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No. 1347—High Court of Justice (King's Bench Division)—
21st, 22nd and 26th January, 1943

Court of Appeal—6th and 7th March and 2nd May, 1944

House of Lords—22nd, 23rd and 24th January and 22nd March, 1946

Craddock (H.M. Inspector of Taxes) *v.* Zevo Finance Co., Ltd. ([1])

Income Tax, Schedule D—Profits of trade—Valuation of opening stock-in-trade of company dealing in investments.

The Respondent Company, an investment dealing company, was formed in May, 1932, *to take over the more speculative investments of another investment dealing company. The investments were purchased by the Respondent Company on* 15*th June,* 1932, *at the prices at which they stood in the books of the old company, being their cost price to that company in* 1927. *The consideration was satisfied by the Respondent Company undertaking to discharge the liability in respect of the old company's debentures and interest thereon and by the allotment of its authorised capital, with the shares credited as fully paid, to the shareholders of the old company.*

As a result of debiting the investments at the purchase price, the Respondent Company's accounts showed a loss for the first accounting period, but an assessment to Income Tax under Case I *of Schedule D was made on the Company for the year* 1933-34 *on the basis that the correct debit in respect of the purchase of the investments as stock-in-trade was their market value on the day of purchase according to Stock Exchange prices, on which basis the trading results of the Company showed a profit.*

On appeal to the General Commissioners against the assessment, the Respondent Company contended (inter alia) (i) *that in computing the profits the amount to be debited in respect of the opening figure of stock was the purchase price, which was the price it had agreed to pay, and that the amount paid in shares should be taken as the par value of the shares; and* (ii) *that, in any event, the Stock Exchange prices did not, in the circumstances of the case, represent the true market value of the investments and there was no evidence what such true market value was. The Commissioners found as a fact that, in the circumstances of the case, if the Respondent Company had set out to buy the investments at the Stock Exchange prices, those prices would have risen against it, though it was impossible to say by how much, and they discharged the assessment.*

In the High Court the Crown abandoned the contention that the investments should be valued at the Stock Exchange prices on 15*th June,* 1932, *but claimed that the disparity between the purchase price and the Stock Exchange prices was so great that the real value of the investments must have been very much less than the price at which they were taken over, and that the case should be remitted to the Commissioners to ascertain their real value when they were taken over.*

([1]) Reported (C.A.) [1944] 1 All E.R. 566 ; (H.L.) 174 L.T. 385.

Held, *that the Crown had failed to establish that the value of the investments was less than the nominal value of the consideration for which the Respondent Company had acquired them, namely, the liability to discharge the debentures and interest thereon and the allotment of its share capital as fully paid.*

CASE

Stated by the Commissioners for the General Purposes of the Income Tax for the City of London pursuant to the provisions of Section 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

1. At a meeting of the said Commissioners held on 17th June, 1940, at Gresham College, Basinghall Street, in the said City, Zevo Finance Co., Ltd., an incorporated company having its registered office at 1 London Wall Buildings, E.C.2 (hereinafter at times called " the Respondent Company "), appealed against an assessment to Income Tax made upon it under the Rules applicable to Schedule D of the Income Tax Acts for the year ended 5th April, 1934, in the estimated sum of £10,000.

2. The Respondent Company came to be formed in the following circumstances.

The late Sir Otto Beit died in 1930 leaving an estate of approximately £5,000,000. Approximately £3,000,000 of this was represented by shares and debentures in Zevo Syndicate, Ltd., a company to which Sir Otto had in 1927 sold a large number of his investments at their then market price. At his death Sir Otto (and his family) owned beneficially all the shares and debentures in this company. Approximately one-half of his estate was absorbed in payment of Estate Duty.

3. Prior to Sir Otto's death the investments held by Zevo Syndicate, Ltd. had seriously depreciated in value. After his death such depreciation continued and caused anxiety to the executors of his will who were unable to pay in full the bequests in Sir Otto's will. Zevo Syndicate, Ltd. was for Income Tax purposes assessed as carrying on the trade of dealing in investments. For the years 1930–31 and 1931–32 its losses were computed for Income Tax purposes at an aggregate figure of £1,117,777, of which it obtained relief under Section 34, Income Tax Act, 1918, to the extent of tax on £386,645. The balance of the losses, viz., £731,132, was carried forward and would normally have been set off for Income Tax purposes against any future profits of Zevo Syndicate, Ltd. for the next six years.

4. Having regard to these heavy losses however the executors of Sir Otto's will decided upon a reconstruction with the objects (*inter alia*) of providing Lady Beit with an assured income. It was proposed that two new companies should be formed of which one, to be called Zevo Trust, Ltd., should take over the sounder investments held by Zevo Syndicate, Ltd., while the other, to be called Zevo Finance Co., Ltd. (the Respondent Company), should take over the more speculative investments. Zevo Trust, Ltd. would be an investment holding company; Zevo Finance Co., Ltd. would be an investment dealing company.

5. Accordingly at an extraordinary general meeting of Zevo Syndicate, Ltd. held on 21st December, 1931, the following resolution was duly passed as a special resolution:—

" That it is desirable to reconstruct the Company and accordingly that
" the Company be wound up voluntarily and that Louis Henry Weatherley of
" 14 George Street, Mansion House, London, E.C.4, be appointed Liquidator
" for the purposes of such winding up."

6. At a further extraordinary general meeting of Zevo Syndicate, Ltd. held on 26th May, 1932, certain resolutions were, in pursuance of the scheme for reconstruction of which the resolution dated 21st December, 1931, formed part, duly passed as special resolutions. The material extracts from such resolutions are as follows:—

"(1) That the reconstruction of the Company referred to in the Resolution "passed on the 21st day of December 1931 take the form of the sale of part "of the Company's undertaking to an Investment Company (being the first "of the new Companies hereinafter mentioned) and of the other part of its "undertaking to a Finance Company (being the second of the new Com-"panies hereinafter mentioned).

"(2) That a new Company be registered under the name Zevo Trust "Limited or some similar name with a nominal capital of £980,000 . . .

"(3) That a second new Company be registered under the name Zevo "Finance Company Limited or some similar name with a capital of "£620,030 . . .

"(4) That the Liquidator be authorised pursuant to Section 234, Companies "Act 1929 to enter into Agreements with the said Companies respectively in "the form of the draft Agreements signed for identification by Crompton "Llewellyn Davies and to carry the same into effect."

7. The said resolutions were duly carried into effect. Zevo Trust, Ltd. was duly formed and took over the sounder investments of Zevo Syndicate, Ltd. Zevo Finance Co., Ltd. (the Respondent Company) was formed on 31st May, 1932, with a capital of £620,030 and took over the more speculative investments. Its share capital was constituted as follows:—

	£
30 Cumulative 25 per cent. preference shares of £1 each	30
20 Ordinary shares of £1,000 each	20,000
600 Deferred shares of £1,000 each	600,000
	620,030

8. The share capital of the Respondent Company as well as that of Zevo Trust, Ltd. were arranged so that together they were practically the same as the share capital of Zevo Syndicate, Ltd.; a table illustrating this is attached hereto, marked "A"(1).

9. By an agreement dated 15th June, 1932 (made in pursuance of the foregoing arrangements) between Zevo Syndicate, Ltd. and its liquidator of the one part and the Respondent Company of the other part it was provided, *inter alia*, as follows:—

(1) Zevo Syndicate, Ltd. should sell and the Respondent Company should purchase that part of the undertaking of Zevo Syndicate, Ltd. which consisted of the assets specified in the first schedule to the said agreement.

(2) As part of the consideration for the said sale the Respondent Company should undertake to satisfy, pay and discharge the liability of the vendor company mentioned in the second schedule to the said agreement.

(3) As the residue of the consideration there should be allotted credited as fully paid up shares in the Respondent Company in the manner set out in paragraph 3 of the said agreement.

Copies of the said agreement, the agreement on similar lines with Zevo Trust, Ltd., and of the memorandum and articles of association of the Respondent Company are attached hereto, marked "B1", "B2" and "C", respectively, and may be referred to as part of this Case(1).

(1) Not included in the present print.

10. The share capital of the Respondent Company was £620,030 and was duly issued credited as fully paid as part of the consideration for the sale pursuant to the provisions of the said agreement. The liability which the Respondent Company undertook to satisfy, pay and discharge as the remainder of the said consideration was the liability of the vendor company in respect of certain second debentures of the vendor company to secure a capital sum of £400,000 and interest thereon from 1st January, 1932, which amounted to the sum of £9,970 (subsequently adjusted to £9,928 15*s*. 4*d*.) making a total consideration for the said sale the sum of £1,029,958 15*s*. 4*d*.

11. On 15th June, 1932, the investments sold as aforesaid to the Respondent Company stood in the books of Zevo Syndicate, Ltd. at their cost figure to that company of £1,029,958 15*s*. 4*d*. The Stock Exchange quotations for the same assets on the same day aggregated the sum of £363,173 2*s*. 11*d*.

A list showing how these figures are made up is attached hereto, marked " D ", and may be referred to as part of this Case(1). The expressions " market value " and " book value " thereon mean respectively the Stock Exchange prices on 15th June, 1932 (or in some cases, 31st March, 1933), and the original cost price to the Zevo Syndicate, Ltd.

The balance sheet of the Respondent Company at 15th June, 1932, was according to the books as follows:—

	£	s.	d.		£	s.	d.
Share Capital ...	620,030	0	0	Investments ...	1,029,958	15	4
Debentures ...	400,000	0	0				
Liquidator of Zevo Finance Syndicate, Ltd.	9,928	15	4				
	1,029,958	15	4		1,029,958	15	4

12. The balance sheet and profit and loss account of the Respondent Company for the period ended 31st March, 1933, by debiting investments at cost showed a loss of £80,502 13*s*. 11*d*. This was on the basis that the said investments cost £1,029,958 15*s*. 4*d*. The Inland Revenue produced a list of the holdings disposed of in the accounting period to 31st March, 1933, which list by comparing the amounts realised with the approximate market value in June, 1932, purported to show a total profit of £31,729.

Copies of the said balance sheet and of the said list of holdings are attached hereto, marked " E " and " F ", respectively, and may be referred to as part of this Case(1).

13. Mr. Louis Henry Weatherley, liquidator of Zevo Syndicate, Ltd., was called as a witness and confirmed that the shareholdings in the Respondent Company were arranged so as to keep the interests of Sir Otto Beit's family in the assets of Zevo Syndicate, Ltd. unaltered by the reconstruction. He agreed that the Stock Exchange prices on 15th June, 1932, of the investments bought as aforesaid by the Respondent Company were less than their original cost price to Zevo Syndicate, Ltd.

14. The Respondent Company proffered evidence to the effect that it was well known in the City that the executors of Sir Otto Beit held large interests in African concerns, that they and Sir Otto's family were connected with the Respondent Company and its predecessor, Zevo Syndicate, Ltd., and that had the Respondent Company attempted to purchase on the Stock Exchange the holdings in concerns operating in Africa or being interested in African enter-

(1) Not included in the present print.

prises which it in fact purchased from Zevo Syndicate, Ltd. as aforesaid the Stock Exchange prices would have risen against the Respondent Company. It was not possible to say by how much. The Appellant however did not dispute this, and the fact was within the Commissioners' own knowledge.

15. The question for the Commissioners was that of the right figure to debit as the cost to the Respondent Company of the investments aforesaid when computing its profits for the year of assessment under appeal, it being agreed that the Company was one which traded in investments. In respect of the said investments the Company had (*inter alia*) issued as fully paid shares to the par value of £620,030 as above described. The balance of the consideration was made up by the Respondent Company assuming liability for debts totalling £409,928 15*s*. 4*d*. This added to the £620,030 makes a total figure of £1,029,958 15*s*. 4*d*. The Respondent Company had debited this total figure in its accounts as the cost price of the investments acquired as aforesaid. The assessment under appeal was based however on the footing that the correct debit was £363,173 only, i.e., the market value of the said investments on the day of purchase according to the Stock Exchange prices.

16. On behalf of the Respondent Company it was contended as follows:—

(*a*) That in computing the profits of a trade the figure to be debited in respect of the purchase of stock-in-trade is the purchase price.

(*b*) That the purchase price of the investments which the Company bought was £1,029,958.

(*c*) That unless the transaction was colourable or fraudulent (which was not suggested) the investments in respect of which the Company agreed to issue as fully paid shares of a par value of £620,030 cost the Company that amount.

(*d*) That to treat such investments as having cost the Company something much less than that sum as the Revenue wished to do involved treating the said shares contrary to the agreement as only partly paid and confused the price of the investments to the Respondent Company with their alleged market value.

(*e*) That in any event the Stock Exchange prices did not in the circumstances of this case represent the true market value of the investments in question having regard to the circumstances mentioned in paragraph 14 above, and there was no evidence of what such true market value was.

(*f*) That it was wrong to ignore the fact that part of the consideration given for the shares was the assumption of debts totalling £409,928.

(*g*) That the proper amount to be debited as the price of the investments in question was £1,029,958.

The following cases were referred to:

Pell's case (1869), 5 Ch. App. 11.

In re *Wragg, Ltd.,* [1897] 1 Ch. 796.

Fothergill's case (1873), 8 Ch. App. 270.

17. It was contended on behalf of the Inspector of Taxes:—

(*a*) That in computing the profits of a trade the figure to be debited in respect of the purchase of stock-in-trade is the cost thereof.

(*b*) That the cost to the Respondent Company of the property transferred to it was not £1,029,958.

(*c*) That the consideration given by Zevo Syndicate, Ltd. to the Respondent Company was illusory in so far as it was represented as being of the value of

£1,029,958 and was at the most of no greater value than £363,173, as appears from paragraph 11 hereof.

(*d*) That the proper amount to be debited as the cost to the Respondent Company of the investments in question was £363,173 at the most.

The cases of:

In re *White Star Line, Ltd.*, [1938] Ch. 458, and
Commissioner for Stamp Duties v. *Broken Hill South Extended, Ltd.*, [1911] A.C. 439,

were referred to.

The Commissioners allowed the appeal.

The Inspector of Taxes thereupon expressed dissatisfaction with the finding of the Commissioners as being erroneous in point of law and required us to state a Case for the opinion of the High Court of Justice which we have stated and do sign accordingly.

JOHN PAKEMAN.
CECIL LUBBOCK.
FRANCIS J. F. EDLMANN.
G. F. HOTBLACK.
ALAN GEOFFREY HOTHAM.

W. W. LEUCHARS, Clerk to the Commissioners of Taxes.
23rd March, 1942.

The case came before Macnaghten, J., in the King's Bench Division on 21st and 22nd January, 1943, when judgment was reserved. On 26th January, 1943, judgment was given against the Crown, with costs.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., and Mr. Terence Donovan for the Respondent Company.

JUDGMENT

Macnaghten, J.—This is an appeal by the Crown against the decision of the General Commissioners for the City of London, discharging an assessment to Income Tax under Schedule D made upon the Respondent, Zevo Finance Co., Ltd., for the year ended 5th April, 1934, in the estimated sum of £10,000.

The Respondent, Zevo Finance Co., Ltd., was incorporated on 31st May, 1932, under the Companies Act, 1929, as a private company limited by shares, with a capital of £620,030, divided into 30 shares of £1 each and 620 shares of £1,000 each. The Company was formed with the object of carrying on the business of dealing in investments theretofore carried on by a company called Zevo Syndicate, Ltd. With that object in view, the Respondent purchased from the Zevo Syndicate, Ltd. a large number of its investments for the consideration set out in an agreement made between the two companies dated 15th June, 1932. The investments thus acquired by the Respondent formed part of the investments which had formerly belonged to the late Sir Otto Beit and had been sold by him to the Zevo Syndicate, Ltd. in 1927 at their then market price. Sir Otto Beit and his family were the beneficial owners of all the shares and debentures of the Zevo Syndicate, Ltd., which was, for Income Tax purposes, assessed as carrying on the business of dealing in investments. Sir Otto Beit died in 1930, and the Case states that before his death the company's investments had seriously depreciated in value and that for the years 1930–31 and 1931–32 its losses were computed for Income Tax purposes at no less than £1,117,777. I take it that the statement that the investments had depreciated in value means that they had depreciated according to the prices ruling on the London Stock Exchange, for no other measure-

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ment of value has been suggested. Against those losses the company obtained relief under Section 34 of the Income Tax Act, 1918, to the extent of £386,645. The balance of the losses, £731,132, was carried forward and would have been set off for Income Tax purposes against any future profits in the next six years if the company had continued to carry on business; but at an extraordinary general meeting held on 21st December, 1931, a special resolution was passed for the voluntary winding up of the company and a liquidator was appointed. The winding up was for the purpose of the reconstruction of the company, and the reconstruction was carried out by the formation of two new companies, namely, the Respondent and another company called the Zevo Trust, Ltd.; and by the transfer of the more or less speculative investments of the Zevo Syndicate, Ltd., to the Respondent and the transfer of the investments described in the Case as the " sounder investments " to the Zevo Trust, Ltd.

The investments transferred to the Respondent were sold at the prices at which they then stood in the books of the Zevo Syndicate Company, amounting to £1,029,958 15*s*. 4*d*., and, in accordance with the agreement of 15th June, 1932, this consideration was satisfied by the Respondent undertaking to discharge the liability of the Zevo Syndicate, Ltd. in respect of debentures for £400,000 and the interest due thereon, amounting to £9,928 15*s*. 4*d*., and by the issue of the whole of its authorised capital, £620,030, with the shares credited as fully paid.

The Respondent is an investment dealing company. It has since its formation carried on the business of dealing in investments, and the investments taken over from the Zevo Syndicate, Ltd. were its original " stock-in-" trade ". The assessment which the Commissioners discharged was made on the footing that the Respondent had made profits from the carrying on of that business. The question whether it had made any profits depends on the value which ought to be placed on the investments it had bought from Zevo Syndicate, Ltd. It was admitted that if those investments were valued at the price which the Company agreed to pay for them, no profits had been made; but before the Commissioners it was contended that, since at that date, according to the prices quoted on the London Stock Exchange, the value of the investments when the Respondent acquired them amounted to no more than £363,173, they ought to be valued for the purpose of computing the profits of the Respondent for the purposes of Income Tax at that figure. The Commissioners found as a fact that the Respondent could not have bought the investments on the London Stock Exchange for that sum and that it was impossible to say how much it would have cost if the Respondent had set out to buy the investments on the Stock Exchange, and they accordingly discharged the assessment.

At the hearing of the appeal the Solicitor-General abandoned the contention that the investments should be valued at the price at which they could have been bought on 15th June, 1932, on the London Stock Exchange, but he submitted that the case should be sent back to the Commissioners with a direction that they ought to ascertain what was the real value of the investments when the Company took them over and, since the disparity between the price at which the Respondent took over the investments and the Stock Exchange quotations was so great, this value must have been very much less than the price at which they were taken over.

I do not think that this conclusion necessarily follows. The price at which a share is quoted on the Stock Exchange may turn out to be very much greater or very much less than its real value, and the investments in question are described in the Case as speculative. Moreover, a voluntary sale imports a willingness on the part of the vendor to sell and of the purchaser to buy,

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and the vendor may insist on an extravagant price and the purchaser may be willing to pay it.

But the short answer to the contention put forward on behalf of the Crown is that made by Mr. Tucker, that the question of the value of stock-in-trade is a question of fact and not a question of law, and on that ground alone this appeal must fail.

I would only add this, that the contention of the Crown amounts to an allegation that the Respondent issued shares at a discount and I do not see how, in the absence of fraud, such an allegation could be sustained in a case where a company took over property at the value which was properly placed upon it by the vendor.

I think the appeal must be dismissed with costs.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Greene, M.R., and MacKinnon and Luxmoore, L.JJ.) on 6th and 7th March, 1944, when judgment was reserved. On 2nd May, 1944, judgment was given against the Crown (Luxmoore, L.J., dissenting), with costs, confirming the decision of the Court below.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., and Mr. Terence Donovan for the Respondent Company.

JUDGMENT

Lord Greene, M.R.—The Zevo Syndicate, Ltd. (which I will call "the "Syndicate") went into voluntary liquidation with a view to a reconstruction on 21st December, 1931. Its issued capital at that date was £1,600,000, divided into £60,000 in 25 per cent. preference shares, £40,000 in ordinary shares and £1,500,000 in deferred shares, all fully paid. Of this capital the preference shares and the deferred shares were held in equal proportions by Sir Alfred Beit, Mrs. Bull, and Miss Lilian Muriel Beit, while the ordinary shares were held by the executors of the late Sir Otto Beit. There were outstanding at the date of the liquidation second debentures amounting to £400,000.

The business of the Syndicate was that of dealing in investments, and it was assessed to Income Tax on that basis. Its assets consisted of a large number of investments of various kinds, a considerable proportion being of a more or less speculative character. All these investments were carried in the books of the Syndicate at cost. Both before and after the death of Sir Otto Beit in the year 1930, serious depreciation had taken place in the value of the investments held by the Syndicate. For the years 1930–31 and 1931–32 the losses of the Syndicate attributable, as I understand it, to the depreciation were computed for Income Tax purposes at £1,117,777; and it obtained relief under Section 34 of the Income Tax Act, 1918, to the extent of tax on £386,645. The balance, namely, £731,132, was carried forward and, if the Syndicate had not gone into liquidation, would have been set off for tax purposes against its future profits for the next six years. There is no finding as to what part of this loss was attributable to the investments purchased by the Respondents on the reconstruction.

The reconstruction contemplated by the winding up resolution was effected in the following manner. Two new companies were formed, Zevo Trust, Ltd. (which I will call "the Trust Company") and the Respondents, Zevo Finance Co., Ltd. The aggregate capital of the two companies was, for practical

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purposes, the same as that of the Syndicate (namely, £1,600,030 for the new companies as against £1,600,000 for the Syndicate). In the case of each of the new companies the capital was divided into preference, ordinary and deferred shares, and amounted in the case of the Trust Company to £980,000 and in the case of the Respondents to £620,030. The capital of the Trust Company was divided into £60,000 in 25 per cent. preference shares, £20,000 in ordinary shares and £900,000 in deferred shares; while that of the Respondents was divided into £30 in 25 per cent. preference shares, £20,000 in ordinary shares and £600,000 in deferred shares. The preference and deferred shares in each of the new companies were allotted equally between Sir Alfred Beit, Mrs. Bull and Miss Beit; while the ordinary shares of both companies were allotted to the executors of Sir Otto Beit. The result was that Sir Alfred Beit, Mrs. Bull and Miss Beit each received £20,000 in preference shares in the Trust Company and £10 in preference shares in the Respondents in place of their holdings of £20,000 each in preference shares in the Syndicate; and £300,000 in deferred shares in the Trust Company and £200,000 in deferred shares in the Respondents in place of their holdings of £500,000 each in deferred shares in the Syndicate. Similarly, the executors received £20,000 in ordinary shares of the Trust Company and £20,000 in ordinary shares of the Respondents in place of their holding of £40,000 in ordinary shares of the Syndicate. As the liquidator said in his evidence before the Commissioners, the shareholdings in the Respondents (and the observation was obviously true as to both the new companies) were arranged so as to keep the interests of Sir Otto Beit's family in the assets of the Syndicate unaltered by the reconstruction. It does not appear to me that the finding has anything to do with the method of fixing the purchase price; it is only concerned with the distribution among the shareholders.

The Trust Company, which is to operate as an investment holding company, took over the sounder investments of the Syndicate and assumed all the liabilities of the Syndicate other than those in respect of the £400,000 second debentures of the Syndicate and the interest thereon as from 1st January, 1932. The Respondents took over the more speculative investments, which stood in the books of the Syndicate at their cost value of £1,029,958 15*s.* 4*d.* The relevant agreement in the case of the Respondents (with which alone we are directly concerned) provided—(by clause 1) that the Syndicate should "sell" and the Respondents should "purchase" these investments; (by clause 2) that as part of the "consideration for the said sale" the Respondents should undertake to discharge the liability of the Syndicate on the £400,000 debentures and interest from 1st January, 1932; (by clause 3) that "as the residue of the "consideration" the allotments of fully paid shares in the Respondents to the shareholders of the Syndicate should be made as above stated; (by clause 4) that dissentient shareholders should have the rights reserved to them by Section 234 of the Companies Act, 1929, and that the Respondents should be entitled to rescind the agreement if the liquidator had to purchase the interests of members of the Syndicate amounting to £1,000 or upwards.

The liability in respect of interest on the debentures was adjusted at the figure of £9,928 15*s.* 4*d.*; and the first balance sheet of the Respondents as at 15th June, 1932, accordingly stood as follows: share capital £620,030, debentures £400,000, liquidator of Zevo Finance Syndicate, Ltd., £9,928 15*s.* 4*d.*; making a total of £1,029,958 15*s.* 4*d.*; and on the other side, investments £1,029,958 15*s.* 4*d.*

It is to be observed at the outset that there is nothing whatever unusual about the scheme of reconstruction thus carried into effect. It was the obvious way of bringing about the desired result of segregating the sounder investments

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from those which were more speculative and placing the former in the hands of a holding company and the latter in the hands of a trading company, which could sell and buy when favourable opportunities offered. There is no question of any impropriety from any point of view; nor is it suggested that it was in any way colourable or a device to circumvent the Revenue, or anybody else.

The question raised by this appeal relates to the basis upon which the investments acquired by the Respondents should be valued for Income Tax purposes. Having regard to the nature of the Respondent's business, these investments are to be regarded as their stock-in-trade; and the question what value should be placed upon them as an opening figure is of importance alike to the Respondents and to the Revenue. On the basis of the value adopted for the purposes of the reconstruction, namely, £1,029,958 15*s.* 4*d.*, the result of the Respondent's trading for the period ended 31st March, 1933, showed a loss of over £80,000. On the basis contended for on behalf of the Crown before the Commissioners, the trading results would show a profit of over £31,000. In order to raise the point, an assessment was made on the Respondents for the year ended 5th April, 1934, in the estimated sum of £10,000, and it was against this assessment that the Respondents appealed to the General Commissioners for the City of London. The Commissioners allowed the appeal, and their decision was affirmed by Macnaghten, J.

It was common ground before the Commissioners that the transaction by which the Respondents acquired the shares was one of sale and purchase and that the proper figure to be debited in respect of the investments was the cost thereof to the Respondents. The sole question propounded for the decision of the Commissioners was, as stated in paragraph 15 of the Case, what was the right figure to debit as the cost. On behalf of the Respondents it was contended that this figure must be the price which they paid, namely, £1,029,958, made up as to part of the liability on the debentures which they took over, and as to the residue by the issue of fully paid shares. The Crown's argument proceeded on an entirely different basis. A list was produced which purported to show the market values of the investments at the date of acquisition by the Respondents (15th June, 1932) or, where no prices were available for that date, the price at 31st March, 1933, nine months later. The aggregate values so ascertained amounted to £363,173; and it was contended that this figure, at the most, ought to be treated as the cost to the Respondents of the investments which they had purchased.

The argument as it was developed before us by the Solicitor-General proceeded on the following lines. He began with the proposition that the value of the investments must be taken as having been at the most £363,173. The £620,000 shares allotted to the shareholders of the Syndicate must, he argued, be regarded as a payment in kind; payments in kind must be valued at their money value; accordingly, the shares were issued at a discount, the shareholders are liable to pay the amount of the discount to the Respondents, and the cost to the Respondents, accordingly, was not more than £363,173. This argument, as originally presented by the Solicitor-General, ignored the liability undertaken by the Respondents in respect of the debentures; and in the end he agreed that the cost of the investments must be placed at the lowest at the nominal amount of this liability. The result, of course, is that on his argument the shares must be taken to have been issued for no consideration and the shareholders remain liable to pay up their nominal amount in full.

This argument is met at the outset by an insuperable difficulty of tact, for the Crown entirely failed to prove by how much, if at all, the value of the

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investments fell short of the sum of £1,029,958. The case of the Crown, and the only case before the Commissioners, was that the value must be ascertained by reference to the Stock Exchange quotations on which the list above referred to was based. The Commissioners refused to accept this basis of valuation, and found that it was impossible to say how much prices would have risen against the Respondents if they had attempted to purchase these investments in the market. Published market quotations, which often relate to quite small and isolated transactions, are notoriously no guide to the value of investments of this character, particularly when the amounts involved are large. The Crown, therefore, failed before the Commissioners to establish the only measure of value for which it was contending. It was, however, suggested that this difficulty could be avoided by sending the matter back to the Commissioners, so as to give the Crown an opportunity of setting up a different measure of value supported by different evidence. Even assuming that this was the only difficulty in the way of the Crown's argument, it would not, in my opinion, have been proper to take this course. The Crown failed in its contention on a matter of fact and it must abide by the result: it would be contrary to all principle to give it another chance to establish by fresh and different evidence a quite different contention which, if it was desired to rely upon it, ought to have been advanced in the first instance. Our task is to deal with the case on the basis of the facts as found by the Commissioners upon the submissions made to them, and on this basis the value of the investments has not been established.

But the argument of the Solicitor-General is open to a fatal criticism of a different character altogether. It is founded on, or necessarily leads to, the proposition that the shares were issued at a discount. This seems to me an impossible contention. First of all, upon the facts as found by the Commissioners, it is impossible even to say that the consideration for which the Respondents acquired the investments—namely, £409,928 in respect of the debentures and the allotment of shares amounting to £620,630—exceeded in nominal amount the real value of the investments. But what is even more conclusive is that on no possible view can the shares be regarded as having been issued otherwise than as fully paid. The agreement of 15th June, 1932, in terms provides that the shares should be allotted to the shareholders of the Syndicate as fully paid. It was on these terms, and these terms alone, that they were accepted by the shareholders: they clearly could not have been accepted and the reconstruction scheme could never have been carried through, if the shares had been allotted as partly paid. The terms on which the Syndicate and its liquidator agreed to part with these investments were (1) that the Respondents should take over the liability on the debentures; (2) that the Respondents should issue fully paid shares to the shareholders of the Syndicate. It was with these terms and none other that the Respondents had to comply in order to acquire the investments. By no possible means can this arrangement be varied so as to leave the shareholders with shares on which only part of the nominal amount (or indeed nothing) is to be treated as having been paid.

The fallacy, if I may respectfully so call it, which underlies the argument is to be found in the assertion that where a company issues its own shares as consideration for the acquisition of property, these shares are to be treated as money's worth as though they were shares in another company altogether, transferred by way of consideration for the acquisition. This proposition amounts to saying that consideration in the form of fully paid shares allotted by a company must be treated as being of the value of the shares, no more and no less. Such a contention will not bear a moment's examination where the transaction is a straightforward one and not a mere device for issuing

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shares at a discount. In the everyday case of reconstruction, the shares in the new company allotted to the shareholders of the old company as fully paid will often, if not in most cases, fetch substantially less than their nominal value if sold in the market. But this does not mean that they are to be treated as having been issued at a discount, or that the price paid by the new company for the assets which it acquires from the old company ought to be treated as something less than the nominal value of the fully paid shares. The Crown in this case is in fact attempting to depart from the rule (the correctness of which it itself admits) that the figure at which stock-in-trade is to be brought in is its cost to the trader and substitute the alleged market value of the stock for its cost. Of course, in a case where stock which a company proposes to acquire for shares is deliberately overvalued for the purpose of issuing an inflated amount of share capital, very different considerations apply. But nothing of the kind is present in this case which, as I have already pointed out, is a perfectly proper and normal reconstruction. The propriety of the course adopted is manifest when the uncertainty as to the value of the investments, which is pointed out by the Commissioners, is borne in mind. It is, I think, true as a general proposition that where a company acquires property for fully paid shares of its own, the price paid by the company is, *prima facie,* the nominal value of the shares. It is for those who assert the contrary to establish it, as could be done, for example, in the suggested case of a deliberately inflated valuation. In the present case the Crown has failed to establish the contrary on the facts as found, and there is no justification for the proposition that, on these facts, the Commissioners were bound in law to decide the appeal in favour of the Crown.

This, then, was the argument advanced by the Solicitor-General, and these, in my opinion, are the reasons for rejecting it. But Mr. Stamp presented to us an argument of a totally different character, and one which was not presented either before the Commissioners or before Macnaghten, J. In the course of the discussion a question was addressed to Counsel by the Bench as to whether, in the case of assets acquired on a reconstruction, the transaction ought to be regarded as one of sale and purchase at all. This suggestion was taken up by Mr. Stamp and embodied in a very subtle and ingenious argument. I do not think that he ought to have been allowed to do this. No such argument had been suggested below, and it was based on propositions directly contrary to those accepted by his leader. Moreover, it was based on an assumption of fact as to which there was no finding by the Commissioners, for the simple reason that no such point was taken before them. This assumption was, that there was no element of bargaining between the Respondents and the liquidator of the Syndicate. This may well have been so. But it is not so found in the Stated Case, nor was any evidence directed to the point, because it was not relevant to the Crown's case; and I do not see that we should be justified in assuming it merely in order to allow the Crown to present an entirely new argument, which is in fact an afterthought. But be this as it may, the argument which I shall now proceed to summarise is, in my opinion, ill-founded. Before doing so I should, perhaps, point out one more reason for thinking that the argument ought not to be allowed. The case for the Crown before the Commissioners was based on the acceptance of the view that the transaction was one of sale and purchase and on the proposition that the proper figure to take was the cost of the investments to the Respondents. It was conceded that they cost the Respondents something. The only controversy was as to what the real cost was. The Crown contended that it could not be put at a higher figure than the alleged value of the investments, the theory being that the shares were, in the circumstances, issued at a discount. But as will be seen Mr. Stamp's argument rejects the

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whole basis of cost, and asserts that the transaction was not (as the Crown before the Commissioners agreed and the Commissioners found it was) one of sale and purchase, that there was no such thing as cost, that the investments cost the Respondents exactly nothing and that a different basis to that of cost must, therefore, be adopted.

The argument was opened with an analogy. The case was taken of a trader who receives by way of legacy an article of a kind in which he deals and brings it into his trading stock. In such a case, it was said, the value at which for Income Tax purposes the article must be brought in is its market value—presumably what it would cost to buy in the wholesale market. The reason for this was that, the article not having been acquired at any cost to the trader, some basis other than cost must be taken and the only possible basis would be that of market value. The argument then proceeded to assert that a reconstruction such as that now in question is in substance merely a private transaction between shareholders in which no element of bargaining or valuation is present; that there is no contract of sale; that what purports to be the price paid by the new company is no price at all; that the new company must be treated as having paid nothing for the investments; that a basis of valuation other than cost must, therefore, be looked for, and that the only basis which can be accepted is that of market value.

I am not concerned to dispute the correctness of the principle advanced by Mr. Stamp in connection with his analogous case. But I am bound to say, with all respect to the ingenuity of its inventor, that this analogy is as misleading as any analogy that I have heard. It seems to me quite impossible to say that there is any analogy to be found between the case where a trader acquires a piece of stock-in-trade for nothing and the case where a company acquires its stock-in-trade upon the terms of a contract under which it provides consideration. The argument, so far as it deals with the facts of the present case, is, as it appears to me, nothing but an attempt to revive the " supposed " doctrine " of substance and form. That argument, one had hoped, had been decently interred by the decision in *Commissioners of Inland Revenue* v. *Duke of Westminster,* [1936] A.C.1; 19 T.C. 490. But its ghost still walks on occasions, and this, it appears to me, is one of them. As Lord Tomlin said in the *Duke of Westminster's* case, " the substance is that which results " from the legal rights and obligations of the parties ascertained upon ordinary " legal principles " ([1936] A.C., at page 20; 19 T.C., at page 521). What then was the substance of the transaction under which the Respondents acquired these investments? First of all they acquired them by virtue of a contract of sale and purchase the validity of which, as importing legal rights and obligations between the parties to it, cannot be impugned, and (until Mr. Stamp's argument was presented in this Court) had always been accepted by the Crown. If the contract had been broken by either of the parties, it could have been enforced in the usual way by the other. There can be no possible question as to this. The contract is described in clause 1 as a contract of sale and purchase. It is a contract under which the Respondents acquired the investments in consideration of their undertaking to the Syndicate and its liquidator to assume the liability on the debentures and to issue the fully paid shares. These were the rights and obligations imported by the contract. Their legal effect is beyond dispute. By what process of reasoning they are to be disregarded and treated as non-existent I am at a loss to understand. The Respondents did in fact, as they were bound to do, take over the liability and issue the shares. It was on these terms, and these terms alone, that they acquired the investments. The carrying out of these terms was in law the price which they paid for the investments, and it seems to me quite impossible to accept the view upon which Mr. Stamp's whole argument was based that

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they must be taken as having acquired the investments in a manner which was not in law contractual and for no consideration at all. Mr. Stamp went so far as to say that not even the liability undertaken in respect of the debentures ought to be regarded as an item of cost, contrary to the position accepted by the Solicitor-General. This is the " supposed doctrine " of substance with a vengeance.

When asked whether it was the practice of the Crown to apply the principle for which he contended to all cases where on a reconstruction a new company acquires stock-in-trade against an issue of fully paid shares, Mr. Stamp replied that it was not. I am not surprised. Reconstructions would be seriously impeded if it were. But in the present case Mr. Stamp contended that his argument was justified by the fact that, if it were wrong, the Respondents would gain certain advantages which had already been granted to the Syndicate in respect of the depreciation of the assets of the Syndicate in past years. He was referring to the relief given under Section 34 of the Income Tax Act, 1918, which I have already mentioned earlier in this judgment. This seems to me to be quite irrelevant. The Respondents are a new entity and their position cannot be affected for better or for worse by the fiscal history of the Syndicate from which they acquired their assets. Indeed, to say that the fiscal position of the Syndicate ought in some way to be taken over by the Respondents is merely another example of the " substance " argument. It is not even consistent; for while asserting that the Revenue is entitled to insist on the Respondents writing down their assets to an alleged (but, be it observed, wholly unproved) value, Mr. Stamp maintained with equal vigour (and this time correctly) that the Respondents are not entitled to take over any part of the benefit of the depreciation which was carried forward for the relief of the Syndicate during the six ensuing years. It is no doubt unfortunate from the point of view of the Revenue; but the result, as it seems to me, flows inevitably from the facts (*a*) that the Respondents are a different fiscal entity from the Syndicate, and (*b*) that they acquired the investments under a bona fide and unchallengeable contract. The consideration provided by the Respondents for the purpose of that acquisition was a genuine consideration, and the Crown's attempt to attack it fails, in my opinion, both on the facts and on the law.

I would dismiss the appeal.

MacKinnon, L.J.—I agree with the conclusion arrived at by the Master of the Rolls, and I do not desire to elaborate or repeat the reasons that he has given for that conclusion. I have now to read the judgment of Luxmoore, L.J.

Luxmoore, L.J. (read by MacKinnon, L.J.).—I find myself unable to agree with the conclusion arrived at in the judgment which has been read and which I have had the opportunity of considering.

The question to be determined is whether an assessment to Income Tax under Schedule D made upon the Zevo Finance Co., Ltd. (hereinafter called " the Finance Company ") for the year ending 5th April, 1934, in an estimated sum of £10,000 ought to be upheld. It was discharged by the General Commissioners for the City of London, and on the Crown's appeal from this decision Macnaghten, J., affirmed the discharge and dismissed the appeal.

It is necessary to state the facts set out in the Case Stated with some particularity. They are as follows. In 1927 the late Sir Otto Beit caused to be incorporated a company under the name Zevo Syndicate, Ltd. (hereinafter called " the Syndicate "). This was a private company. It was formed to take over a number of investments belonging to Sir Otto Beit at their respective market values at the date of incorporation. The capital of

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the Syndicate was £1,600,000 divided into 60 cumulative 25 per cent. preference shares of £1,000 each, 40 ordinary shares of £1,000 each and 1,500 deferred shares of £1,000 each. In addition to the share capital the Syndicate issued first and second debentures, the latter being for a total sum of £400,000.

Sir Otto Beit died in 1930 leaving an estate valued for probate at approximately £5,000,000. Of this about £3,000,000 was represented by shares and debentures in the Syndicate. Before his death the investments belonging to the Syndicate had depreciated greatly in value and such depreciation continued after his death to such an extent that his executors were unable to pay in full the bequests made by his will.

The Syndicate had always been assessed for Income Tax as carrying on the trade of dealing in investments. For the tax years 1930–31 and 1931–32 the losses of the Syndicate were computed at an aggregate sum of £1,117,777, and the Syndicate obtained relief under Section 34 of the Income Tax Act, 1918, to the extent of tax on £386,645, leaving the balance of the loss, viz., £731,132, to be carried forward and available to be set off for Income Tax purposes against future profits to be earned during the next six years.

Owing to these losses the shareholders in the Syndicate decided to reconstruct the Syndicate so that an assured income could be paid to Sir Otto Beit's widow. The reconstruction was carried out by incorporating two new companies, one of which is Zevo Trust, Ltd. (hereinafter called " the Trust " Company ") and the other is the Finance Company. It was a term of the arrangement that the Trust Company should take over what are described in the Case Stated as the sounder investments held by the Syndicate and should be an investment holding company, while the Finance Company should take over the more speculative investments and should be an investment dealing company. To carry into effect these proposals it was resolved to wind up the Syndicate voluntarily, Mr. Louis Henry Weatherley being appointed liquidator. In due course the Trust Company and the Finance Company were incorporated. The capital of the Trust Company was £980,000 and that of the Finance Company was £620,030; the last-mentioned capital being constituted as follows:—30 cumulative 25 per cent. preference shares of £1 each, 20 ordinary shares of £1,000 each and 600 deferred shares of £1,000 each. The whole of the shares in the Syndicate at the date of its reconstruction were held as to the 60 preference shares by the three children of Sir Otto Beit, viz., Sir Alfred Beit, Mrs. Bull and Miss Beit, in equal shares; as to the ordinary shares by the executors of Sir Otto Beit, and as to the 1,500 deferred shares by Sir Otto Beit's three children in equal shares. The reconstruction was carried into effect by two agreements each dated 15th June, 1932. These agreements provide for the transfer by the Syndicate to the Trust Company and the Finance Company, respectively, of the whole of the assets and liabilities of the Syndicate in return for the allotment credited as fully paid of the whole of the capital of each of the two last-named companies. The Finance Company duly acquired the more speculative investments of the Syndicate and took over the liability of the Syndicate to the executors of Sir Otto Beit in respect of the second debentures of the Syndicate, securing £400,000 and the interest thereon then accrued due, viz., £9,928 15*s*. 4*d*.; and issued to the shareholders in the Finance Company, who were also the sole shareholders in the Syndicate, the whole of the authorised capital of the Finance Company, viz., £620,030, in accordance with their respective holdings in the Syndicate.

The total value of the shares taken over by the Finance Company, computed in accordance with the values at which they stood in the books of the Syndicate, was £1,029,958 15*s*. 4*d*. This was not fixed as the purchase

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price as between independent vendors and independent purchasers but, as is found by the General Commissioners, was fixed for the purpose of convenience on the transfer of the investments and liabilities of the Syndicate to the Finance Company, and in order to keep the interest of Sir Otto Beit's executors and family (i.e., the sole shareholders in the three companies) in the assets of the Syndicate unaltered by the reconstruction. The General Commissioners also found that the investments transferred, or to be transferred, by the Syndicate to the Finance Company stood in the books of the Syndicate on 15th June, 1932, at the aggregate sum of £1,029,958 15*s*. 4*d*., which sum coincides with the aggregate nominal value of the Finance Company's issued share capital and the liabilities taken over in respect of the second debentures issued by the Syndicate and the interest due thereon, viz., £400,000 and £9,928 15*s*. 4*d*., respectively. In this connection, it must be borne in mind that the values of the Syndicate's investments, including those transferred to the Finance Company, are found by the Case to have fallen in value in the tax years 1930–31 and 1931–32 by a total sum of £1,117,777. Taking into account the set off allowed for these years, as already mentioned, it would appear that a substantial part of the outstanding loss of £731,132 carried forward was attributable when the reconstruction took place to the speculative investments which were transferred to the Finance Company. It is said that the fact that the agreements for reconstruction are in form agreements for sale and purchase prevents any question being raised as to the adequacy of the so-called purchase consideration. In my judgment this is not the correct view. The subject-matter of the agreements of 15th June, 1932, was a reconstruction of the Syndicate.

The Court in this case is only concerned with the agreement of 15th June, 1932, between the Syndicate and the Finance Company. In my judgment this agreement cannot be treated as if it were a sale agreement between an independent vendor and an independent purchaser. The avowed object of the agreement is a reconstruction of the Syndicate. Buckley, J., pointed out the difference between what he calls a mere sale and a reconstruction in In re *South African Supply and Cold Storage Company, Wild* v. *The Company,* [1904] 2 Ch. 268, at page 286, where he says: "What does 'reconstruction' "mean? To my mind it means this. An undertaking of some definite kind "is being carried on, and the conclusion is arrived at that it is not desirable "to kill that undertaking, but that it is desirable to preserve it in some form, "and to do so, not by selling it to an outsider who shall carry it on—that "would be a mere sale—but in some altered form to continue the undertaking "in such a manner as that the persons now carrying it on will substantially "continue to carry it on. It involves, I think, that substantially the same "business shall be carried on and substantially the same persons shall carry "it on. But it does not involve that all the assets shall pass to the new "company or resuscitated company, or that all the shareholders of the old "company shall be shareholders in the new company or resuscitated company. "Substantially the business and the persons interested must be the same."

In the present case the whole of the assets and liabilities of the Syndicate have been transferred to the Trust Company and the Finance Company, the Finance Company taking the part of the assets which are more suited to its objects and assuming liability only for the second debentures. The shareholders in the Finance Company have precisely the same beneficial interest in the investments taken over by the Finance Company as they in fact had as shareholders in the Syndicate. The General Commissioners have found that the so-called purchase price was not fixed with reference to the value of the assets taken over, for in paragraph 13 of the Case it is stated that

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" the shareholdings in the Respondent Company were arranged so as to keep " the interests of Sir Otto Beit's family in the assets of Zevo Syndicate, Ltd. " unaltered by the reconstruction." This must be read in conjunction with the other material findings, viz., that the original cost to the Syndicate of the assets taken over by the Finance Company was £1,029,958 15*s*. 4*d*., which was also their market value at the date when they were acquired by the Syndicate, and that on the date when the reconstruction agreements were entered into those assets stood at the same price in the books of the Syndicate, although the losses of the Syndicate, agreed for Income Tax purposes, for which no relief had been obtained, amounted to £731,132, a sum which may, I think, be not unfairly contrasted with the difference beween the book value of the assets transferred and their market value on 15th June, 1932. It seems reasonably clear that the so-called purchase price of £1,029,958 15*s*. 4*d*. must be far in excess of the commercial value of the assets transferred, and that if the transfer of those assets had been made by a promoter to the company promoted by him for fully paid shares to the nominal value of £1,029,958, the consideration would, I think, undoubtedly have been held to be illusory. In this connection I would call attention to a passage from the judgment of Vaughan Williams, J., in *Chapman's* case, [1895] 1 Ch. 771, at page 774: " When one has to consider what is payment, " it is plain that the moment the shareholder is relieved from the obligation " of paying in cash, he may pay in goods, or in things without a physical " existence, such as a goodwill or a licence. But the cases decide that a man " must really pay for the shares, and further, that if the contract makes it " manifest on its face that the taker of shares is paying less than their nominal " cash value, he may be liable for the balance. I do not think the cases go " further than that. They do not say that the Court can take each contract " and say whether the price given was fair and reasonable, or whether the " thing given for the shares had a cash value in the market equal to the " nominal value of the shares . . . . But if the consideration is illusory, or " if it permits an obvious money measure to be made showing that discount " was allowed, or if the shares are openly issued at a discount, the mere " fact that the contract has been filed will not put the allottee in a position to " relieve himself from the payment which the Act of 1862 requires to be " made for the shares."

It is said that the so-called consideration in the present case cannot be treated as illusory because the shareholders would not, or might not, have agreed to the construction except on the basis of receiving fully paid shares; but the shareholders in the present case were responsible for the reconstruction with knowledge of the facts and brought it about because of the losses caused to the Syndicate by the fall in value of its assets.

It was argued that it was not permissible to take the market value on 15th June, 1932, of the assets to be transferred, viz., £363,173 2*s*. 11*d*., as the value for Income Tax purposes because, had the Finance Company attempted to purchase the assets concerned on the Stock Exchange, the price would have risen, owing to the personality of those interested in the Finance Company, and that this was a fact within the knowledge of the General Commissioners. But this argument neglects the other side of the picture, which I think must be equally within the knowledge of the General Commissioners, namely, that if it was known that the Syndicate was proposing to sell the same assets on the market, the prices would have fallen. Here the vendors and purchasers are in effect the same, for it is the shareholders in each case who effected the reconstruction.

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The findings of the Commissioners seem to me to support the view that the so-called consideration was not in reality a purchase price, and that the transaction was a transfer of assets and liabilities from the Syndicate to the Finance Company without reference to value. It is true that this point of view was not raised either before the Commissioners or on appeal from them to Macnaghten, J., but the question is one of law and on the findings of fact I see no adequate ground for refusing to consider it in this Court. In truth there is no practical difference in treating the transaction as a sale for an illusory consideration, or as a transfer of assets and liabilities without consideration. In the former case the Commissioners' findings leave but little doubt in my mind that the consideration was illusory and, therefore, for Income Tax purposes, the real value of the investments transferred to the Finance Company ought to be substituted for the so-called consideration. In the latter case there is no consideration and, for Income Tax purposes, the value of the assets transferred must be ascertained. The question remains how is this to be effected? Surely the practice of commerce and of accountants and the necessity of the case are the true criteria. If this be the correct view, the market value of the assets transferred is the only available basis. On either view, I think the contention of the Crown is correct and, consequently, the estimated assessment ought to be upheld.

For these reasons I would discharge the Order of Macnaghten, J., and allow the appeal, with costs here and below, restoring the estimated assessment.

Lord Greene, M.R.—In the result the appeal is dismissed with costs here and below.

Mr. Stamp.—I am instructed to apply to your Lordships for leave to appeal to the House of Lords in this case. It is a very large sum of money that is involved.

Lord Greene, M.R.—You can scarcely resist that, Mr. Donovan, can you?

Mr. Donovan.—I wish I could, but I feel I cannot in the circumstances.

Lord Greene, M.R.—You may have leave, Mr. Stamp.

Mr. Stamp.—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon and Lords Thankerton, Wright, Porter and Simonds) on 22nd, 23rd and 24th January, 1946, when judgment was reserved. On 22nd March, 1946, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

Sir Donald Somervell, K.C., Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., Mr. Terence Donovan, K.C., and Mr. L. C. Graham-Dixon for the Respondent Company.

JUDGMENT

Viscount Simon.—My Lords, this is the Crown's appeal from a decision of the Court of Appeal (Lord Greene, M.R., and MacKinnon and Luxmoore, L.JJ.) (Luxmoore, L.J., dissenting) affirming the judgment of Macnaghten, J., upon a Case stated by the Commissioners for the General Purposes of the

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Income Tax Acts for the City of London. The Commissioners had allowed the Respondent's appeal from an assessment made upon it under Schedule D for the year ended 5th April, 1934, in the estimated sum of £10,000. It seems regrettable that the Revenue authorities, who have been Appellants at every stage since the Commissioners' decision in March, 1942, should not have been able to get a final decision more promptly.

The question is as to the correct figure to debit as the cost of certain investments acquired by the Respondent, when computing for Income Tax purposes the profits of the Respondent's trade of dealing in investments for the first period of its trading life, namely, from 15th June, 1932, to 31st March, 1933. The Respondent has always contended for a figure of cost of £1,029,958 15*s*. 4*d*., and has throughout been upheld in this view. The Appellant contends for a figure of £363,173 2*s*. 11*d*.; in the Court of Appeal the alternative of £409,928 15*s*. 4*d*. was conceded.

The facts of the case appear from the Case Stated and the documents annexed to it. They cannot be summarized better than in the judgment of the Master of the Rolls, from which I take the following account(1).

" The Zevo Syndicate, Ltd. (which I will call ' the Syndicate ') went into " voluntary liquidation with a view to a reconstruction on 21st December, " 1931. Its issued capital at that date was £1,600,000, divided into £60,000 " in 25 per cent. preference shares, £40,000 in ordinary shares and £1,500,000 " in deferred shares, all fully paid. Of this capital the preference shares and " the deferred shares were held in equal proportions by Sir Alfred Beit, Mrs. " Bull, and Miss Lilian Muriel Beit, while the ordinary shares were held by " the executors of the late Sir Otto Beit. There were outstanding at the date " of the liquidation second debentures amounting to £400,000.

" The business of the Syndicate was that of dealing in investments, and " it was assessed to Income Tax on that basis. Its assets consisted of a large " number of investments of various kinds, a considerable proportion being " of a more or less speculative character. All these investments were carried " in the books of the Syndicate at cost. Both before and after the death of " Sir Otto Beit in the year 1930, serious depreciation had taken place in the " value of the investments held by the Syndicate. For the years 1930–31 " and 1931–32 the losses of the Syndicate attributable, as I understand it, to " the depreciation were computed for Income Tax purposes at £1,117,777; and " it obtained relief under Section 34 of the Income Tax Act, 1918, to the extent " of tax on £386,645. The balance, namely, £731,132, was carried forward " and, if the Syndicate had not gone into liquidation, would have been set off " for tax purposes against its future profits for the next six years. There is " no finding as to what part of this loss was attributable to the investments " purchased by the Respondents on the reconstruction.

" The reconstruction contemplated by the winding up resolution was " effected in the following manner. Two new companies were formed, Zevo " Trust, Ltd. (which I will call ' the Trust Company ') and the Respondents, " Zevo Finance Co., Ltd. The aggregate capital of the two companies was, " for practical purposes, the same as that of the Syndicate (namely, " £1,600,030 for the new companies as against £1,600,000 for the Syndicate). " In the case of each of the new companies the capital was divided into " preference, ordinary and deferred shares, and amounted in the case of the " Trust Company to £980,000 and in the case of the Respondents to £620,030. " The capital of the Trust Company was divided into £60,000 in 25 per cent.

(1) *See* pages 274–5 *ante*.

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" preference shares, £20,000 in ordinary shares and £900,000 in deferred " shares; while that of the Respondents was divided into £30 in 25 per cent. " preference shares, £20,000 in ordinary shares and £600,000 in deferred " shares. The preference and deferred shares in each of the new companies " were allotted equally between Sir Alfred Beit, Mrs. Bull and Miss Beit; " while the ordinary shares of both companies were allotted to the executors " of Sir Otto Beit. The result was that Sir Alfred Beit, Mrs. Bull and Miss " Beit each received £20,000 in preference shares in the Trust Company and " £10 in preference shares in the Respondents in place of their holdings of " £20,000 each in preference shares in the Syndicate; and £300,000 in de- " ferred shares in the Trust Company and £200,000 in deferred shares in the " Respondents in place of their holdings of £500,000 each in deferred shares " in the Syndicate. Similarly, the executors received £20,000 in ordinary " shares of the Trust Company and £20,000 in ordinary shares of the " Respondents in place of their holding of £40,000 in ordinary shares of the " Syndicate. As the liquidator said in his evidence before the Commissioners, " the shareholdings in the Respondents (and the observation was obviously " true as to both the new companies) were arranged so as to keep the interests " of Sir Otto Beit's family in the assets of the Syndicate unaltered by the " reconstruction. It does not appear to me that the finding has anything to " do with the method of fixing the purchase price; it is only concerned with " the distribution among the shareholders.

" The Trust Company, which is to operate as an investment holding " company, took over the sounder investments of the Syndicate and assumed " all the liabilities of the Syndicate other than those in respect of the £400,000 " second debentures of the Syndicate and the interest thereon as from 1st " January, 1932. The Respondents took over the more speculative invest- " ments, which stood in the books of the Syndicate at their cost value of " £1,029,958 15*s*. 4*d*. The relevant agreement in the case of the Respondents " (with which alone we are directly concerned) provided—(by clause 1) that " the Syndicate should ' sell ' and the Respondents should ' purchase ' these " investments; (by clause 2) that as part of the ' consideration for the said " ' sale ' the Respondents should undertake to discharge the liability of the " Syndicate on the £400,000 debentures and interest from 1st January, 1932; " (by clause 3) that ' as the residue of the consideration ' the allotments of " fully paid shares in the Respondents to the shareholders of the Syndicate " should be made as above stated; (by clause 4) that dissentient shareholders " should have the rights reserved to them by Section 234 of the Companies " Act, 1929, and that the Respondents should be entitled to rescind the agree- " ment if the liquidator had to purchase the interests of members of the " Syndicate amounting to £1,000 or upwards.

" The liability in respect of interest on the debentures was adjusted at " the figure of £9,928 15*s*. 4*d*.; and the first balance sheet of the Respondents " as at 15th June, 1932, accordingly stood as follows: share capital £620,030, " debentures £400,000, liquidator of Zevo Finance Syndicate, Ltd., " £9,928 15*s*. 4*d*.; making a total of £1,029,958 15*s*. 4*d*.; and on the other " side, investments £1,029,958 15*s*. 4*d*."

The Master of the Rolls points out that there was nothing unusual about this scheme of reconstruction. " It was the obvious way of bringing about the " desired result of segregating the sounder investments from those which " were more speculative and placing the former in the hands of a holding " company and the latter in the hands of a trading company, which could " sell and buy when favourable opportunities offered. There is no question

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" of any impropriety from any point of view; nor is it suggested that " the scheme " was in any way colourable or a device to circumvent the Revenue, " or anybody else."

The figure of cost adopted for the purpose of the reconstruction being £1,029,958 15*s*. 4*d*., arrived at by adding the liability under the second debentures to the cost price of the acquired shares when they were sold to Zevo Syndicate, Ltd. in 1927 (which was their then market price), the question is whether this is the opening figure, representing the cost of the Respondent's stock-in-trade, to be compared with the result of the Respondent's trading during the relevant period. If so, there is a loss of over £80,000 and no assessment of profit is justified. On the basis contended for by the Crown, however, the stock-in-trade would be valued at prices quoted in the market at the date of the agreement by which the Respondent acquired it, namely, 15th June, 1932 (and when no quotations were available for that date, prices quoted nine months later), and the trading results on this basis would show a profit of £31,000.

Notwithstanding the dissenting judgment of Luxmoore, L.J., and the arguments addressed to us on behalf of the Appellant, I find myself unable to resist the conclusion reached by Lord Greene, M.R., with whose judgment I entirely concur. The crucial transaction, albeit in a reconstruction, is a transaction of sale and purchase, and the proper figure to be debited in respect of the purchased investments is the cost thereof to the Respondent. That cost is set out in the agreement between the Zevo Syndicate and its liquidator of the one part and the Respondent of the other part dated 15th June, 1932, and the shares allotted as part of the purchase price are allotted " credited as " fully paid up ". " On no possible view ", says the Master of the Rolls(1), " can the shares be regarded as having been issued otherwise than as fully " paid . . . The terms on which the Syndicate and its liquidator agreed to " part with these investments were (1) that the Respondents should take over " the liability on the debentures; (2) that the Respondents should issue fully " paid shares to the shareholders of the Syndicate." The contrary proposition amounts to saying that consideration in the form of its fully paid shares allotted by a company must be treated as being the value of the shares, no more and no less. I agree with the Master of the Rolls that such a contention will not bear a moment's examination when the transaction is a straightforward one and not a mere device for issuing shares at a discount.

To put the matter in its simplest form, the profit or loss to a trader in dealing with his stock-in-trade is arrived at for Income Tax purposes by comparing what his stock in fact cost him with what he in fact realised on resale. It is unsound to substitute alleged market values for what it in fact cost him. The deduction from gross receipts, which is not prohibited by Rule 3 of Cases I and II of Schedule D, is that of expenses " wholly and ex- " clusively " laid out for the purposes of the trade, even though the outlay is unnecessarily large. The further test of necessity is, by contrast, imposed under Schedule E, Rules 9 and 10. See also Lord Chancellor Cave's observation on expenditure which goes beyond necessity in *British Insulated and Helsby Cables, Ltd.* v. *Atherton*, [1926] A.C. 205, at page 212 (10 T.C. 155, at page 191). The test is what was in fact the cost of the stock.

I am well aware that this view makes it possible to attribute a different figure of cost to the same stock, according to the form which the reconstruction takes. In the present instance, for example, a different figure of profit or loss would be reached if the fully paid shares allotted under the agreement

(1) *See* page 277 *ante*.

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were halved, or doubled. But that is only because the cost of the investments would correspondingly vary. Leaving aside cases where the scheme is what the Master of the Rolls calls a " mere device "—and such cases are difficult to define—I can find nothing in our present Income Tax code which requires Commissioners to examine the price paid for assets acquired by a trading company merely because the price takes the form, in whole or in part, of fully paid shares allotted in a reconstruction. If such a duty is to be imposed on them it must be imposed by the Legislature.

There is, I think, a narrower reason which justifies the House in refusing to reverse the decision hitherto reached. The Case Stated is so drawn, unfortunately, as not to make plain what is the proposition of law which the Commissioners affirmed, but with which the Inspector declared himself dissatisfied. It is much to be desired that those responsible for drawing such Cases should avoid creating this uncertainty—a reference to what was said by Lord Porter and myself in *Bomford* v. *Osborne,* [1942] A.C. 14, at pages 22 and 49 (23 T.C. 642, at pages 684–5 and 705), would perhaps assist. The Commissioners in the present case may have considered the quotations from the Stock Exchange, based on dealings in small parcels, as no safe guide, and, while noting that there had been heavy losses in the holdings of the Syndicate as a whole, may have reached a conclusion of fact as regards the portion now in question. At any rate the alleged question of law is not clearly stated.

I move that this appeal be dismissed with costs.

Lord Thankerton.—My Lords, after a full consideration of the arguments submitted on behalf of the Appellant in this House, I find that they are completely dealt with in the judgment of the learned Master of the Rolls in a manner which coincides with, and so fully expresses, my views that I have no qualification or addition to suggest. I am, therefore, content to adopt his judgment.

I agree that the appeal should be dismissed with costs, and that the Order of the Court of Appeal should be confirmed.

Lord Wright (read by Lord Thankerton).—My Lords, the Respondent Company appealed against an assessment to Income Tax under Schedule D for the year ending 5th April, 1934. Their appeal was heard before the Commissioners for General Purposes for the City of London on 17th June, 1940, who, on 23rd March, 1942, allowed the appeal, but, on the request of the Appellant, stated a Case for the opinion of the High Court. The Case came before Macnaghten, J., on 26th January, 1943, and then before the Court of Appeal, who gave judgment dismissing the appeal, Luxmoore, L.J., dissenting. Now the appeal has come before your Lordships. I refer to these dates because I am impressed by the lapse of time and the multiplicity of proceedings before a final decision is reached. Nor can I help again observing upon what has so often been remarked in this House, that it is essential that the question or questions of law on which the Commissioners state a Case should be clearly and precisely defined. Thus, in the present case, we find Luxmoore, L.J., considering in his dissenting judgment a point of law not raised before the Commissioners or before Macnaghten, J. By way of contrast we also find the Judge holding that the appeal must fail because, in his opinion, the case depended on a question of fact. These difficulties could not have arisen if the question or questions of law had been sufficiently defined in the Case Stated. The Commissioners have no jurisdiction to state a Case except on questions of law.

The crucial issue here is: What was the cost to the Respondent of the assets which it acquired in the course of a reconstruction of Zevo Syndicate, Ltd.? The shares were acquired under an agreement dated 15th June, 1932,

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between the Zevo Syndicate, Ltd. and its liquidator on the one side, and the Respondent Company on the other. Clause 1 of the agreement provided that the Zevo Syndicate should sell and the Respondent should buy the assets specified in the schedule and the old company's undertaking. These assets constituted a portion of the shares and securities held by the Syndicate, which was wound up for purposes of the reconstruction. The consideration for the sale was expressed to be (1) the discharge of the liability of the Syndicate in respect of debentures and interest thereon, which together was adjusted at £409,928 15*s*. 4*d*.; (2) by the allotment to the shareholders of the vendor company of shares in the Respondent Company amounting to £620,030. The construction of this contract does not seem capable of doubt. It is a contract entered into in the ordinary course of a reconstruction for the sale and purchase of the specified assets or shares for the consideration which is expressed. The contract is unimpeachable. It is well established that the issue of shares at a discount is illegal. It has also been held that, if the consideration for the issue of shares is a sum of money which is less than the nominal value of the shares, the shares will be treated as issued at a discount. If, on the other hand, the shares are issued for something other than a money consideration, the position is different because the Court does not inquire into the adequacy of the consideration so long as the transaction is a genuine and honest agreement deliberately entered into between two persons or companies. These rules are clearly established by many cases, in particular the *Ooregum Gold Mining Company of India* v. *Roper,* [1892] A.C. 125, where Lord Watson said, at pages 136–7: " The Court would doubtless refuse effect to a colourable " transaction, entered into for the purpose or with the obvious result of " enabling the company to issue its shares at a discount; but it has been ruled " that, so long as the company honestly regards the consideration given as " fairly representing the nominal value of the shares in cash, its estimate " ought not to be critically examined "; and in In re *Wragg, Ltd.,* [1897] 1 Ch. 796, at page 830, Lindley, L.J., said, after referring to the *Ooregum* case, " It has, however. never yet been decided that a limited company cannot " buy property or pay for services at any price it thinks proper, and pay for " them in fully paid-up shares. Provided a limited company does so honestly " and not colourably, and provided that it has not been so imposed upon as " to be entitled to be relieved from its bargain, it appears to be settled . . . " that agreements by limited companies to pay for property or services in " paid-up shares are valid and binding on the companies and their creditors." It is admitted, and is found by the Commissioners, that there was a genuine bargain, neither colourable nor fraudulent, as between the two companies concerned, which were separate entities. No question could be raised to impeach the efficacy of the agreement, but the contention here by the Revenue is that the figure of £620,030 should be set aside and some other figure should be substituted so as to affect the accounts of the Respondent Company for the year in question. I have not been able to find any authority which would justify this claim. Apparently the Revenue relies on a comparison between a value of the shares issued as fully paid up, namely £620,030, and what they suggest is the true value of the shares which they put at a figure of something like £360,000. They seem to disregard the obligation which was assumed by the Respondent to discharge the debentures and interest, and simply compare £620,030 with £360,000. The bargain, however, in any case, would have to be looked at as a whole. The case here is an ordinary case of a reconstruction, and there may be many reasons of business which would fairly induce the companies to deal with each other on a particular valuation of the shares transferred. In any case, however, the transaction was one for other than a money consideration, and the parties were free to make their own bargain.

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No authority was cited for the claim of the Revenue in a case like this to go behind the agreed consideration and substitute a different figure. The assessment, it may be noted, is under Schedule D. Under Rule 3 of Cases I and II of that Schedule the figure of expenditure which the Revenue have to take is the figure of expenses wholly and exclusively laid out for the purpose of the Respondent's trade, which was that of an investment company. The transaction here being a perfectly straightforward and honest bargain between the two companies, it seems to me that, if the present claim were upheld, it would amount to a precedent enabling the Revenue to revise every such bargain and to defeat what the parties had agreed on. The Revenue, in a case under Schedule D, has no power to examine what they think was reasonable or to say what expenditure was necessary.

The Master of the Rolls, in his very complete and searching judgment, with which I fully agree, has made a reservation for the case, if it should ever arise, of what may be called an illusory or colourable or fraudulent transaction, where assets are deliberately overvalued in order to issue an inflated amount of share capital. It cannot be said here that the transaction was open to any such objection, and the reservation, whatever its validity and scope, may be left for discussion in a future case in which it may be material to decide upon it. If the Revenue are to have power to exercise a general supervisory jurisdiction under Schedule D on the reasonableness of contracts or transactions, they must be invested with that power by legislation. It is not suggested that any such statutory power at present exists.

Luxmoore, L.J., bases his dissent on a different view of the transaction, for which, with respect, there is no justification either in the actual terms or in the findings of the Commissioners, or in the contentions raised in the earlier stages of the proceedings. He speaks, in fact, as if he were prepared to regard the transaction as being in substance the transfer of assets and liabilities without consideration. But that is not the true legal effect (that is, the substance) of the transaction. I cannot, therefore, agree with his opinion.

I would dismiss the appeal.

Lord Porter.—My Lords, the late Sir Otto Beit died in 1930, leaving a large fortune. Some £3,000,000 of his estate was invested in shares and debentures which he had sold to a company called Zevo Syndicate, Ltd. in 1927, at their then market price. This company carried on the business of trading in investments, and during the tax years 1930–31 and 1931–32 made a loss of £1,117,777.

As a consequence, and in order, amongst other objects, to provide Lady Beit with an assured income, the executors of Sir Otto's will decided upon a scheme of reconstruction whereby two new companies were to be formed—one to be called Zevo Trust, Ltd., to take over the sounder investments, the other to be called Zevo Finance Co., Ltd., to take over the more speculative ones. Both companies were accordingly formed, and the share capital of the two together was so arranged as to be practically the same as that of Zevo Syndicate, Ltd.

After the Finance Company had been formed, an agreement was entered into by which the liquidator of the Syndicate sold to it certain specified shares, in payment for which the Finance Company undertook the liability to pay a second debenture of £400,000 and interest of £9,928 15*s*. 4*d*., and to issue £620,030 shares as fully paid to the different types of shareholders in the Syndicate, in proportions similar to those in which the shares in the

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Syndicate had previously been held. The shares so taken over stood in the books of the Syndicate at their cost price of £1,029,958 15*s*. 4*d*., whereas the Stock Exchange quotation for the same assets at that date amounted only to £363,173 2*s*. 11*d*.

The balance sheet of the Respondent Company at 15th June, 1932, stood as follows:—

	£ s. d.		£ s. d.
Share Capital	620,030 0 0	Investments	1,029,958 15 4
Debentures	400,000 0 0		
Liquidator of Zevo Syndicate, Ltd.	9,928 15 4		
	1,029,958 15 4		1,029,958 15 4

From these figures it appears that the capital of the new company was arranged so as to make it correspond with the value in 1927 of the investments then purchased, and *prima facie* without taking into consideration the price at which they could have been bought in 1932 or the value which they might have in the hands of the Respondent Company.

The Respondents admittedly traded in investments, and in the course of the first year's trading sold certain of the investments which they had purchased from the old company. If these investments were properly valued in the balance sheet at the price at which they were originally sold by Sir Otto Beit, the Respondent Company made a loss of £81,279 19*s*. 7*d*. If, on the other hand, they are to be valued at the Stock Exchange quotations on 15th June, 1932, it made a profit of approximately £31,729.

In these circumstances it was urged upon your Lordships by the Appellants that the value at which they appeared in the Respondents' books was a purely conventional figure having no relation to their real value, and being merely inserted so that the capital of the two new companies should be practically the same as that of the old one: that figure was, consequently, fictitious or illusory.

So put, the first question is one of fact, namely: What value might fairly be put as the cost to the Respondents of the investments purchased? It was said that no company acting upon business lines could possibly have purchased investments of the value of £363,000, combined with a liability for £400,000, by the issue of £620,030 fully paid shares, and that the value to be found in the balance sheet was quite illusory.

Before the figures were known, and by way of testing the Respondents' liability, an estimated assessment of £10,000 was made on them. The Commissioners discharged this assessment, but have made no specific finding of fact. Your Lordships have, therefore, to infer as best you can what their findings were.

The evidence given before the Commissioners is to be found in clauses 13 and 14 of the Case Stated. From the former it appears that the shareholdings in the Respondent Company were arranged so as to keep the interests of Sir Otto's family in the assets of the Syndicate unaltered by the reconstruction: from the latter that evidence was preferred on behalf of the Respondents that if they had attempted to purchase on the Stock Exchange the holdings in concerns operating in Africa or being interested in African enterprises which they

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in fact purchased from Zevo Syndicate, Ltd., the Stock Exchange prices would have risen against the Respondent Company. To this latter piece of evidence the Commissioners add that the fact was within their own knowledge.

Later, when setting out the Respondents' arguments, the Commissioners say that it was not suggested that the transaction was colourable or fraudulent. Fraudulent it obviously was not: the arrangement as to the capital to be issued was made so as to keep the shareholding as it had been previously, and consequently treats the shares as of the value at which they were bought. It was not found to have been done to cheat the Revenue, the creditors or the shareholders.

The word " colourable " is a little more difficult to construe. It might mean only that the bargain appearing in the contract between the old and new companies was the real bargain. In a formal sense this is true, since the same persons were concerned both as buyers and sellers, and therefore it did not matter what figure they put as the price of the investments. They therefore chose £1,029,958 15*s*. 4*d*. because that represented the purchase price and because its adoption would enable the share capital of the two new companies to be equal to that of the old. If this had been the sense in which the Commissioners used the word, I should myself call the price put upon the shares a colourable figure, but I do not think that this is the meaning of the Commissioners. In re *Wragg, Ltd.*, [1897] 1 Ch. 796, was quoted to them, and in that case the word " colourable " is used both in the headnote and in the judgments to mean a fancy price having no relationship to the real value.

The same meaning is applied to it by Lord Watson in *Ooregum Gold Mining Company of India* v. *Roper*, [1892] A.C. 125, at page 137. In *Chapman's* case, [1895] 1 Ch. 771, at page 775, Vaughan Williams, J. (as he then was), uses the expression " illusory "; and in the argument before your Lordships " fictitious " and " conventional " were added as epithets of the transaction.

In the present case the Commissioners say that admittedly the price was not colourable, and the ground upon which they reach this conclusion and understand the admission as accurate appears to be not only that it would have cost the new company considerably more than the Stock Exchange quotation to purchase the investments in question, but that, in fact, it was impossible to ascertain what price would have had to be paid.

The question of value is entirely a matter for them and, as I understand their findings, they have determined that £1,029,958 15*s*. 4*d*., though much above the Stock Exchange quotation, was not so excessive as to bear no relation to reality. If the finding be so understood, I do not think it is for your Lordships to interfere. So long as it is a genuine sale and the figure is not a fictitious one, there is no reason for interfering with the price paid.

My Lords, this view of the meaning of the Commissioners' finding absolves me from considering the further question which was argued before your Lordships, as to whether the price could in any event be challenged, at any rate unless the bargain was impeached.

As a decision would strictly be *obiter*, I am anxious not to express any decided view, but I would venture to point out that in all the decided cases the qualification is made that the bargain must not be colourable. It is true that in some of the cases it is suggested that, unless the bargain could be impeached, there is no ground for refusing to accept values which have been agreed. But these observations were made where the claim was by a liquidator to treat certain shares as issued at a discount though purporting to be fully paid.

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A liquidator has the means and knowledge enabling him to challenge the bargain: the Crown have not. They are not concerned with the question whether the shares are fully paid or not. It may be that the Chancery Court would treat the shares as fully paid unless the bargain could be impeached, but that is not the concern of the Revenue authorities, though no doubt they have to show that the value of which they complain was not arrived at on any genuine estimate—I do not say of the real value of the property passing but—of a figure which, in a bargain, one party was prepared to give and the other prepared to take. It is, I think, necessary to find the cost to the purchaser, but it must be the real cost, not a figure formally arranged when assets are transferred from one company to another, both being under the complete control of the same parties.

My Lords, the principles have been laid down in In re *White Star Line, Ltd.*, [1938] Ch. 458, by the Court of Appeal in words which at some time your Lordships may have to consider. Lord Clauson, delivering the judgment of the Court, said, at page 476: " The reported authorities establish that a sum " payable on a share held in a company limited by shares, in response to a " call made while the company is a going concern, is effectually paid up, so " as to protect the shareholder pro tanto from further liability on the share, " if that sum is paid in money or money's worth; see per Lindley, L.J., in " In re *Wragg, Ltd.*(1), and per Vaughan Williams, L.J., in *Mosely* v. *Koffy-* " *fontein Mines, Ltd.*(2); that a payment is an effective payment in money's " worth if the consideration given by way of payment is something which is " bona fide regarded by the parties to the payment as fairly representing the " sum which the payment is to discharge; see per Lord Watson in *Ooregum* " *Gold Mining Company of India* v. *Roper*(3); but if the consideration given by " way of payment is a mere blind or clearly colourable or illusory—see per " A. L. Smith, L.J., in In re *Wragg, Ltd.*(4)—the so-called payment up is " ineffectual for the purpose. The question whether the consideration is " colourable is one of fact in each case: see per Vaughan Williams, L.J., in " In re *Innes & Co., Ltd.*"(5).

I would only add that, in deciding whether a bargain is colourable or not, its whole genesis as well as the purported price may have to be taken into consideration when the time arrives for deciding this question.

In the case now under consideration it was apparently admitted, and the Commissioners have decided, that the bargain is not colourable; that decision is one of fact by which your Lordships are bound, and it follows that, in my view, the appeal should be dismissed.

Lord Simonds.—My Lords, I agree so fully with the reasoning and conclusion of the Master of the Rolls in this case that, but for the divergence of opinion that appeared in the Court of Appeal, I should be well content to adopt his judgment and add no word of my own.

Upon one point at least there is no difference of opinion, and that is that the Case stated by the Commissioners for the General Purposes of the Income Tax for the City of London does but obscurely raise any point of law for your Lordships' consideration. It appears from paragraph 15 of the Case that the question for the Commissioners was "that of the right figure to debit as the cost " to the Respondent Company of the investments aforesaid when computing " its profits for the year of assessment under appeal, it being agreed that the " Company was one which traded in investments." It is difficult to see that

(1) [1897] 1 Ch. 796, 831. (2) [1904] 2 Ch. 108, 114. (3) [1892] A.C. 125, 136.
(4) [1897] 1 Ch. 796, 836. (5) [1903] 2 Ch. 254, 262.

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this is anything but a question of fact, even if it be read (as it must be read) in connection with the other facts found by the Commissioners. As a question of law it cannot, I think, be otherwise stated than as a question whether it was as a matter of law competent for the Commissioners to find that the Inspector of Taxes had not established that £1,029,958 was not the right figure to debit as such cost. And to this question there can, to my mind, be only one answer. It was, I think, clearly competent for the Commissioners so to find.

It is perhaps worth while to examine the rival contentions before the Commissioners upon the question so posed. Upon the fundamental proposition there seems to be no difference. The Inspector of Taxes contended that, in computing the profits of a trade, the figure to be debited in respect of the purchase of stock-in-trade is the cost thereof: the contention of the Company was the same, with the substitution of " the purchase price " for " the cost thereof." The difference is, I think, only verbal. Next the Inspector contended that the cost to the Company of the property transferred to it was not, while the Company contended that the purchase price of the investments which it bought was, £1,029,958. This contention of the Inspector was supported by his next two contentions, (1) that the consideration given by Zevo Syndicate, Ltd. to the Company was illusory in so far as it was represented as being of the value of £1,029,958 and was at most of no greater value than £363,173, and (2) that the proper amount to be debited as the cost to the Company of the investments in question was £363,173 at the most.

This was what the Inspector sought to establish, and I will examine it before I turn to the further contentions of the Company. I must bear in mind that this transaction was not impeached as fraudulent, nor was it suggested that it was designed to evade Income Tax. I am thus faced with this position, that the Company, in consideration for the investments in question, undertook liabilities amounting to £409,928, and issued shares for £620,030 credited as fully paid up. Upon what pretext, then, can it be said that the cost to the Company of, or the purchase price paid by the Company for, the investments was anything else than £1,029,958? That the Company did accept liability for £409,928 is beyond question, and it appears that in the Court below the Solicitor-General " in the end agreed that the cost of the investments must be " placed at the lowest at the nominal amount of this liability." I take these words from the judgment of the Master of the Rolls [1]. I do not think that the learned Counsel for the Appellant in this House would make even this admission, but it appears to me an inescapable conclusion. There remains the balance of £620,030, being the amount credited as paid up upon the shares of that nominal value issued by the Company. Here, too, it is beyond question that the Company have paid £620,030, unless it be said that, though they credited the shares as fully paid, they ought not to have done so, and that the shares ought to be treated as partly paid only, or, in other words, that the Company acted *ultra vires* and illegally issued shares at a discount. From this conclusion Counsel for the Appellant appeared to shrink.

My Lords, I see no *via media*. Either the Company paid the sum of £620,030 by the issue of fully paid shares, or they did not. If they did, then " the cost to them " or " the purchase price paid by them " in respect of these investments was this sum in addition to the £409,928 that I have mentioned. If they did not, then the shares were issued at a discount. My Lords, I would make the same reservation as did the Master of the Rolls, in saying that, where stock which a company proposes to acquire for shares is deliberately

(1) *See* page 276 *ante*.

(Lord Simonds.)

overvalued for the purpose of issuing an inflated amount of share capital, different considerations may apply. I will reserve my opinion on such a case until it comes for decision. But in the present case I can see no justification for a decision which would in effect declare that the shareholders of the Company, who have taken these shares as fully paid, yet remain liable to a call of an unknown amount. Nor can I ignore the far-reaching result of such a decision, for it would mean that, wherever there is a reconstruction and under the authority of the Companies Act the transferee company issues its fully paid shares in payment for the stock or other assets that it acquires, the General Commissioners may be invited, for Income Tax purposes, to consider whether the price so paid conforms to the test of some conventional market value, and, if not, for those purposes and those alone to require a new price to be substituted. For such a proceeding I see no justification on principle, nor was any authority cited for it.

My Lords, the observations that I have made upon the Appellant's contentions before the Commissioners appear amply to justify the counter-contentions of the Company. I think that the proposition of law is incontestable, that the investments, in respect of which the Company issued fully paid shares of the par value of £620,030, cost the Company that amount, and that to treat such investments as having cost the Company less than that sum is to treat the shares as only partly paid, and to confuse the price to the Company of the investments with their alleged market value. In the last analysis the confusion may be even deeper. It may well amount to saying that, because the Company paid too high a price, they did not pay that price at all. Indeed Luxmoore, L.J., seems to come near this in saying that the alleged " consideration was not in reality a purchase price "(1). Yet the terms of the agreement are clear. By it it is provided: " 1. The old Company " shall sell and the new Company shall purchase that part of the undertaking " of the old Company which consists ", etc. Then the agreement goes on to provide for the consideration moving from the new company. I cannot distinguish between consideration and purchase price, and (using again the language of the Master of the Rolls) I find that, acquiring the investments " under a bona fide and unchallengeable contract(2) ", they paid the price which that contract required, a price which, whether too high or low according to the views of third parties, was the price upon which these parties agreed.

The appeal should, in my opinion, be dismissed.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Coward, Chance & Co.]

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(1) *See* page 284 *ante*. (2) *See* page 280 *ante*.