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COURT OF APPEAL—20TH, 21ST AND 22ND JUNE, 1962

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HOUSE OF LORDS—21ST, 22ND AND 23RD MAY, AND 20TH JUNE, 1963

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**C.H.W. (Huddersfield), Ltd.**

**v.**

**Commissioners of Inland Revenue<sup>(1)(2)</sup>**

**Spencer**

**v.**

**Commissioners of Inland Revenue<sup>(1)</sup>**

**Garside**

**v.**

**Commissioners of Inland Revenue<sup>(1)</sup>**

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*Surtax—Undistributed income of trading company—Control transferred during accounting period to company outside Section 245, Income Tax Act, 1952—Whether income can be apportioned to members prior to transfer—Resolution to pay no dividend on ordinary shares followed by resolution at later date to pay a dividend—Whether dividend paid within reasonable time—Income Tax Act, 1952 (15 & 16 Geo. VI & 1 Eliz. II, c.10), Sections 245, 248(1) and 256(2)(c)(i) and (4).*

*The Appellant Company had four members only until 29th January, 1957, and carried on the trade of wool merchants until 31st January, 1957. On 28th January, 1957, the Company agreed (a) to sell its undertaking and assets, except £25,000 cash, to two other companies in return for shares in those companies and bills of exchange and (b) to sell the said shares and bills of exchange to its members for £279,500. On 29th January the four members of the Company sold the entire issued share capital, 90 per cent. being acquired by a company outside Section 245, Income Tax Act, 1952.*

*At a general meeting on 14th February, 1957, the Company adopted accounts for the period 1st April, 1956, to 31st January, 1957, showing a net profit of £32,103, and writing back reserves and provisions no longer required amounting to £129,742. It also resolved that no dividend should be paid for that period except the dividend on its 20,000 6 per cent. £1 redeemable preference shares.*

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<sup>(1)</sup> Reported (Ch.D.) [1961] 1 W.L.R. 1337; 105 S.J. 912; [1961] 3 All E.R. 551; 232 L.T.Jo. 179; (C.A.) [1962] 1 W.L.R. 1223; 106 S.J. 530; [1962] 3 All E.R. 243; 233 L.T.Jo. 458.

<sup>(2)</sup> Reported (H.L.) [1963] 1 W.L.R. 767; 107 S.J. 592; [1963] 2 All E.R. 952; 234 L.T.Jo. 592.

On 27th August, 1957, a notice was issued to the Company under Section 250(1), *Income Tax Act, 1952*, in respect of the period 1st April, 1956, to 31st January, 1957. At an extraordinary general meeting on 13th December, 1957, the Company resolved to pay a dividend for that period on its ordinary shares amounting to £34,000 net (£59,130 gross). On 7th July, 1958, a direction under Section 245 was given in respect of the said period, and the actual income was apportioned as follows: to holders of the redeemable preference shares, £1,000; to holders of the ordinary shares (on a time basis) for the period 1st April, 1956, to 28th January, 1957, £54,282, and for the period 29th to 31st January, 1957, £537.

On appeal, the Company contended (a) that under Section 256(4) it was outside Section 245, because at the date to which the accounts were made up it was controlled by a company outside Section 245; alternatively, (b) that the whole of the Company's income was distributed within a reasonable time; alternatively, (c) that the basis of the apportionment was erroneous. For the Crown it was contended (i) that the Company was within Section 245 by virtue of Section 256(2)(c)(i) and the proviso to Section 256(4), and (ii) that the Company had not distributed a reasonable part of its actual income within a reasonable time after the end of the accounting period. The Special Commissioners held (1) that, on the assumption that a direction could be given, more than half the Company's income could, under the decision in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53, be apportioned to the individuals who were members up to 28th January, 1957, and accordingly the Company was not a "subsidiary" within Section 256(4); (2) that, having resolved at its general meeting on 14th February, 1957, to pay no further dividend for the period to 31st January, 1957, the Company had not made a reasonable distribution within a reasonable time after the end of that period; (3) that the time basis was the correct basis for the apportionment.

Held, in the Court of Appeal (which upheld the Commissioners' decision that the Company was a company to which Section 245 applied), that the Commissioners were entitled to reach their decision on the question of fact whether the dividend had been paid within a reasonable time.

Held, in the House of Lords, that the interests of the members to be considered under Section 248, *Income Tax Act, 1952*, were the interests surviving at the end of the relevant period, and accordingly the Company was not a company to which Section 245 applied.

*Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53, distinguished.

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#### CASES

(1) *C.H.W. (Huddersfield), Ltd. v. Commissioners of Inland Revenue*

#### CASE

Stated under the *Income Tax Act, 1952*, Sections 229(4) and 64, by the Commissioners for the Special Purposes of the *Income Tax Acts* for the opinion of the High Court of Justice.

I. At a meeting of the Commissioners for the Special Purposes of the *Income Tax Acts* held on 18th and 19th June and 21st December, 1959, *C.H.W. (Huddersfield), Ltd.* (hereinafter called "the Appellant Company"), appealed against a direction and an apportionment made under the provisions of Sections 245 and 248 of the *Income Tax Act, 1952*, in

respect of the period from 1st April, 1956, to 31st January, 1957, on the grounds that :

(a) at the date to which the Appellant Company's accounts were made up, 90 per cent. of its issued share capital was held by a company to which Section 245 did not apply, and the Appellant Company was therefore a subsidiary company within the meaning of Section 256(4) and was exempted from the provisions of Section 245 by Section 256(1); and, alternatively,

(b) the whole income of the Appellant Company for the period was distributed within a reasonable time.

II. The following documents were produced and admitted at the hearing of the appeal.

A. Copy of the memorandum and articles of association of the Appellant Company.

B. Copy of the special resolutions passed at the extraordinary general meeting of the Appellant Company on 23rd January, 1957.

C. Copy of an agreement of 28th January, 1957, between George Garside & Son, Ltd. (subsequently the Appellant Company), C.H.W. (Huddersfield), Ltd., and C.H.I. (Huddersfield), Ltd.

D. Copy of an agreement of 28th January, 1957, between George Garside & Son, Ltd. (subsequently the Appellant Company), of the one part, and W. Garside, T. Spencer, G. Garside and K. H. Spencer, of the other part.

E. Copy of an agreement of 29th January, 1957, between W. Garside, T. Spencer, G. Garside and K. H. Spencer, of the one part, and Standard Industrial Trust, Ltd., and Anglo-French Trust, Ltd., of the other part.

F. Copy of an ordinary resolution passed at an extraordinary general meeting of the Appellant Company on 1st February, 1957.

G. Copy of the accounts of the Appellant Company for the periods from 1st April, 1956, to 31st January, 1957, and for the following 14 months to 31st March, 1958, together with copies of the directors' reports of 11th February, 1957, and 24th November, 1958.

H. Copies of summaries of the accounts of the Appellant Company and of its shareholdings and loans to members.

I. Copy of a special resolution passed at an extraordinary general meeting of the Appellant Company on 14th February, 1957.

J. Copy of an extract from the minutes of the annual general meeting of the Appellant Company on 14th February, 1957.

K. Copy of special resolutions passed at an extraordinary general meeting of the Appellant Company on 27th February, 1957.

L. Copy of a notice issued to the Appellant Company under Section 250(1), Income Tax Act, 1952, together with an agreed bundle of correspondence.

M. Copy of a minute of a resolution passed at an extraordinary general meeting of the Appellant Company on 13th December, 1957.

Copies of documents marked "F", "H", "I", "J", "K" and "L" are not annexed hereto and do not form part of this Case, but are available for the use of the High Court if required.

## III. The following facts were agreed and admitted :

1. The Appellant Company was incorporated as a private company on 20th April, 1949, under the name of George Garside & Son, Ltd., to take over, as a going concern, the trade of wool merchants carried on in partnership by W. Garside, T. Spencer, G. Garside and K. H. Spencer under the name or style of George Garside & Son at Halifax.

2. The registered office of the Appellant Company was at 23, Square Road, Halifax, until 13th February, 1958, when it was changed to 73-78 High Holborn, London, W.C.1.

3. The nominal capital of the Appellant Company was £50,000 divided into 50,000 shares of £1 each, and, pursuant to the memorandum and articles of association, this capital was sub-divided into 20,000 6 per cent. non-cumulative redeemable preference shares of £1 each and 30,000 ordinary shares of £1 each. A copy of the Appellant Company's memorandum and articles of association is annexed hereto, marked "A" (1).

4. Under a vending agreement dated 20th April, 1949, the Appellant Company purchased the above business from the four above-mentioned partners for a consideration of £187,238, satisfied as follows :

£	£	
	20,000	6 per cent. non-cumulative redeemable £1 preference shares in the Appellant Company.
	30,000	£1 ordinary shares in the Appellant Company.
95,455		Partners' loans taken over by the Appellant Company.
41,783		Former partner's loan taken over by the Appellant Company (J. E. Garside, deceased).
<u>          </u>	137,238	
	<u>          </u>	
	187,238	

This trade was carried on by the Appellant Company until the close of business on 31st January, 1957.

The original loans taken over were as follows :

	£
W. Garside ... ..	36,059
T. Spencer ... ..	32,745
G. Garside ... ..	14,308
K. H. Spencer ... ..	12,343
Executors of J. E. Garside ... ..	41,783
	<u>          </u>
	137,238

5. The whole share capital of the Appellant Company was issued and, at all material times prior to 23rd January, 1957, held as follows :

<i>Registered holder</i>	<i>Preference shares</i>	<i>Ordinary shares</i>
G. Garside	5,000	14,990
K. H. Spencer	5,000	14,990
T. Spencer	5,000	10
W. Garside	5,000	10

(1) Not included in the present print.



6. The directors of the Appellant Company as from 21st April, 1949, were as follows :

<i>Name</i>	<i>Date of appointment</i>	<i>Date of retirement</i>
W. Garside	} 20th April, 1949	31st January, 1957
T. Spencer		
K. H. Spencer		
G. Garside	} 20th April, 1949	14th February, 1957
F. S. Bowles		
A. F. de Breyne	} 29th January, 1957	14th February, 1957
P. W. Pitt		
D. Steele		
R. C. Wright		
N. E. Morris	} 14th February, 1957	27th March, 1957
J. A. Hogg		
N. Nielsen	27th March, 1957	13th May, 1958
J. B. Whelan	27th March, 1957	to date

7. On 31st December, 1956, the following two companies were incorporated :

	<i>Name changed on 1st February, 1957, to</i>
C.H.W. (Huddersfield), Ltd. ...	George Garside & Son, Ltd.
C.H.I. (Huddersfield), Ltd. ...	George Garside (Imports), Ltd.

8. By special resolutions passed 23rd January, 1957 :

(i) It was resolved that certain of the Appellant Company's assets be sold to C.H.W. (Huddersfield), Ltd., and C.H.I. (Huddersfield), Ltd., respectively.

(ii) That the Appellant Company's name be changed to C.H.W. (Huddersfield), Ltd.

(iii) That the authorised capital of the Appellant Company be increased to £60,000 by the creation of 200,000 ordinary shares of 1s. each.

(iv) That 15,000 of the 1s. ordinary shares be offered for subscription, at par, to the registered holders of the £1 ordinary shares, in the proportion of one for every two shares held.

(v) That upon allotment of the said 15,000 1s. ordinary shares each of the 30,000 £1 ordinary shares be converted into one cumulative second preference share of £1 carrying interest at the rate of 6 per cent. per annum.

(vi) That the authorised capital of the Appellant Company be :

20,000 6 per cent. £1 cumulative redeemable preference shares.

30,000 6 per cent. £1 cumulative second preference shares.

200,000 1s. ordinary shares.

(vii) That the rights attached to the first and second preference shares and to the ordinary shares be as set out in the articles of association (as amended by resolution 4(b) of this resolution), which are briefly :

As regards income : the preference shares carried the right to a fixed dividend at the rate of 6 per cent. per annum and, subject to this, the balance of distributable profit was available for the ordinary shares.

As regards capital : in liquidation the preference shares carried the right to repayment of capital paid up, or credited as paid up, together with arrears

of dividend ; and, subject thereto, the assets were distributable to the ordinary shareholder.

As regards voting rights : the first and second preference shares were to carry on a poll one vote for each share held, and the ordinary shares twelve votes for each share held.

A copy of the special resolutions passed on 23rd January, 1957, is annexed hereto, marked "B"<sup>(1)</sup>.

9. Applications for the aforesaid 15,000 1s. ordinary shares were duly made to and received by the Appellant Company on 23rd January, 1957, and the shares were thereupon allotted in the proportions below stated opposite the respective names, and letters of allotment and renunciation issued accordingly :

W. Garside ... ..	7,495
K. H. Spencer ... ..	7,495
T. Spencer ... ..	5
G. Garside ... ..	5

10. By agreement in writing dated 28th January, 1957, made between the Appellant Company (therein called "the Vendor"), of the first part, C.H.W. (Huddersfield), Ltd. (therein called "the First Purchaser"), of the second part, and C.H.I. (Huddersfield), Ltd. (therein called "the Second Purchaser"), of the third part, the Appellant Company agreed, as from the close of business on 31st January, 1957, to sell its undertaking and assets (other than those specifically excepted) to the first purchaser and to sell the assets thus excepted (saving the sum of £25,000 cash at bank) to the second purchaser.

The following assets at the book values thereof respectively shown hereunder were sold for the considerations stated :

<i>C.H.W. (Huddersfield), Ltd.</i>		<i>C.H.I. (Huddersfield), Ltd.</i>	
£		£	
Motor vehicles ...	3,123	Land and buildings ... ..	19,250
Stock ... ..	78,027	Trade investment ... ..	100
		Shares in subsidiary company	4,000
		Stock ... ..	175,000
	<hr/>		<hr/>
	81,150		198,350

The consideration (in the total sum of £279,500) was to be satisfied in part by the allotment of shares credited as fully paid in the capital of the first and second purchaser, and as to the balance by delivery of bills of exchange, as follows :

	<i>C.H.W. (Huddersfield), Ltd.</i>	<i>C.H.I. (Huddersfield), Ltd.</i>
	£	£
£1 ordinary shares ...	30,000	10,000
£1 preference shares ...	20,000	—
Bills of exchange ...	31,150	188,350
	<hr/>	<hr/>
	81,150	198,350

It was provided that completion should take place on 31st January, 1957.

<sup>(1)</sup> Not included in the present print.

The agreement further provided that on completion there should be an exchange of names between the vendor and the first purchaser, as was done on 1st February, 1957.

A copy of this agreement of 28th January, 1957, is annexed hereto, marked "C"<sup>(1)</sup>.

11. By agreement in writing dated 28th January, 1957, made between the Appellant Company (therein called "the Vendor") of the one part, and W. Garside, T. Spencer, G. Garside and K. H. Spencer (therein called "the Purchasers") of the other part, the vendor agreed to sell and the purchasers to purchase the shares of C.H.W. (Huddersfield), Ltd., and C.H.I. (Huddersfield), Ltd., together with the bills of exchange to which the vendor was entitled as consideration for the sale and purchase under the agreement referred to in paragraph 10 above. The consideration for the sale was the sum of £279,500, and completion was to take place on 31st January, 1957. A copy of the said agreement of 28th January, 1957, is annexed hereto, marked "D"<sup>(1)</sup>.

12. On 28th January, 1957, the said shares in C.H.W. (Huddersfield), Ltd., and C.H.I. (Huddersfield), Ltd., were transferred to the purchasers in accordance with the agreement referred to in paragraph 11 above.

13. By a deed dated 28th January, 1957, between W. Garside, T. Spencer, G. Garside and K. H. Spencer (therein called "the Vendors") of the one part, and the Appellant Company of the other part, the vendors agreed to indemnify the Appellant Company as therein provided.

14. By agreement in writing dated 29th January, 1957, made between W. Garside, T. Spencer, G. Garside and K. H. Spencer (therein called "the Vendors") of the one part, and Standard Industrial Trust Ltd., and Anglo-French Trust, Ltd. (therein called "the Purchasers") of the other part, the vendors agreed to sell and the purchasers to purchase 20,000 6 per cent. cumulative redeemable first preference shares of £1 each, 30,000 6 per cent. cumulative second preference shares of £1 each and 15,000 ordinary shares of 1s. each, being the entire issued share capital of the Appellant Company. Completion of this agreement was to take place on the execution thereof, and, by way of completion, the vendors were to deliver to the purchaser :

- (i) irrevocable instructions in writing addressed to Lloyds Bank, City Office Nominees, Ltd. (in whose name the said first preference shares and second preference shares were then held), to hold the said shares to the order of the purchasers ; and
- (ii) letters of renunciation as respects 15,000 ordinary shares.

15. The total purchase price of £279,500 was made up as follows :

	£
20,000 6 per cent. cumulative first preference shares of £1 each ... ..	20,000
30,000 6 per cent. cumulative second preference shares of £1 each ... ..	30,000
15,000 1s. ordinary shares at £15 6s. per share ... ..	229,500
	279,500

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<sup>(1)</sup> Not included in the present print.

The said consideration was to be provided and paid as to nine-tenths (being £251,550) by Anglo-French Trust, Ltd., and as to one-tenth (being £27,950) by Standard Industrial Trust, Ltd.; and, accordingly, irrevocable directions to Lloyds Bank, City Office Nominees, Ltd., requiring them to hold 18,000 first preference shares and 27,000 second preference shares to the order of Anglo-French Trust, Ltd., and 2,000 first preference shares and 3,000 second preference shares to the order of Standard Industrial Trust, Ltd., were delivered to the respective purchasers.

A copy of the said agreement of 29th January, 1957, is annexed hereto, marked "E" (1).

16. At a board meeting of the directors of the Appellant Company held on 29th January, 1957, it was reported by the secretary that registration forms in respect of 15,000 1s. ordinary shares had been received from Anglo-French Trust, Ltd., and Standard Industrial Trust, Ltd., respectively, and it was resolved that their respective names be registered in the books of the Company as the holders of such shares. On 29th January, 1957, there was therefore entered in the Appellant Company's register of shares the following particulars:

<i>Name</i>	<i>Number of shares allotted or transferred</i>	<i>Class of shares</i>
Anglo-French Trust, Ltd. ... ..	13,500	Ordinary 1s.
Standard Industrial Trust, Ltd. ... ..	1,500	Ordinary 1s.

17. Standard Industrial Trust, Ltd., was and is a company to which Section 245, Income Tax Act, 1952, applied; but at no time material to this appeal was Anglo-French Trust, Ltd., a company to which the said Section applied.

18. On 31st January, 1957, the agreements referred to in paragraphs 10 and 11 above (Exhibits "C" and "D") were duly completed; and the Appellant Company, at the close of business on that date, therefore ceased to carry on the trade of wool merchants. Thereafter the assets of the Appellant Company consisted of £304,500 in cash, made up as to £25,000, retained on sale, and as to the balance of £279,500, being the cash consideration which passed to the Appellant Company.

19. On 1st February, 1957, the Appellant Company's name was changed to C.H.W. (Huddersfield), Ltd.; and C.H.W. (Huddersfield), Ltd., changed its name to George Garside & Son, Ltd., and C.H.I. (Huddersfield), Ltd., changed its name to George Garside & Son (Imports), Ltd.

20. Pursuant to a resolution passed by the Appellant Company at an extraordinary general meeting held on 1st February, 1957, £9,000 undistributed profits was capitalised and a bonus issue of 180,000 1s. ordinary shares made. These shares were allotted on that date to the ordinary shareholders of the Appellant Company in the proportion of twelve new ordinary 1s. shares for every one 1s. ordinary share held at 31st January, 1957, as follows:

Anglo-French Trust, Ltd. ... ..	162,000
Standard Industrial Trust, Ltd. ... ..	18,000
	<hr style="width: 100px; margin-left: auto; margin-right: 0;"/> 180,000

(1) Not included in the present print.

21. The Appellant Company had habitually made up its accounts for the period of 12 months commencing 1st April, and ending on 31st March in each year ; but accounts were made up for the period now in consideration, being 1st April, 1956, to 31st January, 1957. These accounts showed a net profit for the period of £32,103. In addition, reserves and provisions previously provided out of profits and then no longer required—i.e., taxation, £29,742, and future stock fluctuation, £100,000—were written back.

22. The directors of the Appellant Company, in their report dated 11th February, 1957, on the accounts for the period ended 31st January, 1957, recommended :

- (i) that confirmation be given to the payment on the cumulative redeemable preference shares of a dividend of 6 per cent. for the said period ;
- (ii) that no further dividend be paid on the Company's shares for that period.

The said dividend had been paid in two instalments prior to 31st January, 1957.

Copies of the directors' reports, balance sheets and profit and loss accounts of the Appellant Company for the periods from 1st April, 1956, to 31st January, 1957, and from 1st February, 1957, to 31st March, 1958, are annexed hereto, marked " G "(<sup>1</sup>).

23. At an extraordinary general meeting of the Appellant Company held on 14th February, 1957, a special resolution was passed converting the 15,000 1s. ordinary shares into 750 6 per cent. £1 second preference shares.

24. On 14th February, 1957, the allotment of 180,000 1s. ordinary shares referred to in paragraph 20 above was renounced by Anglo-French Trust, Ltd., and Standard Industrial Trust, Ltd., in favour of B.B.F.T. Nominees, Ltd., in whose name the shares were duly registered.

25. On 14th February, 1957, the Appellant Company's accounts for the period ended 31st January, 1957, were adopted by the Company in general meeting, and, pursuant to the recommendation of the directors (referred to in paragraph 22 above), the Company then resolved :

- (i) to confirm the payment of the dividend referred to in paragraph 22 hereof and no more ;
- (ii) to pay no further dividend on the shares of the Company for the period ended 31st January, 1957.

26. By a special resolution passed at an extraordinary general meeting of the Appellant Company held on 27th February, 1957, the objects of the Company were extended to include the functions of an investment trust company.

27. On 27th August, 1957, the Special Commissioners issued to the Company a notice under Section 250 (1), Income Tax Act, 1952, in respect of the period 1st April, 1956, to 31st January, 1957.

28. At a meeting of the board of directors of the Appellant Company held on 6th December, 1957, it was resolved to recommend the distribution of the net profits of the period 1st April, 1956, to 31st January, 1957 ;

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(<sup>1</sup>) Not included in the present print.

and it was accordingly proposed by the directors that a net dividend of 3s. 9½d. per ordinary share be paid for this period.

29. At an extraordinary general meeting of the Appellant Company held on 13th December, 1957, such a resolution was duly passed; and pursuant thereto there was paid by way of dividend to the holders of the ordinary shares on 13th December, 1957, the sum of £59,130 8s. 8d. gross, or £34,000 net. A copy of an extract of the minutes of the extraordinary general meeting of the Appellant Company and the resolution passed thereat is annexed hereto, marked "M" (1).

30. In relation to each of the four financial years of the Company ended with the year ended 31st March, 1956, respectively, a dividend of 20 per cent. was declared on the ordinary shares and was paid within a few weeks of the respective annual general meeting of the Company at which the accounts for the respective financial years were adopted.

31. The registered holders of the ordinary shares as from 14th February, 1957, were B.B.F.T. Nominees, Ltd., which on 13th December, 1957, held the same as nominees for Chalbrook Financial Investments, Ltd.

32. On 7th July, 1958, the assessing Special Commissioners of Income Tax, pursuant to Section 245, Income Tax Act, 1952, made a direction upon the actual income of the Appellant Company for the period 1st April, 1956, to 31st January, 1957, amounting to £55,819; and, for the purposes of assessment to Surtax, they (the Special Commissioners) apportioned the said actual income of that period on the following basis:

	£	£
To 6 per cent. cumulative redeemable preference shares		1,000
To second preference shareholders ... ..		nil
To ordinary shareholders:		
(i) in respect of period 1st April, 1956 to 28th January, 1957 (303 days)—		
W. Garside (10 shares) ... ..	18	
T. Spencer (10 shares) ... ..	18	
G. Garside (14,990 shares) ... ..	27,123	
K. H. Spencer (14,990 shares) ... ..	27,123	
	54,282	
(ii) in respect of period 29th to 31st January, 1957 (3 days)—		
Anglo-French Trust, Ltd. (13,500 shares)	483	
Standard Industrial Trust, Ltd. (1,500 shares)	54	537
	15,000 shares	£55,819

IV. It was contended on behalf of the Appellant Company:

(a) that, as at the date to which the Appellant Company's accounts were made up (namely, 31st January, 1957) 90 per cent. of its issued share capital was held by a company to which Section 245, Income Tax Act, 1952, did not apply, the Appellant Company was exempt from the provisions of Section 245 by Section 256 (4);

(1) Not included in the present print.

- (b) that the whole income of the Appellant Company for the period was distributed within a reasonable time ;
- (c) that the appeal should succeed and the direction and apportionment be discharged.

V. It was contended on behalf of the Crown :

- (a) that by virtue of the proviso to Section 256(4) and Section 256(2)(c)(i) of the Income Tax Act, 1952, the Appellant Company was not a subsidiary company within the meaning of the said Section 256 and was a company to which the provisions of Section 245 of the said Act applied ;
- (b) that the Appellant Company had not, within a reasonable time after the end of the accounting period in question, distributed to its members a reasonable part of its actual income from all sources for the purposes of the said Section 245 ;
- (c) that the direction and the apportionment should be confirmed.

VI. The following cases were referred to :

*Lionel Sutcliffe, Ltd. v. Commissioners of Inland Revenue*, 14 T.C. 171.

*Collier & Sons, Ltd. v. Commissioners of Inland Revenue*, 18 T.C. 83.

*Montague Burton, Ltd. v. Commissioners of Inland Revenue*, 20 T.C. 48.

*Star Entertainments, Ltd. v. Commissioners of Inland Revenue*, 24 T.C. 445.

*Penang & General Investment Trust, Ltd., and Ramsden v. Commissioners of Inland Revenue*, 25 T.C. 219.

*Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53.

*Commissioners of Inland Revenue v. F. P. H. Finance Trust, Ltd. (No. 2)*, 28 T.C. 209.

*Wigram Family Settled Estates, Ltd. v. Commissioners of Inland Revenue*, 37 T.C. 638.

VII. We, the Commissioners who heard the appeal, after considering all the evidence and the arguments, gave, on 30th July, 1959, the following decision in writing :

The only question we were asked to decide was whether the direction made under Section 245 of the Income Tax Act, 1952, for the period 1st April, 1956, to 31st January, 1957, was properly made ; for it was agreed that, if the appeal against this direction failed, the figures of the apportionment and of the consequential assessments to Surtax should be left for agreement.

#### A

The first ground of appeal was that the Appellant Company was outside the scope of Section 245 because at 31st January, 1957, it was the subsidiary of a company (" Anglo-French ") to which, admittedly, Section 245 did not apply ; and accordingly Sub-sections (4) and (1) of Section 256 operated to exempt the Appellant Company from the provisions of Section 245.

The first question is, what is the date at which it must be considered whether the Appellant Company was a subsidiary company.



Section 256(1) provides that Section 245

“shall apply to . . . [a company] which is not a subsidiary company or a company in which the public are substantially interested.”

Sub-section (4) deals with subsidiary companies, but does not provide a date for considering the question whether a company is a subsidiary company. Sub-section (5) deals with companies in which the public are substantially interested, and does provide a date (“the end of the year or other period . . .”). We have come to the conclusion that, since a subsidiary company and a company in which the public are substantially interested are referred to in juxtaposition in Sub-section (1), and since Sub-sections (4) and (5) were introduced together by Section 31(3) of the Finance Act, 1927, the date provided in Sub-section (5) is also the date to be supplied in Sub-section (4)—in the present case, 31st January, 1957.

At that date the control of the Appellant Company was, by reason of the beneficial ownership of its shares, in the hands of Anglo-French. It would therefore have been a subsidiary company within the meaning of Sub-section (4), apart from the proviso to that Sub-section. That proviso provides that, notwithstanding anything in the Sub-section, a company which is deemed to be under the control of not more than five persons—and the Appellant Company is such a company—

“shall not be deemed to be a subsidiary company unless it can be deemed to be under the control of not more than five persons only by including among the persons mentioned in paragraph (a), paragraph (b) or paragraph (c) of subsection (2) of this section a company to which the said section two hundred and forty-five does not apply . . .”

Paragraphs (a), (b) and (c) of Sub-section (2) provide tests for deciding whether a company shall be deemed to be under the control of not more than five persons, and these tests are alternatives.

It was said on behalf of the Appellant Company that it does not matter whether the word “only” in the proviso to Sub-section (4) qualifies the words “not more than five persons . . .” or the words “by including among the persons . . .”. We think that it does matter, and that the word “only” qualifies the words “by including among the persons . . .”, so that the phrase is “only by including among the persons . . .”. The phrase “under the control of not more than five persons only . . .” does not occur anywhere in Section 256, nor, as far as we know, anywhere else in the legislation dealing with Surtax on companies. The effect of our phrasing of the word “only” is that if in the present case the Appellant Company can, under any one of the tests provided by paragraphs (a), (b) or (c) of Sub-section (2), be deemed to be under the control of not more than five persons without bringing in Anglo-French, it will not be deemed to be a subsidiary company within the meaning of Sub-section (4).

The Crown rely on Sub-section (2)(c)(i), which begins:

“on the assumption that the company is a company to which the said section two hundred and forty-five applies”.

To us it seems clear that implicit in this assumption is the assumption that a direction is competent. The effect of the rest of this Sub-section is that if on this assumption more than half of the company’s income could be apportioned among not more than five persons, the company is to be deemed to be under the control of not more than five persons.

On the assumption, under Sub-section (2)(c)(i), that the Appellant Company is one against which a direction could be made, the answer to the question whether more than half its income could be apportioned among



not more than five persons other than Anglo-French (i.e., among the Garsides and the Spencers) depends on the effect of the decision in the case of *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53. In that case it was common ground that a direction was competent, and the dispute was whether a certain apportionment could be made under Section 15 of the Finance Act, 1939 (now Section 260 of the Income Tax Act, 1952) in view of the words "is able to secure . . . or is likely to be able to secure . . .".

We think that in the present case what was common ground in the *Fendoch* case is, under the opening words of Sub-section (2)(c)(i), to be assumed; so that what remains to be considered in relation to the *Fendoch* case is whether its effect is limited to Section 15 of the Act of 1939.

We do not think its effect is so limited, and we base this view on the paragraph of Lord Simonds' speech which begins (27 T.C., at page 68) :

"I turn, however, to the matters principally relied on by the Company. It was contended—and this is of course fundamental to the argument—that under the principal Act an apportionment could only be made against a person who was a member (as defined by Section 21(7)) on the last day of the accounting period."

We think that the effect of this paragraph in its application to the facts of the present case is that, on the assumption that a direction could be made against the Appellant Company, more than half its income could be apportioned among the Garsides and the Spencers although they were not members of the Company at 31st January, 1957.

To summarise the position as we see it :

If the Appellant Company can, under any one of the alternative tests provided by Sub-section (2), be deemed to be under the control of not more than five persons other than Anglo-French, it will not be deemed to be a subsidiary company within the meaning of Sub-section (4), Section 245 will apply to it, and the direction under appeal will be competent. The combined effect of Sub-section (2)(c)(i) and the *Fendoch* decision is that it can be deemed to be under the control of not more than five persons without bringing in Anglo-French. We hold, therefore, that the direction under appeal is competent.

## B

The second ground of appeal is relevant only if the decision we have just come to is correct.

It was that, if the Appellant Company was within the scope of Section 245, nevertheless the distribution was made within a reasonable time after the end of the accounting period in question, i.e., within a reasonable time after 31st January, 1957; no question arises as to the reasonableness of the amount of the distribution.

The accounts for the period ended 31st January, 1957, were adopted in general meeting on 14th February, 1957. At that meeting the payment of a dividend of 6 per cent. on the redeemable preference shares was confirmed, and it was resolved to pay no further dividend. It was not until 13th December, 1957, that it was resolved at an extraordinary general meeting to distribute the net profits of the period ended 31st January, 1957. We find that this distribution was not made within a reasonable time after the end of the accounting period in question, and we hold that the appeal against the direction fails.

## C

We leave the figures of the apportionment and of the consequential assessments to Surtax to be agreed.

VIII. On 21st December, 1959, the parties being unable to agree the figures of the apportionment, we heard further argument.

IX. It was contended on behalf of the Appellant Company that, whether or not the direction under appeal was competent, the suggested apportionment had been made on an erroneous basis and was not in accordance with the relevant statutory provisions.

X. It was contended on behalf of the Crown that the apportionment was correctly made and should be confirmed.

XI. We, the Commissioners who heard the appeal, after considering the further arguments, gave our decision on the apportionment in writing on 24th February, 1960, as follows :

We now have to decide whether the apportionment under appeal was correctly made ; and again the answer to this question appears to us to depend on our interpretation of the decision in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53.

Although the decision in that case was on Section 15 of the Finance Act, 1939, Lord Simonds says, 27 T.C., at page 67, that Counsel for the Fendoch company did not appear to rely on the language of Section 15 taken by itself. Moreover, in passage after passage in the judgments and speeches, careful consideration is given, not to the language of Section 15, but to the language of Section 21 of the Finance Act, 1922, and the legislation amending that Section. We have come to the conclusion that the *Fendoch* case is authority for the proposition that an apportionment, not under Section 15 of the 1939 Act, can be made to persons, "in accordance with their respective interests", who were members "at any time during the period in question", but were not members at the end of that period and at that date had no "respective interests".

On this view it is impossible to say in the one breath that an apportionment can be made to such persons "in accordance with their respective interests", and that it cannot be made because at the end of the relevant period they, not then being members, had no "respective interests" and could not receive any distribution from the company in question. An apportionment to the Garsides and the Spencers is therefore competent, and the remaining question is whether the apportionment under appeal, made as it was on a time basis, is the proper one. The question of apportionment on a time basis in cases which do not fall within Section 15 of the Act of 1939 was not directly dealt with in the *Fendoch* case, since under that Section the apportioning Commissioners have a discretion. We think, however, that it is implicit in the reasoning of the Courts in that case, directed chiefly to a consideration of legislation other than Section 15, that an apportionment on a time basis is the correct one in a case such as the present one.

The appeal against the apportionment fails. There was no discussion before us on the figures of the apportionment, but, to avoid any misunderstanding in what would otherwise be our final determination, we leave these figures to be agreed.

There were also before us appeals against consequential assessments to Surtax. The figures of these assessments we leave to be agreed.

XII. The parties having agreed the figures on 17th June, 1960, we confirmed the apportionment of the Appellant Company's actual income from all sources for the period 1st April, 1956, to 31st January, 1957, as follows :

	£
Redeemable preference shareholders ... ..	1,000
W. Garside ... ..	18
T. Spencer ... ..	18
G. Garside ... ..	27,123
K. H. Spencer ... ..	27,123
Anglo-French Trust, Ltd. ... ..	483
Standard Industrial Trust, Ltd. ... ..	54
	<hr/>
Actual income ... ..	55,819

XIII. The Appellant Company 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 Income Tax Act, 1952, Sections 229(4) and 64, which Case we have stated and do sign accordingly.

XIV. The question of law for the opinion of the High Court is whether our decisions set out in paragraphs VII and XI were correct in law.

H. G. Watson	}	Commissioners for the Special Purposes of the Income Tax Acts.
R. W. Quayle		

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

3rd May, 1961.

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(2) *Spencer v. Commissioners of Inland Revenue*

(3) *Garside v. Commissioners of Inland Revenue*

These cases related to assessments to Surtax which were consequential on the direction and apportionment appealed against in the first case, and the assessments were confirmed by the Special Commissioners following their decision in that case.

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The cases came before Plowman, J., in the Chancery Division on 20th, 21st, 25th and 26th July, 1961, when judgment was given in favour of the Crown, with costs.

Mr. H. H. Monroe, Q.C., and Mr. M. P. Nolan appeared as Counsel for the Appellants, and Mr. F. Heyworth Talbot, O.C., Mr. E. B. Stamp and Mr. Alan Orr for the Crown.

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**Plowman, J.**—I will give judgment in *C.H.W. (Huddersfield), Ltd. v. Commissioners of Inland Revenue* first. This appeal arises out of a Surtax direction and apportionment made under Section 245 of the Income Tax Act, 1952, in respect of the period 1st April, 1956, to 31st January, 1957. The questions with which I am concerned are these. (1) Was C.H.W. (Huddersfield), Ltd. (which I will call “the Company”), at the relevant time a company to which Section 245 applied? The Crown say “Yes”; the Company says “No”, on the ground that it was a subsidiary of another company called Anglo-French Trust, Ltd. (which I will call “Anglo-French”). (2) If the Crown are right on question (1), was a distribution made by the Company in December, 1957, made within a reasonable time after 31st January, 1957, which was the end of the period for which the Company’s accounts were made up? (3) If the answer to question (2) is “No”, was the apportionment made by the Special Commissioners correct in principle? As will appear later, the first and third questions are very much bound up together.

The facts of this case are complicated, but it will, I think, be sufficient to summarise them as follows. On 1st April, 1956, which is the opening date of the relevant accounting period, the Company, which carried on business as wool merchants, had an issued share capital of £50,000 divided into preference and ordinary shares, the whole of which was held by four individuals (whom I will call “the Garsides and the Spencers”). In the latter part of January, 1957—that is to say, towards the very end of the accounting period—a number of transactions took place, as a result of which, (1) two new companies took over all the trading assets of the Company; (2) the only assets left in the Company were two sums of cash, namely, a sum of £25,000 and a sum of £279,500; (3) the Garsides and the Spencers ceased to hold any shares in the Company, their former shareholding being represented by £60,000 worth of shares in the two new companies and £219,500 worth of bills of exchange given by those companies; (4) the whole of the issued capital of the Company, which then consisted of a further £750 as well as the £50,000 I have already mentioned, was held as to nine-tenths by Anglo-French and as to one-tenth by a company called Standard Industrial Trust, Ltd. Thus the Company became a subsidiary, in the ordinary sense of the word, of Anglo-French, a company which was not at any material time a Surtax company, that is to say, one to which Section 245 applied.

On 31st January, 1957, the Company ceased to trade, and within a very short time after that date its accounts were made up for the period 1st April, 1956, to 31st January, 1957, and for that period showed a net profit of £32,103. Those accounts were adopted by the Company in general meeting on 14th February, 1957, and the Company then resolved, first, to confirm the payment which had been made of the dividend on the Company’s 6 per cent. redeemable preference shares, and, secondly, to pay no further dividend on the Company’s shares for the period ended 31st January, 1957.

On 27th August, 1957, the Special Commissioners issued a notice under Section 250(1) of the Income Tax Act, 1952, in respect of the period 1st April, 1956, to 31st January, 1957—that is to say, a notice requiring information which might lead to a Surtax direction. On 13th December, 1957, an extraordinary general meeting of the Company was held at which it was resolved to pay a dividend on the Company’s ordinary shares for the period ended 31st January, 1957, amounting to £59,130 8s. 8d. gross, or £34,000 net.

On 7th July, 1958, the Special Commissioners made a direction under Section 245, and apportioned the Company’s actual income for the period 1st April, 1956, to 31st January, 1957, on a time basis. The position was that

**(Plowman, J.)**

during 303 of the 306 days of that period the ordinary shares of the Company had been held by the Garsides and the Spencers, and during the remaining three days they had been held by Anglo-French and Standard Industrial Trust, Ltd. Accordingly, the balance of the Company's actual income, after apportioning £1,000 to the redeemable preference shares on which a dividend was paid, was apportioned as to 303/306ths for the Garsides and Spencers and as to 3/306ths for the two last mentioned companies. The sums so apportioned were £54,282 and £537 respectively. I have to decide whether that sum of £54,282, which was not in fact received by the Spencers and the Garsides, is nevertheless to be treated as their income for Surtax purposes. That is one of the questions which arises on these appeals.

The matter turns on certain provisions in the Income Tax Act, 1952, to which I must now refer. What I may call the master Section is Section 245, which is in these terms :

“With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.”

Then Section 248(1) provides :

“Where a direction has been given under section two hundred and forty-five of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members.”

Then I turn to Section 256, which is dealing with the question of what companies are within Section 245. The relevant parts of Section 256 are as follows :

“(1) Section two hundred and forty-five of this Act shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested. (2) For the purposes of this section, a company shall be deemed to be under the control of not more than five persons . . . (c) if—(i) on the assumption that the company is a company to which the said section two hundred and forty-five applies . . . more than half the income of the company (including any income which has been apportioned to it, or could on either of those assumptions be apportioned to it, for the purposes of this Chapter) could be apportioned for those purposes among not more than five persons. In ascertaining under paragraph (c) of this subsection whether or not income could be apportioned among not more than five persons, account shall, in cases where an original apportionment and any sub-apportionment are involved, be taken only of persons to whom income could be finally apportioned as the result of the whole process of original apportionment and sub-apportionment.”

Then Sub-section (4) provides :

“For the purposes of this section, a company shall be deemed to be a subsidiary company if by reason of the beneficial ownership of shares therein the control of the company is in the hands of a company not being a company to which section two hundred and forty-five of this Act applies, or of two or more companies none of which is a company to which the said section two hundred and forty-five applies: Provided that, notwithstanding anything in this subsection, a company which is deemed for the purposes of this section to be under the control of not more than five persons shall not be deemed to be a subsidiary company

(Plowman, J.)

unless it can be deemed to be under the control of not more than five persons only by including among the persons mentioned in paragraph (a), paragraph (b) or paragraph (c) of subsection (2) of this section a company to which the said section two hundred and forty-five does not apply and which is not the nominee of any other person."

Obviously, Section 256 is an extremely involved Section, but this much, I think, is common ground, that if, in apportioning the income of a company under Section 248(1) in accordance with the respective interests of the members, it would be open to the Special Commissioners to apportion more than half the income of the Company to the Garsides and the Spencers, as would be the case if it was open to them to apportion on a time basis, then the Company is not a subsidiary of Anglo-French, and is a company to which Section 245 applies. Mr. Monroe, for the Company, concedes that, in a case in which a direction and apportionment can properly be made, the interests of persons who were members during the relevant accounting period but who had ceased to be members before the end of that period fall to be taken into account. But he submits that an apportionment in accordance with their respective interests, as applied to the facts of the present case, where no interim dividend was paid, means, in effect, a nil apportionment. The reason for this, as I understand it, is that, since an apportionment cannot be made before the end of the relevant period, one has to look to that point of time and no other to see who is really interested in the fund of income which comes into being at that date; and in the present case the Garsides and the Spencers had no interest at all on 31st January, 1957.

The reason why Mr. Monroe is bound to make the concession to which I have referred is the decision of the House of Lords in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53. That was a case concerned with an investment company, and investment companies are subject to the special provisions contained in Sections 257 to 264 of the Income Tax Act, 1952; but on this point those special provisions do not, in my judgment, affect the matter. The facts of that case, in a simplified form, and so far as relevant to the present case, were that on 5th April, 1939, a Mrs. Murray held all the "A" and "B" shares in the appelland company—which, as I have said, was an investment company—while the trustees of a settlement held the "C" shares. The rights attached to the shares which Mrs. Murray held at that date were such as to enable her to allocate the whole of the income of the company to her own shares. That position continued until 8th December, 1939, when the capital was reconstructed in such a way that from then until the end of the financial year all the shares became shares of the same class, of which Mrs. Murray held 15,000 and the trustees of the settlement 42,920. The whole of the income of the company for the year 1939-40 was apportioned to Mrs. Murray under Section 15 of the Finance Act, 1939, now Section 260 of the Income Tax Act, 1952. On appeal by the company it was argued, among other things, that in considering, for the purposes of Section 15, whether any person was able to secure that assets or income of the company would be applied for his benefit, regard must be had to the position as it existed on the last day of the relevant year of assessment, and that Mrs. Murray was not, on 5th April, 1940, able to secure that assets or income of the company would be applied for her benefit. The Court of Appeal and the House of Lords, however, decided that the Special Commissioners could make an apportionment against a person who at any time during the relevant year of assessment was able to secure that assets or income of the company would be applied for his benefit.



**(Plowman, J.)**

At page 68 of the report<sup>(1)</sup>, Lord Simonds, in dealing with the point I am now considering, said this :

“ I turn, however, to the matters principally relied on by the Company. It was contended—and this is of course fundamental to the argument—that under the principal Act an apportionment could only be made against a person who was a member (as defined by Section 21(7)) on the last day of the accounting period. Section 21(1) of the principal Act ”

—that Section is now Section 245 of the Income Tax Act, 1952—

“ provides that the Commissioners may ‘direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members’, and Paragraph 8 of the First Schedule ”

—which is now Section 248(1)—

“ to the Act provides that ‘the apportionment . . . shall be made . . . in accordance with the respective interests of the members’. I find nothing in these words which supports the Appellants’ contention, or would restrict the meaning of ‘members’ to persons who were members during the whole period or the last or any other day of it. The language of the Section is clearly apt to include any person who was a member at any time during the period in question. But here again the Appellants rely on some limiting context. It is said that it is as at the end of the period that it must be ascertained whether there has been a reasonable distribution.”

Then, after referring to certain arguments which I need not read, Lord Simonds continued, at the top of page 69 :

“ But it appears to me that the argument breaks down at an earlier stage. I do not find in the provisions to which reference has been made any sufficient justification for thus limiting the meaning of ‘members’. On the other hand I think that there are numerous indications which suggest that no such limitation can have been intended. Under Paragraph 4 of the First Schedule to the principal Act,”

—I pause there to say that that is now Section 250 of the Act of 1952—

“ the Commissioners may require any company to which Section 21 applies, to furnish a statement of the names and addresses and particulars of the respective interests of all members of the company for the period for which the company’s accounts are made up. This must mean all persons who have at any time during the period been members. It is not obvious for what purpose the Commissioners require such particulars, unless the persons concerned are possible objects of apportionment. Again, under Section 20(4)(a) of the Finance Act, 1936, the definition of ‘member’ is extended so as to include a ‘loan creditor’. The object of this extension might be largely defeated if only those loan creditors could be regarded as members whose loans have not been repaid at the end of the fiscal year.”

Lord Simonds then referred to Section 32 of the Finance Act, 1927, and continued :

“ Numerous other provisions and illustrations were in the course of the argument brought to your Lordships’ notice in support of the Respondents’ submission that the members against whom an apportionment can be made include all persons who have been members at any time during the period under review. I do not think it necessary further to examine them. I have already expressed my view that this submission accords with the natural meaning of the language of the principal operative Section. It is sufficient to add that the context does not oppose but rather supports this construction.”

Mr. Monroe points out, however, what is no doubt the fact, that the question of quantum of apportionment which arose in that case is different from the question of quantum of apportionment which arises in this. The question there depended on the special provisions relating to investment companies,

(1) 27 T.C.

(Plowman, J.)

as appears from the last part of Lord Simonds's speech. At page 69 of the report<sup>(1)</sup>, he said this :

"There remains the question of quantum. This can be disposed of very shortly. The power of the Commissioners is to apportion to the member (or person who is treated as a member) such part of the income 'of the company as appears to them to be appropriate'. It has, in this case, appeared to the Commissioners to be appropriate to apportion the whole of the income to Mrs. Murray. I see no ground upon which it can be said that they have improperly exercised their statutory discretion."

Here, the question is not one of what appears appropriate to the Commissioners but of what are the respective interests of the members, including the Garsides and the Spencers.

Now at this point I should refer to the judgment of the Court of Appeal in the *Fendoch* case<sup>(2)</sup>, and also to one further passage in Lord Simonds's speech. In the Court of Appeal, Scott, L.J., who delivered the judgment of the Court, after pointing out that the words, "the amount thereof shall be apportioned among the members", in what is now Section 245, were very wide words, and that the provision which is now Section 248(1) required the apportionment to be made in accordance with the respective interests of the members, and not the members on the register at the expiration of the period, continued, at page 63, as follows :

"We fail to see any reason for the view that members could escape by selling their shares before the end of the year. As Mr. Stamp said, it would have been so easy for Parliament to say that the liability was to be on 'members on the last day of the year' if that had been, or could have been its intention."

Then a little later on he said this :

"The 1927 Finance Act, Section 31(2),"

—which is now Section 249(1) of the Act of 1952—

"expressly authorised deduction from the newly added Sur-tax charge of the amount, if any, already distributed to the member and, therefore, already *ex hypothesi*, included in his Sur-tax return. It is incredible that Parliament, when making that addition to the language there used, should have thought it was only necessary to protect members on the register on the last day of the year."

At page 67, Lord Simonds said this :

"It is in regard to the second year of assessment that the validity of the apportionment is still challenged. Your Lordships will remember that it was in the course of this year that the last recorded change in the financial constitution of the Company took place. On 8th December, 1939, Mrs. Murray surrendered her control of the Company in the manner that I have already stated, and thereafter and particularly on the last day of the fiscal year, 5th April, 1940, she was a minority shareholder in a Company, all of whose shares carried equal voting and other rights. It is on this fact, and this fact alone, that the *Fendoch* Company relies, contending that the facts which enable the Commissioners to make an apportionment must exist on the last day of the year of assessment, and that in the present case they did not exist on 5th April, 1940."

A little later he went on with the passage to which I have already referred.

Now, when one bears in mind that Mrs. Murray was in fact a member throughout the whole of the year April, 1939, to April, 1940, with a controlling interest until December, 1939, and a minority interest thereafter, it is in my judgment implicit in the passages that I have read, first, that an apportionment can be made to any persons who were members during any part of the relevant year ; and, secondly, that such an apportionment can be made by reference to their interests as they existed, not at the end of the year, but at

(1) 27 T.C.

(2) 27 T.C. 53.



**(Plowman, J.)**

the time when they were members. If this is not right, the observations which I have read appear to be largely pointless.

Mr. Monroe says, in effect: I accept that it may be implicit in the *Fendoch* case<sup>(1)</sup> that an apportionment can be made to anyone who was a member during any part of the relevant year, and that such an apportionment can be made by reference to his interest, but one has got to judge what that interest was only after the event, and if it turns out, for example, that he received no interim dividend and parted with his shares before the end of the year, the interest which he in fact had held was nil. In my judgment, this argument is contrary to the reasoning in the *Fendoch* case, and places far too narrow a construction on Sections which have to be construed broadly.

In *Commissioners of Inland Revenue v. F.P.H. Finance Trust, Ltd.*, 28 T.C. 209, Lord Russell of Killowen said this, at page 245:

“ My Lords, in my opinion the contention of the Company places far too narrow a construction upon the wide and comprehensive words which the Legislature has used, and I can find no language in Section 21 ”

—which I have already said is now Section 245 of the Income Tax Act, 1952—

“ to justify such a construction, but much to justify a broader interpretation. The foundation of the power given by the Section to the Commissioners is the fact that the Company, for an unreasonable time after the end of the period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The Section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the Company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as the company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the Commissioners may take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the Section? I can find none. I can conceive many cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases.”

I refer to that, as I have said, in order to show that Section 245 has to be given a wide rather than a narrow construction.

The reasoning of the Court of Appeal and the House of Lords in the *Fendoch* case, in my judgment, leads to the conclusion that the apportionment which the Special Commissioners made here was one which they were justified in making; for in a case where a member owns all the shares in a company and sells them all during an accounting period, the obvious way, if not indeed the only possible way, to give effect to apportionment in accordance with the rights of the members is, in my judgment, on a time basis, as the Special Commissioners did here.

This, in my judgment, provides the answer to the first and third questions which I mentioned at the beginning. I conclude that the Company was not a “ subsidiary ” of Anglo-French on 31st January, 1957, and that the apportionment made by the Special Commissioners was correct in principle. I leave open the question raised by Mr. Heyworth Talbot, whether it would be sufficient for his purposes to establish that

(1) 27 T.C. 53.

(Plowman, J.)

the Company was not a subsidiary at any time during the period ending on 31st January, 1957, even if it was a subsidiary on that date.

The only other point with which I am concerned is the question whether the distribution made by the Company in December, 1957, was made within a reasonable time after 31st January, 1957. Assuming, as I do, that a reasonable time was still running on 14th February, 1957, when the Company in general meeting passed the resolution to pay no further dividend for the period ending on 31st January, 1957, I am of opinion that the passing of that resolution terminated that reasonable time. In my judgment, the case is analogous to *Lionel Sutcliffe, Ltd. v. Commissioners of Inland Revenue*, 14 T.C. 171, where Rowlatt, J., held that a resolution passed by a company for voluntary liquidation terminated a reasonable time. At page 187 of the report, he said this :

“The Company had said and said in the plainest possible terms : ‘We are not going to distribute ; we shall wind-up without distributing’, and it seems to me that that terminates the running of the reasonable time. ‘Reasonable time’ is only mentioned in order that eternity shall not come upon the scene where a company does nothing. But when they come to a determination and say they are not going to distribute, it seems to me that a reasonable time has elapsed for this purpose and the reasonable time has determined.”

But if that is wrong and the question is a question of fact, it was, in my judgment, pre-eminently one for the Special Commissioners ; and since there was, in my judgment, ample evidence on which they could find that the distribution made by the Company in December, 1957, was not made within a reasonable time after 31st January, 1957, I am not prepared to interfere with that finding.

The other two appeals with which I am concerned—namely, *Spencer v. Commissioners of Inland Revenue* and *Garside v. Commissioners of Inland Revenue*—are appeals by the individual shareholders against the assessments to Surtax made in consequence of the direction and apportionment made upon the Company. Since I have decided against the Company on its appeal, it is common ground that these appeals must also be dismissed.

**Mr. Alan Orr.**—I ask that each of the three appeals be dismissed with costs, my Lord.

**Plowman, J.**—Is that the right Order, Mr. Monroe, in the circumstances?

**Mr. H. H. Monroe.**—That would be the right Order, my Lord.

**Plowman, J.**—So be it.

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The Company and the taxpayers having appealed against the above decision, the cases came before the Court of Appeal (Lord Denning, M.R., and Donovan and Pearson, L.JJ.) on 20th, 21st and 22nd June, 1962, when judgment was given unanimously in favour of the Crown, with costs.

Mr. H. H. Monroe, Q.C., and Mr. M. P. Nolan appeared as Counsel for the Appellants, and Mr. F. Heyworth Talbot, Q.C., Mr. E. B. Stamp, and Mr. Alan Orr for the Crown.

**Lord Denning, M.R.**—I will ask Donovan, L.J., to give the first judgment.

**Donovan, L.J.**—I need not repeat the complicated facts of this case. They are set out in the Case Stated itself and summarised in the judgment of Plowman, J. The crucial question is whether, on the assumption that this Company is a company within the scope of Section 245 of the Income Tax Act, 1952, more than half the income of the period 1st April, 1956, to 31st January, 1957, could be apportioned to Mr. Garside and Mr. Spencer. If so, this will in the first place justify the direction, for the Company will then not be a “subsidiary company”. This question of apportionment depends chiefly on the effect of the decision of the House of Lords in *Fendoch Investment Trust Co., Ltd. v. Commissioners of Inland Revenue*, 27 T.C. 53.

It is conceded for the Appellants, and I think necessarily so, that Messrs. Garside and Spencer must, by virtue of the decision in the *Fendoch* case, be regarded as members of the Company for present purposes, notwithstanding that a few days before the end of the trading period with which the case deals—namely, the period ending on 31st January, 1957—Messrs. Garside and Spencer sold all their shares in the Company. But it is argued that nevertheless, when the Special Commissioners come to make the apportionment of the income among the members “in accordance with [their] respective interests”, to quote the language of Section 248, they (that is, the Special Commissioners) must apportion to Messrs. Garside and Spencer no more than a sum equivalent to the dividend on their preference shares—a mere £1,000, which is only a small fraction of the whole income of the period. I think that the *ratio* of the decision in the *Fendoch* case compels us to negative this contention and to say that the Special Commissioners were within their statutory rights in making the much larger apportionment to these two individuals which they did.

If this be so, then two questions are decided: first, the validity of the direction; and, second, the competence of the apportionment. As regards the direction it so happens in this case, as I say, that the competence of the apportionment means that the Company is not a “subsidiary” company within the meaning of Section 256 of the Act, and therefore a direction becomes possible; see in particular on this point Section 256(4) and the proviso thereto. I confess that I have struggled against this conclusion, but in vain. The courageous argument of Mr. Monroe has, I think, much to commend it. Parliament was, at least in my opinion, intending to counteract the non-distribution of profit and to levy Surtax on those persons who would have got the income had it in fact been distributed. This legislation was so understood and administered for more than 30 years, with this exception, that one treated the members who would have got the dividend as being the members on the last day of the accounting period in question. But once it has been decided that “members” include those persons who may have sold their shares during the relevant period, then I think it is very difficult successfully to contend that, in apportioning the income among all the members “in accordance with [their] respective interests”, the Special Commissioners cannot take account of the fact that some members were members for the whole period less three days and load the apportionment accordingly, as has been done in this case.

The question whether the dividend was declared within a reasonable time is a question of fact. Here the Company indicated in February,

(Donovan, L.J.)

1957, that it was going to declare no further dividend out of the profits of this period. But after the Commissioners began the proceedings under Section 245 the Company declared, in December, 1957, a much larger dividend—one, in fact, that absorbed more than the trading profit of the period. The Special Commissioners have held that by then a reasonable time had elapsed. This finding, in my opinion, is not vitiated by any mistake of law and is one with which we cannot interfere.

I think, therefore, we are constrained to disallow this appeal.

**Pearson, L.J.**—I agree, and have nothing to add.

**Lord Denning, M.R.**—I agree. In dealing with the complicated Sections of the Income Tax Acts, I always find it helpful to take a simple illustration of how they work. Mr. Heyworth Talbot has provided us with one. He took the case of a company which makes up its accounts to the end of December in every year. It makes large profits which it does not distribute. A shareholder, A, owns the whole of the issued capital. Three days before the end of December, A sells all his shares to B. The accounting period comes to an end. Seven days later, B sells all his shares to a third person, C. The company has made large profits, but distributes no dividend within a reasonable time. Thereafter, but not within a reasonable time, the company pays a substantial dividend to C. The Commissioners make a direction under Section 245 of the Income Tax Act, 1952, whereby the income of the company for the year is deemed to be the income of the members. And under Section 248 the income is to be apportioned in accordance with the respective interests of the members.

Who are “the members” for this purpose? For many years it was thought that an apportionment could only be made against those persons who were members on the last day of the accounting period. But the decision of the House of Lords in *Fendoch Investment Trust Co., Ltd. v. Commissioners of Inland Revenue* (1945), 114 L.J. K.B. 291; 27 T.C. 53, showed that view to be wrong. The House was clearly influenced by the provisions of Paragraph 4 of the First Schedule to the Finance Act, 1922 (now reproduced in Section 250(1) of the Income Tax Act, 1952), which enables the Special Commissioners to require the company to furnish a statement *for any year or other period for which the company's accounts have been made up* of the names and addresses and particulars of the respective interests of all members of the company. In view of those provisions, the House held that the members against whom an apportionment can be made comprise all those persons who have been members of the company during the accounting period. So, in the instance I have put, A and B would both be members, but not C.

It becomes, therefore, the duty of the Commissioners under Section 248 to apportion the income between A and B “in accordance with the respective interests of the members.” In making this apportionment the Commissioners are not bound to ask themselves who would have received the dividend if it had been distributed. They may deal with the matter more broadly and consider the whole position of the members under the company's constitution: see *F.P.H. Finance Trust, Ltd. v. Commissioners of Inland Revenue* (No. 2), [1946] A.C. 38, at page 51; 28 T.C. 209, at page 246. Seeing that the Commissioners are entitled to consider the matter thus broadly, it seems, in the instance put, that it would be unfair to charge B with the whole of the income, seeing that he received

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

none of it. It is impossible to charge it to C, who has received it, because he was not a member during the accounting period. It would seem only right to charge most of it to A, because he probably knew of the large profits that had been made and got a higher price from B on that account. It would be absurd to suppose that A would get rid of his potential liability by transferring the whole of his shares a few days before the end of the accounting period. The only fair way of charging the members is to apportion the income between A and B according to the time for which they held the shares during the accounting period. That is what the Commissioners did in this case, and I see nothing wrong in it.

On the point of reasonable time, I agree this is a question of fact for the Commissioners and they have made no error in point of law.

I agree that this appeal should be dismissed.

**Mr. F. Heyworth Talbot.**—There are three cases before the Court. They are cases which raise no separate principle, and must be governed by the decision in the Company's case. It was agreed between us there could be no separate argument on them. I therefore ask that all three appeals be dismissed with costs.

**Lord Denning, M.R.**—That must be so.

**Mr. H. H. Monroe.**—I am instructed to ask for leave to appeal to the House of Lords. In making what always seems an impertinent application, the only possible ground I can put forward is the novelty of the point in this case and the fact that it is a challenge to a procedure which has been adopted for many years. For this reason, I would submit it is perhaps an appropriate case for leave to be granted.

**Lord Denning, M.R.**—How much money is involved?

**Mr. Monroe.**—I think, my Lord, in this case the actual Surtax is somewhere about £15,000. I am not absolutely certain on that. But I do know there are a number of other cases raising the same point, in some of which, as I understand it, the amount involved is very much larger.

*(The Court conferred.)*

**Lord Denning, M.R.**—You have no point on this, Mr. Heyworth Talbot?

**Mr. Heyworth Talbot.**—No, my Lord. My instructions are not to oppose the application, but to leave the matter entirely to your Lordships' discretion.

**Lord Denning, M.R.**—We will grant you your leave.

**Mr. Monroe.**—I am much obliged.

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The Company having appealed against the above decision, the case came before the House of Lords (Lords Reid, Jenkins, Hodson, Guest and

Pearce) on 21st, 22nd and 23rd May, 1963, when judgment was reserved. On 20th June, 1963, judgment was given against the Crown, with costs (Lord Guest dissenting).

Sir Andrew Clark, Q.C., Mr. H. H. Monroe, Q.C., and Mr. M. P. Nolan appeared as Counsel for the Company, and Mr. F. Heyworth Talbot, Q.C., Mr. Alan Orr, Q.C., Mr. E. B. Stamp and Mr. J. Raymond Phillips for the Crown.

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**Lord Reid.**—My Lords, this case arises out of Surtax directions made upon the Appellant Company and consequent apportionment of its income for the accounting period 1st April, 1956, to 31st January, 1957, under Sections 245 and 248 of the Income Tax Act, 1952. Until 29th January the whole share capital was held by four persons, two Garsides and two Spencers. They then sold their shares for £279,500, nine-tenths being acquired by Anglo-French Trust, Ltd., and one-tenth by Standard Industrial Trust, Ltd. When the Company's accounts for the period in question were made up they showed a net profit of £32,103. On 14th February, 1957, these accounts were adopted by the Company in general meeting, and it was resolved to confirm payment of a small preference dividend which the former shareholders had received and to pay no further dividend for the period. Then on 7th July the assessing Special Commissioners made a direction and apportionment of the gross income for the period of £55,819. They apportioned £54,282 of this to the Garsides and Spencers in respect that they had owned the ordinary shares for 303 days of the period, and £537 to Anglo-French and Standard in respect that they had owned the shares for the remaining three days of the period. The Appellant maintains that the Commissioners had no right to make this direction and apportionment.

The relevant Sections of the Act are as follows :

"245. With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

"248.—(1) Where a direction has been given under section two hundred and forty-five of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members."

"256.—(1) Section two hundred and forty-five of this Act shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested. (2) For the purposes of this section, a company shall be deemed to be under the control of not more than five persons— . . . (c) if—(i) on the assumption that the company is a company to which the said section two hundred and forty-five applies . . . more than half the income of the company (including any income which has been apportioned to it, or could on either of those assumptions be apportioned to it, for the purposes of this Chapter) could be apportioned for those purposes among not more than five persons. In ascertaining under paragraph (c) of this subsection whether or not income could be apportioned among not more than five persons, account shall, in cases where an original apportionment and any sub-apportionment are involved, be taken only of persons to whom



**(Lord Reid)**

income could be finally apportioned as the result of the whole process of original apportionment and sub-apportionment. . . . (4) For the purposes of this section, a company shall be deemed to be a subsidiary company if by reason of the beneficial ownership of shares therein the control of the company is in the hands of a company not being a company to which section two hundred and forty-five of this Act applies, or of two or more companies none of which is a company to which the said section two hundred and forty-five applies: Provided that, notwithstanding anything in this subsection, a company which is deemed for the purposes of this section to be under the control of not more than five persons shall not be deemed to be a subsidiary company unless it can be deemed to be under the control of not more than five persons only by including among the persons mentioned in paragraph (a), paragraph (b) or paragraph (c) of subsection (2) of this section a company to which the said section two hundred and forty-five does not apply and which is not the nominee of any other person."

It was agreed that we must look at the end of the accounting period to see whether Section 245 applied to the Appellant Company. So it is unnecessary to decide whether that is the universal or general rule, and we can accept this agreement for the purposes of this case. At that date the Appellant Company was under the control of Anglo-French. Section 256(1) would exclude the Appellant if it was a subsidiary company, but the question is whether the proviso to Section 256(4) required the Appellant to be deemed not to be a subsidiary company. If the proviso applies to this case, then Section 245 applied. So the question is, what does the proviso mean? Its language is very obscure, and again I think that we can proceed on the agreement of the parties. They both say that you must begin by assuming that Section 245 does apply, and then on that assumption you must see whether it would be competent for the Special Commissioners to apportion more than half the income to persons other than the controlling company, Anglo-French.

That takes us straight to Section 248(1). That Section requires the actual income of the company to be apportioned "in accordance with the respective interests of the members." So there are two questions—who are "members", and what is meant by their "respective interests". The Appellant agrees that the Garsides and Spencers were "members" although they had ceased to have any interest in the Company before the crucial date, the end of the accounting period. They admit that that is the result of the decision of this House in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53. And I think that must be so. In the present case the Garsides and Spencers had received £1,000 in preference dividend out of the profits of the period, and it would be strange if that sum could not be apportioned to them, because the new shareholders never had any kind of interest in it.

But the question what is meant by "respective interests" is much more difficult. It cannot mean vested interest in the income because these Sections are dealing with income which the company has withheld from distribution. Such income is simply part of the assets of the company until the company has decided what to do with it, and no shareholder has any right to any particular part of the company's assets. At one time it was thought that this meant the interests which members would get if the income were distributed in the ordinary way as dividend. But *F.P.H. Finance Trust Ltd. v. Commissioners of Inland Revenue (No. 2)*<sup>(1)</sup>, [1946] A.C. 38, shows that "interest" must be given a much wider meaning than that. That company had an odd structure. The preference shareholders had control and got all surplus assets in a liquidation, while the ordinary shareholders were entitled to all dividends

(1) 28 T.C. 209.

(Lord Reid)

(except a small preference dividend). But the rights of the ordinary shareholders were worth little because the preference shareholders could refuse to declare a dividend, accumulate the income, and ultimately get it in a liquidation. Plainly they had a very real interest in the income, while the ordinary shareholders' interest was shadowy. So it was held that on a Surtax direction the real interest could be regarded and the case was sent back to the Commissioners to make proper apportionments. Lord Russell of Killowen said, at page 51<sup>(1)</sup> :

“They may well ask themselves the questions: (1.) on whom did it depend whether or not the income should be withheld from distribution, and (2.) for whose benefit was the distribution withheld or (in other words) who would avoid payment of sur-tax by the withholding?”

Lord Russell had just referred to the “preamble” to what is now Section 245, and he was obviously speaking of withholding after the end of the accounting period. If those questions are applied in their natural sense to this case, it could not be right to apportion anything to the Garsides and Spencers in respect of their ordinary shares. They had nothing to do with any failure to distribute after the end of the accounting period—they were not even shareholders then—and it did not matter a penny piece to them whether the income was then distributed or withheld.

I must now try to explain the nature of the interest which the Crown say the Garsides and Spencers had in this income. During the 303 days when they held control, the Company was earning income. There is no finding to this effect, but I am willing to assume that the Commissioners were entitled to infer that 303/306 parts of the actual income for the period had been earned during those 303 days. And I shall further assume, but without expressing any opinion, that that gave them an “interest” in that income and therefore in the “actual income” for the period. But then, in selling their shares, they sold that interest. I have no doubt that the purchasers had a pretty shrewd idea of how much profit had been earned, and that this was reflected in the price of the shares. But, if the sellers had sold their interest, how did they still retain it at the crucial date, the end of the period? The purchasers acquired it and had it at that date: they could have declared a dividend and put the whole of the actual income in their pockets, excepting the small preference dividend already paid. What the sellers had was the price of the interest: they had sold an asset full of profit for a capital sum. There are other Sections which deal with dividend-stripping and the like, and the facts of this case with regard to the Garsides and Spencers seem to me to be far removed from the mischief of withholding profits from distribution.

The Crown seek to bring in this case by an ingenious adaptation of Lord Russell's questions. They say that during those 303 days the Garsides and Spencers could have distributed the profit already earned to themselves, and that they avoided Surtax by not doing so. That would be such a strange thing to penalise that I would require clear words to justify that result. I do not think that the words of the leading Section, Section 245, are capable of being so extended, and certainly such a case is not within its apparent scope. The express purpose of the Section is to prevent avoidance of Surtax by withholding from distribution income which would otherwise be distributed. I take it that “otherwise” means but for the attempt to avoid Surtax. I suppose that could include withholding a customary interim dividend, but even that is excluded by the next part of the Section: there must be a failure to

(<sup>1</sup>) 28 T.C., at p. 246.



**(Lord Reid)**

distribute "within a reasonable time after the end of any year". So a failure to distribute during the year does not bring the Section into operation. That may not be directly relevant to Section 248, but I think that it does support the view that "interests" in Section 248 means interests surviving at the relevant time.

The question in the *Fendoch* case<sup>(1)</sup> was quite different. The Section which applied there does not apply here. There the question was whether any person "is, or is likely to be, able to secure" that income present or future will be applied for his benefit, and it was held that that did not mean on the last day of the year but at any time during the year of assessment. There was no difficulty there such as would arise here if one read "interest" as meaning interest which had existed at any time. As I have said, any interest which the seller once had passed to the purchaser: so if "interest" were to include former interest you would have two people with interests of the same kind in the same income. I do not see how the Commissioners could then simply choose which of the two was to bear the apportionment. They must exercise their powers in a reasonable manner, and I cannot think that Section 248 gives them this choice. I should add that there was some argument about what would happen if control was sold immediately after the end of the accounting period and before a reasonable time for distribution had elapsed. I do not think it necessary to discuss that question.

As the Appellant, in my judgment, succeeds in its main argument, I need not deal with its argument that it had not been proved that a reasonable time had elapsed. The decision of the Court of Appeal in that matter seems to me to be clearly right. In my opinion this appeal should be allowed with costs. The question of law contained in the Case Stated should therefore be answered in the negative.

**Lord Jenkins.**—My Lords, I concur in the opinion just delivered by my noble and learned friend Lord Reid.

**Lord Hodson.**—My Lords, the relevant Sections of the Income Tax Act, 1952, have been cited, and the substantial question which emerges is as to the meaning of Section 248(1), which provides that, when a direction has been given under Section 245 of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members.

It is conceded that the individual ordinary shareholders who are concerned, the Garsides and the Spencers, must be regarded as members of the Company by virtue of the decision of this House in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53, which decided that "members" in a parallel context includes those who were members at any time during the relevant period. It is, however, contended by the Appellant Company that no distribution can be made in accordance with their interests, for, though members, the shareholders had no apportionable interest in the ordinary shares at the end of the relevant accounting period. The Crown, on the other hand, contended that once it is conceded that the Garsides and the Spencers were members, the rest follows and all that is to be done is to ascertain what their respective interests were when they were members and to make an apportionment accordingly. The Crown point out that members are defined in Section 255(2) of the Income Tax Act, 1952, as including any

(1) 27 T.C. 53.

(Lord Hodson)

person having a share or interest in the capital or profits or the income of the company. The Garsides and the Spencers were members and received the benefit of the profit in the sale price of the shares, the profit having accrued during the time when they were in control of the Company. Donovan, L.J., in the Court of Appeal found himself reluctantly compelled to accept the submission of the Crown, but for my part I do not find myself so constrained.

The Garsides and the Spencers were no doubt interested as shareholders in the profits accruing from day to day, but until the actual income had been ascertained at the end of the accounting period there was nothing to distribute, unless by way of interim dividend pending the ascertainment and in anticipation of the profit on the year. No interim dividend was in fact paid. True that the profits were no doubt piling up and these were reflected in the price paid by the purchasers when the Garsides and the Spencers sold their shares before the end of the period, but Section 248(1) speaks of the "actual income . . . of the company", not the profits accruing from day to day. This is the Income Tax income in the ordinary sense in which those words are used, and this accords with the language of Section 245, which begins by the introductory words :

"With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed",

and continues by enacting that

"where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members",

etc. These words, in my opinion, refer to the same income as "the actual income" referred to in Section 248(1), the Section with which your Lordships are mainly concerned, and compel me to the conclusion that the words "in accordance with the respective interests of the members" must be more narrowly construed than might at first appear. In other words, they do not refer to the interests of the members in the profits accruing from day to day during their membership but to their interests in the Income Tax income of the company.

The decision in the *Fendoch* case<sup>(1)</sup> had to do with apportionment to members in accordance with their respective interests, but the question was whether they were members of whom it could be predicated at any time in the fiscal year that they were "able to secure" the income or assets of the company to be applied for their benefit. The Section there under consideration was Section 15 of the Finance Act, 1939, which deals with special investment companies and special powers with respect to persons able to secure such benefit. This Section is now represented by Section 260(1) of the Act of 1952. The question was answered adversely to the taxpayer on the facts of that case, but it does not seem to me to follow that the question what are the respective interests of the members in the context of withholding income from distribution must be answered in the same way.

I am assisted in my conclusion in favour of the Appellant Company by comparison with Section 237(1) of the Income Tax Act, 1952, which contains provisions for preventing avoidance of Surtax by sales cum dividend. This Section is apt to cover systematic and not exceptional sales by individuals.

(1) 27 T.C. 53.

**(Lord Hodson)**

The significance of Section 237, which was introduced by the Finance Act, 1927, is that it makes express reference to income from assets as having "accrued from day to day". I contrast with this the language of Section 245, which speaks of "withholding from distribution of income of a company which would otherwise be distributed", and of a company which "has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed . . . a reasonable part of its actual income from all sources for the said year or other period", etc.

Even if the Company could, as was most probably the case, have distributed its profits by way of interim dividends, I do not see that it can be said that it was withholding within the meaning of Section 245 until the end of the accounting period had been reached and the profits for this Income Tax year ascertained. This event did not happen until after 19th February, 1957, when the accounts were passed, or at earliest until 31st January, 1957, the end of the relevant accounting period. The avoidance of Surtax was thus occasioned by the sale of shares before the end of the accounting period, and, if their sale had been within the mischief struck at by Section 237, appropriate steps could have been taken under that Section.

In my opinion, therefore, the contention of the Crown that the Special Commissioners were entitled to apportion the whole of the income which accrued while the Garsides and the Spencers were members fails. The relevant income is not the income from day to day but the Income Tax income when ascertained: see the opinion of Lord Atkin in *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue*, 24 T.C. 328, at page 352:

"Actual income does not mean the specific receipts that come in from time to time, but the 'Income Tax income' as calculated at the end of the year of assessment."

I would allow the appeal.

**Lord Guest** (read by Lord Jenkins).—My Lords, I do not propose to rehearse the rather complicated facts in this case but only to state the points at which I have the misfortune to differ from the majority of your Lordships.

The primary question which arises is whether the Appellant Company is one to which Section 245 of the Income Tax Act, 1952, applies. The Appellant Company is subject to Section 245 if, in apportioning the income of the Company under Section 248(1), it would be open to the Special Commissioners to apportion more than half the income to the Garsides and Spencers, because then the Company is not a subsidiary of Anglo-French in terms of Section 256. The crucial question therefore revolves around Section 248(1), which is in the following terms:

"Where a direction has been given under section two hundred and forty-five of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members."

It was matter of concession by the Appellant that, notwithstanding the fact that the Garsides and Spencers had parted with their shares before the end of the relevant period, they were nevertheless "members" within the meaning of Section 255(2). This concession was inevitable as

(Lord Guest)

a result of the decision of this House in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53. This case was concerned with Section 15(1) of the Finance Act, 1939, which, so far as relevant, is in the following terms :

" 15.—(1) If in the case of any investment company the Special Commissioners are of opinion that any person who is not a member of the company for the purposes of section twenty-one of the Finance Act, 1922, and the enactments relating thereto is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit, they may, if they think fit, treat him as a member of the company for the said purposes."

The question arose whether the Commissioners were entitled to give a direction to a person who was able to secure that the income would be applied for his benefit at some time during the year of assessment but was not in a position so to secure at the end of the year of assessment. This House held that the Commissioners could make an apportionment against a person of whom it could be predicated at any time in the fiscal year that he was "able to secure", etc. Lord Simonds, who gave the only judgment, said in the course of his speech, at page 68:

" It was contended—and this is of course fundamental to the argument—that under the principal Act an apportionment could only be made against a person who was a member (as defined by Section 21(7)) on the last day of the accounting period. Section 21(1) of the principal Act provides that the Commissioners may 'direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members', and Paragraph 8 of the First Schedule to the Act provides that 'the apportionment . . . shall be made . . . in accordance with the respective interests of the members'. I find nothing in these words which supports the Appellants' contention, or would restrict the meaning of 'members' to persons who were members during the whole period or the last or any other day of it. The language of the Section is clearly apt to include any person who was a member at any time during the period in question."

Section 21(1) of the Income Tax Act, 1922, has its counterpart in Section 245 of the 1952 Act, and Section 21(7) is the forerunner to Section 255(2) of the latter Act. As the Garsides and Spencers were not shareholders either at the end of the relevant period or at the date of the direction, the concession which must be taken for the purpose of the present case can only have been upon the footing that in terms of Section 255(2) they had at the relevant time an interest in the capital or profits or income of the Company. "Member", therefore, for the purposes of Sections 245 and 248(1), includes a person who was a shareholder during the relevant period but has ceased to be a shareholder at the end of this period. A direction can be given to him by the Commissioners under Section 245 presumably because he had a qualifying interest during the time when he was a shareholder in the capital, profits or income of the company. The Appellant, while agreeing that the Garsides and Spencers were candidates for apportionment as members, argued that the apportionment under Section 248(1) must be nil, because they had no interest in the actual income at the end of the relevant period. If sound, this indeed would be a remarkable result. It would mean that a shareholder who parted with his shares during the accounting period could never have a direction made against him, and that the only persons against whom directions could be made would be the shareholders at the end of the relevant period. This, with respect to your Lordships, who held the contrary view, is the negation of what Lord Simonds said

**(Lord Guest)**

in *Fendoch*<sup>(1)</sup> and directly contrary to the concession made by the Appellant in the present case.

I will now attempt to state the argument for the Appellant that a nil direction must be made against the Company. First, reliance was placed on the opening words of Section 245—

“ With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed . . . ”

—which, it was said, indicated that the mischief which the Section was designed to correct was the avoidance of Surtax through the withholding of income for an unreasonable time after the end of the relevant period. It was argued that, as there was no withholding from distribution of the Company's income while the Garsides and Spencers were members of the Company, the Section never applied. It would be a mistake, in my view, to place too much reliance on the opening words of the Section, and in any event the withholding struck at must always occur after the end of the relevant period because it is not until after the expiry of a reasonable time after the end of the period that the Commissioners are entitled to give a direction. Moreover, it is quite unnecessary for the operation of the Section that Surtax has in fact been avoided. Further, it was said that what was struck at was the avoidance of Surtax by the withholding of income for an unreasonable period, and that what had occurred in this case was the avoidance of Surtax by the sale of the shares cum dividend before the end of the period, a situation covered by Section 237. In my view, the fact that a scheme to avoid Surtax may be circumvented by two different provisions in the Income Tax Act does not mean that one or other of these provisions is inoperable. Moreover, Section 237, which is limited in its application (see Sub-section (7)), relates to different matters, not to the withholding by a company of the distribution of its income.

I therefore reject the argument based upon what has been loosely described as the preamble to Section 245, and turn to the operative part of Section 248(1). The Appellant argued that, as the Garsides and Spencers had no interest in the actual income at the end of the relevant period, there could be no apportionment made against them. The question is, therefore, what interest, if any, did they have in the actual income. “ Actual income ” must, I think, mean Income Tax income, and it cannot mean the company's income as it accrues *de die in diem*, because the time for distribution cannot arrive until the actual income is ascertained at the end of the relevant period. At this stage it is necessary to refer in some detail to *Commissioners of Inland Revenue v. F.P.H. Finance Trust, Ltd.* (No. 2) (1946), 28 T.C. 209; [1946] A.C. 38, which was strongly relied upon by the Appellant. The company's share capital was divided into 1,000 ordinary shares and 10,000 preference shares. Under the articles of association the preference shareholders had the voting control. Until winding-up, the preference shareholders were only entitled to a dividend: all the profits were to go on distribution among the ordinary shareholders. Upon a winding-up the ordinary shareholders were to receive £1,000 and the whole surplus assets were to go to the preference shareholders. This House held that there was no justification for restricting the “ interests ” in respect of which apportionment might be made under Section 21 of the Finance Act, 1922, as rights in declared dividends, and that the different interests of members should be considered, including their rights

(1) 27 T.C. 53.

(Lord Guest)

to undistributed profits in a winding-up. A direction against the preference shareholders was held valid.

The observations of Lord Russell of Killowen I quote from 28 T.C., at page 245 :

"The foundation of the power given by the Section to the Commissioners is the fact that the Company, for an unreasonable time after the end of the period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The Section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as the company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the Commissioners must take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the Section? I can find none. I can conceive many cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases. Obviously everyone who falls within the extended definition of member is not necessarily to be included in the apportionment. In my opinion the Commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (1) that they fall within the definition, and (2) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions. Further, I think that, in considering these interests and apportioning the income among members, the Commissioners may properly be guided by the preamble to Section 21 and endeavour to make an apportionment appropriate to their interests to those members for whose benefit, in relation to the avoidance of payment of Super-tax (now Sur-tax), the distribution of income has obviously been withheld. They may well ask themselves the questions, (1) upon whom did it depend whether or not the income should be withheld from distribution, and (2) for whose benefit was the distribution withheld or (in other words) who would avoid payment of Sur-tax by the withholding? If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question. Other members may also have an interest therein, but to a smaller extent. Applying this view to the facts of the present case, there should be no doubt about the broad result. Both questions admit of one answer only—namely, Mrs. Latilla and her daughters, whose voting power enabled them (1) to prevent (before liquidation) any distribution to the ordinary shares beyond a nominal percentage, and thus to enforce the 'understanding' referred to in the Case Stated; (2) to wind up the Company at any moment and (subject to the payment of £1,000 to the Corporation) get all the surplus assets (including the fund in question) for themselves, or (3) if ever they wanted the income paid to them as such, to alter the articles of association by special resolution and (notwithstanding article 47) thereby increase the dividends payable on the preference shares to any desired amount."

It was argued that if the two questions posed by Lord Russell of Killowen were answered in this case the Appellant would not figure in the answers. These observations must, however, be considered *secundum subjectam materiam*, and they are observations made with reference to the particular facts of that case. The position of Mrs. Latilla and her daughters was that they were in control of the company and this entitled them to enforce the arrangement designed to secure for the benefit of these persons immunity from liability to Surtax. The ordinary shareholders were at the mercy of the Latilla family. I cannot think that the questions posed by Lord Russell, who had been a party to the decision in *Fendoch*<sup>(1)</sup>, were intended to be of

(1) 27 T.C. 53.



**(Lord Guest)**

general application. If they were, it humbly seems to me that they are inconsistent with the speech of Lord Simonds in *Fendoch*<sup>(1)</sup>. Tested by these questions, no ex-member would ever be liable to a direction under Section 245, because after he had ceased to be a member he would have no say in the withholding of the distribution of the income. If, however, the crucial tests are the first two tests proposed by Lord Russell, namely, (1) that the persons fell under the definition of "member", and (2) that they are the persons who in view of all their interests in the company are the persons really interested in the income, I am able to reconcile the two cases. It is only if this view is taken of *F.P.H. Finance Trust (No. 2)*<sup>(2)</sup> that it is possible to reconcile the decision with *Fendoch*.

In the present case the Commissioners took the view that the apportionment of the Company's income should be on a time basis as between the Garsides, the Spencers, Anglo-French and Standard. This, in my view, is the only possible apportionment as between members and ex-members. The Garsides and Spencers had an interest in the income until three days before the end of the relevant period. They were in control of the Company until 29th January, 1957, the date of the sale to Anglo-French and Standard. They could have wound up the Company and shared the assets. They could have distributed the profits of the Company as income at any time during that period. By the sale to Anglo-French and Standard on 29th January, 1957, they disabled themselves from distributing the income for the income period to 31st March, but they retained an interest in the profits of the Company which were represented in the purchase price paid to them. In my opinion, the interest necessary to qualify the Garsides and Spencers for a direction under Section 248(1) thus exists. The Company is therefore one to which Section 245(1) applies. In my view, there is no material which would justify us in interfering with the Commissioners' direction.

I would dismiss the appeal.

**Lord Pearce** (read by Lord Hodson).—My Lords, the entire share capital of the Company was held by the Garsides and Spencers, whom I will call collectively the vendors, during most of the accounting period, in which the Company made a substantial profit. Near the end of the period the vendors sold the shares, which were thus big with dividend. One may infer that the profits made during the accounting period were reflected in the sale price of the shares. Thus the vendors probably received as capital on the sale of the shares some part at least of the value of the profits on which, had those profits been distributed by dividend, they would have had to pay Surtax.

Against this obvious method of avoiding tax there is provision under Section 237, which was expressly designed to deal with sales cum dividend, and the vendors would be caught by the Section unless it is shown that the avoidance is exceptional and not systematic and there has not been any such avoidance in the preceding three years.

It happened, however, that subsequently the purchasers failed to declare a dividend in respect of the profits in question within a reasonable time after the end of the accounting period. There is no evidence that their failure was linked up with the sale transaction or was due to any design of tax avoidance, or to anything other than commercial convenience. It is contended by the

(1) 27 T.C. 53.

(2) 28 T.C. 209.

(Lord Pearce)

Crown that, by reason of that failure of the purchasers, Section 245 applied. That Section deals expressly with

“preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed”.

Together with Section 248(1), it gives the Special Commissioners power to assess for Surtax and apportion among the members the “actual income” of the company for the accounting period where it appears to them that any company to which the Section applies

“has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income”.

The words “actual income” mean, not the specific receipts of the company from time to time, but the income as calculated for Income Tax purposes at the end of the period: *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue*<sup>(1)</sup>, [1942] A.C. 643. The normal case to which this Section applies is that of the taxpayer who avoids Surtax by allowing his company to accumulate undistributed profits of which he may ultimately obtain the capital benefit by a winding-up or a bonus issue of shares, and the Section was clearly not intending to deal with the kind of case which is now before your Lordships.

Since the Company failed to distribute to its members within reasonable time, the Section operates as if this was a company to which the Section applies. That depends on the ownership of its shares. The purchaser of nine-tenths of the shares from the vendors was another company whose status would not attract Section 245. To decide the question whether the Section applies to this Company in these circumstances, one looks to the elaborate terms of Section 256. It is conceded that for the purposes of the present case one may paraphrase them by saying that Section 245 applies if, on the assumption that it does apply, one could at the relevant date apportion to the vendors in accordance with Section 248(1) more than half its income for the relevant period in accordance with the respective interests of the members.

It is conceded that the date at which that problem must be considered is the end of the accounting period, namely, 31st January, 1957. As at that date the Special Commissioners, in apportioning the respective interests, ascribed approximately 99 per cent. to the vendors, who then had no rights at all in the Company, and 1 per cent. to the purchasers, who then had complete ownership and control of it, in whose power it was to distribute the income for the period, and who would receive the benefit of that distribution.

It is agreed that by reason of the decision of this House in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*, 27 T.C. 53, “members” includes former members who held shares at any time during the relevant period. Thus the vendors are eligible for the apportionment of their interest. But “everyone who falls within the extended definition of member is not necessarily to be included in the apportionment”: *per* Lord Russell of Killowen in *F.P.H. Finance Trust, Ltd. v. Commissioners of Inland Revenue* (No. 2), [1946] A.C. 38, at page 51<sup>(2)</sup>). The Company claims that the vendors’ interest in the ordinary shares was but a shadowy *spes*, already defunct by 31st January, 1957—a hope of dividend which never fructified,

(1) 24 T.C. 328.

(2) 28 T.C. 209, at p. 246.



**(Lord Pearce)**

since they had parted with their whole interest in the Company before the time when the accounts would be made up, when the profits would be ascertained and when a dividend would be paid. Their interest should therefore either not be included in the apportionment or should be apportioned as a trifling amount. The Crown, however, contend that the vendors were in control during the period when the bulk of the profit accrued from day to day, that they have received the benefit of that profit in the sale price of the shares and that, since they were in that position for 99 per cent. of the period, their interest was rightly apportioned at 99 per cent.

The decision in *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*<sup>(1)</sup> related to the effect of a different Section of a different Act (Section 15, Finance Act, 1939, now Section 260, Income Tax Act, 1952), which gives to the Special Commissioners an unfettered discretion to apportion income between members as they may think fit in the circumstances of the case. Under Sections 245 and 248(1), however, there is no such discretion, and the Special Commissioners are directed to apportion between members according to their respective interests. No case has been cited where there has been, under this Section, an apportionment to former members. Lord Russell of Killowen, in *F.P.H. Finance Trust, Ltd. v. Commissioners of Inland Revenue* (No. 2), [1946] A.C. 38, at page 51<sup>(2)</sup>, which dealt with apportionment between existing members, poses the questions which the Commissioners may ask themselves in making an apportionment :

“(1.) on whom did it depend whether or not the income should be withheld from distribution, and (2.) for whose benefit was the distribution withheld or (in other words) who would avoid payment of sur-tax by the withholding? If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question.”

*Prima facie*, the obvious answers to the questions posed by Lord Russell of Killowen are that at the relevant date it was the purchasers who withheld and the purchasers who benefited by the withholding. Mr. Heyworth Talbot, however, contends that during most of the relevant period the vendors had an interest and were notionally withholding the income as it accrued from day to day. But it is noticeable that, whereas Section 237(4) expressly says that for the purposes of that Section income shall be deemed to accrue from day to day, there is nothing to that effect in Sections 245 or 248.

The greater the apportionment to the vendors, the less must be the apportionment to the purchasers. The chief difficulty of Mr. Heyworth Talbot's argument is its effect on the purchasers. He has to concede that, if it is correct, a Surtax payer who at the end of an accounting period purchases a company with large profits accrued and then fails to declare a dividend, and accumulates the profits for a possible winding-up or issue of bonus shares, should have an apportionment of nothing or of some negligible amount. Yet it would be he who is committing the mischief aimed at and who gets the benefit from it.

In my opinion, weight must be given to the intention expressed in the introductory words of the Section. From the standpoint of sound trading, the conservation of dividends is desirable and compulsory distribution is bad. On the other hand, when the conservation is used not for sound economic reasons but for tax avoidance it is undesirable and must therefore be stopped. Thus two principles conflict. The opening words of the Section were inserted, I think, to underline the fact that the operators of the Section must keep

<sup>(1)</sup> 27 T.C. 53.

<sup>(2)</sup> 28 T.C. 209, at p. 246.

(Lord Pearce)

in mind the object: namely, to stop avoidance by failure of a company to distribute dividends. I therefore approach with suspicion any use of the Section which would disregard the present actual position of the company in order to catch some past owner of its shares.

The question really turns on what meaning one gives to the word "interest". All the existing interest of the vendors had, at the relevant date, been sold to the purchasers. Even assuming that "interest" includes past and present interest, I find it difficult to accept the view that on the relevant date, 31st January, 1957, the past interest of the vendors was for the purposes of this Section greater than the present interest of the purchasers, who could control whether or not the Company should pay them a dividend. The argument that the taxpayer had a notional interest in the profits accruing from day to day entirely disregards the realities. It would be quite unreal to suppose that he could during the period prepare a running account and declare interim dividends monthly. The company may prosper exceedingly during some months and lose in others, and the possible resulting anomalies have been pointed out in argument. Moreover, the end of the accounting period is the relevant date for the apportionment. The argument that the taxpayer had an interest in the profits since he managed to sell that interest for some figure contained in the purchase price has force if one were considering the vendors alone. But I find it difficult to see how one can say that, when the vendor's inchoate interest in the profits crystallises in the purchaser's hands into a power and a right to receive those profits, it should be valued at 1 per cent. or thereabouts. On any view, the interest must surely then be worth more than it was when the vendor had it. The only ground for disregarding the substantial value of the purchaser's interest is that instead of holding shares while the profit was being earned he has paid cash for the shares in their final and productive phase. But why does that fact make his interest on 31st January, 1957, any the less? Why is his interest smaller because he has paid for it? Even, therefore, if "interest" includes past and present interest and requires at the date of apportionment a balance between a past total interest which has ceased before the date when it would in practice produce a dividend and a present total interest which in fact enables the holder to withhold or to declare and receive a dividend, the latter seems to me to be greater than the former on any apportionment. It would be otherwise if one could read the word "interest" as meaning "interest during the period when the income was being earned or was accruing". But I see no justification for this. It is not a natural reading of the Section, nor is it necessary to give a sensible effect to any ambiguity. It would make the vendors in the present case liable in respect of some untaxed profits, but it would in other cases release a purchaser who is committing the actual mischief aimed at.

I find it impossible to hold that the purchasers' practical existing interest on 31st January, 1957, was less than the taxpayers' historical and vanished interest. The Section was not intended to apply to such a case as this, and it is not possible without distortion to make its provisions apt to such a transaction.

I would accordingly allow the appeal.

*Questions put :*

That the Order appealed from be reversed.

*The Contents have it.*

That the question of law in the Case Stated be answered in the negative, and that the cause be remitted to the Special Commissioners.

*The Contents have it.*

That the Respondents do pay to the Appellant its costs here and below.

*The Contents have it.*

[Solicitors :—Malkin, Cullis & Sumption ; Solicitor of Inland Revenue.]

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