A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—17TH, 18TH, 19TH, 20TH, 21ST, 24TH AND 26TH MARCH 1969

COURT OF APPEAL—18TH, 19TH, 20TH, 21ST AND 25TH NOVEMBER AND 18TH DECEMBER 1969

B HOUSE OF LORDS—24TH, 28TH, 29TH AND 30TH JUNE, 1ST July AND 21ST OCTOBER 1971

# Thomson (H.M. Inspector of Taxes) v. Gurneville Securities Ltd.(1)

# Gurneville Securities Ltd. v. Thomson (H.M. Inspector of Taxes)

C *Income Tax, Schedule D—Loss in trade—Dealer in securities—Dividend-stripping—Shares acquired as part of tax avoidance scheme—Whether stock-in-trade —Income Tax Act* 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.*341.

*At the beginning of* 1954 *the C group included* 102 *property companies owning properties of market value much exceeding the book values, and an investment-holding company called B.I. Ltd. The Respondent Company and the* D *companies called B.P. Ltd. and C Ltd. hereinafter mentioned were formed in pursuance of a scheme devised by one S, a director of S Ltd. and other companies in the S group, with the object that* (a) *B.P. Ltd., a property-dealing company, should dispose by way of trade of the properties of the* 102 *property companies,* (b) *B.P. Ltd. should cease to trade just before* 5*th April* 1958, *so that the bulk of its large profits in its accounting year to* 7*th May* 1956 *would not be taken into* E *account for the purposes of assessment to income tax,* (c) *virtually all the profits earned by B.P. Ltd. should be paid as dividends to B.I. Ltd., which would in turn pass them on as dividends to the Respondent Company,* (d) *the Respondent Company, as a share-dealing company, should incur a loss through writing down the value of its shareholding in B.I. Ltd. owing to the payment of the dividends,* (e) *the Company should claim repayment of income tax in respect of the loss by reference* F *to its income from dividends,* (f) *the transaction should show a commercial profit apart from any fiscal advantage.*

*B.P. Ltd. was incorporated in April* 1954 *as a wholly-owned subsidiary of B.I. Ltd., with the object of dealing in property. It commenced trading on* 7*th May* 1954 *and purchased the properties of the* 102 *companies above mentioned at book values. In the year to* 7*th May* 1956 *it made profits of* £1,171,847, G *largely through selling the properties to C Ltd., which was formed on* 28*th February* 1956 *as a member of the C group. B.P. Ltd. ceased trading on* 3*rd April* 1958. *The purchase by C Ltd. was financed by advances secured on money paid by the Respondent Company as mentioned below.*

*The Respondent Company was incorporated in March* 1954 *as a wholly-owned subsidiary of S Ltd., with the object of dealing in shares, and commenced trading* H *on* 1*st December* 1955. *In the period* 1*st December* 1955 *to* 31*st March* 1957 *it bought eight parcels of investments quoted on the London stock exchange at a total cost of* £3,193, *and sold four of them for a net profit of* £27, *as well as purchasing the share capital of B.I. Ltd. as mentioned below. In the year to*

(1) Reported (Ch. D.) [1970] 1 W.L.R. 477; [1969] 2 All E.R. 1195; (C.A.) [1970] 1 W.L.R. 477; 114 S.J. 192; [1970] 1 All E.R. 691; (H.L.) [1972] A.C. 661; [1971] 3 W.L.R. 692; 115 S.J. 850; [1971] 3 All E.R. 1071.

*5th April* 1958 *it made purchases of* £115,851 *and sales of* £66,061. *By an agreement dated 23rd December* 1955, *providing* inter alia *for continued representation of the vendors on the board of B.I. Ltd., the Company agreed to buy the whole issued share capital of B.I. Ltd.* (*the parent of B.P. Ltd.*) *for* £16,803 *plus a supplement equal to* 95 *per cent. of the excess net asset value* (*i.e. excess of market over book value*) *computed as at 7th May* 1956, *the next accounting date of B.I. Ltd. Completion of the sale took place on 30th December* 1955. *An agreement dated 4th May* 1956 *provided that the supplement should be quantified at* £1,769,000. *This sum was paid to a stakeholder, with the condition that* £1,611,434 *should be used to support an overdraft of that amount for C Ltd. to enable it to make the purchase from B.P. Ltd. above mentioned, which was carried out on the same day*, 4*th May* 1956. A B

*On 4th April* 1957 *and 1st April* 1958 *respectively the Company received net payments from B.I. Ltd. of* £682,761 *in respect of a gross dividend of* £1,187,412 *and* £289,851 *in respect of an alleged gross dividend of* £504,090 (*which, however, was derived from a net dividend from B.P. Ltd. in excess of that company's aggregate net profits after deducting net dividends already paid*). *On each occasion the value of its holding in B.I. Ltd. was written down by the amount of the net payment. On 12th March* 1962 *the Company sold its holding in B.I. Ltd. and realised* £519,450 *after charging expenses. Its net cash surplus on the transactions in the shares in B.I. Ltd., apart from any tax repayment in respect of losses, was* £90,996. C D

*On appeal against the rejection of the Company's claims to relief under s.*341, *Income Tax Act* 1952, *in respect of trading losses in the years* 1956–57 *and* 1957–58, *it was contended for the Crown*, inter alia, *that the shares in B.I. Ltd. were not purchased as stock-in-trade; alternatively, that the tax which B.P. Ltd. was entitled to deduct from dividends could not exceed tax on gross dividends equal to its total net profits before tax. The Special Commissioners found, bearing in mind the opinions delivered in* J. P. Harrison (Watford) Ltd. *v.* Griffiths 40 T.C. 281; [1963] A.C. 1, *that the transaction in the shares of B.I. Ltd. formed part of the Company's trade; but they held that B.P. Ltd. was not entitled to deduct tax from dividends in excess of its total net profits before payment of tax.* E F

Held, *in the Chancery Division, that the whole of the so-called net dividend received in* 1957–58 *must be brought into account as a trading receipt.*

Johns *v.* Wirsal Securities Ltd. 43 T.C. 629; [1966] 1 W.L.R. 462 *followed.*

Held, *in the House of Lords, that the transactions relating to the acquisition and sale of the shares of B.I. Ltd. were not trading transactions in the course of the trade of a dealer in shares.* G

Lupton *v.* F. A. & A. B. Ltd. page 580 *ante*; [1972] A.C. 634 *and* Finsbury Securities Ltd. *v.* Bishop 43 T.C. 591; [1966] 1 W.L.R. 1402 *followed;* J. P. Harrison (Watford) Ltd. *v.* Griffiths 40 T.C. 281; [1963] A.C. 1 *distinguished.*

---

CASE H

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

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 7th, 8th, 9th, and 10th December 1964 and 20th May

A 1965, Gurneville Securities Ltd. (hereinafter called " G.S. ") applied under s. 341 of the Income Tax Act 1952 for an adjustment of its liability by reference to losses alleged to have been sustained in the trade carried on by it in each of the income tax years 1956–57 and 1957–58, ended 5th April 1957 and 5th April 1958 respectively.

2. Shortly stated, the questions for our decision were:

B (*a*) for each of the years to which the application related, whether the transactions entered into by G.S. in relation to the shares of Bishopsgate Investment Co. Ltd. (hereinafter called " B.I. ") formed part of the trade of share dealing admittedly carried on at all material times by the former company;

(*b*) for the year 1957–58, (i) whether Bishopsgate Properties Ltd. (hereinafter called " B.P. ") was entitled under s. 184 of the Income Tax Act 1952 to deduct C income tax of £221,000 from the dividend of £520 per share which it paid on its 1,000 issued shares on 1st April 1958; and (ii) what was the proper treatment of the dividend payment received by G.S. from B.I. on 1st April 1958 in computing the loss sustained by G.S. in the year 1957–58.

3. The following witnesses gave evidence before us: David George Innes A.C.A; Ronald Harry Clements F.C.A., a partner in the firm of Clifford Bliss D & Co., auditors to G.S; Robert Cyprian Hope, solicitor, a partner in the firm of Brian Sandelson & Co.; Maurice Stapleton Barker F.C.A., a partner in Barton, Mayhew & Co., auditors to B.I. and B.P.; Johann Ferdinand Beer, solicitor to G.S. from January 1956; Brian Henry Sandelson, solicitor, a director of G.S; Edward Lawson F.C.A., Principal Advisory Accountant to the Board of Inland Revenue.

E 4. The following documents, all of which are attached to and form part of this Case[1], were proved or admitted before us:

(1) Memorandum and articles of association of G.S.

(2) The following accounts relating to G.S.: balance sheet at 31st March 1957; profit and loss account for the period from 1st December 1955 to 31st March 1957, and schedule of stocks and shares at 31st March 1957; profit and F loss account for the five days ended 5th April 1957, with balance sheet as at that date; and profit and loss accounts for each of the five years ended 5th April 1962, together with relevant balance sheets.

(3) A bundle of correspondence.

(4) Schedule of securities purchased and sold by G.S. from 1st December 1955.

G (4A) Schedule of some of the aforesaid purchases and sales showing dates of purchase and sale.

(5) Schedule of deeds and documents relating to the purchase of the issued shares of B.I. and subsequent matters relating thereto.

(6) Letter of 6th September 1961 from Barton Mayhew & Co. to the secretary of G.S. advising on the basis of valuation of the shares in B.I. in the H books of G.S.

(7) Schedule of the income tax computations of G.S.

(8) Dividend vouchers in respect of dividends paid by B.P. on 3rd April 1957 and 1st April 1958.

(9) Dividend vouchers in respect of dividends paid by B.I. on 4th April 1957 and 1st April 1958.

I (10) (*a*) Agreement dated 23rd December 1955 for the purchase of all the

[1] Not included in the present print.

issued shares in B.I. by Willrose Financial Investments Ltd. (hereinafter called "Willrose"). A

(*b*) Agreement dated 3rd May 1956 whereby the vendors under the agreement of 23rd December 1955 assigned their existing rights and interest thereunder to Granleigh Financial Holdings Ltd. (hereinafter called "Granleigh").

(*c*) Agreement dated 4th May 1956 supplemental to the agreements dated 23rd December 1955 and 3rd May 1956. B

(*d*) Agreement dated 4th May 1956 relating to the sale of certain properties by B.P. to Carward Properties Ltd. (hereinafter called "Carward").

(*e*) Agreement dated 29th May 1975 supplemental to the first-mentioned agreement dated 4th May 1956 and to the agreements of 23rd December 1955 and 3rd May 1956.

(*f*) Letter of 27th June 1957 from Granleigh to Willrose and Stormgard Ltd. (hereinafter called "Stormgard") proposing a variation to the first-mentioned agreement of 4th May 1956. C

(*g*) Letter of the same date from Willrose and Stormgard to Granleigh agreeing to the proposed variation.

(*h*) Agreement dated 2nd April 1958 relating to the resolution of differences arising under the first-mentioned agreement of 4th May 1956. D

(*i*) Draft of agreement executed on 2nd April 1958 between B.P., Carward and 87 companies in liquidation.

(*j*) Draft of agreement executed on 2nd April 1958 between B.P. and Carward, supplemental to the second-mentioned agreement of 4th May 1956.

(*k*) Draft of an agreement executed on 2nd April 1958 providing *inter alia* for the sale of the goodwill of the business of property dealers carried on by B.P. to Efgan Securities Ltd. (hereinafter called "Efgan"). E

(*l*) Draft of an agreement executed on 2nd April 1958 to release B.P. from an indebtedness to B.I. in certain eventualities.

(*m*) Draft of an agreement executed on 2nd April 1958 relating to the sale of certain properties by B.P. to Efgan.

(*n*) An agreement dated 2nd April 1958 relating to matters connected with the properties referred to in the draft agreement (*m*), and granting Efgan a "put option". F

(*o*) An agreement dated 17th May 1960 supplemental to the first-mentioned agreement of 4th May 1956.

(*p*) An agreement dated 15th February 1961 supplemental to the agreement dated 23rd December 1955 and certain other agreements. G

(11) B.I.'s audited accounts with the relevant balance sheets for (i) the period ended 7th May 1954; (ii) each of the seven years ended 7th May 1961; (iii) the period ended 12th March 1962; (iv) the period ended 31st December 1962.

(12) B.P.'s audited accounts with the relevant balance sheets for (i) each of the three years ended 7th May 1957; (ii) the period ended 3rd April 1958.

(13) Memorandum and articles of association of B.I. H

(14) Memorandum and articles of association of B.P.

(15) Schedules relating to profits of, and taxation and dividends paid by, B.P., together with summaries of accounts for B.I. and G.S. for the years to 7th May 1958 and 5th April 1958, respectively, and an income tax computation for G.S. for the latter year.

(16) Extracts from minutes of meeting of directors of B.P. on 1st April 1958. I

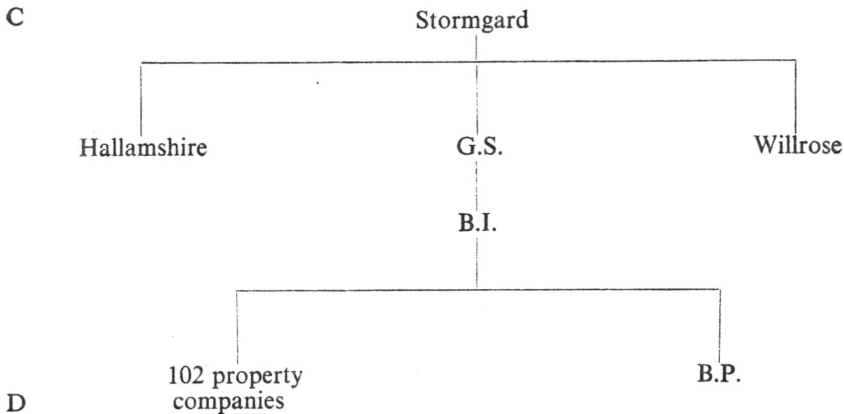
5. The questions raised in this application involved *inter alia* the consideration of a large number of transactions by, or in relation to the shares in or

A assets of, many companies. Before reference is made to the facts found by us concerning them set out in paras. 6 et seq. below, it may be of assistance to the Court to have the following summary outlining briefly the relationship between the Applicant Company and certain other companies and the nature of the scheme which gave rise to the questions before us.

The Applicant Company G.S. was at all material times a wholly-owned B subsidiary of Stormgard, a public company the shares of which were quoted in the London Stock Exchange. Stormgard had two other subsidiaries, namely, Hallamshire Industrial Finance Trust Ltd. (" Hallamshire ") and Willrose.

Under a scheme devised by Mr. Brian Sandelson G.S. acquired all the shares in B.I. B.I. owned all the shares in B.P. and all the shares in 102 property companies. The family tree of Stormgard thereupon was:

C




D

The objects of the scheme were that:

(*a*) B.P., a property-dealing company, should dispose by way of trade of the properties of the 102 property companies;

(*b*) B.P. should cease to trade just before 5th April 1958, as a result of which very large profits of that company arising in the year ended 7th May 1956 E would enter only to the extent of a small fraction thereof into the computation of any assessment to income tax;

(*c*) virtually all the profits earned by B.P. should be paid as dividends to B.I. (an investment company), which company should in turn pass them on as dividends to G.S.;

(*d*) G.S. as a share-dealing company should incur a loss through the F writing down of the values of its shareholding in B.I. because of the diminution in the value of that holding through the payment of dividends to G.S.;

(*e*) G.S. should claim repayment of income tax in respect of this loss by reference to its income consisting largely of the dividends paid to it by B.I. Mr. Sandelson throughout the material periods was a director of G.S., B.P. and Efgan;

G (*f*) the transaction should show a commercial profit apart from any fiscal advantage.

It was the implementation of this scheme which gave rise to the matters in issue before us. The detailed facts relating thereto which we found proved or admitted as a result of the evidence, both oral and documentary, adduced before us are set out in paras. 6 to 16 inclusive.

6. G.S. was incorporated on 9th March 1954 ,with a share capital of £100 divided into 100 shares of £1 each. In the relevant period ten of these shares were issued and beneficially owned by Stormgard Ltd. The memorandum of association (exhibit 1) of G.S. stated, *inter alia:*

> " 3. The Objects for which the Company is established are:—(*a*) To carry on the business or businesses of Stock and Share Dealers . . . "

The first profit and loss account of G.S. (exhibit 2) was made up for the period from 1st December 1955 to 31st March 1957. This account shows that in this period G.S. had purchased eight parcels of investments quoted on the London Stock Exchange at a total cost of £3,193 9*s.* 9*d.* and 11,202 shares in B.I. at a cost of £1,797,094 4*s.* 8*d.*, making total purchases of £1,800,287 14*s.* 5*d.* (The purchase of the 11,202 shares in B.I. is dealt with in more detail in para. 8 below.) Four parcels of the quoted investments were sold during the period, and showed a net profit of £27 9*s.* 3*d.* The remaining quoted securities were written down to their market values at 31st March 1957, and showed a total loss on revaluation of £93 15*s.* The shares in B.I. were valued at 31st March 1957 on the basis of their cost to G.S. After charging expenses the profit and loss account for the period ended 31st March 1957 showed a loss of £359 10*s.* 9*d.*

The next profit and loss account of G.S. (exhibit 2) was made up for the five days ended 5th April 1957.

This account shows no purchases and no sales, but there is a credit of £1,187,412 which is described as " Dividends gross ". The stock-in-trade at valuation is shown as £1,799,502 19*s.* 8*d.* at the beginning of the period and as £1,116,767 19*s.* 2*d.* at the end of the period, a difference of £682,735 0*s.* 6*d.* The profit for the period is shown as £504,676 19*s.* 6*d.*

On 4th April 1957 G.S. received from B.I. cheques for £682,761 18*s.* in respect of a gross dividend of £1,187,412, less income tax at 8*s.* 6*d.* in the pound of £504,650 2*s.*, on the 11,202 shares in B.I. owned by G.S. This gross dividened accounts for the credit to the profit and loss account of dividends gross. The payment of this dividend is dealt with in more detail in para. 14 below. On 5th April 1957 the directors of G.S. wrote down the value of its holding in B.I. by the amount of this net dividend, namely, £682,761 18*s.* This largely accounted for the difference of £682,735 0*s.* 6*d.* between the opening and closing figures for stock-in-trade in the profit and loss account for the five days ended 5th April 1957.

In due course G.S. preferred a claim under s. 341 for the year 1956–57 claiming repayment of tax of £290,315 7*s.* 6*d.* arrived at as follows:

| | £ |
|---|---|
| Profits per accounts for the five days ended 5th April 1957 | 504,677 |
| *Less* dividend received .. .. .. .. .. | 1,187,412 |
| Adjusted loss | 682,735 |
| *Add* loss brought forward from the period ended 31st March 1957 .. .. .. .. .. .. | 360 |
| | 683,095 |

Repayment claimed £683,095 at 8*s.* 6*d.* in the pound = £290,315 7*s.* 6*d.*

7. The profit and loss account of G.S. for the year ended 5th April 1958 shows purchases of £115,851 19*s.* 2*d.* and sales of £66,061 18*s.* 6*d.* The stock-in-trade at the end of the year is shown as valued at £876,826 1*s.* 8*d.*, being £239,941 17*s.* 6*d.* less than the opening valuation of £1,116,767 19*s.* 2*d.* There is a credit in the account for " Dividends (gross) " £504,251 1*s.* 2*d.* The profit for the period is shown as £210,372 16*s.* 9*d.*

A On 1st April 1958 G.S. received cheques for £289,851 15*s*. in respect of an alleged gross dividend of £504,090, less income tax at 8*s*. 6*d*. in the pound of £214,238 5*s*., on the 11,202 shares in B.I. owned by G.S. This gross dividend accounted for all but £161 1*s*. 2*d*. of the credit to the profit and loss account for Dividends (gross). (The payment of this dividend is dealt with in more detail in para. 14 below.)

B On 5th April 1958 the directors of G.S. wrote down the value of its holding in B.I. by the amount of the net dividend received on 1st April 1958, viz. £289,851 15*s*. This is reflected in the " stock-in-trade at 5th April 1958, at valuation " £876,826 1*s*. 8*d*. in the profit and loss account for the year ended 5th April 1958.

In due course G.S. preferred a claim under s. 341 for the year 1957–58 C claiming repayment of tax of £123,391 10*s*. 6*d*. arrived at as follows:

| | £ |
|---|---|
| Profits per accounts for the year ended 5th April 1958 .. | 210,373 |
| *Add* Loan interest charged in the accounts .. .. | 3,545 |
| | 213,918 |
| D *Less* dividends received .. .. .. .. | 504,251 |
| Adjusted loss | 290,333 |

Repayment claimed £290,333 at 8*s*. 6*d*. in the pound = £123,391 10*s*. 6*d*.

8. By an agreement dated 23rd December 1955 (exhibit 10(*a*)), William Emms and others (hereinafter called " the vendors ") sold to Willrose, acting as E agent for G.S., the whole of the issued share capital in B.I., namely 11,202 shares, for £16,803 plus a supplement equal to 95 per cent. of the excess net asset value computed as at 7th May 1956 (the next following accounting date of B.I.).

Apart from normal warranties (that the shares were free from incumbrances, no options for allotment of further shares or debentures had been issued, that there was no litigation, that there were no service agreements determinable by F more than one month's notice and that the net asset value was £16,803, etc.) the agreement contained the following provisions.

Clauses 7 and 8: these provided for certification of the supplement and became irrelevant in the events which happened subsequently.

Clause 9 provided for representation of the vendors on the board of directors of B.I.

G Clause 10 provided that Stormgard made itself responsible for due performance of some of the obligations of Willrose.

In substance clause 7(*e*) contained a put option entitling Willrose to call on the vendors to purchase at book value any asset owned by B.I. or any of its subsidiaries.

Clause 7(*f*) contained a call option entitling the vendors to call on Willrose H to procure the sale to the vendors of any asset owned by B.I. or any of its subsidiaries at a price to be agreed or at book value. This call option was never exercised in respect of any asset, and in subsequent negotiations it was dropped. Completion of the sale took place on 30th December 1955.

After completion the parties decided that it was desirable to quantify the supplement and negotiations commenced.

It was clear that, if the supplement was to be quantified, the vendors would have to give a warranty as to the net asset value. When the purchaser demanded a joint and several warranty objections were raised by some of the vendors. In order to overcome these, it was decided to interpose a company which would give the warranties, and as a result, the agreement dated 3rd May 1956 (exhibit 10(*b*)) was entered into, by which the vendors under the previous agreement (exhibit 10(*a*)) transferred, with the consent of Willrose and Stormgard, all their rights and obligations to Granleigh in consideration of Granleigh undertaking to pay to the vendors a sum equal to 99 per cent. of the supplement. The vendors were released by Willrose and Stormgard. A B

On 4th May 1956 an agreement (hereinafter called " the quantification agreement ") (exhibit 10(*c*)) was entered into by Granleigh, Willrose and Stormgard. The quantification agreement provided that the supplement should be quantified at £1,769,000. The amount was paid by Willrose to Granleigh and deposited by Granleigh with Fiduciary Nominees Ltd. (hereinafter referred to as " Fiduciary ") on the terms of the first schedule to the quantification agreement. C

The following are the salient points of the quantification agreement:

By clause 2(vii) Granleigh warranted that the basic value of B.I. as defined in clause 1 of the quantification agreement would not be less than £1,900,000 with liquidated damages of 94 per cent. in respect of any shortfall (clause 16). D

Clauses 3, 4, 5, 6 and 7 contained provisions for the computation of the basic value which may be summarised as follows:

Barton Mayhew & Co. were to prepare a certificate as to the basic value, which was to be open to challenge. E

The basic value was to be the aggregate assets of the group as at 7th May 1956 less aggregate liabilities as defined in clause 1(*g*).

The certificate was to consist of three schedules.

Pursuant to clause 6 certain assets (those incapable of being assigned, and goodwill) and certain liabilities (surtax and profits tax attributable to distributions after 4th May 1956) and profits or losses resulting from assets acquired after 4th May 1956 and tax thereon were not to be taken into the computation of the basic value. F

Special provisions (clause 6(iv)) were to apply to the amount of tax to be taken into computation.

Clauses 7 and 8 provided that the basic value should not be reduced by anything wilfully done or omitted by Willrose or B.I. or any subsidiary of B.I., and that pending delivery of the final certificate Willrose and Stormgard would procure that all requirements by Granleigh made in writing to reduce to the minimum the aggregate liabilities should be complied with on the usual terms. G

As the financial position of the B.I. group (i.e., B.I. and its subsidiary companies) was far from clear, Willrose required an undertaking that Granleigh would lend to B.I. or its subsidiaries any sums required to pay aggregate liabilities to the extent, broadly, to which the group did not have sufficient money to do so. H

At the material time it was apprehended that Carward would purchase from one of the subsidiaries of B.I. a large number of properties for the amount of £1,611.434 (see exhibit 10(*d*) hereto). It was, however, equally known that as a result of the transaction this amount would not be available to pay aggregate liabilities. Accordingly, it was agreed that, if any demand were to be made on any member of the group for payment of any liability comprised in the aggregate I

A liabilities, Granleigh would lend or procure a loan for the amount required to the extent to which the demand exceeded " the red fund " interest-free and without security (clause 10(ii)). The red fund was defined in clause 1(*h*) as the amount by which the total of the aggregate cash owned by the group on 4th May 1956 and the aggregate of the net proceeds received from realisations up to the date of any demand should exceed the total of the aggregate of all payments B made in respect of aggregate liabilities up to the date of demand and the sum of £1,631,434. (This was the price payable by Carward plus £20,000 reserved for Willrose purposes.)

Willrose had a put option in respect of any assets in the group at book value (clause 10(*i*)).

Granleigh indemnified Willrose against death duties and surtax attributable C to profits arising before 8th May 1955 (clause 12).

Subject to fulfilment of the warranty by Granleigh in clause 2(vi) that the profits of B.I. from 6th April 1955 down to 4th May 1956 did not exceed £25,000, Willrose indemnified the vendors against surtax attributable to profits of any member in the B.I. group arising after 7th May 1955 and all liability for profits tax included in the aggregate liabilities or attributable to distributions after D 4th May 1956.

Stormgard guaranteed due performance of all obligations by Willrose.

The first schedule contained the provisions for the deposit of the sum of £1,769,000 which was the agreed sum of the supplement.

The fund was to be deposited with Fiduciary, who were to divide it into two parts, namely " the blue fund " (£1,611,434) and " the green fund " (£157,566).

E The blue fund was to be used to support an overdraft of an amount equal to the blue fund for Carward on the footing that Fiduciary would guarantee the repayment of such overdraft and would charge the blue fund by way of collateral security. Carward was to use the overdraft to pay to B.P. (one of the subsidiaries of B.I.) the price of certain assets intended to be bought by Carward.

Until repayment of the overdraft, Carward undertook not to dispose of its F assets and incur liabilities except in the ordinary course of business without the consent of the vendors. Carward was also to use the proceeds of sale to reduce its overdraft, but Carward was entitled to spend £20,000 per annum for administration expenses. Carward also undertook to produce its books for inspection, and Fiduciary had the right to appoint one director to the board of Carward.

To the extent that the blue fund became released by the bank on reduction G of Carward's overdraft, Fiduciary were to deal with it as follows:

As to the first £100,000, Fiduciary were to hold the fund for the purpose of discharging any liabilities of Granleigh under the agreement, and as to the balance, 50 per cent. was to be released to Granleigh and 50 per cent. retained by Fiduciary for the purpose of discharging liabilities until final certificate. The amounts released to Fiduciary and not released to Granleigh were to be invested H according to para. 8 of the schedule.

The green fund was to be held for the purpose of discharging liabilities of Granleigh, and subject thereto Fiduciary were to be entitled to lend the green fund to Willrose free of interest and without security, by way of loan repayable on demand.

The second schedule contained a list of subsidiaries of B.I.

Immediately after the quantification agreement had been executed, an agreement dated 4th May 1956 (exhibit 10(*d*)) for the sale and purchase of various properties by B.P. to Carward was executed, and payment was made out of an overdraft provided by the Bank of Greece and Athens.

On 29th May 1957 an agreement (exhibit 10(*e*)) was entered into by Granleigh, Willrose and Stormgard, as a result of which certain assets to which the put option in clause 10(i) of the quantification agreement applied were agreed to be sold by public auction, because Granleigh was unable to comply with its obligations under the said put option.

On 27th June 1957 an exchange of letters (exhibits 10(*f*) and (*g*)) took place, as a result of which it was agreed that the first £100,000 released of the blue fund were to be held on the terms of the green fund, *i.e.*, could be lent by Fiduciary free of interest to Willrose. This agreement, the consideration for which is stated to be 1*s.*, was in fact made because realisations of assets proceeded very slowly and Willrose threatened to exercise its put options in respect of all the assets unless something was done. Accordingly the arrangement in these letters was entered into.

Between 1st July 1957 and 13th March 1958 eight agreements, which were not exhibited to us, were entered into for the disposal of properties, all of which were said to be on the same lines as the agreement of 29th May 1957 (exhibit 10(*e*)). The substance was that assets to which the put option under clause 10(i) of the quantification agreement applied were to be sold by public auction, as Granleigh could not comply with its obligations. If the net price obtained was less than book value, the net price was to be treated as book value, and Willrose was to be entitled to receive a sum equal to 6 per cent. of the difference between book value and the net selling price.

Mr. Sandelson decided that B.P. should cease carrying on trade early in April 1958, and a number of agreements were entered into to give effect to this decision.

Granleigh had been unable to comply with its obligation to take up certain assets under the put options in clause 10(i) of the quantification agreement. They found, however, a purchaser for these assets for £3,695 (which was less than book value), and by an agreement dated 25th March 1958 (which was not exhibited to us) Granleigh, Willrose and Stormgard agreed that that sum should be deemed to be the book value of the assets for the purpose of computing the basic value, whilst Willrose should receive 6 per cent. of the difference between the book value of the assets and the sum of £3,695.

By an agreement dated 31st March 1958 (which was not exhibited to us) Carward sold to B.I. leasehold properties for £100.

By an agreement dated 1st April 1958 (which was not exhibited to us) B.I. transferred certain mortages to Efgan for £2,525.

On 1st April 1958 the solicitors for Granleigh, Willrose and Stormgard wrote a joint letter (which was not exhibited to us) to Messrs. Barton Mayhew & Co. embodying an agreement as to the sum at which the book value of certain assets was to be taken.

A On 1st April 1958 a letter (which was not exhibited to us) was written by Granleigh agreeing that a further £105,000 released of the blue fund should be held on the terms of the green fund, *i.e.* Fiduciary was entitled to lend this further amount interest free to Willrose.

On 2nd April 1958 a number of agreements were executed in connection with the acquisition of the business of B.P. by Efgan.

B By the first agreement (which was not exhibited to us) B.P. sold to Efgan the benefit of a particular mortgage.

By the second agreement (exhibit 10(*h*)) Granleigh, Willrose and Stormgard entered into an agreement supplemental to the original agreement of 23rd December 1955 (exhibit 10(*a*)), the agreement of 3rd May 1956 (exhibit 10(*b*)) and the quantification agreement (exhibit 10(*c*)). The agreement provided that C Willrose should procure that B.P. should cease to trade and go into liquidation before 5th April 1958. It was further agreed that, if five agreements, forms of which were annexed, were executed and the resolution in the form annexed passed, Willrose should be deemed to have fulfilled its obligation to procure that B.P. should cease to trade.

Furthermore, the agreement contained provisions as to the effect of certain D sales to be effected by the agreements, forms of which were attached, on the basic value of B.I. Again Willrose was to be entitled to a sum equal to 6 per cent. of any excess of book value over the amounts realised on the sales.

The agreements annexed, all of which were executed on 2nd April 1958, were as follows:

Exhibit 10(*i*). This agreement embodied a release of B.P. from liabilities E in respect of properties bought by B.P. from certain property companies which were fellow-subsidiaries of B.P. To the extent to which these properties were sold to Carward, the fellow-subsidiary companies released B.P. from its obligations in respect of such properties and B.P. released Carward from its obligations in respect of the same properties, whilst Carward undertook to discharge B.P.'s liabilities to the property companies relating to the said properties. The purpose F of the agreement was to ensure that B.P. could sign a declaration of solvency.

Exhibit 10(*j*). This agreement embodied a release of B.P. by Carward from obligations arising under the agreement for the sale of properties on 4th May 1956 (exhibit 10(*d*)) in consideration of a payment of £157,331 made before execution of the agreement. Again the purpose of this agreement was to ensure that B.P. could file a declaration of solvency.

G Exhibit 10(*k*). This was an agreement for the sale by B.P. to Efgan of the goodwill of B.P.'s business and certain assets.

Exhibit 10(*l*). This agreement embodied an undertaking by B.I. to release B.P. in consideration of B.P., at B.I.'s request, ceasing to carry on trade forthwith. Again the purpose was to enable B.P. to sign a declaration of solvency.

H Exhibit 10(*m*). This was an agreement for the sale of various properties by B.P. to Efgan.

Exhibit 10(*n*). Efgan insisted on a put option such as was originally enjoyed by Willrose (clause 7(*e*) of exhibit 10(*a*)), and by this agreement between Granleigh, Willro se, Stormgard and Efgan such a put option was granted.

Exhibit 10(*o*). An agreement was made on 17th May 1960 between Granleigh, Willrose and Stormgard, providing that if Colbros Properties Ltd. were to purchase certain assets from certain subsidiaries of B.I. the price was to be deemed to be book value for the purpose of computing the book value. A

On 15th February 1961 an agreement (exhibit 10(*p*)) was entered into between the vendors, Granleigh, Willrose and Stormgard.

The basic value was agreed at £1,485,000 on the footing that defined liabilities were taken into account at an estimated figure of £223,000. B

The overdraft of Carward had been repaid, and Fiduciary had paid out the appropriate sums to Granleigh and to the vendors.

The vendors undertook that, upon Barton Mayhew & Co. certifying that more than the estimated sum of liabilities had fallen due in respect of the same, they would pay 94 per cent. of the excess to Willrose. Furthermore, the vendors undertook that, if the liquidator of B.P. was to receive less than £140,000 in respect of book debts (other than sums received from Willrose and Stormgard or associated companies) between 1st October 1960 and 31st December 1965, they would pay 94 per cent. of the shortfall. C

Apart from these terms the parties released each other mutually from the obligations of the various agreements entered into, and certain cash and debentures were deposited by the vendors with Knowsley & Co. for the account of Willrose to secure due performance of the vendors' obligations. D

The surtax indemnity by Willrose to the vendors was repeated in clause 14, and Willrose and Stormgard undertook to the vendors (in clause 16) that each member of the group would comply with all requirements made from time to time in relation to any liabilities as defined in clause 1(2) of the agreement. E

On 15th February 1961 Hillearys also handed a letter, which was not exhibited to us, to the solicitors for Willrose whereby the basis of " excepted tax " (defined in clause 6(iv) of the quantification agreement) was defined.

9. The financial consequences to G.S. of the agreements summarised in para. 8 were as follows.

Under the agreement of 23rd December 1955 (exhibit 10(*a*)) and the quantification agreement (exhibit 10(*c*)) G.S. paid £16,803 and £1,769,000 for the purchase of 11,202 shares in B.I. These payments were reflected in the accounts of G.S. for the period ended 31st March 1957 (exhibit 2). F

Following the agreement of 15th February 1961 (exhibit 10(*p*)) G.S. received £390,100 by way of breach of warranty or, put another way, as a reduction of the sum of £1,769,000 paid under the quantification agreement. This receipt was reflected in the profit and loss account of G.S. for the year ended 5th April 1961 (exhibit 2), which shows a credit " Reduction of purchase price " £390,100. G

10. On 12th March 1962 G.S. sold its holding of 11,202 shares in B.I. at the then net asset value of these shares, and realised £519,450 after charging relevant expenses. This was some £84,000 in excess of the value at which these shares stood in the books of G.S. This profit is reflected in the profit and loss account of G.S. for the year ended 5th April 1962 (exhibit 2). H

The financial effect of G.S.'s dealing in the shares of B.I. may be summarised as follows:

| | £ | £ |
|---|---|---|
| Purchase price of 11,202 shares in B.I. .. .. .. | | 16,803 |
| | | 1,769,000 |
| | | 1,785,803 |
| Expenses relating thereto incurred to 31st March 1957 | | 11,291 |
| | | 1,797,094 |
| Plus further expenses incurred in 1957–58 and 1958–59 | | 935 |
| | | 1,798,029 |
| Reduction in purchase price .. .. .. | 390,100 | |
| Sale of shares less costs .. .. .. | 519,450 | 909,550 |
| Net outlay .. .. .. .. | | 888,479 |
| Net dividends received by G.S. from B.I. | | |
| 4th April 1957 .. .. .. | 682,762 | |
| 1st April 1958 .. .. .. | 289,852 | |
| 6th March 1962 .. .. | 6,861 | 979,475 |
| Net cash surplus .. .. .. | | £90,996 |

It will be seen, therefore, that, apart from any fiscal advantage of obtaining repayment of income tax under the provisions of s. 341, the deal in the shares of B.I. provided G.S. with a commercial surplus of £90,996. It was from the start within the contemplation of Mr. Sandelson that the deal would show a commercial profit apart altogether from any fiscal advantage.

11. We now refer to the activities of B.P., which was incorporated on 20th April 1954, with an authorised capital of £1,000 divided into 1,000 £1 shares. The objects set out in clause 3 of B.P.'s memorandum of association (exhibit 14) are those of a property-dealing company. All the shares of B.P. were issued to and beneficially owned by B.I.

The first accounts of B.P. were made up for the year ended 7th May 1955, and subsequent accounts were made up for each of the years ended 7th May 1956 and 1957, and also for the period ended 3rd April 1958, when B.P. ceased to trade. All these accounts are to be found in exhibit 12.

Exhibit 15, based on the aforesaid accounts, shows that B.P. made net profits from dealing in properties, before charging income tax, as follows:

| | £ |
|---|---|
| Year to 7th May 1955 .. .. .. | 128,289 |
| Year to 7th May 1956 .. .. .. | 1,171,847 |
| Year to 7th May 1957 .. .. .. | 17,250 |
| | 1,317,386 |
| Period 8th May 1957 to 3rd April 1958 loss | 59,772 |
| Total net profits before tax .. .. .. | £1,257,614 |

The provisions made for income tax in these accounts were as follows:

| | |
|---|---|
| Year to 7th May 1955 .. .. .. | 112,267 |
| Year to 7th May 1956 .. .. .. | 530,519 |
| Year to 7th May 1957 .. .. .. | 11,374 |
| Period 8th May 1957 to 3rd April 1958 .. .. .. | Nil |
| | 654,160 |
| *Deduct* adjustment of previous year's taxation credited in the accounts to 7th May 1957 .. .. .. | 460,000 |
| Total provision for income tax .. .. .. | £194,160 |

Thus, in respect of net profits totalling £1,257,614, B.P. found it necessary to provide only £194,160 net for income tax. This provision sufficed owing to the effect of B.P. ceasing to trade on 3rd April 1958. A

In respect of the loss of £59,772 in the period to 3rd April 1958 B.P. had made a " terminal loss claim " for repayment of income tax under s. 18, Finance Act 1954, and tax had been repaid accordingly.

B.P.'s trading life fell wholly in the fiscal years 1954–55, 1955–56, 1956–57 and 1957–58. The profits of £1,171,847 arising in the year ended 7th May 1956 would, if B.P. had continued trading, have provided the measure of the profits assessable to income tax for the year 1957–58. With the cessation of trading, however, any assessment for that year fell to be computed by reference to the profits arising in the period from 6th April 1957 to 3rd April 1958. As a result the major part of the profits of £1,171,847 for the year ended 7th May 1956 was excluded in measuring the company's profits charged to income tax. B C

12. The profits arising to B.P. from the commencement of its trading in 1954 to cessation on 3rd April 1958 came from the disposal of freehold and leasehold properties, ground rents and mortgages, many of which were acquired by B.P. from the 102 property companies which were fellow subsidiaries of B.I. (see para. 5 above). D

As stated in para. 8 above, following the quantification agreement (exhibit 10(*c*)) of 4th May 1956 there was signed on the same day an agreement (exhibit 10(*d*)) for the sale by B.P. of certain properties to Carward for a net purchase price of £1,611,434. In this agreement Carward acted by E. A. Colman, a director, who was one of the vendors of the shares in B.I. under the agreement of 23rd December 1955 (exhibit 10(*a*)). Mr. Colman was an estate agent, and a member of a firm which managed the properties owned by B.P. and the 102 property companies both before and after the sale of the shares in B.I. to G.S. As further stated in para. 8 above, between 27th June 1957 and 13th March 1958 eight agreements were entered into under which it was agreed that various properties to which the put option in clause 10(i) of the quantification agreement (exhibit 10(*c*)) applied should be sold by public auction. E F

When in early April 1958 Mr. Sandelson decided that B.P. should cease to trade before 5th April 1958, B.P. still held some properties. On 2nd April 1958 B.P. sold to Efgan (exhibit 10(*k*)) for £54,643, *inter alia*, the goodwill of its business and certain properties, and on the same date (exhibit 10(*m*)) for a net purchase price of £17,032 17*s*. 6*d*. certain freehold and leasehold properties. Efgan was a company the shares in which were owned by Mrs. Sandelson, the wife of Mr. Sandelson, who was a director of Efgan. The object of these two agreements was to dispose of B.P.'s remaining stock-in-trade and goodwill to ensure that B.P. was able to cease trading before 5th April 1958. G

13. On 3rd April 1957 the directors of B.P. paid an interim dividend of £1,200 per share, less tax, on its 1,000 issued shares. Cheques totalling £690,000 were issued on that date to the persons in whose names the shares were registered, together with letters copies of which are to be found at exhibit 8. These cheques were all received by B.I. as the beneficial owner of the 1,000 shares in B.P. H

On 1st April 1958 the directors of B.P. held a meeting, extracts from the minutes of which are to be found at exhibit 16. At that meeting the directors, after considering reports on the company's position in the light of the impending sale of its assets and the discontinuance of its business, purported to resolve " that an interim dividend of £520 per share actual, less tax, be and it is hereby declared payable forthwith ". At the same meeting, the directors passed resolutions approving agreements relating to the sale of the company's assets, the I

A cessation of its business and its voluntary liquidation. On the same date cheques totalling £299,000 were issued to the persons in whose names the shares were registered, together with statements copies of which are to be found at exhibit 8. These cheques were all received by B.I. as the beneficial owner of the 1,000 shares in B.P.

14. We now refer to the part played by B.I., which was incorporated on B 26th February 1953, with an authorised capital of £20,000 divided into 20,000 £1 shares. Clause 3 of the memorandum of association (exhibit 13) indicated that B.I. was established to be an investment-holding company. 11,202 of the authorised shares were issued and were acquired by G.S. on 23rd December 1955 (exhibit 10(*a*)).

The first accounts of B.I. were made up for the period ended 7th May 1954 C (exhibit 11), and show a loss of £6,494 1*s.* 1*d.* after transferring to capital reserve £50,279 7*s.*, being dividends, less tax, from pre-acquisition profits of subsidiary companies. The next accounts, for the year to 7th May 1955, show a profit of £4,097 13*s.* 10*d.* In this year dividends, less tax, from pre-acquisition profits of subsidiary companies amounting to £3,090 12*s.* 6*d.* were transferred to capital reserve, making a total capital reserve of £53,369 19*s.* 6*d.*

D It is in accordance with normal commercial practice, and with the recommendations of the Institute of Chartered Accountants, for an investment-holding company to transfer to capital reserve (and to hold as not available for distribution) net dividends which arise from the profits of its subsidiary companies earned prior to the date of acquisition of the shares of the subsidiary companies. B.I. did not distribute this capital reserve throughout the period for which E accounts were before us, i.e. to 31st December 1962.

The accounts for the year ended 7th May 1956 show a loss of £14,675 3*s.* 1*d.* The accounts for the year ended 7th May 1957 show a profit of £698,008 0*s.* 9*d.* after crediting the net dividend of £690,000 received from B.P. on 3rd April 1957 (see para. 13 above).

On 4th April 1957 B.I. paid an interim dividend of £106 per share, less tax, F on its 11,202 shares. Cheques totalling £682,761 18*s.* were issued on that date, accompanied by letters which will be found at exhibit 9. This dividend was debited in B.I.'s appropriation account for the year ended 7th May 1957 (exhibit 11), leaving a debit balance of £220 3*s.* 9*d.* to be carried forward.

The accounts of B.I. for the year ended 7th May 1958 show a profit of £297,487 15*s.* 10*d.* after crediting the purported net dividend of £299,000 G received from B.P. on 1st April 1958 (see para. 13 above).

On 1st April 1958 B.I. purported to pay an interim dividend at the rate of £45 per share actual, less tax, on its 11,202 issued shares. Cheques totalling £289,851 15*s.* were issued on that date, accompanied by statements copies of which will be found at exhibit 9. These payments amounting to £289,851 15*s.* were debited to the appropriation account as interim dividend paid £45 per H share (less income tax).

15. In relation to issues raised by this application which affect only the second year of claim we had before us exhibit 15, which was prepared by the Principal Advisory Accountant to the Board of Inland Revenue.

Page I of that exhibit shows that, while the total net profits before tax arising to B.P. in its trading life totalled £1,257,614, the gross dividends pur- I porting to have been paid by B.P. totalled £1,742,500. The net dividends, totalling £1,001,687, were less than the total net profits after tax, namely £1,063,454. As stated in para. 11 above, the major part of the profits arising to B.P. was excluded in measuring the company's profits charged to income tax.

Page II of exhibit 15 shows calculations made to demonstrate that B.P. was not able to declare or distribute on 1st April 1958 a gross dividend totalling £520,000 subject to deduction of tax.

Page III of that exhibit contains calculations to demonstrate the view of the Inland Revenue that on 1st April 1958 B.P. was entitled under the provisions of s. 184, Income Tax Act 1952, to deduct tax from a dividend of no more than £35,114; and, further, that the dividend of £299,000 comprised a true net dividend (paid under deduction of tax) of £20,191, and a distribution of £278,809, not being a dividend from which tax was capable of being deducted under the provisions of s. 184. The figure of £35,114 was arrived at as follows:

Profits before tax throughout existence of B.P.

| | | £ |
|---|---|---|
| Year to 7th May 1955 .. .. .. .. .. | | 128,289 |
| Year to 7th May 1956 .. .. .. .. .. | | 1,171,847 |
| Year to 7th May 1957 .. .. .. .. .. | | 17,250 |
| | | 1,317,386 |
| *Less* loss for period to 3rd April 1958 .. .. .. | | 59,772 |
| | | 1,257,614 |
| *Less* dividends declared (gross) | £ | |
| 28th March 1955 .. .. .. | 10,000 | |
| 27th March 1956 .. .. .. | 12,500 | |
| 3rd April 1957 .. .. .. .. | 1,200,000 | 1,222,500 |
| | | £35,114 |

Page IV of exhibit 15 gives, in the column headed " Original account ", a summary of the profit and loss and appropriation accounts of B.I. for the year ended 7th May 1958; and in the column headed " Revised account " a revision of those accounts on the basis of treating the receipt by B.I. from B.P. of £299,000 as consisting of a true net dividend paid under deduction of tax of £20,191 (equivalent to £35,114 gross) and a distribution, not being a true net dividend from which tax had been deducted, of £278,809. B.I. had made a management expenses claim under s. 425, Income Tax Act 1952, for the year 1957–58, which had been allowed in the sum of £2,271; and accordingly £965 of the tax suffered by it by deduction from gross dividends had been repaid to B.I. Page IV of exhibit 15, therefore, shows the view of the Inland Revenue that B.I. was entitled under s. 184 to deduct tax from a dividend of no more than £32,843 (£35,114 less £2,271).

Finally, page V of exhibit 15 shows, in the column headed " Original account ", a summary of the profit and loss account and appropriation account of G.S. for the year ended 5th April 1958, and in the column headed " Revised account ", a revision of those accounts on the footing that the £289,852 received by G.S. from B.I. on 1st April 1958 consisted of a true net dividend paid under deduction of tax of £18,885 (equivalent to £32,843 gross) and a distribution, not being a true net dividend from which tax had been deducted, of £270,967.

16. On 7th November 1956 a letter (exhibit 3, page 2) was sent on behalf of G.S. giving notice under the provisions of s. 22, Finance Act 1937, as amended, as respects both B.I. and B.P. for the chargeable accounting periods ended on 7th May 1956. Effect was given to that notice in the computation of the profits assessable to profits tax on G.S.

17. It was contended on behalf of G.S. that:

(*a*) the 11,202 shares in B.I. were purchased as stock-in-trade of the trade of dealing in stocks and shares carried on by G.S. in the period ended 31st March 1957;

(*b*) those shares remained stock-in-trade of G.S.;

(*c*) the losses sustained in the relevant years in that trade of dealing in stocks and shares should be computed by reference, *inter alia*, to the treatment of the aforesaid 11,202 shares in B.I. as at all times stock-in-trade of that trade;

(*d*) the losses so sustained were £682,735 in the five days ended 5th April 1957 and £290,333 in the year ended 5th April 1958;

(*e*) the payments received by G.S. from B.I. on 4th April 1957 and 1st April 1958, namely, £682,761 18*s*. and £289,851 15*s*. respectively, were true net dividends representing gross dividends of £1,187,412 and £504,090 from each of which income tax at 8*s*. 6*d*. in the pound had properly been deducted under the provisions of s. 184 of the Income Tax Act 1952;

(*f*) G.S. was entitled to repayment of income tax under the provisions of s. 341 of the Income Tax Act 1952 as follows:

| 1956–57 | |
|---|---|
| Loss sustained in trading for the five days to 5th April 1957 . . . . . . . . . . . . . . | £<br>682,735 |
| *Add* loss brought forward from previous period . . . . | 360 |
| | 683,095 |

Repayment £683,095 at 8*s*. 6*d*. in the pound = £290,315 7*s*. 6*d*.

| 1957–58 | |
|---|---|
| Loss sustained in year . . . . . . . . . . | £290,333 |

Repayment £290,333 at 8*s*. 6*d*. in the pound = £123,391 10*s*. 6*d*.;

(*g*) if, which was not admitted, B.P. was entitled under s. 184 to deduct tax on 1st April 1958 only from a dividend which represented the excess of its net profits before payment of tax over the dividends previously paid by it, then in calculating these net profits no account should be taken of the loss incurred by B.P. in the period ended 3rd April 1958;

(*h*) further, if, which was not admitted, B.I. was entitled under s. 184 to deduct tax on 1st April 1958 only from a dividend which represented the excess of its net income before deduction of tax over the dividends previously paid by it, then in calculating that net income account should be taken of the income arising from dividends received by it from pre-acquisition profits of subsidiary companies notwithstanding that these dividends had been credited to a capital reserve and not to the profit and loss account of B.I.;

(*i*) any excess of the net sum of £289,851 15*s*. received by G.S. from B.I. on 1st April 1958 over such true net dividend as G.S. was entitled to receive from B.I. was not a receipt of the trade carried on by G.S., and should therefore be excluded in computing the loss sustained in that trade in the year 1957–58.

18. It was contended on behalf of the Inspector of Taxes that:

(1) (*a*) the 11,202 shares in B.I. were not purchased as stock-in-trade of the trade of dealing in stocks and shares carried on by G.S.;

(*b*) the said shares never formed part of the stock-in-trade of that trade;

(*c*) the losses arising in the years 1956–57 and 1957–58 in the said trade should be computed without taking into account either the cost or the value of the said 11,202 shares in B.I.; and, alternatively, that: A

(2) (*a*) B.P. was not entitled under the provisions of s. 184 to deduct from dividends paid by it income tax in excess of that deductible from gross dividends not exceeding B.P.'s total net profits before tax;

(*b*) in respect of the dividend paid on 1st April 1958 B.P. was entitled to deduct only the tax appropriate to the excess of its total net profits before payment of tax over the total of the gross amounts of dividends previously paid, such excess being £35,114; B

(*c*) on the same principle, in respect of the dividend paid by B.I. on 1st April 1958 B.I. was not entitled under the provisions of s. 184 to deduct tax exceeding that ascertained by reference to its income computed on the basis of excluding that part of the dividend received by it from B.P. from which tax was not deductible and deducting sums disbursed by it as expenses of management in respect of which repayment of tax had been made to B.I.; C

(*d*) in computing the said income no account should be taken of dividends received by B.I. from pre-acquisiton profits of subsidiary companies which in the books and accounts of B.I. had been credited to a capital reserve account and were not available for the payment of dividends by B.I.; D

(*e*) accordingly, B.I. was entitled to deduct from the dividend paid by it on 1st April 1958 £13,958 tax appropriate to £32,843;

(*f*) in computing the loss sustained in the trade of G.S. for the year 1957–58 the sum of £270,967, being the excess of the payment received *qua* net dividend by it from B.I. on 1st April 1958 (£289,852) over the true net dividend (£18,885, i.e. £32,843 less £13,958 tax), should be treated as a receipt of that trade; E

(*g*) accordingly, the loss of G.S. for which relief was allowable under s. 341, Income Tax Act 1952, was £19,366.

19. We, the Commissioners who heard the applications, took time to consider our decision and gave it in writing on 5th February 1965, as follows:

(1) Gurneville Securities Ltd. (hereinafter referred to as " G.S. ") has preferred claims under s. 341 in respect of losses alleged to have been sustained in a trade of share-dealing. The claims relate to the years 1956–57 and 1957–58 respectively. F

(2) The first question to be determined, which is common to both years of claim, is whether the transactions entered into by G.S. in relation to the shares of Bishopsgate Investment Co. Ltd. (hereinafter referred to as " B.I. ") formed part of the trade of share-dealing admittedly carried on at all material times by the former company. In other words, did G.S. acquire the shares of B.I. as stock-in-trade of its trade of share-dealing and deal with those shares throughout as such? G

As regards dividend-stripping being involved in this transaction, the dividend-stripping transaction which was in issue in *J. P. Harrison (Watford) Ltd.* v. *Griffiths*[1] 40 T.C. 281 was held to form part of that company's trade of dealing in shares or to be an adventure in the nature of trade. Bearing in mind the opinions given the House of Lords in that case, we find on the evidence adduced in the present case that the transaction entered into by G.S. in relation to the shares of B.I. formed part of G.S.'s trade of dealing in shares. H

(3) It follows that G.S. is entitled to relief for the year 1956–57 under s. 341 by reference to the loss sustained in its trade of share-dealing and its income from dividends in respect of its shareholding in B.I. I

(1) [1963] A.C.1.

A (4) Two further questions which arise in this case relate only to the year 1957–58. Of these the first is whether Bishopsgate Properties Ltd. (hereinafter referred to as " B.P. ") was entitled under s. 184 to deduct income tax of £221,000 from the dividend of £520 per share which it paid on its 1,000 issued shares on 1st April 1958.

In none of the authorities cited to us were the Courts concerned with the B problem which arises here, namely, whether a company is entitled under s. 184 to deduct tax at the standard rate from a dividend which with the dividends previously paid is greater than the total profits which have arisen to the company in the whole of its trading life.

It is, of course, well established that a company is entitled to deduct tax at the standard rate in force at the time of payment of a dividend regardless C of the rate or amount of tax which has been paid by the company in respect of the profits or gains out of which the dividend is paid. Accordingly, in this case the Crown did not seek to deny B.P.'s right to deduct tax from gross dividends not exceeding in all its total net profits before tax although it would then be deducting an amount much in excess of the net amount debited in B.P.'s profit and loss accounts in respect of tax under Schedule D in respect of those profits. D It was, however, contended that B.P. was not entitled to deduct from dividends paid by it tax in excess of that deductible from such gross dividends.

Having reviewed the authorities cited and the arguments addressed to us on this matter, we have come to the conclusion that this contention of the Crown is well founded. We hold, accordingly, that B.P. was entitled under s. 184 to deduct tax from dividends up to, but not on any amount in excess of, E the total of its net profits before payment of tax; and that in respect of the dividend paid on 1st April 1958 B.P. was entitled to deduct only the tax appropriate to the excess of its total net profits before payment of tax over the total of the gross amounts of dividends previously paid. We also hold that B.I., in respect of the dividend paid by it on the same day, was in turn not entitled to deduct tax exceeding that ascertained by reference to its profits computed on F the basis of excluding that part of the dividend received by it from B.P. from which we have held tax not to be deductible, and deducting sums disbursed by it as expenses of management.

(5) The second question which arises in relation to the year 1957–58 is the treatment of the dividend payment received by G.S. from B.I. on 1st April 1958 in computing the loss sustained by G.S. in that year. In its profit and loss G account for the year ended 5th April 1958 G.S. has credited £504,090, being the net amount received with the addition of the amount claimed by it to have been deducted for income tax, together with other gross dividends of £161. Taxation deducted from dividends received is debited in the appropriation account for that year.

Having regard to the decision in *Commissioners of Inland Revenue* v. *F. S.* H *Securities Ltd.* [1], we are of opinion that in computing the loss sustained there should be excluded from G.S.'s profit and loss account the maximum gross dividend from which B.I. was entitled to deduct tax under the provisions of s. 184 together with the other gross dividends of £161. We also think that the excess " tax " which B.I. purported, but was not entitled, to deduct under s. 184 should be excluded from the profit and loss account. We see no good I ground for excluding the excess of the payment received *qua* net dividend over the true net dividend. This sum should, it seems to us, be included as being an income receipt accruing to G.S. in the course of its trade. It was, in our view, not a dividend net of tax but a payment of an income nature from which tax could not properly be deducted.

---

[1] 41 T.C. 666; [1965] A.C. 631.

(6) We leave figures for both claims to be agreed between the parties on the basis of this decision. A

20. Figures on this basis were agreed between the parties as to the application for the year 1956–57 on 5th March 1965, and on 18th March 1965 we determined the application for that year accordingly.

21. The representative of the Inspector of Taxes immediately after the determination of the application for the year 1956–57 declared to us his dissatisfaction therewith as being erroneous in point of law, and on 7th April 1965 required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act 1952, s. 64. B

22. It having been reported to us that the parties were unable to agree figures on the basis of our decision in respect of the application for the year 1957–58, the matter came before us again on 20th May 1965. After hearing the parties we held that, in conformity with our decision of 5th February 1965, the loss proved to have been sustained in the trade of G.S. in the year 1957–58 should be taken to be £19,366, and we accordingly determined the loss proved to be in that figure. We thereupon certified that the loss proved for the year 1957–58 was £19,366 and that the tax repayable was £8,231. C

23. The representatives of G.S. and of the Inspector of Taxes each immediately after the determination of the application for the year 1957–58 declared to us his dissatisfaction therewith as being erroneous in point of law. On 24th May 1965 the representatives of G.S., and on 2nd June 1965 the representative of the Inspector of Taxes, respectively, each required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act 1952, s. 64. In accordance with the aforesaid requirements we have stated this Case, which we do sign accordingly. The question of law for the opinion of the Court is whether on the facts found by us herein the decisions set out in paras. 19 and 22 hereof were correct. D E

W. E. Bradley, G. R. East — Commissioners for the Special Purposes of the Income Tax Acts. F

Turnstile House,
94–99 High Holborn,
London W.C.1.
2nd May 1966

---

The case came before Goff J. in the Chancery Division on 17th, 18th, 19th, 20th, 21st and 24th March 1969, when judgment was reserved. On 26th March 1969 judgment was given in favour of the Crown, with costs. G

*W. A. Bagnall Q.C.*, *Patrick Medd* and *John Warner* for the Crown.
*Michael Fox Q.C.*, *J. Milton Grundy* and *A. E. Park* for the Company.

The following cases were cited in argument in addition to those referred to in the judgment:—*Petrotim Securities Ltd.* v. *Ayres* 41 T.C. 389; [1964] 1 W.L.R. 190; *Ridge Securities Ltd.* v. *Commissioners of Inland Revenue* 44 T.C. 373; [1964] 1 W.L.R. 479; *Wisdom* v. *Chamberlain* 45 T.C. 92; [1968] 1 W.L.R. 1230; *Californian Copper Syndicate* v. *Harris* (1904) 5 T.C. 159; 6 F. 894; *Lewis Emanuel & Son Ltd.* v. *White* (1965) 42 T.C. 369; *Commissioners of Inland Revenue* v. *Cull* 22 T.C. 603; [1940] A.C. 51; *Chancery Lane Safe Deposit & Offices Co. Ltd.* v. *Commissioners of Inland Revenue* 43 T.C. 83; [1966] A.C. 85; *Lawson* v. *Hosemaster Machine Co. Ltd.* 43 T.C. 337; [1966] 1 W.L.R. 1300. H I

---

**Goff J.**—This case arises out of a forward dividend strip, but it was part of a larger scheme which included another fiscal arrangement, namely, a realisation of profits by means of a four-year company operation, so as to take advantage of the provisions of ss. 127, 128 and 130 of the Income Tax Act 1952 and thereby greatly to reduce the liability of those profits to income tax.

The scheme as a whole was very complicated, and before it could be fully worked out a very large number of agreements proved necessary. I need not rehearse them in full. They are set out in the Case Stated. In substance, the position is as follows. There were two groups of companies, the Sandelson group and the Colman group. The latter included an investment holding company, Bishopsgate Investments Ltd., which is referred to as " B.I.", and 102 wholly-owned subsidiary property companies. They had large unrealised profits, in that the market values were greatly in excess of the book value. If and when realised, those profits would *prima facie* be liable to large sums of income tax. If, however, the profits could be realised through the medium of a company trading for a limited number of years and making its profit in the penultimate full year of its trading life, that tax would be very greatly reduced.

For the purposes of the scheme four years were chosen for the company's life, and therefore the profits had to be channelled into the second year. The operation was carried out in concert with the Sandelson group, which combined with it a forward dividend strip. The claimants, G.S., were incorporated in March 1954 as a wholly-owned subsidiary of Stormgard Ltd., the head of the Sandelson group, no doubt because it was necessary or desirable to have a company with no previous trading history. G.S. are a share-dealing company. Then in April of the same year the four-year company, Bishopsgate Properties Ltd. (referred to as " B.P."), was incorporated as a wholly-owned subsidiary of B.I. This company clearly was specially created for the purposes of the scheme. B.P. commenced to trade on 7th May 1954, and purchased all the properties from the 102 property companies at book values. To make the scheme effective, therefore, B.P. must realise the bulk of the profit in its second accounting period, namely, 7th May 1955 to 7th May 1956, and cease trading before 5th April 1958; or, alternatively, as affairs were so ordered that the profit was made in the second year, cesser of trading before 5th April 1958 became imperative. These were essential deadlines.

It would no doubt have been difficult, if not impracticable, for the Colman group to carry out their scheme without the concurrence of the Sandelson group, for several reasons, notably provision of finance. Be that as it may, the two groups did in fact concur. G.S. then purchased all the shares in B.I. for a price which reflected the inherent tax-free profit, so giving the shareholders in the Colman group the benefit of that saving in a capital form. The purchase price forms the opening item in the profit and loss account of G.S. Actually, the shares were purchased by another company in the Sandelson group, Willrose Financial Investments Ltd., but they were acting as agents for G.S. and nothing turns on that. The agreement to purchase the shares was made on 23rd December 1955, and it provided for completion within seven days. At that time the actual values could not be ascertained, and therefore a nominal sale price of £16,803, being 30*s*. per share on the B.I. shares, was adopted, plus a supplement to be ascertained later according to a prescribed formula, and being in effect 95 per cent. of the excess of the market value, after allowing for taxation, over book value. The agreement required G.S. to retain the shares and gave the vendors control of the board. The date for completion was 7th May 1956, and the formula was manifestly geared to the four-year operation and to cessation of B.P.'s business before 5th April 1958.

**(Goff J.)**

Completion took place as agreed. The properties were not sold, and time was running out; and so, on 28th February 1956, another company, Carward Properties Ltd., was incorporated in the Colman group to buy the vast majority of the properties at market value, but it needed finance. Accordingly, on 4th May 1956, Willrose, as agents for G.S., entered into a fresh agreement, the "quantification agreement", under which the supplement was quantified at £1,769,000 on an estimated total market value of £1,900,000. This sum of £1,769,000, which was calculated at 94 per cent. instead of 95 per cent., was forthwith paid to another company in the Sandelson group as stakeholders, with provisions enabling them to use it as security so that Carward could arrange the necessary bank loan. There were also, of course, provisions for adjustment of the supplement when the true value should have been ascertained. This agreement abrogated the provisions for the retention of shares and control of the board. On the same day, immediately after that agreement, Carward entered into a contract to buy the properties for £1,611,434, paid on the signing of the contract. There were many other details which remained to be worked out, including the disposal of the remaining properties to enable B.P. to cease trading in due time. Suffice it to say the true supplement was not finally ascertained until 15th February 1961; and even then there were certain liabilities of the property companies remaining to be cleared, so large that in respect of them the vendors deposited £300,000 as security. It is interesting to note that the shortfall on the £1,900,000 was no less than £415,000. To complete the dividend-stripping operation, B.P. declared and paid four dividends. The first three, for the years 1955, 1956 and 1957, amounted to £1,200,000 gross. The fourth, for 1958, was, or purported to be, £520,000 gross, and was paid out as a net £299,000.

It is settled by *F.S. Securities Ltd.* v. *Commissioners of Inland Revenue*(1) 41 T.C. 666 that, where a trader receives a franked dividend, i.e., net after deduction of tax, he does not have to bring it into account when ascertaining his profit or loss for tax purposes. Accordingly, G.S. then claimed repayment of tax under s. 341 of the Income Tax Act 1952 for the financial years 1956–57 and 1957–58 on the footing that they had suffered a loss by the diminution in value of the shares in B.I. due to the payment of those large dividends. The figures appear in paras. 6 and 7 of the Case. It should be noted that this was not the only dealing in shares by G.S., and the other business, though comparatively small, was not insignificant; and there is no doubt that G.S. are, and were at all material times, a share-dealing company.

The first question which arises is whether the purchase of the B.I. shares was in the course of a trade or an operation in the nature of trade. If so, then the claim is good for the first year and good in principle for the second; but if not, then it is wholly bad. The Commissioners found in favour of G.S., and the Crown appeals. If that stands, then further questions arise as to the second year, because the gross dividend exceeded the available net profit before tax.

With regard to the first question, the first point I have to determine is whether the Commissioners' finding that the transaction entered into by G.S. in relation to the shares of B.I. formed part of G.S.'s trade of dealing in shares is a finding of fact, behind which I cannot go unless there be some error apparent on the face of the Case, or it is a conclusion which no reasonable body could have reached if properly instructed as to the law. What they actually said was:

"As regards dividend-stripping being involved in this transaction, the dividend-stripping transaction which was in issue in *J. P. Harrison (Watford) Ltd.* v. *Griffiths*(2) 40 T.C. 281 was held to form part of that

(1) [1965] A.C. 631. (2) [1963] A.C. 1.

A company's trade of dealing in shares or to be an adventure in the nature of trade. Bearing in mind the opinions given in the House of Lords in that case, we find on the evidence adduced in the present case that the transaction entered into by G.S. in relation to the shares of B.I. formed part of G.S.'s trade of dealing in shares."

I think it is a finding of fact, because the question of law, what are the B characteristics of trade or of an adventure in the nature of trade, is one on which the Commissioners are assumed to have rightly directed themselves until the contrary appears: see *per* Viscount Simonds in *Edwards* v. *Bairstow*(1) [1956] A.C. 14, at page 31, where he said:

" But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows C that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made."

Lord Radcliffe, at page 33(2), put it thus:

" But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong D to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not ' erroneous in point of law '; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset E by the Court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the Case that they have misunderstood the law in some relevant particular."

F In *Cooper* v. *Sandiford Investments Ltd.*(3) [1967] 1 W.L.R. 1351 an error of law clearly appeared on the face of the Case, because the Commissioners said that they were constrained by *Harrison's* case(4) to decide against what would otherwise have been their view; and clearly, in the light of *Finsbury Securities Ltd.* v. *Bishop*(5) 43 T.C. 591, they were not so bound. In *Lupton* v. *F.A. & A.B. Ltd.*(6) [1968] 1 W.L.R. 1401 both sides accepted that the question G was one of law; but Megarry J. added: " as, indeed, the *Finsbury* case . . . goes far to establish ": see page 1413(7). The finding in that case was very similar to the present. It was as follows:

" As regards the five transactions involving dividend-stripping, the dividend-stripping transactions which were in issue in *J. P. Harrison (Watford) Ltd.* v. *Griffiths* . . . and *Finsbury Securities Ltd.* v. *Bishop* H were held to be within the scope of a trade of dealing in shares. Bearing in mind the opinions given in the House of Lords in the former, and the judgments given in the Court of Appeal in the latter, of these cases, we find on the evidence in the present case that the five dividend-stripping transactions entered into by the taxpayers formed part of that Company's trade of dealing in shares. "

---

(1) 36 T.C. 207, at p. 225. (2) *Ibid.*, at p. 227. (3) 44 T.C. 355. (4) 40 T.C. 281. (5) [1966] 1. W.L.R. 1402. (6) Page 580. *ante.* (7) *See* p. 593 *ante.*

**(Goff J.)**

In the *Finsbury* case[1], Lord Morris said it is a question of law; but, having regard to *Edwards* v. *Bairstow*[2], I think that must have been because the Commissioners had stated the view of the law on which they acted: see page 596. It was therefore for the Court to decide whether that was a correct view or not; there could be no room for assuming that they had correctly directed themselves. If I am wrong, and it is a pure question of law, then obviously the matter is at large before me. If, on the other hand, it is (as I think) a question of fact, still it is, in my judgment, at large, and not one where the finding can only be upset if it be inexplicable save on the footing of error in law; for here too, in my judgment, the Commissioners have stated the view of the law on which they acted, and in the same manner as they did in *Lupton's* case[3]. That view, however, was incomplete and therefore wrong. Of course, as Mr. Fox says, it was right for the Commissioners to have regard to what the House of Lords had said in *Harrison's* case[4]. The contrary would have been manifestly wrong. But they had not a complete view of the law, because they had not the advantage of *Finsbury's* case in the House of Lords and the two cases at first instance which have been heard since. They evaluated the evidence and reached their conclusion in the light of the *Harrison* case alone, but we now know that it ought to be considered in the light of that case as explained in the *Finsbury* case and as both have been interpreted and applied by Buckley and Megarry JJ.

In my judgment, therefore, the matter is at large. Then how does it stand? It is clear that the facts of this case are by no means identical with any of the others; but the question is: What is the principle to be deduced from the cases and what result does that lead to on the facts found by the Commissioners? For the principle, I turn first to the speech of Lord Morris in the *Finsbury* case, in which all the other members of the House of Lords concurred. He said, at page 627, referring to the *Harrison* case:

> " It was my view in that case that the transaction was demonstrably a share-dealing transaction. Shares were bought; a dividend on them was received; later the shares were sold. There may be occasions when it is helpful to consider the object of a transaction when deciding as to its nature. In the *Harrison* case my view was that there could be no room for doubt as to the real and genuine nature of the transaction. The fact that the reason why it was entered into was that the provisions of the revenue law gave good ground for thinking that welcome fiscal benefit could follow did not in any way change the character of the transaction "; and again, on the same page: " A consideration of the transactions now under review leads me to the opinion that they were in no way characteristic of nor did they possess the ordinary features of the trade of share dealing. The various shares which were acquired ought not to be regarded as having become part of the stock-in-trade of the Company. They were not acquired for the purpose of dealing with them. In no ordinary sense were they current assets. For the purposes of carrying out the scheme which was devised the shares were to be and had to be retained. The arguments before your Lordships depended mainly upon the submission by the Crown that the shares were acquired for a period of five years as part of the capital structure of the Company, from which an income would be earned, and, on the other hand, upon the submission of the Company that they were acquired as part of their stock-in-trade. In my opinion neither argument is correct. For the reasons I have already given this transaction on its particular facts was not, within the definition

(1) 43 T.C. 591. (2) 36 T.C. 207. (3) Page 580 *ante*. (4) 40 T.C. 281.

A of s. 526, ' an adventure or concern in the nature of trade ' at all. It was a wholly artificial device remote from trade to secure a tax advantage."

Buckley J. observed in *Cooper* v. *Sandiford Investments Ltd.*(1) [1967] 1 W.L.R. 1351 that *Harrison*(2) and *Finsbury*(3) were both distinguishable on the facts, but he made two statements of principle. First, at page 1359(4), after reviewing the *Harrison* case, he said:

B " That decision does not establish that, wherever a company engaged in the trade of dealing in shares acquires shares with a view to making some profit, the transaction will necessarily be a transaction entered into in the course of that trade. One has to investigate the true nature of the transaction and find whether or not it was in fact a transaction entered into in the course of the trade of dealing in shares. If one comes to the con-
C clusion that it is a transaction in the course of such a trade then the fact that there may be some incidental fiscal advantage connected with it will not deprive it of that character."

Then, after mentioning the *Finsbury* case, he said(5):

" That case, which again was very different on its facts from the present case, demonstrates this, that where a company engaged in the trade of
D dealing in shares and securities acquires shares with the object of obtaining a profit of a fiscal character, the mere fact that the shares are acquired with a view to obtaining a profit and are acquired by a company that deals in shares does not conclude the question of whether or not those acquisitions are acquisitions in the course of the company's trade of dealing in shares. One must look at the circumstances of the particular
E transaction and discover what its true nature is."

He concluded his judgment by holding that the transaction before him was much more like what the House of Lords had to consider in the *Finsbury* case and—I quote (page 1362(6))—

"... is appropriately described as an artificial device remote from the company's trading activities ".

F In the *Lupton* case(7), Megarry J. said, at page 1417(8), that it seemed to him that the *Harrison* case was a narrow decision on a narrow point, which " merely decides that a transaction is not prevented from being a trading transaction merely because its object is not to make a trading profit but to obtain a tax advantage." He then made two statements of principle. At page 1419(9) he said: " If upon analysis it is found that the greater part
G of the transaction consists of elements for which there is some trading purpose or explanation (whether ordinary or extraordinary), then the presence of what I may call ' fiscal elements ', inserted solely or mainly for the purpose of producing a fiscal benefit, may not suffice to deprive the transaction of its trading status. The question is whether, viewed as a whole, the transaction is one which can fairly be regarded as a trading
H transaction. If it is, then it will not be denatured merely because it was entered into with motives of reaping a fiscal advantage. Neither fiscal elements nor fiscal motives will prevent what in substance is a trading transaction from ranking as such. On the other hand, if the greater part of the transaction is explicable only on fiscal grounds, the mere presence of elements of trading will not suffice to translate the transaction into the
I realms of trading. In particular, if what is erected is predominantly

(1) 44 T.C. 355. (2) 40 T.C. 281. (3) 43 T.C. 591. (4) 44 T.C. 355, at p. 363.
(5) *Ibid.*, at p. 363. (6) *Ibid.*, at p. 365. (7) *Page* 580 *ante*. (8) *See* p. 596 *ante*.
(9) *See* p. 598 *ante*.

**(Goff J.)**

an artificial structure, remote from trading and fashioned so as to secure a tax advantage, the mere presence in that structure of certain elements which by themselves could fairly be described as trading will not cast the cloak of trade over the whole structure." Later, at page 1423[1], I find this: "I do not think that the right approach is, after analysing each transaction meticulously, to compare the constituent elements with those present or absent in other cases and then to decide the matter on the degree of correspondence or divergence. Instead, I consider that each arrangement should be regarded as a whole in the light of the principles which I have derived from the cases. If at the end of the day a transaction, viewed as a whole, appears to be merely, or substantially, a trading transaction, then despite the presence of fiscal elements or fiscal motives a trading transaction it remains. If, on the other hand, the transaction as a whole appears to be no trading transaction but an artificial device remote from trade to secure a tax advantage, then the presence of trading elements in it will not secure its classification as a trading transaction."

I have not found this case entirely easy to decide; but, having carefully reviewed all the facts as found by the Commissioners and evinced by the documents, I have reached the conclusion that this case is on the *Finsbury*[2], rather than the *Harrison*[3], side of the line. I have, of course, against that, the finding in para. 5 (*f*) that it was an object of the scheme that the transaction should show a commercial profit apart from any fiscal advantage, and in para. 10 that it did result in a profit of £90,996. That, however, was largely dependent on dividends which could not have been paid but for the operation of the four-year plan. It is true that G.S. might have made a comparable profit by paying a price which allowed for full taxation on the vendors' profits without a four-year plan; for then, although the dividends would have been less, so would the price. But that was not the transaction, nor would it have suited either party. There are also strong features in favour of the Crown in the *Finsbury* and *Lupton*[4] cases which are not present here: namely, the creation of a special kind of preference share carrying all the profits available for distribution for a limited number of years; the absence of profit, and in some cases actually a loss, apart from the s. 341 claim; and, in the *Finsbury* case only, sharing of the fruits of any claim under s. 341. In one example, however, in *Lupton*, no special shares were created, and Megarry J. still reached the same conclusion, though it is fair to say that he did so with considerable doubt and despite a strong indication of a fiscal nature in a warranty related to the repayment claim. In *Cooper* v. *Sandiford Investments Ltd.*[5] no peculiar property was created, but it was at least an unusual transaction to assign a lease at a nominal rent and take an underlease at a large rent, and still more to pay the whole rent in advance. That was surely explicable only on fiscal considerations.

On the other hand, I have the finding of the Commissioners that there was here one single composite scheme, providing, not only for dividend stripping resulting in a claim in respect of losses under s. 341, but for the vendors to receive as capital a sum equal to the unrealised profits in the 102 property companies, calculated, by virtue of the four-year operation, largely free of income tax, and for the s. 341 claim to be swollen by that freedom from taxation. This necessarily involved retention of the shares or rendered them not readily saleable until the scheme had been worked out. It was not merely an operation, as in *Harrison*, of buying shares in a company pregnant with profits, declaring

(1) *See* p. 601 *ante*. (2) 43 T.C. 591. (3) 40 T.C. 281. (4) Page 580 *ante*. (5) 44 T.C. 355.

A a dividend and reselling or retaining the shares until the end of the year. It included getting the profits out of the 102 companies more or less free of tax for the common benefit of vendors and purchasers and escaping surtax liability for the benefit of the vendors, and for those purposes an elaborate artificial structure had to be erected, and complexities were encountered which I think were not merely commercial ones. Three companies were specially incorporated: B G.S. themselves, B.P. and Carward, the purchaser of the properties; and there was a sale by the 102 companies at book values only.

The original agreement for purchase contained the remarkable feature that, although the price could not be ascertained for some years, because it depended on the working out of the tax position and because the position as to the underlying assets was uncertain—so uncertain that it was afterwards found C that B.P. had sold properties to which it had no title or which it had already sold—yet completion was to take place within seven days for a nominal price and a supplement to be afterwards calculated. Further, this entailed an express agreement by the purchasers to retain the shares and that the vendors should, notwithstanding completion, retain control of the board. It is significant that the expression " the said date " in that agreement, on which the price formula D is based, is the end of the second year of B.P.'s trading. That agreement clearly contemplated the realisation of the properties so as to channel the profits into the second year. Then comes the quantification agreement, under which, although as appears on the face of it the price could not be ascertained for three years, the purchasers agreed to pay immediately upon an estimate, and provision was made for the purchase money to be paid to stakeholders and made E available to finance the purchase by Carward. This agreement and the complexities which it entailed were clearly for the purposes of the four-year plan, and fiscal. I cannot attach much importance to Mr. Fox's argument that G.S. never became contractually bound to cease business so as to implement the four-year operation, because it is plain both from the Commissioners' findings and the documents themselves that it was the common intention from the start; F nor, for the same reason, do I think significant the finding that Mr. Sandelson only decided early in April that B.P. should cease trading.

Looking, as I am bidden to do, at the transaction as a whole, I have come to the conclusion that the losses on which the claim depends were not incurred in a trade or in a venture in the nature of trade; and the appeal therefore succeeds.

G The questions raised on the cross-appeal and the Crown's notice of additional contentions do not, therefore, arise. They are, first, whether, assuming the loss claim under s. 341 was otherwise good, (*a*) G.S. are bound to bring into account the whole of the net dividend received in the year 1957–58 because the grossed-up amount of the dividend declared in respect of that year exceeded the total net profits before tax less previous dividends, or, alternatively, (*b*) H whether at least the amount of the excess must be charged against the loss; and, secondly, if the latter be the true view, then (*a*) in calculating such excess the trading loss in that year must be deducted from the profits, and (*b*) the available profits ought to be treated as increased by capital reserves in the hands of B.I. representing pre-acquisition profits. Both parts of the first question came before Pennycuick J. in *Johns* v. *Wirsal Securities Ltd.*(1) 43 T.C. I 629. The difference between total exclusion and apportionment in that case was very small and, for the purpose of stating his reasons, the Judge ignored this; but I am satisfied that he did actually decide between the two alternatives

(1) [1966] 1 W.L.R. 462.

(Goff J.)

and held that the whole of the purported net dividend must be brought into account. He said, at page 655: A

> " Neither Counsel has very strenuously sought to support the conclusion reached by the Special Commissioners. The dividend consisted in the actual distribution of the sum of £279,422, expressed and intended to be franked of tax by reference to a gross dividend of larger amount. I find it impossible to treat this distribution as representing in part a B dividend of the same gross amount after deduction of tax and, as to the balance, a distribution without deduction of tax. In the result, this whole tax avoidance scheme has misfired. It is not for the Court to reform the scheme so as to make it partly effective."

If I am wrong on the main question I would follow that decision, since it turns simply on the construction of ss. 184, 185 and 186 of the Income Tax Act C 1952; and Mr. Fox has not really invited me to do otherwise, but he has, of course, saved his position, should the case go to a higher Court. In the circumstances, therefore, the other subsidiary questions do not in any event arise, and I express no opinion upon them, although they too will, of course, be open should they become material as the result of any decision on appeal.

**Medd**—My Lord, I would ask that your Lordship would allow the appeal D with costs. The money was paid back—the loss claim was paid back—in pursuance of the Special Commissioners' order, and therefore I would ask your Lordship for an order that the money which has been paid by the Revenue to Gurneville in respect of that loss claim be returned to the Revenue.

**Goff J.**—Will it be necessary to refer it back to the Commissioners on the figures? E

**Medd**—I think not, my Lord. The figures do appear in the Stated Case. I understand from my learned friend Mr. Fox that he would rather there was not a figure put in your Lordship's Order, at this juncture at any rate, just in case there is any point on the figures; but I understand there is likely to be no difficulty about agreeing them, and the matter should be easy.

**Goff J.**—I am much obliged. F

**Fox Q.C.**—I think that is correct. I am merely wondering whether, in order to save any possible dispute that might arise—I cannot think there will be, because it is a pure question of finding out what the figure was—there could be a general direction that it go back to the Commissioners to settle the figure, in case of any disagreement. But I cannot think it is going to arise. I only suggest that as a stopgap. G

**Goff J.**—Should I discharge the Commissioners' order with costs, order repayment of the tax paid to G.S., and direct that in the event of any disagreement as to figures the matter be referred back to the Commissioners for them to find the amount?

**Fox Q.C.**—If your Lordship pleases.

**Goff J.**—That would cover it, would it not? H

**Fox Q.C.**—If your Lordship pleases. That would certainly cover it.

Might I raise one further matter? Would your Lordship give me a stay on the matter of repayment if I gave notice of appeal within (say) 21 days of the drawing up of the Order? Your Lordship will bear in mind that this is not a case where the Crown has proceeded with any great urgency. The matter

A came before the Commissioners in December 1964. They then decided the matter of principle, and left it to the parties to agree figures. There was then some quarrelling about the figures; the matter came back to the Commissioners in May 1965 and the Commissioners decided finally the form of the order and disposed of any questions as to figures. So, as far as the Commissioners were concerned, the matter was disposed of in May 1965. I suppose it then took a B little time to draw up the Case, and no doubt the Crown waited for a bit to see what came out of *Finsbury Securities Ltd.* v. *Bishop*(1); but *Finsbury* v. *Bishop* was in fact decided in July 1966. The Crown's appeal was not then set down until the autumn of 1968.

**Goff J.**—When was the money paid to you?

**Fox Q.C.**—The money would have been paid to us after the Commissioners' C order. I do not know the date; I am instructed some date in 1965.

**Medd**—February 1965, my Lord, I am told.

**Goff J.**—Do you resist a stay on terms of notice being given within some stated time?

**Medd**—My Lord, this is a case in which one would have thought the money ought to come back straight away. They have had it for a very long time.

D **Goff J.**—The Court of Appeal might decide they are entitled to keep it.

**Medd**—Your Lordship will appreciate that, with money of this size, there is a very considerable amount at stake on interest alone. With respect, I should have thought the right thing was to have the money in the place where the Court which has last decided the matter has decided it should be, until somebody overturns that.

E **Goff J.**—It would not be a solution to pay it into Court, would it? That might not be acceptable to either of you.

**Medd**—With respect to my friend, I can see no difficulty in the money being repaid forthwith. If he goes to the Court of Appeal and succeeds, or anywhere else, of course he will get it back again. He has had it for three years already. I do object to that. My Lord, I did not in fact, as I should have done F before my learned friend was asking you, ask you formally to dismiss the cross-appeal with costs as well.

**Goff J.**—Yes. That part of it follows, does it not?

**Fox Q.C.**—If your Lordship pleases. That part of it follows. I would only add this. Your Lordship has my point, on the question of urgency, that the Crown has not proceeded with any marked diligence here. The Company G is in this position, that it might involve it in loss, and put a burden on it to have to realise securities at this moment, in having to provide the repayment money—your Lordship has said it was a case where your Lordship did not find it entirely easy to decide which side of the line it went—in circumstances where, at the end of the day, it might be held that they were entitled to it anyway.

**Goff J.**—I do not feel disposed to grant a stay, but I will not order immediate H payment back of the money, because I think you ought to have time to raise so large a sum. I will direct that the money be repaid within a period of four weeks from the date of this Order.

(1) 43 T.C. 591.

**Fox Q.C.**—If your Lordship pleases. A

**Goff J.**—That covers everything, I think.

**Fox Q.C.**—That covers everything, I think.

**Goff J.**—May I thank you, Mr. Fox, and Mr. Bagnall in his absence, for the assistance you were to me in going through these complicated facts and difficult cases.

**Fox Q.C.**—If your Lordship pleases. B

---

The Company having appealed against the above decision as regards its claim to relief for the year 1956–57, the case came before the Court of Appeal (Lord Diplock and Russell and Cross L.JJ.) on 18th, 19th, 20th, 21st and 25th November 1969, when judgment was reserved. On 18th December 1969 judgment was given unanimously against the Crown, with costs. C

*R. H. Walton Q.C.*, *Michael Fox Q.C.* and *A. E. Park* for the Company

*W. A. Bagnall Q.C.*, *Patrick Medd* and *John Warner* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Californian Copper Syndicate* v. *Harris* (1904) 5 T.C. 159; 6 F.894; *Petrotim Securities Ltd.* v. *Ayres* 41 T.C. 389; [1964] 1 W.L.R. 190. D

---

**Russell L.J.**—I will ask Cross L.J. to read the judgment of the Court.

**Cross L.J.**—The question at issue in this case is whether the purchase by Gurneville Securities Ltd. on 23rd December 1955 of 11,202 shares (the whole issued capital) of Bishopsgate Investments Ltd. was a transaction forming part of the trade of Gurneville Securities Ltd. (which we will call " G.S. ") as a share-dealer or, to put the point in other words, whether the shares in Bishopsgate Investments (which we will call " B.I. ") bought by G.S. became part of its stock-in-trade. The facts are recited at length in the Case stated by the Special Commissioners, which exhibits all the relevant documents. It is therefore only necessary for us to give such a summary of them as will make this judgment intelligible. E F

In 1954 the shares in B.I. were held by several members of the Colman family. B.I. was a holding company with 102 wholly-owned subsidiary property companies owning together a large number of freehold and leasehold properties. The market value of these properties very much exceeded the cost of their acquisition, and if they were sold the subsidiaries would receive very large profits. But these profits would be subject to income tax and, if the balance of profit were distributed by way of dividends through B.I. to the Colmans, the latter would have to pay large sums by way of surtax before they could enjoy the ultimate balance. The Colmans looked about to find a way to avoid or reduce this unwelcome tax liability and found in a Mr. Sandelson—who controlled the Stormgard group of companies—someone who was prepared to help them, if he could help himself at the same time. His scheme was simple enough, though it could only have been evolved and carried through by someone who had an intimate knowledge of revenue law and was further prepared in the conduct of his affairs to adhere to its letter in defiance of its spirit. Whether he would think it proper for the Revenue authorities to adopt the same attitude in the discharge of their duties one does not know. G H I

A The steps in the scheme were as follows: (1) the 102 property companies would transfer their properties at book values to a newly-formed property-dealing company; (2) that company would trade for four years only—which would mean (as the law then stood) that the profits which it made in the ante-penultimate year of its trading would be taxed, regardless of what they really were, by reference to the profit of the previous year; (3) that so many as B possible of the properties should be sold in that second year; (4) that one of Mr. Sandelson's share-dealing companies should purchase the shares in B.I. at an agreed percentage of the net assets value, so that the Colmans and Sandelson should share in agreed proportions in any reduction in the tax liability of the new property-dealing company brought about by the four-year plan; (5) that the new company should, after realising its profits, declare as large C dividends as it legally could declare; (6) that the company which had purchased the B.I. shares and so received the net dividend should in reliance on the principle of law which was affirmed in *F.S. Securities* v. *Commissioners of Inland Revenue*[1] 41 T.C. 666 (i.e., that dividends paid subject to deduction of tax to a share-dealing company do not come into its trading account) write down the value of the shares purchased by reference to the dividend declared and reclaim D the relevant tax; (7) that the shares—reduced in value by the payment of the dividend—should be sold in the course of the share-dealing company's business.

The merit of the scheme from the point of view of the Colmans was that they would receive a large part of the reduction in the tax liability on the realisation of the profits of the property company in the shape of an increase in the purchase price for the B.I. shares and that that price would come to E them in the shape of capital. The merits of the scheme from the point of view of Mr. Sandelson were (*a*) that he would receive some benefit from the reduction in the tax liability, since he was to get a proportion of the net assets value without paying for it; (*b*) that he would or might be able to recover some part of the tax deducted or notionally deducted from the dividends paid to G.S. through B.I., and (*c*) that he would inevitably make some commercial profit on the deal F if none of the fiscal profit materialised since he was only to pay a proportion of the net value of the assets of the companies.

The implementation of the scheme proved to be more troublesome than was anticipated. The books of the 102 subsidiaries were in a state of some confusion, so that it took a long time to find out exactly what the numerous properties were worth. On the other hand, speed was of the essence because G of the ever present risk that legislation would be passed which would deprive the scheme of some or all of its fiscal advantages. For the purposes of this judgment it is not necessary to go into the many documents which were executed in detail. G.S. was incorporated on 9th March 1954 with a share capital of £100, all the shares being owned by Stormgard. Its first profit and loss account was for the period from 1st December 1955 to 31st March 1957. By far the H largest transaction into which it entered was its purchase of the B.I. shares, but it engaged in a number of other share-dealing transactions. The new property company, Bishopsgate Properties Ltd. (which we will call B.P.), was incorporated on 20th April 1954 with a share capital of £1,000, all shares being held by B.I., and the properties of the 102 other subsidiaries were duly transferred to it at book values. The first accounting year of B.P. was from I 8th May 1954 to 7th May 1955, so it was desirable that so much as possible of its profit should be realised in the year 8th May 1955 to 7th May 1956. The contract for the purchase of the B.I. shares by G.S. was made on 23rd December 1955 between the various members of the Colman family who owned the shares

(1) [1965] A.C. 631.

**(Cross L.J.)**

as vendors of the first part, a company called Willrose Financial Investments Ltd. (who were acting as agents of G.S.) as purchasers of the second part, and Stormgard of the third part. The purchase price was £16,803 (i.e. 30*s*. per share) plus a further sum equal to 95 per cent. of the amount by which the net assets of B.P. and its subsidiaries (defined as assets after providing for all liabilities including taxation) as at 7th May 1956 should exceed £16,803. The £16,803 was paid on 30th December 1955, and the shares were then put into the name of G.S. By a further agreement made on 4th May 1956 it was agreed that the further sum should be quantified at £1,769,000, but as the values of many of the properties were still uncertain provision was made for that sum to be increased or reduced. In the ultimate result it proved to be too much by some £400,000. It was further agreed that the vendors should be entitled to only 94 per cent. instead of 95 per cent. of the net assets value. On this same day, 4th May 1956, B.P. sold the greater part of the properties to Carward Properties Ltd., a company controlled by the Colmans, for £1,611,434. It does not appear whether or not it was always intended that the bulk of the properties should come back to the Colmans or whether that was something forced on the parties by the necessity of selling as many as possible before 7th May 1956. The sum of £1,769,000 payable by G.S. was borrowed from the bank, and £1,611,434 of it was applied in paying for the properties bought by Carwards and found its way back to the bank at once. A number of the remaining properties were sold by auction in the following two years and those that remained unsold were bought from B.P. by Efgan Ltd.—another Sandelson company—at the beginning of April 1958, so as to enable B.P. to cease trading on 3rd April 1958, within the four-year period. B.P's total net profit during its trading life, i.e. from 8th May 1954 to 3rd April 1958, was £1,257,614, but as by far the greater part of it was earned in the year 1955–56 only £194,160 tax was paid. On 3rd April 1957 B.P. paid to B.I. as holder of its 1,000 shares a dividend of £1,200 per share less tax on each share, making £690,000, and on 1st April 1958 a further dividend of £520 per share less tax, making £299,000 net. B.I. in its turn paid to G.S. a dividend of £106 less tax on each of its 11,202 shares on 3rd April 1957, making £682,761 18*s*., and on 1st April 1958 a further dividend of £45 per share less tax, making £289,851 15*s*. On 5th April 1957 the directors of G.S. wrote down the value of its holding in B.I. by the amount of the net dividend of £682,761 18*s*., and on 5th April 1958 they further wrote down the value of their holding by £289,851 15*s*.

In due course G.S. preferred repayment claims under s. 341 of the Income Tax Act 1952 on the basis of trading losses sustained in the years 1956–57 and 1957–58 amounting to £683,095 and £290,333 respectively, the amounts of tax claimed to be repayable being £290,315 7*s*. 6*d*. and £123,391 10*s*. 6*d*. respectively. The Special Commissioners held that B.P. was not entitled to deduct tax at the standard rate from the whole of the dividend which it paid on 1st April 1958, since the gross dividend which it was purporting to pay together with the gross dividend which it had previously paid exceeded the total profit which the company had earned during its whole trading life. Accordingly they decided that the repayment claim by G.S. for the year 1957–58 must in any event be restricted to £8,231. In the Court below Goff J. decided (following the decision of Pennycuick J. in *Johns* v. *Wirsal Securities Ltd.*(1) 43 T.C. 629) that no part of that dividend could be excluded from B.I.'s accounts as a net dividend paid after deduction of tax, and on that footing G.S.'s claim for the year 1957–58 failed altogether. G.S. has not challenged that decision, and the dispute is confined to the repayment claim for the year 1956–57. Whether or not this claim

(1) [1966] 1 W.L.R. 462.

A is good depends, as we have said, on whether or not the purchase by G.S. of the B.I. shares was a trading transaction. G.S. sold its holding in B.I. on 12th March 1962 for £519,450 and made a profit of some £90,000 on the transaction apart from the " loss claim ". It would have made a profit of some £70,000 even if B.P. had continued to trade after 3rd April 1958 so that its profits for the accounting year ending 7th May 1956 were fully taxed.

B The Special Commissioners gave their decision in this case on 20th May 1965. At that date the case of *J. P. Harrison (Watford) Ltd.* v. *Griffiths*(1) [1963] A.C.1 had already been decided by the House of Lords, whereas the case of *Finsbury Securities Ltd.* v. *Bishop*(2) 43 T.C. 591 had not progressed beyond the Court of first instance. The facts in *Harrison* v. *Griffiths*, stated briefly, were that a company which had incurred trading losses of about £13,585 C altered its memorandum so as to include dealing in shares amongst its objects and thereupon bought for £16,900 all the shares in a company with a nominal capital of £1,000 which had ceased to carry on business but had distributable profits which had borne tax of £15,900. Having bought the shares the purchasing company caused the company whose shares it had bought to declare a dividend of £15,901 net, equivalent to £28,912 gross, and then resold the D shares for £1,000 six months later. The House of Lords held that the transaction, though it was a pure dividend-stripping transaction in which the purchasing company never envisaged making any profit other than the fiscal profit to be gained by reclaiming the tax deducted from the dividend, was nevertheless an adventure in the nature of trade and that the purchasing company was entitled to recover the tax in question.

E In the *Finsbury Securities* case two different—though fundamentally similar—types of transaction were in question. They are described by Sachs L.J. in his judgment in the *Oakroyd Investments Ltd.* case, *Lupton* v. *F.A. & A.B. Ltd.*(3) [1969] 1 W.L.R. 1627, at pages 1637–8, to which we refer later, and we need not repeat what he said here. It is sufficient to say that in both cases the shares in question became worthless, or practically worthless, by the end of the F periods over which the dividends in question were paid and were in truth only machinery to be used for the purpose of extracting money from the Revenue. The Judge of first instance, Buckley J., held that the *Finsbury* case was covered by the *Harrison* case. That being the state of the authorities when this case came before them, the Special Commissioners held that G.S. was entitled to its " loss " claim for the year 1956–57. The relevant part of their decision was G as follows:

> " As regards dividend-stripping being involved in this transaction, the dividend-stripping transaction which was in issue in *J. P. Harrison (Watford) Ltd.* v. *Griffiths* 40 T.C. 281 was held to form part of that company's trade of dealing in shares or to be an adventure in the nature of trade. Bearing in mind the opinions given in the House of Lords in that H case, we find on the evidence adduced in the present case that the transaction entered into by G.S. in relation to the shares of B.I. formed part of G.S.'s trade of dealing in shares. "

When the *Finsbury* case reached this Court, the decision of Buckley J. was affirmed by a majority, but the House of Lords were unanimously of the opinion that the transactions in question were not trading transactions and that I the *Harrison* case was distinguishable. The only speech was delivered by

(1) 40 T.C. 281. (2) [1966] 1 W.L.R. 1402. (3) Page 580 *ante*, at pp. 606–7.

**(Cross L.J.)**

Lord Morris, who had been one of the majority in the *Harrison* case([1]), and the relevant passage in it reads as follows([2]): A

"In my opinion, the arrangements now under review are essentially different from those which gave rise to the *Harrison* case. In that case there was a purchase of the shares in a company called Bendit Ltd. (afterwards called Claiborne Ltd.). The vendors of the shares had no interest in the shares thereafter. They had no prospect of receiving any benefit from any tax recovery. After the Harrison company owned the shares in Claiborne Ltd. there was a declaration of dividend on the shares. After that the shares were sold. It was my view in that case that the transaction was demonstrably a share-dealing transaction. Shares were bought; a dividend on them was received; later the shares were sold. There may be occasions when it is helpful to consider the object of a transaction when deciding as to its nature. In the *Harrison* case my view was that there could be no room for doubt as to the real and genuine nature of the transaction. The fact that the reason why it was entered into was that the provisions of the revenue law gave good ground for thinking that welcome fiscal benefit could follow did not in any way change the character of the transaction. It was not capable of being made better or worse or being altered or made different by the circumstance that the motive that inspired it was plain for all to see. In that case the vendors of the shares had no further concern once they had sold. The essence of the arrangements now being reviewed was that the future interests of the vendors were being safeguarded. Under the devised scheme they were to have all the benefits that would have resulted from their shareholdings had there been no scheme. In addition, they were to be saved from the full extent of the exactions which taxation imposes. Here also the scheme involved a factor which was entirely absent in the *Harrison* case([2]). In that case the purchasers could have done what they wished with the shares. Here, on the other hand, it seems to me that it was of the essence of the scheme that the Company should continue to hold the shares during the periods covered by the particular set of transactions. It is clear and not seriously disputed that the Company could not have sold the preferred shares during the currency of the agreement without committing a basic breach of it. The Company had to retain the shares so that year by year there would be diminutions in the value of the shares and so that year by year there could be the receipts of dividends from profits to be earned in the future, so that year by year the planned tax recovery could proceed for the mutual benefit of the Company and the vendors. A consideration of the transactions now under review leads me to the opinion that they were in no way characteristic of nor did they possess the ordinary features of the trade of share dealing. The various shares which were acquired ought not to be regarded as having become part of the stock-in-trade of the Company. They were not acquired for the purpose of dealing with them. In no ordinary sense were they current assets. For the purposes of carrying out the scheme which was devised the shares were to be and had to be retained. The arguments before your Lordships depended mainly upon the submission by the Crown that the shares were acquired for a period of five years as part of the capital structure of the Company, from which an income would be earned, and, on the other hand, upon the submission of the Company that they were acquired as part of their stock-in-trade. In my opinion neither

B C D E F G H I

([1]) 40 T.C. 281. ([2]) 43 T.C. 591, at p. 626.

A argument is correct. For the reasons I have already given this transaction on its particular facts was not, within the definition of s. 526, ' an adventure or concern in the nature of trade ' at all. It was a wholly artificial device remote from trade to secure a tax advantage."

Two more cases on this topic have come before the Courts between the *Finsbury* case([1]) and this case. In *Cooper* v. *Sandiford Investments Ltd.*([2]) B [1967] 1 W.L.R. 1351 Buckley J. held that the transaction in question was not an adventure in the nature of trade because (1) it was not a simple purchase of shares but an elaborate transaction designed to produce a fiscal profit, (2) it was bound to result in a loss unless the fiscal profit was realised and (3) the fiscal profit would not be realised unless the shares were retained for three or four years. In *Lupton* v. *F.A. & A.B. Ltd.*([3]) the taxpayer company had entered C into five dividend-stripping transactions. Four of them were on the same lines as those which were the subject of the *Finsbury* case. In the fifth—the *O.I. Ltd.* case—the taxpaying company purchased all the shares in O.I. Ltd. for £1,678,932, the vendor shareholders undertaking that the profits of a wholly-owned subsidiary would be sufficient for O.I. Ltd. to pay a dividend of £800,000 net; that the taxpayer would be able to recover tax on the dividend; and that if D they failed to recover the tax the vendors would pay them as liquidated damages the difference between the tax recovered and £200,000. During the year to 31st March 1961 the taxpayers received net dividends of £800,000. The value of the assets at the end of the year was £695,952, and the taxpayer sought to recover tax on a loss of £982,980—being as to £800,000 the dividend received and as to £182,980 the " commercial loss ". Megarry J. decided all the five E cases against the taxpayers. There was an appeal to this Court in the *O.I. Ltd.* case only and there his judgment was affirmed by a majority—Lord Denning M.R. and Phillimore L.J., Sachs L.J. dissenting. We will refer later in this judgment to the reasons given by Megarry J. and the majority of this Court for distinguishing the *O.I. Ltd.* case from the *Harrison* case([4]).

Those being the facts and the relevant decisions, the first question which F has to be decided is whether the Judge was right in holding as he did that the finding of the Special Commissioners that the transaction in question formed part of the trade of G.S. as a share dealer was not conclusive. If it cannot be shown that the Commissioners instructed themselves wrongly as to the legal principles applicable to the case, then it follows from *Edwards* v. *Bairstow*([5]) [1956] A.C. 14 that their finding is conclusive. But although in May 1966 the G Commissioners were not in any way to blame for thinking that the law on the question whether a dividend-stripping transaction is a trading transaction was fully stated in the *Harrison* case, they were in fact wrong in so thinking. Since the decision in the *Finsbury* case no one can say whether or not a particular dividend-stripping transaction is a trading transaction without first comparing the speeches in the House of Lords in the two cases and forming a view as to H where the House meant the line dividing the two classes of dividend-stripping transactions to fall. After forming that view (which is itself, we think, a conclusion of law) one has to go on to consider on which side of the line the particular facts in the case before one falls; and one's conclusion on that point—assuming that there was any evidence to support it—would be one of fact. In this case the Commissioners of necessity failed to consider what limitations I the *Finsbury* case put on the conclusions which one might otherwise deduce from the *Harrison* case. They were not fully instructed as to the law and we agree with the Judge that their finding—be it right or wrong—is not conclusive.

([1]) 43 T.C. 591. ([2]) 44 T.C. 355. ([3]) Page 580 *ante*. ([4]) 40 T.C. 281.
([5]) 36 T.C. 207.

(Cross L.J.)

So we have to decide where the line between dividend-stripping transactions which are trading transactions and dividend-stripping transactions which are not trading transactions should be drawn and on which side of the line so drawn this case falls. On the first point the Judge followed the view which was expounded at some length by Megarry J. in his judgment at first instance in the *O.I. Ltd.* case[1] [1968] 1 W.L.R. 1401. Shortly stated, that was that a dividend-stripping transaction will not be a trading transaction if it is a complicated transaction and the complications are due, or largely due, to fiscal considerations. Goff J. expressed the view that the scheme evolved by Mr. Sandelson was inherently complicated, quite apart from the complications introduced by the state of the books of the property companies, and that this inherent complexity was due to fiscal considerations—notably the four-year plan. Accordingly he decided, with some hesitation, that even though Mr. Sandelson always aimed at and in fact achieved a commercial profit, this transaction was not a trading transaction. Although we do not find it easy to see exactly what the distinction in principle between the *Harrison* case[2] and the *Finsbury* case[3] is, we find it very difficult to believe that it lies in the fact that in the former case the transaction was simple whereas in the latter the transactions were complicated. In the first place, if once you are going to say—as the House of Lords said in the *Harrison* case—that a transaction can be a trading transaction even though it is a pure dividend-stripping transaction entered into with the sole object of making a fiscal profit without any view to commercial profit, it is hard to see why mere complexity should deprive it of its trading character.

Secondly, the question whether a given transaction has sufficient fiscal complexity to carry it over the line is one which may easily lead to differences of opinion. To our minds, for instance, Mr. Sandelson's scheme was in essence quite simple, though it struck the Judge as complicated. We prefer to find the distinction between the two cases where Sachs L.J. found it in his dissenting judgment in the *O.I. Ltd.* case, namely, in the fact that in the *Finsbury* case the shares in question were not really acquired as stock-in-trade for the purpose of being dealt with, but were acquired as pieces of machinery for extracting money from the Revenue. It may be said that it was charitable of the House of Lords not to regard the purchase of shares in the *Harrison* case in the same light; but if once one accepts, as one must, that the shares bought in that case become part of the purchasing company's stock-in-trade, we find it hard to see why the B.I. shares did not become part of G.S's stock-in-trade. They had considerable value even after the dividends had been paid; and their purchase and resale showed a substantial commercial profit. How should that profit be taxed? Mr. Bagnall submitted that it should be taxed under Case VI as a profit or gain from rendering a service, namely assisting the Colmans to avoid tax liability in return for a commission equal to 6 per cent. of the net value of the assets in question. But one may doubt whether it would have occurred to the Revenue to regard it as anything but an ordinary trading profit if before the scheme was carried to completion legislation had been passed which robbed it of all fiscal attraction from Mr. Sandelson's point of view.

It may, perhaps, be suggested that to reject the distinction between the *Harrison* and *Finsbury* cases suggested by Megarry J. in the *O.I. Ltd.* case is to run counter to the judgment of the majority of this Court in that case; but though Lord Denning M.R. may be said to have accepted the test proposed by Megarry J., Phillimore L.J. distinguished the case from the *Harrison* case

(1) Lupton *v.* F.A. & A.B. Ltd., page 580 *ante*. (2) 40 T.C. 281. (3) 43 T.C. 591.

A on the ground that in the *O.I. Ltd.* case[1] the vendor stipulated for a share in any tax recovery—a ground of distinction which, be it good or bad, is not present here. Further, in the *O.I. Ltd.* case the transactions would only have shown a commercial profit if the fiscal profit failed to materialise; whereas here—and this was throughout the main burden of Mr. Walton's argument—a commercial profit was aimed at and achieved quite apart from any fiscal profit.

B It is, of course, not very satisfactory to have two decisions of this Court given within a few months of each other in which the distinctions are so comparatively slender; but both cases will, no doubt, go to the House of Lords and so we shall soon know the correct answer to the puzzle set for us.

Accordingly, in our judgment this appeal should be allowed.

**Walton Q.C.**—Then your Lordships will allow the appeal and direct that C the Commissioners of Inland Revenue do pay to Gurneville the amount falling to be paid under the certificate—

**Russell L.J.**—You are reading from something, Mr. Walton?

**Walton Q.C.**—I am reading from page 2(ii), " . . . the certificate originally given on the 18th March 1965."

**Russell L.J.**—Cannot you and Mr. Medd readily agree the result of the D appeal being allowed?

**Walton Q.C.**—I was going merely to add that that figure appears on page 5 in the Order of Goff J. It is actually £290,212 7*s.* 6*d.*

**Medd**—I have spoken to my learned friend, and we do in fact agree the form of Order.

**Russell L.J.**—I do not think we need concern ourselves with the Order. E The appeal is allowed, and you and Mr. Walton will make what you can of that short statement.

**Medd**—I am much obliged.

**Walton Q.C.**—I trust the appeal will be allowed with costs here and below.

**Russell L.J.**—Yes.

**Medd**—It will not come as a surprise that I am requested to ask your F Lordships for leave to appeal to the House of Lords.

**Russell L.J.**—The judgment you have heard rather committed us to granting it.

**Walton Q.C.**—I was going to submit to your Lordships that this matter is now of very little more than academic interest, because, as your Lordships heard during the course of the case, the law has now been completely changed and not only forward dividend-stripping but backward dividend-stripping has G been abolished. Under these circumstances, any appeal is really the concern of the Crown on what becomes a purely technical matter. We would have submitted, therefore, that your Lordships ought not to give leave to appeal.

[1] Lupton *v.* F.A. & A.B. Ltd., page 580 *ante*.

**Russell L.J.**—Oh! Mr. Walton, your client, if I may so refer to Mr. Sandelson, has chosen to paddle in waters that might be treacherous in order to get a substantial sum of money, and since the waters might be proved treacherous we do not think we should impose any terms upon the Crown but indeed should give the Crown unfettered leave to appeal to the House of Lords, and we do so. A

**Walton Q.C.**—If your Lordships please. Your Lordships' decision is not entirely unexpected. B

---

The Crown having appealed against the above decision, the case came before the House of Lords (Lords Morris of Borth-y-Gest and Guest, Viscount Dilhorne and Lords Donovan and Simon of Glaisdale) on 24th, 28th, 29th and 30th June and 1st July 1971, when judgment was reserved. On 21st October 1971 judgment was given unanimously in favour of the Crown, with costs. C

*H. H. Monroe Q.C.*, *Patrick Medd* and *J. P. Warner* for the Crown.
*Michael Fox Q.C.*, *A. Miller* and *A. E. Park* for the Company.

The following cases were cited in argument in addition to those referred to in the speeches:—*Commissioners of Inland Revenue* v. *Dowdall O'Mahoney & Co. Ltd.* 33 T.C. 259; [1952] A.C. 401; *Rees Roturbo Development Syndicate Ltd.* v. *Ducker* 13 T.C. 366; [1928] A.C. 132. D

---

**Lord Morris of Borth-y-Gest**—My Lords, this is a further case in which the issue which arose for decision was whether certain transactions formed part of the trade of a dealer in shares. The Respondent Company, Gurneville Securities Ltd. (which I will call " G.S. "), made claims under s. 341 of the Income Tax Act 1952 in respect of losses alleged to have been sustained in a trade of share dealing. The claims related to the year 1956–57 and to the year 1957–58. E

Certain transactions were entered into under which G.S. acquired the shares of a company called Bishopsgate Investment Co. Ltd. (which I will call " B.I."). Did G.S. acquire and deal with the shares of B.I. as stock-in-trade of and in its trade of share dealing? In order to answer that question it is necessary to examine the arrangements that were made. They were made, as the Case Stated records, pursuant to a scheme which was devised. When the scheme is considered and the various transactions by which it was implemented, is what is revealed the trading activity (albeit with complicated ramifications) of a dealer in shares or is what is revealed something which cannot fairly and rationally be so described? F

In the recent appeal of *F.A. & A.B. Ltd.* v. *Lupton*[1] I had occasion to record my conclusions as to the lines of approach to a question such as that which is raised in this appeal. I need not repeat what I there said. Each case must depend upon its own facts and decision can only be reached when all the facts are surveyed. Only then can the shape and structure and nature of what has been created be seen in perspective. G

The Case Stated, which is of some 30 pages in length, sets out in detail the arrangements that were made. Various members of a group who were called the Colman group owned a great deal of real property. There were in fact some 102 property companies. These were subsidiary companies of B.I. H

---

(1) Page 580 *ante*; [1972] A.C. 634.

A The members of the Colman group owned all the issued shares of B.I. The properties had increased in value. The values exceeded the book values. It was in this setting that, as the Case Stated finds, a scheme was devised. It was undoubtedly a scheme of great ingenuity and originality. Two other companies were to be closely involved in the scheme. One was G.S. (the Respondent Company), which was incorporated on 9th March 1954. It had B a share capital of £100 divided into 100 shares of £1 each. It was established to carry on the business or businesses of stock and share dealers. Ten shares were issued, and these were beneficially owned by a company called Stormgard Ltd. (" Stormgard "). The Company did carry on business as share dealers. Its first profit and loss account (for the period from 1st December 1955 to 31st March 1957) showed that in that period—and apart from the transaction in issue C in this appeal, which involved the acquisition of the B.I. shares at a cost of £1,797,094—there were eight purchases of shares at a total cost of £3,193. The other company involved in the scheme was a company called Bishopsgate Properties Ltd. (which I will call " B.P."). That company was incorporated on 20th April 1954. All its shares were held by B.I. If the various properties had been sold by the various property companies there would have been considerable D profits which would attract income tax. The Colmans would be entitled (through B.I.) to the balance of these profits—but presumably surtax would be payable by the members of the Colman group. The scheme involved the introduction of B.P. B.P. was to acquire all the properties at book value. B.P. was to dispose of the properties by way of trade. The profits earned by B.P. were to be paid as dividends to B.I. G.S. was to purchase all the B.I. shares owned by the Colman group. E The dividends received by B.I. were in turn to be passed on as dividends to G.S. A further part of the scheme was that B.P. was to make very large profits in the year ending 7th May 1956 and was to cease to trade just before 5th April 1958, with the result that a great saving of the payment of income tax would be effected. Yet a further part of the scheme was that as a result of the dividend payments to be made by B.I. to G.S. the value of the shares in B.I. owned by F G.S. would fall and G.S. would incur a loss and would in respect of that loss make a claim for repayment of income tax. Yet a further part of the scheme was that it should be designed to produce financial profit which irrespective of fiscal advantage could be described as commercial profit.

The Case Stated refers to and describes the numerous documents and the steps and stages of the complicated transactions by which these massive opera- G tions were mounted. There was an elaborate document recording the terms of sale of the B.I. shares. The agreement (made on 23rd December 1955) was between the various owners of the shares of the first part, the purchasers of the second part, and Stormgard of the third part. For some reason G.S. were not the purchasers. A company called Willrose Financial Investments Ltd., a wholly-owned subsidiary of Stormgard, were the purchasers. H Though the agreement did not so recite they were agents for G.S. The agreement recited that B.I. was a company with a nominal capital of £20,000 (in £1 shares) and that 11,202 shares had been issued and were paid up. The purchasers agreed to purchase those shares for the sum of £16,803 together with such further sum as should be ascertained in accordance with the provisions of the agreement. Completion was to take place seven days after the date of I the agreement, when the £16,803 was to be paid. The shares were, of course, of very high value. The balance of the price was to be computed as follows. The net assets of B.I. on a particular date were to be ascertained. The date chosen was 7th May 1956. The significance of that date will be noted having regard to the plan for the operations of B.P. When the amount of the net assets was ascertained the excess over the sum of £16,803 already paid would

**(Lord Morris of Borth-y-Gest)**

be ascertained and the purchasers were to pay 95 per cent. of the amount of that excess. It is fair to suppose that this gave the purchasers a very confident assurance of profit even if their expectations of fiscal advantages did not mature. The net assets of B.I. (and consequently the price receivable by the vendors for their shares) would increase as a result of the planned method of operation of B.P. The sales agreement contained a great many supplementary provisions which need not be detailed. Some of these related to the period of three years from 7th May 1956, and the purchasers undertook that until there was a final certificate in reference to the accounts of B.I. certain of the vendors should continue as directors of B.I.

A company called Granleigh Financial Holdings Ltd. (" Granleigh ") was introduced to take the place of the vendors, and on 4th May 1956 a quantification agreement was entered into as a result of which it was agreed that the further sum payable for the shares should be quantified at the sum of £1,769,000. There were elaborate further provisions and the result of them was that the purchasers were to pay and the vendors were to receive 94 per cent. rather than 95 per cent. of the net assets value. Granleigh warranted that the aggregate assets (less liabilities) of B.I. and its subsidiaries as at 7th May 1956 would be not less than £1,900,000 and if the warranty was broken Granleigh were to be liable to pay the purchasers " as liquidated damages " a sum equal to 94 per cent. of the deficiency. On the same date—4th May 1956—B.P. sold many properties to a company called Carward Properties Ltd., for the amount of £1,611,434. In early April 1958 B.P. still held some properties. These were, however, sold on 2nd April 1958, so as to ensure that B.P. was able to cease trading before 5th April 1958. It so ceased on 3rd April 1958. In the four years of its trading down to that date B.P. made net profits before tax of £1,257,614 and in respect of such profits found it necessary to provide only £194,160 net for income tax. B.P. paid a dividend of £690,000 to B.I. on 3rd April 1957, and on the following day (4th April 1957) B.I. paid a dividend to G.S. on its 11,202 shares held by G.S. That was a dividend of £682,761 18*s*. G.S. then wrote down the value of its holding in B.I. by that amount and (adding a small loss brought forward) claimed repayment of tax (under s. 341) of the amount of £290,315 7*s*. 6*d*. On 1st April 1958, B.P. paid a dividend of £299,000 to B.I. B.I. then paid a dividend of £289,851 15*s*. to G.S. G.S. then wrote down the value of its holding in B.I. by that amount and on the basis of a loss of £290,333 made a claim for repayment of tax of £123,391 10*s*. 6*d*.

The Special Commissioners allowed the relief (under s. 341) for the year 1956–57, but refused the repayment claim for 1957–58. As regards the former year Goff J. held that the losses on which the claim depended were not incurred in a trade or in a venture in the nature of trade. As regards the latter claim Goff J. held that no part of the dividend could be excluded from the accounts of B.I. and on the basis of the decision in *Johns* v. *Wirsal Securities Ltd.*[1] [1966] 1 W.L.R. 462 he held that the claim of G.S. failed. The appeal of G.S. to the Court of Appeal was confined to the claim in relation to the year 1956–57. The appeal succeeded in the Court of Appeal, from whose decision appeal is now brought.

An elaborate agreement was made on 15th February 1961 between the vendors and Granleigh and Willrose and Stormgard. A figure of £1,485,000 was to replace the figure of £1,900,000 of the quantification agreement. Following upon this new agreement G.S. received £390,100 by way of breach of warranty. The quantification figure of £1,769,000 was therefore reduced by

(1) 43 T.C. 629.

**(Lord Morris of Borth-y-Gest)**

A this amount. Eventually, on 12th March 1962, G.S. sold the 11,202 shares in B.I. at the then net asset value of those shares. Doubtless the assets were financial in form. After charging expenses the shares realised £519,450. In the result the dealings of G.S. in the shares of B.I. produced a net cash surplus of £90,996. It was submitted on behalf of the Crown that that figure reflects the circumstance that G.S. had in effect purchased assets for a sum which was B 6 per cent. less than their value.

My Lords, this is but a brief summary of transactions of much complexity that were entered into. It is apparent and it is undoubted that the arrangements which were made resulted in financial benefit both for the sellers of the shares and for G.S. and that such benefit accrued because fiscal matters were handled with great acumen. This was so even though some parts of the benefit were to C accrue only to G.S. We are not here concerned to express opinions in regard to schemes to avoid the payment of tax. Suffice it to say that the transactions now under review were not merely inspired by fiscal considerations: the provisions in regard to fiscal matters which for mutual benefit were calculated to produce financial advantage were part of the pith and substance of the transactions themselves.

D So the question has to be considered whether there was here a trading activity of a dealer in shares. Whether a transaction is a usual or an unusual one or whether it is a simple one or is complicated may be of no account. The question is whether the transaction bears the stamp and mark of the trade of a dealer in shares or whether its very structure and content reveals it as something different in kind. Approaching the enquiry on the lines that I explained in E my speech in *F.A. & A.B. Ltd.* v. *Lupton*(1) I have no doubt that the transactions now under review were not those that can be regarded as trading transactions in the course of their trade of dealers in shares.

I would allow the appeal.

**Lord Guest**—My Lords, I have had the advantage of reading the speech of my noble and learned friend Lord Morris of Borth-y-Gest. I agree with it, and F that the appeal should be allowed.

**Viscount Dilhorne**—My Lords, in this appeal, as in *F.A. & A.B. Ltd.* v. *Lupton*, the question to be decided is whether certain transactions in which the Respondent Company engaged were activities in its trade as a dealer in stocks and shares. If they were, then the Respondent is, under s. 341 of the Income Tax Act 1952, entitled to obtain a large sum from the Revenue on the G basis that it suffered a loss for income tax purposes, although it suffered no loss in reality. I need not repeat what I said in that case. The facts in this case are more complicated but the nature and object of the transactions is not in doubt.

The Respondent Company was incorporated on 9th March 1954 with a share capital of £100, and one of its objects was to carry on the business of H stock and share dealers. By an agreement dated 23rd December 1955 a Mr. Ems and others (hereafter called " the vendors ") sold to Willrose Financial Investments Ltd., a subsidiary of Stormgard Ltd., acting as agent for the Respondent Company, which was also a subsidiary of Stormgard Ltd., the whole of the issued share capital of Bishopsgate Investment Co. Ltd. (hereafter called " B.I.") for the sum of £16,803 plus a supplement equal to 95 per I cent. (later reduced to 94 per cent.) of the excess net asset value of B.I. computed as at 7th May 1956, the next accounting date of B.I.

---

(1) Page 580 *ante*.

**(Viscount Dilhorne)**

Paragraph 5 of the Case Stated contains the following passages: A

"Under a scheme devised by Mr. Brian Sandelson G.S." [the Respondent] "acquired all the shares in B.I. B.I. owned all the shares in B.P." [Bishopsgate Properties Ltd.] "and all the shares in 102 property companies. . . . The objects of the scheme were that: (*a*) B.P., a property-dealing company, should dispose by way of trade of the properties of the 102 property companies; (*b*) B.P. should cease to trade just before 5th B April 1958, as a result of which very large profits of that company arising in the year ended 7th May 1956 would enter only to the extent of a small fraction thereof into the computation of any assessment to income tax; (*c*) virtually all the profits earned by B.P. should be paid as dividends to B.I. (an investment company), which company should in turn pass them on as dividends to G.S.; (*d*) G.S. as a share-dealing company should incur C a loss through the writing down of the values of its shareholding in B.I. because of the diminution in the value of that holding through the payment of dividends to G.S.; (*e*) G.S. should claim repayment of income tax in respect of this loss by reference to its income consisting largely of the dividends paid to it by B.I. . . .; (*f*) the transaction should show a commercial profit apart from any fiscal advantage." D

This scheme was implemented. There were a number of adjustments and variations, but they did not affect the character of the operation. B.P. disposed of the properties and ceased to trade before 5th April 1958. B.P. made net profits from the dealings in the properties amounting in the three years ending 7th May 1957 to £1,317,386. Of these profits £1,171,847 was received in the year to 7th May 1956, that is to say, in the ante-penultimate year before the E cessation of trading. In consequence of the provisions of tax law relating to cessation, in respect of net profits totalling £1,257,614 B.P. found it necessary to provide only £194,160 for income tax.

The effect of this part of the transaction was to increase the purchase price of the shares bought by the Respondent Company and to make an increased amount available for distribution by dividend by B.I. Virtually all the profits F earned by B.P. were paid as dividends to B.I. and B.I. passed them on as dividends to G.S. The amount received in dividends by G.S. was £682,762 after deduction of tax in the year ending 5th April 1957, and £289,852 after deduction of tax in the year ending 5th April 1958. For the year ending 5th April 1957 the Respondent Company claimed to have suffered a loss and to be entitled to obtain, by virtue of s.341, from the Revenue the sum of £290,315 7*s*. 6*d*. G A claim was also made for £123,391 against the Revenue for the following year, so that, under the scheme as carried out, the total claim against the Revenue amounted to £413,706. Goff J. in the light of the decision in *Johns* v. *Wirsal Securities Ltd.*[1] [1966] 1 W.L.R. 462 rejected the latter claim, and the Respondent Company has not challenged his decision on that.

The provision that G.S. should only pay 94 per cent. of the net asset value H of B.I. in excess of £16,803 meant that apart from any fiscal advantage the transaction would show a profit, and when in March 1962 G.S. sold the shares in B.I. at their then net asset value, reduced by the payment of the dividends, they secured a profit of £90,996. Mr. Fox, for the Respondent Company, strenuously contended that this showed that the transaction had a commercial character and should be regarded as one coming within the scope of the trade I of a dealer in stocks and shares. He stressed the features present in it which are ordinarily to be found when such a dealer is trading. The purchase of

(1) 43 T.C. 629.

A shares, their sale and the receipt of dividends are common features of such a dealer's trade; so they are of a dividend-stripping operation, and one designed and planned to secure sums from the Revenue on the basis that a loss has occurred. One must look further to determine the true character of the transaction, and, looking at it as a whole, one is entitled to have regard to the fact that the profit of £90,996 was far less than the amount initially claimed from the Revenue, B £413,706. On 4th May 1956 the parties entered into what is called the quantification agreement. Under that agreement the supplement to the purchase price of the shares, that is to say, 94 per cent. of the net asset value in excess of £16,803, was fixed at £1,769,000. The Respondent Company could then calculate, if it could not do so before, what 6 per cent. of the net asset value represented. It could also calculate what sum could be distributed by B.I. by way of dividend C and it must have been obvious that the sum claimable from the Revenue was far in excess of the 6 per cent. The vendors gained the advantage that by the sale of the shares for their net asset value less 6 per cent. they avoided the surtax liability which they might otherwise have incurred. Neither the fact that cessation of B.P. was so arranged that a large part of the profits of that company escape income tax nor the avoidance of liability to surtax by the vendors show D that the activities of the Respondent Company were or were not part of its trade.

Looking at the transaction as a whole, the conclusion is, I think, inescapable that it was one designed, intended and carried out, so far as the Respondent Company was concerned, mainly to provide a basis for claims against the Revenue. Whether all the assets of B.I. could have been distributed by way of dividend I do not know, but the fact that £90,996 was not does not, in my E opinion, alter the character of the operation. Such an operation was not, in my opinion, one which came within the scope of the Respondent Company's trade. I would therefore allow the appeal.

**Lord Donovan**—My Lords, in terms of s. 341 of the Income Tax Act 1952 the question is whether the Respondent Company sustained a loss in any trade during 1956–57. The account drawn up for the purpose of the claim under s. 341 F for that year did shew a loss (*a*) because of the writing down of the Respondent's shares in Bishopsgate Investments Ltd. and (*b*) because of the exclusion of the large dividend the Respondent had received from that company in that year: this exclusion being correct in the light of the decision in *F.S. Securities Ltd.* v. *Commissioners of Inland Revenue*(1) [1965] A.C. 631. The question is whether the loss so shewn was a loss in trade. The burden of proof is upon the Respon- G dent. This involves in the present case that it must shew that the purchase of the shares in Bishopsgate Investments Ltd. and the subsequent receipt of the dividend on those shares was a trading transaction.

It is plain that the transaction was part of a scheme whereby *inter alia* the vendors of the shares to the Respondent would be able to receive into H their hands, as capital, profits which, if declared as dividends, would attract surtax, and whereby the Respondent would be able to enrich itself by the device of dividend-stripping; in other words, by obtaining money from the Exchequer *ex facie* as an income tax repayment notwithstanding that the Respondent had never itself paid such tax. In my opinion, when shares are bought for the sole or main purpose of dividend-stripping the transaction is not I a trading transaction; and a loss shewn by the writing down of the value of the shares consequent upon the dividend-stripping is not a loss sustained in trade for the purposes of s. 341. I repeat what I have said in this connection in *F.A. & A.B. Ltd.* v. *Lupton*(2); and in particular that I am still not able to perceive

(1) 41 T.C. 666. (2) Page 580 *ante*.

**(Lord Donovan)**

any line differentiating in essentials the case of *Griffiths* v. *J. P. Harrison (Watford) Ltd.*(1) [1963] A.C. 1 from the case of *Bishop* v. *Finsbury Securities Ltd.*(2) [1966] 3 All E.R. 105. A

The Respondent maintains, however, that a conclusion adverse to its contention ought not to be drawn in the present case largely because—as the Special Commissioners found—it intended from the start to make a commercial profit: and indeed it accomplished that intention, for in 1962 it resold the shares in Bishopsgate Investments Ltd. at a profit of £90,000 (the term " commercial profit " being used in this context as a contrast to " fiscal profit "; in other words, as indicating a profit made by ordinary trading as opposed to a profit which is simply the fruit of exploiting the technicalities of the Income Tax Acts). The weight which would otherwise attach to this circumstance is diminished by these considerations. First, provision for such a profit was part and parcel of the scheme, since the Respondent was to pay a price for the shares of Bishopsgate Investments Ltd. which was 5 per cent. (later 6 per cent.) less than the value of its underlying assets. It is difficult to separate out this element of the scheme and assess its weight as an independent feature. Secondly, any such assessment must necessarily be made as at the date of the inception of the scheme; and at that time it must have been distinctly speculative. By contrast the highly skilled persons advising all those engaged in the scheme would have been able to make a fairly shrewd forecast of the upper and lower limits of the profits to be expected from the dividend-stripping operations in contemplation. The Respondent points to the ultimate commercial profit of some £90,000 and emphasises its magnitude. But the claims under s. 341 consequent on the dividend-stripping came to some £430,000 and were reduced to £292,000 only by reason of the decision in *Johns* v. *Wirsal Securities Ltd.* 43 T.C. 629, which was not given until 1965. Looking at the matter as a whole, I do not think the scheme takes on a different colour because the intention of those behind the Respondent Company was to make a commercial profit as well. Predominantly its aim was to exploit certain features of the existing fiscal system. B C D E

I do not put into the scales as affecting the Respondent the saving of income tax resulting from the cessation of the Bishopsgate Properties company's business and the consequential effect of the discontinuance provisions. If the Legislature prescribes a formula leading to less tax in such a case, I see nothing to justify some adverse inference against a company simply because it conforms to the formula: and still less to draw such an inference against its shareholders. Nor am I influenced in my conclusion by the fact that the transaction now under consideration was in some senses a joint enterprise with the Colman family who had tax saving in mind. I think this is an irrelevant consideration in determining the true construction to put upon the Respondent's actions. All it may do in some cases is to help to decide that the true nature of the transaction is a fiscal device and nothing else. But I would decide that here even if I knew nothing about the Colmans. F G H

I would allow the appeal.

**Lord Simon of Glaisdale**—My Lords, in *F.A. & A.B. Ltd.* v. *Lupton*(3) I ventured to lay before your Lordships certain propositions of law which I thought to be established by the relevant authorities. They are again in point on the instant appeal; and I do not propose to weary your Lordships by repetition. The extensive and intricate facts are set out in the Case stated by the Special Commissioners and have been summarised by my noble and learned I

(1) 40 T.C. 281. (2) 43 T.C. 591. (3) Page 580 *ante*.

A friend Lord Morris of Borth-y-Gest. I quote only a short passage from the Case Stated:

> " Under a scheme devised by Mr. Brian Sandelson G.S." [the Respondents] " acquired all the shares in B.I." [Bishopsgate Investments Ltd., an investment company]. " B.I. owned all the shares in B.P." [Bishopsgate Properties Ltd., a property-dealing company] " and all the shares B in 102 property companies . . . The objects of the scheme were that: (*a*) B.P. . . . should dispose by way of trade of the properties of the 102 property companies; (*b*) B.P. should cease to trade just before 5th April 1958, as a result of which very large profits of that company arising in the year ended 7th May 1956 would enter only to the extent of a small fraction thereof into the computation of any assessment to income tax; C (*c*) virtually all the profits earned by B.P. should be paid as dividends to B.I. . . ., which company should in turn pass them on as dividends to G.S.; (*d*) G.S. as a share-dealing company should incur a loss through the writing down of the values of its shareholding in B.I. because of the diminution in the value of that holding through the payment of dividends to G.S.; (*e*) G.S. should claim repayment of income tax in respect of this D loss by reference to its income consisting largely of the dividends paid to it by B.I. Mr. Sandelson throughout the material periods was a director of G.S., B.I. [and] B.P. . . .; (*f*) the transaction should show a commercial profit apart from any fiscal advantage."

The potential fiscal advantages of this extremely clever and sophisticated scheme are manifest. For the vendors of the shares in question they would E be the following: (*a*) as is normal with vendors of shares leading to a dividend-stripping operation, they would receive, in the form of capital payment for shares, money representing profits which if declared as dividends would attract surtax; though in the present case the money would represent only 95 per cent. (later varied to 94 per cent.) of those profits; and (*b*) by taking advantage of the rules relating to the computation of profits of a company which ceases F trading, those profits would bear less income tax than would normally be payable on such profits, with the result that the price to be paid by the Respondents for the shares representing those profits less tax would be the greater; though again only 95 per cent. (later 94 per cent.) of such tax advantage reflected in the price of the shares which would enure to the benefit of the vendors. The tax advantages hoped for by the Respondents would arise primarily from the G dividend-strip to be carried out by them, enlarged as it would be by the enlargement of the dividends payable by B.P. (through B.I.) due to the fiscal use made by B.P. of the cessation rules. But, in addition, since the price to be paid by the Respondents for the shares was to represent only 95 per cent. (later 94 per cent.) of the underlying assets as they ultimately fell for evaluation (primarily on sale), the odd 5 per cent. (later 6 per cent.) which was the Respondents' H share contained an element whereby those underlying assets were enlarged by the fiscal use made by B.P. of the cessation rules.

Although the fiscal advantages to both the vendors and the Respondents are manifest, this does not necessarily mean that the shares were not acquired by the Respondents as part of their stock-in-trade as a share dealing company, or that the " loss " to them involved in the dividend-stripping operation was I not incurred by them in the course of their trade of dealing in shares. It is only by examining all the circumstances of the case that it can be determined whether the transaction was, on the one hand, a share-dealing in the course of the trade of dealing in shares, or on the other, a mere device to secure a fiscal advantage. The Respondents rely principally on two matters to show that the

**(Lord Simon of Glaisdale)**

transaction with which your Lordships are concerned falls within the former and not the latter category. First, they say, although they bought the shares admittedly intending to procure both the cessation of trading by B.P. and also a dividend-strip, there is no evidence that the scheme was planned with the vendors with these ends in view—in particular, that the vendors knew anything about the intention to conduct a dividend-stripping operation. Secondly, they rely strongly on the finding of the Special Commissioners that the transaction should show a commercial profit apart from any fiscal advantage.

As for the first contention, although a common fiscal motive or object between vendor and purchaser, particularly where it is manifested in agreement to share the proceeds of the tax advantage, may be highly significant as pointing to the real nature of the transaction, the absence of a *common* fiscal motive or object or of any agreement to share the tax advantage is not conclusive in favour of the transaction being a share-dealing in the course of the trade of dealing in shares rather than a mere device to secure a fiscal advantage. After all, it is the purchaser's position which calls for scrutiny, the question here being whether the " loss " was incurred in the course of the *Respondents'* trade. In any case, there are a number of factors in the transaction which, cumulatively at any rate, strain credulity on the assumption that the vendors knew nothing of what the Respondents were up to—I mention them because they are part of the total circumstances which fall for examination in order to determine the true nature of this transaction: (*a*) the price to be paid for the shares was fixed by reference to valuation on the *next following* accounting date and not (as one would expect) that immediately past; this would ensure that the profits would arise *after* the Respondents' acquisition of the shares, so that the transaction would not be caught by the anti-dividend-stripping provisions of the Finance (No. 2) Act 1955; (*b*) the vendors did not need the Respondents in order to carry out the transaction in the way that was beneficial to themselves; it is difficult to see why they should have forgone 5 per cent. (later 6 per cent.) of their potential profit unless this had been a composite scheme put up to them by Mr. Sandelson; (*c*) the 5 per cent. to the Respondents was increased under the quantification agreement to 6 per cent.; it is difficult to understand this except in terms of an agreement the real object of which was to secure a tax advantage to both parties and which now looked like succeeding (in particular, by the Legislature not having in the meantime intervened by retrospective legislation against dividend-stripping).

As for the Respondents' argument based on the " commercial profit ", this was a commercial profit of a very curious nature. It was built into the scheme from the outset by the stipulation that the price to be paid should be fixed at 95 per cent. (later 94 per cent.) of the value of the underlying assets as subsequently ascertained. The result was that on resale the Respondents were *bound* to make a profit—particularly having regard to another unusual feature of the agreement, whereby the Respondents could compel the vendors to buy back at book value any assets remaining unsold. Furthermore, if I am right that, in the absence of any reasonable alternative explanation by the Respondents, their fixed 5 to 6 per cent. cut of the value of the assets represented by the shares which were the subject-matter of the transaction must be taken as a reward to them for putting up to the vendors a scheme of tax avoidance, two alternatives ensue. On the one hand, if the tax avoidance scheme so put up related solely to the advantages accruing to the vendors (i.e. the use to be made of the cessation rules), the 5 to 6 per cent. reward was in no sense a commercial profit earned by the Respondents in their trade of dealing in shares. On the other hand, if (as seems to me to be more likely on the totality of the evidence)

**(Lord Simon of Glaisdale)**

A the whole scheme (with tax advantages both for the vendors and for the Respondents) was put up to the vendors, then the 5 to 6 per cent. cut giving rise to the " commercial profit " can be regarded either as a reward to the Respondents for putting up a tax avoidance scheme (and so not a commercial profit earned by the Respondents on their trade of dealing in shares); or, being an integral part of the entire scheme, as a colourable device to make a mere expedient B for extracting money from the public purse appear to be a *bona fide* dealing in shares, by assuming the semblance of a " commercial profit " arising from the transaction; or partly the one, partly the other. On no view was it true " commercial profit ". It would be absurd, moreover, to remain oblivious to the quantitative relationship of the respective advantages, " commercial " or " fiscal ". The " commercial profit " was £90,996: the total claim against the C Revenue amounted to £413,706 (although of this sum £123,391 was frustrated by the decision in *Johns* v. *Wirsal Securities Ltd.*(1) [1966] 1 W.L.R. 462). Furthermore, even the £90,996 (produced by the 6 per cent.) reflects in some measure the fiscal advantage of the cessation arrangements, which was admittedly within the contemplation of the Respondents.

My Lords, in *F.A. & A.B. Ltd.* v. *Lupton*(2) I stated the question which, D on the view I formed of the authorities, fell for answer in this type of case—namely, whether, in the light of all the circumstances, the transaction is, on the one hand, a share-dealing which is part of the trade of dealing in shares (albeit intended to secure a fiscal advantage, or even conditioned in its form by such intention) or, on the other, a mere device to secure a fiscal advantage (albeit given the trappings normally associated with a share-dealing within the E trade of dealing in shares). In the instant case the question can be narrowed: looking at the transaction as a whole, was it, on the one hand, one whereby a true commercial profit was taken in a fiscally advantageous way or, on the other, one in which a " commercial profit " was merely a by-product of, or a disguise for, what was really a tax recovery device? Whichever way the question is put, I have no doubt that, judged both qualitatively and quantitatively, the transaction F falls into the latter category in each case.

I would allow the appeal.

*Questions put:*

That the Order appealed from be reversed and the judgment of Goff J. restored.

*The Contents have it.*

G That the Respondents do pay to the Appellant his costs here and in the Court of Appeal.

*The Contents have it.*

[Solicitors:—Solicitor of Inland Revenue; Beer, Timothy Jones & Webb.]

---

(1) 43 T.C. 629. (2) *See* p. 631 *ante*.