HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
20TH, 21ST, 22ND AND 29TH JULY, 1960

COURT OF APPEAL—27TH AND 28TH APRIL, AND 1ST MAY, 1961

HOUSE OF LORDS—31ST JANUARY, 1ST FEBRUARY AND 1ST MARCH, 1962

Cenlon Finance Co., Ltd.
v.
Ellwood (H.M. Inspector of Taxes) (1) (2)

Ellwood (H.M. Inspector of Taxes)
v.
Cenlon Finance Co., Ltd. (1)

Tableau Holdings, Ltd.
v.
Williams (H.M. Inspector of Taxes) (1)

Williams (H.M. Inspector of Taxes)
v.
Tableau Holdings, Ltd. (1)

Income Tax, Schedule D—Dealer in securities—Dividend received out of paying company's capital profit—Whether taxable.

Income Tax—Additional assessment—Discovery—Facts known to Inspector at all material times—Appeal settled by agreement after enquiry on material point—Whether additional assessment can be made subsequently—Income Tax Act, 1952 (15 & 16 *Geo.* VI & *Eliz.* II, *c.* 10), *Sections* 41, 50 *and* 510.

C Ltd., the Appellant in the first case, commenced the trade of dealing in stocks and shares on 16*th October,* 1953, *and made up its first accounts to* 15*th April,* 1955. *Among the receipts included in those accounts was an item for dividends paid out of profits not charged to Income Tax. Before these accounts were sent to the Inspector of Taxes, assessments under Case* I *of Schedule D in estimated amounts were made on the Company for* 1953–54 *and* 1954–55, *against which it appealed. After receiving the accounts the Inspector asked for particulars of the item above mentioned, and was told that it included a dividend of* £25,000 *from capital profits made by a subsidiary on the sale of freehold property. He thereupon agreed a computation of the liabilities from which the dividend had been excluded, and the assessments were adjusted accordingly. Subsequently an assessment was made for* 1955–56 *on the same footing. In* 1956 *a new Inspector reviewed the assessments and raised additional assessments for the years* 1953–54 *to* 1955–56 *and a first assessment for* 1956–57 *in amounts including the dividend from the subsidiary.*

On appeal to the Special Commissioners against these assessments it was contended on behalf of C Ltd., (i) *that the dividend, having been paid by a company resident in the United Kingdom, was not taxable in the hands of the*

(1) Reported (Ch. D.) [1961] Ch. 50; [1960] 3 W.L.R. 690; 104 S.J. 850; [1960] 3 All E.R. 390; 230 L.T.Jo. 152; (C.A.) [1961] Ch. 634; [1961] 3 W.L.R. 242; 105 S.J. 422; [1961] 2 All E.R. 859; 231 L.T.Jo. 360.

(2) Reported (H.L.) [1962] 2 W.L.R. 871; 106 S.J. 280; [1962] 1 All E.R. 854; 233 L.T.Jo. 191.

recipient; (ii) *that there had been no discovery within the meaning of Section* 41, *Income Tax Act*, 1952, *to render the additional assessments competent*; *and* (iii) *as regards* 1953–54 *and* 1954–55 *that there had been an agreement within the meaning of Section* 510, *Income Tax Act*, 1952, *on the specific point that the dividend should not be included. It was contended on behalf of the Crown* (i) *that the dividend should be included in the assessments*; (ii) *that a discovery had been made in respect of the years* 1953–54 *to* 1955–56; *and* (iii) *as regards* 1953–54 *and* 1954–55 *the additional assessments were not barred by reason of the settling of the first assessments under Section* 510, *Income Tax Act*, 1952. *The Commissioners decided* (a) *that the dividend was a taxable receipt*; (b) *that the Inspector had made a discovery with regard to the years* 1953–54 *to* 1955–56; *but* (c) *that Section* 510 (1), *Income Tax Act*, 1952, *precluded additional assessments for the years* 1953–54 *and* 1954–55.

In the second case the facts, the contentions of the parties and the findings of the Commissioners were not materially different from those in the first case.

In view of the decision of the Court of Appeal in Commercial Structures, Ltd. *v.* Briggs, 30 T.C. 477, *the Appellant Companies conceded in the High Court and the Court of Appeal that the Inspector had made a discovery within the meaning of Section* 41; *but C Ltd. contended in the House of Lords that there had been no such discovery.*

Held, (*in the House of Lords*) (1) *that the dividend was a taxable receipt in the hands of the Company and* (2) *that there had been a discovery within the meaning of Section* 41, *Income Tax Act*, 1952, *but* (*in the Court of Appeal*) *that the point having been agreed under Section* 510, *Income Tax Act*, 1952, *for the years* 1953–54 *and* 1954–55, *it could not be taken again by the Crown in additional assessments for those years.*

Commissioners of Inland Revenue *v.* Mackinlay's Trustees, 22 T.C. 305, *and* Commercial Structures, Ltd. *v.* Briggs, 30 T.C. 477, *approved.*

CASES

(1) *Cenlon Finance Co., Ltd.* v. *Ellwood* (*H.M. Inspector of Taxes*)
Ellwood (*H.M. Inspector of Taxes*) v. *Cenlon Finance Co., Ltd.*

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 8th December, 1958, and 23rd March, 1959, Cenlon Finance Co., Ltd. (hereinafter called "the Company"), appealed against assessments made upon it under Case I of Schedule D for the years 1953–54, 1954–55, 1955–56 and 1956–57 in the sums of £10,452, £22,134, £22,134 and £22,241 respectively. The assessments for the years 1953–54 to 1955–56 were additional assessments.

2. The questions for our decision were:

(i) As regards the years 1953–54 to 1955–56, whether there had been a discovery within the meaning of Section 41 of the Income Tax Act, 1952. In view of the authorities this question was raised only formally.

(ii) As regards the years 1953–54 and 1954–55, (*a*) whether there had been an agreement on certain matters within the meaning of Section 510 of the said Act; (*b*) if there had been such an agreement, whether additional assessments for these years were competent.

(iii) As regards all years, but subject as regards the years 1953–54 to 1955–56 to the answers to the above-mentioned questions, whether a dividend received by the Company, from which tax had not been deducted, was a receipt of the Company's trade which should be included in computing its Case I profits.

3. Evidence was given before us by Mr. D. E. Lupton (H.M. Inspector of Taxes).

4. The Appellant Company was registered on 12th October, 1953. It carried on business as a dealer in stocks and shares, and was assessable to Income Tax under Case I of Schedule D in respect of any profits arising from such dealings. The Company began trading on 16th October, 1953, and accounts have been drawn up for the period from that date to 15th April, 1955. The assessments for the years 1953–54, 1954–55, 1955–56 and 1956–57 are based on the due proportion of the profits shown in those accounts, i.e.,

1953–54	Period from 16th October, 1953, to 5th April, 1954 ($5\frac{2}{3}$ months).
1954–55	Year to 16th October, 1954.
1955–56	Year to 15th April, 1955.
1956–57	Year to 15th April, 1955.

A copy of these accounts is annexed hereto, marked "A", and forms part of this Case (1).

5. Henry White (Sutherland House), Ltd. (hereinafter called "Henry White"), is a company carrying on business as ladies' outfitters.

On 20th October, 1953, the Company acquired the whole of the issued share capital of Henry White (20,000 £1 shares) for £72,000. Henry White had previously sold some of its freehold property at High Street and at Ironmarket, Newcastle-under-Lyme, and realised thereby a profit which was a capital profit and had not been assessed to tax in its hands.

6. On 2nd November, 1953, Henry White paid to the Company, its sole shareholder, a distribution of £25,000 out of such capital profits, pursuant to the following special resolution of 23rd October, 1953:

> "That the sum of £25,000 surplus moneys in the hands of the Company representing part of the capital profit arising from the sale of the Company's properties at High Street and Ironmarket and being an accretion to capital be distributed amongst the present holders of the shares in the capital of the Company pari passu and in proportion to the number of such shares respectively held by them and on the footing that they become entitled thereto as capital and the Directors are hereby authorised and directed to distribute the same accordingly."

7. On 4th December, 1953, the Company sold its holding of shares in Henry White for £27,500.

8. During the course of its trading from 16th October, 1953, to 15th April, 1955, the Company made various purchases and sales of stocks and shares, received commission, and sold a debt at a profit. There is annexed hereto a schedule, marked "B" and forming part of this Case (1), which gives details of the various profits and losses from dealing in stocks and shares, and also shows how a profit on trading of £634 was computed. It also received the following:

	£
Dividends from United Kingdom companies:	
Paid out of profits not charged to Income Tax ...	33,200
Paid out of profits charged to Income Tax ...	31
Interest	3,625

(1) Not included in the present print.

These figures appear in the Company's accounts for the period to 15th April, 1955 (Exhibit "A").

9. On 19th November, 1954, Schedule D assessments were made on the Company for the year 1953–54 in the estimated amount of £500 and for the year 1954–55 in the estimated amount of £1,000. Formal notice of appeal against both these assessments was given on the Company's behalf on 22nd November, 1954, the grounds stated being that the Appellant had not yet prepared accounts relevant to the years of assessment.

10. On 1st July, 1955, accounts were submitted for the period 16th October, 1953, to 15th April, 1955 (Exhibit "A"), together with a computation of the Company's profits as adjusted for the purposes of Case I of Schedule D, in which the sum of £33,231, dividends received from United Kingdom companies (including the Henry White dividend of £25,000), was deducted and excluded from the profits. On 21st July, 1955, H.M. Inspector of Taxes for the St. Martin's district (in which the Income Tax affairs of the Company are dealt with) wrote to the Company's accountants, *inter alia*, as follows:

"3. *Profit on Trading* £634. A copy of the account is required to show how this profit is made up."

"5. I shall be glad to have particulars of the dividends paid out of profits not charged to income tax of £33,200."

11. On 27th July, 1955, the said accountants replied, *inter alia*:

"3 *Profit on Trading* £634:—

	£
Commission received	22,519
Profit on debt bought	1,930
Profits on dealings in stocks and shares (see separate schedule)	31,623
	56,072
Losses on dealings in stocks and shares (see separate schedule)	55,438
	634"

The separate schedule is Exhibit "B".

"5. *Dividends paid out of profits not charged to income-tax*, £33,200:—

	£
Henry White (Sutherland House), Ltd:—	
Distribution out of capital reserve created from the surplus arising from the sale of certain of the Company's fixed assets—£1. 5*s*. per share	25,000
Abraville Securities, Ltd:—	
Distribution out of profits not subject to income-tax—£164 per share	8,200
	33,200"

The profits of Abraville out of which this dividend was paid have since been assessed to tax, and no question on this sum arises in this appeal.

12. On 8th August, 1955, the Inspector wrote to the said accountants agreeing their computation, and wrote again on 15th August, 1955, enclosing notices of assessment for the years 1953–54 and 1954–55 amended so as to agree with the accountants' figures. On 24th November, 1955, the Inspector issued a notice of assessment to Income Tax, Schedule D, on the Appellant for the year 1955–56 in the amount of £107 in accordance with the figures agreed as above.

13. Mr. D. E. Lupton, H.M. Inspector of Taxes, succeeded to the charge of the St. Martin's tax district in May, 1956. In June, 1956, having received a memorandum from the Chief Inspector of Taxes, he read the correspondence and other documents referred to in paragraphs 8 to 11 hereof and reached

the conclusion that the dividend of £25,000 received by the Company from Henry White should have been included as a trading receipt in the computation of the Company's profits for the purposes of Case I of Schedule D and that the first assessments for the years 1953–54 to 1955–56 inclusive should have been made accordingly. He did not have any facts in relation to the Company's affairs before him additional to those before his predecessor in 1955.

14. On 18th June, 1956, Mr. Lupton wrote to the said accountants as follows:

> "With reference to the accounts for the year ended on the 15th April, 1955, I consider that the two items amounting to £33,200 (viz. £25,000 from Henry White (Sutherland House) Ltd. and £8,200 from Abraville Securities Ltd.) are of an income nature and should be brought into the Case I liabilities of the company."

Subsequently the assessments which are the subject of this appeal were made.

15. The following cases were cited to us:

Liverpool and London and Globe Insurance Co. v. *Bennett*, 6 T.C. 327.
Gundry v. *Dunham*, 7 T.C. 12.
Bradbury v. *English Sewing Cotton Co., Ltd.*, 8 T.C. 481.
Gimson v. *Commissioners of Inland Revenue*, 15 T.C. 595.
Anderton & Halstead, Ltd. v. *Birrell*, 16 T.C. 200.
Commissioners of Inland Revenue v. *Sneath*, 17 T.C. 149.
Neumann v. *Commissioners of Inland Revenue*, 18 T.C. 332.
Rex v. *Special Commissioners of Income Tax* (ex parte *Elmhirst*), 20 T.C. 381.
Hughes v. *Bank of New Zealand*, 21 T.C. 472.
Patuck v. *Lloyd*, 26 T.C. 284.
Canadian Eagle Oil Co., Ltd. v. *The King*, 27 T.C. 205.
Commissioners of Inland Revenue v. *Trustees of Joseph Reid (deceased)*, 30 T.C. 431.
Commercial Structures, Ltd. v. *Briggs*, 30 T.C. 477.
Earl Beatty v. *Commissioners of Inland Revenue*, 35 T.C. 30.
McLuskey's Executrix v. *Commissioners of Inland Revenue*, 36 T.C. 163.

16. It was contended on behalf of the Appellant (the Company):

(1) Formally, that as regards years 1953–54, 1954–55 and 1955–56, there had been no discovery within the meaning of Section 41 of the Income Tax Act, 1952, and that therefore the additional assessments under appeal for all those years were not competent.

(2) That, as regards the years 1953–54 and 1954–55:

(*a*) The proper officer of the Crown and the Appellant had come to an agreement within the meaning of Section 510 of the Income Tax Act, 1952, on the specific point that the dividend of £25,000 received by the Company from Henry White should not be included in the computation of the Company's Case I profits. This agreement was concluded on 8th August, 1955, or on 15th August, 1955.

(*b*) The effect of this agreement was that the like consequences ensued for all purposes as if an appeal on that specific point had been determined by the Commissioners.

(*c*) Consequently, under Section 50 (2) of the Income Tax Act, 1952, the agreement was final and could not be altered since there had been no appeal to the High Court.

(*d*) The effect of raising additional assessments was to attempt to alter what was in effect a final determination.

(*e*) The effect of Section 50 (2) of the Income Tax Act, 1952, was that,

where a specific point had been determined on appeal and there was no appeal to the High Court, an additional assessment could not be raised under Section 41 of that Act.

(3) Subject to the above contentions, that a dividend paid by a company resident in the United Kingdom, whether tax had been deducted from it or not, is not in itself taxable in the hands of the recipient. If a dividend is not taxable, it cannot be included in a computation of Case I profits, since to include it in such a computation is to subject it to tax.

17. It was contended on behalf of H.M. Inspector of Taxes that:

(1) As regards the years 1953–54, 1954–55 and 1955–56, there had been a discovery by the Inspector within the meaning of Section 41 of the Income Tax Act, 1952, that the Company had been undercharged in the first assessments for each of those years and, in consequence of that discovery, additional assessments had been validly made in accordance with the provisions of the said Section.

(2) As regards the years 1953–54 and 1954–55, the additional assessments were not barred by reason of the settling of the appeals against the first assessments under Section 510 of the Income Tax Act, 1952 (which was admitted); nor by reason of the provisions of Section 50(2) of that Act as applied to such settlements; nor by reason of the issue having already been determined, inasmuch as:

(*a*) neither Section 50(2) nor Section 510 of the Income Tax Act, 1952, had any bearing on the meaning of "discovery" under Section 41 of that Act;

(*b*) Section 50(2) of the Income Tax Act, 1952, applied only to the particular assessment which had been determined on an appeal, and did not apply to the additional assessments in the present case.

(*c*) neither Section 50(2) nor Section 510 of the Income Tax Act, 1952, operated by way of estoppel to prevent the raising of an additional assessment under Section 41 of that Act, the doctrine of *res judicata* having no application to the decisions of Income Tax Commissioners.

(3) The dividend of £25,000 received by the Company from Henry White was a receipt of the Company's trade, and as such had to be taken into account in computing the amount of the profits or gains of that trade for the purpose of assessment to Income Tax under Case I of Schedule D.

18. We, the Commissioners who heard the appeal, gave our decision as follows:

(1) As regards the years 1953–54, 1954–55 and 1955–56, we hold that there has been a discovery within the meaning of Section 41 of the Income Tax Act, 1952.

(2) As regards the years 1953–54 and 1954–55, we hold that if at the hearing of an appeal specific matters are raised and argued so that clearly the determination of the appeal is based on arguments dealing with those specific matters, Section 50 (2) of the Income Tax Act, 1952, operates to prevent the raising of an additional assessment under Section 41 of that Act. We find on the correspondence in evidence before us that the specific matter of the taxability of the dividend of £25,000 paid by Henry White had been raised and had been considered by the Inspector of Taxes, and that an agreement within the meaning of Section 510 had been come to that this dividend was not to be included in a computation of the Company's Case I liability. We hold that the effect of this agreement is the same as if there had been a hearing of an

appeal and the determination of the appeal had been based on the view that the above-mentioned dividend was not to be included in a computation of the Company's Case I liability. We hold, therefore, that Section 50(2) of the Income Tax Act, 1952, operated to prevent the raising of additional assessments to include the above-mentioned dividend in a computation of the Company's Case I liability, and that the additional assessments for the years 1953–54 and 1954–55 are not competent.

(3) On the question whether, apart from our decision as regards the years 1953–54 and 1954–55, the dividend paid by Henry White should be included in a computation of the Company's Case I liability, we have come to the conclusion on the authorities cited to us that a dividend paid by a company resident in the United Kingdom, whether tax has been deducted from it or not, is a receipt which in the hands of the recipient is not in itself chargeable to Income Tax. The dividend in question in this case was, we find, a receipt of the Company's Case I trade, and it was not in itself chargeable to Income Tax; but we do not think that the effect of the decision in the case of *Hughes* v. *Bank of New Zealand*, 21 T.C. 472, is that therefore the dividend should not be included in a computation of the Company's Case I liability, as was contended by the Company. That case concerned certain items of income specifically chargeable to tax, but specifically exempted in certain circumstances. We do not think that case applies to a dividend which, in our view, is not specifically chargeable to tax, and we hold that the dividend in question in this case is a receipt of the Company's Case I trade which should be included in the computation of its Case I liability. We leave the figures to be agreed.

19. In due course we were informed that the figures for the years 1955–56 and 1956–57 were agreed; and on 12th May, 1959, we discharged the additional assessments for 1953–54 and 1954–55, and reduced the additional assessment for the year 1955–56 to £16,667 and the assessment for the year 1956–57 to £16,774.

20. Both parties immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

21. The points of law for the opinion of the High Court are:

(1) Whether we were right in holding that there had been a "discovery" within the meaning of Section 41 of the Income Tax Act, 1952.

(2) (*a*) Whether there was evidence upon which we could properly find that there was the agreement under Section 510 of the Income Tax Act, 1952, which is described in 18 (2) above.

(*b*) If there was such an agreement, whether we were right in holding that Section 50 (2) of the Income Tax Act, 1952, operated to prevent the raising of additional assessments for the years 1953–54 and 1954–55.

(3) Whether we were right in holding that the dividend of £25,000 should be included in the computation of the Company's Case I liability.

R. W. Quayle
B. Todd-Jones
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
22nd January, 1960.

(2) *Tableau Holdings, Ltd.* v. *Williams (H.M. Inspector of Taxes)*
Williams (H.M. Inspector of Taxes) v. *Tableau Holdings, Ltd.*

These cases related to appeals against assessments to Income Tax under Case I of Schedule D for the years 1952–53 to 1955–56 in respect of dividends received by Tableau Holdings, Ltd., from Henry White (Sutherland House), Ltd. The facts, the contentions of the parties and the findings of the Commissioners were not materially different from those in the foregoing Case.

The cases came before Cross, J., in the Chancery Division on 20th, 21st and 22nd July, 1960, when judgment was reserved. On 29th July, 1960, judgment was given against the Crown, with costs.

Mr. Philip Shelbourne (Mr. S. T. Bates with him) appeared as Counsel for the Companies, and Mr. Roy Borneman, Q.C., and Mr. Alan Orr for the Crown.

Cross, J.—The taxpayers, Cenlon Finance Co., Ltd., were registered on 12th October, 1953, and started to trade as dealers in stocks and shares on 16th October, 1953. On 20th October, 1953, they bought for £72,000 the whole of the issued share capital—that is to say, 20,000 £1 shares—of another company, Henry White (Sutherland House), Ltd. Henry White, a company carrying on business as ladies' outfitters, had sold some of its freehold property in Newcastle-under-Lyme, and realised thereby a capital profit which was not subject to tax in its hands.

On 2nd November, 1953, Henry White paid to Cenlon, which was then its sole shareholder, £25,000 out of this capital profit pursuant to a special resolution passed on 23rd October, 1953, in the following terms:

> "That the sum of £25,000 surplus moneys in the hands of the Company representing part of the capital profit arising from the sale of the Company's properties at High Street and Ironmarket and being an accretion to capital be distributed amongst the present holders of the shares in the capital of the Company pari passu and in proportion to the number of such shares respectively held by them and on the footing that they become entitled thereto as capital and the Directors are hereby authorised and directed to distribute the same accordingly."

On 4th December, 1953, Cenlon sold its holding of shares in Henry White for £27,500. On 19th November, 1954, Schedule D assessments were made on Cenlon for the year 1953–54 in an estimated amount of £500, and for the year 1954–55 in the estimated amount of £1,000. Formal notices of appeal against both these assessments were given on Cenlon's behalf on 22nd November, 1954, the ground stated being that it had not yet prepared accounts relevant to the years of assessment. On 1st July, 1955, Cenlon submitted accounts for the period 16th October, 1953, to 15th April, 1955, together with a computation of its profits as adjusted for the purposes of Case I of Schedule D which showed a trading profit of £634 and in which the sum of £33,231 in respect of dividends from United Kingdom companies (including the Henry White dividend of £25,000) was deducted and excluded from the profits.

On 21st July, 1955, the Inspector of Taxes for the St. Martin's district, in which the Income Tax affairs of Cenlon are dealt with, wrote to Cenlon's accountants, *inter alia,* as follows:

> "3. *Profit on trading* £634. A copy of the account is required to show how this profit is made up, . . . 5. I shall be glad to have particulars of the dividends paid out of profits not charged to Income Tax of £33,200."

On 27th July, 1955, the accountants replied, *inter alia*:

(Cross, J.)

> "3. *Profit on trading* £634:—Commission received, £22.519; Profit on debt bought, £1.930; Profits on dealings in stocks and shares, £1.623 [Total], £56.072. Losses on dealings in stocks and shares, £55,438; [Balance], £634. . . . 5. *Dividends paid out of profits not charged to income-tax*, £33,200:—Henry White (Sutherland House), Ltd:—Distribution of capital reserve created from the surplus arising from the sale of certain of the Company's fixed assets—£1. 5*s*. per share, £25,000. Abraville Securities, Ltd:—Distribution out of profits not subject to income-tax—£164 per share, £8,200; [Total], £33,200".

On 8th August, 1955, the Inspector wrote to the accountants agreeing their computation, and he wrote again on 15th August enclosing notices of assessment for the years 1953–54 and 1954–55 amended so as to agree with the accountants' figures. On 24th November, the Inspector issued a notice of assessment for Income Tax under Schedule D on the Company for the year 1955–56 in the amount of £107, which was in accordance with the figures agreed as aforesaid. In May, 1956, a new Inspector succeeded to the charge of the St. Martin's tax district, and in June, 1956, having received a memorandum from the Chief Inspector of Taxes, he read the correspondence and other documents to which I have referred and reached the conclusion that the dividends of £25,000 and £8,200 received by Cenlon from Henry White and Abraville Securities, Ltd., should have been included as trading receipts in the computation of its profits for the purposes of Case I of Schedule D and that the first assessments for the years 1953–54 to 1955–56 inclusive should have been made accordingly. He did not have any facts in relation to Cenlon's. affairs before him beyond those which were before his predecessor in 1955.

On 18th June, 1956, the new Inspector wrote to Cenlon's accountants as follows:

> "With reference to the accounts for the year ended on the 15th April, 1955, I consider that the two items amounting to £33,200 (viz. £25,000 from Henry White (Sutherland House) Ltd. and £8,200 from Abraville Securities Ltd.) are of an income nature and should be brought into the Case I liabilities of the company."

Subsequently, additional assessments were made on Cenlon on this footing for the years 1953–54 to 1955–56 in the sums of £10,452, £22,134 and £22,134 respectively, and a first assessment for the year 1956–57 in the sum of £22,241. Appeals by Cenlon against these assessments were heard by the Special Commissioners on 8th December, 1958, and 23rd March, 1959. After the assessments had been made, the profits of Abraville Securities, Ltd., out of which the dividend of £8,200 had been paid, were assessed to tax. In view of this fact, the Inspector dropped his claim in respect of the dividend received by Cenlon from that company.

The Special Commissioners decided: (1) that the dividend paid to Cenlon by Henry White should have been included in the computation of Cenlon's tax liability under Case I of Schedule D; (2) that as regards the years 1953–54, 1954–55 and 1955–56 the new Inspector had made a "discovery" within the meaning of Section 41 of the Income Tax Act, 1952, but (3) that, as regards the years 1953–54 and 1954–55, Section 510 (1) of the Income Tax Act, 1952, prevented the raising of additional assessments under Section 41. The Commissioners therefore upheld the additional assessment for the year 1955–56 and the first assessment for the year 1956–57 as amended by excluding from them the dividend received from Abraville Securities, Ltd., but they discharged the additional assessments for 1953–54 and 1954–55. Neither party was satisfied with this decision, and I have before me an appeal by Cenlon and a cross-appeal by the Crown.

I will deal first with Cenlon's appeal. A company, which is in law a separate entity from its shareholders, pays tax on the revenue profits which it

earns. It is under no legal obligation to divide any, let alone all, of its profits among its shareholders. If and when it decides to pay a dividend, whether out of revenue profits which have borne tax or out of capital profits which have not borne tax, the sums paid to the shareholders are received by them as income. Logically, it might appear to follow that such sums should themselves be liable to tax in the hands of the recipients; but, though there is no express exemption, the provisions which have always appeared in the Income Tax Acts in one form or another enabling companies to deduct tax from dividends paid to their shareholders have been construed as impliedly exempting dividends from tax in the hands of the shareholders.

At one time it was suggested that this was because the tax paid by the company was paid by it as agent for its shareholders. This idea is now discredited. The true view is that, though the tax which the company pays is its own tax and not tax which it pays as agent for its shareholders, payment of tax by the company franks the dividends which it distributes from further tax in the hands of the shareholders. In effect, when one comes to consider the tax liability of the shareholders, the company is treated as though it was a partnership in which the shareholders were partners, and the profits made by the company are treated as though they had been made by the shareholders. The general position, as I have stated it, has been explained by the House of Lords in many cases, stretching from *Commissioners of Inland Revenue* v. *Blott,* (1921), 8 T.C. 101, to *Commissioners of Inland Revenue* v. *Trustees of Joseph Reid (deceased)* (1949), 30 T.C. 431.

The question at issue here is whether the recipient of a dividend is not only freed from liability to be assessed to tax on the dividends themselves but is also entitled to have the dividend excluded for tax purposes from the receipts side of an account, the balance of profit on which is subject to tax under Case I of Schedule D. I do not see how the answer to this question can depend in any way on whether the dividend has been paid out of capital profits or out of revenue profits. To include dividends paid out of revenue profits in an assessment under Case I of Schedule D, though it might seem unfair, would not involve any double taxation, and it is clear that dividends are not exempted from tax because it would be unfair to tax them. If that was the reason for their exemption, dividends paid out of capital profits on which the company has paid no tax would be liable to be taxed directly as income in the hands of the recipient. The exemption which is implied from the deduction provisions in the Act applies to all dividends alike, and the extent of the exemption must, I should have thought, be the same for all alike.

If, therefore, the Inspector is right with regard to the Henry White dividend, I do not see how he was justified in dropping his claim with regard to the Abraville dividend. But why should the exemption of a dividend from tax be confined to a charge to tax on the dividend itself and not extend to a charge under Case I of Schedule D? Counsel for the Crown relied strongly on the fact that several of the Law Lords in the cases to which I have referred stated that tax was not payable on dividends "as such" (see, for example, Lord Tomlin's words in *Neumann* v. *Commissioners of Inland Revenue,* 18 T.C. 332, at page 362). He asked me to infer that the speakers had in mind the possibility that tax might be payable on dividends, as items in a receipt and payment account. I doubt whether the speakers had this possibility in mind at all. It seems to me more likely that they used the qualifying words "as such" because tax is payable on the revenue profits of the company out of which dividends are normally paid; and, in any case, it is to be observed that other Law Lords

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have not used the qualifying words "as such" at all (see, for example, Lord Atkin's statement in *Commissioners of Inland Revenue* v. *Cull*, 22 T.C. 603, at page 636).

On the other hand, I think that the decision in *Hughes* v. *Bank of New Zealand*, 21 T.C. 472, tells strongly against the contention of the Crown. In that case, the bank, which was not resident in the United Kingdom, was assessable to Income Tax under Case I of Schedule D on the profits arising from the trade carried on at its London branch office. Among the assets held by the London branch were certain holdings of 5 per cent. War Loan, and it was held that the exemption conferred by Section 46 (1) of the Income Tax Act, 1918, in respect of War Loan interest where the War Loan is in the beneficial ownership of a non-resident was unlimited, with the result that the interest was not only exempted from tax as interest, but could not be taxed indirectly by inclusion in the bank's trading receipts for the purpose of assessment under Case I of Schedule D.

As appears from the judgment of Romer, L.J., it was argued by the Crown in that case that the charge in Case I of Schedule D was not a charge of the interest as such to tax but simply a charge to tax of the balance of profits and gains of a trade and that the exemption did not apply. The Courts rejected this argument, dissected the trading receipts, discovered among them the items of War Loan interest and held that there was no reason why the general exemption of such interest from tax should not apply to an assessment under Case I of Schedule D. In my judgment, the exemption of dividends from Income Tax which is implied in the deduction provisions of the Income Tax Act is a general exemption analogous to the express exemption of War Loan interest in the beneficial ownership of a non-resident.

In the result, therefore, in my judgment, the dividend in question here was properly left out of the computation of Cenlon's liability to tax under Case I of Schedule D. In view of this conclusion, it is not strictly necessary for me to consider the other points in the case, but as the matter may go further, I propose to deal with them.

The relevant provisions of the Income Tax Act, 1952, are stated briefly as follows. Section 41 (1):

> "If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments; . . . then . . . where the tax is chargeable under Schedule D, the Additional Commissioners shall make an assessment on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to appeal."

Section 47 (1):

> "Subject to the provisions of this section and to any provision of this Act allowing a longer period in any particular class of case . . . an additional first assessment . . . may be . . . made . . . at any time not later than six years after the end of the year to which the assessment relates . . . Provided that where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax, . . . additional assessments . . . may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be . . . made . . . at any time."

Section 50 (1):

> "Save where expressly authorised by this Act, the General Commissioners shall not alter any assessment before the time for hearing and determining appeals, and then only in cases of assessments appealed against, and in accordance with their determination. . . ."

Section 50 (2):

> "An appeal, once determined by the Commissioners, shall be final, and neither the determination of the Commissioners, nor the assessment made thereon, shall be altered, except by order of the court when a case has been required as provided by this Act."

Section 510 (1):

> "Subject to the provisions of this section, where a person gives notice of appeal to the General Commissioners, . . . against an assessment to . . . income tax . . . and, before the appeal is determined by the Commissioners . . . the surveyor or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment . . . should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Commissioners or Board had determined the appeal and had upheld the assessment . . . without variation, had varied it in that manner or had discharged or cancelled it, as the case may be."

The issue between the parties has been narrowed by admissions made on each side. In the first place, the Crown admit that the correspondence between the Inspector of Taxes and the Company's accountants in July and August, 1955, constituted an agreement in writing within the meaning of Section 510 for the variation of the estimated assessment in accordance with the figures put forward by the Company. Secondly, the Company admits that, having regard to the decision of the Court of Appeal in *Commercial Structures, Ltd.* v. *Briggs*, 30 T.C. 477, I must hold that when the new Inspector, acting on instructions from the Chief Inspector of Taxes, took the view that the dividend in question was wrongly excluded from the Company's accounts which had been submitted to his predecessor in July, 1955, he made a "discovery" within the meaning of Section 41. The question at issue between the parties is, therefore: how far, if at all, is Section 41 controlled by Section 50 (2)? Section 41 does not itself place any limit on the time within which a "discovery" may be made. Section 47 expressly cuts down the period in which additional assessments may be made to six years in cases where there has been no fraud or wilful default. Is the right to make additional assessments consequent on a "discovery" further cut down by Section 50?

Counsel for Cenlon argued that what was made final by Section 50 (2) was the determination by the Commissioners of the amount of the taxable income of the taxpayer for the year to which the appeal related, and that once an appeal had been heard in no circumstances could any further additional assessment be made in respect of that year's income. If this were right, then it would follow that if an appeal was brought against an assessment on some point of law, the Revenue authorities could not make an additional assessment after the hearing of that appeal, even if they found that the taxpayer had fraudulently concealed the true amount of his receipts for that year. I see no reason for construing Section 50 in a way which would lead to so extravagant a result. I think that the Section means no more than that the determination of the appeal by the Commissioners is to be final with regard to the particular matter which was the subject of the appeal. This was the view taken by Lord Atkinson of Section 57 (10) of the Taxes Management Act, 1880, which is in very similar terms to Section 50 of the Income Tax Act, 1952 (see *Brooks* v. *Commissioners of Inland Revenue*, 7 T.C. 236).

Even on this construction, however, Section 50 may still conflict with Section 41 in cases in which the Inspector changes his mind without having any fresh facts before him. Suppose that an appeal is brought on a point of law and decided by the Special Commissioners against the Revenue; that the

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Inspector, being satisfied that the Commissioners were right, does not ask for a Case to be stated; but that subsequently the Courts decide in another case that the view of the law taken by the Special Commissioners was wrong. In such a case, the Inspector, on hearing of the Court's decision in the other case, would have discovered that the first assessment was wrong within the meaning given to the word "discovery" by the Court of Appeal in the *Commercial Structures* case[1]. Nevertheless, I think that he would be precluded by Section 50 from raising an additional assessment.

Further, I think that the same result would ensue if, instead of contesting the appeal and losing it, the Inspector agreed to its being allowed by the Commissioners; or, to take the matter a stage further back, if he came to an agreement with the appellant within the meaning of Section 510 on the point at issue.

It is true that in this case Cenlon's notice of appeal did not raise the question whether or not the Henry White dividend should be included in the computation of its profits. It was simply a notice of appeal against estimated assessments; but the question whether the dividend should be included was raised by the Inspector when he saw the accounts, and he agreed to the estimated assessments being reduced on the footing that the dividend ought not to be included. The agreement which he made was, therefore, in substance, equivalent to the allowing of an appeal by Cenlon against the inclusion of the dividend.

It follows, in my judgment, that if, contrary to the view which I have expressed, the dividend should have been included in the original assessments, the Special Commissioners were right in holding that no additional assessments could be made for the years 1953–54 and 1954–55.

The second case before me, *Tableau Holdings, Ltd.,* raises the same points as those on which I have given judgment in the *Cenlon* case. The only material difference in the facts is that the notice of appeal by the taxpayer was against the inclusion of the capital profit dividend in the computation of its profits for the purposes of Case I of Schedule D. It is, therefore, to that extent, an *a fortiori* case.

It follows, therefore, that, in my judgment, both the appeals of the taxpayers should be allowed.

Mr. S. T. Bates (for Mr. Phillip Shelbourne).—Would your Lordship say with costs?

Cross, J.—Yes. You cannot resist that, Mr. Borneman, can you?

Mr. Roy Borneman.—My Lord, there is just this difficulty, that there was one assessment, was there not, which must stand?

Cross, J.—Was there?

Mr. Borneman.—As there are somewhat different approaches to be made in the *Cenlon* and *Tableau* cases, I wonder whether your Lordship would not leave the matter to be agreed between the parties.

Cross, J.—I am certainly quite willing to do that. All I hope is that I have made my views, be they right or wrong, clear. What I simply wanted to decide, which I think covers each case, is that the dividends should not have been included in the computation in the first place. If that is right, the other question about the additional assessments does not arise.

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(1) 30 T.C. 477.

Mr. Borneman.—Your Lordship's judgment is very clear. What I did feel was that it would perhaps be better if your Lordship's Order were agreed, so that there may be no difficulty hereafter.

Mr. Bates.—My Lord, I have no objection to that.

Cross, J.—Then I will not make any formal Order. I am sure you will be able to agree on the terms of what the Order ought to be; and if I have got the figures or the years wrong, I will try and correct that.

Mr. Borneman.—They are not wrong, my Lord.

The Crown having appealed against the above decision, the cases came before the Court of Appeal (Upjohn, Donovan and Pearce, L.JJ.) on 27th and 28th April, 1961, when judgment was reserved. On 1st May, 1961, judgment was given unanimously in favour of the Crown on the question whether the dividend was a taxable receipt, and against the Crown on the question whether additional assessments for the years 1953–54 and 1954–55 were precluded by Section 510 (1), Income Tax Act, 1952.

Mr. Roy Borneman, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. Philip Shelbourne and Mr. J. Holroyd Pearce for the Companies.

Upjohn, L.J.—These are two appeals from judgments of Cross, J. Both raise exactly the same points, and the facts are fully set out in the Cases Stated; but, as they are so short, I propose to re-state them at the beginning of this judgment.

In the first case, the Respondent Company, Tableau Holdings, Ltd., was incorporated in November, 1952, as a finance company—that is to say, a company which trades in stocks and shares. In the same month, Tableau Holdings acquired the whole of the issued capital of a company known as Henry White (Sutherland House), Ltd., which carried on business as ladies' outfitters. It had sold some of its freehold property at Newcastle-under-Lyme, and thereby realised a profit which was a capital profit and had not been assessed to Income Tax in its hands. The purchase consideration for the acquisition of its shares was the sum of £87,909. On the same day, Henry White distributed by way of dividend to Tableau Holdings, as its sole shareholder, a sum of £18,000 out of the capital profit on the sale of its premises. Being a capital profit not subject to tax, no tax was deducted by Henry White when making the distribution. Nearly a year later, on 20th October, 1953, Tableau Holdings sold the whole of the issued share capital in Henry White to the Company concerned in the second appeal—that is, Cenlon Finance Co., Ltd.—for the sum of £72,000. The operation was repeated, and on 2nd November, 1953, Henry White made another capital distribution, by way of dividend out of the profit on the sale of its premises, to Cenlon of £25,000, again without deduction of tax. On 4th December, 1953, Cenlon sold its entire holding of shares in Henry White for £27,500. Cenlon, like Tableau Holdings, was incorporated to carry on a business as a finance company or dealer in stocks and shares.

In these circumstances, it is not in doubt that each Company is assessable under Case I of Schedule D for the profits that it makes on transactions in investments and securities, and is entitled to deduct losses made in the course of such transactions. Thus it is not in dispute that each of the Companies was entitled to bring into the computation of its total profits for the year the loss

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which it made on the sale of the shareholding in Henry White. The sole question is whether the dividends declared by Henry White and paid to Tableau Holdings and Cenlon respectively ought to be brought in as a credit in assessing the profits of the respective Companies' trade. That is the first and principal point raised in the appeal.

But there is a subsidiary point which arises in this way. In the case of each Company, it was submitted to the appropriate Inspector of Taxes that the capital distribution made by Henry White ought not to be brought into account in assessing the profits of the Company under Case I of Schedule D. In each case, the Inspector ultimately accepted the submission and agreed that these dividends should be omitted from the computation of the trading profit. Later, each Inspector changed his mind and raised an additional assessment upon each of the Companies, claiming that these distributions should be brought into account as a profit for the purposes of Case I of Schedule D. It is admitted that, in each case, no new facts had come to light, and the Inspectors respectively raised the additional assessment upon each Company upon a further consideration of the matter, when they respectively came to the conclusion that, in law, each of the Companies was liable to bring these sums so distributed into account in the computation of their profits. The question then arises as to whether the Inspectors respectively, having agreed to the original assessment, are entitled to raise an additional assessment under Section 41 of the Income Tax Act, 1952.

I turn, then, to the first, and main, point—that is to say, whether a company incorporated to transact dealings in stocks and shares is bound to bring into the computation of its profits under Case I of Schedule D dividends it has received from which tax is not deductible by the paying company under Section 184, Income Tax Act, 1952. I must, of course, deal with the argument on behalf of the taxpayer in some detail, but I may perhaps usefully state the argument in a nutshell at this stage, and it is this. Counsel on behalf of the taxpayers submits that the Income Tax Act, 1952, like its predecessors, contains no provision for taxing dividends except as provided by Section 184. That Section, he submits, contains a code for taxing dividends and if, under its provisions, tax is not deductible from a dividend, then, in the hands of the recipient, that dividend escapes tax altogether; and, in truth, dividends from which tax is not deductible under Section 184 are in fact exempt from all tax. Let me state at once that this judgment has reference only to dividends declared by companies resident in the United Kingdom; quite different considerations apply to companies resident abroad. Nor am I concerned with Surtax.

I must begin by reading Section 184:

> "(1) The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying the dividend shall be entitled to deduct tax at the standard rate for the year in which the amount payable becomes due. (2) Subsection (1) of this section shall, in relation to a dividend paid by any body of persons, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of this Act, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period."

The ancestor of this Section was Section 54 of the Income Tax Act, 1842. That Section has been the subject of judicial comment, and both Counsel for the taxpayers and Counsel for the Crown rely on the passage contained in the

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speech of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ltd.*, 8 T.C. 481, at page 518:

> "This case seems to depend upon the following considerations. A joint stock company is under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Schedule D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon. If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Schedule D the money received by him in dividends. Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of Income Tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the Statute; it is founded upon the provisions of the Statute itself; and the Statute carries the analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from Income Tax or pays at a lower rate, can get the Income Tax which has been deducted on the dividend warrant returned to him."

At page 520, the noble Lord continued:

> "A company either comes under Section 40 of the Act of 1842, or it does not. If it does not, it is not taxable; but in that event those who receive dividends from it will be taxable in respect of their dividends. If it does come under Section 40, its shareholders are not taxable for their dividends. This is so, not because of any implied rule of law against double taxation, a rule for which it would be difficult to find support in the books, but because dividends on shares in a taxed company do not come under Schedule D."

The reference by Lord Phillimore to "quasi-partners" is readily understood by reading Sections 54 and 40 of the Income Tax Act, 1842.

Mr. Shelbourne, for the taxpayers, in an attractive and forceful argument, submits that upon the true construction of the Income Tax Acts, and especially having regard to the wide wording of Case VI of Schedule D, it would have been open to the Court to hold that dividends in the hands of the recipient shareholders would freshly be liable to tax in their hands under Case VI; but, as he submits, Lord Phillimore is pointing out that, had that been done, that would have put an end to joint stock company trading overnight. I entirely agree with that submission. Therefore, he submits, and rightly, there is no provision in the Income Tax Acts which provides for the taxation of dividends declared by companies save as is provided by Section 184—that is to say, that if a company is paying dividends out of profits which have been brought into charge to tax, they are entitled (though not bound) to deduct tax from the dividend. He further points out that this result is reached, not by any benevolent construction of the law against double taxation, but, to use the words of Lord Phillimore, "it is founded on the provisions of the Statute itself". Thus, he submits, dividends are taken altogether out of the taxing provisions of the Income Tax Acts so that, in effect, the recipient of the dividend can be taxed only if the company paying the dividend is entitled to deduct tax from that dividend under Section 184. As a general proposition, with all this I agree; and I do not think that Mr. Borneman, who has argued the case on behalf of the Crown, finds himself in disagreement, either.

The proposition that dividends are not subject to taxation except by deduction under Section 184 has been repeatedly re-stated in the House of

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Lords. In *Neumann* v. *Commissioners of Inland Revenue,* 18 T.C. 332, Lord Tomlin said, at page 362:

> "I may say at once that, having regard to the view which I have expressed as to the general scheme and operation of the Income Tax Acts in regard to dividends, I am unable to accept the view that dividends, as such, are taxable under Schedule D."

Lord Wright, at page 368:

> " . . . I reach the conclusion that a shareholder is not separately taxable—I disregard Sur-tax—on a dividend, as a profit individual to himself, under Schedule D, Case VI, as the Court of Appeal held, or at all."

He then went on to cite extracts from earlier cases, including an extract from the passage in Lord Phillimore's speech which I have already read. In *Canadian Eagle Oil Co., Ltd.* v. *The King,* 27 T.C. 205, Lord Simonds put it very briefly in this way, at page 262:

> "The shareholder in an English company is not taxed upon his dividend, but he goes untaxed because upon the true construction of the Income Tax Act no tax is imposed upon his dividend. He does not escape tax because some overriding principle says that he shall not be taxed."

There has been much debate before us as to the meaning of the words, in Lord Tomlin's speech which I have just quoted, "as such". I do not think that they occasion any difficulty. In my judgment, what the learned Lords are saying quite clearly is this: that there is no provision in the Income Tax Acts whereby dividends are brought in as a subject-matter of taxation under any of the Schedules. This is in marked contrast (to take but one example) to the recipient of interest from British Government securities. The mere receipt of such interest automatically makes the recipient liable to an assessment under Schedule C, and he is assessed accordingly; but the receipt of a dividend by a subject does not entitle the Crown to raise an assessment upon him in respect of that dividend. Accordingly, as is perfectly well settled, if a taxpayer receives a dividend—as in this case—out of profits not brought into charge to tax, the company is not entitled to deduct tax, and that dividend remains tax free in his hands both for the purposes of Income Tax and Surtax. That is the first step in Mr. Shelbourne's argument, and I entirely agree with his submission.

The next step which he takes is this. He submits that, in assessing the Company on these capital distributions, the Crown are in fact taxing a dividend, and they are not entitled to do so because Section 184 contains a complete and exhaustive code for the taxation of dividends; and if tax is not deductible under that Section, then the Crown are not entitled to tax upon the dividend in any circumstances. He submits that Section 184 is really a head of taxation comparable to the Schedules contained in the Act. He submits that it is the duty of the Crown to analyse the profit and loss account submitted for the purposes of Case I of Schedule D to see whether something has been brought in which is not subject to tax. He points out truly that if in a trading company's accounts you find, for example, rent received from land, you must take it out of the Case I of Schedule D assessment and tax it under Schedule A. No doubt that is perfectly true, and is due to the construction which has been put upon the Income Tax Acts in the well-known case of *Fry* v. *Salisbury House Estate, Ltd.*(1), [1930] A.C. 432. The law was there laid down that each Schedule contained a definite code applying exclusively to their defined subject-matters (see *per* Lord Atkin at page 457 (2)). Equally

(1) 15 T.C. 266. (2) *Ibid.*, at p. 320.

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no doubt, if you find in the trading account interest from Government securities, you must take that out and tax it under Schedule C. So, he says, if you find a dividend declared by a company, you must take that out and see whether it is taxable under the provisions of Section 184; and, if not so taxable, it escapes the net altogether. He relies, naturally, upon *Hughes* v. *Bank of New Zealand*, 21 T.C. 472. In that case, during the First World War the British Government issued securities which were to be tax-free in the hands of non-residents, for the reason that they wanted to attract funds, with which to fight the war, from overseas non-residents. It was held that not only was the interest exempt as such under Schedule C, but that, in the case of a non-resident trading company, it was not permissible to bring in the interest under Case I of Schedule D and thereby tax the interest indirectly as a profit of the trade carried on by the respondent bank. The same result was reached in the case of interest where there was an exemption not by Statute but by virtue of the Rules made under the Schedules. This result was reached by application of the *Salisbury House* (1) principle: that is, that if a source of income is taxed under one Schedule but is exempt by virtue of Rules under that Schedule, it is altogether exempt and cannot be taxed under another Schedule. For another example of the exclusiveness of the Schedules relied upon by Mr. Shelbourne, see *Thompson v. Trust & Loan Company of Canada*, 16 T.C. 394. He also pointed out that in *Commissioners of Inland Revenue* v. *Reid's Trustees*, 30 T.C. 431, Lord Simonds pointed out that, though a dividend paid out of capital profits is necessarily income in the hands of the recipient, it will escape taxation unless tax can be deducted under Section 184.

These are the main authorities from which he asked us to deduce that Section 184 constitutes a complete and exhaustive code—really a charging Schedule—which charges dividends to tax, so that they cannot be charged in any circumstances under any other Schedule: they are exempt. This was indeed accepted by the learned Judge, who decided this point in his favour when he said (2):

> "In my judgment, the exemption of dividends from Income Tax which is implied in the deduction provisions of the Income Tax Act is a general exemption analogous to the express exemption of War Loan interest in the beneficial ownership of a non-resident."

Speaking for myself, I am quite unable to accept this argument. Section 184 is not a charging Section, and has no analogy with the charging Schedules contained in the Income Tax Acts. It is to be found in Part VII of the Act and is a machinery or administrative provision, and is directed solely to the case where a company is paying a dividend out of profits charged to tax and is authorised (though not compellable) to deduct the tax from the dividend. Speaking for myself, I cannot for one moment accept the submission that Section 184 forms a complete and exhaustive code for the taxation of dividends. I see nothing in Section 184 corresponding to the legislation in the case of *Hughes* v. *Bank of New Zealand* which exempts dividends from taxation. The matter must be regarded as one of general principle.

In the ordinary case, a company pays dividends out of profits brought into charge to tax, and deducts the tax. No difficulty arises. If a company (as in this case) such as Henry White makes a capital profit, then it is not entitled to deduct the tax under Section 184, and there is no provision in the Income Tax Acts whereby the recipient can automatically be assessed to tax on the dividend. Those are the ordinary cases; but this is a case where the company

(1) 15 T.C. 266. (2) *See* page 186 *ante*.

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assessed is a trader in stocks and shares. I can see nothing, myself, to prevent the application of the ordinary rules: that is to say, the company is assessed under Case I of Schedule D upon the profit made from dealing in stocks and shares, and it has to bring in profits that it makes on dealings which, in the hands of a non-trader, would be capital profits. For example, the profit made on the sale of a share over the purchase price; a cash repayment on a reduction of capital; dividends received in a liquidation—all these would be capital profits in the hands of the non-trader. But the trader has chosen to regard his stocks and shares as his stock-in-trade, and he deals with them as such; and the fruit which is yielded by such dealings is the fruit of his trade, and is assessable to tax under Case I of Schedule D. I can see no distinction between the cases I have mentioned and the case of a capital distribution by way of dividend by a company as a going concern. It is all part of the fruit of his stock-in-trade; and, on general Income Tax principles, it must be brought into his computation as part of the revenue profits of his trade. Short of some express exemption exempting dividends from taxation altogether, I cannot see how it is possible to exclude dividends, although not taxable under Section 184, from the computation when ascertaining the trader's profits. There most certainly is no express exemption in Section 184, and I cannot see how any exemption is to be implied from the words of the Section.

It seems to me clear that the learned Lords in the cases I have mentioned were stating a general proposition in relation to the receipt by a shareholder of a dividend, and that they did not have under consideration the special case of the recipient shareholder being a trader in stocks and shares. It is perfectly true that in *Selection Trust, Ltd.* v. *Devitt*, reported with the *Canadian Eagle Oil* case in 27 T.C. 205, the Selection Trust company was a dealer in stocks and shares. It is possible that the case might have been argued on a rather broader basis and have raised the point that is now before us, but in fact the contentions of the Crown were directed to the overthrow of *Gilbertson* v. *Fergusson*[1], which had stood for 50 years; and I cannot myself draw any assistance from that case for present purposes. For these reasons, I find myself unable to agree with the judgment of the learned Judge. In my judgment, the Commissioners in each case came to a correct conclusion, and these tax-free dividends ought to be included in the computation of the Company's profits for the purposes of Case I of Schedule D in the year in which they arose.

That makes it necessary to consider the second point, and it is necessary to refer first of all to the relevant Sections of the Income Tax Act, 1952. I start with Section 50(2):

> "An appeal, once determined by the Commissioners, shall be final, and neither the determination of the Commissioners, nor the assessment made thereon, shall be altered, except by order of the court when a case has been required as provided by this Act."

The next relevant Section is Section 510. That was originally introduced as Section 51 of the Finance Act, 1949.

> "(1) Subject to the provisions of this section, where a person gives notice of appeal to the General Commissioners, the Special Commissioners or the Board of Referees against an assessment to, or a decision of any kind with respect to, income tax other than surtax or surtax, and, before the appeal is determined by the Commissioners or Board, the surveyor or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement

(1) 1 T.C. 501.

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was come to, the Commissioners or Board had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be. (2) Subsection (1) of this section shall not apply where, within twenty-one days from the date when the agreement was come to, the appellant gives notice in writing to the surveyor or other proper officer of the Crown that he desires to repudiate or resile from the agreement."

It is not in doubt that the effect of Section 510 is that, if the Inspector comes to an agreement with the taxpayer, the effect of such an agreement is the same as if the point at issue between the Inspector and the taxpayer had been determined upon appeal by the Commissioners. In this case, it is conceded by the Crown that in each case the Inspector did come to such an agreement with the Company concerned to the effect that these tax-free dividends were to be excluded from the assessments in question. The question, therefore, may be posed very shortly: Are the Crown entitled to raise an additional assessment under the provisions of Section 41, notwithstanding either an agreement or an appeal which has been determined by the Commissioners? Section 41 (1) is in these terms:

"If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement or relief not authorised by this Act, then and in every such case"

—and I turn to paragraph (ii):

"where the tax is chargeable under Schedule D, the Additional Commissioners shall make an assessment on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to appeal."

Before us, Mr. Shelbourne has properly conceded that we are bound by *Commercial Structures, Ltd.* v. *Briggs,* 30 T.C. 477; so that, subject always to the point on Section 50 (2), the Inspector is entitled to raise an additional assessment upon the taxpayer merely because he has a change of mind as to the law applicable to the circumstances of the case, although no new fact or other event has subsequently emerged which would cause him to change his mind. Mr. Shelbourne reserves the right to challenge that case if the matter should go higher.

The Commissioners in each case, and the learned Judge, came to the conclusion that the Inspector was not entitled to raise an additional assessment upon the taxpayer. I agree with them, and propose, therefore, to state my conclusions very shortly.

Mr. Borneman's argument upon this matter may be briefly stated. He submitted that no agreement which an Inspector may make under Section 510, and no determination upon an appeal before the Commissioners, can prevent the operation of the assessing machinery provided by the Income Tax Acts and preclude an Inspector from raising, by a first or additional assessment, the imposition of the correct liability upon the taxpayer. The logical consequence of that submission, subject to the general limitation of six years, is that no agreement by the Inspector, and no determination of an appeal by the Commissioners after a hearing, is binding upon the Crown. Mr. Borneman relied upon certain *dicta* of Warrington, L.J., in *Gundry* v. *Dunham,* 7 T.C. 12, at page 24, but I must confess that such *dicta* are quite inconclusive for the purpose now under consideration. He also relied upon certain observations of Rowlatt, J., in *Anderton and Halstead, Ltd.* v. *Birrell,* 16 T.C. 200. It is

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perfectly true that the learned Judge did there express the view that the Section in the Income Tax Act, 1918, corresponding to Section 50 did not preclude the Inspector from raising an additional assessment, but it is quite clear that he did so upon the ground that in his view a mere change of mind as to the applicable law would not give rise to a case for an additional assessment under the Section corresponding to Section 41. Rowlatt, J., therefore, would have come to the conclusion, in such a case as we have before us, that the Inspector would not be entitled to raise an additional assessment under Section 41, for no new facts had been discovered. It follows, therefore, that his observations are not of assistance in this case.

In my judgment, if we were to give effect to the submissions made on behalf of the Crown, we should be rendering Section 50(2) completely nugatory; and, what is equally important, it was quite futile and unnecessary to pass Section 510 as Section 51 of the Finance Act, 1949, for in essence the Crown would not be bound until the passing of six years, and they could always re-open any assessment upon a change of mind as to the law applicable. It seems to me that Section 50(2) is directed to the case where a particular point has been determined, and when that point is determined it cannot be re-litigated; both sides are bound. So with Section 510, when a particular point has been agreed the parties are bound subject only to a *locus pœnitentiæ* given to the subject but not to the Crown under Sub-section (2). If they are bound, both sides must be bound: and it cannot be open to the Crown, under the guise of an additional assessment under Section 41, to re-litigate the very point, and in this case the only point, that has been agreed between the parties. On that short ground I would agree with the decision of the Judge and of the Commissioners.

For these reasons, I am of opinion that in each case the Commissioners came to a correct conclusion. I would therefore allow the appeal in each case, and restore the decisions of the Commissioners.

Donovan, L.J.—In each of these cases the Respondent is a Company whose trade consists in dealing in investments for profit. In the course of such trade, each Company received a dividend on shares which it held, as part of its stock-in-trade, in a company which at the time was a subsidiary. The dividend was a distribution of profit which the subsidiary had made by selling certain premises which were part of its fixed capital. Accordingly, in the subsidiary's hands the profit was not liable to Income Tax. For the same reason, the subsidiary could not deduct Income Tax at source when paying a dividend out of this capital profit, for Section 184 of the Income Tax Act, 1952, does not allow such a deduction in the case of such a dividend. Nevertheless, the dividend was, in the hands of each of the recipient Companies, income, and income of its trade. So much is admitted. The profits of each such Company are assessable under Case I of Schedule D, and the computation for Income Tax purposes is to be made "on the full amount of the profits or gains . . ." (Section 127(1) of the same Act). It is well settled that, for the purposes of Case I of Schedule D, trading profits are to be computed on the principles of commercial accountancy, subject to any express provisions of the Income Tax Acts by which they are excluded or modified (see *Whimster & Co.* v. *Commissioners of Inland Revenue*, 12 T.C. 813). No such exclusions or modifications are in point here. In consonance with those principles, each of the Respondent Companies included the dividends here in question in its profit and loss account; but in the special computation of its profits liable to Income Tax, each Company excluded it. The Special Commissioners, who decided the appeal of the Cenlon Company, and the General Commissioners for the

City of London, who decided the appeal of the Tableau Company, both held that the dividend should be included in the computation of taxable trading profits. Cross, J., reversed that decision.

Dividends paid by a company resident in the United Kingdom are not liable to tax as though they were a new income in the hands of the recipient shareholder: I speak throughout, of course, of Income Tax as distinct from Surtax. But under Section 184 of the Income Tax Act, 1952, the paying company may if it chooses, and provided the dividend is paid out of profits charged or chargeable to tax, deduct from the dividend on payment Income Tax at the current standard rate. If the company does not exercise its option to deduct tax in this way, or if it has no such option because the dividend is paid out of "capital" profits, then the dividend suffers no Income Tax, albeit that, whether paid out of "income" profits or "capital" profits, it is income in the hands of the recipient shareholder.

So far as they go, these propositions are common ground. They rest upon a number of decisions of the House of Lords beginning with *Bradbury* v. *English Sewing Cotton Co., Ltd.*(1) and continuing to *Canadian Eagle Oil Co., Ltd.* v. *The King* (2) and *Selection Trust, Ltd.* v. *Devitt* (2). But the Crown contend that they do not by themselves solve the problem posed by the present appeals: for what is being taxed here, say the Crown, is the full profit of a trade; and, while a dividend *per se* is not a taxable subject-matter (save under Section 184), nevertheless, when it is a trading receipt as well, the Act requires that it shall be brought in as such when computing the trading profits liable to tax. The Respondents reply that this is to tax the dividend indirectly, which is contrary to law. So, although the matter is susceptible of much argument, and many authorities have been canvassed in the course of it, the question in the end is the very narrow one posed by these rival contentions.

I think these two dividends ought to be brought into the computation of trading profits for these reasons: first, the language of the Act itself, which requires the tax to be levied on the full amount of the trading profits, of which these dividends admittedly form part; secondly, because the provisions of Case I of Schedule D to the foregoing effect are not, in my view, over-ridden by the provisions of Section 184, or by any inference to be drawn from that Section. The reason why dividends are not, as such, liable to be assessed to Income Tax is not because of anything in Section 184, but because the law recognises that, while a company is one person and its shareholder is another, nevertheless no new fund of profit is created merely by dividing that fund. But where the dividend comes to a person who is not merely a shareholder but a trader, and the dividend is income of the trade he carries on, why should the Act not be obeyed, and the dividend included in the computation of those profits to be taxed as profits of the trade? It begs the question, if I may say so, simply to say that Section 184 is the sole provision for the taxation of dividends. Thirdly, I think the decision in *Hughes* v. *Bank of New Zealand* (21 T.C. 472) is not applicable here. In that case, the special exemption granted by the combined effect of the Statute and the Treasury condition, was exemption from *all* taxation if the other terms of the condition were complied with (see the observations of Lord Wright, M.R., at pages 491–2). There is no such special exemption in the case of these dividends; nor, indeed, any exemption properly so called at all. For the term connotes a liability from which someone is excused. The conception does not fit these dividends. Regarded purely as

(1) 8 T.C. 481. (2) 27 T.C. 205.

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dividends, they were never liable to tax. In this respect, I part company with the learned Judge, who considered that the dividends should not lose their "exemption" by being included in a fund of taxable profits.

These appeals do not raise the problem of the proper treatment of dividends taxed at source received by a company dealing in stocks and shares by way of trade, but in the course of the argument the question has naturally been looked at. These also, in my view, would fall to be included in a computation of profits taxable under Case I of Schedule D, with an adjustment of the tax bill which allows for that suffered at source. There may be no specific provision for such an adjustment, and naturally play was made of that fact by the Respondents. But such an adjustment must obviously be made to do justice, and to give effect to the oft-recognised prohibition in the Income Tax Acts against such a double levy of tax, even though it may not be double taxation in the strictly theoretical sense. In this context, of course, I am not considering income of a finance company which is taxed at source under Schedule C, and which cannot otherwise be taxed because of the rule that income taxable under one Schedule may not be taxed instead under another. I do not think the existence of that rule really helps the Respondents.

An argument of some subtlety, based upon the decision of the House of Lords in the cases of *Canadian Eagle Oil Co., Ltd.* v. *The King*(1) and *Selection Trust, Ltd.* v. *Devitt*(1), was addressed to us. It was said that if dividends could be included in a computation of trading profits under Case I of Schedule D, then that provided, in the *Selection Trust* case, a short and complete answer to the taxpayer there, and one hardly likely to be overlooked by the House of Lords if it were right. Yet quite a different answer was in fact given. But it must be remembered that no argument inviting consideration of the short answer was developed in the House of Lords, although it was mentioned; and, while I take notice of what the Respondents in these cases now say, I am nevertheless not relieved from the duty of considering the Crown's present arguments on their merits.

As to the contention raised by the Respondents on Section 510 of the Income Tax Act, 1952, which affords them an alternative defence against certain of the additional assessments, I agree with the views expressed by both bodies of Commissioners and by the learned Judge. I add nothing to these, except to say that Mr. Borneman, for the Crown, admitted that his contention involved that the protection which Parliament obviously intended to confer upon the taxpayer by Section 510 was wholly illusory.

The point is kept open by the Respondents that there has been no "discovery" within the meaning of Section 41 of the 1952 Act so as to justify additional assessments, but merely a change of mind upon the same facts for the same year. But this point is concluded by this Court's decision in *Commercial Structures, Ltd.* v. *Briggs* (2).

Like my brother, I also think that the Crown succeed in these appeals to the extent that the Commissioners' decision in each case should be restored, but that the Crown fail in their contention regarding Section 510.

Pearce, L.J.—I concur. On the question whether the Crown are precluded by the agreement in writing from raising afresh under Section 41 the matter concluded by the agreement, I agree with what the learned Judge and my Lords have said. By Section 50(2) of the Income Tax Act, 1952, an appeal, once determined, shall be final. There are no words saving the effect of Section 41 as to

(1) 27 T.C. 205. (2) 30 T.C. 477.

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that finality. By Section 510, the agreement in writing shares that finality. The finality therefore extends to the particular matter which was the subject of the agreement—namely, in these cases, whether the £25,000 and £18,000 dividends could properly be computed in the receipts under Case I of Schedule D. Such a conclusion does not prevent Section 41 having a reasonable, though limited, application. Any other conclusion would conflict with the express words in Section 50 (2) and would (particularly in view of what Section 41 must be taken to mean following on *Commercial Structures, Ltd.* v. *Briggs* [1]), rob Section 50 (2) (and, incidentally, Section 510) of its clear intention.

On the other questions also, I agree with what my Lords have said. With all respect to the learned Judge's judgment and to Mr. Shelbourne's able and ingenious argument, I am unable to find any principle that justifies the exclusion of these capital dividends from a computation to which they are otherwise clearly relevant under Case I of Schedule D.

In *Commissioners of Inland Revenue* v. *Blott*, 8 T.C. 101, at page 136, Viscount Cave said:

> "It [the company] pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and, in that case, the payment by the company operates in relief of the shareholder."

In *Bradbury* v. *English Sewing Cotton Co., Ltd.*, 8 T.C. 481, following on that case, Lord Wrenbury said, at page 516:

> "The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend".

Lord Phillimore thus expresses it at page 519:

> "the shareholder is taken to have paid the tax upon his dividends through the company and is not assessed or taxed upon them."

That is a perfectly reasonable concept. The company has paid the tax, and the dividend is therefore not brought into receipts under Schedule D to be further taxed. But the concept becomes unreasonable if it is extended to capital dividends which are part of the receipts of a trader. They have not contributed tax at source as dividends on income have done, whether or not that tax is deducted from the dividend. Such capital dividends have not come within Section 184 at all, since the Section expressly confines itself to "the profits or gains to be charged on any body of persons" and to "any dividend thereof . . . made in respect of any share, right or title thereto" —that is, to profits or gains to be charged. There is therefore no reason why the capital dividend, with which, *qua* dividend, the Act does not concern itself, should not be taxable if any person receives it as part of the revenue of a taxable trade. To equate such a capital dividend to the income dividend from which tax has been deducted, or might have been deducted, is misleading. The income dividend is a distribution from, and a part of, a source that has suffered tax. The capital dividend is a distribution from, and a part of, a source which has never been concerned with Income Tax at all. It becomes for the first time the subject of Income Tax if it becomes part of a trader's receipts. It has at no time received any exemption or exclusion from deduction of tax, as had the War Loan interest in *Hughes* v. *Bank of New Zealand*, 21 T.C. 472. It is not comparable to the dividends paid in the case of *Thompson* v. *Trust and Loan Company of Canada*, 16 T.C. 394, which, having suffered tax by deduction under Schedule C, could not properly be included under Schedule D. It

(1) 30 T.C. 477.

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had no tax character whatever. It had never previously been income, or come within the ambit of income taxation. When first it became income by virtue of a trader receiving it, it could not rely on any exemption or exclusion, or any allocation to any other Schedule, under the Income Tax Acts. One may compare it, for instance, to the proceeds of the sale of a house. Such proceeds have nothing to do with the Income Tax Acts unless and until they are received by a trader who has on the expenses side of his balance sheet the price at which he bought the house. But in such an event they become part of the revenue of his trade.

The appeals will therefore be to that extent allowed, and the decisions of the Commissioners restored.

Mr. Roy Borneman.—My Lord, in the event, would your Lordship allow the Crown's appeal on the first point in each case and affirm the decision of the Commissioners; dismiss the Crown's appeal on the second point in each case and affirm the decision of the Commissioners; dismiss the recipient Company's appeal on the first point in each case and restore the decision of the Commissioners; and, on the second point, affirm the judgment of the learned Judge?

Pearce, L.J.—Is that right, Mr. Shelbourne?

Mr. Phillip Shelbourne.—Yes, my Lord.

Mr. Borneman.—As regards costs, my Lord, I would submit that the fair and proper way of dealing with this matter is that your Lordship should say that there should be no costs in this Court either side.

Pearce, L.J.—Let us hear what Mr. Shelbourne has to say.

Mr. Borneman.—As regards the costs in the Court below, I ask your Lordship to say that the Order of the learned Judge awarding costs to the Respondents on both grounds should be varied in such a way that there should be no costs in that Court either. That does appear to do substantial justice.

Mr. Shelbourne.—My Lord, I am instructed to agree to the proposal my learned friend has made.

Pearce, L.J.—So be it. Then that will be the Order. Is there any other application?

Mr. Shelbourne.—On behalf of the Respondents in this case, may I apply for leave to appeal against that part of your Lordships' decision which is adverse to them?

Pearce, L.J.—Have you anything to say on that, Mr. Borneman?

Mr. Borneman.—My Lord, the Crown never make a contribution on the occasion of an application of that kind. If your Lordships think it right, then the Crown will accept it. I wish to add this: that my clients do wish to have the opportunity of considering what your Lordships have said on the second point, as to whether it would be right and proper to pursue this matter.

Pearce, L.J.—We will hear what Mr. Shelbourne says, but if the case is to go to the House of Lords I should have thought it was better that it should go *in toto*.

Mr. Borneman.—Yes, my Lord. The only reason I make that application is that it is so difficult to constitute this Court similarly if we have to make an application later.

Mr. Shelbourne.—If I may say so, I am entirely agreeable to my learned friend's application. My application is made, if I may say so, on the same basis: in order to give my clients time to consider their position.

Pearce, L.J.—So be it. Then leave is given to either side.

Mr. Borneman.—If your Lordship pleases.

Cenlon Finance Co., Ltd., having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Reid, Denning, Morris of Borth-y-Gest and Guest) on 31st January and 1st February, 1962, when judgment was reserved. On 1st March, 1962, judgment was given unanimously in favour of the Crown, with costs.

Mr. Philip Shelbourne and Mr. J. Holroyd Pearce appeared as Counsel for the Company, and Mr. Roy Borneman, Q.C., and Mr. Alan Orr for the Crown.

Viscount Simonds.—My Lords, I am so fully in agreement with the judgments of the Court of Appeal in this case that I can state my opinion shortly upon the only question which it fell to them to consider. But there is a second question upon which they were constrained to follow an earlier decision of the Court, and upon this question it will be necessary to state the facts in some detail.

The appeal relates to an additional assessment for the year 1955–56 and an assessment for the year 1956–57 made upon the Appellant in the circumstances appearing in the Case stated by the Special Commissioners, which can be summarised as follows. The Appellant Company was registered on 12th October, 1953. It carried on business as a dealer in stocks and shares, and was assessable to Income Tax under Case I of Schedule D in respect of any profits arising from such dealing. On 20th October, 1953, the Appellant acquired the whole issued share capital of Henry White (Sutherland House), Ltd. (hereinafter called "Henry White"), for £72,000. Henry White carried on the business of ladies' outfitters, and had previously realised a profit from the sale of some of its freehold property which was a capital profit and not assessable to Income Tax in its hands. On 2nd November, 1953, Henry White made to the Appellant a distribution of £25,000 out of that capital profit. On 4th December, 1953, the Appellant sold its holding of shares in Henry White for £27,500. These figures were included in the Appellant's accounts for the period 16th October, 1953, to 15th April, 1955. On 1st July, 1955, those accounts were submitted to H.M. Inspector of Taxes for St. Martin's district together with a computation of the profits adjusted for the purposes of Case I of Schedule D, in which the sum of £25,000 dividends received from Henry White was deducted and excluded from the profits. Details of these dividends were then asked for and given in correspondence between the Appellant's accountants and the Inspector. On 8th August, 1955, the Inspector wrote to the accountants agreeing their computation. On 24th November, 1955, the Inspector issued a notice of assessment to Income Tax, Schedule D on the Appellant for the year 1955–56 in accordance with the agreed computation. In May, 1956, a new Inspector succeeded to the charge of the St. Martin's tax district, and having received a memorandum from the Chief Inspector of Taxes and having read the relevant correspondence and documents, he came to the conclusion that the dividend of £25,000 received from Henry White should have been included as a trading receipt in the computation of the

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Appellant's profits for the purposes of Case I of Schedule D. He subsequently raised the additional assesment for 1955–56 and the assessment for 1956–57, whereby the dividend from Henry White was included in the assessable profits. He did not have any facts in relation to the Appellant's affairs before him additional to those before his predecessor in 1955.

It will be noticed that no question arises on the assessments for the years 1953–54 or 1954–55. The reason for this is irrelevant. But, in regard to the additional assessment for the year 1955–56 and the assessment for the year 1956–57, the question is whether a sum paid by way of dividend out of so-called capital profits and received by the Appellant as a trader in stocks and shares ought to be included in the computation of its liability under Case I of Schedule D of the Income Tax Act, 1952, in respect of that trade. A second question arises only upon the additional assessment for the year 1955–56. I will deal with this hereafter. It does not arise if the first question is answered in favour of the Appellant. That question was decided against the Appellant by the Special Commissioners. Their decision was reversed by Cross, J., but restored by the unanimous judgment of the Court of Appeal.

My Lords, it is beyond doubt that, under Case I of Schedule D and the applicable Rules, the dividend in question must be included in the receipts of the Appellant's trade for Income Tax purposes unless it is excluded by statutory provision or (perhaps I should add, to do justice to the contentions of the Appellant) by judicial interpretation of the relevant Statute. Such exclusion could arise either because the dividend is made subject to Income Tax under some other Schedule or because it is exempt from tax altogether in whosesoever hand it may be. The first reason for exclusion is not advanced: on the contrary, it is claimed that the dividend is not liable to tax under Schedule D or any other Schedule. It is the second reason that was urged with much ingenuity by Counsel for the Appellant.

My Lords, it is a familiar fact that the statutory provisions in regard to the payment of dividends by any body of persons (which expression includes a limited company) have from time to time caused difficulties and created anomalies. But first it must be observed that no other Section is relied on for affording exemption from tax than Section 184 of the Act, and this Section will be searched in vain for any least suggestion that, where a dividend has been paid by a company out of profits and gains which have not been assessed to tax, it is to be exempt in the hands of the shareholders. On the contrary, it does nothing more than require that the company shall be assessed to tax on the full amount of its profits and gains before any dividend is paid and entitles it, but no more, to deduct from the dividend tax at the standard rate for the year in which the amount payable becomes due. There is no resemblance here, my Lords, to such cases as *Hughes* v. *Bank of New Zealand* [1], [1938] A.C. 366, where, in respect of certain securities, specific and express exemption from tax was provided.

It is, however, upon observations that have been made in this House in other tax cases that reliance was placed. It is not clear to me whether they are to be regarded as interpretations of Section 184, though that Section or its predecessors were not mentioned, or as expositions of some underlying principle which governs the liability to tax of sums received by way of dividend by any person in any circumstances. My Lords, I have read, not for the first or second time, the many cases that were cited to us, of which I name only *Bradbury* v. *English Sewing Cotton Co., Ltd.*[2], [1923] A.C. 744; *Neumann* v.

(1) 21 T.C. 472. (2) 8 T.C. 481.

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Commissioners of Inland Revenue(1), [1934] A.C. 215; *Canadian Eagle Oil Co., Ltd.* v. *The King*(2) and *Selection Trust, Ltd.* v. *Devitt*(2), [1946] A.C. 119. These cases establish that a dividend as such is not taxable in the hands of its recipient. So be it. But it is not a logical step from that to say that a sum paid out of untaxed profits and received by a trader in respect of his trade is to be excluded from the computation of his profits and gains. Nor is there any warranty for it in any speech in your Lordships' House that I have read, unless it be in a *dictum* made *per incuriam* in the speech of Lord Wright in *Neumann's* case.

I will add two more observations. First, it is true that the *Selection Trust* case, where the shareholder was a trader in stocks and shares, might have been shortly disposed of upon the grounds on which I would dismiss this appeal. But the case had been linked with the *Canadian Eagle Oil Co.* case, which had been brought to this House to dispose of that long-standing sore in the administration of the revenue, *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562(3). That point having been determined in favour of the Crown, it was unnecessary to discuss any other question. Secondly, I would affirm what was said by Donovan, L.J. (than whom no one has a wider knowledge of revenue law), about the treatment by a trading company of dividends from which tax has been deducted at the source. There is no doubt that the practice is, and, so far as I know, always has been, to include such dividends in the computation of profits taxable under Case I of Schedule D and to make an allowance or adjustment for the tax that has been paid. I agree with the learned Lord Justice in thinking that there is no specific provision of any Statute which prescribes such an adjustment. It can only arise out of the recognition by the Crown that it is necessary in order to avoid double taxation of the same subject-matter. It is, in any case, no justification for exempting from taxation a dividend paid out of profits which have not borne tax.

I come to the second question, which turns upon the true construction of Section 41 (1) of the Act. That Section provides:

> "If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessment; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement or relief not authorised by this Act",

then an additional first assessment shall be made on the person chargeable in the manner prescribed.

In the present case, the single question is whether the word "discover" covers the case where no new fact has come to light but the Revenue authorities have formed the opinion that, upon a mistaken view of the law, the taxpayer has been undercharged in his original assessment. Upon this question the Court of Appeal followed a previous decision of the Court in *Commercial Structures, Ltd.* v. *Briggs*, 30 T.C. 477. In that case the Court, preferring a decision of Finlay, J., in *Williams* v. *Trustees of W.W. Grundy*(4), [1934] 1 K.B. 524, to that of Rowlatt, J., in *Anderton and Halstead, Ltd.* v. *Birrell* (5), [1932] 1 K.B. 271, and following a decision of the Court of Session, *Commissioners of Inland Revenue* v. *Mackinlay's Trustees*(6), 1938 S.C. 765, held that discovery had the wider meaning for which the Crown contended and contend in this case. I think that that decision was clearly right, and find the judgment of the

(1) 18 T.C. 332. (2) 27 T.C. 205. (3) 1 T.C. 501. (4) 18 T.C. 271. (5) 16 T.C. 200. (6) 22 T.C. 305.

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Lord President (Normand) wholly convincing. I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged, and the context supports rather than detracts from this interpretation.

The appeal should, in my opinion, be dismissed with costs.

Lord Reid.—My Lords, the Appellant is a company which deals in stocks and shares, and it is therefore assessed to Income Tax under Schedule D, Case I. So any sum coming to it from its trading assets must enter into the computation of its profits for Income Tax purposes unless either that sum is separately assessable under some other Schedule, e.g., Schedule C, or that sum is exempt from taxation, as was the case in *Hughes* v. *Bank of New Zealand*(1), [1938] A.C. 366. The Appellant owned, as part of its trading assets, all the shares of another company, Henry White; and it received a dividend of £25,000 from that company. That dividend was paid out of capital profits realised by Henry White on the sale of its freehold property. Accordingly, that capital profit was not taxable in the hands of Henry White, and Henry White was not entitled to and did not deduct Income Tax in paying that dividend to the Appellant. The question in this case is whether that sum must now be taken into account in determining the trading profits of the Appellant. The Appellant maintains that it must be excluded because it is exempt from taxation.

There is not, in the Income Tax Act or anywhere else, any express general exemption of dividends from taxation in the hands of those who receive them. But the Appellant founds on a series of decisions in this House which establish that no dividend received by a person who is not a trader can be taxed in his hands. The Appellant maintains, and the Crown deny, that these decisions apply to the present case.

The difference between a case like the present and the case of a non-trader receiving a dividend is this. In the hands of a non-trader, a dividend would have to be treated as a separate item: it would not fall within any of the first five Cases of Schedule D and would have to be assessed, if at all, under Case VI. In the case of a trader, it would not be treated as a separate item: like any other trading receipt, it would be taken into account in determining the balance of profits and gains assessable under Case I. The Appellant maintains that this difference is immaterial: the Crown say it is all-important.

It is therefore necessary to see why dividends are not assessable in the hands of a non-trader. It is not because Case VI is not wide enough to catch them, and it is not because of any express statutory provision to that effect. The Appellant says that it results from the provisions of Section 184 of the Income Tax Act, 1952, which can be traced back to Section 54 of the Income Tax Act, 1842. But that Section and its predecessors do not even mention the shareholder who receives a dividend: they merely entitle the company paying a dividend out of profits to deduct tax in paying it, and they are silent about a dividend which is not paid out of profits charged to tax. It is, however, argued that, by reason of the decisions of this House to which I have referred, the Section must now be treated as referring to all dividends and as exempting them from tax in the hands of shareholders who receive them. The short answer to that appears to me to be that there is no mention of this Section or its predecessors in any of the passages in the speeches in this House which are founded on by the Appellant. No doubt a good deal has been read into various

(1) 21 T.C. 472.

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provisions of the Income Tax code from time to time, but I find it difficult to believe that anyone could ever have intended to attribute that meaning to these provisions.

To reach a solution of the present problem I find it necessary to start from the ordinary case of a dividend paid out of profits under deduction of tax. Why is the shareholder not taxed on what he receives? It is part of his income, or, if he is a trader, it is a trading receipt. But it seems always to have been recognised that an individual does not pay Income Tax on it (I do not refer to Surtax), and a trader does not include it as a trading receipt in determining his taxable profits. At one time it was thought that a company pays tax on behalf of or as agent for its shareholders, and, if that were so, the explanation would be obvious. But that idea has long been discarded. The fullest explanation is that given by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ltd.*(1), [1923] A.C. 744, at pages 769–70, which was approved and amplified by Lord Tomlin in *Neumann* v. *Commissioners of Inland Revenue*(2), [1934] A.C. 215, at pages 223–4. These passages are too long to quote: they give an explanation of the rule as stated by Viscount Cave in *Commissioners of Inland Revenue* v. *Blott*(3), [1921] 2 A.C. 171, at page 201:

> "If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder."

Lord Phillimore said, in the passage to which I have referred:

> "But the law is not founded upon the introduction of some equitable principle as modifying the statute; it is founded upon the provisions of the statute itself".

He does not say to which provisions he refers: he only says that the Statute carries the matter further in entitling a shareholder with a small income to recover from the Revenue part of the tax which the company deducted and retained when paying his dividend to him. In spite of the fact that Lord Phillimore denies the introduction of any equitable principle and that other Judges well versed in Income Tax law have also denied any equitable principle, I am inclined to think that the rule cannot be fully explained without recourse to practice based on equity, or perhaps on the old theory that the company pays tax on behalf of the shareholders and not on any specific provision in any Statute.

The matter becomes much more difficult when tax could not be, and is not, deducted by the company when paying the dividend; and I can find no satisfactory explanation of why an individual who receives such a dividend is not assessable in respect of it. It cannot, then, be said that, because the company has already paid tax on this money, it would be unjust if the shareholder had to pay again.

Neumann's case and *Gimson* v. *Commissioners of Inland Revenue*(4), [1930] 2 K.B. 246, which was approved in *Neumann's* case, were both dealing with Surtax or Super-tax, which introduced other complications. The Surtax position was made clear. Lord Tomlin said in *Neumann's* case, at page 228(5):

> "It is not disputed that if a dividend is paid out of the profits produced by a sale of a capital asset it is not made out of profits or gains charged on the company, and therefore no deduction from the dividend is authorized and the dividend itself is not liable to be taken into account in fixing the liability to surtax of the shareholder."

But I can find, neither in that case nor elsewhere, any clear statement of the

(1) 8 T.C. 481, at pp. 518–9. (2) 18 T.C. 332, at pp. 359–60. (3) 8 T.C. 101, at p. 136. (4) 15 T.C. 595. (5) 18 T.C., at p. 363.

(Lord Reid)

reason why a shareholder cannot be assessed to Income Tax in respect of a dividend paid out of money which has not borne tax in the hands of the company. He does not receive the dividend as capital, and it has not been "franked" by payment of tax on it by the company. But nevertheless he does not pay tax on it. All that Lord Tomlin said (1) was that

> "having regard . . . to the general scheme and operation of the Income Tax Acts in regard to dividends, I am unable to accept the view that dividends as such are taxable under Sch. D."

The words "as such" cannot be disregarded. They were repeated by Lord Warrington of Clyffe at page 233 (2). And when the rule has been restated in later cases it has almost always been qualified in a similar way. For example, Lord Macmillan said in *Cull* v. *Commissioners of Inland Revenue* (3), [1940] A.C. 51, at page 64:

> "it is now well settled that the shareholders of a company are not liable to be directly charged with income tax at the standard rate on the dividends which they receive from the company."

So the position is this. The dividend in question was received as income, and is for ordinary commercial or accounting purposes a trading receipt. Therefore it cannot be left out of account in computing the Appellant's profits for Income Tax purposes unless there is some good ground in law for doing so. There is nothing in the Act to require this; and, if this be relevant, there is no ground in equity for doing it, as there is where a dividend has already borne tax in the hands of the company. So the only ground left to the Appellant is the rule as stated in this House with regard to dividends. But, on the face of it, that rule is so stated that it only applies to the assessment of dividends "as such". So the Appellant's last resort is that the reason behind the rule requires that it should be more widely stated. But I have been unable to find any reason behind the rule which would justify such an extension, even if it were now open to us to extend the rule.

On the matter of discovery, I agree with what my noble and learned friend Viscount Simonds has just said. So I agree that this appeal should be dismissed.

Lord Denning (read by Lord Morris of Borth-y-Gest).—My Lords, the key to this case is that the Cenlon Finance Co., Ltd., carried on in the United Kingdom the trade of a dealer in stocks and shares; and it is therefore chargeable with tax under Case I of Schedule D in respect of that trade.

If the Cenlon Finance Co., Ltd., had not been a dealer in stocks and shares but a butcher or baker or anything else, it would not have been chargeable with tax on this dividend for the simple reason that by a positive rule of law, to be found in judicial decisions and not in the Statute, dividends *as such* are not liable to tax. The justice of this rule is obvious when the dividend is paid out of a fund which has already been brought into charge for tax. It is not so obvious when the dividend is what is called a "capital" dividend, that is, a dividend paid out of a capital profit which has not been brought into charge for tax. I should have thought that, in the ordinary way, any dividend on shares would be income in the hands of the recipient and it would have been chargeable under Case VI as an "annual profit or gain", were it not for the positive rule of law which exempts it. But I see no reason why this positive rule of law should extend to a dealer in stocks and shares. He is chargeable with tax under Case I of Schedule D "on the

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(1) [1934] A.C., at p. 228; 18 T.C., at p. 362. (2) 18 T.C., at p. 366.
(3) 22 T.C. 603, at p. 642.

full amount of the profits or gains of the year". The dividends which he receives are certainly part of his profits or gains. They are the very lifeblood of his trade. Take this very case. The Cenlon Finance Co., Ltd., bought shares for £72,000. Two weeks later it received a "capital" dividend of £25,000. This, of course, lowered the value of the shares. One week later the Company sold the shares for £27,500. Can anyone suppose that, in computing his profits or gains, he can bring in his loss on the resale of the shares and omit his profit from the dividends? It would not only give an entirely false picture of his trade, it would make a breach in the Revenue laws through which a regiment of share dealers would soon pass.

I would agree, of course, that if a share dealer receives a dividend which has been taxed at source—that is to say, if it is paid out of a fund which has already been brought into charge to tax—he should not be taxed again on it. The tax bill against him should be adjusted, as Donovan, L.J., said(1), on equitable grounds, so as to allow for the tax suffered at source, even though there is nothing in the Statute about it. But when a dividend has not been taxed at source—as, for instance, when it is a "capital" dividend—I think it is part of his profits as a share dealer and it must be brought into his tax bill in full.

Mr. Shelbourne suggested that there was an implied exemption in the Statute to the effect that dividends were not chargeable to tax in the hands of anyone. If there were such an exemption, no doubt a share dealer could take advantage of it. But I cannot read the Statute in that way. Section 184 certainly gives no such exemption. Nor do the cases. There are observations here and there which, taken out of their context, give some slight support for the argument, but none do so when read fairly in their context.

Mr. Shelbourne took another point. He said that the Inspector of Taxes, with full knowledge of the facts, at first allowed this dividend to pass untaxed, and that his successor in office cannot be allowed to bring it into the assessment simply because he takes a different view of the legal position. He must "discover" an under-assessment. Mr. Shelbourne said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an Inspector of Taxes. I am afraid I cannot agree with Mr. Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an Inspector of Taxes. On this point I find myself in full agreement with the judgments of the Lord President (Normand) in the Court of Session (2) and Tucker, L.J., in the Court of Appeal (3).

I would therefore dismiss this appeal.

Lord Morris of Borth-y-Gest.—My Lords, I concur, and my noble and learned friend, **Lord Guest,** has asked me to say that he also concurs.

Questions put:

That the Order appealed from be reversed.

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(1) *See* page 198 *ante*.
(2) Commissioners of Inland Revenue v. Mackinlay's Trustees, 22 T.C. 305, at pp. 310–3.
(3) Commercial Structures, Ltd. *v*. Briggs, 30 T.C. 477, at pp. 487–94.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Manches & Co.; Solicitor of Inland Revenue.]