HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
15TH AND 18TH MARCH, 1963

COURT OF APPEAL—2ND AND 3RD JULY, 1963

HOUSE OF LORDS—13TH AND 14TH APRIL, AND 5TH MAY, 1964

Rendell

v.

Went (H.M. Inspector of Taxes)[1]

Income Tax, Schedule E—Benefit in kind—Director prosecuted for driving offence—Whether legal expenses incurred and paid by company for his defence assessable as income of director—Income Tax Act, 1952 (15 & 16 *Geo.* VI & 1 *Eliz.* II, *c.* 10), *Section* 161.

The Appellant was a director of a staff catering company. In the course of carrying out his duties, and while driving a car belonging to the company, he was involved in a fatal accident and was subsequently charged with causing the death of a pedestrian by reckless or dangerous driving. The Appellant put in hand arrangements for his defence, but did not demur when the company countermanded these instructions and took over the defence itself. If the charge had been proved the Appellant would have been liable to be imprisoned, and the company did not wish to be deprived of his services. The defence was thereafter handled by the company's solicitors.

In the event, the Appellant was acquitted. The total legal costs involved, amounting to £641, *were paid by the company, and this sum was in due course included as a benefit chargeable under Part* VI, *Chapter* II, *Income Tax Act,* 1952, *in an assessment to Income Tax upon the Appellant for the year* 1958–59.

On appeal against the assessment, the Special Commissioners found that the whole of the sum of £641 *was an expense incurred by the company in or in connection with the provision for the Appellant of a benefit or facility within the meaning of Section* 161, *Income Tax Act,* 1952.

Held, *that the Commissioners' decision was correct.*

CASE

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

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 27th September, 1961, Mr. J. S. Rendell (hereinafter called "the Appellant"), appealed against an assessment to Income Tax under Schedule E made upon him for the year 1958–59 in the sum of £3,919 in respect of his emoluments as a director of Peter Merchant, Ltd.

[1] Reported (Ch.D.) 107 S.J. 253; (C.A.) [1963] 1 W.L.R. 1085; 107 S.J. 552; [1963] 3 All E.R. 325; 234 L.T.Jo. 539; (H.L.) [1964] 1 W.L.R. 650; 108 S.J. 401; [1964] 2 All E.R. 464; 235 L.T.Jo. 318.

2. Included in the assessment appealed against was a sum of £641 which was paid by Peter Merchant, Ltd., in the circumtsances set out in paragraph 4 below. The question for our determination was whether this sum of £641 was an expense incurred " in or in connection with the provision " for the Appellant of " other benefits or facilities of whatsoever nature " within the meaning of Section 161 of the Income Tax Act, 1952, with the result that the said sum was a perquisite of his office to be included in the emoluments thereof assessable to Income Tax.

3. Evidence was given before us by the Appellant ; by Mr. W. L. Cardy, the chairman and managing director of Lockhart Group, Ltd., of which Peter Merchant, Ltd., was a wholly owned subsidiary ; by Miss D.M. Greig, the personal secretary to the Appellant ; and by Mr. R. L. Williams, a partner in Bentleys, Stokes & Lowless, who were solicitors to Lockhart Group, Ltd., and Peter Merchant, Ltd. They were not solicitors to the Appellant. The facts found by us are set out in paragraph 4 below.

4. (*a*) The Appellant was a full-time director of Peter Merchant, Ltd. (hereinafter called " the company "). On 23rd July, 1958, while returning to the head office of the company after making a call on its business, the car which the Appellant was driving unaccountably left the road and killed a pedestrian. The car belonged to the company. The Appellant was injured and was taken to hospital, and on the following day he instructed his secretary, Miss Greig, to get in touch with the Automobile Association, of which he was a member, and ask them to arrange for a solicitor to see him to give him legal advice.

(*b*) Mr. Cardy happened to hear Miss Greig speaking to another director about her instructions when she returned to the company's office, and he instructed her not to get in touch with the Automobile Association. He telephoned Mr. Williams, a partner in the firm of Bentleys, Stokes & Lowless, who acted as solicitors to Lockhart Group, Ltd., and the company. Mr. Cardy gave Mr. Williams details of the accident in which the Appellant had been involved, and asked what the latter's position might be. Mr Williams stated that the Appellant might be charged with causing death by reckless or dangerous driving ; and that if he were convicted, he would be imprisoned and his conviction might involve the company in liability. Mr. Cardy expressed concern at this possibility, and informed Mr. Williams that he could not afford to be deprived of the Appellant's services. Mr. Cardy instructed Mr. Williams to spare no reasonable expense to obtain the Appellant's acquittal of any charge made against him or, if he were convicted, to avoid his going to prison ; for if he went to prison, the company and Lockhart Group, Ltd., might lose much business.

(*c*) The company carried on the trade of an industrial and staff caterer. It made annual contracts with owners of factories and other establishments with many employees. The price charged to the owner was based on individual items of food supplied to the employees and the company worked on a very small profit margin, and the financial terms of every contract had to be kept under constant review. The Appellant was the contract director in charge of that side of the business. He had a service agreement. Only the Appellant was in a position to negotiate contracts with the owners of industrial establishments, to negotiate contracts for vending machines, and he had to ensure that neither the company nor Lockhart Group, Ltd., made a loss.

At the time of the accident Mr. Cardy was particularly anxious not to lose the services of the Appellant because Lockhart Group, Ltd., was

in the process of acquiring control of a company manufacturing automatic vending machines and the Appellant was needed to co-ordinate the activities of that company and those of Peter Merchant, Ltd. Mr. Williams saw the Appellant in hospital on the evening of 24th July, 1958, and told him that Mr. Cardy had given instructions that the Appellant was not to have anything further to do with the provision of his defence in any proceedings that might be brought against him. This would be provided by the company. Mr. Williams then instructed the Appellant what he should do in connection with any such proceedings. In fact, the Appellant was subsequently charged under Section 8 of the Road Traffic Act, 1956 (now Section 1 of the Road Traffic Act, 1960), with causing the death of another person by reckless or dangerous driving and was liable on conviction to imprisonment for a term of up to five years. His defence was undertaken by Messrs. Bentleys, Stokes & Lowless. They instructed junior Counsel to appear at the police court on 18th September, 1958, and 9th October, 1958, and leading and junior Counsel to appear at the Old Bailey on 3rd November, 1958, when the Appellant was acquitted. The Appellant gave no instructions relating to his defence, and was not consulted about his representation in court; these being arranged by Mr. Williams, in consultation with Mr. Cardy.

The bill of costs, totalling £641, for the defence of the Appellant, was presented by Bentleys, Stokes & Lowless to the company, which paid it in April, 1959. A copy of the bill of costs, marked "A", is attached to and forms part of this Case[1].

(*d*) The Appellant would not have spent on his own defence as much as was spent by the company. He was very relieved when he was informed on 24th July, 1958, that the company was paying for his defence.

5. It was contended on behalf of the Appellant that:

(*a*) the sum of £641 was not an expense incurred in or in connection with the provision for the Appellant of a benefit or facility;

(*b*) the said sum was expended by the company for its own purposes, namely, to ensure that it was not deprived of the Appellant's services;

(*c*) no benefit or facility resulted to the Appellant from the expense incurred by the company;

(*d*) at the relevant moment of time, namely, when the expense was incurred, the providing of a benefit or facility for the Appellant was not intended;

(*e*) if any benefit or facility was provided for the Appellant, its value did not exceed the amount (£50 or £60) which he could have spent on his own defence if the company had not incurred the expense of it.

6. It was contended on behalf of the Crown that the whole of the sum of £641 was an expense incurred by the company in or in connection with the provision for the Appellant of a benefit or facility, and that this sum was accordingly to be treated as a perquisite of his office as a director of the company, and included in the emoluments thereof assessable to Income Tax.

7. We, the Commissioners who heard the appeal, decided to dismiss it. The sum in dispute was paid by the company for services rendered by its solicitors in arranging for the Appellant's defence against a charge of causing the death of another person by reckless or dangerous driving.

[1] Not included in the present print.

This expenditure provided a benefit for the Appellant, and he was assessable under Schedule E in respect of it in accordance with the provisions of Sections 160 and 161 of the Income Tax Act, 1952.

It was argued for the Appellant that the disputed sum was expended by the company for its own business purposes; and that it was not, therefore, an expense incurred *in* providing a benefit for the Appellant. Reliance was placed on the words of Birkett, L.J., in *Commissioners of Inland Revenue* v. *Universal Grinding Wheel Co., Ltd.*, 35 T.C. 551, at page 563:

> "The first question is: Is it a sum? There is no question about that. The second question is: Was it applied? I think it is clear beyond contradiction that it was applied. The third question of course, which is the vital question, is: Was it applied in reducing the share capital? I am bound to say, having thought a good deal about it, that I cannot see any particular virtue in the word 'in'. Supposing it had been 'in order to reduce the capital' or 'for the purpose of reducing the capital'. I cannot think there is any clear or vital distinction in the word 'in'—'in reducing the capital'. Of course, if it is contended that the word 'in' impliedly means nominal capital, why that is a different thing; but I do not think it does"

as supporting the view that in Section 161 the word "in" should be interpreted as "for the purpose of" or "in order to". We rejected that argument, being of opinion that the decision in *McKie* v. *Warner*, 40 T.C. 65, enjoined us to hold that expenditure in or in connection with the provision of a benefit gave rise to liability under Schedule E notwithstanding that the expenditure was incurred for good commercial reasons of its own by the company incurring it. In the *Warner* case expenditure on the provision of a flat for Mr. Warner was held to be assessable on him even though the company incurring the expense of providing the flat considered it essential that its employee, Mr. Warner, should reside in the flat to carry out his duties satisfactorily. It seemed to us, therefore, that the fact that the company spent £641 in defending the Appellant, because it was anxious not to lose his services at a critical time, did not affect the Appellant's liability under Schedule E in respect of the cost of providing him with an undoubted benefit.

We also rejected the contention that part only of the sum of £641 should be assessed on the Appellant. We could not see any grounds for holding that liability should be limited to an estimate of what the Appellant might have spent on his defence if the company had not undertaken to provide it.

We accordingly confirmed the assessment appealed against.

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

9. The point of law for the determination of the High Court is whether, on the facts found by us as set out herein, we were wrong to dismiss the Appellant's appeal.

W. E. Bradley
R. W. Quayle
} Commissioners for the Special Purposes of the Income Tax Acts.

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

8th October, 1962.

The case came before Buckley, J., in the Chancery Division on 15th and 18th March, 1963, when judgment was given against the Crown, with costs, it being held that only the amount which it would have been reasonable for the company to expend on the Appellant's defence should be regarded as a benefit within the meaning of Section 161, Income Tax Act, 1952.

Mr. F. N. Bucher, Q.C., and Mr. R. Buchanan-Dunlop appeared as Counsel for the taxpayer, and Mr. Peter Foster, Q.C., and Mr. Alan Orr for the Crown.

Buckley, J.—This is an appeal from a determination of the Commissioners for the Special Purposes of the Income Tax Acts by which they affirm liability on the Appellant to tax upon the sum of £641 paid for his defence in proceedings which arose out of a motor accident.

The Appellant was at the material time, and for all I know still is, a full-time director of a company named Peter Merchant, Ltd. On 23rd July, 1958, he had the misfortune to kill a pedestrian in a motoring accident. The car which he was driving belonged to the company, and the Appellant himself was injured and taken to hospital. He instructed his secretary to get into touch with the Automobile Association with a view to his defence in any proceedings arising out of the accident. The chairman and managing director of the company, being aware of this, got into touch with the company's solicitors, by whom he was advised that if the Appellant was convicted he would be liable to imprisonment and that his conviction might involve the company itself in liability. The Appellant was the contract director of the company, in charge of obtaining and supervising contracts with owners of factories and other establishments for the provision of catering services. He was the only officer of the company in a position to negotiate contracts with the owners of industrial establishments or to negotiate contracts for the supply of vending machines, and his services were of importance to the company in that respect. The company was also in the process of acquiring control of another business, and the continuation of the Appellant's services was necessary to co-ordinate the activities of that business and those of Peter Merchant, Ltd. The managing director of the company gave instructions that the Appellant was not to have anything further to do with the provision of his defence in any proceedings which might be brought against him. In fact, the Appellant was subsequently charged with causing the death of the pedestrian by reckless or dangerous driving, and in respect of that charge he was liable, on conviction, to imprisonment for a term of up to five years. His defence was undertaken by the company's solicitors although, of course, acting in this respect as the Appellant's solicitors. It is found, in the Case, that the Appellant gave no instructions relating to his defence and was not consulted about his representation in Court. No doubt the company must be taken to have instructed the solicitors on the Appellant's behalf and with his authority, but it appears that the Appellant himself took no active part in the arrangement for, or the instructions given in respect of, his defence.

The bill of costs for the defence amounted to £641. It was presented to the company and paid by the company. The Special Commissioners find in the Case that the Appellant would not have spent on his own defence as much as was spent by the company, and it was contended before the Commissioners that the Appellant would not have expended more than £50 or £60 in his own defence. There is no finding that that would have been the sum which he would have had to spend. The Commissioners

(Buckley, J.)

find as a fact that the company spent the sum of £641 in defending the Appellant because the company was anxious not to lose his services at a critical time, and they further find as a fact that the defence which was so provided for the Appellant was an undoubted benefit to him. In these circumstances, the Appellant was assessed to tax upon the sum of £641 under the Income Tax Act, 1952, Section 161 (1), which, so far as I need read it, is in the following terms:

> ". . . where a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of living or other accomodation, of entertainment, of domestic or other services or of other benefits or facilities of whatsoever nature, and, apart from this section, the expense would not be chargeable to income tax as income of the director or employee, paragraphs 1 and 7 of the Ninth Schedule to this Act, and section twenty-seven of this Act, shall have effect in relation to so much of the said expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount thereof had been refunded to him by the body corporate by means of a payment in respect of expenses."

Those last words refer one back to the preceding Section, 160, which makes what are called in the rubric " Expenses allowances " taxable as perquisites of the office or employment of the director or employee in question. The Special Commissioners came to the conclusion that the sum of £641 was in its entirety properly assessed or charged to tax under that Section, and they say in the Case:

> " We could not see any grounds for holding that liability should be limited to an estimate of what the Appellant might have spent on his defence if the company had not undertaken to provide it."

Mr. Bucher, for the Appellant, has contended that the terms of the Sub-section require the Court to look at the motive of the company in making the expenditure in question, because he says that the word " in " should be construed as equivalent to " for the purpose of ", in which connection he relies upon what was said by Birkett, L.J., as he then was, in *Commissioners of Inland Revenue* v. *Universal Grinding Wheel Co., Ltd.*, 35 T.C. 551, at page 563 ; and further, because he says that the expense must be incurred for the director or employee in question in contradistinction to its being incurred for the purposes of the company itself ; and thirdly, because the words " or of other benefits ", which is the only one of the series of heads of charge in this Sub-section under which the present case would come, point to an enquiry as to whether it is the benefit of the director or the benefit of the company that is aimed at, for, Mr. Bucher says, where the purpose of the expenditure is to protect the company itself in some way or to advantage the company itself in some way, the words of this Sub-section are not appropriate to apply. His contention is that on the particular facts of this case the object of the company in undertaking the Appellant's defence was to protect its, the company's, own position by retaining the Appellant's services and avoiding the possibility of their being interrupted by a period of imprisonment. Alternatively, Mr. Bucher contends that the only extent to which it could be said that the Appellant was benefited by the company's expenditure on his defence was the extent by which his own pocket was relieved, and that the relevant enquiry is not what the company spent, but what he might reasonably have been expected to spend in his own defence, that being the amount of which he was in fact relieved by the company's undertaking his defence free of charge to him.

On the other hand, for the Crown it is said that the only questions which require to be answered to discover whether or not Section 161 applies are,

first of all: Did the company spend money in or in connection with the provision of something? And if the answer to that is in the affirmative, then there is the further question: Was what was so provided a benefit to a director or employee? Mr. Foster says that, if the answers to those two enquiries are in the affirmative in each case, that is the end of the matter. He submits that the motive of the company is wholly irrelevant, and in that connection he points to Sub-sections (2), (3) and (4) of Section 161 which, he says, would be otiose Sub-sections if it were an answer to a claim under Section 161 that the expenditure was one which was made either entirely or predominantly for the purposes of the company's own business. The question whether the expenditure is or is not a benefit to the director or employee, he says, is purely a question of fact, and he submits that it is found in the Case before me by the Commissioners that the expenditure with which I am concerned was in fact beneficial to the Appellant. He says that there is no room for any apportionment of the expenditure between that part of it which may be said to benefit the Appellant and any excess over that part. He submits that the Appellant could not be compelled to accept a defence which was on a more lavish scale than he was willing to accept, that there is no suggestion that he was required by the terms of his employment to accept any kind of defence the company might think fit to provide and that, in fact, he was quite content that the company should provide his defence and provide it on the scale which occurred.

If I extract from Section 161 (1) the words which are directly in point here, I have to consider whether this is a case in which the company has incurred expense in or in connection with the provision for the Appellant, one of its directors, of a benefit of whatsoever nature. It may be, I think, that in approaching a case where one is not concerned with the provision of living accommodation or of entertainment or of domestic or other services, but only of something which comes under the words " or of other benefits ", that the enquiry which the Court has to make is not really of quite the same character as the enquiries that it has to make in cases falling under the other heads in the Sub-section. I have been referred to two cases decided under this Section, the earlier in time of which is a case decided by Plowman, J., *McKie* v. *Warner,* 40 T.C. 65. That was a case concerned with the provision of living accommodation, and Plowman, J., came to the conclusion upon the construction of the Sub-section that, when the Section speaks of a body corporate incurring expense in the provision for any person employed by it of living or other accommodation, it follows as a matter of construction that the living or other accommodation provided by the body corporate must be a benefit within the meaning of the Sub-section irrespective of what the facts relating to it are. Where, on the other hand, one is not concerned with the provision of living accommodation but of something which only comes within the Section under the heading of " or of other benefits ", one must of necessity enquire whether what it is that the company has provided is something which can properly be described as a benefit. The other case to which I have been referred also relates to living accommodation. That is the case, decided in the House of Lords on appeal from the Scottish Court, of *Luke* v. *Commissioners of Inland Revenue*(1), [1963] 2 W.L.R. 559. In that case the director in question had bought a house in Ayrshire for himself, but he found it too expensive and was proposing to dispose of it. However, the chairman of the company was anxious to ensure that the appellant continued to live in this particular house for the benefit of the company's

(1) 40 T.C. 630.

(Buckley, J.)

business, and it was accordingly proposed that the company should buy the house from the appellant and let it to him. That transaction was carried out, and the lease to the appellant was one which was negotiated at arm's length and under which the appellant paid an economic rent and undertook the ordinary obligations of a tenant. The company paid the rates and feu duty, which under the law of Scotland would have been in any case the obligation of the owner as distinct from that of the tenant, and it also paid a small sum in respect of the insurance of the property. The case principally turned upon the question whether in these circumstances the company could properly be said to have provided the living accommodation for the director, and it was held by a majority of the House that the appellant director, being in occupation under a lease under which he was paying an economic rent, was in the position of a perfectly ordinary tenant who had negotiated his tenancy at arm's length with his landlord and was not living in accommodation provided for him by the company. There was a further question as to whether the company, by paying a sum in respect of insurance, was paying something for the benefit of the director under Section 161 (1), and Lord Dilhorne, L.C., reached the conclusion that that would have been the position had it not been for the provisions of Section 162 (1). The considerations so introduced into the case are really irrelevant to the case which I have to consider, but that case is relied upon by Mr. Bucher as showing, he submits, that the House of Lords there did pay attention to the objects which the company had in mind in making the arrangements which gave rise to the suggested charge for tax. With the exception of the point which was raised with regard to the insurance payment, it does not appear to me that the case gives Mr. Bucher much assistance, because, as I say, as I understand the decision, it went on the main point upon the basis that on the facts of that particular case the company was not, in fact, providing the living accommodation at all ; the appellant was himself providing his own living accommodation albeit by means of a lease from the company of property owned by the company. Those both being cases which related to the provision of living accommodation which is expressly referred to in the Sub-section do not, I think, give me very great assistance in answering the problem which I have to consider.

I ask myself, therefore, first of all, did the company here incur an expense? The answer must clearly be that it did. Was the expense incurred in providing something for the Appellant? Certainly, I think it was ; it could not be said that the defence was not provided for the Appellant, nor indeed does anybody seek to suggest that. Was what was provided a benefit to the Appellant? and here it seems to me I reach what must really be the crucial point of the case. If one merely considers the fact that he was, as a result of the company's expenditure, represented by solicitors and counsel at the trial and successfully defended, obviously what was provided was a benefit to him. But if a company chooses to expend some extravagantly large sum on doing something which benefits a director, it seems to me that it would be extremely hard that the director should be chargeable to tax on the amount so expended, when he could *ex hypothesi* have obtained for himself the same result at a much lower cost. Suppose it be the case, as to which I have no means of judging, that a reasonable, indeed, an ample, sum to be spent on the Appellant's defence would have been £60, it seems extremely hard that because the company chose to spend ten times as much the Appellant should be taxed on the larger sum, nine-tenths of which would really have been thrown away. In considering whether what the company has done confers a benefit upon the

director, it appears to me that one must take into account what has been achieved for the director. Now what was achieved for the director here was that he was defended at his trial. How much of the expenditure then ought really to be regarded as having been made for his benefit? Is it right to say the whole of the £641 was expended for his benefit or is it right to say that of that £641 £60 or whatever may be the measure of the reasonable amount to be expended for his defence was spent for his benefit and the rest was spent by the company perhaps *e majore cautela* for its own benefit because it considered that it was desirable to do the thing on a lavish scale? It seems to me that it must be right to consider what sum the company could reasonably have spent in whatever may be the particular circumstances of the case and the particular method of expenditure for the benefit of the director or employee concerned, and that only what could reasonably have been spent can be regarded as spent beneficially for that director or employee. So far as the company chooses to spend more than what is reasonably required for the purpose, I think the company must be assumed to make that expenditure for its own purposes and not to make it for the director or for his benefit. That the company had reasons for wanting to protect itself in the present case is clear from the findings. What the company did was not disinterested, which I think makes it easier for me to reach the conclusion that some part of the expenditure here was not incurred for the Appellant or as a benefit to him, but was incurred for the company's own purposes.

In my judgment, therefore, this case should be referred back to the Commissioners to find as a matter of fact what sum was a reasonable sum to expend on the Appellant's defence at his trial and to the extent of that sum the Appellant will be chargeable to tax ; but to the extent of any excess over that sum, he will not be chargeable to tax.

Mr. F. N. Bucher.—My Lord, I think your Lordship allows the appeal?

Buckley, J.—I do not know whether I allow the appeal. You see, it may be that the answer will come back that £641 was a reasonable sum.

Mr. Bucher.—Yes, but in the way in which the case has come before your Lordship, of course, I had to come here to get the case referred back to the Special Commissioners.

Buckley, J.—You are thinking not of the form of the Order so much as the result as to costs?

Mr. Bucher.—Perhaps I was, yes. It would be enough, I should have thought, so far as the Order is concerned in this case, to refer the case back to the Commissioners to deal with it in the way your Lordship has said in your judgment.

Buckley, J.—It would not need to come back again to the Court because there is nothing more for it to come back about.

Mr. Bucher.—I should hope not. I do not know if my learned friend agrees with that.

Mr. Peter Foster.—So far as the costs are concerned, your Lordship has seized that a reasonable sum may well be £641. I would ask your Lordship to reserve the costs depending on the decision of the Special Commissioners when they have had a look at it again.

Mr. Bucher.—Oh no, I cannot accept that, my Lord. I was only dealing with your Lordship's question about the Order which I think we are agreed upon ; but on costs, my position is that I had to come before your Lordship in order to get—you see, the Special Commissioners refused to deal with the question which was put to them—in order to get your Lordship to say that they ought to deal with it, and that is part of the argument upon which your Lordship's time has been spent. I would have thought, respectfully, that it was quite clear that I ought to have my costs in this case.

Buckley, J.—Yes, and your submission is the one you have already made?

Mr. Foster.—I am instructed, my Lord, that the submission was never put before the Special Commissioners that the true test was what would be the reasonable sum which ought to be expended ; my Lord, the contention was £60.

Buckley, J.—I do not think so.

> "We could not see any grounds for holding that liability should be limited to an estimate of what the Appellant might have spent on his defence if the company had not undertaken to provide it."

That is much the same as what I have said, is it not?

Mr. Foster.—No, my Lord, because your Lordship has said they must now find what would have been a reasonable sum, not an estimate of what he might have spent ; my Lord, it is quite a different test.

Buckley, J.—He would presumably have spent what he thought to be reasonable and there is not a very wide gap between the two things, I should have thought.

Mr. Foster.—My Lord, it does not necessarily follow that it is what is reasonable to him ; the test will be what is reasonable in all the circumstances. My Lord, those are two quite different tests. My Lord, it may well be that they will find that £641 is, in fact, a reasonable amount to spend on the defence in this case. My Lord, the contention that it should be reasonable was never put forward to the Commissioners, nor was it advanced in this Court, as I understand, by my learned friend.

Buckley, J.—No, I think the Appellant is entitled to his costs for this appeal.

Mr. Bucher.—If your Lordship pleases.

Buckley, J.—And I will deal with the matter in that way.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Donovan, Russell and Sellers, L.JJ.) on 2nd and 3rd July, 1963, when judgment was give unanimously in favour of the Crown, with costs.

Mr. Peter Foster, Q.C., Mr. Alan Orr, Q.C., and Mr. J. Raymond Phillips appeared as Counsel for the Crown, and Mr. F. N. Bucher, Q.C., and Mr. R. Buchanan-Dunlop for the taxpayer.

Donovan, L.J.—I agree with the Special Commissioners in this case. The company clearly incurred an expense, namely, the sum of £641. That expense was incurred in connection with the provision of a benefit to Mr. Rendell, namely, the benefit of being defended by solicitors and counsel on his trial. Mr. Rendell was, and is, a director of the company. The conditions precedent to liability specified in Section 161(1), Income Tax Act, 1952, are therefore satisfied; and by virtue of Section 160 the expense in question has to be treated as a perquisite of Mr. Rendell's office as a director and included in his emoluments assessable under Schedule E. Against this it is said that, if the company incurs the expense primarily in its own interests and only secondarily in the interests of the director, then no benefit is provided within the meaning of Section 161(1). This interpretation I am unable to accept. For present purposes I see no sufficient distinction between the case of a company expending money primarily for its own benefit and the case of a company expending money for its own benefit which, as a by-product, benefits a director, always assuming that this was part of the company's purpose. The latter kind of expense could not be justified unless there were some benefit to the company.

It is also argued that the Respondent would not have spent £641 on his own defence if left to himself. He could and would have spent no more than £60 or so. Thus he had been saved that sum and no more. Accordingly, that sum represents his only benefit, and the charge to tax should be restricted accordingly. Section 161(1), however, does not lay the charge upon the benefit. The combined effect of Sections 160 and 161(1) is to lay the charge upon the sum paid by the company as an expense in connection with the provision of the benefit. At the same time the rather curious language at the end of Section 161(1) gives the director the opportunity to claim a countervailing deduction under Paragraph 7 of the Ninth Schedule, if the facts justify it. Here, admittedly, they do not; but as a matter of construction I can see nothing in the language of the Act which would justify the Court in investigating how much of the expense would have been incurred by the director had he been left to provide the benefit, or a corresponding benefit, for himself.

Buckley, J., remitted the case to the Special Commissioners with a direction to discover how much the company would reasonably have incurred for Mr. Rendell's defence. Nobody had suggested that this was the question to be decided, and I think that in this respect a slip has probably occurred. Although in the last resort Mr. Bucher would wish to retain the learned Judge's decision, his real alternative argument before us has been that liability under Schedule E extends only to the sum Mr. Rendell would have paid out if his defence had been left to himself. Failing this, he says that the liability should not exceed tax upon the sum the company would have paid for his defence if the company had no interests of its own to consider. I find this last proposition somewhat elusive, seeing that the company could not properly pay out anything if it had no interests of its own to consider. In any event, however, the true construction of these two Sections leaves no room for either of the Respondent's interpretations.

Finally, it is said for the taxpayer that it is obviously unjust if he has to be saddled with Income Tax liability on any extravagant sum that a company might choose to expend on a benefit to a director, notwithstanding that the benefit could have been obtained by him for much less. That may be so, but I do not think this possibility can of itself justify a construction of the Act which would involve writing in a proviso which is not there. Moreover, wanton extravagance of the kind suggested would probably be *ultra vires* the company, and therefore not something to be contemplated by the Legislature. Once a benefit has designedly been conferred upon a director, the Act

(Donovan, L.J.)

itself prescribes what the measure of liability shall be, namely, the sum expended by the company; and I find nothing in the language of these two Sections for dissecting that sum and taxing only so much as the director would have paid himself. For those reasons, I think that this appeal must be allowed and the cross-appeal dismissed.

Russell, L.J.—I agree with everything that has fallen from Donovan, L.J. I cannot see how the provision of solicitors and counsel for the defence of the taxpayer was anything other than the provision of a benefit for the taxpaper. The expense incurred by the company in providing that benefit was £641. Section 161, Income Tax Act, 1952, requires that that sum should be treated in effect as money paid by the company in respect of expenses, which throws it into the ambit of Section 160, and since in this case no part if spent by the director could be described as expenses necessarily incurred by him as such, it will all fall to be taxed as emoluments of his office. There is no justification, in my view, for the suggestion that either the word " in " or the word " for " in Section 161 somehow import the possibility of analysing the purpose or motive of the company making the expenditure. So far as the alternative suggestion is concerned, namely, that it could be said that the only benefit to the taxpayer was a saving to him of that amount of money which he would have expended if he had been left to his own resources, I cannot, for my part, accept that argument either.

Suppose the case to have been that he had paid, or was prepared to pay, himself for his defence on a fairly inexpensive scale and the company came to him at the last moment and said, for the reason the company gave in this case, namely, his importance to them, " We will pay the solicitor to employ in addition leading counsel " and did so. I cannot for my part see how it could possibly be said in such a case that the provision of leading counsel by, and at the expense of, the company was not the provision of a benefit for the director of the company in respect of which the company had incurred the expense of his fee. But the contrary would be a necessary result on the basis of Mr. Bucher's alternative argument. For those reasons, which are substantially, I think, repetitions of what my Lord has said, I agree with him that the cross-appeal fails and the appeal should be allowed.

Sellers, L.J.—The decision of Buckley, J., as I would interpret its reasoning, although not in the form of the Order which was drawn up, seems to me to be sensible and reasonable, but it is said by the Crown that it is not in accordance with the Statute and that there is no power to remit back to the Commissioners as the learned Judge directed. I have been much inclined to interpret Section 161, coming as it does in the sequence of Sections dealing with expenses allowed—expenses to directors and others—in such a manner that it would support the learned Judge's conclusion. It would seem to me, having regard to the particular facts of this case, an unusual application of the Section, although I claim no great familiarity with this branch of the law, and so exceptional that it would lead one to believe that such circumstances ought not to be embraced by a Section such as this.

As I understand the intention of these Sections, it might be expressed in a word—to bring perquisites of employment into tax; and from that broad approach the total expenditure does not seem to me, to the extent which has been charged against this particular taxpayer, to be properly in the category of a perquisite. The facts are quite simple. It may be quite true, as learned Counsel for the Crown put so clearly and emphatically, that within the four corners of the Section are the questions to which the answers follow almost

(Sellers, L.J.)

inevitably: Did the company spend money for the provision of counsel for the taxpayer? Answer, yes. Was that to the benefit of the taxpayer? And the answer is yes, also; and it is said this is conclusive.

The only matter on which I feel there is an outlet for the taxpayer is to consider the extent of the benefit. It is said that because of the strict wording of Section 161, the extent of the benefit is the extent of the expenditure which has been incurred, but that is hardly the reality of the situation. So far as the benefit to the taxpayer is concerned, it seems to me that you might well get a case where the benefit might be something less on any real interpretation of the object of this taxing Section. In the course of argument the case was envisaged of an operation on a young director who had fallen sick. He might have been quite content to have had the operation performed without expense as it could have been under the National Health provisions, or at a reasonable sum of 100 guineas which he could afford to pay the surgeon, and if the company said "We will go to the best man" he might find himself having the services of a highly qualified and fashionable surgeon at a figure of 1,000 guineas. That sum would be in no real sense a perquisite of his employment. It may, I recognise, come within the precise terms of Section 161 unless one is to give some narrow interpretation to the benefit. I think the extent of the benefit was a matter which appealed to the learned Judge, and it appeals to me. I would not myself have used the language which is reflected in the Order, and I doubt whether the learned Judge intended to put it that way, either.

Mr. Bucher's contention was—and it was this, I must say, which has appealed to me—that the benefit was only to the extent by which his pocket was relieved, and the relevant enquiry is not what the company spent but what the taxpayer might reasonably be expected to spend in his own defence, that being the amount by which he was relieved and therefore benefited. However, I am not quite satisfied that the wording permits that conclusion and I am not going to dissent from the views my brethren have taken.

I find no further difficulty in the matter complained of by the Crown in the Judge's Order to remit this matter back to the Special Commissioners. Reliance was placed on *Evans Medical Supplies, Ltd.* v. *Moriarty,* 37 T.C. 540. I do not think that case ought to be regarded as a general prohibition against a Judge ordering that a matter should go back to the Commissioners. Power is given by a Section in the Statute enabling remission in appropriate circumstances. That particular case is explained by the fact that throughout the whole proceedings in relation to a sum of £100,000 the contention had been that it was "all or nothing". It was really too late to consider any sort of apportionment, and there was no basis on the facts of that case for remitting it to the Commissioners. I would not regard that as authority for depriving the Court of power to send back an appropriate case. With much reluctance, I do not dissent.

Mr. Peter Foster.—Would your Lordships confirm the Special Commissioners' determination and allow the appeal with costs here and below, and dismiss the cross-appeal with costs?

Sellers, L.J.—I think that is right.

Mr. F. N. Bucher.—Yes, my Lord.

Russell, L.J.—Dismiss an appeal *from* the Special Commissioners? You said Buckley, J., ought to have dismissed the appeal to him from the Special Commissioners.

Mr. Foster.—Yes. I am much obliged.

Mr. Bucher.—May I make an application? If my client should be advised to do so, might we have leave of your Lordships to appeal to the House of Lords? There is a division of judicial opinion in the case.

Sellers, L.J.—Yes. I think the interpretation of a case like that is important. I should be ready to give leave. It is an everyday affair. All sorts of things crop up, and I think it should be made clear if there is any doubt about it.

Mr. Bucher.—I am much obliged to your Lordship.

The taxpayer having appealed against the above decision, the case came before the House of Lords (Viscount Radcliffe, and Lords Reid, Hodson, Guest and Upjohn), on 13th and 14th April, 1964, when judgment was reserved. On 5th May, 1964, judgment was given unanimously in favour of the Crown, with costs.

Mr. F. N. Bucher, Q.C., and Mr. R. Buchanan-Dunlop appeared as Counsel for the taxpayer, and Mr. Peter Foster, Q.C., Mr. Alan Orr, Q.C., and Mr. J. Raymond Phillips for the Crown.

Lord Reid.—My Lords, the Appellant is a whole-time director of Peter Merchant, Ltd. On 23rd July, 1958, the car which he was driving on the company's business struck and killed a pedestrian. The next day while in hospital he instructed his secretary to get legal advice from the Automobile Association. But when his managing director heard of this he countermanded that instruction and consulted the company's solicitors. He was advised that the Appellant might be charged with causing death by reckless or dangerous driving, that if convicted he would be sent to prison and that the company might be involved in liability. The Appellant was the only director in a position to negotiate contracts with certain customers and his services were also needed in connection with a reorganisation. So the managing director instructed the solicitors to spare no reasonable expense in his defence. This appears to have been fully justified in the interests of the company, as they might have lost much business if the Appellant had been convicted and sent to prison.

A partner of the solicitors' firm went immediately to see the Appellant in hospital and told him that the managing director had given instructions that he was not to have anything further to do with the provision of his defence, and the Appellant was very relieved by this information. The solicitors made full preparation for the defence, instructing an expert and senior and junior counsel. On 3rd November, the Appellant was tried at the Old Bailey and acquitted. The cost of the defence, £641, was paid by the company.

The Appellant was then assessed to Income Tax for the year 1958–59 in the sum of £3,919 in respect of his emoluments as director. This sum included the sum of £641 spent by the company on his defence. The question in this appeal is whether that sum ought to have been included in the assessment.

(Lord Reid)

The Crown relies on Section 161 (1) of the Income Tax Act, 1952, which provides:

> "(1) Subject to the following provisions of this Chapter, where a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of living or other accommodation, of entertainment, of domestic or other services or of other benefits or facilities of whatsoever nature, and, apart from this section, the expense would not be chargeable to income tax as income of the director or employee, paragraphs 1 and 7 of the Ninth Schedule to this Act, and section twenty-seven of this Act, shall have effect in relation to so much of the said expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount thereof had been refunded to him by the body corporate by means of a payment in respect of expenses."

The facts make it quite clear that the company did incur expense in the provision of a legal defence for its director, the Appellant. And it appears to me to be equally clear that the provision of that defence was a benefit within the meaning of this Sub-section. It was argued that the expense had been incurred solely for the purpose of protecting the interests of the company. That may be so. But it cannot be doubted that in fact the provision of his defence was a benefit to him: if it had not been provided by the company he would have had to pay for his own defence or take the risk that lack of a proper defence might lead to his being convicted and sent to prison. No one suggests that he could have obtained free legal aid. And I can find nothing in the Act to support an argument that a benefit in fact provided by the company ceases to be a benefit within the meaning of the Section if it is proved that the company's sole reason, motive or purpose was to protect itself and was not to favour its director.

The main argument for the Appellant was that, although he had received a benefit, it was not worth £641 to him and that that sum should be apportioned. I could understand a case being made for apportionment if the expenditure had been made for two objects, only one of which was of benefit to the director. But here there was only one object—to prevent conviction of the Appellant. The company's reason for trying to achieve that object may have been different from the Appellant's. The company did not want to be deprived of his services, while he wanted to avoid going to prison. But the whole of the money was spent for the purpose of avoiding that.

It is found as a fact that the Appellant would not have spent so much on his own defence: he mentioned a sum of £60. But then he would not have got the same benefit. His defence would not have been prepared in the way it was and he would not have been defended by experienced counsel. There is nothing to suggest that the £641 was extravagantly spent or that the benefit which he actually received could have been got for less. This is not a case of the company spending without the director's knowledge a large sum to procure a benefit which he did not want, and I do not intend to consider how such a case ought to be dealt with. The Appellant knew and accepted what was being done on his behalf though he may not have realised how much it was costing.

Where there is in fact a benefit and, therefore, a perquisite the Act provides that the measure of the perquisite shall be the expense incurred by the company in providing it. Whether there can ever be circumstances in which it would be possible to depart from that rule in a case where the money was wholly spent to provide the benefit is a matter which it is

(Lord Reid)

unnecessary to consider. I can see nothing in the facts of this case to justify any reduction of the sum in which the Appellant has been assessed, and accordingly I would dismiss this appeal.

Viscount Radcliffe.—My Lords, this is, in my opinion, a hopeless appeal. The £641 which the company, Peter Merchant, Ltd., spent in providing the legal defence for the Appellant, when he had to meet the charge that followed upon his unfortunate accident, falls directly within the range of Section 161 of the Income Tax Act, 1952, and I cannot see any ground for elaborate argument about it or by raising doubts about how the Section would apply in other hypothetical circumstances which are not the circumstances of this case.

The purpose of the Section is to charge to the taxable emoluments of a director whatever his company may have spent, without reimbursement from him, in providing for him living accommodation, entertainment, domestic or other services or other benefits or facilities, no matter of what nature they may be. Moneys spent by the company in providing such benefits—" Benefits in kind " as the Section heading says—are treated for tax purposes as if he had spent the money himself and had had it made good to him by the company as a payment on account of business expenses. Thus they are treated under Section 160 as if they were part of his assessable emoluments and only so much, if any, of those expenses as falls within Paragraph 7 of the Ninth Schedule can be deducted from those emoluments. I daresay that Section 161 by working its machinery backwards through Section 160 has produced a rather elaborate way of enacting a simple idea, but I do not think that the elaboration makes any difference to the plain meaning of the Section.

The Appellant's argument seems to attach some weight to the consideration that the company served its own purposes in arranging for his defence and undertaking the cost of it. I expect that it did : indeed, I think that one ought to assume that it did, for otherwise what right had it to spend the money at all? Naturally, the board did not wish to face the loss of his valuable services through a possible term of imprisonment, and, apart from that, I should suppose that, with him injured in the accident and involved in his most sad predicament, his colleagues were anxious to relieve his anxieties as much as they could by taking off his shoulders the burden and expense of arranging for his legal representation and defence.

But an expenditure is not the less advantageous to a director because it suits or advantages his company to make it. Since he renders services and it remunerates them with money or money's worth, there is always a common interest that the emoluments should be provided. If they were not, the company would not have his services. Similarly, what it makes available by way of supplementary benefits, such as services or other benefits in kind, is paid for in the company's interest, in order to retain services that it values and to secure that its officer is efficient and contented. That, however, does not make any difference to the application of Section 161, if the money spent does result in providing what is a benefit to the director. This is a case in which the money bought nothing except the Appellant's defence. No part of it was spent on something that did not benefit him. There is, therefore, no ground for resorting to the apportionment permitted by Section 161 (6), because apportionment only comes into play where of a total sum spent part can be identified as having been spent on something that was not a benefit or facility to the director concerned.

(Viscount Radcliffe)

I cannot at all understand how the issue of "extravagance" was allowed to enter this case. The idea that it was somehow present seems to have led Buckley, J., in the High Court to refer the matter back to the Special Commissioners(1)

> "to find as a matter of fact what sum was a reasonable sum to expend on the Appellant's defence at his trial",

in order that he should be charged to tax with no more than that sum. Yet there was absolutely nothing in the Stated Case to suggest that the company had been asked to pay or had paid an extravagant or unreasonable sum for this purpose. All that it had commissioned its solicitors to do was

> "to spare no reasonable expense to obtain the Appellant's acquittal of any charge made against him or, if he were convicted, to avoid his going to prison",

and it really could not be right, without any evidence to support it, to require a finding which, unless it produced a figure as large as the actual bill, would amount to a conclusion that the solicitors had incurred unreasonable costs. Besides, whatever motive could the company have had in spending any more money than was reasonably required to meet its purpose?

No one supported that particular form of enquiry in the Court of Appeal, and before us the Appellant has not argued in favour of it. What he did ask for was that the case should be sent back for a finding of what sum the Appellant would have spent on his defence if he had had no help towards it from the company. It was said that, left to himself, he would not have spent as much as was spent by the company, and the Special Commissioners made a finding to that effect. I do not believe that there can be any true finding of fact about what a man would have done in circumstances that are past and in which he was never presented with the necessity of decision. But, even if there could be a real finding on such a matter, I am satisfied that it would have no bearing on the Appellant's liability to tax under Section 161, for the sum attributed to him as emolument is the sum actually spent by the company, of which he received the benefit, not a notional sum which he could or would or might have spent if he had had to meet the predicament out of his own resources. After all, it does not reduce the value of a present to say that the recipient could not or would not have bought it for himself.

In my opinion, the appeal must be dismissed.

Lord Guest.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Viscount Radcliffe, with which I concur.

Lord Hodson.—My Lords, I concur.

Lord Upjohn.—My Lords, for the reasons given by my noble and learned friend, Viscount Radcliffe, in his opinion, with which I am in entire agreement, I would dismiss this appeal.

---

(1) *See* p. 649, *ante*.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Allen & Overy; Solicitor of Inland Revenue.]

(82470) Wt. 53—A5705 K54 12/64 St.S.