HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION, DIVISIONAL COURT)—16TH AND 19TH OCTOBER, 1956

COURT OF APPEAL—11TH, 12TH AND 13TH FEBRUARY, AND 6TH MARCH, 1957

HOUSE OF LORDS—12TH, 13TH, 14TH, 19TH AND 20TH NOVEMBER, 1957, AND 23RD JANUARY, 1958

Special Commissioners of Income Tax

v.

Linsleys (Established 1894), Ltd. (in liquidation)[1]

Surtax—Profits Tax—Company under control of not more than five persons—No estate or trading income—Income receipts less than deduction for Profits Tax in computing actual income from all sources—Whether Profits Tax " payable "—Whether Surtax direction mandatory so as to found Profits Tax exemption—Finance Act, 1947 (10 & 11 *Geo.* VI, *c.* 35), *Section* 31 (3); *Income Tax Act,* 1952 (15 & 16 *Geo.* VI & 1 *Eliz.* II, *c.* 10), *Sections* 245 *and* 262; *Finance Act,* 1952 (15 & 16 *Geo.* VI & 1 *Eliz.* II, *c.* 33), *Section* 68.

A company to which at all material times Section 245, *Income Tax Act,* 1952, *applied had sold its business of beer, wine and spirit merchants on* 1*st April,* 1952, *and thereafter had no trading income before going into liquidation on* 7*th May,* 1953. *An assessment to Profits Tax was made on it for the chargeable accounting period* 1*st April to* 7*th May,* 1953, *in an agreed figure (including a distribution charge arising from the distributions on liquidation), against which it appealed on the ground that it might not be assessable for Profits Tax for that period.*

For Surtax purposes the Special Commissioners considered that for the year 1952–53 *the company was an investment company and its actual income from all sources was liable to automatic direction and apportionment among the members under Section* 262, *Income Tax Act,* 1952; *for the period* 6*th April to* 7*th May,* 1953, *they considered that, as its income from all sources before making the deduction to be allowed under Section* 68, *Finance Act,* 1952, *for Profits Tax payable by the company did not exceed the amount of that deduction, the actual income was nil and therefore no Surtax direction should be given.*

Before the determination of the Profits Tax appeal the company applied for an Order of Mandamus requiring the Special Commissioners to give a Surtax direction for the period 6*th April to* 7*th May,* 1953, *in order that the company and its corporate members might be enabled to elect under Section* 31 (3), *Finance Act,* 1947, *that it should not be chargeable to Profits Tax for the period* 1*st April to* 7*th May,* 1953. *The company contended that the Special Commissioners were bound to direct and apportion even if the actual income was nil, and, alternatively, that in the circumstances the Profits Tax for the relevant period was not " payable ".*

[1] Reported (Q.B.D. and C.A. *sub nom.* Regina *v.* Special Commissioners of Income Tax (*ex parte* Linsleys (Established 1894), Ltd.)) (Q.B.D.) [1957] 2 Q.B. 78; [1956] 3 W.L.R. 854; 100 S.J. 840; [1956] 3 All E.R. 577; 222 L.T. Jo. 249; (C.A.) [1957] 2 Q.B. 78; [1957] 2 W.L.R. 654; 101 S.J. 318; [1957] 2 All E.R. 167; 223 L.T. Jo. 219; (H.L.) [1958] 2 W.L.R. 292; 102 S.J. 122; [1958] 1 All E.R. 343; 225 L.T. Jo. 74.

Held, *that there could not be a direction unless the company had an actual income, and in determining whether it had an actual income there must be a deduction for Profits Tax which was payable and would remain payable if no direction were given.*

STATEMENT PURSUANT TO THE RULES OF THE SUPREME COURT, 1883, ORDER 59, RULE 3 (2).

1. The name and description of the applicant is Linsleys (Established 1894) Limited (in voluntary liquidation) whose Registered Office is situate at 2 Parliament Street in the City and County of Kingston upon Hull. Prior to the 7th day of May, 1953, when a resolution was duly passed for the voluntary winding up of the applicant, the applicant carried on business in the City and County of Kingston upon Hull and in the East Riding of the County of York as Beer, Wine and Spirit Merchants and Bottlers.

2. The relief sought is an order of mandamus directed to the Commissioners for the special purposes of the Income Tax Acts requiring them to give a direction under Sections 245 and 262 of the Income Tax Act, 1952, in respect of the period from the 6th day of April, 1953, to the 7th day of May, 1953 (both dates inclusive), in relation to the applicant.

3. The grounds of the application are:

(*a*) that the applicant was an investment company as defined in Section 257 of the Income Tax Act, 1952, during the said period from the 6th day of April, 1953, to the 7th day of May, 1953, being the period elapsing between the end of the year of assessment 1952–53 and the time of the commencement of the winding up of the applicant;

(*b*) that by virtue of sub-sections (1) and (6) of Section 262 of the Income Tax Act, 1952, the said Commissioners for the special purposes of the Income Tax Acts have a duty to give a direction under Section 245 of the Income Tax Act, 1952, in respect of the said period in relation to the applicant;

(*c*) that by a letter dated the 29th day of September, 1954, Messrs. Carlill, Burkinshaw & Ferguson, Chartered Accountants, on behalf of the applicant requested the said Commissioners for the special purposes of the Income Tax Acts to direct that the actual income of the applicant for the period from 1st April to 7th May, 1953, be apportioned to the members for surtax purposes;

(*d*) that by a letter dated the 7th day of March, 1956, the said Commissioners for the special purposes of the Income Tax Acts refused to give any direction under Section 262 (1) of the Income Tax Act, 1952, for the period from the 6th day of April to the 7th day of May, 1953;

(*e*) that the grounds relied upon by the said Commissioners for the special purposes of the Income Tax Acts for refusing to give a direction as aforesaid are erroneous in law.

Dated the Third day of July, 1956.

(Signed) J. Wood.

AFFIDAVIT FOR THE APPLICANT

I, John Wood, of 2 Parliament Street in the City and County of Kingston upon Hull, Chartered Accountant, make oath and say as follows:—

1. I am the liquidator of the above named applicant (hereinafter called "the Company"), having been duly so appointed by a Special Resolution passed by the Company on the 7th day of May, 1953.

2. I am duly authorised to make this Affidavit on behalf of the Company.

3. The Company was incorporated under the Companies Acts, 1862 to 1890, on the 7th day of May, 1894, under the name of T. Linsley & Company Limited having an authorised and issued capital of £8,000 divided into 800 shares of £10 each which was subsequently increased to £40,000 divided into 2,000 ordinary shares of £10 each and 2,000 preference shares of £10 each. Until the 31st day of March, 1952, the Company carried on business as Beer Wine and Spirit Merchants and Bottlers. On the 1st day of April, 1952, the Company sold its said business. By Special Resolution dated the 14th day of March, 1952, the Company changed its name to Linsleys (Established 1894) Limited.

4. At all material times the Company was under the control of not more than five persons within the meaning of Section 256 (1) of the Income Tax Act, 1952, and accordingly was a Company to which Section 245 of the Income Tax Act, 1952, applied. Between 6th April and 7th May, 1953, some (but not all) of the persons who were "members" of the Company within the meaning of Section 255 (2) of the Income Tax Act, 1952, and to whom the income of the Company could be apportioned under Section 248 (1) of the Income Tax Act, 1952, were individuals.

5. During the year of assessment 1952–53 the Company was an investment company within the meaning of Section 257 of the Income Tax Act, 1952, and has been treated as such by the Commissioners for the special purposes of the Income Tax Acts (hereinafter called "the Special Commissioners") who by letter dated the 7th day of March, 1956, indicated their intention to give a direction under Section 262 (1) of the Income Tax Act, 1952, in respect of the actual income of the Company from all sources for that year. The said letter is now produced and shown to me marked "J.W.1"(1).

6. During the period from the 6th day of April, 1953, to the 7th day of May, 1953, the Company remained an investment company and its actual income from all sources for that period computed in accordance with Section 255 (3) of the Income Tax Act, 1952, amounted to £6,782 calculated without reference to the provisions of Section 68 (1) of the Finance Act, 1952.

7. By a Special Resolution passed at an Extraordinary General Meeting of the Company duly convened and held on the 7th day of May, 1953, it was resolved that the Company be wound up voluntarily.

8. By a letter dated the 29th day of September, 1954, Messrs. Carlill, Burkinshaw & Ferguson, Chartered Accountants, acting on behalf of the Company, formally requested the Special Commissioners to direct that the actual income of the Company for the period for 1st April to 7th May, 1953, be apportioned to the members for surtax purposes. This request was in fact intended to refer to the actual income of the Company for the period from 6th April to 7th May, 1953. A copy of the said letter is now produced and shown to me marked "J.W.2"(1).

(1) Not included in the present print.

9. By the said letter dated the 7th day of March, 1956, the Special Commissioners indicated that they did not propose to give any direction under Section 262 (1) of the Income Tax Act, 1952, for the period from the 6th April to the 7th May, 1953. The ground relied upon by the Special Commissioners for refusing to give a direction was that, according to the view taken by the Special Commissioners, the Company was liable to profits tax for the chargeable accounting period from the 1st April, 1953, to the 7th May, 1953, in the sum of £18,987 (which sum arose mainly from distribution charges on liquidation distributions) and that by virtue of Section 68 (1) of the Finance Act, 1952, a deduction should be allowed in computing the actual income of the Company for the period from the 6th April to the 7th May, 1953, of such an amount as would, after deduction of income tax at the standard rate for the year 1953–54, be equal to so much of the sum of £18,987 as was apportionable to the period from the 6th April to the 7th May, 1953, and that the effect of this deduction was that the Company had no actual income during the said period and there was nothing in respect of which a direction could be given under Section 262 (1) of the Income Tax Act, 1952.

10. It is contended by the Company that the ground relied upon by the Special Commissioners for refusing to give a direction is erroneous and that no such deduction should be made by virtue of Section 68 (1) of the Finance Act, 1952, or at all in computing the actual income of the Company for the relevant period and that the Special Commissioners are in breach of their statutory duty in refusing to give a direction. Accordingly the relief sought by the Company is an order of mandamus directed to the Special Commissioners requiring them to give a direction in respect of the period from the 6th day of April to the 7th day of May, 1953, in relation to the Company.

11. I am enabled to make this statement from the facts within my own knowledge as liquidator of the Company and from information derived from my investigation of the affairs and the books, documents and papers of the Company.

Sworn at the City and County of Kingston upon Hull this Third day of July, 1956, } J. Wood.

Before me,

T. H. JACKSON,

A Commissioner for Oaths.

AFFIDAVIT OF THE SPECIAL COMMISSIONERS

We, Frederick Hickman Lucraft and Frank Charles Skinner, of the Office of the Special Commissioners of Income Tax, Lynwood Road, Thames Ditton, in the County of Surrey, two of the Commissioners for the special purposes of the Income Tax Acts, make oath and say as follows :—

1. We have read the Statement herein made pursuant to the Rules of the Supreme Court, Order 59, Rule 3 (2), and a copy of the affidavit sworn on the 3rd July, 1956, by John Wood (hereinafter referred to as "the Liquidator").

2. We admit that the above named applicant (hereinafter referred to as "the Company") was at all material times a company to which Section 245 of the Income Tax Act, 1952, applied.

3. We further admit that the Company was during the year of assessment 1952–53 an investment company within the meaning of Section 257 of the said Act, and that for the said year of assessment a direction pursuant to Sections 245 and 262 of the said Act falls to be given by us in relation to the Company.

4. If, as is claimed by the Liquidator, the Company remained an investment company during the period from 6th April, 1953, to 7th May, 1953, the Company's actual income from all sources for the said period would fall to be computed by reference to Sections 255 (3) and 262 (2) of the Income Tax Act, 1952, and Section 68 of the Finance Act, 1952.

5. The Company has been assessed for Profits Tax for the chargeable accounting period from 1st April, 1953, to 7th May, 1953, in an agreed figure of £18,987. The Company has appealed against the said assessment on the ground that it may not be assessable for Profits Tax for the said period.

6. In computing the Company's actual income from all sources for the period from 6th April, 1953, to 7th May, 1953, the deduction to be allowed under Section 68 of the Finance Act, 1952, in respect of Profits Tax payable is as follows:—

Proportion (32/37ths) of £18,987 Profits Tax payable for the chargeable accounting period 1st April, 1953, to 7th May, 1953	£16,421 3 9
Addition for Income Tax at 9*s.* in the pound ...	£13,435 10 4
Total to be deducted under Section 68 of the Finance Act, 1952	£29,856 14 1

7. We have insufficient information to enable us to compute precisely the Company's said income for the aforesaid period, but if, which we do not admit, it is proper to make a computation without taking into account the deduction to be allowed by Section 68 of the Finance Act, 1952, then we agree that the Company's actual income from all sources for the period from 6th April, 1953, to 7th May, 1953, would amount to not more than £8,920.

8. A deduction of the said amount of £29,856 from the Company's gross income for the period from 6th April, 1953, to 7th May, 1953, must however result in a minus figure, and accordingly if that sum falls to be deducted the Company's actual income from all sources for the said period is nil.

9. Since, according to our own computation referred to in paragraphs 6 and 8 above, the Company has no actual income from all sources for the period from 6th April, 1953, to 7th May, 1953, we respectfully submit that we are not obliged to direct, pursuant to Sections 245 and 262 of the Income Tax Act, 1952, that the actual income of the Company from all sources for the said period shall be deemed to be the income of its members. The effect of such a direction would be wholly nugatory, since there is in our submission no income from all sources for us to apportion among the members of the Company.

10. We have therefore declined to give a direction and make an apportionment as aforesaid.

11. The facts deposed to in this affidavit are within our knowledge being derived from the official papers and documents in relation to the matters in question.

Sworn by both of the above named deponents at 149, Strand, W.C.2, in the County of London this 10th day of October, 1956. } F. H. Lucraft. F. C. Skinner.

Before me,

Denis Hayes,

A Commissioner for Oaths.

The case came before the Queen's Bench Divisional Court (Lord Goddard, C.J., and Hallett and Donovan, JJ.) on 16th October, 1956, when judgment was reserved. On 19th October, 1956, judgment was given unanimously against the Special Commissioners, with costs, granting the Order applied for.

Mr. Cyril King, Q.C., and Mr. H. H. Monroe appeared as Counsel for the Company, and the Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Sir Reginald Hills and Mr. E. B. Stamp for the Special Commissioners.

Lord Goddard, C.J.—Donovan, J., will deliver the judgment of the Court.

Donovan, J.—In this case Mr. King, on behalf of Linsleys (Established 1894), Ltd. (in this judgment called " the Company "), moves for an Order of Mandamus addressed to the Special Commissioners of Income Tax requiring them to make a direction under the mandatory terms of Section 262 of the Income Tax Act, 1952, in respect of the Company's income for the period 6th April, 1953, to 7th May, 1953.

That Section is one of a number of provisions designed to prevent the avoidance of Surtax through the withholding from distribution of the profits or income of private companies under the control of a few shareholders. The history of this legislation goes back to 1922, since when it has, on various occasions, been made more stringent as the taxpayer discovered new loop-holes in it. In particular, the Legislature in 1936, and again in 1939, singled out what it called " investment companies " for special and drastic treatment. These were companies whose income was derived from property rather than from trading ; and the target of these new provisions was, no doubt, the kind of scheme under which a taxpayer transferred all his assets to a limited company and then arranged that the company distributed little or no income in such a way as to make him liable to Surtax. In the case of investment companies it was provided by Section 14 of the Finance Act, 1939, now Section 262 of the Income Tax Act, 1952, that the company's income should suffer Surtax however much or however little it had distributed in dividend.

(Donovan, J.)

The general plan of this legislation both as regards investment companies and other companies is that the Special Commissioners first "direct" that the company's income for the period under review be deemed to be the income of the members. The company's income for that period is then computed, and "apportioned" (notionally, of course) among the members according to their interests in the company. The amount so apportioned to any member then becomes his income for Surtax purposes, and if he is an individual it is added to his other income and the appropriate Surtax is computed. That Surtax is payable by the company unless within a given time the member elects to pay it himself: see Sections 245, 248 and 249, Income Tax Act, 1952.

There are various provisions for appeals which are not here in question. There is, however, this distinction between trading companies and "investment companies". In the case of a trading company the initial question for the Special Commissioners is whether it has distributed a reasonable dividend for the period in question, and the Commissioners have a discretion whether to make a direction or not. In the case of the investment company the Commissioners have no such discretion. A direction must be made, however much or however little the company has distributed.

Section 262 of the Income Tax Act, 1952, reproducing Section 14 of the Finance Act, 1939, reads thus:

> "(1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which section two hundred and forty-five of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said section two hundred and forty-five in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income. (2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are given by virtue of subsection (1) of this section as they apply in cases in which directions are given by virtue of the last preceding section with respect to a year of assessment . . ."

It is this Section which the Company is asking shall be put into effect. The Special Commissioners have declined to do so, contending that in the special circumstances of the case they are under no duty to do so. The explanation of this unusual reversal of roles, where the taxpayer is seeking to be taxed and the taxing authority declines to do so, is this. After going into voluntary liquidation on 7th May, 1953, the Company made distributions in the liquidation of trading profits previously undistributed. These distributions attracted a "distribution charge" under the Profits Tax legislation to be found in the Finance Act, 1947, Sections 30 (3) and 35. This distribution charge will be diminished if the Company is made liable to Surtax as it claims. This will result if the members of the Company avail themselves of the provisions of Section 31 (3) of the Finance Act, 1947. But this they cannot do, under the terms of that Sub-section, unless the Company's income for the relevant period is made the subject of a direction for Surtax purposes pursuant to Section 262 of the 1952 Act, in which case it would be followed by an apportionment of such income among the members. Once that is done, the way is clear for the Company and such of its members as are themselves corporate bodies to exercise their rights under Section 31 (3) of the Finance Act, 1947, which will have the result already indicated. Hence the present proceedings, which are designed to require the Special Commissioners to make such a direction and apportionment.

(Donovan, J.)

Nothing of moment turns on the fact that the Company is in liquidation, or that the period involved is the short one, 6th April to 7th May, 1953. That period (hereinafter called " the relevant period ") is by Section 262 (6) deemed to be a " year of assessment " for the purposes of Sub-section (1) of the Section. No question of figures is involved. Nor is it necessary to consider at length the intricate language of Section 31 (3) of the Finance Act, 1947, embodying the right of election above referred to. It is sufficient to indicate its broad effect, which appears to be this. If, within the elastic time limit allowed by the Section, the Company and such of its members as are not individuals so elect, then for the period in question the business of the Company will be treated as carried on by all the members in partnership. The effect of that will be that the members of the Company which are themselves bodies corporate will pay Profits Tax on their shares of the apportioned income, but those members who are individuals will pay Surtax only on their share of such income, measured in each case as the Sub-section provides. An additional result is that the Company itself will not be liable to Profits Tax for the relevant period, and presumably the total tax bill for all concerned will be reduced. A condition precedent to this right of election is, however, as already noted, that the Company's income for the period " is apportioned " for Surtax purposes to its members.

The rival contentions of the parties are these. Mr. King says that the provisions of Section 262 (1) of the Income Tax Act, 1952, are mandatory, and that the Special Commissioners have wrongfully refused to operate them. He complains that until they do so the right of election under Section 31 (3) of the 1947 Act, which Parliament has conferred upon the Company and some of its members, cannot be exercised, and that a continued refusal to put Section 262 (1) into effect will completely frustrate that right and such cannot have been intended by the Legislature.

The Attorney-General argues that in the circumstances of this case the Special Commissioners are under no duty to make a direction under Section 262 (1) and a consequential apportionment, one effect of which will be that the full distribution charge which ought to be paid will not be paid. The reasons advanced by the Attorney-General why the Special Commissioners are under no obligation to make a direction and apportionment are these. (1) A necessary preliminary to that operation is the computation of the Company's actual income from all sources in accordance with the terms of Section 255 (3) of the Income Tax Act, 1952. (2) In computing that income, Profits Tax payable by the Company for the relevant period must be deducted under the mandatory provisions of Section 68 of the Finance Act, 1952. (3) The amount of the said Profits Tax is £29,856. (4) When that is deducted, the result is that the actual income from all sources of the Company for the relevant period is reduced to nil. (5) There is no obligation to make a direction in regard to non-existent income, and no possibility of apportioning nothing. (6) Therefore Section 262 (1) imposes no duty upon the Special Commissioners for the relevant period.

Mr. King's answer is two-fold. First, the Attorney-General's conclusion does not follow even if the rest of his argument is right, for the Special Commissioners are bound by Section 262 (1) to direct even if the income is nil, and to make an apportionment of nil. We need not decide this question, and content ourselves with saying that we think there are formidable difficulties in the way of the argument. Mr. King's second answer is that the whole of the Crown's case is based upon a misconception, namely, that Profits Tax for the relevant period is " payable " by the Company. He says that this cannot be properly asserted in the existing circumstances. If

Mr. King is right upon this point, it disposes of the case. For if no deduction has to be made in respect of Profits Tax, the Company will admittedly have an actual income from all sources of some £8,900, and a direction and apportionment of that income can be made.

The Attorney-General contends that Profits Tax is payable, within the meaning of Section 68, because the distributions made by the Company in liquidation attract Profits Tax under the charge imposed by Section 30 (3) of the Finance Act, 1947, and the amount of tax has been particularised by an assessment made upon the Company. He quoted and relied upon the words of Lord Dunedin in *Whitney* v. *Commissioners of Inland Revenue,* 10 T.C. 88, at page 110, to the effect that liability to tax does not depend upon assessment but upon the charging provisions of the taxing Act, the assessment merely particularising the amount payable. He adds that the circumstances of an appeal, and the prospect that later on Profits Tax may not be payable by the Company for this same period, i.e., in the event of an election under Section 31 (3) of the 1947 Act, is irrelevant. As things stand at the moment, he says, Profits Tax is payable.

For the Company, however, it is said that whether Profits Tax is payable depends upon a consideration of all the relevant provisions of the taxing Act. The charging Section may impose a charge but a later Section remove it in particular cases. That, in effect, it is argued, is the position here, or may well be, because if the right of election under Section 31 (3) of the 1947 Act is exercised, no Profits Tax will be payable by the Company for the relevant period. Apart altogether from this, it is argued that the appeal against the Profits Tax assessment already lodged prevents the tax from being "payable" until the appeal is disposed of. Reference is made in this connection to Paragraph 5 of Part II of the Fifth Schedule to the Finance Act, 1937, which clearly recognises, by implication, that a taxpayer cannot be made to pay Profits Tax while it is in dispute and the subject-matter of an appeal.

"Payable" is a word which may bear different meanings according to its context. Here it has to be considered in its context in Section 68 of the Finance Act, 1952. By that Section the Special Commissioners are told that

> "if any amount is payable by the body corporate by way of the profits tax or the excess profits levy . . . a deduction shall be allowed":

see Sub-section (1). And Sub-section (2), which is directly in point here, tells the Special Commissioners that in the case of an investment company a deduction is to be allowed

> "in relation to any amount payable by the company by way of profits tax or the excess profits levy".

Bearing in mind that the ultimate purpose is the imposition of Surtax liability on the members of the Company under what have been authoritatively called "penal provisions" (see *Fattorini* v. *Commissioners of Inland Revenue,* [1942] A.C. 643, at page 655[1]), it seems a little unlikely that Parliament intended that such Surtax should be reduced by the deduction of a sum for Profits Tax which might turn out never to be payable at all.

Sub-section (4) of Section 68 itself will also seem to throw light on the point. This deals with the case where a deduction has been allowed under Section 68 for Excess Profits Levy, which levy is later reduced (as it might

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[1] 24 T.C. 328, at p. 350.

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have been when that levy was in force) by losses incurred in a subsequent year; an appropriate repayment of the levy previously paid would then be recovered by the company; when that happens, says Sub-section (4), fresh apportionments shall be made to counteract the excessive deduction. There is no similar provision as regards Profits Tax, and although that was levied on a different basis, the absence of any provision to correct deductions for Profits Tax which afterwards turn out to be excessive tends to show that in Section 68 the Legislature was using the word " payable " in relation to Profits Tax as connoting a liability ascertained and fixed.

If the word " payable " is construed in this sense, the results are that a direction can be made as Section 262 (1) directs, and be followed by a consequential apportionment, since no deduction for Profits Tax will fall to be made. In addition, the Company and its non-individual members will be able to exercise the right of election given by Section 31 (3) of the 1947 Act. The untoward result is that some tax will be lost to the Revenue, and, while that is a relevant consideration, it is not an overriding one on a question of construction. If, on the other hand, the word " payable " is construed as the Revenue wishes, the Company and its non-individual members will never be able to exercise an election under Section 31 (3) for the period in question.

Bearing all these considerations in mind, we think the better construction is that for which the Company contends: in other words, that in the circumstances of this case the Special Commissioners were not bound under Section 68 to make a deduction for Profits Tax on the footing that it is at present payable by the Company within the meaning of that Section. We think that word connotes a liability to pay which has become ascertained and fixed so far as Profits Tax is concerned; and that the Special Commissioners are not bound to treat as payable Profits Tax which is the subject of a pending appeal and which, if the Company follows a course allowed it by the law, may never become payable by the Company at all. If it were merely an outstanding appeal which created the difficulty, no doubt the Special Commissioners would merely await its outcome before calculating actual income and making an apportionment.

On the view we take, therefore, a direction under Section 262 (1) followed by a consequential apportionment can be made in this case and, having regard to the mandatory terms of that Section, must be made. An Order of Mandamus will accordingly issue, and the Respondents will pay the costs of the motion.

Sir Reginald Hills.—Will your Lordship think it right, in order that the Crown may have an opportunity of considering an appeal, to direct that the Mandamus shall not be put into force pending that decision, subject to a period of time, no doubt? One does not want to appear in contempt of this Court, even for a moment.

Lord Goddard, C.J.—If you give notice of appeal within 14 days, the Order will await the hearing of the appeal; it will lie in the office for 14 days.

Sir Reginald Hills.—If your Lordship pleases.

The Special Commissioners having appealed against the above decision, the case came before the Court of Appeal (Jenkins, Hodson and Sellers, L.JJ.) on 11th, 12th and 13th February, 1957, when judgment was reserved. On 6th March, 1957, judgment was given unanimously against the Special Commissioners, with costs.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Sir Reginald Hills, Mr. E. B. Stamp and Mr. Alan Orr appeared on behalf of the Special Commissioners, and Mr. Cyril King, Q.C., and Mr. H. H. Monroe for the Company.

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

This is an appeal by the Special Commissioners from an Order of Mandamus made by the Queen's Bench Divisional Court on 19th October, 1956, whereby the Special Commissioners were ordered and commanded to give a direction under Sections 245 and 262 of the Income Tax Act, 1952, in respect of the period from 6th April, 1953, to 7th May, 1953, both dates inclusive, in relation to the applicants (now Respondents), Linsleys (Established 1894), Ltd. (hereinafter called " the Company "), which went into voluntary liquidation on the latter date.

To begin with a broad statement of the nature of the case, the effect of such a direction (which, according to the Company, the Special Commissioners are bound to make under the mandatory provisions of Section 262) would be (*a*) to make the actual income of the Company from all sources for the relevant period apportionable amongst its members for Surtax purposes; and (*b*) to give under the somewhat complicated provisions of Section 31 (3) of the Finance Act, 1947, a right of election exercisable jointly by the Company and any of its members other than individuals (that is to say, bodies corporate as distinct from natural persons) which if exercised would, to put the matter very shortly, operate to relieve the Company from a substantial liability in respect of Profits Tax, while on the other hand rendering apportionable amongst its members for Surtax purposes the income which, but for the election, would have been absorbed by the Profits Tax.

The case at first sight seems to involve what Donovan, J., in delivering the judgment of the Divisional Court, described as an unusual reversal of roles. It must be seldom that taxpayers seek to compel the Special Commissioners to tax them, and as a general rule the Special Commissioners need no compulsion in that regard. But the figures are in fact such that the liability in respect of Profits Tax far exceeds the amount of income which on cancellation of that liability would be apportionable for Surtax purposes.

It is vital to the Company's contention that the Company should be held to be an " investment company " within the meaning of Section 262 of the Income Tax Act, 1952, for it is only in relation to companies of that character that the Special Commissioners are enjoined in mandatory terms to give a direction of the nature sought. The Attorney-General, for the Special Commissioners, presented a subsidiary argument to the effect that the Company was not at the material time an investment company within the meaning of Section 262, but without prejudice to that subsidiary contention we propose to deal with the main arguments in the case on the assumption that it was, reserving for later examination the Attorney-General's submission to the contrary.

(Jenkins, L.J.)

The main argument for the Special Commissioners was to the effect that, even if the Company was an investment company within the meaning of Section 262 at the material time, they are under no statutory duty, and indeed have no power, to give the direction in question, because Section 68 (1) of the Finance Act, 1952, requires them, in computing the Company's actual income from all sources for the purposes of Section 262, to make a deduction in respect of the Profits Tax liability which when made has the effect of reducing such actual income to a minus quantity. There is thus no income in respect of which any direction or apportionment can be given or made, and the mandatory terms of Section 262 of the Income Tax Act, 1952, cannot be construed as obliging the Special Commissioners to give a direction or make an apportionment in respect of income which amounts to nil, or in other words non-existent income: *lex non cogit ad impossibilia.* It follows, according to the argument for the Special Commissioners, that as no direction or apportionment can be given or made, the right of election conferred by Section 31 (3) of the Finance Act, 1947, can never be exercisable; for that right of election only arises when there has been a direction and apportionment. Thus the submission made on behalf of the Special Commissioners would, if accepted, lead inevitably to the conclusion that the liability in respect of Profits Tax must stand, and is not to be exchanged under the provisions of Section 31 (3) of the Finance Act, 1947, for the less onerous liability to Surtax which the relief from the liability in respect of Profits Tax afforded by that Sub-section would, if applicable, entail.

On the other hand, it is argued for the Company that upon the true construction of the relevant legislation, and in particular Section 68 (1) of the Finance Act, 1952, any deduction in respect of Profits Tax enjoined by Section 68 (1) only falls to be made, at earliest, when a direction has been given; that apart from such deduction there is actual income from all sources of the Company for the relevant period in respect of which a direction can, and in view of the mandatory terms of Section 262 of the by Section 68 (1) only falls to be made, at earliest, when a direction has been given, and the earliest time at which it may be proper to make any deduction enjoined by Section 68 (1) of the Finance Act, 1952, has consequently arrived, the question of deduction must still remain in suspense, inasmuch as Section 68 (1) only enjoins the deduction in respect of any amount "payable" by way of Profits Tax, and the amount here in question does not answer that description, because it is not an amount certainly payable, but an amount which will become payable in one contingency, that is to say, the non-exercise of the right of election conferred by Section 31 (3) of the Finance Act, 1947, but which will not become payable in another contingency, that is to say, in the event of such right of election being exercised.

The argument for the Company is also put on the more general ground that, apart from the submission made in regard to the necessity of a direction by the Special Commissioners as a condition precedent to any deduction in respect of Profits Tax under the provisions of Section 68 (1) of the Finance Act, 1952, the amount claimed by the Special Commissioners to be deductible was not "payable" within the meaning of that Sub-section, in view of the potential right of election conferred by Section 31 (3) of the Finance Act, 1947, which if exercised would prevent it from ever becoming payable, and also in view of a pending appeal by the Company against the relevant assessment or assessments to Profits Tax.

It is further submitted on the Company's side, though somewhat faintly, that it is not impossible for the Special Commissioners to give a direction and make an apportionment in respect of a nil amount of income. The Company also puts forward an argument rather in the nature of a plea *ad misericordiam*, to the effect that the Special Commissioners ought not to manipulate the legislation so as to defeat the right of election conferred in clear terms by Section 31 (3) of the Finance Act, 1947. This argument may perhaps be regarded as offset by the retort made by Mr. Stamp, for the Special Commissioners, to the effect that the broad intention of Section 31 (3) of the Finance Act, 1947, and Section 68 (1) of the Finance Act, 1952, is to protect persons who suffer Surtax under the legislation taxing the undistributed profits of companies from suffering Profits Tax as well, rather than to enable persons on whom no liability to Surtax would otherwise fall to exchange a liability to Profits Tax for a less onerous liability to Surtax.

The decision of the Divisional Court in favour of the Company was, as we understand the judgment of the Court delivered by Donovan, J., founded wholly upon the view that the amount of Profits Tax in respect of which the Special Commissioners claimed to make the deduction prescribed by Section 68 (1) of the Finance Act, 1952, was not " payable " within the meaning of that Sub-section, in view of the right of election conferred by Section 31 (3) of the Finance Act, 1947. We may note that, without deciding the point, the judgment of the Court expressed the opinion that there were formidable difficulties in the way of the argument submitted by Mr. King, for the Company, to the effect that the Special Commissioners were bound to direct even if the income was nil and to make an apportionment of nil.

We hope that this outline of the nature of the case, in which we have referred in general terms to the more relevant statutory provisions, will aid appreciation of the bearing upon the question to be decided of the various enactments to which we must next refer in some detail.

The law relating to Surtax on the undistributed profits of companies was consolidated by the Income Tax Act, 1952, and accordingly the earlier enactments so consolidated require no more than a brief reference. As is well known, this line of legislation began with Section 21 of the Finance Act, 1922, which may perhaps be described as the ancestor of Section 245 of the Income Tax Act, 1952. The short effect of Sub-section (1) of the former Section was to empower, not enjoin, the Special Commissioners, where it appeared to them that a company to which the Section applied (defined by Sub-section (6), so far as material for the present purpose, as any company under the control of not more than five persons) had not distributed a reasonable part of its income in such a way as to make it part of the income of the members for Surtax (or, as it was then, Supertax) purposes, to direct that the income of the company should for those purposes be deemed to be income of the members and the amount thereof should be apportioned among the members. Section 20 of the Finance Act, 1936, singled out for special treatment companies termed " investment companies ", and therein defined as companies whose income consisted mainly of

> " investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in subsection (3) of section fourteen of the Income Tax Act, 1918 ".

(Jenkins, L.J.)

Section 14 (1) of the Finance Act, 1939 (which may perhaps be described as the ancestor of Section 262 (1) of the Income Tax Act, 1952), introduced a system of automatic direction and apportionment with respect to every investment company, as defined by the 1936 Act, to which Section 21 of the 1922 Act applied. The short effect of this new provision was that with respect to every such investment company the Special Commissioners were enjoined to give a direction and make the consequential apportionment under Sub-section (1) of Section 21 of the 1922 Act, however much or however little of the income of the company had been distributed. That is the origin of the mandatory provision now contained in Section 262 (1) of the Income Tax Act, 1952, on which the Company in the present case relies.

Before passing to the Income Tax Act, 1952, and the Finance Act of the same year, it will, we think, be convenient to refer to some of the provisions in regard to Profits Tax contained in the Finance Acts of 1937 and 1947. Profits Tax was imposed under the name of National Defence Contribution by Section 19 of the Finance Act, 1937, and it was originally charged on the profits arising in each chargeable accounting period, as therein defined, from any trade or business carried on in the United Kingdom (with immaterial exceptions) at the rate of 5 per cent. in the case of a corporation and 4 per cent. in other cases. Section 24 of the Act of 1937 has some bearing upon the question whether the Profits Tax in respect of which the Special Commissioners in the present case claim that the disputed deduction from the Company's actual income from all sources falls to be made under Section 68 (1) of the Finance Act, 1952, is "payable" within the meaning of that Sub-section. It provides as follows:

> "(1) The national defence contribution shall be assessed and collected by the Commissioners of Inland Revenue in accordance with the provisions of Part I of the Fifth Schedule to this Act, and shall be due and payable at the expiration of one month from the date of the assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed. (2) Any person who is dissatisfied with any such assessment may appeal subject to and in accordance with the provisions of Part II of the said Schedule. (3) The provisions of Part III of the said Schedule shall have effect for the purpose of carrying into effect the provisions of this section and of Parts I and II of the said Schedule and otherwise for supplementing those provisions."

We also note, as bearing upon the same question, Paragraph 1 of Part I of the Fifth Schedule to the Act of 1937, which provides as follows:

> "The national defence contribution payable in respect of any chargeable accounting period shall be assessed on the person carrying on the trade or business in that period";

and Paragraph 5 of Part II of the same Schedule, which provides as follows:

> "Notwithstanding that an appeal is pending against an assessment to the national defence contribution, such part of the contribution assessed as appears to the Commissioners of Inland Revenue not to be in dispute shall be collected and paid in all respects as if it were a contribution charged by an assessment in respect of which no appeal was pending, and on the determination of the appeal any balance chargeable in accordance with the determination shall be paid, or any amount over-paid shall be repaid, as the case may require."

Section 25 of the 1937 Act made Profits Tax a deductible expense for Income Tax purposes.

Radical alterations in relation to Profits Tax were introduced by the Finance Act, 1947. It is fortunately unnecessary to refer in detail to the highly complicated provisions of this Act. By Section 30 the rate of tax was increased to 25 per cent., reducible by relief for non-distribution, and

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Page 688—*delete* line 32 *and insert* "Income Tax Act, 1952, must, be given; and that when a direction has ".

on the other hand increasable by distribution charges, in the events and manner therein provided. By Section 31 (1) individuals were exempted from the tax, and by Sub-section (2) of the same Section it was provided as follows:

> "The said section nineteen shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of section twenty-one of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

Sub-section (3) of Section 31 is important as conferring the right of election on which the Company in the present case relies. It is in these terms:

> "If, for a year or period which includes, or for years or periods which together include, the whole of a chargeable accounting period of a trade or business carried on by a body corporate, the actual income of the body corporate from all sources is apportioned under or for the purposes of the said section twenty-one, and some (but not all) of the persons to whom the income is apportioned are individuals, then if by notice in writing given to the Commissioners within six months from the end of that chargeable accounting period, or such longer time as the Commissioners may in any case allow, the body corporate and the persons other than individuals to whom the income is apportioned jointly so elect as respects that chargeable accounting period and each subsequent chargeable accounting period the whole of which is included in a year or period or years or periods for which the said actual income is so apportioned to those persons and persons who are individuals, the provisions of this Part of this Act shall apply as if—(*a*) the trade or business had been carried on, during that and each such subsequent chargeable accounting period, in partnership by the persons to whom the income is apportioned, and the share of any one of them of the profits and losses of the trade or business therefor had been equal to the proportion of the income apportioned for the year or period or years or periods in question which is apportioned therefor to that one of them; and (*b*) any payment which is received from the body corporate during that or any such subsequent chargeable accounting period by any of the persons to whom the income is apportioned, and which is not allowable as a deduction in computing the profits of the trade or business therefor, had not been made; and the body itself shall not be chargeable to profits tax for that or any such subsequent chargeable accounting period."

Finally, so far as the Act of 1947 is concerned, Section 35 (1) (*c*) has, as we understand it, the effect of making distributions in the winding-up of a company other than distributions of capital rank as distributions for the purposes of the tax.

We now come to the Income Tax Act, 1952. That Act replaced Section 21 (1) of the Finance Act, 1922, by Section 245, which, as one of the Sections directly relevant in this case, we had better read *verbatim*:

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

(Jenkins, L.J.)

It also by Section 248 (1) and (2), again substantially replacing earlier legislation, provided as follows:

> "(1) Where a direction has been given under section two hundred and forty-five of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members. (2) Notice of any such apportionment shall be given by serving on the company a statement showing the amount of the actual income from all sources adopted by the Special Commissioners for the purposes of the said section two hundred and forty-five and either the amount apportioned to each member or the amount apportioned to each class of shares, as the Commissioners think fit."

It also replaced Section 14 (1) of the Finance Act, 1939, by Section 262 (1), which again is one of the immediately relevant provisions and is in these terms:

> "Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which section two hundred and forty-five of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said section two hundred and forty-five in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income."

We think the only other provisions of the Income Tax Act, 1952, to which we need refer at length are paragraph (*a*) of the proviso to Section 262 (2), which is in these terms:

> "Provided that—(*a*) no deduction shall be allowed in computing the actual income from all sources of the company which would not be allowable in computing the total income of an individual for the purposes of this Act, other than deductions for any profits tax payable by the company or for any such sums disbursed by the company as expenses of management as the Special Commissioners consider reasonable, having regard to the requirements of the company's business and, in the case of directors' fees or other payments for services, to the actual services rendered to the company";

and Section 255 (3), which reproduces in substantially identical terms Paragraph 6 of the First Schedule to the Finance Act, 1922, and is in these terms:

> "In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

We should, however, mention that Section 256 (1) provides, so far as material, that Section 245 shall (as did Section 21 of the Finance Act, 1922) apply to any company which is under the control of not more than five persons; that Section 257 (2) preserves (*mutatis mutandis*) the old definition of an "investment company"; and finally that Section 25 of the Finance Act, 1937, which, as we have said, made Profits Tax a deductible expense for Income Tax purposes, was repealed by the Income Tax Act, 1952, but re-enacted in substantially identical terms by Section 141 of that Act.

The Finance Act, 1952, repealed Section 141 of the Income Tax Act, 1952, and by Section 33 (1) provided as follows:

> "The profits tax payable for any chargeable accounting period ending after the end of the year nineteen hundred and fifty-one shall not be allowed as a deduction in computing the profits or gains or losses of a trade or

business for the purposes of income tax for the year 1951–52 or any subsequent year of assessment, and sums disbursed in discharge of profits tax for any such period shall not be treated as sums disbursed as expenses of management for the purposes of any income tax relief for any such year of assessment in respect of expenses of management."

We come at length to Section 68 of the Finance Act, 1952, Sub-sections (1) and (2) of which are in these terms:

"(1) Where for the purposes of section twenty-one of the Finance Act, 1922, or Chapter III of Part IX of the Income Tax Act, 1952 (which provide for the payment of surtax, in certain cases, on undistributed income of companies), the actual income from all sources of a body corporate for a year or period ending after the end of the year nineteen hundred and fifty-one falls to be computed under paragraph 6 of the First Schedule to the said Act of 1922 or subsection (3) of section two hundred and fifty-five of the said Act of 1952, then, if any amount is payable by the body corporate by way of the profits tax or the excess profits levy, respectively, for any chargeable accounting period falling wholly or partly within that year or period, a deduction shall be allowed, in computing the said actual income, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment during which the said year or period ends, be equal to so much of the amount so payable by the body corporate as is apportionable to the said year or period: Provided that this subsection does not apply in relation to any chargeable accounting period ending at or before the end of the year nineteen hundred and fifty-one. (2) Paragraph (*a*) of the proviso to subsection (2) of section two hundred and sixty-two of the Income Tax Act, 1952 (which relates to the deductions allowable in computing the actual income from all sources of an investment company in relation to which a direction is in force under subsection (1) of that section), shall have effect as if instead of authorising a deduction for profits tax payable by the company it authorised a deduction, in relation to any amount payable by the company by way of profits tax or the excess profits levy, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment in respect of which the direction is given, be equal to the first-mentioned amount."

As to the facts, the Company was admittedly an investment company within the meaning of Section 257 of the Income Tax Act, 1952, during the year of assessment 6th April, 1952, to 5th April, 1953. We are, as we have said earlier in this judgment, for the time being assuming that the Company was also an investment company within the meaning of that Section from 6th April, 1953, down to the commencement of its voluntary liquidation on 7th May, 1953. The relevant chargeable accounting period of the Company for the purposes of Profits Tax is the period from 1st April, 1953, to 7th May, 1953, and the Company has been assessed to Profits Tax for that period in the sum of £18,987. The Company has agreed that figure in point of amount but not in point of liability, which is the subject of a pending appeal by the Company.

In order to ascertain the amount which ought, if and when deductible, to be deducted in respect of Profits Tax under Section 68 (1) of the Finance Act, 1952, in computing the Company's actual income from all sources for the purposes of Sections 245 and 262 of the Income Tax Act, 1952, it is necessary to calculate the proportion of the Profits Tax assessment of £18,987 for the period 1st April, 1953, to 7th May, 1953, attributable to the part of the year of assessment 1953–54 which had elapsed at the date of the Company's liquidation, that is to say, the period from 6th April, 1953, to 7th May, 1953. That proportion is £16,421 3*s.* 9*d.*, which when "grossed up" as required by Section 68 (1) of the Finance Act, 1952, comes to £29,856 14*s.* 1*d.* The amount of the Company's actual income from all sources for the period from 6th April, 1953, to 7th May, 1953, computed without any deduction in respect of Profits Tax does not exceed £8,920.

(Jenkins, L.J.)

It is thus apparent that, if the Special Commissioners are right in their submission that the deduction in respect of Profits Tax required by Section 68 (1) of the Finance Act, 1952, must be made before giving any direction in respect of the Company under Sections 245 and 262 (1) of the Income Tax Act, 1952, it necessarily follows that any such direction subsequently given would be in respect of a nil amount of income, for the deduction of £29,856 14*s.* 1*d.* from £8,920 produces a minus quantity.

Returning to the arguments summarised earlier in this judgment, we will for convenience of discussion term a company to which Section 245 of the Income Tax Act, 1952, applies, but which is not an investment company, " a 245 company " ; and a company to which that Section applies and which is an investment company, " a 262 company ".

It seems to us that the first matter for determination is the time at which the actual income from all sources of a 245 company or a 262 company does, within the meaning of Section 68 (1) of the Finance Act, 1952, " fall to be computed " under Paragraph 6 of the First Schedule to the Finance Act, 1922, or Section 255 (3) of the Income Tax Act, 1952, for it is only when the income of the company concerned does fall to be so computed that the deduction in respect of Profits Tax is to be made. The Attorney-General submits that the income of the company concerned falls to be so computed before any direction is given. He does not fix any exact moment of time, but he says it must be before any direction is given, on the ground that the Special Commissioners must compute the income of a 245 company before they can form the opinion that it has not distributed a reasonable part of its income from all sources, and must likewise compute the income of a company before they can conclude that it is a 262 company and as such amenable to automatic direction. We think this is wrong.

No doubt the Special Commissioners must necessarily make calculations, or obtain from the company concerned calculations, of the actual income from all sources of the company concerned, before they can decide whether to give a direction or not in the case of a 245 company, or whether a company is a 262 company in respect of which they must automatically give a direction. But such calculations are provisional and preliminary only, and cannot of themselves have any effect on the liability, if any, of the company concerned to Surtax. We think " falls to be computed " means " is required by law " or " is required by the relevant statutory provisions to be computed " ; and that meaning of the phrase can only be satisfied by the giving of a direction. Take the case of a 245 company. The Special Commissioners here have a discretion whether to give a direction or not. They may be thinking of giving a direction or may even have decided to give a direction ; but unless and until a direction is actually given the company's income does not " fall to be computed " in any way other than the ordinary method applicable in cases to which Section 245 does not apply. We would test this by reference to the very deduction which is in question here. It will be remembered that Section 141 of the Income Tax Act, 1952, which allowed Profits Tax as a deduction for Income Tax purposes, was repealed by the Finance Act, 1952, which by Section 33 (1), cited at length above, prohibits any such deduction. There could, therefore, as it seems to us, be no question of a 245 company in respect of which no direction had been given making or being allowed any deduction on that account. If " falls to be computed " has the meaning we suggest, all is clear. The case is taken out of the ordinary rule, and a special

deduction is allowed. If, on the other hand, "falls to be computed" means, as the Attorney-General would have it, "is computed by the Special Commissioners with a view to deciding whether to give a direction or not", it seems to us that a mere computation by the Special Commissioners with a view to deciding whether to give a direction or not would, although not in fact followed by any direction, entitle the 245 company concerned to be assessed in the special way, and claim the special deduction, allowed by Section 68 (1).

If we are right as to the effect of Section 68 (1) of the Finance Act, 1952, in relation to a 245 company, we think the same result follows in relation to a 262 company. Section 68 (1) of the Finance Act, 1952, draws no distinction between them, and the machinery of direction and apportionment is common to both cases. Moreover, although in the case of a 262 company the whole of its actual income from all sources is, by Section 262 (1) itself, deemed to be income of its members irrespective of the amount of any distributions, and the Special Commissioners are accordingly required to give a direction under Section 245 in any such case, the giving of such a direction is nevertheless a necessary step for the purpose of bringing into operation in any particular case the general principle which Section 262 (1) lays down and the consequences as to computation of income referred to in Section 68 (1) of the Finance Act, 1952. But the matter does not rest there, for it is, as we think, abundantly plain that Section 68 (2) treats the deduction in the case of a 262 company as authorised only when a direction is in force. It seems to us also that Section 248 (2) of the Income Tax Act, 1952, points in the same direction, as the language of that Sub-section would appear to indicate the taking by the Special Commissioners of the following steps in the following order: (*a*) direction; (*b*) computation of actual income from all sources; and (*c*) notice of apportionment in the form of a statement showing the amount of the actual income from all sources adopted by the Special Commissioners and the amount apportioned to each member or to each class of shares. We should add that to our minds the very "grossing up" of the amount of the deduction allowed in respect of Profits Tax strongly suggests that the deduction is intended for cases in which the income of the company concerned has been made—or in the case of a 262 company perhaps we should say effectively made—income of its members for Surtax purposes, that is to say, cases in which a direction has been given.

It follows that in our opinion there was actual income of the Company from all sources for the period 6th April, 1953, to 7th May, 1953, amounting to or provisionally estimated at £8,920, in respect of which the Special Commissioners can give a direction under Section 262 (1) of the Income Tax Act, 1952, and if they can give such a direction then in view of the mandatory terms of the Sub-section they are clearly bound to give it.

On this footing it seems to us impossible, once the Special Commissioners have given the direction which in our view they are bound to give, to hold that the Profits Tax in respect of which they have sought to make the deduction mentioned in Section 68 (1) of the Finance Act, 1952, is "payable" within the meaning of that Sub-section. Once the direction is given (and for the present purpose it should be treated as having been given) the way is clear for an exercise of the right of election conferred by Section 31 (3) of the Finance Act, 1947. We understand it is not in dispute that apportionment follows as a necessary consequence of the

(Jenkins, L.J.)

direction. Accordingly, all the conditions precedent to an exercise of the right of election will have been fulfilled. The actual income of the Company from all sources for the period 6th April to 7th May, 1953, will have been apportioned. There has also admittedly been an apportionment of such income for the period from 1st to 5th April, 1953. These two periods together include the whole of the chargeable accounting period from 1st April, 1953, to 7th May, 1953. Admittedly some, but not all, of the persons to whom the income has been or is to be apportioned are individuals. There remains only the question of time. The right is expressed to be exercisable by notice in writing to the Commissioners (that is to say, according to Section 74 (5) of the Finance Act, 1947, the Commissioners of Inland Revenue) within six months from the end of the relevant chargeable accounting period, or such longer time as the Commissioners may in any case allow. We assume that in the circumstances of this case, in which the refusal, and as we hold the wrongful refusal, of the Special Commissioners to give a direction has made it impossible to exercise the right of election at any earlier date, a reasonable time within which it may now be exercised will be allowed.

Accordingly, the amount of Profits Tax in question is not, in our opinion, an amount certainly and presently payable, but an amount which will become payable only in the contingency of the right of election not being exercised, and which will never become payable in the event of the right of election being exercised. Such an amount, in our view, clearly cannot be an amount which is " payable " within the meaning of Section 68 (1) of the Finance Act, 1952, or within any reasonable meaning of the word. It is a sum which may or may not be payable according to the course of events.

Therefore, it cannot, in our view, be said that a direction would merely have the effect of reducing the Company's actual income from all sources to nil on the ground that, the Profits Tax being " payable " within the meaning of Section 68 (1) of the Finance Act, 1952, the amount calculated in accordance with Section 68 (1) thereof would thereupon become forthwith deductible under that Sub-section. The actual income of the Company from all sources for the relevant period would stand at £8,920 or whatever the exact figure may be, though no doubt reducible to nil in the event of the Profits Tax becoming payable. We see no insuperable difficulty in framing the consequential apportionment or apportionments (for the Attorney-General, as we understood him, agreed that supplementary apportionments could, if necessary, be made) in such a way as to meet this state of affairs.

This reasoning suffices, in our judgment, to dispose of the appeal, subject to the Attorney-General's submission to the effect that the Company was not at the material time an investment company within the meaning of Section 262 of the Finance Act, 1952. Before passing to that, however, we should perhaps say a word about the more general aspect of the argument on the issue as to whether the Profits Tax is " payable " within the meaning of Section 68 (1) of the Finance Act, 1952, on the assumption that the question whether it is payable, and consequently gives rise to the deduction prescribed by Section 68 (1) of the Finance Act, 1952, falls to be determined before any direction is given. On this assumption, the circumstances in which that question must be answered are these: (1) it is not in dispute that the Profits Tax if payable at all is, in point of amount, correctly assessed at £16,421 3*s.* 9*d.*; (2) the Profits Tax will, however, not be payable at all in the event of the right of election under Section 31 (3)

of the Finance Act, 1947, being exercised; and (3) the assessment or assessments to Profits Tax is or are the subject of a pending appeal by the Company on the ground indicated in (2) above, which we understand to be the sole ground of appeal; but (4) the right of election upon which the appeal is based can, having regard to the terms of Section 31 (3) of the 1947 Act, only arise if and when a direction is given and the consequential apportionment is made, an event which has not happened and, if the Special Commissioners have their way, will never happen.

In these circumstances, it is contended for the Special Commissioners that the Profits Tax is "payable" within the meaning of Section 68 (1) of the Finance Act, 1952. In support of this argument, reliance is placed on Section 24 (1) of the Finance Act, 1937, which provides that the tax

> "shall be due and payable at the expiration of one month from the date of the assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed."

Reliance is also placed on Paragraph 1 of Part I of the Fifth Schedule to the same Act, which provides that the tax "payable" in respect of a given period shall be assessed on the person carrying on the trade or business in that period. It is pointed out, further, that Section 68 (4) of the Finance Act, 1952, refers to the amount "payable" by a body corporate for a given period in respect of the Excess Profits Levy and goes on to provide that the amount so described may be reduced in the event of a deficiency of profits for a subsequent period.

We do not think the use of the word "payable" in these statutory provisions really assists the Special Commissioners' case. The word "payable" has more than one meaning, and must be construed in any given case by reference to the exact context in which it appears. More to the point, as we think, is Paragraph 5 of Part II of the Fifth Schedule to the 1937 Act, on which Mr. King relied on the Company's behalf. That Paragraph provides that where an appeal is pending against an assessment to Profits Tax such part of the tax as appears to the Commissioners of Inland Revenue not to be in dispute shall be collected and paid in all respects as though no appeal was pending. This seems to us to mean, as a matter of necessary implication, that any amount which is in dispute is not to be collected or paid, or in other words is not to be payable pending the appeal; and where the appeal challenges *in toto* the alleged liability to tax it is obvious that the dispute extends to the whole amount.

The Attorney-General also relied on this well-known passage from the speech of Lord Dunedin in *Whitney* v. *Commissioners of Inland Revenue*, 10 T.C. 88, at page 110:

> "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

But these observations related to a wholly different case concerning the liability of a non-resident to Super-tax (as it was then) on profits arising

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in this country. Here the question is not whether the liability to tax depends on the charge imposed by the taxing legislation or on the assessment made pursuant to such legislation, but whether the taxing legislation itself has imposed a certain, as distinct from a merely contingent, liability to tax.

In *W. H. Cockerline & Co.* v. *Commissioners of Inland Revenue,* 16 T.C. 1, at pages 18–19, to which the Attorney-General also referred, Lord Hanworth, M.R., cited the above passage from the speech of Lord Dunedin together with a passage in a similar sense from the judgment of Sargant, L.J., in an unreported case of *Williams* v. *Henry Williams, Ltd.,* and applied the law as therein laid down to repel an argument presented on behalf of a taxpayer who was seeking to reopen a final settlement of his tax liability to the effect that a certain payment made by him on account of tax was invalid because there had been no assessment. This again appears to us to be very far removed from the present case.

Finally, on this part of the case, the Attorney-General referred to *Commissioners of Inland Revenue* v. *John Dow Stuart, Ltd.,* 31 T.C. 274, in which it was held that under Section 18 (1) of the Finance (No. 2) Act, 1939, the Excess Profits Tax " payable " in respect of a trade or business for any chargeable accounting period, and consequently deductible for Income Tax purposes as an expense incurred in that period, was the Excess Profits Tax as assessed and not the reduced amount which might ultimately become payable in consequence of subsequent deficiencies. But that case only shows that a tax may be said to be payable in respect of a given period when it has been quantified by assessment, although the legislation provides that the amount as originally assessed may be reduced on account of losses sustained in subsequent periods. We do not think it follows from this that, where the legislation charging a particular tax gives taxpayers a right of election which if exercised will exempt them from liability for such tax, references in the legislation to the tax as " payable " are to be understood as meaning that the tax must be treated as payable notwithstanding the existence of the right of election. Nor, in our view, can it be right in such a case to hold that, where under the relevant legislation the Special Commissioners are bound to take a certain step if the tax is not payable, and that step is a necessary preliminary to any exercise of the right of election, which if exercised will prevent the tax from being payable, the Special Commissioners are entitled to refrain from taking that step and claim that because they have not taken it, and have thus precluded any exercise of the right of election, therefore the tax is beyond a peradventure payable inasmuch as the right of election can never be exercised.

We need say no more than that we agree with the conclusion of the Divisional Court on this aspect of the case, though, as appears from what we have said above, it is in our view unnecessary for the purposes of the present appeal to form any decided opinion upon the question whether these more general grounds in themselves suffice to make good the Company's contention that the Profits Tax with which we are here concerned is not " payable " within the meaning of Section 68 (1) of the Finance Act, 1952, even if, contrary to our view, that point falls to be determined before a direction is given. It follows that we need express no view one way or the other on the question whether the procedure of direction and apportionment can be applied to a company whose income is nil as distinct from a company that has income which is contingently liable to be reduced to nil in a particular event.

It remains finally to consider the Attorney-General's submission to the effect that the Company was not, during the relevant period, an investment company within the meaning of Section 262 (1) of the Income Tax Act, 1952. The Attorney-General invites us so to hold by the following process of reasoning. The income of the Company for the relevant period, that is to say, the period from 6th April, 1953, to 7th May, 1953, was, subject to Profits Tax, £8,920 or thereabouts, the whole of which was admittedly investment income. From this, however, the Profits Tax for the like period, that is to say, £16,421 3*s.* 9*d.*, must be deducted. Consequently the income of the Company for the relevant period was nil. But a company which has no income cannot be an investment company; for, having no income at all, it obviously cannot be said to have investment income. He relies on *F.P.H. Finance Trust, Ltd.* (*in liquidation*) v. *Commissioners of Inland Revenue*, 26 T.C. 131, where it was held that a company which had income derived from investments and also carried on a trade was not an investment company with respect to a period in which it made losses on trading far exceeding its income from investments and so during the relevant period had no income at all. It seems to us that, if we are right in thinking that the other submissions made by the Attorney-General fail, this final submission necessarily fails with them, for if the Profits Tax is not payable within the meaning of Section 68 (1) of the Finance Act, 1952, so that the deduction prescribed by that Sub-section does not fall to be made, then the Company did during the relevant period have income estimated at £8,920 and admittedly consisting wholly of investment income. It is no doubt true that in the event of the right of election not being exercised that income will by reason of the Profits Tax deduction ultimately be reduced to nil, but that possibility does not, as it seems to us, afford any answer to the Company's contention that the Company, as matters now stand, is an investment company in respect of which a direction can and ought to be given. On the other hand, if, contrary to our view, the other submissions made by the Attorney-General should prevail, the question whether the absorption of the whole of the Company's actual income for the relevant period by the Profits Tax deduction would have the effect of excluding it from the category of investment companies so far as that period was concerned becomes purely academic. We therefore need not pause to consider whether that deduction would be truly comparable for this purpose to the trading loss which absorbed the whole of the investment income of the company concerned in the *F.P.H. Finance Trust, Ltd.* case.

For the reasons we have endeavoured to state, we would dismiss this appeal.

Mr. Cyril King.—Would your Lordships say, with costs?

Jenkins, L.J.—That follows, Mr. King; appeal dismissed with costs. You cannot say anything to that, can you, Sir Reginald?

Sir Reginald Hills.—I am instructed to ask that my clients shall (if, after having considered the terms of your Lordships' judgment, they wish to) have leave to appeal to the House of Lords.

Jenkins, L.J.—What do you say, Mr. King? You cannot resist that, can you, in the circumstances?

Mr. King.—All I respectfully submit is that if my friend's clients decide to avail themselves of any leave your Lordships give them, a question of my clients' costs arises. It is an important case and is, I believe, a test case.

Jenkins, L.J.—That will have to be left, I think, to be decided by Sir Reginald's clients. If they think it right to make any arrangement of that sort, no doubt they will offer it; but this is not the case of an impecunious litigant being pursued on some question of principle.

Mr. King.—No. It does raise a question of principle which no doubt the Revenue are very anxious to have decided. I have made my submission. It is the only thing I have to say.

Sir Reginald Hills.—I have to ask, as this is technically an application for a Mandamus, that there should be a stay of execution.

Jenkins, L.J.—That must be right, Sir Reginald. How long should we make it?

Sir Reginald Hills.—Two months from today. It is a question of preparing the petition.

Jenkins, L.J.—It was lying in the office and has been left lying in the office, has it not, ever since the Divisional Court dealt with the matter? We should direct, I suppose, that it should lie in the office for a further two months and, in the event of an appeal to the House of Lords being initiated within that time and duly prosecuted, I suppose it remains in the office until a determination by the House of Lords.

Sir Reginald Hills.—If your Lordship pleases. I think my learned friend will agree to that.

Mr. King.—Yes.

The Special Commissioners having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Morton of Henryton, Reid, Somervell of Harrow and Denning) on 12th, 13th, 14th, 19th and 20th November, 1957, when judgment was reserved. On 23rd January, 1958, judgment was given unanimously in favour of the Special Commissioners. The Special Commissioners were awarded costs in the Divisional Court, each party to bear their own costs above.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), and Mr. E. B. Stamp appeared as Counsel for the Special Commissioners, and Mr. Cyril King, Q.C., and Mr. H. H. Monroe for the Company.

Viscount Simonds.—My Lords, I have had the advantage of reading the opinion which my noble and learned friend Lord Reid is about to deliver, and I agree so fully in his reasoning and conclusions that I do not think it necessary to add anything. In accordance with it I move that the appeal be allowed and the appropriate declaration made. The Respondents must pay the Appellants' costs in the Divisional Court. Each party will bear their own costs in the Court of Appeal and in this House.

Lord Morton of Henryton.—My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend Lord Reid. That opinion sets out fully the facts leading up to this appeal and the relevant statutory provisions, and I agree with it; but, as your Lordships are differing from the unanimous conclusion of the Court of Appeal and of the Divisional Court, I shall state shortly in my own words my reasons for thinking that the appeal should be allowed.

For the purpose of stating the respective contentions of the parties I borrow, with only trifling alterations, the language of Donovan, J., in delivering the judgment of the Divisional Court. Counsel for the Crown contend that the Special Commissioners are not obliged to give a direction under Section 262 (1) of the Income Tax Act, 1952, followed by an apportionment because (1) a necessary preliminary to a direction and apportionment is the computation of the Respondent Company's actual income from all sources in accordance with the terms of Section 255 (3) of the same Act; (2) in computing that income, any Profits Tax payable by the Company for the relevant period (6th April to 7th May, 1953) "grossed up" in accordance with Section 68 of the Finance Act, 1952, must be deducted under the mandatory provisions of the same Section; (3) the amount of the Profits Tax so payable is £16,421, and the gross sum to be deducted is £29,856; (4) when this sum is deducted, the result is that the actual income from all sources of the Company for the relevant period is reduced to nil; (5) there is no obligation under Section 262 to make a direction in regard to non-existent income and no possibility of apportioning nothing; (6) therefore Section 262 (1) imposes no duty upon the Special Commissioners for the relevant period.

Counsel for the Company attack the third stage in this reasoning. They submit that the sum there mentioned is not "payable" within the meaning of Section 68 of the Finance Act, 1952, because Profits Tax is not "payable" within the meaning of that Section unless the amount thereof has been finally determined and must ultimately be payable, having regard to all relevant Sections of the taxing Statutes, including Section 31 of the Finance Act, 1947; and no Profits Tax will ever be payable by the Company if, after a direction under Section 262 of the Income Tax Act, 1952, and a consequent apportionment, the Company and the corporate members thereof exercise their right to elect under Section 31 (3) of the Finance Act, 1947. To this argument Counsel for the Crown reply that Profits Tax is now "payable" within the meaning of Section 68 of the Finance Act, 1952, because the distributions made by the Company in liquidation attracted Profits Tax under the charge imposed by Section 30 (3) of the Finance Act, 1947, and the amount of tax payable has been particularised by an assessment made upon the Company. Thus, the decision of this appeal turns upon the question whether this sum of tax is or is not "payable" within the meaning of Section 68 of the Finance Act, 1952, in the circumstances of the present case.

My Lords, I express no opinion upon the question whether a particular sum of Profits Tax can be said to be "payable" within the meaning of Section 68 before there has been an assessment, but in the present case I am of opinion that the contentions of Counsel for the Crown are well founded. In the case of an investment company to which Section 262 of the Income Tax Act, 1952, applies, it may not be necessary for the Special Commissioners to make any computation of the actual income from all sources of the company before giving a direction, because the direction is to be given under Section 262 (1)

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> "without considering whether or not the company has distributed a reasonable part of its said income".

To this extent the position under Section 262 differs from the position under Section 245; but it seems to me impossible for the Commissioners to apportion the actual income from all sources of the company among the members of the company without first computing what that actual income is. This computation must be carried out in accordance with the provisions of Section 255 (3) of the Income Tax Act, 1952, and Section 68 of the Finance Act, 1952, and no election under Section 31 (3) of the Act of 1947 can take place until there has been an apportionment of the income. Thus, the order of events is first computation, secondly apportionment and thirdly election, and in my view the provisions of Section 68 compel the Commissioners to deduct at the first stage the sum of £29,856 already mentioned. The reasons which lead me to this result are as follows: (*a*) This sum has already been assessed upon the Company and is, I think, "payable" in any ordinary sense of the word. This view is supported by the observations of Lord Dunedin in *Whitney* v. *Commissioners of Inland Revenue,* 10 T.C. 88, at page 110, and by members of your Lordships' House in *Commissioners of Inland Revenue* v. *John Dow Stuart, Ltd.,* 31 T.C. 274, at pages 287 *ad fin.* and 296 *ad fin.* (*b*) The words "the amount payable" appear in Sub-section (4) of the same Section 68, and in that Sub-section the word "payable" cannot mean "finally determined", because it is contemplated that the amount "payable" may be reduced by reason of a deficiency of profits for a subsequent period. It seems to me that the same meaning should be given to the word "payable" in Sub-sections (1) and (4). If so, the possibility of a subsequent election under Section 31 (3) of the Act of 1947 would not relieve the Commissioners from the duty to deduct the sum now in question in accordance with Section 68 (1) of the Finance Act, 1952. (*c*) The contention of Counsel for the Company would result in Section 68 (1) having a very limited application, whereas it appears to me to be intended to be a general relieving Section for the benefit of the taxpayer. (*d*) It might well happen in many cases that the company would have paid the sum assessed by way of Profits Tax before the Commissioners came to make their computation under Section 68, and it would seem strange if a sum which had actually been paid, and properly paid, should be held not to be "payable" within the meaning of the Section. (*e*) Although both sides could point to certain anomalous results if their contentions were rejected, the most striking anomaly arises from the argument on behalf of the Respondent Company. For, if that argument were correct, an investment company having an investment income of (e.g.) £10, and being liable for Profits Tax amounting to a very large sum, could get rid of the liability for Profits Tax by insisting upon a direction being given by the Commissioners under Section 262 (1), followed by an apportionment of the £10, thus bringing into effect the provisions of Section 31 (2) or (3) of the Finance Act, 1947.

I have not overlooked the fact that an appeal against the relevant assessment to Profits Tax is still pending, but that appeal only raises again the question which is now before this House. I agree with my noble and learned friend Lord Reid in thinking that in these circumstances the fact that this appeal is still pending can be disregarded, and I join with him in refraining from expressing any opinion on a case in which the assessment is attacked on some other ground.

I agree with the motion proposed by my noble and learned friend on the Woolsack.

Lord Reid.—My Lords, the facts of this case are simple. The Respondent, whom I will call "the Company", was at all material times under the control of not more than five persons, of whom some, but not all, were individuals. Until 1952 the Company carried on trade as beer, wine and spirit merchants, but on 1st April of that year it sold its business. Thereafter it was an investment company. On 7th May, 1953, it went into voluntary liquidation. In respect of its last chargeable accounting period from 1st April to 7th May, 1953, the Company was assessed to Profits Tax in the sum of £18,987, mainly on account of distribution charges in respect of assets distributed in the liquidation. If no account be taken of this assessment its actual income for the period 5th April to 7th May, 1953, was not more than £8,920. If this assessed amount of Profits Tax is treated as an expense, its actual income for that period is nil, being arithmetically a minus quantity. In this action the Company seeks an Order of Mandamus against the Appellants, the Special Commissioners; and by a judgment of the Divisional Court, affirmed by the Court of Appeal, the Special Commissioners have been ordered to give a direction under Sections 245 and 262 of the Income Tax Act, 1952, in respect of the period 6th April to 7th May, 1953. The present appeal is brought against that Order. The result of that Order would be that the Company would not be bound to pay that part of the Profits Tax attributable to that period, i.e. £16,421, but that the actual income of the Company, i.e. £8,920, or such less sum as might ultimately be determined, would be deemed to be the income of its members, so that Surtax would be payable in respect of what would be apportioned to individual members and other additional tax would be payable in respect of the part apportioned to corporate members of the Company.

The difficulty in this case arises from the interrelation of provisions by which the income of certain companies can be deemed to be the income of their members, beginning with Section 21 of the Finance Act, 1922, and provisions dealing with Profits Tax, which began as the National Defence Contribution in the Finance Act, 1937. Under the Act of 1922, if it appeared to the Special Commissioners that a company to which those provisions applied had not distributed a reasonable part of its actual income (i.e., its income for the year in question estimated on Income Tax principles), they could direct that the company's actual income should be deemed to be the income of its members and apportion that income among the members. As a result Surtax (then Super-tax) had to be paid by the company on the whole of the company's actual income at rates at which its members would pay the Surtax, although the income had not been distributed to the members. Then the Finance Act, 1939, made even more stringent provisions regarding certain investment companies: Section 14 (1) required the Special Commissioners to give such a direction whereby the whole actual income of such companies (subject to special provisions for any part of it which might be estate or trading income) was deemed to be the income of the members whether or not a reasonable part had been distributed.

The Finance Act, 1937, Section 19, charged National Defence Contribution on profits in each chargeable accounting period from a trade or business and included investment companies within the scope of the charge. But by Section 25 it allowed National Defence Contribution to be deducted as an expense in computing profits for Income Tax purposes. By the Finance Act, 1947, extensive alterations were made. This tax had been renamed Profits Tax; the rate was increased to 25 per cent.; and provision was made for non-distribution relief and for a distribution charge when profits which

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had enjoyed that relief were ultimately distributed. Moreover, individuals and partnerships were relieved from this tax, which thereafter only applied to companies and corporate bodies. The provision which allowed National Defence Contribution to be deducted as an expense for Income Tax purposes remained in force for Profits Tax. The previous enactments dealing with Income Tax were consolidated in the Income Tax Act, 1952. Thereafter further amendments were made by the Finance Act, 1952, whereby, in the general case, Profits Tax was no longer allowed to be deducted as an expense in computing income for Income Tax purposes, but special provision was made to permit deduction of Profits Tax in cases where directions were to be given by the Special Commissioners.

The difficulty which arises in the present case can only arise if Profits Tax payable by an investment company in respect of a particular period exceeds the profits of the company for that period. That can happen, and has happened in this case, because in the past the company has enjoyed non-distribution relief in respect of profits not then distributed to its members ; and then when those profits come to be distributed, as happened here in the liquidation, the company has to pay distribution charges, corresponding to the earlier non-distribution relief, in addition to Profits Tax payable in respect of the actual profits for the period in question. The drafting of the various statutory provisions suggests that this possibility was overlooked, but that is hardly surprising. We are therefore confronted with the not unusual problem of applying statutory provisions to circumstances which they were not designed to meet. In such a case it appears to me to be necessary to make a rather wide survey, because one can easily reach a wrong conclusion if attention is concentrated only on those provisions which are immediately applicable to the particular case.

Two general points call for notice. In the first place, in cases where the Special Commissioners direct that the whole actual income of a company is to be deemed to be the income of its members, such income would be subject to triple taxation unless special provision were made ; it would be subject to Income Tax, Profits Tax and Surtax, notwithstanding the fact that Surtax is a tax on individuals and that individuals are not subject to Profits Tax. And, secondly, the matter is complicated by the fact that the provisions regarding Profits Tax and Surtax might seem to be at cross purposes. Non-distribution relief in respect of Profits Tax is calculated to discourage companies from making a full distribution of profits to their members, whereas the provisions with regard to directions by the Special Commissioners are calculated to encourage such distribution by imposing heavy, and indeed penal, liabilities on companies which fail to make sufficiently large distribution.

It seems appropriate first to consider Sections 245 and 262 of the Income Tax Act, 1952 (which replaced Section 21 of the Finance Act, 1922, and Section 14 (1) of the Finance Act, 1939). The relevant parts of those Sections are as follows. Section 245 (Power to direct that income of bodies corporate is to be deemed to be income of their members):

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

sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

Section 262 (Investment companies ; directions to be given automatically for all years in certain cases) :

"(1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which section two hundred and forty-five of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said section two hundred and forty-five in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income. (2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are given by virtue of subsection (1) of this section as they apply in cases in which directions are given by virtue of the last preceding section with respect to a year of assessment: Provided that—(*a*) no deduction shall be allowed in computing the actual income from all sources of the company which would not be allowable in computing the total income of an individual for the purposes of this Act, other than deductions for any profits tax payable by the company or for any such sums disbursed by the company as expenses of management as the Special Commissioners consider reasonable, having regard to the requirements of the company's business and, in the case of directors' fees or other payments for services, to the actual services rendered to the company".

"Actual income" is defined as follows by Section 255 (3):

"In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

The procedure for apportionment of income is set out in Section 248, as follows:

"(1) Where a direction has been given under section two hundred and forty-five of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members. (2) Notice of any such apportionment shall be given by serving on the company a statement showing the amount of the actual income from all sources adopted by the Special Commissioners for the purposes of the said section two hundred and forty-five and either the amount apportioned to each member or the amount apportioned to each class of shares, as the Commissioners think fit."

It will be seen that Section 245 is the leading Section. Under it the giving of a direction is within the discretion of the Special Commissioners, and before giving a direction they must determine whether or not a reasonable part of the company's actual income has been distributed. It would seem to be clear that they cannot determine whether a reasonable part of the actual income has been distributed unless they know what the actual income was. There appears to be no means whereby a direction once given can later be cancelled or withdrawn, and therefore it would not be right for the Commissioners to make their determination until they had before them all the facts from which the actual income could be computed and had made the necessary computation. When this Section was enacted Profits Tax was still a permissible deduction for Income Tax purposes, and it would require an exceedingly cogent argument to persuade me that the Commis-

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sioners were not required to deduct Profits Tax in computing the actual income which they must have in mind when determining whether a reasonable part of it has been distributed.

Section 262 applies to a particular class of the companies to which Section 245 applies. When it applies the Commissioners have no discretion. They are required to give a direction, which is a direction under Section 245, whether or not a reasonable part of the actual income has been distributed. Again, it would require an exceedingly cogent argument to persuade me that " actual income " in this Section has a different meaning from " actual income " in Section 245. In the present case the taxpayer, the Company, seeks to compel the Commissioners to issue a direction under this Section. It must be very unusual for a taxpayer to take this course, but I think that it is open to the Company provided it can show that the Section does apply. But in my judgment the Section cannot apply unless there is some " actual income " for the period in question. Subject to an exception which does not arise in this case, the Section provides that the whole actual income for every year of assessment shall be deemed to be the income of the members of the company, and the giving of a direction is merely for the purpose of achieving this object. It would be quite unreasonable to read this Section as requiring the Commissioners to give a direction as regards a year when the company had no actual income and there was nothing which could be deemed to be the income of its members. Moreover, a direction must be followed by an apportionment. Directions given by virtue of Section 262 are directions under Section 245, and Section 248 requires that every such direction must be followed by a statement showing the amount of the actual income adopted by the Commissioners for the purposes of Section 245 and the amount apportioned to each member or each class of shares. It would be even more unreasonable to read this as requiring the Commissioners to apportion a non-existent income by attributing nil to each member or class of shares.

I have said that this Company was an investment company. A point was taken that, by reason of the definition, a company can only be an investment company so long as it has an actual income and that if this Company had no actual income during the period in question it ceased to be an investment company during that period. I find it unnecessary to deal with the point and only mention it to avoid any misunderstanding.

The question, therefore, is whether for the period in question the Company had any actual income. If the Profits Tax of £16,421 was not a proper deduction, then the Company had an actual income, and the Commissioners were bound to give a direction and to apportion that income. But if the Profits Tax was deductible in ascertaining the actual income, then the Company had no actual income, the Commissioners were not bound to give a direction, and this appeal must succeed.

It is, I think, clear that any Profits Tax which was " payable " by the Company at the time when the computation of actual income was made must be deducted in making that computation. That is in effect enacted by the proviso to Section 262 (2), which I have already quoted. The Finance Act, 1952, by Section 33, provided that in general Profits Tax should not be a deduction, but special provision was made by Section 68 to cover cases involving directions. The relevant parts of that Section are :

> " 68.—(1) Where for the purposes of section twenty-one of the Finance Act, 1922, or Chapter III of Part IX of the Income Tax Act, 1952 (which provide for the payment of surtax, in certain cases, on undistributed income

of companies), the actual income from all sources of a body corporate for a year or period ending after the end of the year nineteen hundred and fifty-one falls to be computed under paragraph 6 of the First Schedule to the said Act of 1922 or subsection (3) of section two hundred and fifty-five of the said Act of 1952, then, if any amount is payable by the body corporate by way of the profits tax or the excess profits levy, respectively, for any chargeable accounting period falling wholly or partly within that year or period, a deduction shall be allowed, in computing the said actual income, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment during which the said year or period ends, be equal to so much of the amount so payable by the body corporate as is apportionable to the said year or period . . . (2) Paragraph (*a*) of the proviso to subsection (2) of section two hundred and sixty-two of the Income Tax Act, 1952 (which relates to the deductions allowable in computing the actual income from all sources of an investment company in relation to which a direction is in force under subsection (1) of that section), shall have effect as if instead of authorising a deduction for profits tax payable by the company it authorised a deduction, in relation to any amount payable by the company by way of profits tax or the excess profits levy, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment in respect of which the direction is given, be equal to the first-mentioned amount. . . . (4) If—(*a*) the amount payable by a body corporate in respect of the excess profits levy for any chargeable accounting period is reduced by reason of a deficiency of profits for a subsequent period; and (*b*) the amount deducted under the preceding provisions of this section in computing the actual income from all sources of the body corporate was arrived at without regard to the reduction and is excessive in view thereof, such apportionments, assessments or additional assessments to surtax shall be made as are necessary to counteract the excessive deduction and may be so made notwithstanding that the time limited by law for making assessments or additional assessments has expired."

Again a deduction is to be made if any amount is "payable" by way of Profits Tax. The amount of the deduction is not the sum payable as Profits Tax but that sum "grossed up". But no point arises on that in this case.

I hope that I state the Company's contention accurately when I say that it is that the Profits Tax which has been assessed on the Company was not and is not now "payable" within the meaning of these provisions, because if a certain event should happen the Company would be under no obligation to pay the tax. To understand this contention it is necessary first to consider the provisions of Section 31 of the Finance Act, 1947. Sub-section (1) provides (subject to modifications which do not affect the present question) that Section 19 of the Finance Act, 1937 (the Section which charges Profits Tax), shall not apply to any trade or business unless it is carried on by a body corporate, unincorporated society or other body. Having so provided, it then was logical and reasonable to make special provision for the case where a business is carried on by a body corporate but, by reason of a direction by the Special Commissioners, the actual income of the body corporate must be deemed to be the income of its members so as to attract Surtax. Profits Tax was now only a tax on bodies corporate; Surtax was and is only a tax on individuals. So it would not have been appropriate to charge both Profits Tax and Surtax in respect of the same income. The remaining provisions of Section 31 appear to be intended to avoid this double taxation so far as possible. Those provisions, so far as relevant to this matter, are as follows:

"(2) The said section nineteen shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the

(Lord Reid.)

> purposes of section twenty-one of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals. (3) If, for a year or period which includes, or for years or periods which together include, the whole of a chargeable accounting period of a trade or business carried on by a body corporate, the actual income of the body corporate from all sources is apportioned under or for the purposes of the said section twenty-one, and some (but not all) of the persons to whom the income is apportioned are individuals, then if by notice in writing given to the Commissioners within six months from the end of that chargeable accounting period, or such longer time as the Commissioners may in any case allow, the body corporate and the persons other than individuals to whom the income is apportioned jointly so elect as respects that chargeable accounting period and each subsequent chargeable accounting period the whole of which is included in a year or period or years or periods for which the said actual income is so apportioned to those persons and persons who are individuals, the provisions of this Part of this Act shall apply as if—(*a*) the trade or business had been carried on, during that and each such subsequent chargeable accounting period, in partnership by the persons to whom the income is apportioned, and the share of any one of them of the profits and losses of the trade or business therefor had been equal to the proportion of the income apportioned for the year or period or years or periods in question which is apportioned therefor to that one of them . . . and the body itself shall not be chargeable to profits tax for that or any such subsequent chargeable accounting period."

Sub-section (2) deals with the case where all the members of the company are individuals, and before coming to the more complicated provisions of Sub-section (3) I think it desirable to deal with Sub-section (2). Its provisions are somewhat complicated because the periods in respect of which Profits Tax and Surtax are calculated are not the same. But I do not think that any light is thrown on the present question by considering this complication. Omitting it, the Sub-section provides that the Section charging Profits Tax

> "shall not apply . . . if . . . the actual income of the body corporate . . . is apportioned under or for the purposes of section twenty-one of the Finance Act, 1922"

(now Section 245 of the Income Tax Act, 1952). That appears to me to mean that the Section charging Profits Tax does apply unless and until the actual income has been apportioned, but that it ceases to apply if and when the apportionment is made. That can be illustrated in this way. The Special Commissioners, who deal with directions, do not deal with Profits Tax, and in the general case of a trading company a considerable time may elapse before they are in a position to decide whether to give a direction. In the meantime Profits Tax may well have been assessed, and on a demand being made for payment of the assessed Profits Tax it would, in my opinion, be no answer for the company to say that the Profits Tax is not payable because the Special Commissioners may later give a direction, which would be followed by an apportionment and consequent relief from the tax. The Profits Tax must be paid, but if later a direction is given by the Special Commissioners and is followed by an apportionment, then the Section charging Profits Tax does not apply and the tax which has been paid must be repaid. Any other view would mean that the recovery of Profits Tax from "Section 21" trading companies would be held up for years until it was clear that the Special Commissioners could not give directions to them under Section 245.

If I am right so far, then it appears to me necessarily to follow that, at least as regards trading companies where the Commissioners have a discretion whether or not to give a direction, Profits Tax which has been assessed is "payable" in every ordinary sense of that word, and therefore must be allowed as a deduction by the Commissioners in computing the

actual income which they adopt when considering whether the sums which have been distributed to the members amount to a reasonable part of the company's actual income. Otherwise there might be grave injustice. The Commissioners' decision whether a reasonable part of the actual income has been distributed must depend in large measure on the figure which they adopt as the amount of the actual income. If this figure is inflated by neglecting the liability for Profits Tax because it is not yet "payable", the Commissioners might see fit to give a direction which they would not have given if the amount of actual income which they had in mind had been the lower figure resulting from deduction of the amount of Profits Tax. It appears to me to be an inadequate answer to say that, although the Commissioners are not entitled to deduct Profits Tax in computing actual income because it is not yet "payable", yet they may make allowance for Profits Tax as a potential liability in considering whether the amount of the actual income which has been distributed is reasonable.

The terms of Section 68 of the Finance Act, 1952, appear to me to give strong support to the view which I have expressed. But the Court of Appeal took a different view of the Section, and it is therefore necessary to examine it with some care. It directs that where for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, the actual income of a company "falls to be computed" under Section 255 (3), then if any Profits Tax or Excess Profits Levy is payable a deduction shall be allowed. The Court of Appeal held that the actual income did not fall to be computed until after a direction had been given. With all respect, I am unable to agree. Chapter III includes all the provisions with regard to the giving of directions to which I have referred. Section 255 (3) is merely the definition of "actual income". I have already given my reasons for thinking that the provisions of Chapter III require the Commissioners to determine the amount of actual income before they decide whether or not to give a direction in cases where they have a discretion, and therefore it appears to me that the actual income does fall to be computed within the meaning of Section 68 at that stage. And the same must apply to investment companies because, for the reasons I have stated, directions can only be given in respect of those companies if they have an actual income, and before giving a direction there must be a computation to determine whether there is any actual income. Moreover, under Section 248 the Commissioners must apportion the amount of the actual income adopted by them for the purposes of Section 245. There is no provision for a computation of actual income after the direction but before the apportionment, and that again appears to me to require a computation before a direction is given.

The Court of Appeal also relied on the terms of Section 68 (2). That Sub-section deals with the amount of a deduction. The difficulty does not arise from the enacting words but from the words in brackets which purport to describe the proviso to Section 262 (2) of the Income Tax Act, 1952. Those words could well be held to support the view of the Court of Appeal, but they seem to me to be a misdescription of the proviso to Section 262 (2). This is one of the places where I think that obscurity has resulted from a failure of the draftsman to anticipate a case like the present—as I have said, a very natural failure. In fact the proviso merely deals with the deductions to be allowed in computing actual income. But the words in brackets in Section 68 (2) refer to deductions in computing the actual income of a company "in relation to which a direction is in force"

(Lord Reid.)

under Section 262 (1). It would seem that these words have crept in because the draftsman assumed that a direction would always be given automatically in the case of an investment company and did not realise that a computation must first be made to determine whether the company has in fact any actual income. Whether that be the true explanation or not, I cannot regard the presence of these words in brackets, which are mere description, as of much weight in comparison with the other considerations to which I have referred.

It therefore appears to me that Section 68 has enacted that, when a computation of actual income is being made by the Commissioners before they consider whether or not to give a direction, then if any amount is payable as Profits Tax a deduction shall be allowed. But the argument for the Company is that at that stage no Profits Tax can ever be " payable " because the tax cannot be finally payable until the Commissioners have decided that no direction is to be given. If the Company's argument is right I cannot imagine any possible case where Profits Tax could be " payable ", in the sense of finally payable, at that stage, and no such case was suggested in argument ; so this provision of Section 68 would be meaningless.

A further argument was submitted for the Company. If the amount of Profits Tax is deducted in computing the income apportioned and thereafter by reason of the apportionment Profits Tax ceases to be payable, then the sum so deducted will be retained by the company unapportioned and will not be chargeable to Surtax. If this were so it would support the Company's contention, but the Attorney-General submitted an argument that this sum would not escape taxation but could be covered by an additional apportionment.

Section 68 also deals with Excess Profits Levy. Some argument was based on the provisions which deal with this tax. For what they are worth in this connection they appear to me to support the Appellants' contention, because they make it clear that Excess Profits Levy is " payable " within the meaning of this Section although not finally payable because events in subsequent years may cause the amount " payable " to be ultimately reduced.

I can now turn to Section 31 (3) of the Finance Act, 1947, under which the present question arises. This Sub-section applies where, as in the present case, not all the members of the company subject to direction are individuals, some being corporate bodies. Giving a direction imposes a liability on the company to pay Surtax but it does not directly affect individual members unless they choose to relieve the company by paying their shares of the Surtax. It does, however, affect the tax position of non-individual members, and it was apparently thought that such members required special protection. Accordingly a direction given in respect of a company with non-individual members is not followed automatically by relief from Profits Tax as it would be if all the members were individuals. Such relief only arises if the company itself and its non-individual members jointly elect to claim it. One might suppose that it would always be in their interest to claim the relief, but we were informed that there are cases where that is not so in view of the fact that the election to claim relief, once made, applies not only to the period in question but to all subsequent periods.

Basically, the schemes under Sub-sections (2) and (3) of Section 31 are the same. Under whichever Sub-section the case falls no question of relief

from Profits Tax can arise until there has been a direction and consequent apportionment of the actual income of the company. There cannot be a direction unless the company has an actual income, and in determining whether the company has an actual income there must be deducted Profits Tax which is payable and will remain payable if no direction is given. The only difference is that, whereas under Sub-section (2) relief from Profits Tax is automatic once a direction is given, under Sub-section (3) there is a further stage and there must be an election before relief is granted. If all the members of this Company had been individuals there would have been no automatic relief from Profits Tax, for the reasons which I have given, and for the same reasons there is no right to elect that there shall be relief. It would be somewhat strange if it were otherwise. If the Company were right they would escape payment of £16,421 by electing to pay Surtax on a sum not exceeding £8,920. Such a result might follow from the construction of numerous and complicated enactments, but it could hardly have been intended.

It only remains to note a further argument for the Company. In this case the Profits Tax was assessed but the assessment is still under appeal, and it was said that, whatever might be the effect when such an assessment had become final, the tax cannot be " payable " before that. I do not intend to express any opinion about a case where there has been no assessment or where the amount payable is in dispute. But it appears that the only ground for the appeal in the present case is that nothing is " payable ", the same ground as the Company maintains before your Lordships. If this appeal is allowed it follows that the appeal against the assessment must fail, and therefore I think that it is proper to disregard the fact that that appeal is still pending.

In my judgment this appeal should be allowed. I agree with what my noble and learned friend has just said about costs.

Lord Somervell of Harrow.—My Lords, where the actual income of companies liable to Surtax falls to be computed, Section 68 of the Finance Act, 1952, allows a deduction if any amount is payable by the company by way of the Profits Tax or the Excess Profits Levy. Section 31 of the Finance Act, 1947, gives exemption from Profits Tax to such companies if certain conditions are fulfilled. Under Section 31 (2), if the actual income from all sources is apportioned and all the persons to whom it is apportioned are individuals, the Section which charges the Profits Tax is not to apply. Under Section 31 (3), if the actual income from all sources is apportioned and some but not all of the persons to whom it is apportioned are individuals, then the company is not chargeable to Profits Tax if, by notice, the company and the persons aforesaid, other than individuals, so elect. The election binds those concerned for the current and all subsequent chargeable accounting periods. There are other provisions which I need not summarise.

The question turns on the construction of Section 68, and in particular on the word " payable ". The taxpayer submits that no deduction is to be made unless and until it is clear that the conditions of Section 31 providing for exemption cannot be fulfilled. In other words, " payable " means payable in the last resort. As apportionment is a condition precedent to the exemption under Section 31, there can, on this view, be no deduction before or for the purpose of apportionment. There is an initial difficulty, to my mind, in that there must be computation before apportionment and, on the face of it, the deduction is to be made when the actual income falls to be computed.

(Lord Somervell of Harrow.)

The Crown submits that the Profits Tax is payable within the Section notwithstanding that later events may give exemption. The Courts below have accepted the taxpayer's contention. It is, no doubt, a possible meaning of " payable ", a meaning which certain contexts might make plainly right. It is therefore necessary to consider the context. Beginning with trading companies under Section 245 of the Income Tax Act, 1952, the first computation of the actual income from all sources would be in order that the Commissioners may decide whether the company has or has not distributed a reasonable amount of its income. In considering that question it would be absurd to disregard the liability to Profits Tax. If the Commissioners decide that there has been no failure to distribute a reasonable amount, no exemption under Section 31 will arise. The taxpayer's submission does not make sense at that stage. This stage does not exist in the case of investment companies, where the direction is automatic (Section 262 of the Income Tax Act, 1952). If the Commissioners decide to make a direction and apportionment, and all the members are individuals, the taxpayer's construction works more simply than the Crown's. If the actual income is £2,000 and the Profits Tax £500, the Crown has to make two bites at the cherry although under Section 31 (2) there can be no ultimate liability to Profits Tax. When one comes to Section 31 (3) the Crown would on the above figures apportion £1,500 and then have to have an additional apportionment of £500 if, but only if, the election was exercised. On the taxpayer's construction the whole £2,000 would be apportioned, since the election might destroy liability to Profits Tax. The Attorney-General submitted that there would be no machinery if the election was not exercised for withdrawing the original apportionment and substituting one for £1,500. In his view Surtax would be levied on the whole £2,000 and the taxpayer would in addition have to pay £500 Profits Tax. If I had thought the taxpayer's construction was right, there would, in my opinion, be no difficulty in implying a power to make the necessary adjustment to carry out the substantive effect of the Act.

If one considers consequences, the results of the taxpayer's construction would be remarkable. In the present case, however small the actual income and however large the distribution charges, the apportionment of the former would relieve the taxpayer of all liability for the latter if all members were individuals or if the election was exercised. Benevolent as at times financial provisions may be, it is impossible to believe that such capricious benevolence could have been intended. Unhappily the Crown's submission has its own anomaly, though perhaps a lesser one. On the Crown's contention, if the Profits Tax is less than the actual income by however small a sum, the whole of the actual income is treated on a Surtax basis and no Profits Tax is exigible. I am assuming that either it is a Section 31 (2) case or the election is exercised. If, on the other hand, the Profits Tax exceeds the actual income by however small a sum, one would have expected the actual income to be treated on a Surtax basis, the excess of the Profits Tax over that amount being payable as Profits Tax. This is not the result on the Crown's contention. The whole has to be handed over as Profits Tax, the taxpayer not retaining what would be left out of the actual income after Surtax.

Context and consequences do not, in my opinion, give any sufficient support to the taxpayer's construction. The ordinary meaning of " payable " is, I think, that for which the Crown contends, that is, payable at the time of computation disregarding the fact that subsequent events may destroy the liability.

I would, therefore, allow the appeal.

Lord Denning.—My Lords, this case depends on the meaning of the word " payable " in Section 68 of the Finance Act, 1952. The Courts below have held that Profits Tax is not " payable " within that Section until it has been ascertained that no election can or will be made under Section 31 (3) of the Finance Act, 1947. It seems to me that this treats the making of an election as a *condition precedent* to the Profits Tax being payable ; whereas, on the true construction of the Statute, it is not a condition precedent but a *condition defeasant*. The Profits Tax is " payable " when everything has happened to make it payable, that is to say, when it is duly assessed on the taxpayer. It may thereafter cease to be payable if an election is made ; but, that being a *condition defeasant*, the legal position is that right up till that moment it is payable. The result is that in computing the " actual income " of these Surtax companies, so as to see whether a direction or apportionment should be made, the Profits Tax (grossed up) must be deducted before the direction or apportionment is made. This is a sensible and practical way of working the Act.

I would allow the appeal.

Question put :

That the Order appealed from be reversed, and that it be declared, That the Respondents are not entitled to obtain exemption from Profits Tax in respect of the profits of their trade or business for the accounting period from the 1st April, 1953, to the 7th May, 1953, and that the Appellants ought not, pursuant to the mandatory provisions relating to Surtax on the income of investment companies, to give such a Surtax direction as is required by Section 262 of the Income Tax Act, 1952.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue ; Smith & Hudson, for Rollit, Farrell & Bladon, Hull.]