VOL. XXVII—PART V

No. 1346—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
27TH, 28TH, 29TH, 30TH JULY, 12TH, 27TH, 28TH OCTOBER AND
1ST NOVEMBER, 1943

COURT OF APPEAL—24TH, 25TH, 26TH, 27TH, 28TH APRIL,
1ST, 2ND AND 24TH MAY, 1944

HOUSE OF LORDS—29TH MAY, 1ST, 4TH, 5TH, 6TH, 7TH, 11TH,
13TH, 14TH JUNE AND 30TH JULY, 1945

(1) CANADIAN EAGLE OIL CO., LTD. *v.* THE KING[1]
(PETITION OF RIGHT—ON DEMURRER ONLY)

(2) SELECTION TRUST, LTD. *v.* DEVITT (H.M. INSPECTOR OF TAXES)[2]

(3) SELECTION TRUST, LTD. *v.* COMMISSIONERS OF INLAND REVENUE[3]

Income Tax, Schedule D—Foreign dividends—Dividends paid by foreign company to shareholders resident in the United Kingdom out of profits including income which had already borne United Kingdom Income Tax—Double taxation—National Defence Contribution—"Income received directly or "indirectly by way of dividend"—Income Tax Act, 1918 (8 *&* 9 *Geo.* V, *c.* 40), *Schedule D, Miscellaneous Rule* 7, *and General Rule* 20; *Finance Act,* 1937 (1 *Edw.* VIII *&* 1 *Geo.* VI, *c.* 54), *Fourth Schedule, Paragraph* 7(*a*) (i).

(1) *The Suppliant Company was incorporated in Canada and was not resident in nor did it carry on business in the United Kingdom. The Company's capital consisted of cumulative preference shares, participating preference shares and ordinary shares, and in the relevant years dividends were paid on all or some of these three classes of shares through a British bank as paying agent. The paying agent was paid by the Company's financial agent in the United Kingdom, out of funds supplied by the Company, a sufficient sum to cover the gross amount of the dividends payable on the presentation of coupons in the United Kingdom. The paying agent was assessed to and paid United Kingdom Income Tax under Miscellaneous Rule* 7, *Schedule D, Income Tax Act,* 1918, *in respect of so much of the dividends as was payable to persons resident in the United Kingdom, and when paying the dividends to such persons deducted the appropriate amount of Income Tax.*

The Company's profits out of which it paid the dividends on its shares consisted in part—in some years wholly—of (i) *dividends and interest from British companies from which those companies deducted United Kingdom Income Tax at the standard rate, and* (ii) *interest on deposits with British banks which was charged with United Kingdom Income Tax by direct assessment under Case* III *of Schedule D on the Company's financial agent in the United Kingdom, who paid the tax out of moneys provided by the Company.*

The Company, relying on the rule in Gilbertson *v.* Fergusson, 1 T.C. 501, *from time to time claimed repayment through its financial agent, of Income Tax on so much of the dividends of all three classes paid to persons resident*

(1) Reported (K.B.) [1943] 2 All E.R. 702 ; (C.A.) 171 L.T. 42 ; (H.L.) [1946] A.C.119.
(2) Reported (K.B.) 170 L.T. 180 ; (C.A.) 171 L.T. 47 ; (H.L.) [1946] A.C. 119.
(3) Reported 170 L.T. 180.

in the United Kingdom as represented profits which had suffered United Kingdom Income Tax either by direct assessment or by deduction. The Commissioners of Inland Revenue accepted the claims for years preceding 1931–32, *but for that and subsequent years they refused repayment in respect of the two classes of preference dividends, having been advised that the rule in* Gilbertson v. Fergusson *did not apply to preference dividends paid at a fixed rate. Repayment continued to be made in respect of the dividends on the ordinary shares up to and including* 1938–39, *but for the year* 1939–40 *the Commissioners, in view of the judgments in the House of Lords in* Barnes v. Hely-Hutchinson, 22 T.C. 655, *restricted the relief to the part of the ordinary dividends regarded as paid out of the profits directly assessed to United Kingdom Income Tax under Schedule D, viz., the bank interest.*

On a Petition of Right the Company submitted (a) *that relief in respect of the ordinary dividends had been wrongly restricted for the year* 1939–40 *and* (b) *that relief ought to have been granted in respect of both classes of preference dividends for the year* 1931–32 *and subsequent years, and prayed that the relief claimed should be given by way of repayment to itself or to its financial agent or paying agent in the United Kingdom. On behalf of the Crown it was contended* (inter alia), *on demurrer, that the Company had neither borne any Income Tax wrongfully nor suffered any double taxation, and that it was not competent for the Company to supplicate for relief to persons other than itself.*

(2) *The Appellant Company was incorporated in the United Kingdom and carried on there the business of dealing in and holding investments. During the relevant years it held shares in an American company which did not carry on business in the United Kingdom but whose profits included dividends paid by British companies under deduction of United Kingdom Income Tax.*

On appeal against the inclusion in assessments made upon it to Income Tax under Case I *of Schedule D of the whole of the dividends received from the American company, the Appellant Company contended that, following the rule in* Gilbertson v. Fergusson, *there should be excluded the proportion of the American dividends attributable to that part of the American company's profits for each year which consisted of dividends received by the American company from its investments in the United Kingdom. The Special Commissioners dismissed the appeal.*

(3) *The Appellant Company in the preceding case claimed on appeal a similar adjustment of its assessments to National Defence Contribution, under Paragraph* 7 (*a*) (i) *of the Fourth Schedule to the Finance Act,* 1937, *on the ground that the proportion of the American dividends attributable to dividends paid by the United Kingdom companies, which were all liable to National Defence Contribution in the material years, was " income received directly " or indirectly by way of dividend " from bodies corporate carrying on a trade or business within the charge to the Contribution. The Special Commissioners dismissed the appeal.*

(1) *and* (2). Held, *in the House of Lords, that there had been no " double " taxation " of the dividends in question and that no relief was due.*

Decision in Gilbertson v. Fergusson, 1 T.C. 501, *overruled.*

(3). Held, *in the King's Bench Division, that the Company had received income " indirectly " by way of dividend from companies chargeable to National Defence Contribution within the meaning of Paragraph* 7 (*a*) (i) *of the Fourth Schedule to the Finance Act,* 1937, *and was entitled to the adjustment claimed.*

DEVITT (H.M. INSPECTOR OF TAXES)
COMMISSIONERS OF INLAND REVENUE

(1) *Canadian Eagle Oil Co., Ltd.* v. *The King*

PETITION OF RIGHT

TO THE KING'S MOST EXCELLENT MAJESTY

The Humble Petition of Canadian Eagle Oil Company Limited whose registered office is Canadian Bank of Commerce Building, Toronto, Canada, by Mr. Horace Davey, of 47 Parliament Street, Westminster, its solicitor.

SHEWETH that:—

1. Your Suppliant was incorporated in the Dominion of Canada by letters patent under the laws of the said Dominion on 4th January, 1928, and has thenceforward carried on the business of acquiring and holding shares and securities of companies carrying on the businesses of exploring for, winning and refining, buying, selling and distributing petroleum. Since 1936 or thereabouts Your Suppliant has also carried on, outside the United Kingdom, the business of exploring for and dealing in petroleum.

2. The authorised capital stock of Your Suppliant consists of 7,997,550 cumulative first preference shares of three Canadian gold dollars each, 1,416,666 participating preference shares without nominal or par value and 20,137,935 ordinary shares without nominal or par value.

The said cumulative first preference shares carry the right, subject to a declaration by the board of directors, out of moneys of Your Suppliant properly applicable to the payment of dividends, to a fixed cumulative cash dividend at the rate of 10·08*d.* sterling per share per annum, payable half-yearly on the 30th day of April and the 31st day of October in each year, on the amounts from time to time paid up thereon, such dividend to be payable by warrant or cheque at London, England. At all material times dividends on such cumulative first preference shares have always been so paid in London. The said cumulative first preference shares also carry the right on a winding up to the repayment of the amount paid up thereon plus an amount to make that up to 12*s.* 7⅕*d.* per share and also (to the extent of profits available) to the payment of all unpaid preferential dividends before the holders of any other shares of Your Suppliant are entitled to the repayment of any amounts paid up thereon or to any participation in the assets of Your Suppliant.

The said participating preference shares carry the right, subject to a declaration by the board of directors, to a fixed preferential non-cumulative dividend at the rate of but not exceeding 23·88 cents per share per annum on the amount paid up thereon, payable only out of net profits of Your Suppliant in each year.

If in any year, after provision has been made for the payment of the fixed preferential dividend on the said cumulative first preference shares, and for the payment of the said dividend of 23·88 cents on the said participating preference shares, and for the payment of a dividend of 23·88 cents on the said ordinary shares, there remains any surplus of net profits for such year, that surplus or any part thereof, if applied to dividends for that year, is so applicable rateably amongst the holders of the said participating preference shares and the said ordinary shares without any distinction or priority of one class of shares over the other class.

On a winding up the holders of the said participating preference shares are to rank *pari passu* with and *pro rata* to the holders of the said ordinary shares in the assets to be distributed.

In every year in which dividends on the said participating preference shares and the said ordinary shares have been paid they have been declared payable in London as well as at some place or places abroad. In every material year a large part of the dividends so declared has been paid in London.

3. The issued capital of Your Suppliant at 5th April, 1929, and at 5th April, 1940, respectively, was as follows:—

	5th April, 1929	*5th April,* 1940
Cumulative first preference shares ...	5,796,335	2,786,010
Participating preference shares ...	853,740	854,770
Ordinary shares	12,103,781	12,128,271

In the share register of Your Suppliant the said cumulative first preference shares are and were at all material times all registered in the name of the Midland Bank Executor and Trustee Co., Ltd. (hereinafter called " the Trustee " Company "). The Trustee Company is not and was never the beneficial owner of the said shares or any of them. The certificates for the said shares are in Amercian form and have endorsed thereon a form of transfer, which in every case has been signed by the Trustee Company in blank. The certificates so endorsed are and have at all times been held by the beneficial owners for the time being of the shares comprised in such certificate. On collecting payment of a dividend the beneficial owner of a cumulative first preference share has always been required to produce his share certificate to the paying bank, and upon payment of the dividend the paying bank has always made an endorsement upon the share certificate to that effect.

All the said issued participating preference shares and ordinary shares, with the exception of 20 of the said ordinary shares the names of the holders whereof are registered in the share register of Your Suppliant, are represented by share warrants to bearer with dividend coupons attached. When a dividend is declared payable upon such shares payment is made by the paying bank against delivery of the relative coupon.

4. Whitehall Securities Coroporation, Ltd. of 47 Parliament Street, Westminster (hereinafter called " the Whitehall Corporation "), has at all material times been and still is the London financial agent of Your Suppliant. At all material times the procedure in respect of the payment of dividends on the issued shares of Your Suppliant has been as follows. When a dividend was declared payable upon the cumulative first preference shares the fact was advertised in the press of the United Kingdom, and the Whitehall Corporation, as the agent of Your Suppliant, paid a sum equal to the gross amount of the dividend less the Canadian dividend tax to the Trustee Company as the registered holder of the said shares. The Trustee Company thereupon paid over the full amount of this sum to the Midland Bank, Ltd. (hereinafter called " the Bank ") to enable the Bank to pay the said dividends and any Income Tax chargeable thereon. The Bank thereupon paid the beneficial owners of the said shares the amount of dividend due to them (less tax, if any) against production of their share certificates. When a dividend was declared payable on the said participating preference shares, or on the said ordinary shares, the fact was advertised in the press of the countries (other than the Dominion of Canada) in which payment was to be made. Notices so appearing in the press of the United Kingdom intimated that the Bank would pay the dividends declared against delivery of the relative coupons. The Whitehall Corporation, as agent of Your Suppliant, paid to the Bank a sum sufficient to cover the gross amount of the dividends payable on the presentation of coupons in the United Kingdom.

All the sums so paid by the Whitehall Corporation to the Bank were always provided by Your Suppliant.

5. In respect of every such dividend as aforesaid, and pursuant to Rule 7 of the Miscellaneous Rules applicable to Schedule D, Income Tax Act, 1918, the Bank duly made returns to the Commissioners for the Special Purposes of the Income Tax Acts (usually known as the Special Commissioners) of the dividends so paid by the Bank, and, in due course, assessments to Income Tax in respect of so much of the said dividends as were paid to persons resident in the United Kingdom were made upon the Bank by the Special Commissioners.

6. In making payment of any such dividend upon any of the said three classes of shares in respect of a holding in the beneficial ownership of a person not resident in the United Kingdom, the Bank, in pursuance of established arrangements between paying agents and the Special Commissioners, made no deduction in respect of United Kingdom Income Tax.

In all other cases the Bank when paying any person the dividend due to him deducted the amount of Income Tax appropriate to such dividend (due adjustment being made in respect of any Dominion Income Tax relief allowed) as shown by the assessment referred to in paragraph 5 hereof, and in due course, pursuant to the said Rule 7, delivered for the use of the Special Commissioners an account of such dividends paid under such deduction of tax and of the amounts of tax deducted. Pursuant to the said Rule 7 the Bank, out of the moneys so lodged with the Bank by Your Suppliant through the Whitehall Corporation, paid over to the Commissioners of Inland Revenue the total amount of tax so deducted, and paid the same in discharge of the said assessment made by the Special Commissioners.

7. The income of Your Suppliant for each of the years ended 5th April, 1929 to 1940, and out of which Your Suppliant paid a dividend on any one or more of its above-mentioned three classes of shares, has consisted (in some of such years wholly and in other years partly) either of income which had borne United Kingdom Income Tax by deduction or of income which had borne such tax by direct assessment. In particular, Your Suppliant's income from sources in the United Kingdom which has suffered such tax as aforesaid has consisted of all or some of the following kinds, namely:—

(*a*) Dividends and interest on loans paid by the Anglo-Mexican Petroleum Co., Ltd., the Anglo-Mexican Oil and Shipping Co., Ltd. and the Eagle Oil and Shipping Co., Ltd. (originally called the Eagle Oil Transport Co., Ltd.) all of which companies were incorporated and at material times carried on business in England. In the case of all such income, Income Tax at the standard rate was in all cases deducted from such dividends and interest before the receipt thereof by Your Suppliant.

(*b*) Dividends from the London & National Property Co., Ltd., a company incorporated and at material times carrying on business in England, Income Tax at the standard rate having been deducted from all such dividends before the receipt thereof by Your Suppliant, and

(*c*) Interest on money of Your Suppliant deposited with banks in England by the Whitehall Corporation on behalf of Your Suppliant, all such interest having been charged with Income Tax by direct assessment on the Whitehall Corporation under the provisions of Case III of Schedule D, Income Tax Act, 1918, such tax having been paid by the Whitehall Corporation out of moneys provided by Your Suppliant.

8. Your Suppliant is not and never has been a person residing in the United Kingdom within the meaning of the Income Tax Acts.

9. During the year ended 5th April, 1929, Your Suppliant paid dividends out of its income upon its issued cumulative first preference shares. The income out of which such dividends were paid included income of one or more of the classes alleged in paragraph 7 (*a*) to (*c*) hereof. The amount of Income Tax so paid over by the Bank to the Commissioners of Inland Revenue in respect of such dividends as aforesaid having been paid out of the gross amount of money lodged with the Bank in the manner above described in paragraph 4 hereof, the Whitehall Corporation, on behalf of Your Suppliant, represented to the Commissioners of Inland Revenue that, as a substantial part of Your Suppliant's income out of which the said dividends were paid had already borne or was about to bear Income Tax, either by deduction or otherwise, the amount of Income Tax paid by the Bank to the Commissioners of Inland Revenue was excessive, and that a repayment of part thereof was due to Your Suppliant in accordance with the rule laid down in *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562; 1 T.C. 501. On or about 14th December, 1929, the Whitehall Corporation received from H.M. Inspector of Taxes at Westminster 3rd District a letter in the terms following:—

"Inland Revenue,
"H.M. Inspector of Taxes,
"(Westminster 3rd District),
"13, Victoria Street, S.W.1.
"14th December, 1929.

"Reference F. 1395B JPH/RE.

"W. J. H. Hunter, Esq.,
"Whitehall Securities Corporation, Ltd.,
"47, Parliament Street,
"Westminster, S.W.1.

"Dear Sir,

"Canadian Eagle Oil Company, Ltd.
"*Gilbertson* v. *Fergusson* Claim.

"With further reference to your letter of the 8th ultimo, I beg to "inform you that the claim has been admitted on the basis indicated in "my letter of October 23rd, and agreed in your letter of the 24th idem. "A slight modification of the figures is necessitated, however, by the fact "that tax on £684 of the dividends paid in this country has been repaid "on the ground of non-residence. This reduces the third term in the "proportion sum from the agreed figure of £306,420 to £305,736, and "the net relief due thus works out at £26,933, as follows:—

"*Total Income*	*U.K. Income*	*Net Dividends assessed by Foreign Dividends Branch*	*Amount on which allowance is due*
"£709,444	£412,370	£305,736	£177,711

"£177,711 at 4/– = £35,542 4 0
"*Less* Case III asst.
"outstanding 8,609 4 0
"£26,933 0 0

"If you will let me know that you are in agreement with these "figures, repayment will follow in due course.

"Yours faithfully,
"J. P. HUGHES,
"H.M. Inspector."

Relief by way of repayment to the extent of the said sum of £26,933 was thereupon given to the Whitehall Corporation on behalf of Your Suppliant in accordance with the terms of the said letter.

10. During the year ended 5th April, 1930, Your Suppliant again paid dividends upon its issued cumulative first preference shares only. A similar claim for relief by way of repayment of tax in accordance with the said rule in *Gilbertson* v. *Fergusson* (*sup. cit.*) was made on behalf of Your Suppliant and this claim was allowed and paid by the Commissioners of Inland Revenue.

11. During the year ended 5th April, 1931, Your Suppliant paid dividends upon all three classes of its shares. A similar claim for relief by way of repayment of tax in accordance with the said rule was made on behalf of Your Suppliant in respect of all the said dividends, and this claim was allowed and paid by the Commissioners of Inland Revenue.

12. During the year ended 5th April, 1932, Your Suppliant again paid dividends upon all three classes of its shares, and a similar claim for relief by way of repayment of tax under the said principle was made on behalf of Your Suppliant by a letter from the Assistant Secretary to the Whitehall Corporation to H.M. Inspector of Taxes on 4th May, 1932. On 10th October, 1932, H.M. Inspector of Foreign Dividends, by a letter to the Assistant Secretary of the Whitehall Corporation with reference to the said claim, stated that the Board of Inland Revenue "are now advised that no relief under that "decision"—viz., the decision in *Gilbertson* v. *Fergusson* (*sup. cit.*)—"is "properly allowable in the case of preference dividends paid at a fixed rate. "They are therefore unable to entertain the claim to an allowance on the "dividends payable on 30th April, 1931, on the 7 per cent. Cumulative First "Preference Shares and on 29th June, 1931, on the Participating Preference "Shares of the Company."

Thereupon relief by way of repayment as aforesaid was allowed to Your Suppliant for the year ended 5th April, 1932, in respect only of the dividends paid in that year upon the ordinary shares of Your Suppliant, and Your Suppliant has never had any and has been wrongfully refused such relief in respect of the dividends paid in such year on its 7 per cent. cumulative first preference shares and its participating preference shares.

13. In the year ended 5th April, 1934, Your Suppliant paid a dividend, and arrears of dividend, on its cumulative first preference shares, and also a dividend at the rate of 23·88 cents per share on its participating preference shares but no dividend on its ordinary shares. No such relief as aforesaid has ever been given to Your Suppliant in respect of any of the dividends referred to in this paragraph, but Your Suppliant humbly submits that it is entitled thereto.

14. During the years ended 5th April, 1933, 1935 and 1936, respectively, no dividends were paid by Your Suppliant.

15. The whole of the income of Your Suppliant for the years ended 5th April, 1938 and 1939, respectively, was derived from sources in the United Kingdom, which income had borne or suffered United Kingdom Income Tax either by deduction or by direct assessment in the manner hereinbefore alleged.

16. During the years ended 5th April, 1937, 1938 and 1939, respectively, Your Suppliant paid dividends on all three classes of its shares, and arrears of dividend on its cumulative first preference shares. For each of these three years claims for relief by way of repayment as aforesaid in respect of the tax deducted from the dividends on the ordinary shares were made on behalf of Your Suppliant. The claims were all allowed by the Commissioners of Inland Revenue and Your Suppliant received appropriate repayments of tax. Your Suppliant has never received any such relief as aforesaid in respect of the dividends paid in any of the said years ended 5th April, 1937, 1938 and

1939, on its 7 per cent. cumulative first preference shares or its participating preference shares; but Your Suppliant humbly submits it is entitled thereto.

17. During the year ended 5th April, 1940, Your Suppliant again paid dividends on all three classes of its shares, and a similar claim for relief by way of repayment as aforesaid in respect of the tax deducted from the dividend paid on the ordinary shares was made on Your Suppliant's behalf. With reference to this claim the Whitehall Corporation received on or about 22nd August, 1940, a letter from the office of the Commissioners of Inland Revenue in the terms following:—

" Ref. F.D./10030/38.

" D.I.T. " 22nd August, 1940.

" Sir,

" Canadian Eagle Oil Company, Limited.

" Income Tax adjustment 1939–40.

" With reference to your claim, made through H.M. Inspector of " Taxes, Westminster 3rd District, to an adjustment under the decision " in *Gilberston* v. *Fergusson* on ordinary dividends of this company " assessed to Income Tax under Miscellaneous Rule 7 of Schedule D for " the year 1939–40, I am directed by the Board of Inland Revenue to " inform you that, in their view of the Judgments in the House of Lords " on 27th July, 1939, in the case of *Barnes* v. *Hely-Hutchinson* (22 T.C. " 655), the allowance must be restricted for the year 1939–40 to the part " of the ordinary dividends that can be regarded as paid out of the " profits of the company directly assessed to United Kingdom Income " Tax under Schedule D (i.e., the bank interest assessed in the sum of " £3,689) and that therefore no allowance can be granted in respect of " the part of the company's dividends derived from the taxed dividends " of the Eagle Oil & Shipping Co., Ltd. and the London National " Property Co., Ltd.

" After taking into account the amounts on which repayment has been " made on the grounds of non-residence in the United Kingdom the allow- " ance for the year 1939–40 on dividend number 6 amounts to " £151 16*s*. 7*d*.

" Further relief amounting to £1,193 5*s*. 2*d*. is also due on ordinary " dividends numbers 3, 4, and 5 assessed (less further repayments to non- " residents) since the previous adjustments on those dividends.

" The total amount repayable is therefore £1,345 1*s*. 9*d*.

" Statements showing how the amount of relief is computed are " enclosed[1].

" On hearing that you are in agreement with the figures, arrangements " will be made for the issue to you of a receivable order cheque for the " amount due.

" I am, Sir,

" Your obedient servant,

" M. C. LYNCH.

" The Secretary,

" Whitehall Securities Corporation, Ltd.,

" Stoney Ware, Bisham,

" Marlow, Bucks."

In respect of the year ended 5th April, 1940, therefore, Your Suppliant has never received any such relief as aforesaid in respect of the dividends paid in that year on its 7 per cent. cumulative first preference shares or its participating preference shares, and has never received the full amount of such relief

[1] Not included in the present print.

in respect of the dividend paid on its ordinary shares in such year; but Your Suppliant humbly submits that it is entitled to the said relief and the said full amount of such relief respectively, and that in respect of the latter the Commissioners of Inland Revenue have wrongfully refused the same.

18. Your Suppliant therefore humbly submits:—

(*a*) That, under the said rule in *Gilbertson* v. *Fergusson*, it is entitled to have repaid to it or, alternatively, to the Whitehall Corporation as its agents, or alternatively, to the Bank as its agents, so much of the Income Tax assessed in respect of the undermentioned dividends as is equivalent to Income Tax on so much of the said dividends as was paid out of income of Your Suppliant which has borne Income Tax; and

(*b*) That the income of Your Suppliant which for this purpose must be treated as income which has borne Income Tax includes not only income which has been subjected to such tax by direct assessment, but also all income from which Income Tax has been deducted before payment thereof to Your Suppliant; and

(*c*) That the said dividends referred to in (*a*) of this paragraph are the following:—

(1) Dividends or arrears of dividend on the cumulative first preference shares, and also dividends on the participating preference shares, paid during the years ended 5th April, 1932, 1934, 1937, 1938, 1939 and 1940.

(2) Dividends on the ordinary shares paid during the year ended 5th April, 1940, Your Suppliant having been given only part of the total relief for that year's ordinary share dividends as hereinbefore alleged. Your Suppliant makes no claim for any such relief in respect of ordinary share dividends for any year prior to the year 5th April, 1940, since relief for all such previous years on such dividends has been duly given to Your Suppliant.

19. Your Suppliant further humbly submits that the basis for calculating the relief due to Your Suppliant, and the consequent amount of Income Tax due to be repaid to Your Suppliant in respect of the said dividends paid in any year, is as follows:—

Let " A " equal the aggregate amount of income of Your Suppliant which would, if Your Suppliant had been resident in the United Kingdom, have been the total amount of income upon which Your Suppliant would have been liable to be directly assessed to Income Tax for that year under Case I, Schedule D, Income Tax Act, 1918.

Let " B " equal the total amount of any income upon which Your Suppliant was in fact directly assessed to Income Tax for that year under Schedule D.

Let " C " equal the gross amount of dividends or interest actually received by Your Suppliant from sources within the United Kingdom dur-that year, and from which Income Tax had been deducted before the receipt thereof by Your Suppliant.

Let " D " equal the total amount of dividends paid by Your Suppliant during the said year as were assessed to Income Tax by the Special Commissioners under the said Rule 7, Miscellaneous Rules, Schedule D. There would then be ascertained what part of D bore the same proportion to D as B + C bore to A + B + C. In respect of that part of D so ascertained Your Suppliant was entitled to have repaid to it Income Tax thereon at the same rate as that at which the dividends paid by Your Suppliant for that year were so assessed by the Special Commissioners.

20. For the year ended 5th April, 1940, the figure of A was nil; B was £3,689; C was £830,412 18*s*. The figure of D was £247,687 5*s*. 9*d*. The rate at which the dividends (D) were assessed by the Special Commissioners was 6*s*. in the £, that is to say, the standard rate of 7*s*. in the £ less 1*s*. in the £ Dominion Income Tax relief in respect of Canadian dividend tax. Since for this year A + B + C exactly equalled B + C (A being nil), Your Suppliant humbly submits that it was entitled to be repaid Income Tax at 6*s*. in the £ on £247,687 5*s*. 9*d*., which repayment would amount to £74,306 3*s*. 9*d*.

21. Nevertheless, the Commissioners of Inland Revenue have refused to allow the whole of the said repayment, partly on the ground that no such repayment is due in respect of any dividend paid during that year on the 7 per cent. cumulative preference shares or the participating preference shares, and that repayment is due only in respect of the dividend paid on the ordinary shares, and partly on the ground that the £830,412 18*s*., being the gross amount of dividends (C) received by Your Suppliant during the year, from which Income Tax was deducted by the companies paying the same under Rule 20, General Rules applicable to all Schedules, Income Tax Act, 1918, before payment over the balance of such dividends to Your Suppliant, is not income of Your Suppliant which has suffered or borne United Kingdom Income Tax.

The Commissioners of Inland Revenue have accordingly offered to repay to Your Suppliant the sum of £151 16*s*. 7*d*. only, being a sum equal to tax at 6*s*. in the £ on so much of the sum of £114,429 13*s*. (the amount of the dividend paid on the ordinary shares) as bore the same proportion to such £114,429 13*s*. as £3,689 (B) bore to £834,101 18*s*. (A + B + C). Your Suppliant has not accepted the said sum of £151 16*s*. 7*d*.

YOUR SUPPLIANT THEREFORE HUMBLY PRAYS:—

(1) That the Commissioners of Inland Revenue may be ordered to repay to Your Suppliant or, alternatively, to Whitehall Securities Corporation, Ltd. as its agents, or, alternatively, to Midland Bank, Ltd. as its agents, the sum of £74,306 3*s*. 9*d*., being the sum mentioned in paragraph 20 hereof.

(2) That it may be declared that Your Suppliant is entitled to relief in respect of the years ended 5th April, 1932, 1934, 1937, 1938 and 1939 by way of repayment of tax as aforesaid, and that such relief is to be ascertained in manner set forth in paragraph 18 hereof, and that an account may be taken of the amount of repayment due to Your Suppliant in respect of each of the said years, and of any sums actually repaid by the Commissioners of Inland Revenue in respect of those years, and that the Commissioners of Inland Revenue may be ordered to repay to Your Suppliant, or, alternatively, to Whitehall Securities Corporation, Ltd., as agents for Your Suppliant, or, alternatively, to Midland Bank, Ltd. as agents for Your Suppliant any balance so found to be due.

(3) And that Your Suppliant may be granted such further or other relief as may be just.

And that Your Majesty may be graciously pleased to direct this Petition to be endorsed with Your Majesty's Fiat that right be done.

Dated the 30th day of March, 1942.

J. MILLARD TUCKER,
F. HEYWORTH TALBOT,
Counsel for the Suppliant.

DEMURRER, ANSWER AND PLEA

To the said Petition by His Majesty's Attorney-General for and on behalf of our Lord the King delivered the 29th day of September, 1942, by the Solicitor of Inland Revenue.

DEMURRER

SIR DONALD BRADLEY SOMERVELL, Knight, His Majesty's Attorney-General, on behalf of our Lord the King gives the Court here to understand and be informed that the Petition of Right is bad in substance and in law in that it does not disclose a sufficient or lawful or any obligation on His Majesty towards the Suppliant or any legal or equitable right of the Suppliant against His Majesty and in particular in that it does not show that the Suppliant has been assessed to or borne any sum by way of Income Tax to which it was not liable or that it has been wrongfully assessed to any Income Tax or that Income Tax was not lawfully deducted from any payment made to it or that if and in so far as the claim made by the said Petition for relief is based upon a pretended double taxation the Suppliant has suffered any such double taxation and in so far as by way of an alternative claim the said Petition claims any relief or repayment due to persons other than the Suppliant whether as its agents or otherwise in that no claim to relief or repayment is competent to be claimed in the said Petition except relief or repayment due to the Suppliant and further that no right to relief or repayment is disclosed in the said agents or any right in the Suppliant to any relief or repayment on account of such agency and for other sufficient grounds.

[*The case having been argued and determined on the demurrer only, the Attorney-General's answer and plea are not included in the present print.*]

REGINALD HILLS.

CASES

(2) *Selection Trust, Ltd.* v. *Devitt* (*H.M. Inspector of Taxes*)

CASE

Stated by the Commissioners for the Special Purposes of the Income Tax Acts under Section 149 of the Income Tax Act, 1918, 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 at Turnstile House, 94/99 High Holborn, London, W.C.1. on 28th January, 1942, Selection Trust, Ltd. (hereinafter called "the "Company") appealed against assessments to Income Tax for the year 1939–40 in the sum of £200,000 and for the year 1940–41 in the sum of £64,000, less £15,000 loss, made upon it under Case I of Schedule D.

2. The sole question for determination in this case is whether, in arriving at the Company's profits for the purposes of assessment under Case I of Schedule D, there should be included in full certain dividends received by it in respect of its holding of common stock in an American company in the circumstances hereinafter appearing.

3. The Company was incorporated in England under the Companies Act, 1929, on 2nd November, 1933, and carries on business in the dealing in and holding of investments. Shortly after the date of its incorporation, the Company acquired for cash 338,100 shares of the common stock of an American company called the American Metal Co., Ltd. (hereinafter referred to as "the "American company"). Since that time, and from time to time during the relevant years, the Company has continued to hold shares in the common stock of the American company and has received dividends in respect thereof. A

schedule giving particulars of the shares so held is annexed hereto, marked " A ", and forms part of this Case(1).

The authorised capital of the American company at all material times consisted of 2,100,000 shares, divided into:—

(1) 100,000 shares in 6 per cent. cumulative non-callable preferred stock of the par value of $100 each, of which 68,441 shares were issued, and

(2) 2,000,000 shares in common stock of no par value, of which 1,224,585 shares were issued.

An extract from the certificate of incorporation of the American company specifying the rights attached to these two classes of shares is annexed hereto, marked " B", and forms part of this Case(1).

4. The Company received from the American company the following dividends on its common stock between 3rd June, 1937, and 31st March, 1940, during the respective accounting periods of the Company set out below:—

during the 15 months ended 31st March, 1938, £157,035 17*s.* 4*d.*;

during the year ended 31st March, 1939, £68,514 17*s.* 2*d.*, and

during the year ended 31st March, 1940, £96,220 7*s.* 5*d.*

The American company has, since 31st December, 1937, held shares in American companies and also shares in five British companies, to wit:—

The Roan Antelope Copper Mines, Ltd.;

Rhodesian Selection Trust, Ltd.;

Rhodesian Anglo-American, Ltd.;

San Francisco Mines of Mexico, Ltd., and

Anglo-Metal Co., Ltd.

These five companies (hereinafter referred to as " the British companies ") were all incorporated in the United Kingdom, carried on business there and were liable to be assessed to British Income Tax in the material years.

In paying dividends to the American company in respect of their shares each year the British companies deducted tax at the standard rate then in force (as reduced by Dominion Income Tax relief where applicable). A statement showing the American company's shareholding in the British companies is annexed hereto, marked " C ", and forms part of this Case(1), and a further statement showing the total of the dividends received by the American company from the British companies for the years 1938, 1939 and 1940 is annexed hereto, marked " D ", and forms part of this Case(1). In addition to the dividends received from the British companies the American company also received during the material years large dividends from various companies incorporated and carrying on business outside the United Kingdom.

5. The dividends paid by the American company (referred to in paragraph 4 hereof) were paid out of the balance of the American company's profits. The said profits in each year were arrived at after crediting in the American company's profit and loss account the profits arising from its own trading activities, the dividends from the British companies and the dividends from the various companies incorporated and carrying on business outside the United Kingdom, and deducting therefrom the expenses required to earn the said profits. The accounts of the American company for the years ended 31st December, 1938, 1939 and 1940, are annexed hereto, marked " E ", and form part of this Case(1).

6. The dividends received by the Company from the American company on its common stock were included in full as trade receipts in computing its

(1) Not included in the present print.

profits assessable to Income Tax under Case I of Schedule D for the years in question.

7. A computation shewing the amount of relief claimed by the Company in computing its profits assessable to Income Tax under Case I of Schedule D for each of the years in question is annexed hereto, marked " F ", and forms part of this Case[1].

8. It was contended by the Company:—

(1) That there should be excluded from its profits for assessment to Income Tax under Case I of Schedule D a proportion of the dividends received by it from the American company, attributable to that part of the American company's profits for each year which consisted of dividends received by the American company from its British investments. The decision in the case of *Gilbertson* v. *Fergusson*, 1 T.C. 501, was relied on.

(2) Alternatively, that corresponding relief should be given by way of relief from the amount of tax chargeable.

9. It was contended by the Inspector of Taxes:—

(1) That the dividends received from the American company by the Company were rightly included in full in the assessments upon the Company to Income Tax under Case I of Schedule D.

(2) That the present case was distinguishable from *Gilbertson* v. *Fergusson* by reason of the fact that in *Gilbertson* v. *Fergusson* the company paying the dividends was the same as the company whose English profits had already been taxed, whereas in the present case there was the interposition of the American company whose profits had not been assessed to United Kingdom Income Tax.

(3) That the present case is governed by the decision of *Barnes* v. *Hely-Hutchinson*, 22 T.C. 655.

(4) Alternatively, that, if the Company is entitled to relief, it should be given by way of relief from the amount of tax chargeable and not by means of deduction from the amount of assessable income.

10. We, the Commissioners who heard the appeal, were of opinion that the Company was not entitled to any relief from Income Tax under the *Gilbertson* v. *Fergusson* decision in respect of the dividends received by it from its holding of the common stock of the American Metal Co., Ltd. and that these dividends were rightly included in full in the Case I, Schedule D, assessments made upon the Company for the years 1939–40 and 1940–41. We arrived at this conclusion on the authority of the reasoning of the House of Lords and particularly that of Lord Atkin in the case of *Barnes* v. *Hely-Hutchinson*, 22 T.C. 655, in which the facts were similar, except that the appellant was a holder of preference shares and not of ordinary stock as in the present case. We left the figures to be agreed between the parties and, as subsequently agreed, we adjusted the assessments appealed against, as follows:—

1939–40 reduced to nil.

1940–41 ,, ,, £59,481, less £15,839 losses brought forward.

11. The Company immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law

[1] Not included in the present print.

and in due course required us to state a Case for the opinion of the High Court pursuant to Section 149 of the Income Tax Act, 1918, which Case we have stated and do sign accordingly.

F. ENGLAND, H. H. C. GRAHAM, } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
29th December, 1942.

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(3) *Selection Trust, Ltd.* v. *Commissioners of Inland Revenue*

CASE

Stated by the Commissioners for the Special Purposes of the Income Tax Acts under Section 24(2) and Part II of the Fifth Schedule to the Finance Act, 1937, and Section 149 of the Income Tax Act, 1918, 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 at Turnstile House, 94/99 High Holborn, London, W.C.1. on 28th January, 1942, Selection Trust, Ltd. (hereinafter called " the "Company ") appealed against assessments to National Defence Contribution for the three accounting periods 1st April to 31st December, 1937; 1st January, 1938, to 31st March, 1938, and 1st April, 1938, to 31st March, 1939, in the sums of £7,500, £2,500 and £5,000, respectively.

2. The sole question for determination in this case is whether, in arriving at the Company's profits for the purposes of assessment to National Defence Contribution, there should be included in full certain dividends received by it in respect of its holding of common stock in an American company in the circumstances hereinafter appearing or only a proportion thereof pursuant to Paragraph 7(*a*)(i) of the Fourth Schedule to the Finance Act, 1937.

3. That Paragraph reads, so far as is material to this case, as follows:—

" Income received from investments or other property shall be included " in the profits in the cases and to the extent provided in this paragraph, " and not otherwise:—

" (*a*) in the case of . . . a . . . business consisting wholly or mainly " in the dealing in or holding of investments or other property, " the profits shall include all income received from investments " or other property except:—

" (i) income received directly or indirectly by way of dividend " or distribution of profits from a body corporate carrying on a " trade or business to which the section of this Act charging the " national defence contribution applies ".

* * *

Paragraphs 4 to 6 were stated in terms similar to paragraphs 3 to 5 of the preceding Case, with the addition that " the British companies " were all liable to be assessed to National Defence Contribution in the material years.

* * *

7. The whole of the dividends received from the American company by the Company were included in the Company's profits assessed to National Defence Contribution for the periods in question.

8. The American company is not liable to be assessed to National Defence Contribution.

9. A computation shewing the amounts which the Company claimed to exclude in computing its profits for the purposes of assessment to National Defence Contribution for the periods in question is annexed hereto, marked " F ", and forms part of this Case[1].

10. It was contended by the Company that there should be excluded from its profits for assessment to National Defence Contribution a proportion of the dividends received by it from the American company, attributable to that part of the American company's profits for each year which consisted of dividends received by the American company from the British companies as being income received directly or indirectly from a body corporate or bodies corporate carrying on a trade or business to which Section 19 of the Finance Act, 1937, applied.

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

(1) That the dividends paid by the British companies lost, on receipt by the American company, their identity and became merged in the general balance of the profits as a whole of the American company.

(2) That, accordingly, the investment from which the Company received income was the Company's investment in the American company.

(3) That the words " directly or indirectly " in Paragraph 7(*a*)(i) of the Fourth Schedule to the Finance Act, 1937, qualify the word " received ".

(4) That the dividends received from the American company were not income received directly or indirectly from a body corporate carrying on a business to which Section 19 of the Finance Act, 1937, applied within the meaning of the said Paragraph 7(*a*)(i) of the Fourth Schedule to that Act and should be included in full in computing the assessments to National Defence Contribution appealed against.

12. We, the Commissioners who heard the appeal, refused the claim of the Company in respect of the dividends received from the American company for purposes of National Defence Contribution on the ground that, in our opinion, such dividends were not income received directly or indirectly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which Section 19 of the Finance Act, 1937, applies within the meaning of Paragraph 7(*a*)(i) of the Fourth Schedule to that Act. We held that these dividends were rightly included in full in the assessments made upon the Company for National Defence Contribution for the three accounting periods 1st April to 31st December, 1937; 1st January, 1938, to 31st March, 1938, and 1st April, 1938, to 31st March, 1939. We accordingly confirmed the assessments in principle and left the final figures to be agreed between the parties. As subsequently agreed we adjusted the assessments as follows:—

1st April, 1937, to 31st December, 1937, increased to £7,766;

1st January, 1938, to 31st March, 1938, increased to £2,587 3*s*. 0*d*., and

1st April, 1938, to 31st March, 1939, reduced to nil.

13. The 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

[1] Not included in the present print.

Section 24(2) and Part II of the Fifth Schedule to the Finance Act, 1937, and Section 149 of the Income Tax Act, 1918, which Case we have stated and do sign accordingly.

F. ENGLAND, H. H. C. GRAHAM, } Commissioners for the Special Purposes of the Income Tax Acts.

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

29th December, 1942.

The first case came before Macnaghten, J., in the King's Bench Division on 27th, 28th, 29th and 30th July, 1943, when judgment was reserved. On 12th October, 1943, judgment was given in favour of the Crown on the demurrer, with costs. The second and third cases came before Macnaghten, J., in the King's Bench Division on 27th and 28th October, 1943, when judgment was reserved. On 1st November, 1943, judgment was given in favour of the Crown, with costs, in the second case, and against the Crown, with costs, in the third case.

In the first case Mr. J. Millard Tucker, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Suppliant Company, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown. In the second and third cases Mr. J. Millard Tucker, K.C., Mr. Frederick Grant, K.C., and Mr. J. W. P. Clements appeared as Counsel for the Appellant Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENTS

(1) *Canadian Eagle Oil Co., Ltd.* v. *The King*

Macnaghten, J.—This is a Petition of Right presented by the Canadian Eagle Oil Co., Ltd., a company incorporated in the Dominion of Canada on 4th January, 1928, by letters patent under the laws of that Dominion. The Suppliant claims to be entitled, in the circumstances set out in the Petition, to repayment of part of the Income Tax assessed and charged under Case V of Schedule D of the Income Tax Act, 1918, on dividends paid by it in London to shareholders resident in the United Kingdom of Great Britain and Northern Ireland. The Attorney-General, on behalf of the Crown, demurred to the Petition: and the demurrer came on for argument before me at the end of the Trinity Sittings, when judgment was reserved.

The share capital of the Suppliant is divided into three classes, namely, (1) cumulative first preference shares of three Canadian gold dollars each, entitled to a fixed cumulative cash dividend at the rate of 10·08*d*. sterling per share per annum, payable in London on 30th April and 31st October in each year; (2) participating preference shares of no par value, entitled to a fixed preferential non-cumulative dividend at the rate of 23·88 cents per share per annum; and (3) ordinary shares of no par value.

If in any year the divisible profits are more than sufficient to pay the preferential dividends and a dividend at the rate of 23·88 cents on the ordinary shares, the surplus is divided among the holders of the participating preference and ordinary shares rateably. All the dividends on the cumulative first preference shares and a large part of the dividends on the other two

(Macnaghten, J.)

classes of shares are paid here in London by the Midland Bank as agent for the Suppliant; and for the purposes of making those payments the Suppliant remits to its London financial agent, the Whitehall Securities Corporation, Ltd., the gross amount of the dividend (less Canadian dividend tax) payable to its shareholders in London, and the Whitehall Securities Corporation, Ltd. transfers that sum to the Midland Bank.

Many of the shareholders who thus receive their dividends from the Midland Bank are resident in the United Kingdom; and, since the Suppliant is for the purposes of the Income Tax a " foreign company ", the dividends paid to them are subject to British Income Tax under Case V of Schedule D of the Income Tax Act, 1918, as " income arising from possessions out of the " United Kingdom ".

By Rule 7 of the Miscellaneous Rules applicable to Schedule D, which reproduces the provisions contained in Section 10 of the Income Tax Act, 1853, it is provided that where, as in the present case, the dividends payable in respect of the shares of a foreign company are entrusted to a person in the United Kingdom for payment to a person in the United Kingdom, such dividends are to be assessed and charged to Income Tax by the Special Commissioners, and that the Rules applicable to the tax under Schedule C are to extend to the tax so assessed and charged. By the Rules applicable to tax under Schedule C, the person entrusted with the payment of the dividends is required to furnish particulars thereof; and it is provided that "2. The special " commissioners . . . shall assess and charge the dividends at the rate of tax " in force at the time of payment, but reduced by the amount of the " exemptions (if any) allowed by them, and shall give notice of the " amount so assessed and charged to the person intrusted with payment. The " person intrusted with payment shall out of the moneys in his hands pay the " tax on the dividends on behalf of the persons entitled thereto, and shall " be acquitted in respect of all such payments ".(1)

In accordance with these Rules, the Midland Bank, year by year, made returns to the Special Commissioners of all dividends entrusted to it by the Suppliant for payment to shareholders in London; and in due course the Special Commissioners assessed and charged the dividends payable to those shareholders who were resident in the United Kingdom, at the rate of tax in force at the time of payment. On payment of their dividends to those shareholders, namely, the shareholders resident in the United Kingdom, the bank deducted tax at the rate then in force; and, after receiving notice of the assessment from the Special Commissioners, the bank, on behalf of the shareholders, paid the tax so assessed out of the moneys entrusted to it by the Suppliant; and thus, in the language of the Rules, was " acquitted in respect " of all such payments ".

The Suppliant is not and never has been " resident " in the United Kingdom within the meaning of the Income Tax Act, nor has it ever carried on any business in the United Kingdom; but, from the first, it has held shares in certain companies which were incorporated and carry on business in this country, namely, the Anglo-Mexican Petroleum Co., Ltd., the Anglo-Mexican Oil and Shipping Co., Ltd., the Eagle Oil and Shipping Co., Ltd. and the London & National Property Co., Ltd. Those companies, pursuant to

(1) Rules 2 and 3 of the Rules as to interest, &c., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are intrusted.

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Rule 20 of the General Rules, deduct Income Tax from the dividends paid to their shareholders. Moreover, interest on money lent by the Suppliant to one or other of the above-mentioned companies is subject to deduction of tax by the borrower; and, in the case of interest on money deposited by the Suppliant with its bankers, direct assessment to tax is made upon the Suppliant's London financial agent, the Whitehall Securities Corporation, Ltd. Thus it comes about that in every year since its incorporation in 1928 part of the income of the Suppliant—in some years the whole of its income—was subject to British Income Tax.

In these circumstances, the Suppliant claims that, in accordance with the rule laid down more than 60 years ago in *Gilbertson* v. *Fergusson*, 5 Ex.D. 57; 7 Q.B.D. 562; 1 T.C. 501, it is entitled to repayment of part of the tax which the Midland Bank paid to the Crown on behalf of its shareholders resident in the United Kingdom.

In *Gilbertson's* case, as in the present case, the question arose with regard to the assessment to Income Tax on dividends which were payable here in London in respect of the shares of a foreign company and had been entrusted to an agent in this country for payment. In that case the foreign company was the Imperial Ottoman Bank, a Turkish corporation incorporated by a firman of the Sultan in accordance with the laws of Turkey, with a capital divided into shares of £20 each. In 1863 the Imperial Ottoman Bank acquired and took over the assets and business of a British banking company established and carrying on business here in London, called the Ottoman Bank of London; and the shareholders of that company received 12,500 of the £20 shares fully paid of the Imperial Ottoman Bank. From that time the Imperial Ottoman Bank carried on the business in London by a committee of ten persons.

The appellants in *Gilbertson's* case were the members of this committee. For the year which ended on 5th April, 1875, an assessment was made upon them in respect of the profits made by the London agency of the Imperial Ottoman Bank in the sum of £81,477 14*s*. 8*d*., being the average of the profits of the agency during the three preceding years. There was no dispute about that assessment. During the year ended 5th April, 1875, the appellants had paid to the shareholders of the Imperial Ottoman Bank who were resident in the United Kingdom dividends on their shares amounting in all to £98,322 10*s*. 0*d*.; and the Special Commissioners, pursuant to Section 10 of the Income Tax Act, 1853, made an assessment on the appellants in respect of those dividends at the rate of tax in force for the year 1874–75. The Special Commissioners were, it seems, of opinion that, since the dividends were paid out of the profits of the Imperial Ottoman Bank, and those profits had been earned partly in this country and partly abroad, and the profits earned in this country had paid Income Tax, the assessments on the shareholders resident in the United Kingdom should be limited to so much of the dividends as had been earned abroad; or, in other words, that the shareholders resident in the United Kingdom ought not to be required to pay tax on that portion of their dividends which represented the profits earned by the bank in this country. But the Special Commissioners, having no information as to what proportion of the sum of £98,322 10*s*. 0*d*. represented profits which had been earned abroad, made an assessment upon the whole of that sum, leaving it to the appellants to prove upon appeal what amount should be deducted from the assessment in respect of the profits earned in this country. The appellants raised two grounds of appeal against this assessment: namely, (1) that the case did not come within the provisions

(Macnaghten, J.)

of Section 10 of the Income Tax Act, 1853, because they were not " persons " intrusted " with the payment of the dividends within the meaning of the Section; and (2), since the profits earned in this country in the year 1874–75 exceeded the amount of the dividends paid to the British shareholders in that year, the assessment on the dividends payable to the British shareholders should be nil. The Special Commissioners rejected both those contentions, and, at the request of the appellants, stated a Case for the opinion of the Court. The Crown did not enter any appeal. The decision of the Special Commissioners was upheld by the Exchequer Division of the High Court, Huddleston and Pollock, BB., Kelly, C.B., dissenting (5 Ex.D. 57), and by the Court of Appeal, consisting of Bramwell, Brett and Cotton, L.JJ. (7 Q.B.D. 562; 1 T.C. 501). The Order made by the Court of Appeal was that the assessment on the dividends made by the Special Commissioners was based upon the right principle " in so far as it assesses so much of the " dividends intrusted to the committee for payment in the United Kingdom " as is not shown, by a proper return on the part of the bank, to arise from " profits made in the United Kingdom." From that date, 1881, the Special Commissioners, in making their assessments on the dividends paid by foreign companies to British shareholders, have acted on the principle laid down in *Gilbertson's* case. They have, until recently, exempted from the assessments such part, if any, of such dividends as arose from profits made in the United Kingdom.

In accordance with that rule, in each of the years ended 5th April, 1929, 1930 and 1931, the Commissioners of Inland Revenue repaid to the Suppliant in the present case the tax on so much of the dividends paid in those years to shareholders resident in the United Kingdom as represented profits which had suffered tax, either by direct assessment or by deduction. For the year ended 5th April, 1929, the dividends paid to persons resident in the United Kingdom amounted to £305,736, and of that sum no less than £177,711 represented profits which had suffered tax either by direct assessment or by deduction; and tax at 4*s*. in the £ (the rate then in force) amounting to £35,542 4*s*. 0*d*. was repaid.

In 1932, the Commissioners of Inland Revenue were advised that no reduction could be allowed under the rule in *Gilbertson's* case, in respect of preference shares entitled to a fixed rate of dividend; and, since then, no repayment has been allowed to the Suppliant in respect of such dividends.

The decision of the House of Lords in *Barnes* v. *Hely-Hutchinson*, 22 T.C. 655, has established the correctness of this advice. Mr. Hely-Hutchinson was the holder of preference shares in an Indian company, which entitled him to a preferential dividend at a fixed rate. The company remitted the dividends to Mr. Hely-Hutchinson direct, and he was accordingly assessed to Income Tax under Case V of Schedule D on the full amount of his dividends. The Indian company held shares in two British companies. The dividends received by Mr. Hely-Hutchinson were paid partly out of taxed dividends received on its shares in the British companies and partly out of other income which had not borne British Income Tax. Mr. Hely-Hutchinson appealed against the assessment on the ground that, according to the rule in *Gilbertson's* case, the assessment should have been limited to so much of the dividend as was paid out of profits which had not borne British Income Tax. This contention was upheld by the Special Commissioners and, on appeal to the Court, by the Revenue Judge and the Court of Appeal; but it was overruled by the House of Lords, who held that *Gilbertson's* case does not apply to a fixed preferential dividend, and

(Macnaghten, J.)

that Mr. Hely-Hutchinson had been correctly assessed upon the full amount of his dividends. The House of Lords commented upon, but did not overrule, the *Gilbertson* case([1]).

In 1940, in consequence of the decision of the House of Lords in the *Hely-Hutchinson* case([2]) the Special Commissioners restricted the repayment of tax under the rule in *Gilbertson's* case to the income of the Suppliant which had been directly assessed, and this amounted for that year to no more than £151 16*s*. 7*d*.

In these circumstances, on 30th March, 1942, the Suppliant presented this Petition of Right. The Suppliant by the Petition prays for the repayment of tax for the year ended 5th April, 1932, and subsequent years: it prays for such repayment to itself, or, alternatively, to the Whitehall Securities Corporation, Ltd. as its agents, or alternatively, to the Midland Bank as its agents. But, if the assessments in question ought under the rule laid down in *Gilbertson's* case to have been at a rate less than the standard rate, and the excess were recoverable by Petition of Right, it is not the Suppliant or its agents, but the individual shareholders, who would be entitled to the return of the excess. The Midland Bank paid the tax which is alleged to have been excessive out of moneys which had been entrusted to it by the Suppliant for those shareholders. The Suppliant had no right to those moneys—they belonged to the individual shareholders. Therefore, on that ground alone, the Petition by the Suppliant must necessarily fail and judgment must be entered for the Crown on the demurrer.

But a further point is raised on behalf of the Crown; namely, that if the assessments were excessive and the Suppliant were entitled to repayment of part of the tax, it could have appealed under Section 147 of the Income Tax Act, 1918, and it is, therefore, not open to the Suppliant to proceed by Petition of Right. Mr. Tucker, on behalf of the Suppliant, urged that Section 147 has no application except to assessments made under Part VI of the Income Tax Act. No such limitation is expressed in the Section, which provides that " Where proceedings in order to an assessment under " Schedule D are taken before the special commissioners " the person assessed may appeal against the assessment. In this case proceedings " in order to an assessment under Schedule D " were taken before the Special Commissioners. Rule 7 of the Miscellaneous Rules applicable to Schedule D expressly requires that such proceedings should be so taken; and I see no ground whatever for limiting the provisions of Section 147 to assessments made under Part VI of the Act. It seems to me they apply to all proceedings " in order to an assessment under Schedule D " taken before the Special Commissioners.

The Attorney-General, on behalf of the Crown, raised a further point, namely, that in view of the observations upon *Gilbertson's* case by Lord Atkin and Lord Wright in *Hely-Hutchinson's* case([3]), the rule in *Gilbertson's* case is applicable only where a foreign company carries on business in this country; and that tax on dividends in British companies and tax on interest on money lent to persons in the United Kingdom does not come within the rule in *Gilbertson's* case. In view of the opinion that I have formed on the two points I have mentioned, it is unnecessary for me to come to any decision upon that question. It seems to me, however, since the House of Lords did not overrule the decision in *Gilbertson's* case, I should be bound to

([1]) 1 T.C. 501. ([2]) 22 T.C., 655. ([3]) Ibid., at pp. 672–3, 677.

(Macnaghten, J.)

make the same Order as was made by the Court of Appeal in that case, and to declare that so much of the dividends entrusted by the Suppliant to the Midland Bank for payment to its shareholders who were resident in the United Kingdom as arose from profits made in the United Kingdom, should be excluded from the assessments.

For the reasons I have given, I think that the demurrer succeeds and that judgment must be entered for the Crown with costs.

Mr. Tucker.—I am not quite certain about the procedure in these interlocutory proceedings on Petition; but, if it is necessary for me to have leave to appeal to the Court of Appeal, I am sure your Lordship would give it?

Macnaghten, J.—I do not think it is necessary.

Mr. Hills.—No.

Macnaghten, J.—But if my leave is required, you have it.

Mr. Tucker.—If your Lordship pleases.

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(2) *Selection Trust, Ltd.* v. *Devitt* (*H.M. Inspector of Taxes*)

(3) *Selection Trust, Ltd.* v. *Commissioners of Inland Revenue*

Macnaghten, J.—In the first of these cases, the Appellant, Selection Trust, Ltd., appeals against a decision of the Special Commissioners with regard to assessments to Income Tax made upon it under Case I of Schedule D of the Income Tax Act, 1918, for the years ended 5th April, 1940, and 5th April, 1941.

The Appellant is a British company incorporated under the Companies Act of 1929. It carries on in this country the business of dealing in and holding investments. Throughout the relevant years the Appellant held shares in the common stock of an American company called the American Metal Co., Ltd., and during those years it received dividends in respect of those shares, namely, during the 15 months ended 31st March, 1938, dividends amounting to £157,035 17*s.* 4*d.*; during the year ended 31st March, 1939, dividends amounting to £68,514 17*s.* 2*d.*; and during the year ended 31st March, 1940, dividends amounting to £96,220 7*s.* 5*d.*

The American Metal Company is, for the purposes of Income Tax, a "foreign company", and the dividends received from it by the Appellant are assessable under Case V of Schedule D as income received from "possessions out of the United Kingdom". Since, however, the Appellant carries on business in the United Kingdom, these dividends are also assessable under Case I of Schedule D as part of the profits of the Appellant's trade or business, and the Crown has chosen, as it is entitled to do, to assess the dividends under Case I instead of under Case V.

While the Appellant held shares in the American Metal Company, the American Metal Company held shares in certain British companies incorporated and carrying on business in the United Kingdom, namely, the Roan Antelope Copper Mines, Ltd., Rhodesian Selection Trust, Ltd., Rhodesian Anglo-American, Ltd., San Francisco Mines of Mexico, Ltd., and Anglo-Metal Co., Ltd. Those companies paid dividends to the American Metal Company out of profits which had been charged to Income Tax in this

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country, and, on payment to the American company of dividends on the shares belonging to that company, the British companies, pursuant to Rule 20 of the General Rules, deducted Income Tax at the rate then in force (less the amount, if any, allowed in respect of Dominion Income Tax relief). During the relevant years the profits which the American Metal Company distributed by way of dividend amongst its shareholders were made up, in part, of its own trading profits, in part, of dividends received on shares which it held in other foreign companies and, in part, of the dividends which it received from the five British companies.

In the computation of the profits of the Appellant under Case I of Schedule D for the years ending 5th April, 1940, and 5th April, 1941, the full amounts of the dividends received by the Appellant from the American Metal Company were credited as receipts and thus became chargeable to tax at the standard rate. Since, however, British Income Tax had been deducted from the dividends received by the American company from the British companies, the Appellant claimed that, in accordance with the principle laid down by the Court of Appeal in *Gilbertson* v. *Fergusson* (5 Ex. D. 57; 7 Q.B.D. 562; 1 T.C. 501), in the computation of its profits for the purpose of assessment to Income Tax under Case I of Schedule D, so much of the dividends received by it from the American Metal Company as were attributable to that part of the profits of the American company which consisted of dividends received by it from the British companies, ought to be excluded from the computation. The Special Commissioners rejected that claim.

The question at issue on this appeal is, therefore, whether, in the computation of the profits of the Appellant for the purpose of assessment under Case I of Schedule D, the full amount of the dividends received by the Appellant from the American company ought to be credited as a receipt, or whether, as the Appellant contends, so much of those dividends as is attributable to the dividends received by the American company from the five British companies ought to be excluded from the computation in accordance with the rule or principle laid down in *Gilbertson's* case.

It is therefore necessary to ascertain precisely what rule or principle was laid down in *Gilbertson's* case. In that case, as in this, the question arose with regard to the assessment to Income Tax in respect of dividends paid by a foreign company—in that case, the Imperial Ottoman Bank—to shareholders resident in the United Kingdom. The Imperial Ottoman Bank was a Turkish corporation incorporated by a firman of the Sultan in accordance with the laws of Turkey, and it had a branch or agency in London. The appellants in *Gilbertson's* case were the managers of the London branch of the bank, and for the year ending 5th April, 1875, an assessment was made upon the appellants in respect of the profits made by the London agency in the sum of £81,477 14*s*. 8*d*., being the average of the profits of the agency during the three preceding years. There was no dispute about that assessment. During that year 1874–75 the appellants had paid to the shareholders of the Imperial Ottoman Bank who were resident in the United Kingdom dividends amounting in all to £98,322 10*s*. 0*d*., and the Special Commissioners, pursuant to Section 10 of the Income Tax Act, 1853, made an assessment on those dividends at the rate of tax in force for that year and gave notice of the assessment to the appellants as the persons who had been entrusted with the money to pay the dividends.

It seems that the Special Commissioners were of opinion that, since the dividends were paid out of the profits of the Imperial Ottoman Bank, and

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those profits had been earned partly in this country and partly abroad, and the profits earned in this country had been assessed to Income Tax, the assessments on those shareholders who were resident in the United Kingdom should be limited to so much of the dividends as had been earned abroad, or, in other words, that the shareholders resident in the United Kingdom ought not to be required to pay tax on that portion of their dividends which was attributable to the profits earned by the bank in this country. But the Special Commissioners, having no information as to what proportion of the sum of £98,322 10*s*. 0*d*. paid by way of dividend to the British shareholders was attributable to profits which had been earned abroad, made an assessment upon the whole of that sum, leaving it to the appellants to prove upon appeal what amount should be deducted from the assessment in respect of the profits earned in this country.

It so happened that the profits of the London branch of the Imperial Ottoman Bank for the year ending 5th April, 1875, exceeded the amount of the dividends paid by way of dividend to the British shareholders in that year, and the appellants claimed that, in those circumstances, the British profits should be appropriated to the payment of the dividends on the shares held by the British shareholders, with the result that the assessment of those dividends would be nil. The Special Commissioners rejected that contention, and, at the request of the appellants, stated a Case for the opinion of the Court.

It seems that the Crown assented to the view of the Special Commissioners that the assessment should be reduced in respect of the profits made in this country since no cross-appeal was entered. The decision of the Special Commissioners was upheld by the Exchequer Division of the High Court and by the Court of Appeal. The Order made by the Court of Appeal was that the assessment was based upon the right principle " in so far as it " assesses so much of the dividends as is not shewn, by a proper return on " the part of the bank, to arise from profits made in the United Kingdom." The decision of the Court was based on the ground that an assessment on profits made in the United Kingdom which had already borne British Income Tax would infringe the rule, which is implicit in Income Tax legislation, against double taxation.

Gilbertson's case[1] came up for consideration in the case of *Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81; 22 T.C. 655. In that case, Mr. Hely-Hutchinson held preference shares in an Indian company which entitled him to a preferential dividend at a fixed rate. The company remitted the dividends to Mr. Hely-Hutchinson direct, and he was accordingly assessed to Income Tax under Case V of Schedule D on the full amount of his dividends as " income arising from possessions out of the United Kingdom ". The Indian company held shares in two British companies, and those companies deducted tax under Rule 20 of the General Rules from the dividends paid by them to the Indian company. The dividends received by Mr. Hely-Hutchinson were paid out of a fund which comprised the taxed dividends received by the Indian company from the two British companies.

Mr. Hely-Hutchinson appealed against the assessment on the ground that, according to the rule in *Gilbertson's* case, the assessment should have been limited to so much of the dividends as was paid out of the profits of the Indian company which had not borne British Income Tax. This contention was upheld by the Special Commissioners, and, on appeal to the Court,

(1) 1 T.C. 501.

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by the Revenue Judge and the Court of Appeal. The case was then carried to the House of Lords, and there Mr. Hely-Hutchinson met with a reverse. The House of Lords, consisting of Lord Atkin, Lord Russell of Killowen, Lord Macmillan and Lord Wright, were unanimous in holding that the rule in *Gilbertson's* case(1) was not applicable to a fixed preferential dividend, and that Mr. Hely-Hutchinson had been correctly assessed upon the full amount of his dividends.

In the judgments of Lord Atkin and Lord Wright the decision in *Gilbertson's* case was subjected to comment and criticism, and the criticisms are, I think, relevant to the issue that arises in the present case. Lord Atkin, referring to *Gilbertson's* case, said: "It will be seen that there, as in the "present case, the shareholders were liable to pay tax on foreign dividends "though in that case the tax was paid 'on behalf of them' by the persons "entrusted with money to pay the dividends. As far as the company had "been taxed on its profits made in England it seems to me plain that the "reasoning proceeded on the theory then prevailing that the company "paid tax on its profits on behalf of its shareholders, a theory which as "was pointed out in *Cull* v. *Inland Revenue Commissioners*(2) can no longer "be maintained. But it seems equally plain that the exception which the "Courts were able to imply was based upon this very ground, the injustice "that would prevail if the tax were payable twice over by the same person "in respect of the same thing. Whatever the grounds of the decision it "has stood to the present day, and the Attorney-General did not seek to "dispute its validity in facts such as those found in that case. There has "been much legislation in income tax matters since the date of its decision, "and this House would hesitate long in these circumstances before infringing "a decision of such long standing and so often acted upon. But does the "decision affect the present case? In that case, no doubt, as in this, the "shareholder was being charged in respect of dividends in a foreign company. "In that case the foreign company had been directly charged with income "tax on its English profits. In the present case the foreign company has "not been, and could not be, charged with income tax on its dividends "derived from the British companies. The fund out of which profits had "been declared by the British company had no doubt been diminished by "the incidence of the British tax; and the Indian company had suffered "the deduction from their dividends in respect of 'tax' which the British "companies were entitled to make if they chose, the nature of which I "have mentioned in *Cull's* case. I think that this distinction makes it "difficult to apply the decision in *Gilbertson* v. *Fergusson* now to the case "of ordinary shareholders in the Indian company. Where does the inquiry "end in the case of a shareholder in a foreign company? If he can inquire "which of the dividends received by that company had suffered British tax, "can he go on to inquire what proportion of those dividends were derived "from income that had suffered tax and so on ad infinitum: and what "fraction of a fraction of a fraction has eventually to be calculated and "verified?"(3)

Lord Wright also criticised *Gilbertson's* case. Speaking of that case he said: "The claim in the action was two-fold, first a claim against the "company represented by its London agency in respect of the profits of its "English trading, and secondly a claim also against the London agency, "in respect of the moneys entrusted to them to distribute as dividends to "English shareholders. In the latter claim, the agency were in truth assessed

(1) 1 T.C. 501. (2) 22 T.C. 603. (3) [1940] A.C., at p. 89; 22 T.C., at p. 672.

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" as representing the English shareholders. It was held that the latter " assessment should be reduced in respect of so much of the dividends as " represented profits arising within the United Kingdom. But in that case " the dividends were ordinary, and not preference dividends, so that the " amount of the ordinary dividends might, in fact or in theory, have " been reduced by the English taxation. There was the further difference " that the Indian company, unlike the Ottoman Bank, was not carrying " on business in England and was not directly assessable or assessed in " England. Its contribution to British taxation was indirect, in the sense " that there had been the deduction made by the two British companies in " paying their dividends to the Indian company. Thus it may be said " that the Indian company occupied the same position for this purpose as " did the English shareholders in the Ottoman Bank case, whereas the " respondent is one stage more remote. The Indian company is interposed " between the respondent and any question of British taxation on the Indian " company's income. Logically the process of tracing back profits of a " foreign company to ascertain if they have, however remotely, indirectly " borne British tax, should not stop at a single stage, but I need not point " out the practical difficulties of going back beyond the simple stage at " which the foreign company has directly borne British tax. It is not, " however, necessary here to examine *Gilbertson's* case(1) in principle or in " detail. It raises questions perhaps of great importance but questions not " material to this appeal. Your Lordships were told that it has been followed " in practice and it has certainly stood for many years. If it is ever after " this lapse of time to be reconsidered, that should be done, when occasion " arises, where the facts are analogous. In the present case the circumstances " are so different that a decision can be arrived at without finally exploring " *Gilbertson's* case."(2).

Lord Macmillan simply concurred in the judgment, which may have meant that he merely concurred in the result but did not approve of all the observations of Lord Atkin and Lord Wright. But Lord Russell of Killowen said: " I have been given the opportunity of considering the opinion " (of Lord Atkin) " which I have just read, and also the opinion about to be delivered by my " noble and learned friend Lord Wright. They indicate exactly the views " which I entertain on the subject of this appeal."(3)

It seems to me that in this case it is necessary to examine *Gilbertson's* case in principle and in detail. In that case the Imperial Ottoman Bank made profits by carrying on business in London, and those profits were duly charged to Income Tax. The Order made by the Court in that case—and it is clear that the form of the Order was considered carefully by the Judges in the Court of Appeal since they amended the Order of the Exchequer Division so that there should be no ambiguity or doubt as to its meaning or effect—was that so much of the dividends as arose " from profits made in " the United Kingdom " were to be exempt from assessment. The words in the Order, " profits made in the United Kingdom ", plainly mean " profits " made by the Imperial Ottoman Bank in the United Kingdom "—they cannot mean anything else.

The rule laid down in *Gilbertson's* case would no doubt be applicable in any case where a foreign company carries on business in the United Kingdom and thereby makes profits which are charged to Income Tax. But is there any ground, especially in view of the observations of Lord Atkin and

(1) 1 T.C. 501. (2) [1940] A.C., at p. 95; 22 T.C., at p. 677.
(3) [1940] A.C., at p. 91; 22 T.C., at p. 674.

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Lord Wright, for extending the rule where the foreign company does not carry on business or make profits in the United Kingdom? In my opinion, there is none, and any such extension of the rule is unwarranted. The American Metal Company received dividends from the British companies which were paid out of profits made by them either in the United Kingdom or elsewhere, but no profits were made by the American Metal Company in the United Kingdom charged to British Income Tax. The fact that for many years the Commissioners of Inland Revenue did—erroneously, as I think--apply the rule in cases similar to the one now under appeal is immaterial and cannot affect the decision of the Court. I therefore think that the appeal in the first case must be dismissed with costs.

In the second case, the Selection Trust appeal against a decision of the Special Commissioners with regard to assessments to National Defence Contribution, and the question at issue is whether, in the computation of the Appellant's profits for the purpose of assessment to National Defence Contribution, the dividends received by the Appellant from the American Metal Company should be included, or only so much as represents profits made abroad.

That depends upon Paragraph **7** (*a*) (i) of the Fourth Schedule to the Finance Act, **1937**, which provides, in the case of a company such as this: " Income received from investments or other property shall be included in " the profits in the cases and to the extent provided in this paragraph, and " not otherwise—(*a*) in the case of the business . . . consisting wholly or mainly " in the dealing in or holding of investments or other property, the profits " shall include all income received from investments or other property " except—(i) income received directly or indirectly by way of dividend " or distribution of profits from a body corporate carrying on a trade or " business to which the section of this Act charging the national defence " contribution applies ".

The five British companies in which the American Metal Company held shares were liable to be assessed to Income Tax. They each carried on a trade or business to which the Section of the Finance Act, **1937**, charging the National Defence Contribution applied. The Appellant received income by way of dividend from the American Metal Company, which is not, of course, liable to be assessed to the National Defence Contribution. It received that income directly from the American Metal Company. The question is: Did it thereby receive income " indirectly " from the five British companies in which the American Metal Company held shares?

It seems to me that the words " or indirectly " must have been inserted for no other purpose than to meet such a case as this, for I cannot see how otherwise any meaning can be given to the words " or indirectly ". It was suggested that the words were inserted to meet a case where the shares are held in the name of a nominee, but if that was all that was meant by the word " indirectly " there was no reason for inserting the words " directly " or indirectly " since the beneficial owner of shares standing in the name of a nominee obviously received the income by way of dividend from the company.

The final result, therefore, is that the appeal on the first case will be dismissed with costs, and, in the second case, it will be allowed with costs, and in the second case the assessments will go back to the Special Commissioners to be adjusted in accordance with my decision.

Mr. Tucker.—If your Lordship pleases; that will be the right Order.

Appeals having been entered in the first and second cases against the decisions in the King's Bench Division, the first case came before the Court of Appeal (Scott, Goddard and du Parcq, L.JJ.) on 24th, 25th, 26th, 27th and 28th April and 1st and 2nd May, 1944, and the second case on 2nd May, 1944, when judgment was reserved in each case. On 24th May, 1944, judgment was given unanimously in favour of the Crown in each case, with costs, confirming the decisions of the Court below.

Mr. J. Millard Tucker, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Canadian Eagle Oil Co., Ltd.; Mr. J. Millard Tucker, K.C., Mr. Frederick Grant, K.C., and Mr. J. W. P. Clements for Selection Trust, Ltd., and the Solicitor-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp (in the second case only), and Mr. Reginald P. Hills for the Crown.

JUDGMENTS

(1) *Canadian Eagle Oil Co., Ltd.* v. *The King*

Scott, L.J.—This is an Income Tax case and in this judgment I use the epithet "foreign" as meaning resident outside the United Kingdom, and the epithet "British" as meaning resident within the United Kingdom. In this sense the Suppliant Company is foreign; a Canadian company carrying on business in Canada and not in the United Kingdom. In the present case it is claiming, by Petition of Right, repayment from the Inland Revenue of Income Tax on dividends from which the tax had been deducted by the Company's "paying agents" in the United Kingdom, to whom it had entrusted moneys for the payment in London of dividends on its shares. Of these there were three classes: (*a*) cumulative preference, entitled to a fixed rate of dividend; (*b*) participating preference; (*c*) ordinary. Class (*b*) were entitled to a fixed non-cumulative dividend (upon declaration) payable out of net profits. Then followed a similar dividend for class (*c*), i.e., after payment to (*b*) of its fixed dividend, but at the same fixed rate as (*b*). Then, if there still remained a surplus of distributable profits, the Company could declare a further distribution, but this had to be rateable between all the shares of (*b*) and (*c*). There is no information before the Court about Canadian law, but classes (*b*) and (*c*) appear to be somewhat similar to what in England are often called ordinary and deferred ordinary: (*a*) alone seem to be true preference shares. The paying agent was the Midland Bank, who duly carried out all the directions of Rule 7 of the Miscellaneous Rules under Schedule D, and the third set of Rules under Schedule C—"the Paying "Agents Rules" (as they are now to be called; see Finance Act, 1938, Section 23)—which are applied by Rule 7 of Schedule D. The bank, as such paying agent, was duly assessed to tax which, in respect of all the dividends it distributed, it duly deducted, and it paid the tax over to the Inland Revenue as required by those Rules. The Suppliant now claims a return of the tax so paid over, to the extent to which the dividends so distributed by the bank under deduction of tax came out of a balance of profits and gains which had consisted in part of dividends received by it from various companies resident in the United Kingdom, all of whom had deducted British Income Tax before payment to the Suppliant Company, and in part interest received by it on which British tax had been paid by it. In the proportion that the Suppliant's own income had been so taxed by deduction in the United Kingdom, the Suppliant claims that on the Income Tax principles of English law its own dividends should be similarly apportioned, and that tax was only properly deductible in the hands of its

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appointed "paying agent" on that part of the dividends which could be regarded as earned by it wholly abroad, the other part having indirectly, through its original British sources, already suffered tax.

The Suppliant has proceeded by Petition of Right because it contends that there is no procedure under the Income Tax Acts by which it can enforce its rights. The Crown has demurred, and the only issues before us, as before Macnaghten, J., are those raised by the demurrer. For more reasons than one, it is a difficult case. The claim purports to be based upon a rule of law enunciated in the year 1879, when the Divisional Court held that there was behind the express terms of Income Tax legislation, as it then was, a principle forbidding "double taxation", and making it illegal for "the same "income" to be taxed twice over; the phrase "the same income" predicating identity, not only of source, but of the person entitled to receive it. That was the case of *Gilbertson* v. *Fergusson,* 5 Ex. D. 57, decided in favour of the taxpayer by the majority of the Divisional Court. Their decision was affirmed two years later in the Court of Appeal, 7 Q.B.D. 562; 1 T.C. 501. The "principle" of *Gilbertson* v. *Fergusson* was followed by the Inland Revenue for half a century; and, indeed, it was so applied by the Inland Revenue to the Suppliant Company, completely till 1932, when H.M. Inspector of Foreign Dividends raised the objection that the principle of *Gilbertson* v. *Fergusson* was inapplicable to "preference dividends paid at a "fixed rate", although at that time he still conceded the operation of the principle in regard to the Suppliant's ordinary dividends. During the years 1932–33, 1934–35 and 1935–36 the Suppliant paid no dividends, but in each of the three following years it paid dividends on all three classes of its shares, including arrears on its cumulative preference shares. In each of those years, however, the Suppliant's claims for relief were allowed in respect of its ordinary dividends paid through the Midland Bank, its paying agent in London. In the year 1939–40 the Suppliant again paid dividends on all its shares through the same paying agent as before, but the Inland Revenue then contended that, by reason of the decision of the House of Lords in July, 1939, in the case of *Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81; 22 T.C. 655, the Suppliant's relief must be restricted to that part of its ordinary dividends distributed by the bank which could "be regarded as paid "out of the profits of the Company *directly* assessed to United Kingdom "Income Tax under Schedule D", i.e., the bank interest received by it in London. The Suppliant did not accept the suggestion that it should be content with that small concession, and therefore declined the offer. Presumably that item remains conceded by the Inland Revenue; but the claims of the Suppliant to relief in respect of tax deduction at the source from the dividends it received from the various British companies are all now resisted by the Inland Revenue, and this claim the Suppliant now puts forward in regard to all the relevant past years. The Crown also contends (1) that if anyone is entitled to claim, it is the shareholders on whose behalf, under the Paying Agents Rules, the tax was paid over by the bank to the Inland Revenue, and not the Suppliants; and (2) that Petition of Right does not lie because the Company could have proceeded by a certain procedure under the Income Tax Acts. I postpone discussion of these questions of parties and procedure till after I have dealt with the important matters of principle in issue.

On the latter I have come to the conclusion that the Crown is right. On the one hand the problem is in most ways made easier of solution for this Court by the help the reasoning of their Lordships in the *Hely-Hutchinson*

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case gives to use; but, on the other hand, in some ways, it is made more difficult by the deliberate abstention of the House from overruling *Gilbertson* v. *Fergusson*(1). Indeed, it is not easy to say how far, if at all, that case can still stand, in view of the fundamental character of the reasoning of their Lordships in *Hely-Hutchinson*(2), especially in certain passages in Lord Wright's speech.

In view of the above considerations, it is incumbent on this Court on the one hand to treat whatever was really decided in *Gilbertson* v. *Fergusson* as binding on us, but on the other hand to consider very carefully how far the reasoning by which either Court reached its conclusion in that case is now modified by the decision of the House of Lords in *Hely-Hutchinson*. We have further to consider how far we are free to criticise the reasoning in *Gilbertson* v. *Fergusson* on principle and to form our own views on the basic questions of law involved.

The facts there, so far as material to the present issues, can be stated shortly. The Ottoman Bank were, at the time in question, a foreign corporation, but carried on business in the United Kingdom through an agency in London, and on the profits so made were liable to tax under Schedule D, Case I. In addition they made profits abroad. Out of those two sources they paid dividends. For distribution of the dividends payable to persons in the United Kingdom they employed their London agents also as paying agents under Section 2 of the Income Tax (Foreign Dividends) Act, 1842 (roughly equivalent to our Schedule D, Miscellaneous Rule 7, and the Schedule C Paying Agents Rules). To the agency they "intrusted" payment of the dividends, and those agents, before payment, deducted the tax on the whole dividend, in each case without regard to whether the profits out of which it was being paid had been made abroad or in Great Britain (now the United Kingdom—Income Tax Act, 1853, Section 5). The shares were all bearer shares, dividends whereon were payable at Constantinople, Paris or London at the option of the holders. So far as relevant to the present problems, the question there was whether the London agency (a member whereof, Gilbertson, was treated as representing it) was entitled to recover from the Inland Revenue an amount of tax bearing the same proportion to the whole tax paid to the Revenue by the agency in its twofold capacity, as the profits made in the United Kingdom bore to the total profits of the Ottoman Bank, on the ground that in the name of the London agency the Ottoman Bank had already been directly taxed on the totality of their United Kingdom profits under Case I of Schedule D (see paragraph 32 of the Stated Case, 5 Ex. D., at page 62; 1 T.C., at page 506. The Court held that the Inland Revenue must return that proportion, on the ground that, the *whole* of the British profits having already been taxed, if the Inland Revenue were to retain the whole of tax on the dividends payable out of the mass of profits, partly foreign and partly British, it would, to the partial extent to which the mass was British income, necessarily involve double taxation of the same income—see per Huddleston, B., at pages 71–2; per Pollock, B., at pages 75–6. Kelly, C.B., differed on an issue to which it is unnecessary to refer in the present case. It may be noted in passing that there was some confusion in the Divisional Court between the two capacities in which the London agency were acting, viz., (*a*) earning profits in the United Kingdom for the Ottoman Bank abroad; and (*b*) distributing dividends entrusted to it as "paying agent" who has nothing to do but to perform the duties imposed on him—(see now Miscellaneous Rule 7 of Schedule D and the Paying Agents Rules of Schedule C, which,

(1) 1 T.C. 501. (2) 22 T.C. 655.

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in effect, repeat the earlier statutory provisions). The Court of Appeal (7 Q.B.D. 562; 1 T.C. 501) affirmed the decision, holding, in effect, that the part—i.e., the dividend—partook of the nature of the whole, being partly foreign-earned, and partly British-earned income, and, consequently, that if the British-earned part of the dividend was again taxed, it would affend against the rule forbidding double taxation of the same income.

The House of Lords in *Barnes* v. *Hely-Hutchinson*(1) having expressly abstained from overruling that case, the decision remains binding upon us. But it is necessary to see how far it goes and where it stops short. As I see it, the essential factor there was that the Court treated the shareholder's dividend out of the Corporation's profits as, in essence, a part of those very profits; and if half the corporation's profits had been earned in the United Kingdom, half the shareholder's dividend had been equally earned there: if the whole had been charged to British tax, it would have been just as wrong in principle again to charge any fraction as again to charge the whole.

If the above be the principle there affirmed, it has no necessary relevance to the present appeal. The Suppliant here did not carry on any business in the United Kingdom and did not earn a penny here and suffered no direct taxation here. It had money invested in English companies and they paid tax on their own incomes and on paying dividends deducted tax, as they were entitled to do under General Rule 20. But the *ratio decidendi* of *Gilbertson* v. *Fergusson*(2) is absent. On what ground then should we hold that there has been any " double taxation " in the *Gilbertson* v. *Fergusson* sense? I can see none. And on consideration I have come to the conclusion that the whole idea of any such principle applying to such a case as the present is impossible. The Suppliant is a foreign company, which has carried on no " trade " (in the sense of Section 237 of the Income Tax Act, 1918) in the United Kingdom, so as to attract direct tax under Schedule D to its own income, but has only had money invested in British companies. Why should not its dividends when distributed here be taxed as income coming from foreign possessions to British residents, whether sent direct, so as to come under Case V of Schedule D, or entrusted to a paying agent under Miscellaneous Rule 7? The Rules applicable to Case V of Schedule D in terms apply to such a dividend and exact tax on the full amount of the actual sum received. What was received was the gross untaxed amount. Unless there is some clear legal ground for cutting down the ambit of those plain words, it is, in my view, impossible to apply any such principle as that of indirect double taxation, even if *Gilbertson* v. *Fergusson* be upheld, where the profits out of which the dividend is paid have been earned in part in the United Kingdom.

Fiscal legislation must of necessity be restricted, broadly speaking, within the limits of jurisdiction of British sovereignty. Parliament cannot legislate so as to bind foreign corporations or foreign persons, in the sense in which in this judgment I have used the word " foreign ". Conversely, I can see no ground for assuming that when Parliament purports to tax income coming into this country from abroad, it does not intend to treat it simply as so much income, without dissecting it in order to consider its original nature or composition. To do the latter would mean embarking on all sorts of questions, often complicated, of foreign law. Parliament cannot control a foreign corporation, nor can our executive enforce any rules against it. Why, then, should Parliament be supposed to be making legislative concessions in its favour, if it does not use plain words to say so? I must not be understood

(1) 22 T.C. 655. (2) 1 T.C. 501.

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as expressing an opinion that such concessions might not be thought desirable by Parliament in connection with our export trade; but there is no indication that I can find in our Income Tax legislation at present, to suggest that income from " foreign possessions " coming to British recipients is to be relieved of tax because of any particular characteristic in the source from which that income has originated. I therefore arrive at the conclusion that no such enquiries are permissible, except in the one case in which this Court held over 60 years ago that, in regard to income earned by a foreign corporation within the United Kingdom, the principle of not taxing the *same* income twice may impose on the Inland Revenue a duty to return the tax on dividends so far as they are attributable to those British earnings when directly charged against the foreign corporation.

In the case of *Barnes* v. *Hely-Hutchinson,* [1939] 1 K.B. 93, at page 101; 22 T.C., at page 664, I pointed out this difference and ventured to express an opinion that our Income Tax legislation treated corporation and corporators as to some extent identified. That passage was not expressly disapproved in the House of Lords[1], but the application I gave it in that case to a foreign company's dividend was held to be wrong; and I think that the speech of Lord Wright, in particular, does involve the corollary that in the present case we must firmly refuse to enquire into the actual sources of the Canadian Company's income, except in the single item of bank interest where the income was gained in the United Kingdom and became subject to direct taxation by the Inland Revenue. Unless this general conclusion be accepted and applied, I humbly agree with the observations of Lord Atkin and Lord Wright in *Hely-Hutchinson* that it is impossible logically to draw a line at any particular stage of remoteness.

This conclusion makes the discussion of a possible difference between " ordinary " dividends and fixed " preference " dividends superfluous. It also saves the necessity of enquiring into the question of whether, assuming there to be a right of recovery, that right belongs to the company or to the shareholder whose dividend has been taxed. I merely observe that General Rule 20 can have no application to a foreign company; for such an application would be no concern of British sovereignty. I therefore express no opinion on the point, although I recognise the force of the judgment of Goddard, L.J., which I have had the advantage of reading since I wrote the preceding part of this judgment.

On the questions of procedure, if, contrary to my view, there be a right vested in the Company, I am not disposed to concur in the demurrer to the Petition of Right on the ground that it cannot lie because the Income Tax Acts afford another remedy, for I am not satisfied that there is another remedy; but again I do not think it necessary to decide the point.

In deciding against the contentions of Mr. Tucker, I should like to add that I am greatly indebted to him for his clear and very interesting argument; and I hope I learnt much from it, although I reject it. The appeal must be dismissed with costs.

Goddard, L.J.—This is an appeal by the Suppliants against a judgment of Macnaghten, J., allowing a demurrer by the Attorney-General against a Petition of Right claiming the repayment of part of the Income Tax assessed and charged under Case V of Schedule D on dividends paid by the Company, which neither resides nor carries on business in the United Kingdom, to shareholders who are resident within the Kingdom. Put shortly, the circumstances are that the Company remits a sum of money derived from its

(1) [1940] A.C. 81; 22 T.C., at pp. 669 *et seq.*

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profits to a bank in London for distribution as dividend among its British shareholders. Part of the profits of the Company have already borne British tax; and by Rule 7 of the Miscellaneous Rules applicable to Schedule D, the sums remitted to the paying agent are assessed and charged to tax. So, say the Suppliants, this is a case of double taxation, and they are entitled to reclaim a proportion of the tax, because it is always assumed that Parliament does not intend that profits are to be subject to double taxation. The first answer raised by the Crown on the demurrer is that, whether or not the Company's profits have suffered tax, either by deduction or by direct assessment, the Company have no right to reclaim; if there is a right in any one, it is either in the shareholders or in the paying agent, but in any case not in the Company. Macnaghten, J., has held that this contention is correct, and if it is, it follows that the Petition must fail. The case for the Appellants was supported by Mr. Tucker in an elaborate argument involving a very wide survey of the relevant provisions of the Schedules, and a close examination of *Gilbertson* v. *Fergusson*, 5 Ex. D. 57, affirmed in 7 Q.B.D. 562; 1 T.C. 501, and of *Barnes* v. *Hely-Hutchinson*, [1940] A.C. 81; 22 T.C. 655, and certain other authorities. But with all respect to his interesting argument, and in spite of the fact that this case relates to Income Tax, I am bold enough to believe that the solution is comparatively simple.

I start by accepting that *Gilbertson's* case has not yet been overruled and has stood for some sixty years, though it can no longer be taken as applicable to dividends paid on preference shares since the decision of the House of Lords in *Hely-Hutchinson*. But, in my opinion, it is not conclusive of the point that we have to decide. Assuming it to be an authority that a claim for repayment can be made, it does not decide, in my opinion, that the Company can make the claim. Turning to the relevant provisions of the Schedules, Case V of Schedule D provides for the charging of tax in respect of income arising from possessions out of the United Kingdom, usually called foreign possessions. It is plain that, if a foreign company sends dividends direct to a shareholder, he must show those dividends in his Income Tax return and he is then assessed and must pay upon them. In such a case Mr. Tucker agrees that if any claim for repayment is to be made, it is the shareholder who must make it. But, he says, it makes all the difference if a paying agent is employed by the company. It would be strange, indeed, if the benefit of a repayment accrues to a shareholder who receives the dividend direct from the company, but that if an agent is employed the benefit should go to the company. No doubt if the repayment goes to the company its financial position is strengthened to that extent, and so an indirect benefit is conferred on the shareholders, but this would be cold comfort for one who was minded to dispose of his shares after receiving his dividend from the agent.

Now, by Rule 7 of the Miscellaneous Rules, where dividends are intrusted to a paying agent in the United Kingdom for payment to persons in the United Kingdom, they are to be assessed and charged to tax by the Special Commissioners, and the provisions of Schedule C, relating to tax on dividends payable out of public revenue other than that of the United Kingdom, and intrusted to any person other than the National Debt Commissioners or the Bank of England, are applied. Rule 1 of the relevant part of Schedule C provides for the delivery by the agent of accounts, describing the dividends intrusted to him for payment; Rule 2 provides for the assessment of the dividends, and then Rule 3 provides that the person intrusted with payment shall, out of the moneys in his hands, pay the tax on the dividends ***on behalf***

(Goddard, L.J.)

of the persons entitled thereto. How, then, if the Crown remits any part of the tax charged, can any one, other than the person on whose behalf it has been paid, be entitled to it? Placing the obligation on the agent to pay the tax is in accordance with the well-known policy of the Acts relating to Income Tax, of making the tax payable at the source. If he pays on behalf of the shareholder it must be the latter who is entitled to any repayment. Who then can claim? In my opinion, either the shareholder or the paying agent: the latter is the person responsible to the Revenue for making the payment. Notice of assessment is given to him, and if he does not pay, it is he who is liable to the prescribed penalties. But if he claims and receives a repayment, for whose use does he receive the money? I venture to think it is clear beyond question that he must receive it for the use of the person for whom he paid the tax. In *Gilbertson's* case(1), no question arose as to who was the proper claimant. The claimant was a member of the London committee of the bank, and that committee acted, as I understand the case, as paying agents in London for the Turkish bank. Although the matter was not specifically dealt with, I read all the judgments in the Court of Appeal, and particularly that of Cotton, L.J., as recognising that it was the shareholders who could be said to have suffered double taxation, and to be entitled to benefit by the return of the tax, and this, I think, is supported by the variation the Court made in the Order of the Exchequer Division by substituting the word " dividends " for " profits ".

As, in the view that I have formed, the Suppliants have no title to sue, the other questions raised by the demurrer do not arise. Whatever relief can be given, except in respect of that part of the Company's profits which have been the subject of direct assessment, arises in the next case in which we are giving judgment(2), and I need say no more about it here. Nor is it necessary here to discuss whether a Petition of Right would in any case lie, or whether appeal was not the proper remedy; if the Company is not the proper party to claim relief, the nature of the remedy is immaterial, for it has none. I think the appeal should be dismissed.

du Parcq, L.J.—In this case we are invited by the Appellant Company, as was Macnaghten, J., to apply what is called the rule in *Gilbertson* v. *Fergusson,* 1 T.C. 501. The Crown, while reserving to itself the right to question the propriety, or even the very existence, of that rule in some later case, is prepared for the purposes of the present appeal to admit the existence of the rule and to join in the invitation that we should apply it. The question remains: What is the rule in *Gilbertson* v. *Fergusson*?

In these circumstances I will assume, without deciding, that the so-called " rule in *Gilbertson* v. *Fergusson* " is binding on this Court. I have done my best to ascertain what the rule is. In my opinion it may be stated in the form of four propositions. (1) It would be unjust that the same profits should be taxed twice over, and the taxing Acts must, if possible, be so construed as to avoid such a result. (2) A company paying tax on its profits must be regarded as paying the tax on behalf of its shareholders—see per Lord Atkin, *Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81, at page 89; 22 T.C. 655, at page 672, where the learned Lord says of the rule: " It " seems to me plain that the reasoning proceeded on the theory then " prevailing that the company paid tax on its profits on behalf of its " shareholders ". (3) When a foreign company has been taxed on the profits of a trade or business which it carries on in England, a shareholder whose dividends are subject to tax is entitled to say that so much of the dividend

(1) 1 T.C. 501. (2) Selection Trust, Ltd. *v.* Devitt, *post,* at p. 240.

(du Parcq, L.J.)

as is attributable to the profits of the company's English trade or business has already been taxed. (4) It follows that when a paying agent has paid tax (in pursuance of the Income Tax Act, 1918, Schedule C, Rules as to interest, Rule 3) on behalf of a shareholder entitled to a dividend, the paying agent is entitled to say, on behalf of the shareholder, that he (the shareholder) has been doubly taxed *quoad* that part of the dividend which is attributable to English trading profits, and to obtain relief for and on behalf of the shareholder.

If the learned Judges of the Exchequer Division and the Court of Appeal in *Gilbertson's* case[1] had had their minds directed to the possible conflict between the claims of a company on the one hand, and its shareholders on the other, to a refund of the tax which a paying agent had paid on dividends "on behalf of the persons entitled thereto", the precise point which Macnaghten, J., decided in this case might have been the subject of a definite and clear-cut decision in 1879. As matters then stood, however, the Courts were not considering that aspect of the matter at all. Indeed, they were not consciously formulating any precise rule, but rather approving the construction which the Crown was prepared to put on the relevant provisions. I think, however, that the four propositions which I have stated may be taken as summarising the rule which can be deduced from the decision. If I am right, it follows that the reasoning of Macnaghten, J., in the present case was correct. It is not the Suppliant or its agent, but the individual shareholders who are entitled to the return of the excess.

My understanding of the judgments in *Gilbertson* v. *Fergusson* accords with that of Macnaghten, J. When those judgments are read, it must not be forgotten that, however indefensible the *ratio* of the decision may have been according to principles more recently established, the Courts, even in 1879, were not blind to the distinction between a corporate body and a partnership, or between the right of the company to its profits, and the separate and different right of the shareholder to his dividend. Thus, in *Calcutta Jute Mills Co., Ltd.* v. *Nicholson,* 1 Ex. D. 428 (which was decided three years earlier), Huddleston, B., had said, at page 456[2], that "if you "could make out this artificial being, a corporation, to be a partnership, "and say that every shareholder was a partner", the argument for the appellants in that case would have been very forcible; and Kelly, C.B., in *Cesena Sulphur Co., Ltd.* v. *Nicholson,* 1 Ex. D., at page 451, stated the position in terms which, so far as they go, are consistent with the view which has now been authoritatively established: "The whole of the gains come into "the hands of the company, and have to be divided among the whole of the "shareholders. But until they are divided they are the property of the "company, and only pass into the hands of the shareholders when its "dividends have been declared under the authority of the company, and "according to the articles of their constitution."

The judgments delivered in the Exchequer Division in *Gilbertson* v. *Fergusson* must be read in the light of that earlier pronouncement. In particular I would refer to the judgment of Pollock, B. When (5 Ex. D., at page 75) the learned Baron said that the London agents were "assessable "under the provisions of section 10", he clearly meant assessable, not in respect of the profits earned by the company, but in respect of the dividends which the shareholders were entitled to receive. This is plain from the words of Section 10 of the Income Tax Act, 1853, 16 & 17 Vict., c. 34, to which reference had just been made in the judgment. When it is remembered that it is on the dividends that the paying agents are assessed (for to this extent

(1) 5 Ex. D. 57; 1 T.C. 501. (2) 1 T.C. 83, at p. 108.

(du Parcq, L.J.)

at least there is no difference between the provisions of the code which are now applicable and the Section which was then in force); that the dividends are the shareholders' money; that any deduction from them by way of tax is at the shareholders' expense, and that the paying agent pays the tax on the dividend on behalf of the shareholder, the apparent obscurity of the immediately succeeding words in the judgment disappears. " If they " can shew that they have already paid income tax upon the amount in " whole or in part, they are entitled to do so ", must, I think, mean: " If the shareholders, through the paying agents who for this purpose are the " shareholders' agents, can show that they (the shareholders) have already " paid income tax ", etc. Then the argument ran thus: The shareholders are able to show that they have already paid tax because, although juristically speaking the dividend is income received by the shareholder and the company's profits are income received by the company, in substance the dividends are, so to say, a part of the profits which have already been taxed. In the words of Brett, L.J., " they are not two profits but one indivisible " profit " (7 Q.B.D., at page 570; 1 T.C., at page 517). The same reasoning is to be found in the judgment of Cotton, L.J. " The dividends are payable ", he said, " in respect of all profits ", and he adds that " the share- " holders would be entitled to say as against the Crown, part of this is " attributable to English profits, and we have already paid duty in respect of " that " (7 Q.B.D., at page 573; 1 T.C., at page 520).

The fact is, I think, that in *Gilbertson* v. *Fergusson*(1) the Court was dealing with the position as between the Crown, the company and the shareholders at a stage at which the paying agents, who had paid the tax on behalf of the shareholders, were to be regarded as demanding its repayment in the capacity in which they had paid it, viz., as agents for and on behalf of the shareholders. The rule in *Gilbertson* v. *Fergusson* must, therefore, operate not in favour of the company but in favour of the shareholders. It may now be said without disrespect that the reasoning in *Gilbertson* v. *Fergusson* must be adjudged faulty in the light of later decisions but, even if it be assumed that the rule itself has survived the partial collapse of its foundations, I agree with Macnaghten, J., that it gives no assistance to the Suppliant here.

I was impressed by the argument that the main reason for respecting a rule which, though questionable, has long been established, is that it has governed the practice for many years, and that the practice generally adopted, and certainly the practice formerly adopted in the case of the Suppliant Company itself, had been to treat the company rather than its shareholders as being entitled to relief. If, however, I am right in the construction which I place on the judgments in *Gilbertson* v. *Fergusson,* there is really nothing in this argument. The Courts may think it wrong to disturb a rule which is based on a precedent of doubtful validity if it has long been observed in practice. It can never be right to approve a wrong practice, of however long standing, which is based on an erroneous construction of a rule which the Court has laid down.

I would add that, in my opinion, no assistance can be derived in this case from the provisions of the code with regard to English companies. There is nothing in any of the judgments in *Gilbertson* v. *Fergusson* which suggests that the Courts were founding their decision on an analogy drawn from those provisions.

Agreeing, as I do, with Macnaghten, J., on a point which is conclusive of the whole case, I should not have thought it desirable to express an

(1) 1 T.C. 501.

(du Parcq, L.J.)

opinion on any of the other points which were argued before us had I not found it necessary to decide one of them in the case of *Selection Trust, Ltd.* v. *Devitt,* in which judgment is shortly to be delivered. As matters stand it is convenient that I should now express my opinion that there is no double taxation where the receipts of the foreign company which are in question are dividends paid by English companies. The rule in *Gilbertson* v. *Fergusson*(1) may be wide enough to cover that part of a foreign company's income which consists of interest on moneys deposited with an English bank, but cannot, in my judgment, be stretched so as to cover English dividends. I base this opinion on those passages in the speeches of Lord Atkin and Lord Wright in *Barnes* v. *Hely-Hutchinson*(2), on which Macnaghten, J., relied in the *Selection Trust* case (3). In my opinion this appeal should be dismissed.

Scott, L.J.—The appeal is dismissed with costs.

Mr. Talbot.—May I venture, in the special circumstances of this case, the circumstances which have been adverted to in the judgment, to ask your Lordships for leave to appeal to the House of Lords?

Scott, L.J.—Yes.

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(2) *Selection Trust, Ltd.* v. *Devitt* (*H.M. Inspector of Taxes*)

Scott, L.J.—The question of principle in this Stated Case is the same as that upon which this Court decided in favour of the Crown on the Petition of Right of the Canadian Eagle Oil Co., Ltd. and the Crown's demurrer, in which we have just given judgment. The only difference is that here the facts are even stronger against the taxpayer than there. I therefore content myself with a reference to the main part of my judgment in that case. I would add, however, that I entirely agree with Macnaghten, J.'s judgment in the present case. The appeal is dismissed with costs.

Goddard, L.J.—I agree that this appeal should be dismissed, but as I base my judgment on a narrower ground than do my Lords, and unfortunately differ from them on one point, I will briefly state my reasons. As the House of Lords expressly refrained from overruling the case of *Gilbertson* v. *Fergusson,* 1 T.C. 501, this Court must regard it as a binding authority as regards ordinary, though not preference, shareholders. So far, then, as profits have been earned and directly taxed before they come into the hands of the foreign company, relief can be claimed by British shareholders when they receive their dividends from that company. This the Crown was ready to concede in the last case. Then one must consider profits in the shape of dividends received from British companies in which the foreign company is a shareholder. These will have been received under deduction of a sum representing the shareholder's proportion of the tax borne by the British companies on its profits. There were such dividends in the case in which we have just given judgment. In regard to these I feel there is great difficulty in holding that no relief can be claimed. My difficulty is that *Gilbertson's* case has not yet been overruled. I cannot see that the Court, in that case, either expressly or impliedly differentiated between the two classes of profits that I have mentioned, nor, on the reasoning applied by the Court, do I think it is possible to do so. It is, of course, true that the company in that case was trading in England, but it is easy to visualise a foreign company, whose business is of a financial character, carrying on a business here which consists solely of dealing in stocks and shares of English companies. Their profits

(1) 1 T.C. 501. (2) 22 T.C. 655. (3) *Ante*, at p. 225.

(Goddard, L.J.)

then would consist in part of dividends on the shares which they possessed when dividends were declared, and partly of the profits they made on sales. They would, no doubt, be directly assessed here on the latter profits, but, in my opinion, as *Gilbertson's* case(1) must still be regarded as law, there would be no ground for distinguishing between the two classes of profits. While I am conscious of the force of the criticisms on that case which my brethren have made in the light of the decision in *Barnes* v. *Hely-Hutchinson*, 22 T.C. 655, I think we are still bound by it, and, for that reason alone, I do not feel able to agree that, in the case I have put, relief could not be claimed. But in the present appeal the Appellants are not shareholders in a British company. They hold shares in another foreign company, which is a holder of shares in British companies. I think we are well justified in holding that in such a case no relief can be claimed; the chain is broken, if I may so express it. The reasoning of both Lord Atkin and Lord Wright in the *Hely-Hutchinson* case is, I think, quite destructive of any claim to relief in these circumstances and, therefore, I agree that the appeal fails.

du Parcq, L.J.—In the *Canadian Eagle Oil Company* case I stated the opinion which I have formed as to the true intent and scope of the rule in *Gilbertson* v. *Fergusson*, 1 T.C. 501, which we were asked to apply in this case also. It follows from what I then said that, in my judgment, Macnaghten, J., came to the right conclusion in the present case also, and for the right reasons, and that this appeal should be dismissed.

Scott, L.J.—The appeal will be dismissed with costs. Do you ask for leave to appeal?

Mr. Grant.—Yes, my Lord.

Scott, L.J.—You may have leave.

Appeals having been entered against the decisions in the Court of Appeal, the first case came before the House of Lords (Viscount Simon and Lords Thankerton, Russell of Killowen, Macmillan and Simonds) on 29th May and 1st, 4th, 5th, 6th and 7th June, 1945, and the second case on 11th, 13th and 14th June, 1945, when judgment was reserved in each case. On 30th July, 1945, judgment was given unanimously in favour of the Crown in each case, with costs, confirming the decisions of the Court below.

Mr. J. Millard Tucker, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Canadian Eagle Oil Co., Ltd.; Mr. J. Millard Tucker, K.C., Mr. Frederick Grant, K.C., and Mr. J. W. P. Clements for Selection Trust, Ltd., and the Attorney-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp (in the second case only), and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Simon.—My Lords, these two appeals were heard in immediate succession, in order that the House might give judgment upon them together.

Canadian Eagle Oil Co., Ltd. v. *The King*

The Suppliant in this Petition of Right, the Canadian Eagle Oil Co., Ltd., is a company incorporated in Canada and not resident in the United Kingdom. Many of its shareholders, however, are resident in this country. Their shares are of three different categories: cumulative first preference shares entitling

(1) 1 T.C. 501

(Viscount Simon.)

the holders to dividends at a fixed rate; participating preference shares entitling them to dividends at a fixed rate and in certain circumstances to further dividends at a rate determined upon each particular occasion of distribution; and ordinary shares which entitle them to dividends at rates so to be determined. Their dividends are paid to them under deduction of tax by the Midland Bank, Ltd. as agent in this country for the Suppliant Company. The Company does not carry on trade in the United Kingdom, but it receives income amenable to the Income Tax Acts in this country from three sources, namely, dividends on shares in British companies, interest on loans, and interest on moneys deposited with banks; in respect of the two former Income Tax is levied by deduction at the source, in respect of the last by direct assessment.

For a number of years the Company received repayments of the tax thus deducted by the Midland Bank from dividends paid to its shareholders resident in the United Kingdom according to the rule adopted by the Court of Appeal in *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562; 1 T.C. 501: that is to say, so much of the amount of tax deducted against shareholders of all three classes as was found by means of a proportionate sum to be attributable to that part of the Company's income which was, as above stated, subject to United Kingdom Income Tax, was repaid to the Company. Later, however, this repayment was confined to a similar proportion of the tax deducted against the holders of ordinary shares alone, a practice which was not disapproved by the House of Lords in *Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81; 22 T.C. 655. At a later stage, however, in 1940, in deference to certain observations made in that case, the proportion for repayment was calculated only in relation to the Company's directly assessed income from deposits, and the two categories of income upon which tax was deducted against the Company at the source were left out of account. The comparatively small sum thus tendered in repayment was refused by the Company.

As a result the Company, relying still upon the full application of the rule in *Gilbertson* v. *Fergusson,* claims to be entitled to repayment in respect of dividends on both classes of preference shares for the years ending 5th April, 1932, 1934, 1937, 1938, 1939 and 1940 (the years intervening and omitted are years in which no dividend was paid); and in respect of dividends on the ordinary shares for the year ending 5th April, 1940. It is claimed that the amount repayable should be calculated, in relation to all three categories of the Company's income that are charged in the United Kingdom, by the method already mentioned.

A Petition of Right has been presented accordingly. The Attorney-General has demurred to the Petition, and the demurrer has been upheld by the Courts below—Macnaghten, J.; and in the Court of Appeal, Scott, Goddard and du Parcq, L.JJ.

At the time when *Gilbertson* v. *Fergusson* arose and was decided, the Income Tax Acts of 1842 and 1853 were the principal ones in force. By the latter Act the more general terms of Schedule D in the Act of 1842 were replaced by granting the duties (so far as material to the present subject), "For and in respect of the annual profits or gains arising or accruing to "any person residing in the United Kingdom from any kind of property "whatever, whether situate in the United Kingdom or elsewhere . . ."— Section 2, Schedule D. Such a description includes (among many other

(Viscount Simon.)

matters), " all interest, dividends, or other annual payments payable out " of or in respect of the stocks, funds, or shares of any foreign company " . . . ", and by Section 10 of the Act of 1853, in which those words are found, provision was made for the levy of the tax on this particular kind of income. This was done, it is important to notice, not by assimilating the procedure to that which regulated the levy of tax on the profits of a United Kingdom company or even of its shareholders, but by applying *mutatis mutandis* the provisions of Section 2 of the Income Tax (Foreign Dividends) Act, 1842, which related to dividends or shares of annuities payable out of the revenues of any foreign State. By Section 10 of the Act of 1853, then, when any " dividends . . . in respect of the . . . shares of " any foreign company . . . have been . . . intrusted to any person in the " United Kingdom for payment to any persons . . . in the United King- " dom ", all persons " intrusted " with such payments or " acting therein " as agents " are required to do what was required of paying agents by the Income Tax (Foreign Dividends) Act, 1842; that is, putting it shortly, to render accounts, submit to assessments, and pay the duty on such dividends; and moreover (for Section 2 of the Income Tax (Foreign Dividends) Act, 1842, in its turn prays in aid the provisions of Section 93 of the Income Tax Act, 1842, relating to payments out of public revenues) to " set apart and retain " the amount of duty in making the payments to the persons entitled to receive them—in other words, to deduct the tax at the source; and Section 93 acquits and discharges the paying agents of the amount of the tax deducted as if it had been paid to the recipients of the dividends.

It is manifest from a consideration of the enactments thus summarised that the only power in the Revenue authorities to make repayment, or in the Courts to order it, in accordance with the rule laid down in *Gilbertson* v. *Fergusson*, was for repayment through the paying agents who had deducted the tax to the shareholders who were entitled to receive the dividends. The company whose shares they held was not liable to the deduction of the tax, nor entitled to any repayment of it; this was recognised by Cotton, L.J., in the passages of his judgment (7 Q.B.D., at pages 572–4; 1 T.C., at pages 519–20), which were referred to by Goddard, L.J., in the Court of Appeal in the present case(1), as well as by Bramwell, L.J., 7 Q.B.D., at page 569; 1 T.C., at page 516. Indeed, in *Gilbertson* v. *Fergusson*, the company was not a party; the appellant, Mr. Gilbertson, was a member and the representative of the London committee who acted as the paying agents.

So far as this point is concerned, the legal position has not been changed by the repeal of the Acts of 1842 and 1853 and their replacement by the Income Tax Act, 1918. The awkward arrangement of the relevant provisions has been but slightly modified by the Act of 1918, and their effect remains practically unaltered. By Rule 7 (1) of the Miscellaneous Rules of Schedule D, " Where—(*a*) any . . . dividends . . . payable . . . in respect of the . . . " shares . . . of any foreign or colonial company . . . are intrusted to any " person in the United Kingdom for payment to any persons in the United " Kingdom, the same shall be assessed and charged to tax under this " Schedule by the special commissioners "; and by Sub-rule (2) the provisions, commonly called the " Paying Agents Rules " of Schedule C, which are primarily concerned with interest, etc., payable out of any public revenue, are extended to the tax to be assessed and charged under Rule 7. Rule 3 of the Paying Agents Rules directs the person intrusted with payment, out

(1) *Ante*, at p. 237.

(Viscount Simon.)

of the moneys in his hands, to " pay the tax on the dividends on behalf " of the persons entitled thereto ", and he is to be acquitted in respect of all such payments. The substantive authority for charging dividends in respect of shares in a foreign or colonial company with tax is given by Paragraph 1 (*a*) (i) of Schedule D:—" Tax under this Schedule shall be charged " in respect of—(*a*) The annual profits or gains arising or accruing—(i) to any " person residing in the United Kingdom from any kind of property whatever, " whether situate in the United Kingdom or elsewhere "; and but for Rule 7 just quoted, such dividends would be charged by direct assessment on the recipient under Case V.

The provision of the Income Tax Act, 1918, by which deduction at the source is authorised in the case of dividends in respect of shares in companies resident in the United Kingdom, stands in sharp contrast to the Rules which relate to dividends of foreign companies. It forms the latter part of Rule 20 of the General Rules applicable to Schedules A, B, C, D and E. This Rule begins with an obviously necessary direction that a body of persons is to be charged on the full amount of its profits " before any dividend " thereof is made ", and continues by providing that " the body of persons " paying such dividend shall be entitled to deduct the tax appropriate " thereto." There is here, as has often been pointed out, no *duty* imposed on the company to deduct tax such as appears in Rule 7 of the Miscellaneous Rules of Schedule D, nor is it liable to any assessment for the tax on the dividends. The liability of the company to tax does not depend upon the distribution of dividends, nor has it any direct relation to their amount; it is based upon and ascertained according to the Cases, Rules and Sections that may be applicable to the particular kinds of income chargeable with United Kingdom tax that the company enjoys. Any direct assessment on the company would be made upon the total amount of its profits thus ascertained, whether the amount of the dividends distributed were greater or less, and even if no part of these actual profits were distributed at all.

These characteristics of Rule 20 are illustrated by the fact that the Legislature has found it necessary in the well-known provisions of Section 21 of the Finance Act, 1922 (the scope of which has been more than once enlarged), to impose the Sur-tax on the undistributed income of certain companies, and through them on their shareholders; and, on the other hand, in Section 20 of the Finance Act, 1940, to provide for the " grossing " of dividends paid without a full deduction of tax. For if the distribution of dividends by the company and the deduction of Income Tax against them on payment to the shareholders bore any necessary relation to the company's taxable profits, or if such deduction were obligatory, the gross amount of those profits would automatically be apportioned to each of the shareholders, and form part of his " total income " for the purposes of Sur-tax, as well as for the purpose of calculating his personal and other reliefs.

Rule 20 of the General Rules in the Act of 1918 is itself the successor of the middle portion of Section 54 of the Act of 1842, with this perhaps not insignificant alteration that, whereas Section 54 provides that the recipients " shall *allow* out of such dividends a proportionate *deduction* in respect of " the duty so charged ", Rule 20 in direct words entitles the body of persons which is charged on its profits " to *deduct* the tax appropriate thereto." Now, although the definition of " body of persons " in Section 237 of the Act of 1918 is sufficiently wide to cover a company not residing in the United Kingdom, the definition does not apply if " the context otherwise requires ",

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and it is manifest that Rule 20 is inapplicable to such a body. The tenor of that Rule (as well as of its precursor) when read as a whole indicates that it is intended to relate only to a company or other body which is chargeable to tax in the United Kingdom upon all its profits from whatever source derived. To come down to details, if Rule 20 were applicable to a foreign company, the company itself might deduct the tax against its shareholders in the United Kingdom, before remitting the net amount to the "person intrusted" as the channel for distribution here; the paying agent would be obliged to hand over to each shareholder the net amount thus allocated to him; and when an assessment came to be made on the paying agent under Rule 7 of the Miscellaneous Rules, he would be left with no money in his hands out of which to pay the tax. In order to obviate this and other difficulties and to reconcile the two Rules so that Rule 7 might be read as subordinate to Rule 20, Mr. Tucker, on behalf of the Suppliant, felt compelled to submit to the House an elaborate and ably drafted pair of provisos which he asked the House to read into Rule 7. It need only be said that Rule 7 is clear upon the face of it, and when read with the paying agents rules of Schedule C which it incorporates, is comprehensive enough to cover the whole ground with which it purports to deal; there is, therefore, no warrant for reading into Rule 7 words, and indeed whole sentences, which are not to be found there. Rule 7 of the Miscellaneous Rules and Rule 20 of the General Rules are not capable of being harmonized, for they are not *in pari materia*.

It is further argued that Miscellaneous Rule 7 and its precursor, Section 10 of the Act of 1853, are mere machinery provisions to prescribe a method of assessing and collecting at the source tax in relation to foreign dividends; and that is certainly the case. But the argument goes on to suggest that this machinery was introduced in order to implement the charge imposed a number of years earlier by Section 54 of the Act of 1842; and this suggestion is not well-founded. Section 54 did not impose a charge; it was itself a machinery provision, even more obviously so than General Rule 20 in the Act of 1918, for it begins and ends with directions as to the delivery of statements. The Act of 1842, however, provided no machinery for the collection of tax on dividends paid by foreign companies, other than as a result of direct assessment on individual shareholders, as in the case of other profits charged with tax under Case V; the Act of 1853 by Section 10 provided the much more convenient procedure by which the paying agent could be assessed, and compelled to pay the tax and deduct it against the recipient of the dividend. This, and not the filling up of any gap left in Section 54 of the Act of 1842, was the improvement effected by Section 10 of the Act of 1853.

Two further points remain to be noted in connection with the statutory enactments referred to in the course of the argument. General Rules 19 and 21 (like the provisions of the earlier Acts which they replace) deal with interest and "other annual payments"; they have no bearing upon dividends, even dividends upon preference shares, for dividends are not "annual "payments", their distribution depending in every instance upon a specific declaration by the company. Again, Sections 16 and 17 of the Income Tax Act, 1918, refer to allowances and deductions specifically granted by that Act and the Acts amending it, such as the personal allowances, life assurance allowances, allowances for children and so forth, and have nothing to do with the subject of the present appeal.

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From the foregoing consideration of the enactments in force at the time of the decision in *Gilbertson* v. *Fergusson*(1), and of those now current, it emerges clearly that the rule adopted in that case enures for the benefit of the shareholders and not of the foreign company itself. This conclusion is consistent with the decision of the House in *Barnes* v. *Hely-Hutchinson*(2) already referred to; for if the rule were for the benefit of the company, it could obviously make no difference that some of the shareholders are entitled to dividends at a fixed rate, and others only at a rate which is determined afresh at each declaration. Even on the assumption, therefore, that the rule is well founded, the Suppliant is not entitled to the benefit of it.

There is also a subsidiary point. Rule 7 of the Miscellaneous Rules of Schedule D provides, as has been seen, for the assessment of dividends from shares in foreign companies by the Special Commissioners under that Schedule. A right of appeal against an assessment under Schedule D by those Commissioners is granted by Section 147 of the Act of 1918 to the person assessed, who is in this case the paying agent; and no reason is apparent for excluding an assessment under Rule 7 from the general words of Section 147. If there is to be a repayment of tax assessed under Rule 7 it must be because the assessment was excessive, and it is the person assessed who is aggrieved. Where there is another and not less convenient remedy, a Petition of Right will not lie—see *Holborn Viaduct Land Co., Ltd.* v. *The Queen* (1887), 2 T.C. 228, where the claim was in some respects comparable with that made in the present case.

These observations might be sufficient to dispose of the present appeal, but the question whether the rule in *Gilbertson* v. *Fergusson* is in conformity with the Income Tax Acts has been fully argued both in this appeal, and in that of *Selection Trust, Ltd.* v. *Devitt* where it arises in a somewhat different form. The validity of that rule comes, therefore, for a third time under the scrutiny of the House, and it is right that that general question should now be decided once and for all.

Mr. Gilbertson and his colleagues were the representatives in England of the Imperial Ottoman Bank, a Turkish corporation whose principal business was carried on in Turkey, but which also carried on some business in the United Kingdom, though it was not resident here. It had shareholders in the United Kingdom, and paid their dividends through the agency of Mr. Gilbertson and his committee. In the material year the profits earned by the bank in this country, and remaining in the paying agent's hands, were sufficient in amount to pay the dividends of the shareholders in the United Kingdom without any remittance from Turkey, and the claim was made that, therefore, no charge at all could be imposed on Mr. Gilbertson in respect of the dividends. It was contended on his behalf that Section 10 of the Act of 1853 applied only to sums remitted from abroad in order to pay dividends here—see 7 Q.B.D., at page 562; 1 T.C., at page 514. This contention had commended itself to Kelly, C.B., who delivered a dissenting judgment in the Exchequer Division, (1879) 5 Ex. D., at page 76, but the other Judges of that Court barely allude to it, and none of the members of the Court of Appeal refers to it directly.

For the Revenue, on the other hand, it was conceded that some abatement or repayment should be made to the paying agent, although he had in the first instance been assessed (somewhat tentatively, it would appear) by the Special Commissioners upon the full amount of the dividends. Mr.

(1) 1 T.C. 501. (2) 22 T.C. 655.

(Viscount Simon.)

Dicey in the Court of Appeal claimed no more on behalf of the Revenue than that Income Tax was payable "on the portion of the dividends paid "to persons resident in England which arises from foreign profits", the bank itself being liable to tax on the whole of the English profits—see his argument at page 515 of 1 T.C. This claim succeeded, and the paying agent's appeal was dismissed. It is well to bear this fact in mind, for the majority in the Exchequer Division, and the Judges of the Court of Appeal, were not adjudicating upon a claim to charge the paying agent with tax in respect of the whole amount of the dividends he had paid to the shareholders, and consequently cannot be taken to have rejected such a claim.

What was no doubt in the minds of the Revenue and its advisers in taking this course, as well as of the Judges in approving it, was the view then prevailing that a company charged with and paying tax under Schedule D, for example in respect of profits accruing to it in the United Kingdom, was assessed, and paid the tax as agent on behalf of its shareholders. Thus, in the Court of Appeal, Brett, L.J., commenced his judgment by saying that the first question is, "Who are the persons intended to be charged "*ultimately* with the income tax?"—and further on his Lordship says: "It "would be so clearly unjust and obviously contrary to the meaning of the "statute that the Government should have the tax payable twice over by "the same person in respect of the same thing, that I should say it was "a necessary implication that that could not be right. Therefore if part "of the dividends in respect of which the income tax is payable is also in "respect of profits earned from a business in England, the tax on that part "would have to be paid twice over, which ought not to be; and as to that "there should be a deduction"—7 Q.B.D., at pages 569–70; 1 T.C., at pages 517–8. And Cotton L.J., says, 7 Q.B.D., at page 572; 1 T.C., at page 519, "That when duty is charged as against *the person* in one part "of the Act he is not to be charged again"—(this passage will have to be considered again in another connection); the final sentences of his Lordship's judgment are based on the same underlying position.

But that position is demonstrably wrong, and the contrary view has now prevailed for a quarter of a century. The law was thus declared by Viscount Cave in *Commissioners of Inland Revenue* v. *Blott,* [1921] 2 A.C. 171, at page 201; 8 T.C. 101, at page 136: "Plainly, a company paying income tax "on its profits does not pay it as agent for its shareholders. It pays as a "taxpayer, and if no dividend is declared the shareholders have no direct "concern in the payment. If a dividend is declared, the company is "entitled to deduct from such dividend a proportionate part of the amount "of the tax previously paid by the company; and in that case the payment "by the company operates in relief of the shareholder. But no agency, "properly so called, is involved."

That view has been acted upon in subsequent decisions, notably in that of the House of Lords in *Cull* v. *Commissioners of Inland Revenue,* [1940] A.C. 51, at page 56; 22 T.C. 603, at page 636, where Lord Atkin stated the law thus: "My Lords, it is now clearly established that in the case of a "limited company the company itself is chargeable to tax on its profits, "and that it pays tax in discharge of its own liability and not as agent "for its shareholders. The latter are not chargeable with income tax on "dividends, and they are not assessed in respect of them. The reason "presumably is that the amount which is available to be distributed as "dividend has already been diminished by tax on the company, and that

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" it is thought inequitable to charge it again. At one time it was thought " that the company in paying tax paid on behalf of the shareholder; but " this theory is now exploded by decisions in this House; and the position " of the shareholders as to tax is as I have stated it." And Lord Russell of Killowen, looking at the matter from a different angle, said, [1940] A.C., at page 62; 22 T.C., at page 640, that while the amount which the company " could have deducted as the ' tax appropriate thereto ' has been definitely " fixed at the standard rate for the year in which the amount of the dividend " became due, it is in no way comparable with the tax payable by the " company itself."

In face of the law thus established, it is impossible now to hold that a shareholder in a foreign company who suffers a deduction of tax in respect of his dividend under Rule 7 of the Miscellaneous Rules of Schedule D, or the paying agent who is charged on behalf of the shareholders and hands over the tax to the Revenue under the Paying Agents Rules incorporated by Rule 7, is paying tax a second time upon a dividend which has already been taxed. The *ratio decidendi* of *Gilbertson* v. *Fergusson*[1] is gone, and the rule adopted in that case is not consistent with the true facts, or with the law as now understood.

Further, it was assumed in that case that there was a general principle to be applied in construing the Income Tax Acts, that tax is not " payable " twice over by the same person in respect of the same thing ", as Brett, L.J., said (7 Q.B.D., at page 570; 1 T.C., at page 518); or as it was put by Cotton, L.J. (7 Q.B.D., at page 572; 1 T.C., at page 519): " I take it " there would be this implied exception, that when duty is charged as against " the person in one part of the Act he is not to be charged again under " another part applying no doubt in terms to him, but intended to include " those who have not been charged under the preceding part "; and again (7 Q.B.D., at page 574; 1 T.C., at page 520): " Where the dividend has " already been taxed then, by the necessary implication of the statute, the " duty is not again to be paid upon it ".

Now there have certainly been cases in which some such inference has been drawn from particular provisions of the Income Tax Acts, as was done, for instance, by the House of Lords from the Tenth Rule of Schedule A in the Act of 1842; Section 24 of the Customs and Inland Revenue Act, 1888, and the other enactments considered in *London County Council* v. *Attorney-General,* [1901] A.C. 26; 4 T.C. 265. But the opinions delivered by Lord Macnaghten and Lord Davey in that well-known case proceed upon a meticulous construction of those particular provisions and not upon the supposition of any general principle underlying them and remaining unexpressed. No such supposition is legitimate. In the words of the late Rowlatt, J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase: " In a taxing Act one has to look merely at what is clearly said. " There is no room for any intendment. There is no equity about a tax. " There is no presumption as to a tax. Nothing is to be read in, nothing is to " be implied. One can only look fairly at the language used "—*Cape Brandy Syndicate* v. *Commissioners of Inland Revenue,* [1921] 1 K.B. 64, at page 71; 12 T.C. 358, at page 366.

Looking fairly at the language used in Rule 7 of the Miscellaneous Rules of Schedule D in the Act of 1918 which governs the present case (as its

[1] 1 T.C. 501.

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predecessor, Section 10 of the Act of 1853, governed the case of *Gilbertson* v. *Fergusson*(1)), it is clear that a charge is there imposed upon dividends payable in respect of the shares of any foreign company without any reference to the sources of that company's income. There is nothing in either provision to imply that the charge upon the dividends is to be abated in proportion as the income is itself chargeable, or not chargeable, to British Income Tax. No general principle can be set up which would make any such abatement a "necessary implication of the statute." The thesis which lies at the root of the decision in *Gilbertson* v. *Fergusson* is unsound, and for this reason, as well as for the reasons previously given, this appeal fails.

Selection Trust, Ltd. v. *Devitt* (*H.M. Inspector of Taxes*)

The Appellant in this appeal, the Selection Trust, Ltd., is a British company resident in the United Kingdom and carrying on here the business of dealing in and holding investments. As such it holds, *inter alia,* shares in the common stock of a company incorporated in the United States and described in the Stated Case as "the American Metal Co., Ltd." (*sic*). This American company in its turn holds shares in five British companies trading in the United Kingdom, and the American company has received dividends on those shares after deduction by the respective British companies of the United Kingdom Income Tax appropriate thereto, as is authorised by Rule 20 of the General Rules. These dividends formed part of the profits of the American company out of which they paid dividends on their stock; such dividends were so paid to the Appellant Company on the shares which it held in the American company, without any deduction being made on account of United Kingdom tax.

The dividends thus paid to the Appellant Company were, of course, "income arising from possessions out of the United Kingdom", and, as such, might have been charged under Case V of Schedule D. But the Commissioners of Inland Revenue, exercising the option vested in them, included those dividends in the charge under Case I in respect of the trade carried on in the United Kingdom by the Appellant Company, and included the whole of those dividends in computing the amount of the charge. It does not appear whether the American company had any paying agent in the United Kingdom; but at any rate there has been no assessment upon any such agent, and Rule 7 of the Miscellaneous Rules of Schedule D has no application in this appeal.

In the circumstances stated, the Appellant Company seeks to have the benefit of the rule adopted in *Gilbertson* v. *Fergusson,* 1 T.C. 501. It claims that, from the computation of its profits for the purpose of Case I of Schedule D, there should be omitted a part of the dividends received from the American company proportionate to so much of the American company's profits as is derived in its turn from the dividends of the shares of the five British companies paid to the American company under deduction of British Income Tax. It is unnecessary to consider the actual figures which are to be found in the Case. Even if the rule in *Gilbertson* v. *Fergusson* were well founded (which for the reasons just given in the appeal of the *Canadian Eagle Oil Co., Ltd.,* it is not), it would be impossible in the present circumstances to say that the dividends paid by the American company to the Appellant

(1) 1 T.C. 501.

(Viscount Simon.)

Company have themselves borne British Income Tax, although it may be that the general profits of the American company out of which those dividends were paid would have been greater if there had been no deduction of British Income Tax on the dividends received by the American company from the five British companies in which they held shares. That consideration is far too remote to justify the assertion that, when the Appellant Company pays tax on its trading profits as they have been computed for the purpose of the charge under Case I of Schedule D, it has been called upon to pay the tax twice over in respect of the same thing. Such an extension of the rule in *Gilbertson* v. *Fergusson*(1) would be contrary to the reasoning of Lord Atkin and Lord Wright in *Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81; 22 T.C. 655.

Consequently, even upon this ground alone, the judgments of Macnaghten, J., and of the Court of Appeal, given when it was still assumed that *Gilbertson* v. *Fergusson* was good law, were right and should be approved. But, as has been decided in the appeal of the *Canadian Eagle Oil Co., Ltd.*, the rule there adopted can no longer be supported, and the appeal fails.

I move that these two appeals be dismissed with costs.

Lord Thankerton.—My Lords, I agree with the opinion of my noble and learned friend on the Woolsack, which has just been delivered, and which I had earlier opportunity of considering. It expresses fully my views in its reasons and its conclusions, and I will only add observations on two points of crucial importance in these cases.

In the first place, in the first of these cases, it appears to me that the contentions of the Appellant Company require their being able to invoke the provisions of Rule 20 of the General Rules applicable to all Schedules in their favour, but, in common with my noble and learned friend, I am of opinion that it does not apply to the case of a non-resident body of persons, who are beyond the range of British taxing Acts, and are therefore outside the opening words of the Rule.

In the second place, I am of opinion that the principle embodied in the decision in *Gilbertson* v. *Fergusson* is so wrong, and might be so far-reaching, that, despite the lapse of time, it should not be left uncorrected. That principle, in my opinion, is to be found in the judgment of Brett, L.J., afterwards Lord Esher, in 7 Q.B.D. 562, at page 570; 1 T.C. 501, at page 518: "Now it may be true that there are no specific words in this statute "which point out that the Government are not to receive the tax twice "over, but it would be so clearly unjust and obviously contrary to the "meaning of the statute that the Government should have the tax payable "twice over by the same person in respect of the same thing, that I should "say it was a necessary implication that that could not be right." It is clearly beyond the province of the Courts either to correct hardship or afford justice by an implication which is not based on the language of the statute.

Lord Russell of Killowen.—My Lords, the main question which is raised in these two appeals, though from a different angle in each, may, I think, be stated thus. In taxing a person resident in the United Kingdom in respect of his income arising from dividends on shares in a foreign company (i.e., in respect of income arising from possessions out of the United Kingdom under Case V of Schedule D), should relief from taxation be given as regards

(1) 1 T.C. 501.

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so much of that income as can be shown to have already borne tax in the United Kingdom? The claim to such relief is asserted in each appeal, but in the first appeal the benefit of the relief is claimed by the foreign company, while in the second appeal it is claimed by its shareholder, who is taxed under Case V.

The ground upon which the relief is claimed is the alleged necessity of avoiding what is alluded to as "double taxation." The normal meaning of double taxation is that the same person pays tax twice on his income; but the present relief is claimed not upon that footing, but upon the theory that if the income of a foreign company, out of which a dividend is paid to a shareholder resident here, can on being analysed and traced to its origins be shown to have at some time, as to some portion thereof, borne tax in the United Kingdom, then if the shareholder is taxed on the full amount of the company's income which is distributed to him in dividend, double taxation will have taken place as regards a portion of the income distributed to him as dividend, namely, on so much as can be said to arise from profits made in the United Kingdom which have already been charged to tax.

The theory that this species of double taxation gives rise to a claim to exemption from, or repayment of, tax must rest on some express enactment in the Income Tax Acts, or on some principle to be implied from those Acts, or to be found in the common law. Express provision there is none. On principle, double taxation in the strict sense which I have indicated would, in default of express provision, no doubt be wrong: the Crown may choose the Case under which it taxes the subject, but it cannot tax the subject in respect of his income under one Case, and tax him again in respect of it under another. But I am unable to state, or justify, any principle (to be implied from the Acts or existing at common law) to support the view that it is illegal for the Crown to levy and retain the tax on the full amount of its profits distributed in dividends declared by a foreign company in favour of a shareholder resident here, because some part of the income out of which those dividends have been declared can be traced back to a source in which it has been taxed in the United Kingdom.

That some such principle, giving rise to the present claims, did exist was decided many years ago in *Gilbertson* v. *Fergusson*, 5 Ex. D. 57; 7 Q.B.D. 562; 1 T.C. 501, and was accepted and acted upon by the Revenue authorities until recently. Its correctness has now been challenged. The Court of Appeal in the present cases were bound by that decision, but they decided the present appeals in favour of the Crown on other grounds. In your Lordships' House, however, *Gilbertson* v. *Fergusson* is open to review. Its correctness has been challenged before us and we cannot, I think, avoid the task of determining whether or not it should, nothwithstanding its respectable age of 64 years, be overruled. There is no valid reason why, if we think that it was wrongly decided, it should not be overruled. Its long standing has only resulted in some taxpayers reaping a benefit for a time, during which the Revenue has suffered loss. No title has been created or affected by the decision, nor will any title be weakened or jeopardised by its being overruled.

This theory about double taxation, in the circumstances mentioned, has no doubt arisen from the fact that, in the legislation relating to Income Tax, a departure has been made in one respect from the consequences which should logically have followed from the fact that a limited company is a

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legal entity separate and distinct from the individuals who are the owners of its share capital. Logically there would be no answer to the view that a company's income is one taxable income, and that the profits which it distributes to its shareholders out of its taxed income in dividends is another and new income, taxable again in the shareholder's hands. But as was said by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ltd.*, [1923] A.C. 744, at page 769; 8 T.C. 481, at pages 518–9: "Their taxation would "seem to be logical, but it would be destructive of joint stock company "enterprise"; and he points out that the Act of 1842 apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a partnership, "so that the payment of income tax by a company would "discharge the quasi-partners." The provisions of the 1842 Act, which result in this fictional treatment of the relationship between a joint stock company and its shareholders, are now to be found in Rules 1 and 20 of the General Rules. Under Rule 20 the company, having been charged on the full amount of its profits and gains, is entitled to deduct tax from the dividends which it pays, the tax which it can so deduct being now (see Finance Act, 1927, Section 39 (1)) tax at the standard rate for the year in which the dividend is declared, irrespective of the rate or rates at which tax was paid by the company on the profits and gains out of which the dividend is being paid. The procedure indicated by Rule 20 is, accordingly, an artificial device by means of which a shareholder's income from dividends of a joint stock company is protected from being treated as a new taxable income in his hands, but as a result of which the company, in shifting the burden on to the shoulders of the shareholder, may well recoup itself a larger sum than the Revenue had received from it. As Lord Atkin pointed out in *Cull* v. *Commissioners of Inland Revenue,* [1940] A.C. 51, at page 56; 22 T.C. 603, at page 636, the shareholder pays no tax, in the sense that the Revenue receives nothing from the shareholder and receives no tax except what it has already received from the company. The shareholder, however, bears the burden of what the company has paid (and perhaps more), and has certainly paid tax by deduction within the meaning of Section 29 of the Income Tax Act, 1918.

But to contend that the same considerations which prompted (as regards resident companies) the provisions of the 1842 Act, now represented by Rule 20, apply, or should be applied, to the case of foreign companies is quite another matter, and it is the examination of this question which must determine whether *Gilbertson* v. *Fergusson*[1] was rightly decided.

Certain propositions which were discussed in the course of the arguments before us appear to me to be beyond question. (1) Dividends paid by a foreign company and received in the United Kingdom constitute income arising from possessions out of the United Kingdom, and are taxable under Case V of Schedule D. (2) Rule 20 does not enable a foreign company to deduct any British Income Tax from dividends paid by it direct to a shareholder resident in the United Kingdom. The Rule (in its application to a limited company) envisages a charge on the full amount of its profits before payment of a dividend to its shareholders, followed by a payment of a dividend to its shareholders, from which the company may deduct tax at the standard rate on the whole dividend. (3) If the foreign company (as is most probable) does not pay dividends direct to shareholders resident in the United Kingdom, it must resort to Rule 7 of the Miscellaneous Rules applicable to Schedule D,

(1) 1 T.C. 501.

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which makes applicable the Rules (under Schedule C) as to interest, etc., with the payment of which persons, other than the Bank of England, the Bank of Ireland and the National Debt Commissioners, are intrusted. Under No. 3 of those Rules there is no escape from the position that tax on the full amount of the dividend has to be paid on behalf of and borne by the shareholder.

These appeals, then, resolve themselves into cases of a taxpayer resident here taxed under Case V of Schedule D in respect of dividends paid by a foreign company to a person resident in the United Kingdom (in the one case) in the manner indicated in Rule 7, and (in the other case) direct without deduction of tax. They are the exact cases contemplated by Lord Phillimore in the *Sewing Cotton* case ([1923] A.C., at page 770; 8 T.C., at page 519) when he said: " But the British taxpayer may be receiving annual " sums from foreign possessions and thus become liable to be assessed and " taxed . . . according to the fifth case of Schedule D. And it matters not " what the foreign possession is, whether it is land or goods or shares in a " foreign company. The periodic sums which are so remitted to him . . . " are liable to assessment and taxation, not because they are dividends or " shares in foreign companies, but because they are remittances from foreign " sources. The officers of the Crown do not know and do not care what " is the character of the sources from which the money comes." And I would myself add that I am not aware of any means by which those officers could insist on a disclosure of, or verify the pedigree of, sources of the income out of which a foreign company was paying any particular dividend. The case is simply that such income is liable to assessment and taxation under Case V of Schedule D; and since the tax legislation contains no provision in reference to the case corresponding to Rule 20, it must be treated as new income in the hands of the shareholder, and no question of the alleged or any other double taxation can arise.

The case of *Gilbertson* v. *Fergusson*(1) was a similar case. The facts were more complicated, and some confusion is apparent in the judgments between the position of the London agency as carrying on the bank's business in the United Kingdom and its position as the person intrusted with the payment of dividends to persons in London, within Section 10 of the Income Tax Act, 1853, the provision then in force corresponding to the before-mentioned Rule 7. But the essence of the decision was as follows. The London agency had been assessed on the full amount of the dividends paid in London. It was held that, since those dividends were payable out of the general earnings of the bank, which were composed partly of profits made in the United Kingdom (which had already been taxed under Case I of Schedule D) and partly of profits made elsewhere, the agency should only be assessed under Section 10 upon so much of the dividends as were paid out of the profits made elsewhere than in the United Kingdom. If that decision is right, a claim to some relief and repayment would arise in the present cases. In my opinion, however, the decision was wrong. It was based upon the view, which I think erroneous, that some general principle was to be found in the taxing Acts, either expressly or by implication, which prohibited double taxation in the sense which I have indicated. Brett, L.J., calls it " the meaning of the statute(2)", while Cotton, L.J., speaks of " the neces- " sary implication of the statute(3)". To exclude the power to exact such double taxation you must find some provision to that effect. As regards a company resident here and its shareholders, Rule 20 prevents what the shareholder receives from the company in dividend being treated as new taxable

(1) 1 T.C. 501. (2) *Ibid.*, at p. 518. (3) *Ibid.*, at p. 520.

(Lord Russell of Killowen.)

income in his hands; but Rule 20 does not apply to a foreign company, and there is nothing in the tax legislation to justify the view that income (whatever its pedigree) received by a person resident here from his shareholding in a foreign company, should not be taxed as new income in his hands under Case V of Schedule D.

I would dismiss both appeals.

Lord Macmillan.—My Lords, encouraged by a recent success in an affair of outposts (*Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81; 22 T.C. 655), the Inland Revenue authorities have now in these appeals launched a frontal attack on what is known as " the rule in *Gilbertson* v. *Fergusson* " ((1879) 5 Ex. D. 57; (1881) 7 Q.B.D. 562; 1 T.C. 501). Speaking of *Gilbertson* v. *Fergusson,* Lord Atkin said: " This House would hesitate long . . . before " infringing a decision of such long standing and so often acted upon "— [1940] A.C., at page 89; 22 T.C., at page 672. Despite this admonition, your Lordships are invited to hesitate no longer and boldly to declare that the decision was wrong and must be overruled.

The problem may be stated in general terms. A company not resident in the United Kingdom, which I shall call " the foreign company ", derives part of its income from business carried on in the United Kingdom, on the profits of which it pays Income Tax by direct assessment on its agents here, or from dividends paid to it by companies in the United Kingdom in which it has shares and from which dividends Income Tax has been deducted. The total income of the foreign company is thus composed in part of income which has borne Income Tax either by direct assessment or by deduction. The foreign company also happens to have shareholders resident in the United Kingdom. To these shareholders it pays dividends out of its total available income, either individually or by transmitting to agents in the United Kingdom a block sum sufficient to pay all dividends due to its shareholders in the United Kingdom, intrusting to these agents the task of distributing to each individual shareholder his appropriate dividend. The dividends distributed to shareholders in the United Kingdom are thus seen to be paid out of moneys which in part have already borne Income Tax, to the extent of the proportion which the part of the company's income which has borne Income Tax bears to its total income. Consequently, if Income Tax is exacted in respect of the full amount of the dividends paid by the foreign company to its shareholders in the United Kingdom, this is, *pro tanto,* to subject the same income to double taxation. So ran the successful argument in *Gilbertson* v. *Fergusson,* in which it was held that proportional relief must be given.

It is important to consider the circumstances in which that decision was pronounced. There the foreign company, the Imperial Ottoman Bank, earned profits in London from business transacted there. On these profits it paid Income Tax through its London agency. These profits were merged with its profits made outside the United Kingdom, and from its total profits thus ascertained dividends were paid to its shareholders in the United Kingdom. The profits earned in the United Kingdom were sufficient in amount to pay the whole dividends to the United Kingdom shareholders, and, as Income Tax had already been paid on the profits earned in the United Kingdom, it was contended that no further Income Tax was exigible in respect of the dividends paid to United Kingdom shareholders. This con-

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tention failed because the dividends paid to the United Kingdom shareholders were not paid solely out of the profits earned in the United Kingdom, but were paid out of the total profits of the foreign company, both those earned within and those earned outside the United Kingdom. So far as the dividends paid to United Kingdom shareholders were attributable to profits earned out of the United Kingdom, no Income Tax had been paid thereon, and the claim of the Inland Revenue, which succeeded, was that to this proportional extent the dividends paid to United Kingdom shareholders were liable to Income Tax. I note particularly the passage in the judgment of Pollock, B., where he states, 5 Ex. D., at page 74: "To the extent that the amount "paid by way of dividend consisted of profits earned in the United "Kingdom, the commissioners admitted that this amount, having been taxed "once as profits, was not further liable." In view of this admission and of the way in which the case was presented, it is not surprising that the decision took the form which it did. The Inland Revenue authorities make no such admission in the present cases, and they submit that they made an error in law in so admitting in *Gilbertson* v. *Fergusson*(1).

I pause to disencumber the question of a complication which, in my view, has no material bearing upon it. In *Gilbertson* v. *Fergusson* the money necessary to pay the dividends to the United Kingdom shareholders was intrusted in block (so it was held) to paying agents in London for distribution. As part of the general machinery of Income Tax collection at the source, it is provided that where a foreign company adopts this convenient course, then the paying agents in the United Kingdom shall be accountable for tax on the dividends in block. But it is expressly declared in the statute that the paying agents "pay the tax on the dividends on behalf of the "persons entitled" to the dividends. In *Gilbertson* v. *Fergusson* the appeal was taken on behalf of the London agents of the Imperial Ottoman Bank, who had been assessed to tax on the sum intrusted to them for payment of the dividends to the United Kingdom shareholders, and the question does not appear to have been discussed as to who were properly entitled to the relief which the Court found to be due. In the first of the two present appeals, it is the foreign company which as suppliant craves repayment to itself or to its London agents of the tax alleged to have been doubly assessed. In the other present appeal, it is the United Kingdom shareholder in a foreign company who claims relief in respect of tax on dividends received direct from the foreign company, in so far as these dividends have been paid by the foreign company out of dividends received by it under deduction of tax from United Kingdom companies. If it were necessary to express an opinion as to the proper party entitled to relief, if any, I should agree with the view of Goddard and du Parcq, L.JJ., that it would be the United Kingdom shareholder who would be entitled to the relief and not the foreign company. This in itself would be a sufficient ground for dismissing the first of these appeals.

So far as the question of principle is concerned, it seems to me immaterial whether the United Kingdom shareholder in a foreign company receives his dividends direct from the foreign company without deduction of tax and is then taxed directly on the amount thereof, or receives his dividends from agents in the United Kingdom of the foreign company who have been intrusted with the requisite funds, and having paid tax thereon on behalf of the shareholders, pay their dividends to them less tax. This is all merely

(1) 1 T.C. 501.

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machinery. The point is whether, in the type of case represented by *Gilbertson* v. *Fergusson*(1) and the appeals now before the House, the same income within the meaning of the Income Tax Acts is really being subjected to double taxation.

The key to the problem is to be found in the fundamental distinction drawn in the Income Tax code between income arising from sources in this country and income arising from sources outside the United Kingdom. The income of a British taxpayer, so far as earned or received from sources within the United Kingdom, is dealt with in one way, and his income so far as received from sources abroad is dealt with in another way; and for the very good reason that sources of income in this country are subject to the jurisdiction of the Government of this country, which can enact laws and make regulations as to returns, accounts and investigations which it has no power to do in respect of sources of income outside the United Kingdom. So far as a British taxpayer has a source of income arising from possessions out of the United Kingdom, the revenue laws of this country have no operation on that source. It is only in so far as income from that foreign source is received by, or in some cases credited to, a resident within the United Kingdom that it comes within the purview of British taxation at all. The British Revenue authorities have no means of analysing or investigating such income from foreign sources. All that they have power to ascertain from the British taxpayer is the amount of his income derived therefrom. Thus, in the case of income from stocks, shares or rents abroad, the tax is directed to be computed on the full amount thereof, and with that full amount alone are the British Revenue authorities concerned. They have no power to pursue inquiries abroad as to the prior history or provenance of such income. " The officers of the Crown do not know and do not care " what is the character of the sources from which the money comes "—per Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ltd.*, [1923] A.C. 744, at page 770; 8 T.C. 481, at page 519.

The topic has been darkened rather than illumined by a false analogy which it has been sought to draw with the case of the taxation of the income of United Kingdom companies and their shareholders. It is true, as Lord Phillimore points out in the case just cited ([1923] A.C. at page 769; 8 T.C., at pages 518–9), that in the system of taxation in this country a company and its shareholders are for economic reasons treated as if they constituted a partnership having a single income, the tax on which is paid by the company, the shareholders being thereby discharged of liability to tax (apart from Sur-tax) on their dividends or shares of the company's income. The company recoups itself by deducting Income Tax from the dividends which it pays to its shareholders. The system is highly artificial, for the tax is deducted at the standard rate obtaining when the dividends are paid, while the profits out of which the dividends are paid may have been earned in previous years and have borne tax at a higher or a lower rate, and a company does not usually distribute in dividends in any one year all the profits of that year on which it has paid tax. But this is a domestic expedient limited in its operation to this country. It has no application to foreign companies. A foreign company paying dividends to its shareholders within the United Kingdom is not subject to British revenue laws or practice. It cannot pay dividends to its United Kingdom shareholders under deduction of a tax of which it has no knowledge and to which it is not subject except in so far

(1) 1 T.C. 501.

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as it derives income from a source in this country. It pays its dividends to its United Kingdom shareholders either directly or through paying agents in this country and then leaves our domestic revenue laws to operate upon the money so transmitted.

The so-called " rule in *Gilbertson* v. *Fergusson* "(1) is open, in my opinion, to at least one insuperable objection. It is agreed that the relief which it gives is not relief against the whole tax exigible on the foreign dividends, but only to the extent of the proportion which that part of the foreign company's income which has borne British tax bears to the total income of the foreign company, for the British shareholder's dividend is only in part paid out of income which has borne tax. But how is this proportion to be ascertained? The foreign company doubtless has quite different rules for arriving at its total profits from the artificial rules which apply to the ascertainment of the profits of a British company. One essential factor in the ascertainment of the extent of the relief under the rule in *Gilbertson* v. *Fergusson* is thus entirely beyond any means of criticism and control on the part of the Revenue authorities. This seems to me a quite untenable position. Incidentally I may point out that, if the foreign company were to pay dividends to its British shareholders under deduction of tax, the amount to be deducted would be dependent on this same unverifiable factor.

The result of these considerations is to satisfy me that, for the purposes of Income Tax, the income of a foreign company and the income received from it in dividends by its British shareholders are not to any extent or effect one and the same income, but are two distinct incomes. The fact that the foreign company's total income is in part composed of British dividends which have borne tax by deduction is entirely irrelevant to the question of the tax to be paid by a British shareholder on the dividends received by him from the foreign company. There is no such identification of the British shareholder with the foreign company as there is between a British shareholder and a British company, and the attempted analogy is only misleading. The income of the foreign company and the income received in dividends from it by its British shareholder are in our revenue law the incomes of two different persons, and there can thus be no room for any invocation of the rule against double taxation, which applies only against taxing twice the same income of the same person.

The principle of the decision in *Gilbertson* v. *Fergusson,* already undermined by *Barnes* v. *Hely-Hutchinson*(2), is thus, if I am right, finally exploded. If it is relegated to the limbo of cases overruled, the whole basis of the arguments of the Appellants in both these appeals goes with it. They should both, in my opinion, be dismissed.

Lord Simonds (read by Lord Macmillan).

Canadian Eagle Oil Co., Ltd. v. *The King*

My Lords, this is an appeal from an Order of the Court of Appeal dismissing an appeal by the Appellant from an Order of Macnaghten, J., whereby a Petition of Right presented by the Appellant was on demurrer dismissed with costs and the demurrer allowed.

The revelant facts do not appear to be in dispute, but it is necessary for your Lordships to consider, in regard to them, certain provisions of the law relating to Income Tax and certain cases which have been recently decided

(1) 1 T.C. 501. (2) 22 T.C. 655.

(Lord Simonds.)

in this House. I do not hesitate to say at the outset that in my opinion your Lordships, having done so, must refuse to admit that the case of *Gilbertson* v. *Fergusson,* 7 Q.B.D. 562; 1 T.C. 501, upon which so much argument has turned, can any longer be regarded as a binding authority.

The Appellant is a corporate body, incorporated in the Dominion of Canada under the laws of that Dominion. It has never been a person residing within the United Kingdom within the meaning of the Income Tax Acts. Its income for the years material to this appeal consisted either wholly or partly of income which bore United Kingdom Income Tax either by deduction or by direct assessment. Such income fell into three classes: (*a*) dividends on shares owned by the Appellant in British companies resident in the United Kingdom which were received under deduction of tax; (*b*) interest on loans made by the Appellant to British companies resident in the United Kingdom which was also received under deduction of tax, and (*c*) interest on money deposited with banks in England by the Appellant's agents on its behalf, which was charged with tax by direct assessment on the Appellant's agents under the provisions of Case III of Schedule D of the Income Tax Act, 1918.

The authorised and issued capital stock of the Appellant has at all material times consisted of, (*a*) cumulative first preference shares, which are entitled only to a dividend at a fixed and predetermined rate; (*b*) participating preference shares which are entitled to a dividend at a fixed and predetermined rate but are also entitled in certain circumstances to a further dividend, and (*c*) ordinary shares. Dividends have from time to time been paid by the Appellant upon one or more of the three classes of shares through the Midland Bank, Ltd., which I will call " the bank ", and, in accordance with Rule 7 of the Miscellaneous Rules applicable to Schedule D, were assessed to tax by the Special Commissioners in the hands of the bank, who deducted it at the appropriate rate from so much of the dividends as were paid to persons resident in the United Kingdom, after making any due adjustment in respect of Dominion tax relief allowance, and duly paid over to the Commissioners of Inland Revenue the amount of tax so deducted.

Upon these facts the Appellant makes a claim which is thus stated in its formal case. It contends that " there has been a double charge of United " Kingdom Income Tax upon a portion of its income, in that in addition " to the tax suffered, either by deduction or direct assessment, upon the " whole of the Appellant's income which arose in the United Kingdom, " there has also been paid to the said Commissioners, through the bank, " further sums by way of tax upon so much of that income as was dis- " tributed to British resident shareholders in dividend." Upon this contention the Appellant proceeds to base the further contention " that relief " from such double charge must be given, and that, in the circumstances " of the present case, it is the Appellant itself who is entitled to such relief."

My Lords, I propose briefly to examine this claim in the light of the express provisions of Income Tax law before I turn to the case upon which the Appellant relies, and first I will refer to the provisions under which the Appellant itself paid tax.

Under Schedule D of the Income Tax Act, 1918 (to which I refer as " the Act "), tax is chargeable " in respect of—(*a*) The annual profits or " gains arising or accruing—(i) to any person residing in the United Kingdom " from any kind of property whatever, whether situate in the United King- " dom or elsewhere . . . (iii) to any person, whether a British subject or not,

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"although not resident in the United Kingdom, from any property whatever "in the United Kingdom, or from any trade, profession, employment, or "vocation exercised within the United Kingdom; and (*b*) All interest of "money, annuities, and other annual profits or gains not charged under "Schedule A, B, C or E, and not specially exempted from tax".

Rule 1 of the General Rules applicable to Schedules A, B, C, D and E provides that, "Every body of persons shall be chargeable to tax in like "manner as any person is chargeable under the provisions of this Act"; and Rule 20 of the same Rules provides that, "The profits or gains to be "charged on any body of persons shall be computed in accordance with "the provisions of this Act on the full amount of the same before any "dividend thereof is made in respect of any share, right or title thereto, "and the body of persons paying such dividend shall be entitled to deduct "the tax appropriate thereto." It may be noted in passing that the words "appropriate thereto" are, by virtue of Section 39 (1) of the Finance Act, 1927, to have effect as if they were " at the standard rate for the year in "which the amount payable becomes due". Rules 19 and 21 of the same Rules provide, as a matter of right or of obligation, for the deduction of tax from any yearly interest of money, annuity, or any other annual payment by the person making such payment. It is unnecessary to state these Rules more fully. From these provisions it follows that the Appellant, in respect of its three sources of income to which I have referred, paid tax either by deduction under Rule 20 or by deduction under Rule 19 or Rule 21, or by direct assessment and payment. Deduction, assessment and payment were alike unchallenged and unchallengeable.

Next I refer to the tax suffered by the shareholders in respect of their dividends. Under Schedule D, Case V, tax is chargeable "in respect of "income arising from possessions out of the United Kingdom". This tax is chargeable only upon persons resident in the United Kingdom. Dividends of the Appellant are income arising from possessions out of the United Kingdom within this Case. It follows that the shareholders of the Appellant who are resident in the United Kingdom are chargeable to tax in respect of their dividends, and they would be directly assessable and chargeable but for the machinery provision to which I next refer. It is provided by Rule 7 of the Miscellaneous Rules applicable to Schedule D (which replaces and substantially reproduces Section 10 of the Income Tax Act, 1853), (1) that "Where—(*a*) any interest, dividends, or other annual payments payable out of "or in respect of the stocks, funds, shares, or securities of any foreign or "colonial company . . . are intrusted to any person in the United Kingdom "for payment to any persons in the United Kingdom, the same shall be "assessed and charged to tax under" Schedule D by the Special Commissioners; and (2) that, "All the provisions of Schedule C relating to the tax "to be assessed and charged in respect of dividends payable out of any "public revenue" (other than as therein mentioned) "and intrusted to any "person" (other than as therein mentioned) "for payment to any persons "in the United Kingdom, shall extend to the tax to be assessed and charged "under this rule." This takes me to the relevant Rules under Schedule C. They need not be stated in detail. Rule 1 provides for the persons who are intrusted with the payment of the dividends therein mentioned delivering to the Commissioners of Inland Revenue certain accounts and particulars; Rule 2 for the assessment and charge of the dividends by the Special Commissioners, and for notice of the assessment and charge being given to the

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person intrusted with payment. Rule 3 provides that "The person intrusted "with payment shall out of the moneys in his hands pay the tax on the "dividends on behalf of the persons entitled thereto, and shall be acquitted "in respect of all such payments," and that the provisions of the Act shall apply as in the case of dividends payable out of the public revenue of the United Kingdom. Rule 5 provides for remuneration by the Treasury of the person intrusted with payments, who has thus in effect acted as a Collector of Taxes. It is perhaps worth referring to Rule 7 of the Rules as to interest payable out of the public revenue (referred to in Rule 3 above), which provides that the retaining of this amount (i.e., of tax) out of interest, annuities, or dividends by the Bank of England shall be deemed a payment of the tax by the persons entitled to such interest, annuities or dividends. This reinforces what is already sufficiently clear, that the payment of tax by the persons intrusted with the payment of dividends is a payment on behalf of the shareholder. It is a matter with which the foreign company paying the dividend has nothing whatever to do. Whether it pays its dividend direct to its shareholders or to paying agents for distribution to its shareholders, it fades from the fiscal scene as soon as the payments are made: more accurately, it has never come on to the stage at all except so far as its own income may, directly or by deduction, have suffered British Income Tax.

Here then are the simple facts. The Appellant has under Paragraph 1 and Case III of Schedule D paid tax upon some part of its income: it has distributed dividends to its shareholders of whom some are resident in the United Kingdom: in respect of such dividends tax has been paid by such shareholders under Case V of Schedule D: some part of such dividends is attributable to income upon which tax has been paid by the Appellant under Paragraph 1 and Case III: therefore the Appellant maintains that it is entitled to be repaid a proportionate part of the tax which it has paid.

This claim, my Lords, is not based on any express provision of the Act. Indeed, as may be plainly seen from my recital of the relevant provisions, it gets no support from them. It is founded on the authority of *Gilbertson* v. *Fergusson*(1) which was decided over sixty years ago; upon a long course of practice by the Revenue authorities, and upon an alleged overriding principle of revenue law, which (whatever the statute appears to say) precludes the same income in the same hands being taxed twice over, and for this purpose identifies as the same hands the hands of a company and its shareholders.

I must first deal with *Gilbertson* v. *Fergusson*. I respectfully concur in the view of the Court of Appeal in the present case that it was not open to them to treat the case as overruled, though I should have shared their difficulty in determining how much of it was left standing. I must concur also in the view expressed by Lord Atkin in *Barnes* v. *Hely-Hutchinson*(2) that this House will hesitate long before overruling a case which has stood for so long. But, if I find that it is based on a line of reasoning which is not really consistent with the law as laid down in this House, I must conclude that it ought to be expressly overruled.

The relevant facts in *Gilbertson's* case were these. The Imperial Ottoman Bank, a foreign corporation, not resident in the United Kingdom, carried on business and earned profits outside the United Kingdom. It also had an agency in London which there carried on a branch of its business. The

(1) 1 T.C. 501. (2) 22 T.C. 655, at p. 672.

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dividends of the bank were payable at the option of its shareholders either abroad or by the London agency in London. In a particular year the profits earned by the business carried on in London by the London agency sufficed to enable the agency to pay all the dividends payable in London, without recourse to the bank's profits which were made abroad or to funds held abroad. The London agency was assessed to tax under Case I of Schedule D of the Income Tax Act, 1842, in respect of the profits earned by the bank in the United Kingdom. The validity of this assessment could not be and was not challenged. Then, however, upon payment of the dividends payable in London (which was intrusted to the London agency), two further assessments were made on the agency, which were contested by Gilbertson as its representative. One of them was held to be invalid and need not be examined. The other was on the London agency as the person intrusted with the payment of the dividend of a foreign corporation under Section 10 of the Income Tax Act, 1853 (the precursor of the present Rule 7 of the Miscellaneous Rules). On this it was held that, under the cited Section, the London agency was liable to be assessed in respect of the dividends paid in the United Kingdom, but that since those dividends were payable out of the general income of the bank, which consisted of profits made partly in the United Kingdom and partly elsewhere, and the London agency had been assessed to tax under Case I of Schedule D on the profits earned in the United Kingdom, the agency ought to be assessed under Section 10 of the Income Tax Act, 1853, only upon so much of the dividends as were not paid out of the profits arising in the United Kingdom which had themselves been taxed under Case I.

Two things in this case deserve attention. First, that the agency had a dual capacity; it was through it that the bank carried on its London business, and it was to it that payment of the dividends was intrusted; it was in the latter capacity that it was assessed and challenged the assessment under Section 10 of the Act of 1853. Secondly, that it would appear from the argument of counsel that the principle of the relief to which the agency was held to be entitled was conceded by the Crown. It is I think clear that, the challenged assessment being under Section 10 of the Act of 1853 and being, therefore, an assessment upon the agency on behalf of the shareholders, it could only be on their behalf that the assessment was challenged. So far, then, as the case is to be regarded as an authority, it decides that in such circumstances the shareholders are entitled to relief, and gives no support to the claim of the Appellant that a foreign company which has been properly assessed under Schedule D, Paragraph 1 and Case III, is entitled to relief because certain of its shareholders are assessed to tax under Schedule D, Case V. This is alone sufficient to dispose of the Appellant's claim so far as it rests on *Gilbertson's* case[1].

But, my Lords, as there is another case before the House, in which a similar claim is made by or on behalf of a shareholder, it is desirable to deal more fully with the matter. To me it seems that the decision in *Gilbertson's* case is fundamentally wrong. As Lord Atkin said of the case in *Barnes* v. *Hely-Hutchinson,* [1940] A.C. 81, at page 89; 22 T.C. 655, at page 672: " It seems to me plain that the reasoning proceeded on the " theory then prevailing that the company paid tax on its profits on behalf " of its shareholders ". The same learned Lord had already said in *Cull* v.

(1) 1 T.C. 501.

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Commissioners of Inland Revenue, [1940] A.C. 51, at page 56; 22 T.C. 603, at page 636: " It is now clearly established that in the case of a " limited company the company itself is chargeable to tax on its profits, " and that it pays tax in discharge of its own liability and not as agent for " its shareholders. The latter are not chargeable with income tax on divi-" dends, and they are not assessed in respect of them. The reason presumably " is that the amount which is available to be distributed as dividend has " already been diminished by tax on the company, and it is thought to be in-" equitable to charge it again. At one time it was thought that the company " in paying tax paid on behalf of the shareholder: but this theory is now " exploded by decisions in this House: and the position of the shareholders " as to tax is as I have stated it."

Similar statements in this House might be multiplied. I would take, however, Lord Atkin's exposition of the relation between a company and its shareholders in regard to tax and apply it to, and contrast it with, the facts of the present case. It must be true of a foreign company, as of an English one, that the company does not pay tax on behalf of its shareholders. But when Lord Atkin said that the shareholder in a limited company is not taxed in respect of his dividend, he was dealing with an English company, and cannot be read as referring to a foreign company; for no one doubts that a dividend from a foreign company is taxable as " income " from foreign possessions ", and that a shareholder in a foreign company does pay tax upon his dividend. The shareholder in an English company is not taxed upon his dividend, but he goes untaxed because upon the true construction of the Income Tax Act no tax is imposed upon his dividend. He does not escape tax because some overriding principle says that he shall not be taxed. As Rowlatt, J., said in *Purdie* v. *The King,* [1914] 3 K.B. 112, at page 116: " There is, strictly speaking, no tax upon dividends at " all ": cited with approval by Lord Tomlin in *Neumann* v. *Commissioners of Inland Revenue,* [1934] A.C. 215, at page 228; 18 T.C. 332, at page 362. But in the case of the foreign company's dividend the Act imposes tax in unambiguous terms. It is impossible to escape it by reference to some overriding principle.

These difficulties were, I think, present to the mind of the House in the recent case of *Barnes* v. *Hely-Hutchinson*[1]. There the claim for relief was by a shareholder, but it was possible, inasmuch as it was by a preference shareholder who had received his preference dividend in full, to reject it without formally overruling *Gilbertson's* case[2]. But the decision appears to me to be wholly inconsistent with the principle upon which *Gilbertson's* case was decided. For if there is an identity between a foreign company and its shareholders which requires that, if the company has paid tax upon its income, the shareholder should not pay tax upon so much of his dividend as is attributable to that income, there can be no ground for saying that this is to apply to one class of shareholder but not to another. I would, indeed, be inclined to regard the claim in *Barnes* v. *Hely-Hutchinson* as the *reductio ad absurdum* of the decision in *Gilbertson's* case and the opinion of this House as an exposition of its falsity.

It was urged by Counsel for the Appellant that, even if the reasoning in *Gilbertson's* case must be regarded as demonstrably wrong in the light of the decisions of this House, yet the actual decision could be supported

(1) 22 T.C. 655. (2) 1 T.C 501.

(Lord Simonds.)

on other grounds equally applicable to the present appeal. This argument is primarily founded on Rule 20 of the General Rules, which was originally enacted as Section 54 of the Act of 1842. I have already cited and need not repeat it. It is argued that the Rule has five purposes, (1) it recognises and affirms the principle that a dividend paid by a body corporate to a shareholder therein is not a new income separate from the income of the body corporate but is a part of such latter income, the ownership of which is, on the declaration and payment of a dividend, transferred from the body corporate to the shareholder; (2) it provides machinery for taxing the dividend received by such shareholder at its source; (3) it ensures that where the shareholder receives part of the income of the body corporate, the burden of the tax attributable to that part falls on him, unless the body corporate does not exercise its right of deduction; (4) it ensures that the Crown does not receive tax more than once on the income of the body corporate whether such income is distributed or not, and (5) it affirms the principle that a shareholder cannot himself be assessed to tax on his dividend if it is one from which deduction of tax is authorised by the Rule. I have set out this argument at such length in deference to the care and elaboration with which it was presented. But it may be answered very shortly. I will for this purpose assume, though I am far from assenting to it, that Rule 20 applies to a foreign company. If so, let the foreign company take advantage of it. But I am unable to see how there can be given to this Rule, which is, after all, a rule and nothing more, the substantive effect for which the Appellant contends. His contention involves nothing less than this, that there must be read into the statute, presumably as a proviso to Schedule D, a provision that where a foreign company has paid tax under Paragraph 1 of Schedule D and at a later date (it does not matter how much later) its shareholders are taxed in respect of dividends under Case V of the same Schedule, then, if some part of the dividends is attributable to profits which have borne tax under Paragraph 1, the company is entitled to be repaid a proportionate part of the tax. There can, in my opinion, be no possible justification for such an interpolation. It is, I think, true that in the result the treatment meted out to English and foreign companies and their respective shareholders may not be the same. But I see no reason why this should not be so. It was, I think, justly observed by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ltd.*, [1923] A.C. 744, at page 770; 8 T.C. 481, at page 519, in regard to income from foreign possessions: " The officers of the Crown do not know and do not " care what is the character of the sources from which the money comes." Even if Income Tax law could be regarded as one logical and consistent whole, there appears to be good reason for differentiation between the two kinds of companies. But reason or no reason, the provisions of the Act are clear.

It is convenient now to deal shortly with the practice of the Revenue authorities since *Gilbertson's* case([1]) and particularly in regard to the Appellant since its incorporation in 1928. There appears to be no doubt that the Revenue authorities rightly or wrongly for long treated the decision in *Gilbertson's* case as requiring or justifying the granting of such relief to a foreign company as the Appellant now claims. Accordingly, in the year 1929 (for which year the Appellant paid dividends only on its cumulative first preference shares) repayment was made to the Appellant of a substantial

([1]) 1 T.C. 501.

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sum in respect of the tax which had been paid by the bank under Rule 7, this sum being ascertained by means of an agreed formula with which I need not trouble your Lordships. In the year 1930 a similar course was followed. In the year 1931 the Appellant paid dividends on all three classes of its shares, and similar relief was given to the Appellant in respect of the tax paid upon all such dividends. In the year 1932 a change was made, for in that year the Revenue authorities declined to grant relief in respect of the tax paid upon the dividends on the two classes of preference shares, the ground of their refusal being that they were advised no relief was allowable in the case of dividends paid at a fixed rate. I see no logic in this, for it was the Company that claimed relief on the ground that the same income was being taxed twice, first in its hands and then in the hands of its shareholders, and it must be irrelevant what were the rights of the shareholders either *inter se* or in relation to the Company. However the Revenue authorities maintained their position and the Appellant did not contest it. In the years 1933, 1935 and 1936 the Appellant paid no dividends at all. In the year 1934 it paid dividends only on its preference shares. In the years ended 5th April, 1937, 1938 and 1939, the Appellant paid dividends on all three classes of its shares, and in these years relief was claimed and allowed in respect of the dividends on the ordinary shares only. For the year ended 5th April, 1940, a new attitude was adopted by the Revenue authorities. In that year the Appellant again paid dividends on all three classes of shares, but, on claiming relief in respect of tax paid on the ordinary share dividend, was told by the Revenue authorities that it could only be granted in respect of so much of the tax as was attributable to that part of its income arising in the United Kingdom which had been the subject of direct assessment, i.e., the interest paid by banks in England with whom money had been deposited. This refusal led to the whole issue being raised which has eventually reached this House. For the Appellant thereupon presented its Petition of Right praying for relief in respect of the tax upon the dividends of all three classes of shares, and the Crown, though at first willing to concede the much diminished relief to which I have referred, at the last has objected that no relief of any kind should be given.

Upon these facts the Appellant argued that, whatever opinion your Lordships might form upon the merits of the case if the matter were *res integra*, it was too late to disturb a decision given sixty years ago and so long honoured by the Crown, particularly in a matter of revenue where there is in each year an opportunity for review. There would be great weight in this contention but for the fact that, as I have already pointed out, the *ratio decidendi* of *Gilbertson's* case[1] is inconsistent with later decisions of this House. I see no way of maintaining the earlier decision. If this House were to do so, it would assert the validity of two contradictory views of the relation of a company and its shareholders in regard to the payment of dividends. That is a course which your Lordships will, I think, decline to take. In my opinion *Gilbertson's* case must be overruled without any qualification or distinction either in regard to the different sources of the foreign company's income arising in the United Kingdom or in regard to the quality of the shares held by shareholders in the United Kingdom to whom it pays dividends.

I would make one further observation upon the merits of the claim. It has been found possible in the past, when the principle of relief was accorded,

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to agree the proportion attributable to the Company's income arising in the United Kingdom. And since it has been found possible, I cannot say that it is impossible. But I do say that such an attribution must involve an examination of accounts, which in the case of a foreign company might well present great difficulties and at the best result in a conventional and arbitrary figure. The constituents of the fund out of which a dividend is paid, made up, perhaps, of profits earned in the year in question, of a carry over from previous years, of recourse perhaps to a dividend equalisation fund, really defy analysis. It is a satisfactory result of your Lordships' decision that such an investigation will not be necessary.

Finally, I would say on the question of procedure, which is no longer relevant, that it appears to me that the Appellant had no other remedy than to proceed by Petition of Right.

Selection Trust, Ltd. v. *Devitt* (*H.M. Inspector of Taxes*)

My Lords, this appeal raises substantially the same question as that which your Lordships have just determined on the appeal of the *Canadian Eagle Oil Co., Ltd.* The differences are these: (1) the Appellant who claims relief is a holder of ordinary shares in a foreign company, not the foreign company itself, and (2) the foreign company paid its dividends direct to its shareholders in the United Kingdom, who were, therefore, directly assessed in respect of such dividends as income arising from foreign possessions under Case V of Schedule D of the Income Tax Act, 1918. It differs only from the case of *Barnes* v. *Hely-Hutchinson*(1) in that there the claimant was a holder of preference shares carrying a fixed rate of dividend, here it is a holder of ordinary shares. It relies on the authority of *Gilbertson* v. *Fergusson*(2), as did the claimants in the cases cited. I have already given my reasons for thinking that case was wrongly decided and should be overruled, and will not repeat them. I concur in the motion that this appeal should be dismissed.

Questions put:

That the Orders appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Horace Davey, for the Canadian Eagle Oil Co., Ltd.; Freshfields, Leese & Munns, for Selection Trust, Ltd.; Solicitor of Inland Revenue.]

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