(i) List of directors of the parent Company and Briggs.

(ii) Accounts of the parent Company and Briggs for the years ending 30th June, 1947, and 31st March, 1947, respectively (including chairman's statement at the meeting on 30th October, 1947).

(iii) Bundle of accounts and notices of meetings of the parent Company and its subsidiaries for the periods ending 31st March, 1948, 31st March, 1949, 31st March, 1950, and 31st March, 1951, together with statements by the chairman.

(iv) Balance sheets and profit and loss accounts of Briggs for the years ended 31st March, 1948, 31st March, 1949, 31st March, 1950, and 31st March, 1951.

(v) List of investments held by the parent Company and Briggs from 1946 to 1951.

(vi) Summaries of the profit and loss accounts of, and dividends paid by, the parent Company and Briggs from 1946 to 1952.

(vii) Summary of trading accounts of the parent Company from 1946 to 1951.

(viii) Circular letters to the shareholders of the parent Company dated February, 1951.

(ix) Schemes presented to the High Court in December, 1950, and Order made thereon.

4. It was contended on behalf of the parent Company:

(i) that the sole trade carried on by Briggs prior to 1st January, 1947, was

that of colliery owner and that that trade necessarily ceased by virtue of the Coal Industry Nationalisation Act, 1946;

- (ii) that from 1st January, 1947, Briggs was entitled to compensation under the Coal Industry Nationalisation Acts and that such right was a right of property;
 - (iii) that from 1st January, 1947, the functions of Briggs consisted wholly or mainly in the holding of the said property;
 - (iv) that the dividends received by the parent Company from Briggs from 1st January, 1947, onwards were therefore franked investment income;
 - (v) that from 1st July, 1939, the trades or businesses of the parent Company comprised the making of bricks, the quarrying of lime, the distribution of gas and the ownership and management of the colliery undertaking of Briggs;
 - (vi) that on 1st January, 1947, with the vesting of the colliery undertaking of Briggs in the National Coal Board, the trade or business of the parent Company (in so far as it consisted in the ownership and management of such colliery undertaking) necessarily ceased;
 - (vii) that the dividends received by the parent Company from Briggs from 1st January, 1947, were not therefore profits arising from any trade or business carried on by the parent Company during the relevant chargeable accounting period; and
 - (viii) that the parent Company's shareholding in Briggs at and after 1st January, 1947, was not an investment in any way related to the trade or business carried on by the parent Company during such chargeable accounting periods.
5. It was contended on behalf of the Respondents, the Commissioners of Inland Revenue, that the dividends received from Briggs from 1st January, 1947, onwards were to be included in the computation of its profits because the Company was throughout a company whose business consisted wholly or mainly in the holding of investments or other property within Section 19 (4) of the Finance Act, 1937, and that such dividends related, both before and after 1st January, 1947, to such trade or business. Such dividends were not exempt as franked investment income because, after January, 1947, Briggs carried on no trade or business to which Section 19 of the Finance Act, 1937, applied.

6. We, the Commissioners who heard the appeal, took time to consider our decision, and gave it in writing on 17th March, 1958, as follows:

(1) The first question for decision is whether the dividends paid by Briggs Collieries, Ltd., to the parent Company are exempt from the charge to Profits Tax as not being profits arising from any trade or business carried on by the Appellant in the relevant chargeable accounting periods (see *Commissioners of Inland Revenue v. Butterley Co., Ltd.*, 36 T.C. 411).

Having reviewed the evidence, we are of opinion that since 1939 the parent Company has been one the functions of which have consisted mainly in the holding of investments and other property, a position which continued after 31st December, 1946. We do not think that the interference in the affairs of Briggs by the directors of the parent Company prior to 1st January, 1947, amounted to the carrying on of the trade or business of owning and managing a colliery by the parent Company. Such interference was, in our view, no more than might be expected of a prudent holder of all of the equity in a substantial concern. It follows that the dividends received from Briggs are profits of the trade or business which the parent Company is deemed to carry on.

(2) The second question is whether the aforesaid dividends are franked investment income as being income received by way of a dividend or distribution of profits from a body corporate carrying on a business to which Section 19 (4), Finance Act, 1937, applies.

The colliery trade of Briggs ceased on 31st December, 1946, and the material question is whether since that date the functions of Briggs have consisted wholly or mainly in the holding of investments or other property. On authority, the rights to compensation enjoyed by Briggs were "property", but we find on a review of the evidence that the functions of Briggs did not consist wholly or mainly in the holding of that property. It was only kept in existence after 31st December, 1946, so that the rights to which it was entitled might be realised and liquidated as early as possible, and its functions cannot, in our view, be properly described as the holding of property.

In view of this conclusion we hold that the said dividends were not franked investment income of the parent Company.

(3) We leave the figures to be agreed accordingly.

7. Figures having subsequently been agreed, we adjusted the assessments before us in accordance with such agreement and issued our final determination thereon on 5th June, 1958.

8. The Appellant immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly. The question of law for the decision of the Court is whether on the facts admitted or proved our decision was correct.

B. Todd-Jones	} Commissioners for the Special Purposes of the Income Tax Acts.
W. E. Bradley	

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The case came before Upjohn, J., in the Chancery Division on 22nd, 23rd and 24th April, 1959, when judgment was reserved. On 28th April, 1959, judgment was given in favour of the Crown, with costs.

Sir John Senter, Q.C., Mr. Desmond Miller and Mr. Neil Elles appeared as Counsel for the Company, and Mr. John Foster, Q.C., and Mr. Alan Orr for the Crown.

Upjohn, J.—This is an appeal by way of Case Stated from the Special Commissioners of Income Tax, who decided that Profits Tax was exigible on certain dividends paid to the Appellant Company (which I will call the "parent Company") after 1st January, 1947, by its wholly-owned subsidiary, Briggs Collieries, Ltd. (which I will call "Briggs"). As the name implies, Briggs carried on the business of owning and managing certain collieries until 31st December, 1946, when, of course, they were nationalised, and the dividends in question were paid out of sums received by Briggs by way of interim income

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received under Sections 19 and 22 of the Coal Industry Nationalisation Act, 1946.

The claim is made under Section 19 of the Finance Act, 1937, which reads :

"(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the years of charge to the national defence contribution, from any trade or business to which this section applies, a tax (to be called the 'national defence contribution') of an amount equal to twenty-five per cent. of those profits."

That, of course, is now called "Profits Tax", and the rate has changed.

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

Then Sub-section (4) is the important one :

"Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society."

Two points arise. First, in respect of chargeable accounting periods after 31st December, 1946, did the dividends received by the parent Company from Briggs arise from any trade or business carried on by the parent Company in the relevant chargeable accounting period? If the answer is in the negative, then the House of Lords decision in *Commissioners of Inland Revenue v. Butterley Co., Ltd.*, 36 T.C. 411, makes it quite clear that no Profits Tax is exigible. Secondly, was Briggs itself, in respect of the periods after 31st December, 1946, a company which fell within Section 19 (4), which I have just read? If so, then it is not in dispute that the dividends paid by Briggs to the parent Company would be what is known as "franked investment income", and by virtue of various statutory provisions would not be liable to Profits Tax in the hands of the parent Company, although it is equally clear from the *Butterley* case, and is admitted, that the interim income received by Briggs is not so liable either.

The first question is primarily a question of fact and was determined by the Commissioners adversely to the parent Company. Sir John Senter, on its behalf, very fairly recognised that to succeed he must satisfy me, to adopt the language of Lord Radcliffe in *Edwards v. Bairstow*, 36 T.C. 207, at page 229, that "the true and only reasonable conclusion contradicts the determination"—it being clear that in applying that test there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other.

I must briefly refer to the facts more fully set out in the Case Stated. The parent Company was incorporated as long ago as 1865 to carry on the business of a colliery company, and it did so for many years, obviously with great success. By the year 1939 the position was this: the parent Company was carrying on its colliery business in a number of collieries; it also carried on a small brick-making business; a lime quarry business; through subsidiary or associated companies a gas and coke business, a chemical business and another coal mining business; and, in addition, through a wholly-owned subsidiary company, Ledston, Ltd., yet another colliery business owned and managed by the Micklefield Coal & Lime Co., Ltd., which in turn was a wholly-owned subsidiary of Ledston, Ltd.

In 1939 the parent Company availed itself of the provisions of the Mining Industry Act, 1926, the Coal Mines Act, 1930, and the Coal Act, 1938, to

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bring before the Railway and Canal Commission a scheme for partial amalgamation of the parent Company, Ledston, Ltd., and the Micklefield company, whereby a new company—in fact, Briggs—was formed to acquire and carry on the colliery undertakings of those three companies. Briggs became a wholly-owned subsidiary of the parent Company and the other two companies were wound up. It is clear, however, that the parent Company did not become a bare holding company. It continued to own and operate the brickworks, the lime quarry, and, until 1940, a gasworks. In addition it held 1,500 acres of agricultural land and continued to own about 400 houses occupied by colliery employees. It also continued to hold shares in the chemical company. Furthermore, it had about £750,000 of invested funds representing reserves as a result of years of successful operations. However, it is clear—and it is so found by the Commissioners—that by far the largest item of receipts in its profit and loss accounts were dividends from Briggs. Furthermore, as is set out in detail in paragraphs 2 (i), (j) and (k) of the Case Stated, it is clear that the trade or trades of the parent Company and of Briggs were closely integrated. Of ten directors of the parent Company, five were directors of Briggs; and of the eight directors of Briggs, five were directors of the parent Company, such five common directors being persons skilled in mining. These figures should be substituted for the inaccurate figures set out in paragraph 2 (j) of the Case Stated. In addition, although the day-to-day business of Briggs was managed by its board of directors, the board of the parent Company exercised some policy control over Briggs's directors. Thus the sanction of the board of directors of the parent Company was required before any item of plant or equipment exceeding a cost of £10,000 for any one item was acquired, or before any new seams of coal could be acquired.

So the position remained until the nationalisation of the coal industry on 31st December, 1946. It was at once decided to liquidate Briggs when the compensation was fully received, and this took place on 17th October, 1952—not 1954, as stated in the Case. Briggs paid substantial dividends to the parent Company out of its interim income, and they are the subject of the Crown's claim. The parent Company sought the views of its shareholders (I was told there were several hundred) as to amalgamating with an allied company and becoming an investment trust company. Nothing came of that, and the parent Company then explored the prospects of purchasing three possible businesses, but none was found suitable. It was then found that the preparation of claims for compensation on nationalisation took so much of the directors' time that nothing further was done in seeking fresh business. In March, 1949 (and not April, 1951, as stated in the Case), 15s. in the £ was returned to shareholders. Then the brickworks and quarry or lime works were sold, the large holding of investments was realised, and on 18th July, 1951, the parent Company went into liquidation.

I return to the first point. In my judgment, the vital question is whether, on the partial amalgamation in 1939, the parent Company remained an ordinary trading company as previously, or whether it became a company whose functions could properly be described, in the terms of Section 19 (4), as one whose functions consisted "wholly or mainly in the holding of investments or other property". I say this because, so far as the parent Company is concerned, it does not seem to me that there was any change in the quality or character of its activities by reason of the nationalisation of Briggs in 1946. Whether it was a company which before 1st January, 1947, fell within Section 19 (2) or within Section 19 (4), in my judgment that state of affairs continued until the parent Company, having failed to find fresh lucrative employment for

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its resources, resolved to wind itself up. The decision of the Commissioners clearly shows that they considered the events of 1939 to be the vital issue, and I did not understand either party seriously to dispute that.

The decision of the Commissioners on this point was in these terms:

"The first question for decision is whether the dividends paid by Briggs Collieries, Ltd., to the parent Company are exempt from the charge to Profits Tax as not being profits arising from any trade or business carried on by the Appellant in the relevant chargeable accounting periods",

and they refer to the *Butterley* case⁽¹⁾.

"Having reviewed the evidence, we are of opinion that since 1939 the parent Company has been one of the functions of which have consisted mainly in the holding of investments and other property, a position which continued after 31st December, 1946. We do not think that the interference in the affairs of Briggs by the directors of the parent Company prior to 1st January, 1947, amounted to the carrying on of the trade or business of owning and managing a colliery by the parent Company. Such interference was, in our view, no more than might be expected of a prudent holder of all of the equity in a substantial concern. It follows that the dividends received from Briggs are profits of the trade or business which the parent Company is deemed to carry on."

Sir John Senter submits that the only reasonable conclusion on the facts found contradicts the determination. He submits that the only and true view is that the parent Company continued after 1939 to act as an ordinary trading company within Section 19 (2), as it had done before. It continued to own the collieries, though indirectly through Briggs, and to manage them by its direction of the higher policy of Briggs. It would be wrong, he submits, on the facts, to say that the parent Company went out of the coal business and became merely an investment holding company. The 1939 scheme, he submits, was a purely commercial arrangement to take advantage of certain Acts of Parliament. He relies, too, on certain observations made by the chairman of the parent Company at annual general meetings in 1946 and 1947. I doubt whether these statements are admissible in evidence at all, but, if they are, they seem to me to be of small weight in considering the particular issues before me. He criticised the decision of the Commissioners on two grounds. First, he said that the word "interference" used by them naturally means "unwarranted intervention", and shows that the Commissioners had misunderstood the functional relationship between the parent Company and Briggs. Secondly, he said that in the absence of any evidence before them the Commissioners could not properly make any finding as to how far a prudent holder of all the equity would interfere in a substantial concern. I propose to consider the authorities on the word "function" in connection with the second point, but I have them in mind in expressing my judgment on this part of the case.

The question whether the parent Company ought properly to be regarded as an ordinary trading company or as having the function of a holding company is, I think, a difficult one. The fact that the vast majority of the parent Company's assets consisted of shares in other companies is not conclusive that it is a Section 19 (4) company. That is clear from *Commissioners of Inland Revenue v. Tootal Broadhurst Lee Co., Ltd.*, 29 T.C. 352, and from the observations of Lord Simonds in *Electric and Musical Industries, Ltd. v. Commissioners of Inland Revenue*, [1950] 2 All E.R. 261, at page 266. On the other hand, the fact that it exercised some degree of control over the board of Briggs is not conclusive that it is a Section 19 (2) company. It is a question

(1) 36 T.C. 411.

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of fact in each case. The Commissioners have clearly set out the relevant facts and have considered them. Their finding might perhaps have been more happily expressed, but in my judgment the expressions that they have chosen to employ do not warrant the conclusion that they have misunderstood the meaning of the word "functions" in Section 19 (4), or that they are under some misapprehension as to the facts to be considered or the law to be applied. They have applied their minds to the relevant matters, and it seems to me have come to the conclusion that the managerial functions retained by the parent Company cannot be said to amount to the carrying on of a trade or business of owning and managing a colliery. On the contrary, they consider it is a holding company within the meaning of Section 19 (4). In deference to Sir John's argument I should add that he made a submission to me on the word "deemed" in Section 19 (4), but in view of the explanation of the reason for the insertion of that Sub-section which Lord Greene, M.R., gave in *Commissioners of Inland Revenue v. Desoutter Bros., Ltd.*, 29 T.C. 155, at page 160, it did not, with all respect, in my judgment, advance his case. The word "deem" cannot in my judgment be said in that Sub-section to be a true alternative and exclusive of the word "actual". To return to the main point, in my judgment the facts set out in the Case do not entitle me to say that the only and true conclusion on those facts contradicts the determination. The appeal fails on this point.

I turn to the second point, that is whether, on nationalisation, Briggs, to put it shortly, became a Section 19 (4) company. Sir John was disposed to concede that this point also was one primarily of fact, but as the argument developed on each side it seemed to me really to depend upon the true construction of the word "functions" in Section 19 (4). I propose to consider, therefore, forthwith, two of the authorities on this point. The first is *Commissioners of Inland Revenue v. Buxton Palace Hotel, Ltd.*, 29 T.C. 329. In that case the hotel company's property had been requisitioned in 1939, and it received a compensation rent under the Compensation (Defence) Act, 1939. The question was whether, in that state of affairs, it was subject to Profits Tax on the compensation rent received; and it was argued that the hotel company, on being requisitioned, became a Section 19 (4) company. Atkinson, J., said this, at page 334:

"Now what is the meaning of the word 'functions'? The dictionary definition (I think it is a very good one for the purposes of this case) is: 'the activities appropriate to any business'; so that it ought to read: 'Where the "activities appropriate to any business" . . . consist wholly or mainly in the holding of investments or other property'. So read, of course, it is plain that the words would only apply to a company whose business could be so described. The activities appropriate to this business of hotel proprietors certainly did not consist mainly or at all in the holding of investments or other property, but it is in effect argued that the words should be read as equivalent to 'activities' *simpliciter* during the relevant period—what, in fact, it is asked, during the relevant chargeable period were the activities of the Company? I do not accept that interpretation of the word. I think that Sub-section (4) is aimed at companies of a particular nature and quality, companies who set out to make profit in the way indicated or who have changed their business into one of that character."

Then the learned Judge referred to *Costa Rica Railway Co., Ltd. v. Commissioners of Inland Revenue*, 29 T.C. 34, and to *F.P.H. Finance Trust, Ltd. v. Commissioners of Inland Revenue*, 26 T.C. 131, and he continued, at page 337:

" . . . I think all that reasoning applies just as forcibly to the proper construction of this Sub-section (4) of Section 19, and I think that the functions of this Company were the running of an hotel and making trading profits thereby—that was the nature and quality of the Company—and I accept the view of the Commissioners that it was not a business consisting wholly or mainly in the holding of investments

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or other property, and further I hold that the functions of this Company did not consist wholly or mainly in the holding of investments or other property."

The second case is *Carpet Agencies, Ltd., v. Commissioners of Inland Revenue*, 38 T.C. 223. In that case the appellant company carried on the trade of carpet dealing until 1953, when it ceased trading. It then held investments and other assets, but no trading stock. It was held by Harman, J., that it was not a Section 19 (4) company. The learned Judge referred to the passage to which I have just referred in the judgment of Atkinson, J., in the *Buxton Palace Hotel* case (1), and then he continued (2):

"For myself, I entirely agree with those observations, with great respect, but I am not bound by them. It seems to me that in order to get within Section 19 (4) you must prove not merely that the company is one that happens to hold some income bearing investments but that one of its functions, that is to say one of its purposes, has always been or has been for a considerable time the making of money by the holding of investments."

I do not myself regard the learned Judge's rider, that it must have been one of its purposes "for a considerable time" to hold investments, as a complete statement of the position. It seems to me that a company may change its functions almost overnight by ceasing to engage in a purely trading activity, by selling its business, and by employing the proceeds in the business of, say, an investment trust company. That, however, is not this case.

Sir John submitted that on 1st January, 1947, Briggs's functions changed. You must, he said, look at each chargeable accounting period thereafter. Briggs decided to wait until the compensation was fully received and then go into liquidation. What were its functions during those successive accounting periods? He says they were properly described by Morris, L.J., and Romer, L.J., in *Commissioners of Inland Revenue v. Parkhouse Collieries, Ltd.*, 36 T.C. 675. That was also a colliery case, and, of course, in that case the colliery activities of the respondent company had necessarily come to an end at the end of 1946. It is, however, very material to bear in mind what the learned Lords Justices were considering. They were considering Section 20 (1) of the Finance Act, 1936, and not the Section that I have to consider. It is conveniently set out in the judgment of Singleton, L.J., at page 694:

"The following provisions of this section shall have effect as respects companies (hereafter in this section referred to as 'investment companies') the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in sub-section (3) of section fourteen of the Income Tax Act, 1918."

So that the matter for consideration there was not as to the functions of a company but whether in fact the income consisted mainly of investment income, and that is a very different point. However, Morris, L.J., said this, at pages 705-6:

"It was submitted that the Company had existed for such purpose and that so far as the Company was concerned there had never been a change of purpose. But in my judgment a very definite change was compulsorily enforced upon the Company. Before 1st January, 1947, the reason for the Company's existence was to carry on a trade or business as colliery owners. There was no other trade or business. At the moment of vesting the colliery passed from the Company and thereafter it did not and could not carry on a trade or business as colliery owners. Its continued existence as a company was solely for the purpose of receiving those sums to which it became by Statute entitled because it had ceased to exist for the purpose of carrying on its colliery trade. The Company became entitled to income payments but those payments were not profits arising from any trade or business."

(1) 29 T.C. 329, at p. 334.

(2) 38 T.C., at p. 230.

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Romer, L.J., said this, at page 709 :

"If the Company's purpose was merely to obtain compensation for the compulsory transfer of its business to the Coal Board at the end of 1946 I cannot see how on any view it can be said that it existed in any degree in 1947 or subsequently for the purpose of carrying on its former trade. The position is wholly different, as it seems to me, from that of a trading company which, as suggested in argument, suffers a setback in trade over a period and whose income during that period consequently consists mainly of income from investments. The intention of such a company remains an intention to trade, as it always had been, and to regain its business prosperity as soon as it can. No such intention however can be attributed to a company whose whole business has been transferred, whether voluntarily or under compulsion, to someone else and whose sole purpose in life thenceforward is to collect the purchase money and then to go into liquidation."

So it is submitted that Briggs's functions necessarily changed from that of a trading company to that of a company whose only function was to hold an investment, or at least "other property"; and there is no doubt that the right to compensation under the Coal Industry Nationalisation Act, 1946, is "property".

The Commissioners expressed their findings thus:

"The second question is whether the aforesaid dividends are franked investment income as being income received by way of a dividend or distribution of profits from a body corporate carrying on a business to which Section 19 (4), Finance Act, 1937, applies. The colliery trade of Briggs ceased on 31st December, 1946, and the material question is whether since that date the functions of Briggs have consisted wholly or mainly in the holding of investments or other property. On authority, the rights to compensation enjoyed by Briggs were 'property', but we find on a review of the evidence that the functions of Briggs did not consist wholly or mainly in the holding of that property. It was only kept in existence after 31st December, 1946, so that the rights to which it was entitled might be realised and liquidated as early as possible, and its functions cannot, in our view, be properly described as the holding of property."

Functions, as Atkinson, J., said, may be defined as being an activity appropriate to any business of the company. Is the company holding property as an activity appropriate to its business? A company whose business is temporarily stopped by requisition does not satisfy that test; nor does one which has given up trading—see the cases I have mentioned. They do not bind me, because in this field every case depends on its own facts once the true meaning of the word "functions" has been determined; and in this case it is true to say that Briggs never could re-enter into its colliery activities. Nevertheless, on ceasing to trade as a colliery company, a company might do one of several things. It might decide to engage in some other trading activity, in which case, in my judgment, it would remain a trading company: it might decide to become an investment trust company, in which case it seems to me clear that it would engage in a new business of holding property. If it does neither, but resolves to wind up, it does not seem to me to gain any new character in the sense of carrying on an activity of holding property as being appropriate to its business. It really has no business. It seems to me it is carrying out a residual function as a colliery company. It can no longer trade as such: it can only receive its compensation and die. I agree with the decision of the Commissioners. This point also fails.

I therefore dismiss the appeal with costs.

The Company having appealed against the above decision, the case came before the Court of Appeal (Lord Evershed, M.R., and Pearce and Harman,

L.JJ.) on 10th and 11th March, 1960, when judgment was given unanimously in favour of the Crown, with costs.

Sir John Senter, Q.C., Mr. Desmond Miller and Mr. Neil Elles appeared as Counsel for the Company, and Mr. John Foster, Q.C., and Mr. Alan Orr for the Crown.

Lord Evershed, M.R.—Section 19 of the Finance Act, 1937, which constituted and defined the scope of what was then called National Defence Contribution, and is now known as Profits Tax, provided, by Sub-section (2), that, subject to what was provided in later paragraphs in the Section,

“the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on”,

as there described,

“by persons ordinarily resident in the United Kingdom.”

Sub-section (4), which is the Sub-section particularly involved in this appeal, reads:

“Where the functions of a company . . . incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company”.

The present Appellant, Henry Briggs, Son & Co., Ltd., at the material dates held all the shares of another company, Briggs Collieries, Ltd. (called in the Case “Briggs”), which, until the events of 1946, had carried on the trade or business of coal mining. As a result of the nationalisation of the coal mining industry in 1946, its coal mines and the business of conducting them were taken away compulsorily, and Briggs became entitled to receive compensation as provided by the Coal Industry Nationalisation Act, 1946. The facts of the present case, which are set out in the Case Stated subject to the corrections made by Upjohn, J., as he then was, show that the compensation which Briggs was entitled to receive was finally paid in or about the year 1955; but in October, 1952, Briggs went into liquidation. What is more important is the finding of fact in the Case Stated that from the time when the Nationalisation Act operated the Company really ceased any activity whatever. It is stated in paragraph 2 (*m*) of the Case, as follows:

“No effort was made by Briggs to embark upon any other trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to which it was entitled under the Coal Acts”;

and, after stating that the process was long and arduous, the Case goes on to point out that the decision was made, when the Act operated, that this Company would embark on no other activity—and I deliberately use that word—but would await the receipt, or at least the final ascertainment, of the compensation, and would then go into liquidation. In the meantime, however, in accordance with the Nationalisation Act, it received from time to time what were called “interim income payments”; and out of those income payments, or out of other resources which it had, it paid from time to time dividends to its parent company, the Appellant Company in this case.

The terms of the 1937 Act were in some sense modified by later provisions, particularly by the Finance Act, 1947. I need not, however, take time upon the modifications. It is sufficient to say that in certain circumstances income received by the parent company might be treated as “franked investment income” as defined in the Acts of 1937 and 1947, and as such would not be taken into account for purposes of Profits Tax assessment. There is now no doubt—because no points to the contrary are any longer put forward—that

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the parent Company falls within one or other of the Sub-sections of Section 19 of the Finance Act, 1937, which I have read, so that it is itself liable to Profits Tax; and its liability can only be limited if it can show, as regards the dividends from its subsidiary, Briggs, which I understand formed a most substantial part of the total income, that they were franked investment income—and they would fall within that definition if it could be said that for the relevant accounting periods Briggs, the subsidiary company, fell within the scope of Sub-section (4). The issue, therefore, in this appeal, is narrowed to the single point, capable of short and simple statement: After the coming into operation of the Coal Industry Nationalisation Act, 1946, and in the light of the decisions of the subsidiary company as I have extracted them from the Case, can it be said that the functions of Briggs consisted wholly or mainly in the holding of property so that the holding of that property should be deemed for the purposes of the Section to be a business carried on by Briggs? The right which Briggs had under the Statute to obtain the compensation when ascertained, and to receive in the meantime interim income or other payments, is conceded for the purpose of this case (and, I should have thought, rightly conceded) as a species of property; so that it can be said that Briggs at any rate held—that is to say, owned, or was possessed of—that right, that species of property. But so to say is not to conclude the matter in favour of the Appellant because it must be shown, first of all, of Briggs, as regards each accounting period, that its “functions” consisted wholly—and I can leave out “or mainly”—in the holding of investments or other property. In the end of all, therefore, the matter turns upon the significance and the use of the word “functions”. The learned Judge, Upjohn, J., came to the conclusion that Briggs did not fall within the Sub-section. At the end of his judgment, referring to the observations of Atkinson, J., in the case he cited of *Commissioners of Inland Revenue v. Buxton Palace Hotel, Ltd.*, 29 T.C. 329, at page 334, he said⁽¹⁾:

“Functions . . . may be defined as being an activity appropriate to any business of the company. Is the company holding property as an activity appropriate to its business? A company whose business is temporarily stopped by requisition does not satisfy that test; nor does one which has given up trading . . . They do not bind me, because in this field every case depends on its own facts once the true meaning of the word ‘functions’ has been determined; and in this case it is true to say that Briggs never could re-enter into its colliery activities. Nevertheless, on ceasing to trade as a colliery company, a company might do one of several things. It might decide to engage in some other trading activity, in which case, in my judgment, it would remain a trading company: it might decide to become an investment trust company, in which case it seems to me clear that it would engage in a new business of holding property. If it does neither, but resolves to wind up, it does not seem to me to gain any new character in the sense of carrying on an activity of holding property as being appropriate to its business. It really has no business.”

I will say at once that I have myself come to the conclusion that the judgment of Upjohn, J., is correct, and should be affirmed. The only way, as it seems to me, by which the Appellant could escape from the conclusion stated in the light of the facts, is to say that the phrase “shall be deemed for the purpose of this section to be a business carried on”, etc., imported this, that the Sub-section contemplated a case in which there was really no business but there was none the less deemed to be a business if the earlier part of the Sub-section was satisfied. But even so, that earlier part of the Sub-section must be satisfied. It must be shown, in other words, that of Briggs it could truly be said it had the function or functions of holding property. Unless that is done, it seems to me that Sub-section (4) must inevitably cover every activity

(1) See page 423 ante.

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you can think of, whether it is active or passive, or whatever the company is doing or not doing. So I think the learned Judge concluded rightly that the matter must turn upon the significance of this word "functions", and in its context I agree with him that it cannot be said of a company that it has the "function" of holding property if, as in this case, it has deliberately determined to have no function, no activity in any business sense whatever; if it said, "We make no further plans; we will do nothing; we will simply wait until the money due to us is paid and then we shall go into liquidation."

The view taken by the learned Judge gets some support from certain language used by my predecessor, Lord Greene, M.R., in the case of *Commissioners of Inland Revenue v. Desoutter Bros., Ltd.*, 29 T.C. 155. That case related not to the language of the Act with which we are concerned, but to the Finance (No. 2) Act, 1939. But Section 12 (4) of that Act is in terms identical with the Sub-section of the 1937 Act with which we are concerned. Lord Greene said, at page 160:

"I should have thought that the objects of that Sub-section were manifest. In my view it was intended, and quite clearly intended, to bring into the net a type of corporation which otherwise would or might have escaped it. The commonest type of corporation with which the Sub-section is dealing is what may be called a trust investment company, whose business is the holding of investments and deriving income from them. Such a corporation would not be said to be carrying on a 'trade or business' within the meaning of Sub-section(1)."

I pause to say that to be within the meaning of Sub-section (1) would involve it also being within the meaning of Sub-section (2) of the Section there under review, which in turn corresponds with Sub-section (2) of the Act of 1937. Lord Greene went on to say:

"Anyhow, if it were not absolutely clear, Sub-section (4) makes it quite certain that that type of corporation is to be included, and its operations are to be regarded as the carrying on of a trade or business. That seems to me to be the real and sole object of Sub-section (4)."

Whether that statement puts the matter rather more strongly than I might put it myself, if the question were entirely free, I need not consider. I was troubled because it seemed to suggest that you could not say of a trust investment company, properly so-called, that it was carrying on a business—although in one of his sentences Lord Greene said that such would be the case. If for "trust investment company" you substitute "property company" of the kind commonly met with, Lord Greene's statement would, I venture to think, be free from difficulty. But, however that may be, Lord Greene may well have intended no more than to say that if there should be any argument whether such a company was or was not within Sub-section (2), the purpose of Sub-section (4) was to make it clear. In any case, on the particular facts of this case, whatever might be said as regards other cases, I have concluded, for the reasons indicated by the learned Judge, Upjohn, J., that this company, the Briggs subsidiary, had not got, at the relevant date or dates, "functions", and had certainly not got functions of the kind indicated in the first two lines of the Sub-section.

Sir John Senter referred to certain other cases. He relied particularly upon certain language in *Commissioners of Inland Revenue v. Butterley Co., Ltd.*, 36 T.C. 411, and in *Commissioners of Inland Revenue v. Parkhouse Collieries, Ltd.*, 36 T.C. 675. I do not think, upon the final point on which this case turns, that those passages really assist. No doubt the rights conferred by the Coal Industry Nationalisation Act were of a somewhat special kind, but, as I have already said, they were proprietary. That they constitute a form of

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property is not, I think, in dispute, and the precise question with which we are concerned was not before the Court in either the *Butterley* or the *Parkhouse* cases. I shall not, therefore, I hope, be thought disrespectful to Sir John Senter's argument if I make no further reference to those cases but confine myself to saying that I agree in the end of all with the conclusion of the learned Judge and with his reasons for it, and I would accordingly dismiss the appeal.

Pearce, L.J.—I agree with what my Lord has said. In my opinion the view taken by the learned trial Judge was correct, and I would dismiss the appeal.

Harman, L.J.—I also agree. Counsel for the Crown cited to the Court a decision of mine on this subject in *Carpet Agencies, Ltd. v. Commissioners of Inland Revenue*, 38 T.C. 223. I am there reported to have said that in order to get within Section 19 (4) you must prove not merely that the company is one that happens to hold some income-bearing investments, but that one of its functions—that is to say, one of its purposes—has always been, or has been for a considerable time, the making of money by the holding of investments. I want to say I think that puts it too high. I do not think you need say “has always been or has been for a considerable time”, but I do adhere to the part which says that one of its purposes is the holding of investments. Unless you can get so far you cannot get within the Sub-section. Subject to that, I agree that the appeal should be dismissed.

Mr. John Foster.—I ask that the appeal be dismissed with costs.

Lord Evershed, M.R.—I think that follows.

Sir John Senter.—Would your Lordship consider granting leave in this case? I quite appreciate that there is a unanimity of judicial opinion against me, but it is a case that reflects.

Lord Evershed, M.R.—And, of course, incidentally, the Commissioners also were against you, and so far you have had considerable . . .

Sir John Senter.—An uphill battle.

Lord Evershed, M.R.—Played three, lost three.

Sir John Senter.—I recognise that, my Lord. It does involve a considerable number of companies.

Lord Evershed, M.R.—We think on the whole, Sir John, if you desire to pursue it, you should apply to the Appeal Committee.

Sir John Senter.—If your Lordship pleases.

On the petition of the Company, leave to appeal against the above decision was granted on 9th May, 1960, by the Appeal Committee of the House of Lords (Lords Cohen, Keith of Avonholm and Denning).

Mr. Desmond Miller appeared as Counsel for the Company, and Mr. Alan Orr for the Crown.

The case came before the House of Lords (Lords Reid, Tucker, Morris of Borth-y-Gest and Hodson) on 14th and 15th November, 1960, when judgment was reserved. On 21st December, 1960, judgment was given unanimously in favour of the Crown, with costs.

Sir John Senter, Q.C., Mr. Desmond Miller and Mr. Neil Elles appeared as Counsel for the Company, and Mr. John Foster, Q.C., and Mr. Alan Orr for the Crown.

Lord Reid (read by Lord Tucker).—My Lords, the question in this case is whether certain dividends paid to the Appellant by Briggs Collieries, Ltd. (which I shall call “Briggs”), during the chargeable accounting periods commencing on 2nd January, 1947, and ending on 18th July, 1951, ought to have been included in the computation of the Appellant’s profits for the purposes of Profits Tax.

Briggs was a wholly-owned subsidiary of the Appellant formed in 1939 to acquire certain collieries, including those previously owned by the Appellant. It continued to work these collieries until 1st January, 1947, the vesting date under the Coal Industry Nationalisation Act, 1946. Thereupon it became entitled to receive the statutory compensation payable on nationalisation. Briggs never carried on any business other than its colliery business, either before or after the vesting date. It was generally realised, as Lord Simonds explained in *Commissioners of Inland Revenue v. Butterley Co., Ltd.*, 36 T.C. 411, that a long period would elapse before the statutory rights to compensation were finally settled. After the vesting date it was necessary to prepare and submit a large body of information with a view to the determination of the amount of compensation, and it appears from the Case Stated that

“the directors found that the preparation and prosecution of the claims for compensation under the Coal Acts were of such complexity, and demanded so much time, that they felt that they should devote all the time and energy of the small number of personnel remaining in the service of the Company towards these objects”.

The directors, or most of them, were directors both of the Appellant and Briggs, and it does not appear very clearly from the Stated Case whether this work was done by Briggs or by the Appellant; but, for the purposes of this case, I shall assume that it can be regarded as having been done by Briggs, which was responsible for the proper presentation of the necessary material. The Stated Case sets out:

“It was always the intention that so soon as Briggs had recovered the compensation to which it was entitled under the Coal Acts it should go into liquidation”. In fact, Briggs was put into liquidation on 17th October, 1952, although the last payments of compensation were not made until 1955.

The Appellant’s contention is that the dividends which they received from Briggs were franked investment income and ought for that reason to have been excluded from the computation of their profits. The parties are agreed that the decision of the case depends on whether Section 19 (4) of the Finance Act, 1937, applied to Briggs. If it did, the dividends in question were admittedly franked investment income and ought, therefore, not to have been included in the computation of the Appellant’s profits. But the Crown’s contention is that Section 19 (4) did not apply to Briggs. The relevant parts of Section 19 are as follows:

“19.—(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the years of charge to the national defence contribution, from any trade or business to which this section applies, a tax (to be called the ‘national defence contribution’) of an amount equal to twenty-five per cent. of those profits.⁽¹⁾ . . . (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or

(1) As amended by Section 36 (2), Finance Act, 1942, and Section 7 (1), Finance (No. 2) Act, 1947.

(Lord Reid)

through an agent, by persons ordinarily resident in the United Kingdom. . . .
(4) Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society."

If the provisions of Section 19 (4) could be considered in isolation, I would be in some doubt and I might think that they applied to Briggs. The right to statutory compensation is admittedly property, and that right was held by Briggs in the sense that Briggs owned it. And, if the word "function" has its ordinary rather wide and vague meaning, I would think that it was a function of Briggs to own, and perhaps to "hold", that property until the compensation was received in cash. Indeed, it had no other function after the vesting date, and I would find it difficult to suppose that a company in being has no function at all. But, if the words "holding" and "functions" were given such wide meanings in this context, the result would be that, whenever any company ceases to carry on its ordinary business but does not immediately start a new business or go into liquidation, Section 19 (4) would apply to it (except in the unlikely case of such a company having no assets). Its function would be to hold such assets as it possesses, and it would have no other function. But it was pointed out that such a result cannot be reconciled with other provisions in the Act. I need not enter into a lengthy explanation of why that is so, because Counsel for the Appellant admitted that he could not defend that result: if that were correct, *Carpet Agencies, Ltd. v. Commissioners of Inland Revenue*, 38 T.C. 223, must have been wrongly decided, and he accepted that case as having been rightly decided. In so doing I think that he was right.

It is necessary, therefore, to see whether more limited meanings can reasonably be given to those words in this context so as to make this Sub-section accord with the rest of the Act, and with its apparent purpose. The 1937 Act imposed a new tax which was then called National Defence Contribution: its name was later changed to Profits Tax and a number of changes were made in its incidence, but Section 19 is still in its original form, and it seems to me unnecessary to consider in this case any of the subsequent changes. The tax was not a tax on income. It was a tax on the profits of all trades or businesses, whether carried on by companies or by individuals. But careful provision was made to exclude income of individuals derived from property or investments. It was common, long before 1937, to find companies whose sole or main purpose was to make money by investing their capital in property or investments with a view to receiving income and capital appreciation. Although such companies carried on business in the ordinary sense, they might not have been held to be carrying on a business within the meaning of Section 19 (2), and Sub-section (4) may have been necessary to bring them into the charging Section. That was the view of Lord Greene, M.R., in *Commissioners of Inland Revenue v. Desoutter Bros., Ltd.*, 29 T.C. 155. But whether that is so or not, as the Act only sets out to tax profits from trades or businesses, one might expect that any extension of its scope by a deeming provision would only extend to companies conducting something analogous to a trade or business with the object of making profits. Section 19 (4) is a charging provision and, therefore, if it is reasonably capable of being read in that narrower sense, this affords an additional argument for so reading it.

The Court of Appeal and Upjohn, J., reached that result by giving to the word "functions" a meaning which is to my mind narrower than its ordinary meaning. I do not at all dissent from their view, but I would prefer to lay more stress on the word "holding". It appears to me that, in this context, the phrase

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“the holding of investments or other property” does not mean simply the owning of investments or other property. The word “holding” often involves the idea of retention permanently or for an indefinite time, and I think that that is involved in the use of that word in the context. I have said that the apparent purpose of Sub-section (4) is to bring within the scope of the charge companies conducting something at least analogous to a trade or business. From that point of view there appears to me to be an essential distinction between companies whose function or purpose or objective is to make profit by continuing to hold their assets in the form of investments or property and companies which are not trying to make profitable use of their assets but whose whole activities are directed to realising their assets as soon as possible. In the former case, the company’s activities are of a business character. They will almost always involve some degree of active management. Circumstances may for a time require the company to remain quiescent, but it still has the purpose of deriving profit from continuing to hold its assets in the form of investments or property. But in the latter case, the function or purpose or objective of the company is not to continue to hold investments or property but to cease holding its assets in that form as soon as they can be turned into money. Briggs had to assemble a great deal of information after the vesting date and it had to wait a long time before it received the money due to it, but its whole activities were directed to the realisation of its property rights. So I would hold that, if it had any functions after the vesting date, those functions consisted in collecting the money due to it and not in the holding of property.

In the end, the problem is not to determine the meaning of any particular word but to determine the meaning and scope of the Sub-section read as a whole, and it does not matter whether one begins by considering the word “functions” or by considering the word “holding”. Whatever be the starting point, I agree that the Sub-section is not wide enough in its scope to apply to Briggs after the vesting date.

In my judgment, therefore, this appeal should be dismissed, with costs.

Lord Tucker.—My Lords, the position of the subsidiary company, which has been referred to throughout as “Briggs”, on 1st January, 1947, when the Coal Industry Nationalisation Act, 1946, came into force, is thus described in the Case Stated:

“With the vesting of its assets in the National Coal Board on 1st January, 1947, the colliery trade of Briggs ceased, and the cessation provisions of the Income Tax Acts, at that date contained in Section 31, Finance Act, 1926, were applied. The board was reduced to four persons. Three of the directors who resigned from the board did so to take up posts with the National Coal Board, and a member who left the board in 1947 also took up employment with the National Coal Board. All executive and managerial staff below board level were transferred to employment under the National Coal Board on or shortly after 1st January, 1947. *No effort was made by Briggs to embark upon any other trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to which it was entitled under the Coal Acts. This process was long and arduous, involving the furnishing of many particulars and the making of extensive valuations. . . .* It was always the intention that so soon as Briggs had recovered the compensation to which it was entitled under the Coal Acts it should go into liquidation, and it was in fact put into liquidation on 17th October, 1954.”

The last-mentioned date should have been 1952.

The short, but difficult, question involved in this appeal is whether the words which I have italicised in the quotation above, describing the operations of Briggs from 1st January, 1947, to 17th October, 1952, should, in the light

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of the company's intention throughout to go into liquidation on obtaining the compensation to which it was entitled, be held sufficient to constitute Briggs a company the functions of which consisted wholly or mainly in the holding of investments or other property within the meaning of Section 19 (4) of the Finance Act, 1937.

It has been held in *Commissioners of Inland Revenue v. Buxton Palace Hotel, Ltd.*, 29 T.C. 329, and *Carpet Agencies, Ltd. v. Commissioners of Inland Revenue*, 38 T.C. 223, that the word "functions" involves some activity beyond the mere holding of investments and that the activities must be appropriate to some business such, for instance, as the making of money by holding investments. As I understood Sir John Senter, he did not ask your Lordships to overrule these decisions, but submitted that the findings quoted above were sufficient to satisfy the required test. My Lords, I confess that I think there is much substance in his contention, but as your Lordships and the Courts below are unanimous in taking the contrary view I am not prepared to dissent; and, in agreeing to the dismissal of this appeal, would do so on the ground adopted by Upjohn, J., in the concluding paragraph of his judgment⁽¹⁾ where, after saying Briggs might have decided to engage in some other trading activity or become an investment trust company, he says:

"If it does neither, but resolves to wind up, it does not seem to me to gain any new character in the sense of carrying on an activity of holding property as being appropriate to its business. It really has no business. It seems to me it is carrying out a residual function as a colliery company. It can no longer trade as such: it can only receive its compensation and die."

Lord Morris of Borth-y-Gest.—My Lords, it is not in dispute that the dividends paid by Briggs Collieries, Ltd., to the Appellant would constitute franked investment income if Briggs Collieries, Ltd., in respect of the periods after 31st December, 1946, fell within the scope of Section 19 (4) of the Finance Act, 1937. Did its functions consist wholly or mainly in the holding of investments or other property? If they did, then the holding of the investments or property would be deemed to be a business carried on by the company.

On 1st January, 1947, the colliery assets owned by Briggs Collieries, Ltd., were transferred to the National Coal Board. There accrued to the company a right to receive compensation in respect of such assets. It was inevitable, however, that time would elapse before the full or final amounts of the compensation could be paid. The colliery trade of the company ceased, but the company made no effort to embark upon any other trade. Throughout the period subsequent to 31st December, 1946, it was the intention of the directors of the company that it should go into liquidation so soon as it recovered the compensation to which it was entitled. In fact, the company went into liquidation before the final payments of compensation were received. The process of ascertaining and obtaining its entitlement of compensation was long and arduous, and all the energies of the directors were devoted to this process. In that state of affairs, it being recognised that the company's rights to receive compensation constituted "property", did its "functions", in the respective chargeable accounting periods, consist in the "holding" of property? In considering the meaning of Sub-section (4) it seems to me that attention should not be separately focussed upon any of the individual words contained in it, but that the intendment of the Sub-section should be ascertained by reading it as a whole. The Sub-section would doubtless cover a trust investment company—compare the observations of Lord Greene, M.R., in reference to another statutory provision in identical terms, in *Commissioners of Inland Revenue*

(1) See page 423 ante.

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v. Desoutter Bros., Ltd., 29 T.C. 155. But the question arises as to whether the words of the Sub-section are apt to cover Briggs Collieries, Ltd., even though it had not the features of what would ordinarily be called a trust investment company.

Inasmuch as the directors of Briggs Collieries, Ltd., had to be active and energetic in order to formulate and present their claims for compensation, it can be said that they had functions to perform. It can also be said that they had the purpose of claiming and recovering the compensation which was payable. It can further be said that, until the time arrived when compensation payments were complete, the company intended to retain its property rights and to retain them in successive chargeable accounting periods. While recognising these circumstances, the question to be decided is whether the functions of the company consisted wholly or mainly in the holding of property. The wish of the directors was that the company should come to an end as soon as possible. The company had come into existence in order to carry on the trade or business of colliery proprietors. When that trade or business could no longer be conducted, there was no plan or purpose of carrying on any other or different trade or business: all that remained was to receive compensation. The position was, if I may say so, well expressed by the learned Judge when he said that the company was carrying out a residual function as a colliery company and that, being unable any longer to trade as such, it could only "receive its compensation and die."

It is to be observed that the Sub-section does not provide that the mere ownership by a company of investments or other property brings about the result that such ownership is to be deemed to be a business carried on by the company. There is only such a deeming if the "functions" of the company consist wholly or mainly in the "holding" of investments or other property. The conjunction of the words "functions" and "holding" suggest to my mind something more than a mere ownership of some property, and certainly something more than an enforced or involuntary ownership of rights to receive compensation money, which ownership it is hoped will be terminated at the earliest possible moment by the receipt of the money. The company did not set out to acquire or to own investments or property and, just as there was nothing intentional or purposeful in its acquisition of its rights to compensation, so there was no intention or wish to continue to own such rights; but, on the contrary, there was an eager wish for an early settlement followed by a dissolution. In these circumstances I cannot think that the company was one of which it could aptly be said that its functions consisted wholly or mainly in the holding of investments or other property.

I would dismiss the appeal.

Lord Hodson.—My Lords, I am in entire agreement with the reasons given by my noble and learned friend, Lord Reid, for the dismissal of this appeal, and I concur in the result.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

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

CORRECTION

Tax Cases, Volume 39, Part 6

Page 422, line 31. *For* Section 20 (1) *read*
Section 20(1).

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