

# VOL. XXVII—PART II

No. 1332—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—  
12TH, 13TH AND 14TH JANUARY, 1943

COURT OF APPEAL—7TH, 10TH AND 11TH MAY AND 9TH JUNE, 1943

HOUSE OF LORDS—21ST AND 22ND FEBRUARY AND 17TH MAY, 1945

- (1) FENDOCH INVESTMENT TRUST CO. v. COMMISSIONERS OF INLAND REVENUE<sup>(1)</sup>  
(2) ALPORTENO INVESTMENT TRUST CO. v. COMMISSIONERS OF INLAND REVENUE

*Sur-tax—Undistributed income of investment company—Apportionment—Ability to secure income or assets—Shareholder with overriding powers—Alteration of shareholding during year of assessment—Finance Act, 1922 (12 & 13 Geo. V, c. 17), Section 21; Finance Act, 1937 (1 Edw. VIII & 1 Geo. VI, c. 54), Section 14 and Third Schedule, Paragraph 1 (b); Finance Act, 1939 (2 & 3 Geo. VI, c. 41), Section 15.*

(1) *The Appellant Company, an "investment company" within the meaning of the relevant statutory provisions, was formed on 23rd September, 1935, by M who transferred to it substantial investments. Under the articles, as amended by a special resolution three days later, (i) the share capital of 100,000 £1 shares was divided into 10,000 "A" ordinary shares, 45,000 "B" ordinary shares and 45,000 "C" ordinary shares; (ii) so long as all the "A" shares belonged to M, each class of share was entitled only to such dividends, if any, as the Company should determine in general meeting; (iii) the "A" shares carried rights of ten votes each on a poll, and the "B" and "C" shares carried one vote for every five shares; and (iv) M was made chairman and governing director of the Company for life, with complete controlling powers. The "A" shares were issued to him, the "B" shares to his daughter, E, and most of the "C" shares to the trustees of a settlement which he had executed shortly before the formation of the Company for the benefit of his daughter's children. Further "C" shares were purchased from the settlement funds from time to time.*

*M died in September, 1937, leaving the "A" shares to his daughter, E, who thereupon held all the 55,000 "A" and "B" shares, the settlement trustees' holding being 42,920 "C" shares. Under the articles, on M's death the "A", "B" and "C" shares merged in one class of share ranking pari passu in all respects, but, on 4th April, 1938, by special resolution the share capital of the Company was reconverted into "A", "B" and "C" shares in the same manner as before M's death, and E was appointed governing director with the same powers as her father had held. She therefore had power to allocate the whole income of the Company to the "A" and "B" shares held by herself to the total exclusion of the "C" shares held by the settlement trustees.*

*This position continued until 8th December, 1939, when, by special resolutions the issued capital of the Company (which had been increased to £110,000 by the creation of a further 10,000 "C" shares) was reduced to*

<sup>(1)</sup> Reported (C.A.) 169 L.T.203; (H.L.) 173 L.T. 35.

£70,000 by the redemption of the "A" shares and 30,000 of the "B" shares, and the remaining "B" and "C" shares were converted into one class of ordinary shares ranking *pari passu*, each carrying one vote. Of these shares E then held 15,000 and the settlement trustees 42,920.

The whole of the actual income of the Company for the years 1938-39 and 1939-40 was apportioned to E under the provisions of Section 15 of the Finance Act, 1939. On appeal before the Special Commissioners against the apportionments for both years, the Company contended (*inter alia*) that E was not at any time during those two years able to secure that income or assets of the Company should be applied for her benefit to a greater extent than was represented in the value for apportionment purposes of her relevant interests in the Company in relation to those of the beneficiaries of the settlement. As regards the apportionment for 1939-40 it was also contended that, in considering for the purpose of Section 15 whether any person is or is likely to be able to secure that assets or income of the Company would be applied for his benefit, regard must be had to the position as it existed on the last day of the year of assessment the income of which was to be apportioned, and that, having regard to the resolutions of 8th December, 1939, E was not on 5th April, 1940, in a position to secure that the income or assets of the Company would be applied for her benefit. The Commissioners confirmed the apportionments for both years, holding that, as regards the year 1939-40, they were entitled to review the position over the whole period.

(2) The facts in the second case and the decision of the Commissioners were similar to those in the first case.

Held, (Court of Appeal) that the decision of the Commissioners in each case was correct, and (House of Lords), as regards the year 1939-40, that the Special Commissioners can make an apportionment under Section 15 of the Finance Act, 1939, against a person of whom it could be predicated at any time in the relevant year of assessment that he was "able to secure", etc.

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#### CASES

##### (1) *Fendoch Investment Trust Co. v. Commissioners of Inland Revenue*

#### CASE

Stated under the Finance Act, 1922, First Schedule, Paragraphs 1, 2 and 3, and Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 27th January, 1941, the Fendoch Investment Trust Company (hereinafter referred to as "the Company") appealed against apportionments made under Section 15 of the Finance Act, 1939, for the years 1938-39 and 1939-40.

It was conceded on behalf of the Company that, having regard to previous decisions of the Special Commissioners, it could not resist the apportionment for the year 1938-39 before us, but it desired to test its validity in the High Court.

This appeal was heard at the same time as an appeal by the Executors of Percy A. Molteno, deceased, and an appeal by the Alporteno Investment Trust Company. The appeal by the Alporteno Investment Trust Company is the subject of a separate Case Stated.

2. Percy A. Molteno (who died on 19th September, 1937) on 23rd September, 1935, formed the Fendoch Investment Trust Company to which he transferred investments, valued at cost, of £87,070.

Three days previously, on 20th September, 1935, he had executed a deed of settlement between himself, as settlor, and his daughter Mrs. Elizabeth M. Murray, Lenox B. Murray (husband of Mrs. Elizabeth M. Murray) and Vincent B. Molteno, as trustees.

3. Under this settlement a trust fund was created which was to include all money and properties at any time paid or transferred to and accepted by the trustees. During the lifetime of the settlor the income was to be accumulated. The trust fund was to be appropriated to the children of Mrs. Elizabeth M. Murray and, subject to the trust for accumulation, the income of each share was to be paid to the child. During his life the settlor retained power to vary the investments comprised in the trust funds, and under clause 3 (e) of the settlement power was given to the settlor and Vincent B. Molteno to revoke the trusts and declare new trusts whether in favour of the settlor or otherwise.

4. The original capital of the Company was £100,000 divided into 10,000 "A" ordinary shares of £1 each, 45,000 "B" ordinary shares of £1 each, and 45,000 "C" ordinary shares of £1 each. By a special resolution passed 26th September, 1935, the "A" shares were entitled to ten votes per share on a poll, and the "B" and "C" shares to one vote for every five shares held. At 31st December, 1935, 10,000 "A" ordinary shares had been issued and were held by Percy A. Molteno, 45,000 "B" ordinary by Mrs. Murray, 40,000 "C" ordinary by the trustees of the settlement. Percy A. Molteno therefore during his lifetime controlled the Company by voting power. By the resolution of 26th September, 1935, during the lifetime of Percy A. Molteno and for so long as all the "A" shares were held by him, each class of shares was to be entitled to such dividends as the Company in general meeting should determine—after his death all shares were to be merged into one class ranking *pari passu*. The articles of association contain a provision that no business should be transacted at any general meeting unless a quorum is present when the meeting proceeds to business and that for all purposes the quorum shall be two members personally present. The articles also contain a provision whereby in a winding up the liquidator may, with the sanction of an extraordinary resolution, divide the assets otherwise than in accordance with the existing rights of the members, but so that if any division is resolved on otherwise than in accordance with such rights the members shall have the same right of dissent and consequential rights as if such resolution was a special resolution passed pursuant to Section 234 of the Companies Act, 1929.

On 26th September, 1935, the settlor added to the settlement the following investment :—

40,000 Fendoch Investment Trust Company "C" ordinary shares of £1 each fully paid.

The trust accounts show that further "C" shares of the Company have been purchased from time to time.

Up to the date of the death of P. A. Molteno (19th September, 1937), and for the accounting period immediately thereafter, the income of the Company and the distributions thereout were as follows:—

	£	s.	d.
Net income for period 23rd September, 1935, to 31st December, 1935 .. .. .	155	7	8
Dividend declared on "C" shares on 31st March, 1936, free of tax .. .. .	166	13	4
Net income for year ended 31st December, 1936 .. .. .	2,811	12	11
Dividend declared on "C" shares on 19th March, 1937, free of tax .. .. .	2,761	0	0
Net income for year ended 31st December, 1937 .. .. .	2,984	12	3
Dividend declared on "C" shares *on 4th April, 1938, free of tax .. .. .	3,004	8	0

(\*Although the shares were merged into one class on the death of P. A. Molteno, resolutions were passed on 4th April, 1938, recreating the three classes, see paragraph 6 below.)

The gross investment income for the period 6th April, 1937, to 19th September, 1937, was £1,631 18s. 7d. This sum has been assessed to Sur-tax for the year 1937-38 on the Executors of P. A. Molteno and no question now arises with regard to this assessment.

5. By the said deed of settlement it was provided that the income accruing during the life of any child or children of Mrs. E. M. Murray should belong to such child or children. There were living during the years 1938-39 and 1939-40 the following children of Mrs. E. M. Murray, viz. :—

Iona Margaret Murray  
George Lenox Molteno Murray  
Patrick Anthony Molteno Murray

6. By special resolution of 13th April, 1937, the capital of the Company was increased by the creation of 10,000 "C" ordinary shares of £1 each to rank *pari passu* with the existing "C" ordinary shares. By the special resolution of 26th September, 1935, the three classes of shares of the Company were to be merged into one class on the death of P. A. Molteno. The merger took place accordingly, but on 4th April, 1938, special resolutions were passed by which the shares were reconverted into "A", "B" and "C" shares "in such manner "as existed immediately prior to the death of the said Percy Alport Molteno", and the shares were thereafter held as follows:—

"A" shares, by the Executors of the will of P. A. Molteno for Mrs. Murray (there was a specific bequest of these shares to Mrs. Murray) .. .. .	10,000
"B" shares, by Mrs. Murray .. .. .	45,000
"C" shares, by the trustees of the settlement dated 20th September, 1935 .. .. .	42,920

By the same resolutions Mrs. Murray was made governing director of the Company, having the same powers as those previously possessed by P. A. Molteno.

By further special resolutions passed 8th December, 1939, the capital of the Company was reorganised. The capital was reduced to £70,000, divided into 15,000 "B" ordinary and 55,000 "C" ordinary shares of £1 each, the reduction being effected by redeeming 10,000 "A" ordinary and 30,000 "B"

ordinary shares. The remaining "B" and "C" shares were then converted into one class of ordinary share ranking *pari passu*. The holdings were then as follows (ordinary shares) :—

Mrs. Murray .. .. .	15,000
Trustees of the settlement ..	42,920

Following the special resolutions of 4th April, 1938, and until the passing of the further special resolutions of 8th December, 1939, the Company was in the absolute control of Mrs. Murray, who was in a position to decide the dividends to be declared in respect of each class of share and had power to allocate the whole income of the Company to the "A" and "B" shares held by herself to the total exclusion of the "C" shares held by the trustees.

The income and distributions of the Company subsequent to those referred to in paragraph 4 have been as follows :—

	£	s.	d.
Net income for year ended 31st December, 1938 .. .. .	2,438	8	5
Dividend declared on "C" shares on 20th March, 1939, free of tax .. .. .	2,446	8	9
Net income for year ended 31st December, 1939 .. .. .	2,246	3	8
Dividend declared on ordinary shares on 28th March, 1940, free of tax .. .. .	2,245	11	2
Actual income year 1938-39 .. .. .	2,995	0	0
Actual income year 1939-40 (as agreed) .. .. .	3,182	0	0
Income accrued for period 1st January, 1940, to 5th April, 1940 .. .. .	1,043	16	0
Dividend declared within the year 1939-40, free of tax ..	1,055	19	8

During the whole of the year 1938-39 there were three classes of shares of the Company (special resolutions of 4th April, 1938), the holdings in which were as set out above. The "A" shares carried ten votes per share, the "B" and "C" shares one vote for every five shares held.

7. By the will of P. A. Molteno he appointed Vincent B. Molteno, Donald James Molteno and Mrs. Elizabeth M. Murray as executors, and bequeathed 10,000 "A" shares to Mrs. Murray. Articles 14 to 16 of the articles of association of the Company deal with the transmission of shares.

8. Mrs. Murray did not either directly or indirectly transfer any assets to the Company.

9. Copies of

- (1) the memorandum and articles of association of the Company,
- (2) the special resolutions,
- (3) the relevant accounts, and
- (4) the settlement above referred to,

are annexed hereto, marked "A.", "B.1." to "B.4.", "C.1." to "C.6." and "D.", respectively, and form part of this Case<sup>(1)</sup>.

10. The whole of the actual income of the Company for each of the years 1938-39 and 1939-40 was apportioned to Mrs. Murray under the provisions of Section 15 of the Finance Act, 1939.

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

## 11. On behalf of the Company it was contended :—

- (1) That Mrs. Murray was not at any time during the year 1938–39 or the year 1939–40 able to secure or likely to be able to secure that income or assets of the Company should be applied for her benefit to a greater extent than was represented in the value for apportionment purposes of her relevant interests in the Company considered in relation to the value for those purposes of the relevant interests of the persons beneficially entitled to the shares held by the trustees of the settlement.
- (2) That, as Mrs. Murray had not directly or indirectly transferred any assets to the Company, it was not open to us, with respect to either of such years, to draw the inference that she was likely to be able to secure that assets or income of the Company would be so applied for her benefit.
- (3) That in considering for the purposes of Section 15 of the Finance Act, 1939, whether any person is or is likely to be able to secure that income or assets of a company will be applied for his benefit, regard must be had to the position as it existed on the last day of the year of assessment the income of which is to be apportioned. Paragraph 9 of the First Schedule to the Finance Act, 1922, and Section 14 and Paragraph 1 (*b*) of the Third Schedule to the Finance Act, 1937, were referred to.
- (4) That, as at 5th April, 1940, Mrs. Murray was not able to secure that income or assets of the Company whether present or future would be applied for her benefit to a greater extent than was represented in the value for apportionment purposes of her relevant interests in the Company, no income could be apportioned to her in excess of that appropriate to her relevant interests.
- (5) Alternatively, that as after 8th December, 1939, Mrs. Murray was not able to secure that income or assets of the Company would be applied for her benefit to a greater extent than was represented by the value of her relevant interests, no part of the income of the Company arising to it after that date could be apportioned to her under the provisions of the said Section 15.

## 12. On behalf of the Respondents it was contended :—

- (1) That Mrs. Murray was in a position to be able to secure that the income of the Company should be applied to her benefit over the periods covered by this appeal.
- (2) That the position must be regarded as a whole and not only on the last day of the year.

13. We, the Special Commissioners who heard the appeal, held that we were entitled to review the position over the whole period and not upon 5th April only; that Section 15 of the Finance Act, 1939, applied, and that the apportionments should stand confirmed.

14. 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 the Finance Act, 1922, First Schedule, Paragraphs 1, 2 and 3, and

Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

MARK GRANT-STURGIS, }  
H. H. C. GRAHAM, } Commissioners for the Special Purposes  
of the Income Tax Acts.

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

5th June, 1942.

(2) *Alporteno Investment Trust Co. v. Commissioners of Inland Revenue*

At the same meeting of the Special Commissioners the Alporteno Investment Trust Company appealed against apportionments made under Section 15 of the Finance Act, 1939, for the years 1938-39 and 1939-40.

The Case was stated in similar terms, the material point being the same as in the first case.

The cases came before Macnaghten, J., in the King's Bench Division on 12th, 13th and 14th January, 1943, and on the last-named date judgment was given in favour of the Crown in each case, with costs.

Mr. Cyril L. King, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Appellant Companies, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

**Macnaghten, J.**—This is an appeal by the Fendoch Investment Trust Company against apportionments of its income for the purposes of Sur-tax made under the Finance Act, 1939, Section 15, for the tax years 1938-39 and 1939-40.

The Company was formed by the late Mr. Percy A. Molteno as an unlimited company with a share capital of £100,000 divided into 100,000 shares of £1 each, and was duly registered under the Companies Act, 1929, on 23rd September, 1935. By a special resolution passed on 26th September, 1935, three days after the incorporation of the Company, the authorised capital of £100,000 was divided into 10,000 "A" ordinary shares, 45,000 "B" ordinary shares, and 45,000 "C" ordinary shares; and it was provided that (1) so long as all the "A" shares were registered in the name of Mr. Percy A. Molteno each class of shares should be entitled only to such dividends, if any, as the Company should from time to time in general meeting determine; (2) every member should have one vote on a show of hands, and in the case of a poll the "A" shares should confer upon the holders thereof ten votes for each such share, and that the "B" and "C" shares should confer upon the holders thereof one vote for every five such shares held by them respectively, and (3) Mr. Percy A. Molteno should be the chairman and sole governing director of the Company for life, and the government and control of the Company should be vested in him, and that he should have power from time to time appoint such other persons as he might think fit to be directors or other officers of the Company and for such period or purposes as he might think proper and to remove any director or other officer, howsoever appointed, from office.

**(Macnaghten, J.)**

By 31st December, 1935, the date to which the Company's accounts were made up, all the "A" and "B" shares and 40,000 of the "C" shares had been issued. The 10,000 "A" shares were held by Mr. Percy A. Molteno, the 45,000 "B" shares by his daughter, Mrs. Elizabeth M. Murray, and 40,000 of the "C" shares by the three trustees of a deed of settlement made by Percy A. Molteno for the benefit of Mrs. Murray's children, dated 20th September, 1935, namely, Mrs. Murray, her husband, Mr. Lenox B. Murray, and a Mr. Vincent B. Molteno. By a special resolution passed on 13th April, 1937, the nominal capital of the Company was increased from £100,000 to £110,000 by the creation of 10,000 additional "C" shares of £1 each.

Mr. Percy A. Molteno died on 19th December, 1937. By his will, he bequeathed to Mrs. Murray the 10,000 "A" shares, and she thus became the holder of all the "A" shares as well as all the "B" shares. The special resolution of 26th September, 1935, had provided that on the death of Mr. Percy A. Molteno all the "A", "B" and "C" shares should automatically be and become one class of shares, all ranking *pari passu* in every respect, entitling the holders thereof, in the case of a poll, to one vote for each share held by them respectively; but by a special resolution passed on 4th April, 1938, the share capital was reconverted into "A", "B" and "C" shares in such manner as existed before the death of Mr. Percy A. Molteno, and Mrs. Murray was appointed governing director of the Company for life, with the same powers and authority as her father had possessed under the special resolution of 26th September, 1935. Mrs. Murray thereby became able to determine, by means of her voting power, that all dividends payable by the Company should be paid to herself as the holder of all the "A" shares or as the holder of all the "B" shares and to exclude the holders of the "C" shares from any right thereto.

It is provided by Section 15 (2) (c) of the Finance Act, 1939, that in the case of an investment company the Special Commissioners may apportion "to any person who is a member of the company and in their opinion is . . . able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the company". The Fendoch Investment Trust Company is an "investment company", and during the years 1938-39 and 1939-40 Mrs. Murray was able to secure by means of her voting power that income and assets of the Company should be paid to her by way of dividend to a greater extent than was represented in the value for apportionment purposes of her "relevant interests in the company" as defined in that Section. Accordingly the Special Commissioners have apportioned the whole of the income of the Company to Mrs. Murray for the years 1938-39 and 1939-40.

With respect to the apportionment for the year 1938-39, the only contention put forward before me in support of the appeal was that, since the articles of association required the presence of two members to constitute a general meeting of the Company, Mrs. Murray might not be able to secure a quorum for the purposes of a general meeting. The number of members personally present required to constitute a quorum was two. It would appear from the Case that after the death of Mr. Percy A. Molteno the Company had but three members, namely, Mrs. Murray, her husband, Mr. Murray, and Mr. Vincent B. Molteno, the third trustee under the deed of settlement. The difficulty that is suggested in the way of Mrs. Murray obtaining



**(Macnaghten, J.)**

for herself the income of the Company is that both Mr. Murray and Mr. Vincent B. Molteno might decline to attend the meeting. This point was not taken before the Special Commissioners, and, therefore, in the absence of notice having been given pursuant to the rule requiring such notice, it was not open to the Appellant Company to raise this point before the Court. But if it had been raised before the Special Commissioners, or notice of it had been given pursuant to the rules, the answer to the point is, as the Attorney-General pointed out, that if her husband and Mr. Vincent B. Molteno declined to attend she could transfer one of her 55,000 shares to a nominee and then she and her nominee could constitute a quorum, which would be able to determine in general meeting that the whole of the dividends recommended by Mrs. Murray as a governing director should be distributed to herself. I do not think there is anything in that point, and that disposes of the appeal so far as the apportionment for the year 1938-39 is concerned.

With respect to the apportionment for the year 1939-40, a further point was raised. On 8th December, 1939, during the fiscal year, a special resolution was passed for the reduction of the authorised capital of the Company from £110,000 to £70,000. This reduction was effected by the redemption, pursuant to the provisions of article 17 of the articles of association, of the whole of the 10,000 "A" shares and 30,000 of the "B" shares, with the result that Mrs. Murray was left with no more than 15,000 "B" shares and the trustees of the settlement of 20th September, 1935, held 42,920 "C" shares.

The special resolution passed on 8th December, 1939, provided that every member should have one vote on a show of hands and, in the case of a poll, one vote for each share registered in his name. The result of that was that after 8th December, 1939, Mrs. Murray lost her control of the Company which then passed to the trustees of the settlement.

By Paragraph 1 (b) of the Third Schedule to the Finance Act, 1937, it is provided that the income apportioned to a member of an investment company, so far as assessable and chargeable to Sur-tax under Section 21 of the Finance Act, 1922, shall, for the purposes of that tax, be deemed to have been received by him on the last day of that year of assessment. The contention was put forward that the Special Commissioners could not apportion any part of the income of the Company to Mrs. Murray under Section 15 of the Finance Act, 1939, for the year 1939-40 unless she was able on 5th April, 1940, to secure the income of the Company to a greater extent than was represented in the value for apportionment purposes of her relevant interests in the Company. The Act does not say so, and I can see no reason for importing that meaning into the words used in the Finance Act, 1937, Third Schedule, Paragraph 1 (b). Indeed, I do not think those words are capable of bearing that meaning. The Finance Act, 1939, Section 15, becomes applicable—as it seems to me—if during the accounting period, or some part of it, the member to whom the income is apportioned was in the position described in that Section; but I see no reason for thinking that it is necessary that the member should continue to be in that position throughout the whole of the accounting period, or after it has expired. I therefore think that point also fails.

In those circumstances the appeal must stand dismissed, with costs.

By agreement, a similar Order will be made in the case of the Alporteno Investment Company.

Appeals having been entered against the decision in the King's Bench Division, the cases came before the Court of Appeal (Scott, MacKinnon and Luxmoore, L.J.J.) on 7th, 10th and 11th May, 1943, when judgment was reserved. On 9th June, 1943, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Cyril L. King, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Appellant Companies, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

#### JUDGMENT

**Scott, L.J.**—The judgment I am about to read is the judgment of the Court.

The judgment of Macnaghten, J., with which we agree, contains a full statement of the material facts, and it is only necessary to refer to a very few of them. The Appellant Company is an investment company within the meaning of the Finance Act, 1936, and subsequent Income Tax legislation. For the assessment year 1938-39, Mrs. Murray—and this appeal is really hers—was assessed to Sur-tax in respect of the income of the Appellant Company pursuant to the Finance Act, 1922, Section 21, and the Finance Act, 1939, Section 15 (7). She was throughout that assessment year in complete control of the Company; and no argument has been addressed to us in respect of that year. Mrs. Murray continued in complete control of the Company until 8th December, 1939, but on that day the Company passed a special resolution under which that control was taken from her, and passed to other persons who were trustees for her children.

It was contended for her, both below and before us, that the statutory jurisdiction of the Special Commissioners to direct that the Company's income is to be deemed to be the income of the members for the purpose of their individual liability to Sur-tax is subject to a condition precedent to the effect that neither "direction" nor "apportionment" to members of the income of the Company can be effectively made so as to bind any member, unless that member occupies that position on the last day of the year under consideration. The Appellants argue that the sole subject-matter of a statutory "direction" to a company is the company's income for the period ending on that date. Under the 1922 Act the material period was the company's accounting year or such other period as might in any particular time have been adopted by the company; but in 1937 the year of assessment was, in the case of "investment" companies, substituted as the basic period—see Section 14 (2) (d) of the Finance Act, 1937. In the present case the Company had shortly before 8th December, 1939, changed its final accounting date to the 5th April, so that its period had become coincident with the year of assessment.

Mr. King took us through a large number of Sections of different Finance Acts in order to establish his proposition that the pecuniary subject-matter of a direction is always the result of a completed financial year. But even if this proposition be established, it by no means follows that the Commissioners are thereby precluded from "apportioning between the members" in such a way as to make the apportionment amongst the members for the time being on the register during the whole of the period.

The original enactment is contained in Sub-section (1) of Section 21 of the Finance Act, 1922, and the material words there are "the amount thereof shall be apportioned among the members". What more general enabling

(**Scott, L.J.**)

words could have been devised? If there were any ambiguity in them—which in our opinion there is not, for generality is not the same thing as ambiguity—the opening preamble or recital to the Section shews that the object of the Legislature was to get Super-tax out of the members of a private company, who by creating it would escape Super-tax but for the Section under consideration.

Paragraph 4 (b) of the First Schedule to the 1922 Act provides that the Commissioners may require the company to furnish them with the names of all members and their respective interests throughout the period in question; and that return must necessarily cover transfers during the period. Paragraph 8 of the same Schedule requires the apportionment to be made in accordance with the respective interests of the members; not, be it observed, the members on the register at the expiration of the period. We fail to see any reason for the view that members could escape by selling their shares before the end of the year. As Mr. Stamp said, it would have been so easy for Parliament to say that the liability was to be on “members on the last day of the year” if that had been, or could have been its intention. He put two crucial instances to demonstrate the absurdity of such a construction: (1) A transfer by law: two successive tenants for life, A and B, during the year; would A’s executors escape all charge and B have to bear the whole? (2) One small controlling group of shareholders, A, succeeded by another, B, to whom it transfers all its shares towards the end of the year, having already received a large interim dividend.

There are two further reasons in favour of the Crown’s interpretation. The 1927 Finance Act, Section 31 (2), expressly authorised deduction from the newly added Sur-tax charge of the amount, if any, already distributed to the member and, therefore, already *ex hypothesi*, included in his Sur-tax return. It is incredible that Parliament, when making that addition to the language there used, should have thought it was only necessary to protect members on the register on the last day of the year. The second reason is that the 1939 Finance Act, Section 15 (2) (c), gives the Commissioners complete discretion in apportionment; and that discretion has to be exercised, in the case of investment companies, with regard to various people who are not shareholders at all, for example loan creditors (Finance Act, 1936, Section 20), and anybody who is able, or is likely to be able, to secure any part of the income or assets of the company. These provisions seem to us wholly inconsistent with any such arbitrary limitation as was put forward on behalf of the Appellant Company.

For these reasons we are of opinion that this appeal should be dismissed with costs.

The appeal of the Alporteno Investment Company was not opened, because it was agreed that the questions there raised were identical with those raised in the appeal we have just decided, and that it must stand or fall with it. We therefore dismiss that appeal also with costs.

**Mr. King.**—I have to ask your Lordships for leave, if so advised, to appeal. It is a novel point, if I may say so, in this case.

(*The Court conferred.*)

**Scott, L.J.**—Mr. King, we think, as it is a unanimous judgment of the Court, affirming the judgment below, that we ought to leave you to go to the Committee of the House of Lords, if you desire leave to appeal.

**Mr. King.**—If your Lordship pleases.

On the petition of the Appellant Companies leave to appeal against the decision in the Court of Appeal, as regards the apportionments for the year 1939-40, was granted by the Appeal Committee of the House of Lords.

The cases came before the House of Lords (Lords Russell of Killowen, Macmillan, Porter, Simonds and Goddard) on 21st and 22nd February, 1945, when judgment was reserved. On 17th May, 1945, judgment was given unanimously in favour of the Crown, with costs, affirming the decision of the Court below.

Mr. Cyril L. King, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Appellant Companies, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

#### JUDGMENT

**Lord Russell of Killowen.**—My Lords, I have had an opportunity of reading and considering beforehand the opinion about to be delivered by my noble and learned friend Lord Simonds. I concur in it, and I desire to add nothing to it.

My noble and learned friend, **Lord Macmillan**, who is unable to be present here today, desires me to say that he also concurs in that opinion.

**Lord Porter.**—My Lords, I also have had a like opportunity, and find it unnecessary to add anything to the opinion prepared by my noble and learned friend Lord Simonds, with which I agree.

**Lord Simonds.**—My Lords, these consolidated appeals are from Orders of the Court of Appeal (Scott, MacKinnon and Luxmoore, L.J.J.) affirming Orders of the King's Bench Division (Macnaghten, J.) which had affirmed decisions of the Commissioners for the Special Purposes of the Income Tax Acts.

In each case the issue turns on the meaning and effect of Section 15 of the Finance Act, 1939, and it is conceded on both sides that the decision in one case must govern that in the other. It will be sufficient, therefore, to state the facts in one case only, and following the course taken at your Lordships' Bar, I shall confine myself to the facts of the case of the *Fendoch Investment Trust Company*, which I will call "the Fendoch Company".

On 20th September, 1935, the late P. A. Molteno (whom I will call "the settlor") executed a trust deed between himself as settlor and three other persons as trustees, namely, his daughter, Mrs. Elizabeth M. Murray; her husband, Lenox Biggar Murray, and Vincent B. Molteno. The trust fund was to consist of such funds or properties as the trustees might from time to time receive. During his lifetime the settlor had power to direct in what manner the trust funds should be invested and to appoint new trustees. The trusts, as declared and subject to a power of variation that was not exercised, were for the accumulation of income during the settlor's lifetime and thereafter for the benefit of Mrs. Murray's children or their issue.

Three days later, on 23rd September, the settlor formed the Fendoch Company, an unlimited company, and to it in due course transferred investments of the value (at cost) of £87,070. The original capital of the Company was £100,000 divided into 10,000 "A" ordinary shares of £1 each, 45,000 "B" ordinary shares of £1 each and 45,000 "C" ordinary shares of £1 each.

On 26th September, 1935, a special resolution of the Company was passed whereby (a) the voting rights were so arranged as to give the holders of "A" shares control of the Company, ten votes being given for each "A" share and

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one vote only for every five " B " or " C " shares ; and (b) during the settlor's lifetime, so long as he held all the " A " shares of the Company, each class of shares was to be entitled to such dividends as the Company in general meeting should determine ; and (c) on the settlor's death all shares were to be merged into one class ranking equally, and (d) the settlor was to be chairman and governing director of the Company for his life. I have stated compendiously and with sufficient accuracy for the present purpose the elaborate provisions of the special resolution.

On 31st December, 1935, the settlor held 10,000, that is, all the " A " shares ; Mrs. Murray held 45,000 " B " shares, and the trustees of the settlement of 20th September, 1935, held 40,000 " C " shares, which had been transferred to them by the settlor on 26th September, 1935. A further 2,920 " C " shares were at a later date acquired by the trustees.

On 19th September, 1937, the settlor died. He had been in control of the Company since 26th September, 1935, under the terms of the special resolution which I have stated, but upon his death the three classes of shares merged and became one class with equal rights. The trustees of the settlement, as the holders of 42,920 out of 97,920 issued shares of the Company, were thus in a position to prevent the passing of any special resolution which might prejudice their rights. By his will, which was duly proved by the executors therein named, his brother, Vincent B. Molteno, his son, Donald James Molteno, and Mrs. Murray, the settlor bequeathed his 10,000 " A " shares of the Company to Mrs. Murray.

Thus matters rested until 4th April, 1938, when, by further special resolutions of the Company duly passed on that day, the former capital structure of the Company was restored to what it had been before the death of the settlor and Mrs. Murray was appointed governing director with all the powers previously possessed by the settlor. Thus, as beneficial owner of all the " A " shares with their former voting rights restored to them and as governing director, Mrs. Murray had complete control of the Company, and was able to secure to herself as holder of " A " or " B " shares and to deny to the settlement trustees as holders of " C " shares as much or as little of the income of the Company as she thought fit. In this resolution the trustees had strangely acquiesced.

On 8th December, 1939, the final event in the story took place. On that day further special resolutions of the Company were passed whereby its capital was again reorganised. The effect of these resolutions was that the capital of the Company was reduced to £70,000 divided into 15,000 " B " shares and 55,000 " C " shares, the whole of the 10,000 " A " shares and 30,000 of the 45,000 " B " shares being redeemed, and that the remaining " B " shares and the " C " shares were then converted into ordinary shares ranking equally. Thus, for the period from 8th December, 1939, to 5th April, 1940, the end of the financial year, Mrs. Murray held 15,000 shares and the settlement trustees held 42,920 shares all ranking equally. Mrs. Murray no longer controlled the Company.

My Lords, the question for your Lordships' decision arises upon certain apportionments of the income of the Fendoch Company that were made by the Commissioners under Section 15 of the Finance Act, 1939, during the relevant periods, but, before I refer to them, I must remind your Lordships of certain provisions of the Finance Acts affecting this Company.

The Fendoch Company is an " investment company " as defined by Section 20 (1) of the Finance Act, 1936. As it was at all material times under the control of not more than five persons, it was a company to which Section 21 of the

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Finance Act, 1922, applied. None of its income consisted of estate or trading income. Therefore, by Section 14 (1) of the Finance Act, 1939, the whole of its actual income from all sources must be deemed for the purposes of assessment to Sur-tax to be the income of its members, and the Special Commissioners were bound to give a direction that the whole income of the Company for the fiscal year 1938-39, and for each subsequent fiscal year of assessment, should be deemed to be the income of the members. It is not in respect of these matters that any controversy has arisen. It is conceded that the directions were correctly given, and that having given them the Commissioners were bound to make an apportionment. The question for your Lordships' consideration arises out of the fact that the Special Commissioners, acting under the powers given to them by Section 15 of the Finance Act, 1939, apportioned the whole of the actual income of the Company for the years of assessment 1938-39 and 1939-40 to Mrs. Murray, and it is to this Section that I must now turn, though it will be necessary at a later stage to refer also to the earlier Finance Acts.

Section 15 of the Finance Act, 1939 (which falls within Part II of the Act and, therefore, under Section 38 (3) is to be " construed as one with the Income " Tax Acts ") provides as follows:—“(1) If in the case of any investment company “ the Special Commissioners are of opinion that any person who is not a member “ of the company for the purposes of section twenty-one of the Finance Act, “ 1922, and the enactments relating thereto is, or is likely to be, able to secure “ that income or assets, whether present or future, of the company will be “ applied either directly or indirectly for his benefit, they may, if they think “ fit, treat him as a member of the company for the said purposes. (2) In “ apportioning for the purposes of the said section twenty-one the income of an “ investment company . . . (c) to any person who is a member of the “ company and in their opinion, is, or is likely to be, able to secure that income “ or assets, whether present or future, of the company will be applied either “ directly or indirectly for his benefit to a greater extent than is represented in “ the value for apportionment purposes of his relevant interests in the company, “ considered in relation to the value for those purposes of the relevant interests “ of other persons therein; the Special Commissioners may apportion to him “ such part of the income of the company as appears to them to be appropriate “ and may adjust the apportionment of the remainder of the company's income “ as they may consider necessary.”

It will be observed that Sub-sections (1) and (2) (c) deal with two classes of persons: (a) a person who “ is able to secure ”, etc., and (b) a person who “ is “ likely to be able to secure ”, etc. Sub-section (3) defines these two classes, and it is common ground that Mrs. Murray does not fall within class (b). She is covered, if at all, by the first branch of Sub-section (3), which provides that for the purposes of the Section, “ a person shall be deemed to be able to secure “ that income or assets will be applied for his benefit if he is in fact able so to “ do by any means whatsoever, whether he has any rights at law or in equity “ in that behalf or not ”.

By Sub-section (6) (c) the expression “ relevant interests ” is defined to mean, “ in relation to a person connected in any way with a company, interests by “ reference to which income of the company could be apportioned to him for “ the purposes of section twenty-one of the Finance Act, 1922, apart from the “ provisions of this section, and the expression ‘ value for apportionment “ purposes ’ means, in relation to any relevant interests in any company, “ the value falling to be put thereon in apportioning income of the company “ for the purposes of the said section twenty-one ”.

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It is not, I think, necessary to refer to any other provision of the Finance Act, 1939. Acting under the wide discretionary power given to them by Section 15, the Special Commissioners treated Mrs. Murray as a person who, in the years of assessment 1938-39 and 1939-40, was able to secure that income or assets, whether present or future, of the Company should be applied for her benefit to a greater extent than was represented in the value for apportionment purposes of her relevant interests in the Company, and accordingly, as already stated, thought it appropriate to apportion to her the whole of the Company's income for the same two years of assessment. It is not disputed before your Lordships that the apportionment for the earlier year of assessment, 1938-39, must stand. From 6th April, 1938, to 5th April, 1939, Mrs. Murray was in absolute control of the Company. What was in fact done with the income of the Company is immaterial: it was the indisputable fact that she was in a position to do what she liked with it.

It is in regard to the second year of assessment that the validity of the apportionment is still challenged. Your Lordships will remember that it was in the course of this year that the last recorded change in the financial constitution of the Company took place. On 8th December, 1939, Mrs. Murray surrendered her control of the Company in the manner that I have already stated, and thereafter and particularly on the last day of the fiscal year, 5th April, 1940, she was a minority shareholder in a Company, all of whose shares carried equal voting and other rights.

It is on this fact, and this fact alone, that the Fendoch Company relies, contending that the facts which enable the Commissioners to make an apportionment must exist on the last day of the year of assessment, and that in the present case they did not exist on 5th April, 1940. In the alternative it is claimed that no apportionment can be validly made which does not recognise and give effect to the fact that, from 8th December, 1939, to 5th April, 1940, the position was changed, so that, in any case, not the whole of the actual income of the Company for the year of assessment can be properly apportioned to Mrs. Murray. These contentions, which have been rejected in turn by the Special Commissioners, by Macnaghten, J., and by the unanimous judgments of the Court of Appeal, must now be examined.

Upon the language of Section 15 of the Finance Act, 1939, taken by itself, learned Counsel for the Fendoch Company did not appear to rely. There is nothing in that Section to confine a member or a person who "is able to secure", etc., to one who fills that role on the last day of the fiscal year. Strictly read, the present tense in the expression that I have cited might refer to the date of apportionment. This is a construction which has nothing to commend it. Some words then have to be written in; the Fendoch Company would write in, "on the last day of the year of assessment"; the Respondents, "at any time during the year of assessment". Between these alternatives I have no hesitation in adopting the second. Here is a Section which is intended to bring within the ambit of taxation to Sur-tax for a particular year of assessment a class of persons who under pre-existing law would be outside it. I should require a clear expression or compelling context before I concluded that inclusion within or exclusion from that class depended on the circumstance that on the last or any other day of the year of assessment a person did or did not fill the prescribed role. In the Section read by itself neither grammar nor context demands the construction for which the Appellants contend.

It is, however, on the scheme of taxation of which Section 15 of the Finance Act, 1939, forms part that reliance is placed. It is urged that a consideration

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of Section 21 of the Finance Act, 1922, which may be regarded as the principal Act, and of the amending Acts, shows that it is as on the last day of the year of assessment that the position has to be reviewed, and to support this contention your Lordships have been invited to consider in detail the elaborate provisions of the principal and other Acts, which have been framed to meet the no less elaborate devices of those who would escape from a position in which Sur-tax is exigible. My Lords, I do not doubt that, in construing the latest of a series of Acts dealing with a specific subject-matter, particularly where all such Acts are to be read as one, great weight should be attached to any scheme which can be seen in clear outline, and amendments in later Acts should, if possible, be construed consistently with that scheme. But this is a principle which can easily be pressed too far in the consideration of a body of legislation such as that now under review, in which, if any prevailing motive can be found, it is in the attempt, as each loophole for escape from taxation is discovered, to close it as firmly as possible. I can by no means find in it any such scheme or context as would justify me in giving to the language of Section 15 of the Finance Act, 1939, any meaning which it does not naturally bear.

I turn, however, to the matters principally relied on by the Company. It was contended—and this is of course fundamental to the argument—that under the principal Act an apportionment could only be made against a person who was a member (as defined by Section 21 (7) ) on the last day of the accounting period. Section 21 (1) of the principal Act provides that the Commissioners may “direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members”, and Paragraph 8 of the First Schedule to the Act provides that “the apportionment . . . shall be made . . . in accordance with the respective interests of the members”. I find nothing in these words which supports the Appellants’ contention, or would restrict the meaning of “members” to persons who were members during the whole period or the last or any other day of it. The language of the Section is clearly apt to include any person who was a member at any time during the period in question. But here again the Appellants rely on some limiting context. It is said that it is as at the end of the period that it must be ascertained whether there has been a reasonable distribution. It is said that, under Paragraph 9 of the First Schedule to the Act, the income apportioned to a member under Section 21 is, for the purposes of tax, to be deemed to have been received on the date to which the accounts of the company are made up. This last provision is repeated in Paragraph 1 (b) of the Third Schedule to the Finance Act, 1937, with the substitution of the last day of the year of assessment for the date to which the accounts of the company are made up. Under Section 31 (6) of the Finance Act, 1927, income apportioned to a member of a company for the period from the end of the last year or other period for which accounts have been made up to the date of the order or resolution for winding up shall, for the purposes of Sur-tax, be deemed to have been received by him on the date of that order or resolution. An analogous provision is to be found in Section 14 (3) of the Finance Act, 1937. Pointing to these and, it may be, to other provisions, Counsel for the Fendoch Company have urged that it is only members as on the last day of the accounting period or year of assessment, as the case may be, against whom an apportionment can consistently be made. And, he says, what was true of members before the Finance Act, 1939, was passed, must be true also of members and other persons against whom an apportionment can be made under Section 15 of that Act. I have already indicated that to me this final conclusion does not commend itself.



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But it appears to me that the argument breaks down at an earlier stage. I do not find in the provisions to which reference has been made any sufficient justification for thus limiting the meaning of "members". On the other hand I think that there are numerous indications which suggest that no such limitation can have been intended. Under Paragraph 4 of the First Schedule to the principal Act, the Commissioners may require any company to which Section 21 applies, to furnish a statement of the names and addresses and particulars of the respective interests of all members of the company for the period for which the company's accounts are made up. This must mean all persons who have at any time during the period been members. It is not obvious for what purpose the Commissioners require such particulars, unless the persons concerned are possible objects of apportionment. Again, under Section 20 (4) (a) of the Finance Act, 1936, the definition of "member" is extended so as to include a "loan creditor". The object of this extension might be largely defeated if only those loan creditors could be regarded as members whose loans have not been repaid at the end of the fiscal year. Again, a striking contrast is provided by Section 32 of the Finance Act, 1927, which deals with so-called interconnected companies. That Section specifically requires the companies concerned to furnish to the Commissioners a "statement showing the names and addresses . . . of all its members as on the last day of the year or "other period", etc. The difference between this provision and that of Paragraph 4 of the First Schedule to the principal Act, which I have already cited, cannot be ignored. Numerous other provisions and illustrations were in the course of the argument brought to your Lordships' notice in support of the Respondents' submission that the members against whom an apportionment can be made include all persons who have been members at any time during the period under review. I do not think it necessary further to examine them. I have already expressed my view that this submission accords with the natural meaning of the language of the principal operative Section. It is sufficient to add that the context does not oppose but rather supports this construction.

I therefore conclude this part of the case by saying that it has, in my opinion, been rightly held that the Commissioners can make an apportionment under Section 15 of the Finance Act, 1939, against a person of whom it could be predicated at any time in the fiscal year that he was "able to secure", etc.

There remains the question of quantum. This can be disposed of very shortly. The power of the Commissioners is to apportion to the member (or person who is treated as a member) such part of the income "of the company as appears to them to be appropriate". It has, in this case, appeared to the Commissioners to be appropriate to apportion the whole of the income to Mrs. Murray. I see no ground upon which it can be said that they have improperly exercised their statutory discretion. It has been contended that an arbitrary division of the income of the Company should be made as at 8th December, 1939, the date when Mrs. Murray surrendered her control of the Company, and that the Commissioners could not validly apportion to her more than a rateable part of the whole income. If your Lordships upheld such a contention, you would, I think be setting a dangerous precedent by imposing a fetter upon the exercise by the Commissioners of their discretion in a field where experience has shown, and the language of the statute confirms, that it should be unfettered and absolute.

I would, therefore, dismiss this appeal; and the same result will follow in the appeal of the *Alporteno Investment Trust Company*.

My Lords, my noble and learned friend **Lord Goddard**, who is unable to be present today, has asked me to say that he has read, and concurs in, the opinion which I have just pronounced.

*Questions put :*

That the Orders appealed from be reversed.

*The Not Contents have it.*

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

*The Contents have it.*

[Solicitors:—Markby, Stewart & Wadesons; Solicitor of Inland Revenue.]

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