VOL. XXIX—PART II

HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
27TH AND 28TH MARCH AND 8TH APRIL, 1941

COURT OF APPEAL—18TH, 19TH AND 30TH JUNE, 1941

HOUSE OF LORDS—7TH, 8TH AND 9TH DECEMBER, 1942

(1) COMMISSIONERS OF INLAND REVENUE *v.* F. A. CLARK AND SON, LTD.[1]

(2) BRITISH-AMERICAN TOBACCO CO., LTD. *v.* COMMISSIONERS OF INLAND REVENUE[2]

Profits Tax—Whether a "controlling interest" held in a company —Finance Act, 1937 (1 *Edw.* VIII & 1 *Geo.* VI, *c.* 54), *Fourth Schedule, Paragraphs* 4, 7(*b*) *and* 11.

(1) *In the first case the issued share capital of the Respondent Company was* £22,600 *divided into* 22,500 *preference shares and* 100 *ordinary shares both of* £1 *each, each share carrying the right to one vote at general meetings. Under the terms of a deed of trust made in* 1927, 14,999 *of the preference shares were held by the two directors of the Company and another individual upon trust to pay the income therefrom to one of the directors (the settlor) during his life, and after his death to transfer the shares or the proceeds thereof to the second director. It was a term of the trust deed that during the life of the settlor the trustees, who were the registered proprietors of the shares, would at his request attend meetings of shareholders and vote as previously directed by him or, if required to do so, execute proxies so as to enable the settlor to vote at such meetings in place of the trustees.*

The two directors of the Respondent Company were also the sole directors of and shareholders in the F.C.B.C. (Phoenix) No. 1 *Company (hereinafter called the "Phoenix Company"), and on 7th December,* 1936, *they sold their respective life and reversionary interests in the* 14,999 *preference shares of the Respondent Company to the Phoenix Company, undertaking as a term of the agreement of sale to execute and procure to be executed such transfers as the Phoenix Company might reasonably require in order that the legal property in the* 14,999 *shares might vest in that company. The shares thereafter remained registered in the names of the trustees until* 23*rd December,* 1937, *when they were transferred to the Phoenix Company.*

An assessment to Profits Tax (then known as National Defence Contribution) was made for the chargeable accounting period commencing 1*st April,* 1937, *and ending* 31*st December,* 1937, *on the footing*

(1) and (2) Reported (K.B.) [1941] 2 All E.R. 86; (C.A.) [1941] 2 K.B. 270.
(2) Reported (H.L.) [1943] A.C. 335.

that the Respondent Company was a company the directors whereof had a controlling interest therein, and that certain remuneration, interest and annuities paid to the directors of the Company were not allowable as a deduction in computing the Company's profits for the purposes of National Defence Contribution in view of the provisions of Paragraphs 4 *and* 11 *of the Fourth Schedule to the Finance Act,* 1937. *On appeal against this assessment it was contended on behalf of the Respondent Company that as from* 7*th December,* 1936, *the Phoenix Company, a legal entity separate from its shareholders, alone was beneficially entitled to the voting rights annexed to the* 14,999 *shares, and that accordingly the directors of the Respondent Company did not at any material time have a controlling interest therein. The Special Commissioners allowed the appeal.*

(2) *In the second case, the Appellant Company received dividends from eleven companies carrying on business outside the United Kingdom and not liable to be assessed to National Defence Contribution. The vote-carrying shares in these companies were owned as follows:—*

(a) *by the Appellant Company alone* ... *amounts varying from* 0.4 *per cent. to* 70.24 *per cent.*

(b) *by the Appellant Company and a company in which more than* 50 *per cent. of the voting power belonged to the Appellant Company and/or a company in which more than* 50 *per cent. of the voting power belonged to a company in which the Appellant Company held more than* 50 *per cent. of the voting power* ... *amounts varying from* 60 *per cent. to* 100 *per cent.*

The articles of association of the eleven companies required that for certain purposes—e.g., a winding up—a 75 *per cent. majority of votes was necessary, but for all ordinary purposes a bare majority was sufficient.*

An additional assessment to National Defence Contribution was made for the chargeable accounting period commencing 1*st April,* 1937, *and ending* 30*th September,* 1937, *on the footing that the dividends received from the eleven companies not liable to be assessed to National Defence Contribution were required to be included in computing the profits of the Appellant Company for the purposes of National Defence Contribution by Paragraph* 7 (*b*) *of the Fourth Schedule to the Finance Act,* 1937. *On appeal against this assessment it was contended on behalf of the Appellant Company* (1) *that the words "controlling "interest" implied a proprietary right and that before it could be claimed that the Appellant Company had a controlling interest in any one of the eleven companies it must be shown that the Appellant Company did, in fact, itself own beneficially a controlling number of shares or votes in the respective companies:* (2) *that in no one of the eleven companies did the Appellant Company beneficially own such a preponderance of shares or votes as was necessary in order to give the Appellant Company control, and* (3) *that the Appellant Company did not have a controlling interest in any of the eleven companies. The Special Commissioners dismissed the appeal.*

Held, *that in the first case the Respondent Company was a company the directors whereof had a controlling interest therein, and that in the second case the Appellant Company had a controlling interest in the eleven companies not liable to be assessed to National Defence Contribution.*

CASES

(1) *Commissioners of Inland Revenue* v. *F. A. Clark and Son, Ltd.*

CASE

Stated under the Finance Act, 1937, Paragraph 4 of Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 1st December, 1939, F. A. Clark and Son, Ltd. (hereinafter called "the Respondent Company") appealed against an estimated assessment to the National Defence Contribution in the sum of £270 for the accounting period commencing on 1st April, 1937, and ending 31st December, 1937.

2. The Respondent Company was incorporated on 2nd December, 1926, to carry on the business of lead merchants and manufacturers. Its issued capital consisted of £22,600 divided into 22,500 preference shares and 100 ordinary shares both of £1 each. All shares carried the right of one vote each at general meetings. At all time material to this appeal, F. C. Brown Clark and F. H. Bessemer Clark were its only directors. A copy of its memorandum and articles of association, marked "A", is annexed to and forms part of this Case(1).

3. This appeal raises the question as to whether the two said directors had, in the material accounting period, a controlling interest in the Respondent Company within the meaning of Paragraphs 4 and 11 of the Fourth Schedule to the Finance Act, 1937. If the said directors are held to have such controlling interest then the excess of a proportion of their remuneration (£7,500 a year) over a proportion of £1,500, and certain interest and annuities paid to them, fall to be disallowed.

4. Under a deed of trust made 16th February, 1927, between F. C. Brown Clark as settlor and the said F. C. Brown Clark, F. H. Bessemer Clark and H. D. Bessemer as trustees, after reciting that the settlor has lately caused to be issued in the names of the trustees 15,000 preference shares of £1 each in the Respondent Company and that the said shares were issued in the names of the trustees as nominees of the settlor, it was agreed that the trustees should hold the said shares upon trust to pay the interest receivable thereon to F. C. Brown Clark during his life, and after his death to transfer the said shares or the proceeds thereof to F. H. Bessemer Clark.

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(1) Not included in the present print.

Clause 4 of this deed is as follows:— "4. The Trustees will at "the request of the settlor during his life attend all meetings of "Shareholders of F. A. Clark & Son Limited which they shall be "entitled to attend by virtue of being the registered Proprietors of "the said Preference shares or any of them and will vote at every "such meeting in such manner as the Settlor shall have previously "directed in writing And further will if so required by the Settlor "execute all proxies or other documents which shall be necessary or "proper to enable the Settlor to vote at any such Meeting in the "place of the Trustees." A copy of this deed, marked "B", is annexed to and forms part of this Case(1).

Up to 23rd December, 1937, the said shares, with the exception of one share which had been transferred to H. Douglas Bessemer in 1927, were registered in the names of the trustees of this deed.

5. On 2nd December, 1936, F.C.B.C. (Phoenix) No. 1 Company (hereinafter referred to as "the Phoenix Company") was incorporated.

It was an unlimited company and was an investment company. Its authorised share capital was £50,000 divided into 1,400 "A" ordinary, 3,600 "B" ordinary and 45,000 preference shares, all of £1 each.

Its issued shares were held as follows :—

F. C. Brown Clark F. H. Bessemer Clark	jointly	1,064 "A" ordinary shares 4,797 preference shares

These shares were all held beneficially by F. C. Brown Clark and F. H. Bessemer Clark.

F. H. Bessemer Clark	2,736 "B" ordinary shares 10,152 preference shares.

At all material times its sole directors were F C. Brown Clark and F. H. Bessemer Clark. A copy of its memorandum and articles of association, marked "C", is annexed to and forms part of this Case(1).

6. By an agreement made 7th December, 1936, between F. C. Brown Clark, F. H. Bessemer Clark and the Phoenix Company, after reciting the terms of the said deed of trust made 16th February, 1927, it was agreed that the Phoenix Company should purchase the respective life and reversionary interests of F. C. Brown Clark and F. H. Bessemer Clark in the 14,999 preference shares in the Respondent Company held by the trustees of the said deed of trust.

Clause 6 of this agreement is as follows :— "6. On or at any "time after the Seventh day of December the said Frederick Charles "Brown Clark and Frederick Henry Bessemer Clark shall at the "expense of the Company execute and do and procure to be executed "and done such transfers assurances and things as the Company may "reasonably require in order that the Life and Reversionary interests "agreed to be hereby sold and the legal property in the said Shares "shall vest in the Company." A copy of this agreement, marked "D", is annexed to and forms part of this Case(1).

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(1) Not included in the present print.

7. The issued shares of the Respondent Company at 31st December, 1937, were held as follows:—

	Preference Shares
The Phoenix Company, including 50 shares in the name of F. C. Brown Clark as nominee for the Phoenix Company	14,999
F. H. Bessemer Clark	5,499
F. H. Bessemer Clark, R. C. Furber, H. Douglas Bessemer — Trustees for R. F. Bessemer Clark's marriage settlement	1,000
F. H. Bessemer Clark, R. C. Furber, H. Douglas Bessemer — Trustees for R. F. Bessemer Clark's marriage settlement	1,000
H. Douglas Bessemer	1
Leonard Pells	1
	22,500

The 100 ordinary shares issued were held by F. H. Bessemer Clark.

8. The said 14,999 preference shares referred to in the agreement made 7th December, 1936, were transferred by the trustees of the deed of trust dated 16th February, 1927, to the Phoenix Company by a transfer dated 10th December, 1937; this transfer was registered on 23rd December, 1937, in the books of the Respondent Company.

9. On behalf of the Respondent Company it was contended :—

(i) that the Phoenix Company, having been duly incorporated under the provisions of the Companies Act, 1929, was a legal entity separate and distinct from its shareholders; and

(ii) that as from 7th December, 1936, the Phoenix Company alone was beneficially entitled to the voting rights (*inter alia*) annexed to the said 14,999 preference shares of the Respondent Company; and accordingly

(iii) that the directors, F. C. Brown Clark and F. H. Bessemer Clark, did not at any material time have a controlling interest in the Respondent Company.

10. On behalf of the Appellants it was contended that the directors, F. C. Brown Clark and F. H. Bessemer Clark, had a controlling interest in the Respondent Company throughout the whole of the accounting period in that:—

(i) up to 23rd December, 1937, the trustees of the deed of trust dated 16th February, 1927, who were the registered shareholders of the said 14,999 preference shares, and under the articles of association the only persons entitled to vote at meetings of the Company, were required by clause 4 of the said deed of trust to vote as F. C. Brown Clark, who was a director of the Respondent Company, should direct;

(ii) alternatively, if after 7th December, 1936, and up to the 23rd December, 1937, the trustees were required to vote in accordance with the directions of the Phoenix Company, having regard to the fact that that company was controlled by the persons who were directors of the

Respondent Company, the trustees in effect were required to vote in accordance with the directions of the directors of the Respondent Company;

(iii) after 23rd December, 1937, the directors of the Respondent Company by reason of their control of the Phoenix Company, and through that company's holding of shares in the Respondent Company, had a controlling interest in the Respondent Company.

11. We, the Commissioners, gave our decision as follows :—

In our opinion, the Phoenix Company, a separate legal entity, acquired, as from 7th December, 1936, the beneficial interest in the said 14,999 preference shares of the Respondent Company. From that date, in our opinion, clause 4 of the said trust deed, made 16th February, 1927, ceased to have any operative effect as far as those shares were concerned. As from that date the registered holders of those shares became bare trustees for the Phoenix Company. Until the transfer was registered on 23rd December, 1937, the voting rights in the shares remained with the registered holders but had to be exercised under the direction of the Phoenix Company.

We hold, not without doubt, that from 7th December, 1936, to 23rd December, 1937, the directors of the Respondent Company had no controlling interest therein.

After this latter date, the Phoenix Company became the registered holder of the shares and could attend general meetings of the Respondent Company by proxy and vote.

In our opinion the fact that F. C. Brown Clark and F. H. Bessemer Clark were the sole directors and holders of all the issued shares in the Phoenix Company did not establish a controlling interest by them in the Respondent Company, of which they were also sole directors. We hold that as from 23rd December, 1937, the directors of the Respondent Company had no controlling interest therein.

We allowed the appeal and discharged the assessment.

12. The representative of the Appellants, immediately after the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Paragraph 4 of Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

R. COKE,
F. ENGLAND, } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
26th August, 1940.

(2) *British-American Tobacco Co., Ltd.* v. *Commissioners of Inland Revenue*

CASE

Stated under the Finance Act, 1937, Paragraph 4 of Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 19th October, 1939, the British-American Tobacco Co., Ltd., hereinafter called "the Appellant Company", appealed against an additional assessment to National Defence Contribution in the sum of £354,864, for the chargeable accounting period commencing on 1st April, 1937, and ending on 30th September, 1937.

1. This appeal depends upon the interpretation of Sub-paragraph (*b*) of Paragraph 7 of the Fourth Schedule of the Finance Act, 1937.

The said Sub-paragraph reads as follows:—

"(*b*) in the case of any other trade or business, being a "trade or business carried on by a body corporate, the profits "shall include all income received by way of dividend or distri-"bution of profits from any other body corporate in which the "first-mentioned body corporate has a controlling interest and "which is not liable to be assessed to the national defence con-"tribution".

2. The Appellant Company had an interest in other bodies corporate which were not liable to be assessed to National Defence Contribution, and the sole question for the determination of the Court is whether that interest was a controlling interest within the meaning of these words in the said Sub-paragraph.

3. The Appellant Company owns shares in companies carrying on business in various countries throughout the world. The bodies corporate concerned and referred to in paragraph 2 of this Case and the dividends received from each are set out below, the names of the respective bodies corporate, which are all incorporated outside the United Kingdom, being indicated by letters for the sake of convenience:—

	Dividends received therefrom
"A" Company	£79,536
"B" Company	£66,508
"C" Company	£26,462
"D" Company	£32
"E" Company	£4,920
"F" Company	£28,504
"G" Company	£9,376
"H" Company	£3,569
"J" Company	£19,896
	£72,821
	£33,100
"K" Company	£10,127
"L" Company	£13
Total	£354,864

All these eleven companies carried on business outside the United Kingdom and are not themselves, therefore, liable to National Defence Contribution. The assessment against which the Appellant Company appealed included the dividends set out above.

4. The votes in the companies specified in the preceding paragraph were owned as follows :—

"A" Company

Appellant Company	33⅓%	
Westminster Tobacco Co., Ltd.	33⅓%	Appellant Company owned 100% of the votes in Westminster Tobacco Co., Ltd.
Tobacco Investments Ltd.	33⅓%	Tobacco Securities Trust Co., Ltd. owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
	100%	

"B" Company

Appellant Company	50%	
Tobacco Investments, Ltd.	50%	Tobacco Securities Trust Co., Ltd., owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
	100%	

"C" Company

Appellant Company	40%	
British American Tobacco Co. (Ceylon), Ltd.	30%	Appellant Company owned 85% and Abbey Investment Co., Ltd. 15% of the votes in British American Tobacco Co. (Ceylon), Ltd. Appellant Company owned 50% and Tobacco Investments, Ltd. 50% of votes in Abbey Investment Co., Ltd. Tobacco Securities Trust Co., Ltd. owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company

		owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
Westminster Tobacco Co., Ltd.	30%	Appellant Company owned 100% of the votes in Westminster Tobacco Co., Ltd.
	100%	

"D" Company

Appellant Company	0.4%	
W. D. & H. O. Wills (N.Z.), Ltd.	99.6%	Appellant Company owned 100% of the votes in W. D. & H. O. Wills (N.Z.), Ltd.
	100%	

"E" Company

Appellant Company	56.67%	
Tobacco Investments, Ltd.	10.00%	Tobacco Securities Trust Co., Ltd., owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
Others	33.33%	
	100%	

"F" Company

Appellant Company	50%	
Tobacco Investments, Ltd.	50%	Tobacco Securities Trust Co., Ltd. owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
	100%	

"G" Company

Appellant Company	53.85%
Others	46.15%
	100%

"H" Company		
Appellant Company	55.35%	
Tobacco Investments, Ltd.	13.53%	Tobacco Securities Trust Co., Ltd. owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
Others	31.12%	
	100%	
"J" Company		
Appellant Company	70.24%	
Tobacco Securities Trust Co., Ltd.	4.63%	Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
Others	25.13%	
	100%	
"K" Company		
Appellant Company	49.57%	
Tobacco Investments, Ltd.	12.39%	Tobacco Securities Trust Co., Ltd. owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
Others	38.04%	
	100%	
"L" Company		
Appellant Company	2%	
American Tobacco Co. Akt.	58%	Appellant Company owned 85% and Tobacco Investments, Ltd. 15% of the votes in American Tobacco Co. Akt. Tobacco Securities Trust Co., Ltd. owned 100% of the votes in Tobacco Investments, Ltd. Appellant Company owned 59.17% of the votes in Tobacco Securities Trust Co., Ltd.
Others	40%	
	100%	

5. The following statement shows the percentage of votes owned:—

(*a*) by the Appellant Company,

(*b*) by the Appellant Company and a company in which the Appellant Company owned 100% of the votes,

(*c*) by the Appellant Company and a company in which more than 50% of the votes were owned by the Appellant Company and/or a company in which more than 50% of the votes were owned by a company in which the Appellant Company owned more than 50% of the votes.

	(*a*)	(*b*)	(*c*)
"A" Company	33⅓	66⅔	100
"B" Company	50		100
"C" Company	40	70	100
"D" Company	.4	100	100
"E" Company	56.67		66.67
"F" Company	50		100
"G" Company	53.85		
"H" Company	55.35		68.88
"J" Company	70.24		74.87
"K" Company	49.57		61.96
"L" Company	2		60

6. The Appellant Company's position vis-à-vis the eleven companies was as follows :—

(*a*) In the case of "E" Company, "G" Company, "H" Company and "J" Company more than 50% of the votes were owned by the Appellant Company.

(*b*) In the case of the remaining companies more than 50% of the votes were owned by the Appellant Company and a company or companies in which the Appellant Company owned more than 50% of the votes and/or a company or companies in which more than 50% of the votes were owned by a company in which the Appellant Company owned more than 50% of the votes. In the case of "A" Company, "B" Company, "C" Company, "D" Company and "F" Company 100% of the votes were so owned.

7. Extracts from the statutes or articles of association or other documents regulating the voting powers of the members of the respective bodies corporate referred to in paragraph 4 hereof are attached hereto and form part of this Case(1).

8. On behalf of the Appellant Company it was contended:—

(1) That the words "controlling interest" implied a proprietary right, and that before it could be successfully claimed that the Appellant Company had a controlling interest in any one of the eleven companies referred to in paragraph 3 it must be shown that the Appellant Company did, in fact, itself own beneficially a controlling number of shares or votes in the respective companies.

(1) Not included in the present print.

(2) That in no one of the said eleven bodies corporate did the Appellant Company beneficially own such a preponderance of shares or votes as was necessary in order to give the Appellant Company control.

(3) That the Appellant Company did not have a controlling interest in any of the said eleven bodies corporate.

9. On behalf of the Commissioners of Inland Revenue it was contended :—

(1) That the Appellant Company had a controlling interest in each of the eleven companies within the meaning of Paragraph 7(*b*) of the Fourth Schedule to the Finance Act, 1937.

(2) That the appeal should be dismissed.

10. We, the Special Commissioners who heard the appeal, held that the Appellant Company has a controlling interest in each and all of the eleven companies the facts concerning which were put before us in this case. The appeal therefore failed.

11. The representative of the Appellant Company immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Paragraph 4 of Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

MARK GRANT-STURGIS, } Commissioners for the Special Purposes
N. ANDERSON, } of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
24th June, 1940.

The first case came before Lawrence, J., in the King's Bench Division on 27th and 28th March, 1941, and the second case on 28th March, 1941, when judgment was reserved in each case. On 8th April, 1941, judgment was given in favour of the Crown in each case, with costs.

The Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown; Mr. F. Heyworth Talbot for F. A. Clark and Son, Ltd., and Mr. J. Millard Tucker, K.C., and Mr. J. S. Scrimgeour for the British-American Tobacco Co., Ltd.

JUDGMENT

Lawrence, J.—In these cases the questions to be decided are what is the meaning of the phrase "a controlling interest" in a company, in Paragraphs 4, 7 (*b*) and 11, of the Fourth Schedule to the Finance Act, 1937.

(Lawrence, J.)

It was contended by Mr. Talbot for the Respondents in the first appeal, and by Mr. Tucker for the Appellants in the second, that the word "interest" in these contexts means a legal or equitable interest of a proprietary nature in the shares of the company sought to be taxed; and that directors of a company who only had a controlling interest in the company sought to be taxed by holding a controlling interest in the shares of another company, which in turn held a controlling interest in the shares of the company sought to be taxed, had not a controlling interest within the meaning of the above-mentioned Paragraphs of the Fourth Schedule. They cited the case of *Macaura* v. *Northern Assurance Co., Ltd.*, [1925] A.C. 619, which decides that a shareholder in a company has no insurable interest in the assets of that company; and also relied, among other statutes, upon the words of Section 53(2)(b) of the Finance Act, 1920, arguing that that Section indicated that if the Legislature had meant an indirect controlling interest in the Finance Act, 1937, it would have said so.

The Attorney-General on the other hand contended that the word "interest" is a word of wide connotation, citing *Lapish* v. *Braithwaite*, [1925] 1 K.B. 474, and *Skinner* v. *Attorney-General*, [1940] A.C. 350, at pages 357 and 358; that the words "controlling "interest" must be interpreted together; that there can be no reason which could have induced the Legislature to exclude the case of an indirect controlling interest; that the Finance Act, 1920, shows that the words can equally be used to include an indirect as well as a direct controlling interest; and that in their ordinary meaning they include both.

I have come to the conclusion that the contention of the Crown is correct. I do not think that it is a proper inference that because the Finance Act, 1920, mentioned expressly a controlling interest direct or indirect, the Legislature, when it spoke of "a controlling "interest" *simpliciter* in 1937 meant only a direct controlling interest. The word "controlling" is not a term of art; nor is the word "interest" necessarily; and when the word "controlling" is used to qualify "interest". I think the phrase in its ordinary meaning covers both direct and indirect control.

Mr. Tucker also argued that companies which only hold 51 per cent. and less than 75 per cent. of the shares in a company have not a controlling interest in such company; but it was conceded that, upon this point, I am bound by the decision of Rowlatt, J., in *B. W. Noble, Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 911. That was the case, was it not ?

Mr. Scrimgeour.—Yes.

Lawrence, J.—The Crown's appeal will therefore be allowed, and the British-American Tobacco Company's appeal will be dismissed, with costs.

Appeals having been entered against the decision in the King's Bench Division, the cases came before the Court of Appeal (Scott, Clauson and Goddard, L.JJ.) on 18th and 19th June, 1941, when judgment was reserved. On 30th June, 1941, judgment was given

unanimously in favour of the Crown in each case, with costs, confirming the decision of the Court below.

Mr. F. Heyworth Talbot appeared as Counsel for F. A. Clark and Son, Ltd.; Mr J. Millard Tucker, K.C., and Mr. J. S. Scrimgeour for the British-American Tobacco Co., Ltd., and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Scott, L.J.—British-American Tobacco Co., Ltd.—This is an appeal by the taxpayer from a judgment of Lawrence, J., in regard to the measure of its liability to National Defence Contribution under the Finance Act, 1937. The operative provisions of Part III of that Act are these. Section 19: "(1) There shall be charged, on the "profits arising in each chargeable accounting period falling within "the five years beginning on the first day of April, nineteen hundred "and thirty-seven, from any trade or business to which this section "applies, a tax (to be called the 'national defence contribution') of "an amount equal to five per cent. of those profits in a case where "the trade or business is carried on by a body corporate and four "per cent. of those profits in any other case. (2) Subject as here-"after provided, the trades and businesses to which this section "applies are all trades or businesses of any description carried on in "the United Kingdom, or carried on, whether personally or through "an agent, by persons ordinarily resident in the United Kingdom." Then in the fourth Schedule it says: "7. Income received from in-"vestments or other property shall be included in the profits in the "cases and to the extent provided in this paragraph, and not other-"wise—. . . . (*b*) in the case of any other trade or business, being "a trade or business carried on by a body corporate, the profits shall "include all income received by way of dividend or distribution of "profits from any other body corporate in which the first-mentioned "body corporate has a controlling interest and which is not liable "to be assessed to the national defence contribution".

The Appellant Company is a very large concern. It carries on business in the United Kingdom and is therefore liable to pay National Defence Contribution on its profits; but it also possesses shares with voting power attached in each of eleven corporate bodies which carry on business outside the United Kingdom, some within the British Empire, some in foreign countries. These corporations, to which for convenience I will refer generally as "the foreign corpora-"tions", are therefore themselves "not liable to be assessed to the "national defence contribution", within the concluding words of the part of the proviso which I have quoted. The Crown however contends that the Company itself is liable to National Defence Contribution in respect of dividends received from all the eleven foreign corporations, because, says the Crown, it has a "controlling in-"terest", direct or indirect, in each one of them (whether registered in its own name or in that of its nominees)—partly by itself owning shares in the controlled companies, or partly by owning shares in intermediate foreign corporations over which it has *de facto* control, either direct or indirect, which in turn own shares in the controlled companies. The Commissioners upheld that con-

(Scott, L.J.)

tention; and the learned Judge in a short judgment upheld their conclusion, holding in effect that there was evidence to support the finding and that the Commissioners had committed no error of law. I agree with his judgment, but as the legal issue is one of general importance, it is perhaps better to state my reasons.

The whole appeal turns on the simple but far-reaching question, what does the phrase "controlling interest" mean in its context in Paragraph 7 of the Fourth Schedule? The Company contends that "interest" necessarily means a proprietary interest in the foreign corporation owned by the British Company; and that the phrase as a whole is not satisfied unless the control is achieved by means of a beneficial holding by the British Company of the foreign corporation's shares registered in the name of itself, or its nominee, or by means of some other proprietary interest such as an option over shares. To such a control Mr. Tucker, for the Company, gave the name "direct" and contends that the statute excludes indirect control through another corporation however complete may be the British Company's effective control over its intermediary. He relied on the omission from the Paragraph of any qualifying epithet attached to the phrase, such as "direct or indirect", and drew our attention to the presence of those words in Section 53 of the Finance Act, 1920, which dealt with Corporation Profits Tax. That Section contains a proviso, Sub-section (2)(c), as follows: "any deduction "allowed in respect of the remuneration of any director, manager or "other person concerned in the management of a company, who has "a controlling interest in the company, whether directly or indirectly, "and whether solely or jointly with any other persons, shall not "exceed an amount calculated at the rate of one thousand pounds "per annum". The object of that provision is plain: it was to prevent a person having a *de facto* control over the company's annual finance debiting the company's profits with an annual payment to himself, which properly should be regarded as a distribution of profits when earned, as though it had been an expenditure incurred in earning those profits. The possibility of such persons exercising influence in many different and devious ways, or even of endeavouring to conceal the fact of such exercise, seems to me sufficient to account for the elaboration and particularity of language there used. I therefore do not regard the use of that language in that context as having any relevant bearing, or affording any sufficient argument for denying to the simpler words of Paragraph 7 of the Fourth Schedule of the 1937 Act their natural meaning. The Oxford Dictionary contains two definitions, with illustrations, which appear to me to convey the natural meaning of the English verb "control" and of the English noun "interest", as used in the present context: "Control. . . . 4. To exercise restraint or direction upon the free "action of; to hold sway over, exercise power or authority over; to "dominate, command . . . . 1809 PINKEY *Trav. France* 184 "'Castles . . . built with the evident purpose of controlling . . . the "'navigation' . . . . " "Interest . . . . 2. The relation of being con-"cerned or affected in respect of advantage or detriment; esp. an "advantageous relation of this kind."

The commercial device of exercising company control through one or more intermediate corporations, British or foreign, was already

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notorious and therefore well-known to Parliament in 1937, as was the financial economy in investment open to a company A desiring the control over a foreign operative corporation B, if it interposed a holding corporation C between itself and corporation B and caused corporation C to acquire a share control in corporation B. Assuming the sufficiency of a 51 per cent. majority in each stage to give "control", company A could thus achieve control of corporation B at half the investment cost to itself of acquiring the direct share control of B; for by the indirect method 49 per cent. of the shares of both C and B would be paid for by others whilst A's investment would be limited to 51 per cent. of the holding company C. The commercial practice was and is really addressed to results rather than means. Ownership by the controlling company of the control shares in the controlled company was irrelevant; and it was appropriate to choose a word for expressing the relationship between controller and controlled which had a wide meaning, not limited to that of a proprietary relationship. Had Parliament intended so to limit the provision as to refer to direct shareholding by the British controlling company, liable to National Defence Contribution, in the controlled corporation, that intention could have been easily and would have been naturally expressed by adding the word "proprietary". In the circumstances I have no doubt that the Chancellor of the Exchequer, if I may personify Parliament in him, had no such intention; for he was concerned to bring within his net such part of the profits of controlled corporations carrying on business abroad as is in fact brought to this country through this well-known system of company control exercised by controlling companies here. An obvious fiscal gap had been discovered in the escape, actual or potential, of such profits from the tax-gatherer's net. If the Appellant Company's arguments were accepted, the introduction of any intermediate holding company not carrying on business within the United Kingdom would at once re-open the sluices and let the Chancellor's fertilizing water escape again. In dealing with the usual method of so-called "indirect" control, I have only taken for the purpose of illustration the case of one intermediate company; but the principle is the same if there are more links in the chain, as there are in several of the eleven foreign corporations affected by the appeal. The arithmetical economy is of course multiplied by each link—as the power of levers can be multiplied by repetition. But in law a point may, of course, be reached where the legal limit of remoteness may arrive through repetition of intermediate stages or other elaboration.

A subsidiary point was raised on behalf of the Appellant Company to the effect that a mere majority of shares (whether directly held or held indirectly within the method I have attempted to describe) is not enough to give the control contemplated by Paragraph 7 (*b*). It was pointed out that for various purposes both of the articles of association of the Appellant Company and of the constitutions of the eleven foreign corporations a 75 per cent. majority is required; and it was argued that the statutory control is intended to be a complete control, and that therefore an appropriate mathematical adjustment must be made in the relations of the Appellant Company to each of the eleven foreign corporations before it can be ascertained whether in the case of any one of the eleven the

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Appellant Company has or has not control. The Attorney-General relied upon a decision of Rowlatt, J., in *B. W. Noble, Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 911, that the degree of control afforded by a 51 per cent. holding is control within the statute. Lawrence, J., took the same view and so do I. I agree with the whole of his judgment. The Commissioners were right in law, and the appeal must be dismissed with costs.

The appeal of F. A. Clark and Son, Ltd., in which Mr. Talbot appeared for that Company both below and before us, was heard in both Courts with the appeal of the British-American Tobacco Co., Ltd., because it too depended on the meaning of the phrase "con-"trolling interest", although the primary question there was whether the two sole directors of that Company had such an interest in it so as to bring them within Paragraphs 4 and 11 of the Fourth Schedule of the Finance Act, 1937, where the phrase is used. Paragraph 4 (*b*) forbids any deduction from the profits of a business carried on by a company of "any interest, annuity or other annual "payment paid to any person carrying on the trade or business, or "any royalty or rent so paid;" and the Paragraph continues "and, "for the purpose of paragraph (*b*) of this proviso, where the trade "or business is carried on by a company the directors whereof have "a controlling interest therein, the directors shall be deemed to "be carrying on the trade or business." Paragraph 11 is a similar provision, limiting the deduction in respect of the remuneration of directors where they have a "controlling interest". The case was heard by different Commissioners to those who heard the British-American Tobacco Company's case, and they came to the conclusion that the two directors had not such a "controlling interest". But there was no dispute about the facts, and the issue depended on a pure question of law. It is the same question as in the British-American Tobacco Company's case except that the phrase "con-"trolling interest" is applied to directors who control the Company, instead of to one company controlling another. The learned Judge could find no sufficient legal ground for giving the phrase one meaning in Paragraph 7 and another in Paragraphs 4 and 11, and we agree with him. In each case the decision must depend on the meaning of the phrase. In my opinion it contemplates, when standing alone in the context of any one of the three Paragraphs, such a relationship as brings about a control in fact—by whatever machinery or means that result is effected. This appeal like the other must be dismissed with costs.

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

Goddard, L.J.—I agree.

Mr. Scrimgeour.—My Lords, in the case of *British-American Tobacco Co., Ltd.* v. *Commissioners of Inland Revenue*, I am instructed to ask whether your Lordships would give leave to appeal to the House of Lords ?

Scott, L.J.—No; the Court cannot give leave.

Mr. Scrimgeour.—If your Lordships please.

Mr. Talbot.—My Lords, I am instructed to ask for the same leave in the other case but I take it that your Lordships will not give leave ?

Scott, L.J.—No, we take the same view.

On the petition of the British-American Tobacco Co. Ltd., leave to appeal against the decision in the Court of Appeal was granted by the Appeal Committee of the House of Lords.

The case came before the House of Lords (Viscount Simon, L.C., and Lords Atkin, Thankerton, Russell of Killowen and Porter) on 7th and 8th December, 1942, when judgment was reserved.

On 9th December, 1942, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. J. Millard Tucker, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Simon, L.C.—My Lords, this appeal is brought, by special leave of this House, from the Order of the Court of Appeal (Scott, Clauson and Goddard, L.JJ.) which dismissed an appeal by the Appellants from a judgment of Lawrence, J., on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts. The matter arises upon an assessment to National Defence Contribution made upon the Appellant Company under Part III of the Finance Act, 1937; and the question in dispute is whether the Appellant Company had "a controlling interest" in certain foreign companies referred to in the Case, within the meaning of that expression as contained in Sub-paragraph (*b*) of Paragraph 7 of the Fourth Schedule to the Act, so as to require that dividends received by the Appellant Company from these foreign companies should be included in its income liable to National Defence Contribution.

Mr. Tucker for the Appellant Company put forward two contentions in support of the view that the Appellant Company had no such controlling interest. First, he argued that "interest" in this connection means interest of a proprietary nature and that the condition that there should be a controlling interest would only be satisfied if the Appellant Company itself owns sufficient shareholding in the other company to control the latter. Secondly, he contended that, in any event, a controlling interest is not constituted by the control of the bare majority of shares (whether directly or through other companies), but that the control must be of such proportion of shares as would secure the passing of a special resolution or other resolution for which a special majority is required by the terms of the constitution of the foreign company.

These two contentions have been rejected as unsound by each tribunal which in turn has dealt with the Appellant Company's claim,

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and at each stage the decision arrived at has been in favour of the Crown. Nothwithstanding the full and careful argument addressed to the House, I take the view that the decision arrived at below was correct, and I understand that your Lordships are in agreement with me that the appeal should be dismissed.

The case turns on the meaning of the words "controlling in-"terest" in the context in which they are used.

The Appellants argue that, in order that one company should have a controlling interest in another, it must be the beneficial owner of a requisite number of shares in that other company, either registered in its own name or in the name of its nominees; and that if company No. 1 owns all the shares in company No. 2, which in turn owns all the shares in company No. 3, company No. 1 has no interest, controlling or otherwise, in company No. 3.

It is true that in such circumstances company No. 1 own none of the assets of company No. 2, and *a fortiori* owns none of the assets of company No. 3, and in that sense neither owns, nor has an interest in, company No. 3, But that is to treat the phrase "controlling "interest" as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. The word "interest", however, as pointed out by Lawrence, J., is a word of wide connotation, and I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first mentioned company. If, for example, the Appellant Company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the Appellant Company will none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter.

In my opinion this is the meaning of the word "interest" in the enactment under consideration, and where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act.

I find it impossible to adopt the view that a person who (by having the requisite voting power in a company subject to his will and ordering) can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has in fact control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company.

As to what may be the requisite proportion of voting power, I think a bare majority is sufficient. The Appellant Company has, in respect of each of the foreign companies referred to in the Case, the control of the majority vote. I agree with the interpretation of "controlling interest" adopted by Rowlatt, J., in *B. W. Noble, Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 911, at page 926, when construing that phrase in Section 53, Sub-section (2)(*c*) of the Finance Act, 1920. He said that the phrase had a well known meaning and referred to the situation of a man "whose shareholding in "the Company is such that he is the shareholder who is more power-

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" ful than all the other shareholders put together in General Meeting." So here, the owners of the majority of the voting power in a company are the persons who in effective control of its affairs and fortunes. It is true that for some purposes a 75 per cent. majority vote may be required, as, for instance (under some company regulations), for the removal of directors who oppose the wishes of the majority; but the bare majority can always refuse to re-elect and so in the long run get rid of a recalcitrant board. Nor can the articles of association be altered in order to defeat the wishes of the majority, for a bare majority can always prevent the passing of the necessary resolution.

We are proceeding, in the absence of evidence as to foreign law, on the basis that the law governing these foreign companies does not differ materially from our own.

I move that the appeal be dismissed with costs.

Lord Atkin.—My Lords, I agree.

Lord Thankerton.—My Lords, I am of the same opinion.

Lord Russell of Killowen.—My Lords, I also agree.

Lord Porter.—My Lords, I concur.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:— Solicitor of Inland Revenue; Richard Furber & Son for F. A. Clark and Son, Ltd.; D. M. Oppenheim for the British-American Tobacco Co., Ltd.]