HIGH COURT OF JUSTICE (CHANCERY DIVISION)—14TH, 15TH AND 17TH NOVEMBER 1972

COURT OF APPEAL—13TH, 14TH, 15TH AND 27TH FEBRUARY 1974

HOUSE OF LORDS—2ND, 3RD, 4TH AND 5TH DECEMBER 1974 AND 12TH MARCH 1975

Haddock (H.M. Inspector of Taxes) *v.* Wilmot Breeden Ltd. (1)

Income tax, Schedule D—Subvention payment—Whether subvention payment made—Finance Act 1953 (1 & 2 *Eliz.* 2, *c.* 34), *s.* 20.

A group of which H Ltd. was the parent company included the Respondent Company and M, a French company in which the group had a 94 *per cent. shareholding. At the material times the central management and control of M was exercised by the board of H Ltd. and so was in the United Kingdom. M having run into difficulties, in* 1963 *four French manufacturers to which it supplied components entered into an agreement with H Ltd.* ("*the protocol*") *to advance* 10,000,000 *francs to M on the terms* (inter alia) *that M should increase its capital by an issue of shares to be paid up in consideration of the cancellation of advances made to it by H Ltd. and another company in the group, and then reduce the new capital in accordance with the total losses appearing in its balance sheet as at* 31*st December* 1963. *Three of the French companies undertook to convert their loans into share capital if certain conditions were fulfilled by the end of* 1964, *but it was not shown whether they had done so.*

By arrangement within the group M's indebtedness to the remainder of the group was transferred to the Respondent Company before 1*st July* 1964, *and the Company proceeded to discharge H Ltd.'s obligation to eliminate it. By an agreement dated* 1*st July* 1964 ("*the shares agreement*") *the Company agreed to transfer* 24,400,000 *francs* (*the greater part of the indebtedness*) *to M in consideration of the issue to the Company of* 244,000 *shares of* 100 *francs, fully paid up; on* 15*th September* 1964 *M duly increased its share capital from* 12,200,000 *francs to* 36,600,000 *francs and issued the said shares to the Company, which on* 14*th September had acquired* 94 *per cent. of the share capital of M from another member of the group. By a further agreement dated* 15*th September* 1964 ("*the subvention agreement*") *the Company agreed to bear the deficits of M; the agreement recited that the parties were associated and had surpluses and deficits respectively for tax purposes, and that pursuant thereto the Company had paid M* £1,567,798 (*the equivalent of* 21,635,611 *francs*), *but no payment was in fact made apart from the extinguishment of the debt under the shares agreement. On* 15*th October* 1964 *M reduced its capital to* 14,640,000 *francs by substituting two new shares of* 100 *francs for every five old shares of that amount and wrote off* 21,635,611 *francs shown as a loss in its balance sheet as at* 31*st December* 1963. *The Company's accountants explained to the Inspector of Taxes that this procedure had been adopted because a direct cancellation of the indebtedness would have been treated as a taxable receipt of M for the purposes of French taxation.*

(1) Reported (Ch.D.) [1973] S.T.C. 38; (C.A.) [1974] S.T.C. 223; (H.L.) [1975] S.T.C. 255.

On appeal against an assessment to income tax under Schedule D for the year 1964–65 the Special Commissioners held that the obligation undertaken by H Ltd. under the protocol and discharged by the Company under the shares and subvention agreements came within the ambit of s. 20, Finance Act 1953, and that accordingly the Company had made a subvention payment to M of £1,561,739 (computed as below).

In the High Court and above it was contended for the Crown that the amount of the debt extinguished in payment for the shares in M could not do double duty as a subvention payment. The Company contended that, as a matter of commercial common sense, by entering into the shares agreement it had concurred in the writing down of M's capital under the protocol, and that the amount by which its shareholding in M was reduced must be regarded as a subvention payment of £1,561,739, the equivalent of 21,552,000 francs, being the difference between 24,400,000 francs, the debt extinguished, and 2,848,000 francs, the eventual par value of the holding acquired in return; further, that it was not necessary for either the paying or the receiving company to be parties to the agreement which brought s. 20, Finance Act 1953, into play.

Held, *that, although (Lord Simon of Glaisdale dissenting) an agreement to make subvention payments need not be legally enforceable, no part of what was expressed as consideration for the purchase of shares could be treated as a direct payment to M made for no consideration in order to share its losses.*

CASE

Stated under the Taxes Management Act 1970, s. 56, 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 10th, 11th and 12th March 1970 Wilmot Breeden Ltd. (hereinafter called "Wilmot Breeden") appealed against an assessment to income tax for the year 1964–65 in the amount of £2,000,000 less capital allowances of £325,000. That appeal was heard, by agreement of all parties, together with a related appeal by Compagnie Industrielle de Mécanismes S.A. (hereinafter called "C.I.M.") against alternative protective assessments. (The latter appeal is not being taken further by the Crown.)

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

(*a*) whether C.I.M. was at all material times resident in the United Kingdom within s. 20(9) of the Finance Act 1963;

(*b*) whether in computing its profits for the purposes of Case I of Schedule D Wilmot Breeden was entitled to deduct the whole or any part of a sum of £1,567,798 alleged, in the circumstances hereinafter set out, to constitute a subvention payment with the said s. 20.

3. The following witnesses gave evidence before us: (*a*) David Lucas Breeden (hereinafter called "Mr. D. L. Breeden"), at all material times chairman and joint managing director of Wilmot Breeden and a director of C.I.M.; (*b*) Jean Matheus, chief accountant of C.I.M.

4. The following documents were proved or admitted before us:

(1) Copy translation of articles of association of C.I.M.

(2) Copy translation of minutes of board meetings of C.I.M.

(3) Copies of extracts from minutes of board meetings of W. Breeden (Holdings) Ltd. (hereinafter called "Holdings").

(4) Copy translation of report of M. Piquet dated 8th November 1962.

(5) Copy report of economic survey of C.I.M. and Autocoussin Dura S.A. by Associated Industrial Consultants Ltd. A

(6) Copy translation of protocol agreement between consortium of French Motor Manufacturers and Holdings dated 8th July 1963 (exhibit A(1)).

(7) Copy agreement for shares to be paid for other than by cash, dated 1st July 1964 (exhibit B(2)).

(8) Copy agreement (referred to on its back as "Subvention Agreement") dated 15th September 1964 between (1) Wilmot Breeden Ltd. and (2) C.I.M. (exhibit C(2)). B

(9) Copy translations of resolutions of extraordinary general meeting of shareholders of C.I.M., 15th September 1964 and 15th October 1964.

(10) Copy endorsement to protocol dated 8th July 1963.

(11) Copy of summary of the way in which the sum alleged to constitute a subvention payment was dealt with in books of C.I.M. C

(12) Copy alleged subvention payment to C.I.M. pursuant to agreement dated 15th September 1964.

Copies of such of the above as are not annexed hereto as exhibits are available for inspection by the Court if required.

5. As a result of the evidence, both oral and documentary, adduced before us we find the following facts proved or admitted: D

(1) Wilmot Breeden was incorporated under the Companies Acts 1908 to 1917 with limited liability, and was at all relevant times a wholly-owned subsidiary of Holdings.

(2) Holdings had its head office and organisation at Tyseley, Birmingham, England, and was the parent of a group of English and European companies (hereinafter called "the group"), which manufactured (*inter alia*) components for automobiles. E

(3) Wilmot Breeden and C.I.M. were two of the group. Wilmot Breeden had its head office and factory at Tyseley in the Birmingham area. C.I.M. had its head office in Paris and major factories at St. Dié and Evreux, in France. Wilmot Breeden specialised in the design and production of door locks and window winders (hereinafter called "mechanisms"). F

(4) French car manufacturers became aware of the engineering expertise possessed by Wilmot Breeden, and sought to have mechanisms of the Wilmot Breeden design incorporated in their new models. Early in 1959 Holdings saw its opportunity to enter France on a manufacturing basis. Initially Holdings made an investment in a French company called Société Autocoussin Dura (hereinafter called "A.D."), which was one of the main French producers of mechanisms, car seats and mattresses, and which was a licensee of Wilmot Breeden. Eventually on 13th October 1959 Holdings decided to form a new company (to be called C.I.M.) to take over that part of the undertaking and assets of A.D. employed in the manufacture of mechanisms, and on 11th November 1959 set up a committee of its board (hereinafter called "the committee"), comprising Mr. D. L. Breeden, Mr. M. L. Breeden and Mr. L. F. Herbert, to develop the French enterprise and to report thereon from time to time. At all material times Mr. D. L. Breeden was joint managing director and chairman both of Holdings and Wilmot Breeden. Mr. M. L. Breeden was the other joint managing director of Holdings and Wilmot Breeden; and G H

(1) *See* page 142 *post*. (2) Not included in the present print.

Mr. Herbert was a director of Holdings and senior partner in a firm of solicitors practising in Oxford.

(5) It soon became clear to Mr. Herbert that the committee was an executive body and that he could not involve himself in the day-to-day work of that body and also carry on his practice. He accordingly resigned by letter dated 19th November 1959, and Mr. Victor Chanaryn (hereinafter called "Mr. Chanaryn") was co-opted on to the committee in place of Mr. Herbert. Mr. Chanaryn, of Polish origin, was an able engineer, and was employed by Wilmot Breeden as head of its product engineering division. He spoke fluent French and was instrumental in persuading French car manufacturers to take an interest in the new locking and latching systems designed by Wilmot Breeden. He played an important part in the negotiations with A.D., negotiations which eventually led to the formation of C.I.M.

(6) C.I.M. was incorporated under the laws of France on 22nd December 1959. At all material times Holdings beneficially owned more than 75 per cent. of the issued share capital of C.I.M. either directly or indirectly through Wilmot Breeden or through Wilmot Breeden Continental S.A. (hereinafter called "Continental"), which was a Swiss company and a member of the group. At 15th November 1963 94 per cent. of the issued capital of C.I.M. was held by Continental, and on 14th September 1964 that shareholding was transferred by Continental to Wilmot Breeden.

(7) The articles of association of C.I.M. (the text of which was in French) were expressed to be drawn by Mr. Chanaryn (therein described as "Company Director, having his address at 32 Alderbrook Road, Solihull, Warwickshire, England") and contained the following provisions (translated) material to this Case:

> "Section One. *Formation—Objects—Name—Registered office—Life of the Company.*
>
> Article 2. *Objects.* The objects of the Company are in all countries: To manufacture and sell all apparatus, machinery, mechanisms, equipment and supplies of all kinds intended for vehicles and transportation media and for all other mechanical and industrial uses. And generally any and all personal, real, financial, industrial or commercial transactions connected directly or indirectly with above objects or to any similar or related objects, or conducive to promoting and facilitating the attainment or development of such objects.
>
> Article 4. *Registered office.* The registered office is situate at Paris (80) Seine, 33 avenue des Champs-Elysées. It may be transferred to any other location in the same "Department" by a resolution of the Board of Directors, and may be transferred to any other locality by resolution adopted at an extraordinary shareholders' meeting.
>
> Section Two. *Share capital—Shares.*
>
> Article 7. *Increase or Reduction of capital.* (1) The share capital may be increased one or more times, by the issue of new shares representing contributions in kind or in cash, by the transfer of surplus, provisions or profits of the Company to shares, or by any other means, by resolution adopted at an extraordinary meeting of shareholders. Such meeting shall establish the conditions governing the issue of the new shares, or shall delegate its powers to this end to the Board of Directors. The share capital must be fully paid up prior to any increase of capital for cash.

(2) An extraordinary shareholders' meeting can also adopt a resolution to reduce the share capital, for any reason and in any manner whatsoever, particularly by means of a refund to the shareholders, of a redemption of the shares of the Company or of an exchange of the old shares against new shares, in equivalent or lesser number, of the same or a different par value and numbers and if deemed necessary, subject to surrender or purchase of old shares to facilitate the exchange, or subject to payment of an amount in cash." A B

[The remainder of sub-para. (7) and sub-paras. (8) to (10) were relevant only to the Commissioners' finding on the residence of C.I.M., which was not in issue in the High Court.]

(11) During the latter half of 1962 C.I.M. ran into serious trading and financial difficulties. The board of Holdings instructed a Monsieur J. Piquet (who had advised Holdings on the position of A.D. prior to the formation of C.I.M. in 1959) to make a report (hereinafter called "the Piquet report"), which was produced, and dated 8th November 1962. The Piquet report, which was written in French, went into detailed facts and figures, revealing a critical state of affairs, but concluding that such state was transitory and could be speedily redressed, provided well-directed steps were taken. C D

(12) A translation of the Piquet report was laid before the board of Holdings on 11th December 1962. Mr. D. L. Breeden then realised that the committee had been working on imperfect or inaccurate data supplied by Mr. Chanaryn and that the latter's forecasts had been far too optimistic. Accordingly, as chairman of Holdings, Mr. D. L. Breeden commissioned Associated Industrial Consultants to make a further investigation and report, which was undertaken by a Mr. E. A. Fyne (hereinafter called "Mr. Fyne"). E

Shortly before Mr. Fyne commenced his investigation Mr. D. L. Breeden dismissed Mr. Chanaryn from his employment with the group. Mr. J. T. Cross (hereinafter called "Mr. Cross"), a director of Holdings, then became a member of the committee in place of Mr. Chanaryn. During the crisis Mr. D. L. Breeden was obliged to spend at least a day and a half each week in Paris. F

(13) Mr. Fyne produced his Economic Survey of C.I.M. and Autocoussin (hereinafter called "the Fyne survey") in May 1963. The Fyne survey, which was in English, was more elaborate than the Piquet report, indicating the action which ought to be taken to rectify the situation; with (*inter alia*) detailed technical and financial advice.

(14) Neither the Piquet report nor the Fyne survey was laid before or considered by the board of C.I.M., which did not meet between 29th October 1962 and 18th June 1963, a period of 7½ months. The board of Holdings did not hold the board of C.I.M. to be responsible for the financial crisis which had arisen, and the rescue operation being mounted by Holdings was conducted outside the board of C.I.M., although the latter were informed that negotiations aimed at financial recovery were being undertaken by Holdings. At the meeting of the board of C.I.M. held on 18th June 1963 Mr. D. L. Breeden announced that Mr. Chanaryn no longer exercised any authority within the group. Subsequently, on 8th August 1963, Mr. Chanaryn resigned as director and assistant general manager of C.I.M. Mr. Fyne then took over the former appointment and duties of Mr. Chanaryn as assistant general manager, being answerable to Mr. Cross and with authority to take day-to-day executive decisions in France. G H I

(15) Meantime (during the first half of 1963) Mr. D. L. Breeden had also realised the pressing need to raise further finance if the French enterprise was to be continued. Holdings had achieved an important penetration into the

French car industry in spite of heavy losses and had established a flow of production essential to that industry. Mr. D. L. Breeden went to see representatives of the four main French car manufacturers, explaining the situation to them individually and presenting the Fyne survey. In the result the four manufacturers agreed to form a consortium to make an interest free loan of 10,000,000 francs to C.I.M. by way of advances against supplies. That arrangement provided the finance over the period during which Holdings expected to be able to bring the situation under proper control. The board of C.I.M. was in no way concerned with the negotiations for the loan.

(16) The said loan was made upon the terms and conditions contained in a protocol (hereinafter so referred to) dated 8th July 1963 and made between (1) Régie Nationale des Usines Renault (Renault), Société Anonyme des Automobiles Peugeot (Peugeot), Société Simca Automobiles (Simca) and Société Anonyme André Citroen (Citroen), therein referred to as "the Constructors", and (2) Holdings, acting on its own behalf and on that of C.I.M. and Autocoussin.

A translation of the protocol, the text of which was in French, is annexed hereto, marked exhibit A(1).

Briefly, in return for the loan and subject to various safeguards for the creditors, Holdings undertook on behalf of itself and Continental to cancel advances made by it and Continental to C.I.M. by subscribing for additional shares in C.I.M., and then to procure that C.I.M. would reduce its capital in accordance with the total losses appearing in C.I.M.'s balance sheet at 31st December 1963. The loan was in part to be converted into share capital in C.I.M., and in so far as not so converted it was to be repaid during 1965 in cash. C.I.M. had incurred large trading losses, and had been sustained largely by advances from Holdings and Continental, and to a lesser extent by Wilmot Breeden in respect of machinery supplies.

(17) Although under the protocol Holdings assumed the obligation to eliminate the indebtedness of C.I.M., it was Wilmot Breeden that proceeded, by arrangement within the group, to discharge that obligation, and towards this end there had been transferred to Wilmot Breeden prior to 1st July 1964 the indebtedness of C.I.M. to the remainder of the group other than Wilmot Breeden. The board of C.I.M. were never shown the text of the protocol, but were informed of its gist on 9th October 1963. On 14th May 1964 the details of the proposed increase of capital to be effected by set-off against Wilmot Breeden were explained to and approved by the board.

(18) The terms of the protocol were then implemented in the following way:

(*a*) By an agreement dated 1st July 1964 (hereinafter called "the shares agreement") and made between (1) Wilmot Breeden and (2) C.I.M., Wilmot Breeden transferred to C.I.M. the sum of 24,400,000 francs (representing the greater part of the total debts of C.I.M. therein specified and then owing to Wilmot Breeden itself), such transfer being satisfied by the issue to Wilmot Breeden of 244,000 shares of 100 francs each, fully paid up, which were to be issued by C.I.M. as an increase in share capital. On behalf of both parties

(1) *See* page 142 *post*.

this agreement was endorsed "Good for the transfer of 24,400,000 francs". A copy of the shares agreement is annexed hereto, marked exhibit B(1). A

(*b*) By a further agreement dated 15th September 1964 (which was referred to on its back sheet and is hereinafter referred to as "the subvention agreement"), and made between (1) Wilmot Breeden and (2) C.I.M., reciting that the parties were associated and had surpluses and deficits respectively for tax purposes, Wilmot Breeden agreed to bear the deficits of C.I.M. It was stated therein that pursuant to that agreement Wilmot Breeden had paid to C.I.M. £1,567,798, being the equivalent of 21,635,611 francs, with intent that such payment should be a subvention payment. A copy of this "subvention agreement" is annexed hereto, marked exhibit C(1). B

(*c*) (i) At an extraordinary general meeting of shareholders of C.I.M. held on 15th September 1964 the capital of C.I.M. (until then 12,200,000 francs) was increased to 36,600,000 francs by the creation of 244,000 new shares of 100 francs each, fully paid up "in payment for the consideration introduced by Wilmot Breeden". C

(ii) At a further extraordinary general meeting of shareholders of C.I.M. held on 15th October 1964 the capital of C.I.M. was reduced from 36,600,000 to 14,640,000 francs by replacing the 366,000 shares of 100 francs then issued by 146,000 new shares of the same nominal amount allocated to shareholders in the ratio of two new shares for five old shares. The reduction of 21,960,000 francs was used to write off the sum of 21,635,611 francs shown as a loss in its balance sheet as at 31st December 1963, the balance of 324,389 francs being used against the cost of increasing the capital on 15th September 1964. D

(*d*) By an endorsement dated 27th January 1965 and made between (1) Renault, Peugeot and Simca and (2) Holdings, on behalf of itself and C.I.M., the provisions of the protocol were expressed to be varied, but such variation is not material to this Case. E

(19) The following is a summary of the way in which the sum of 21,635,611 francs (=£1,567,798) written off as aforesaid (out of which 21,552,000 francs (=£1,561,739) constituted the sum in the event claimed by Wilmot Breeden as a subvention payment) was dealt with in the accounts of C.I.M. F

Wilmot Breeden Limited

Compagnie Industrielle de Mecanismes

Summary of the way in which the subvention payment was dealt with in the books of C.I.M.

		French francs
1.	Debt due by C.I.M. to Wilmot Breeden	24,400,942
2.	Original share capital of C.I.M.	12,200,000
	Additional share capital issued to absorb the debt due to Wilmot Breeden on the understanding that 21,552,000 French francs of the losses were to be written off	24,400,000
	Capital as increased	36,600,000
	Reduction of capital	
	Amount written off share capital by agreement	*21,960,000
	Reduced share capital	14,640,000

G H

(1) Not included in the present print.

A

	French Francs
*This amount is calculated as follows:	
Amount of trading loss written off, in pursuance of subvention agreement	21,552,000
Balance of trading loss written off, not covered by subvention agreement	83,611
B Cost of increasing capital partly written off ..	324,389
	21,960,000

(20) The following is a copy of a document supplied by the accountants of Wilmot Breeden to H.M. Inspector of Taxes at the latter's request.

"Wilmot Breeden Limited
C Subvention Payments to French Subsidiaries
Subvention to C.I.M. pursuant to
Agreement dated 15th September 1964

C.I.M. was indebted to Wilmot Breedon Limited for Frs. 24,400,942. It was desired to make a subvention payment of an amount equal to the accumulated losses as shown by C.I.M.'s accounts up to 31st December, D 1963 which amounted to Frs. 21,635,611. Had this been done by a direct cancellation of indebtedness the credit to C.I.M. would have been treated as a taxable receipt for the purposes of French taxation. To avoid this, the following procedure was adopted:—(a) Wilmot Breedon applied for new shares in the C.I.M. for Frs. 24,400,000 at par and (b) C.I.M. wrote off its accumulated losses against share capital under a scheme for capital E reconstruction. Following this subvention the balance due to Wilmot Breedon Limited was reduced to Frs. 942. The effect of the transactions may be seen from the following comparison:

	Frs.
Wilmot Breeden investment in C.I.M. prior to subvention	
Shares at par	11,520,000
F Current account	24,400,942
	35,920,942
Wilmot Breeden investment in C.I.M. after subvention	
Shares at par	14,368,000
Current account	942
G	14,368,942
Reduction (=subvention)	21,552,000

The subvention agreement refers to an amount of Frs. 21,635,611, but the effective subvention claimed is Frs. 21,552,000 as above.

H *Entries in books of C.I.M.*

	Frs. Dr.	Frs. Cr.
1. Wilmot Breeden Limited—		
Current account	24,400,000	
Share capital		24,400,000
I Being payment by Wilmot Breeden Limited for shares in C.I.M. to the nominal value of Frs. 24,400,000		

		Frs. Dr.	Frs. Cr.
2.	Share capital—		
	Wilmot Breeden Limited's holding ..	21,552,000	
	Other holdings	408,000	
	Profit and loss account		21,960,000
	Being capital written off in a reconstruction against accumulated losses (Frs. 21,635,611) and reconstruction costs		

Entries in books of Wilmot Breeden Limited

		£ Dr.	£ Cr.
1.	Shares in C.I.M.	1,768,166	
	C.I.M. current account		1,768,116
	Being payment by Wilmot Breeden Limited for shares in C.I.M. to the nominal value of Frs. 24,400,000		
2.	Provision for subvention	1,561,739	
	Capital reserve	77,986	
	Shares in C.I.M.		1,639,725
	Being a write-down of the shareholding to par following the reconstruction of the capital of C.I.M."		

6. It was contended on behalf of the Inspector of Taxes:

(*a*) that the central management and control of C.I.M. was at all material times in France, so that C.I.M. was not resident in the United Kingdom within the meaning of s. 20(9) of the Finance Act 1953;

(*b*) that, further or alternatively, no payment in fact was made which qualified as a subvention payment within the said s. 20;

(*c*) that accordingly, the requirements of the said s. 20 not being satisfied, Wilmot Breeden was not entitled to deduct the payment in question in computing its profits;

(*d*) that the appeal should be dismissed.

7. It was contended on behalf of the Respondent, Wilmot Breeden:

(*a*) that the central management and control of C.I.M. was at all material times in the United Kingdom, and that therefore C.I.M. was resident in the United Kingdom within the meaning of the said s. 20(9);

(*b*) that the payment in question qualified as a subvention payment under the said s. 20;

(*c*) that Wilmot Breeden was accordingly entitled to deduct the amount of the said payment in computing its profits;

(*d*) that the appeal should be upheld.

8. The case of *Bullock* v. *Unit Construction Co. Ltd.* 38 T.C. 712; [1960] A.C. 351 was cited before us in argument.

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

The appeals before us raised two issues: whether C.I.M. was resident in the United Kingdom during the relevant period; and, if so, whether the payment of £1,567,798 was paid under an agreement to bear a part of the losses of that company.

A On the first issue, and having regard to the evidence as a whole, we found that C.I.M. was a company resident in the United Kingdom. We were satisfied that the central control and management of C.I.M. were actually carried out in the United Kingdom. It seemed to us that location of control and management lay in the hands either of the board of Holdings or their committee set up to direct C.I.M. in all important matters.

B On the second issue we were of the opinion that the obligation undertaken by Holdings under the protocol and discharged by Wilmot Breeden under the shares and subvention agreements came within the ambit of s. 20 of the Finance Act 1953.

Accordingly, we upheld the appeals in principle and left figures to be agreed between the parties.

C 10. Figures were agreed between the parties on 2nd July 1971, and on 13th July 1971 we reduced the main assessment for 1964–65 to £1,032,515 (capital allowances being agreed at £304,058).

11. The Inspector of Taxes immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and on 9th August 1971 required us to state a Case for the opinion of
D the High Court pursuant to the Taxes Management Act 1970, s. 56, which Case we have stated and do sign accordingly.

12. The question of law for the opinion of the Court is whether our decision was erroneous in point of law.

B. James, G. R. East } Commissioners for the Special Purposes of the Income Tax Acts

E

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17th May 1972

F The case came before Goff J. in the Chancery Division on 14th and 15th November 1972, when judgment was reserved. On 17th November 1972 judgment was given in favour of the Crown, with costs.

C. N. Beattie Q.C. and *Patrick Medd* for the Crown.

F. Heyworth Talbot Q.C. and *Barry Pinson* for the Company.

Evans Medical Supplies Ltd. v. *Moriarty* 37 T.C. 540; [1958] 1 W.L.R. 66
G was cited in argument in addition to the case referred to in the judgment.

Goff J.—This is an appeal by the Crown against a decision of the Special Commissioners upholding in principle a claim by Wilmot Breeden Ltd. (to whom I shall refer as "W.B.") to have a sum of £1,567,798, being the equivalent of 21,635,611 French francs, allowed as a subvention payment under s. 20 of the
H Finance Act 1953.

The claim as in fact presented both before the Commissioners and before me was for a somewhat smaller sum—namely, £1,561,739, the equivalent of 21,552,000 French francs—and in para. 5(20) of the Case Stated there appears the following statement: "The subvention agreement refers to an amount of Frs. 21,635,611"—as indeed it does, and as the balance sheet of a French
I company, to be later more particularly mentioned, Compagnie Industrielle de Mécanismes (which I shall call "C.I.M.") shows was the true amount of that

(Goff J.)

company's losses—"but the effective subvention claimed is Frs.21,552,000." This discrepancy is, I think, significant, as it stresses what will emerge more clearly later on, that the claim was not really based on any payment by W.B. but on a mathematically calculated loss which it claimed to have suffered. After the decision in principle figures were agreed between the parties, but nothing turns on that.

The claim arose in the following way. W.B. and C.I.M. were both subsidiaries of Wilmot-Breeden (Holdings) Ltd. (which I shall call "Holdings"), W.B. being wholly owned and C.I.M. 94 per cent. so. C.I.M., which had been formed in the course of steps taken to give the Wilmot Breeden group an entry into France on a manufacturing basis, had suffered heavy losses, but, as the Case states, an important penetration into the French car industry had been achieved and a flow of production essential to the industry had been established. Accordingly, Holdings were anxious to save C.I.M., and so were four French motor car manufacturers. In the result, the four French houses and Holdings entered into an agreement in the French language, and governed it would seem by French law, dated 8th July 1963, and referred to in the Case as the "protocol" agreement, exhibit A being an English translation. By article 1 of this protocol, the four French houses agreed to lend to C.I.M. a total sum of 10,000,000 francs interest-free by way of advances against supplies. Article 2 is in the terms following:

> "WBHL"—that is, Holdings—"undertakes on behalf of itself and WB Continental and the other shareholders of CIM and Autocoussin, whose concurrence it guarantees: As soon as definitive accounts for 1963 have been prepared for the two latter companies, to increase their capital by an issue of shares which will be paid up in consideration of the cancellation of advances which WBHL and WB Continental have made to these companies, the total of which is quoted as 30,757,000 Francs. When this has been done to reduce their new capital in accordance with the total of the losses appearing in the balance sheets of these companies at 31st December 1963 according to current accounting practices."

W.B. Continental and Autocoussin were also members of the group. There is no significance in the figure being 30,757,000 francs, as no doubt it included losses of Autocoussin. It will be observed, however, that there is nothing in article 2 referring, at all events in terms, to paying anything to C.I.M. to discharge its losses or to C.I.M. reducing its capital by returning any part or making any other payments to Holdings or W.B. By articles 3 and 4 three of the French companies undertook to convert their loans into share capital on the condition that the plan of rehabilitation therein specified (a plan for the rehabilitation of C.I.M. and Autocoussin) had been previously put into force in its entirety and that the financial results thus obtained revealed a progressive and material improvement in the situation of the companies concerned and permitted of a reasonable expectation of their return to balanced trading before the end of 1964. This would involve 9,300,000 of the 10,000,000 francs. There is nothing in the Case to show whether or when these loans were in fact converted into shares.

It was found in para. 5(17) and (18) of the Case as follows:

> "(17) Although under the protocol Holdings assumed the obligation to eliminate the indebtedness of C.I.M., it was Wilmot Breeden that proceeded, by arrangement within the group, to discharge that obligation, and towards this end there had been transferred to Wilmot Breeden prior to 1st July 1964 the indebtedness of C.I.M. to the remainder of the group other than Wilmot Breeden . . . (18) The terms of the protocol were then

implemented in the following way: (*a*) By an agreement dated 1st July 1964 (hereinafter called 'the shares agreement') and made between (1) Wilmot Breeden and (2) C.I.M., Wilmot Breeden transferred to C.I.M. the sum of 24,400,000 francs (representing the greater part of the total debts of C.I.M. therein specified and then owing to Wilmot Breeden itself), such transfer being satisfied by the issue to Wilmot Breeden of 244,000 shares of 100 francs each, fully paid up, which were to be issued by C.I.M. as an increase in share capital . . . (*b*) By a further agreement dated 15th September 1964 (which was referred to on its back sheet and is hereinafter referred to as 'the subvention agreement') and made between (1) Wilmot Breeden and (2) C.I.M., reciting that the parties were associated and had surpluses and deficits respectively for tax purposes, Wilmot Breeden agreed to bear the deficits of C.I.M. It was stated therein that pursuant to that agreement Wilmot Breeden had paid to C.I.M. £1,567,798, being the equivalent of 21,635,611 francs, with intent that such payment should be a subvention payment."

The shares agreement was made exhibit B and the subvention agreement was made exhibit C. It was conceded in argument that the statement in the subvention agreement that W.B. had paid to C.I.M. £1,567,798 had no foundation in fact. The decision of the Commissioners was one of law, that the obligation undertaken by Holdings under the protocol and discharged by W.B. under the share and subvention agreements came within the ambit of s. 20 of the Finance Act 1953.

In opening, the Crown said quite simply the payment for the 240,000 shares by the extinguishment of C.I.M.'s debt was a payment for shares and could not do double duty as a subvention payment, and the money stated in the subvention agreement simply was not paid. In answer, W.B. made a main and an alternative case. The primary submission for W.B. is that one has to start from the beginning with the protocol and look at the whole picture. They say: (1) There is a finding of fact that W.B. assumed the obligations of Holdings under the protocol (see para. 5(17) of the Case Stated). (2) Those obligations were twofold: (*a*) to cancel advances by increasing the capital of C.I.M. and issuing new shares credited as fully paid; (*b*) to reduce their new capital in accordance with C.I.M.'s losses. (3) The shares agreement and its implementation discharged (*a*) but not (*b*). (4) Obligation (*b*) was then carried out by W.B. concurring in the writing down of the capital, and that involved a loss which must be regarded as a payment made under the subvention agreement. They quantify that loss thus. W.B. started with having a sum of 24,400,192 French francs owing to it by C.I.M. That was an asset equal to its face value—which is of course an assumption, because it depends on the ability of C.I.M. to pay its debts, but I will assume it to be so. Incidentally, W.B. retained the odd 192 francs, which may therefore be disregarded. W.B. also had a holding of 11,520,000 shares in C.I.M. They finished up with the debt discharged and their holding of shares 14,368,000. Taking the shares in each case at par, the holding had increased by 2,848,000 French francs only, but this had cost 24,400,000 francs by the extinguishment of the debt. Therefore W.B. lost the difference; that is, 21,552,000 French francs, which is the equivalent of £1,561,739, which is the amount claimed.

I cannot accept this submission for various reasons. In the first place, it involves assumptions for which there is no warrant. The debt of 24,400,000 francs did not initially belong wholly to W.B., and the Case does not disclose whether W.B. gave any consideration for its transfer to them. If they did not, then so far from making a loss they may have made a profit. If one is to look at

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the whole picture, that includes the transfer of indebtedness to W.B. Secondly, it assumes par value for the initial and final holdings of shares, but the regularisation of the affairs of C.I.M. may well have increased the value of its shares.

Apart from these objections, there seems to me to be a fundamental fallacy in the argument. The protocol provided for the losses to be set against "their shares", but that is not what was done. The losses and certain expenses also were set off against the whole of the share capital *pro rata*, including the outside 6 per cent. Therefore there was no loss, because the reduced holding of 14,368,000 shares gave W.B. precisely the same share of the equity as they had after the issue of the extra 24,400,000 shares and before the reduction of capital. The loss, if loss there be, could only have arisen upon the three French companies converting their loans into shares, which they were conditionally bound and entitled to do. I say "if loss there be" because, although that would reduce W.B.'s share of the equity, it would increase the assets by 9,300,000 francs brought in by those companies, and, of course, before these operations C.I.M. was in a critical state (see para. 5(11) of the Case) and the whole transaction was intended to rescue it. Moreover, the French companies were not obliged to convert their loans into shares until they had satisfied themselves that it had. Such a loss could only be proved by evidence of value, and there was none, and no relevant findings of fact. The case was presented purely on a mathematical calculation. Further, in any event the loss, if and so far as incurred, did not arise only from the carrying out of the obligation in article 2 of the protocol to reduce "their new capital" in accordance with the terms of C.I.M's losses in the manner in which it was in fact carried out. It arose, if at all, from the combined effect of the reduction and the conversion by the French companies of their loans into shares, and I do not consider that a commercial loss arising in that way can fairly be regarded as a payment within s. 20.

The primary submission is faced with one further difficulty, that it cannot be based on the subvention agreement alone but entails reliance on the protocol, to which neither W.B. nor C.I.M. were parties. Some of the provisions of the protocol suggest that there might be grounds for saying that C.I.M. and possibly W.B. were by French law parties though not named as such. There was, however, no evidence of French law; and it is clear, and Mr. Heyworth Talbot conceded, that it would not be so under English law and that I must proceed on that basis. To escape this last difficulty, Mr. Heyworth Talbot presented an alternative submission that it is not necessary for the paying or the receiving company, or indeed either of them, to be parties to the agreement which must be found to bring s. 20 into play. There is no authority directly in point on this question. Something like it came before Buckley J. in *Montague L. Meyer Ltd.* v. *Naylor* (1961) 39 T.C. 577, but on the facts there the only agreement that could be found was one between the paying and payee companies, and all that he had to decide was whether or not such agreement had been proved, which it had not because it purported to be made on behalf of the payee by an agent who had no authority. In my judgment, both must be parties to the agreement. I think that is the natural meaning of the words in subs. (2) in their context. At the very least, in my view, the paying company must be a party, as I do not see how it can be said to make a payment under an agreement if it is not a party to it. If I had not thought it necessary that both should be parties, and had I not seen other insuperable objections to the alternative submission, I would have directed a reference back to the Commissioners to find precisely what the arrangements referred to in para. 5(17) of the Case were, but as it is that is unnecessary. If I were wrong and W.B. could rely on the protocol, either on the footing that s. 20 does not require either company to be a party to the agreement or on the footing,

A if it were so found, that the arrangement within the group under which W.B. proceeded to discharge the obligation of Holdings was a sufficient agreement within s. 20 to which W.B. was a party, the same objection presents itself, that the loss, if any, to be relied on as a payment was a commercial loss which, for the reasons I have already given, was in my judgment not proved, and in any case was not a payment within s. 20.

B Finally, there is, as it seems to me, a further fatal objection both to the main and to the alternative case. It is necessary for W.B. to equate what happened with an obligation incurred by W.B. to pay off the losses and a cross-obligation incurred by C.I.M. to repay capital, the two being treated as set off. First, however, the transaction did not take that form, as the terms of the protocol and the resolutions show. C.I.M. did not resolve to repay capital but C to cancel shares, and to do so because the losses remained. Secondly, such a set-off involves W.B. assuming a liability to pay C.I.M. the amount of its losses, which could never have been intended since it would have run straight into the difficulty to which the accountants referred in the document set out in para. 5(20) of the Case.

For these reasons, in my judgment the appeal succeeds. Mr. Beattie, D what is the right Order for me to make?

Beattie Q.C.—My Lord, I think the Order should be that the case should be remitted to the Commissioners to adjust the assessment in accordance with your Lordship's judgment. It is not a case where we can agree figures, and that is why I would ask for it to be remitted.

Goff J.—Would you agree, Mr. Pinson, that that is what you would like E me to do?

Pinson—I agree, my Lord.

Goff J.—I am much obliged.

Beattie Q.C.—Would your Lordship allow the appeal with costs?

Goff J.—You cannot resist that, can you, Mr. Pinson?

Pinson—I cannot resist that, no, my Lord.

F **Goff J.**—Very well; then I will so order.

Beattie Q.C.—If your Lordship pleases.

The Company having appealed against the above decision, the case came before the Court of Appeal (Russell, Stamp and Orr L.JJ.) on 13th, 14th and 15th February 1974, when judgment was reserved. On 27th February 1974 G judgment was given unanimously in favour of the Crown, with costs.

Desmond Miller Q.C. and *Andrew Park* for the Company.

C. N. Beattie Q.C., *Patrick Medd Q.C.* and *Harry Woolf* for the Crown.

The following cases were cited in argument:—*De Beers Consolidated Mines Ltd.* v. *Howe* 5 T.C. 198; [1906] A.C. 455; *Bullock* v. *Unit Construction Co. Ltd.* 38 T.C. 712; [1960] A.C. 351; *Cooper* v. *Stubbs* 10 T.C. 29; [1925] 2 K.B. 753;

Edwards v. *Bairstow* 36 T.C. 207; [1956] A.C. 14; *Davies* v. *Davies, Jenkins & Co. Ltd.* 44 T.C. 273; [1968] A.C. 1097; *Montague L. Meyer Ltd.* v. *Naylor* (1961) 39 T.C. 577; *Marshall Richards Machine Co. Ltd.* v. *Jewitt* (1956) 36 T.C. 511; *Henley* v. *Murray* (1950) 31 T.C. 351; *Special Commissioners of Income Tax* v. *Pemsel* 3 T.C. 53; [1891] A.C. 531; *Ransom* v. *Higgs* 50 T.C. 1; [1973] 1 W.L.R. 1180; *White's Case* (In re *Government Security Fire Insurance Co.*) (1879) 12 Ch. D. 511.

Russell L.J.—The judgment I am about to deliver is the judgment of the Court.

This appeal from a decision of Goff J. concerns the applicability to the facts of s. 20 of the Finance Act 1953. That section concerns subvention payments made by one associated company to another associated company. If company A has in respect of a particular accounting period a deficit for tax purposes, and receives a subvention payment from company B which has a surplus for tax purposes in respect of the same period, the section provides that the payment is to be treated for tax purposes as a trading expense of company B and a trading receipt of company A: but a payment by company B to company A falls to be treated as a subvention payment if, and only if, it is made under an agreement providing for company B to bear or share in losses or a particular loss of company A.

A number of associated companies (as defined) constituted the Breeden group of companies. There was Wilmot Breeden Holdings Ltd. (which I call "Holdings"), Wilmot Breeden Ltd. ("W.B."), W.B. Continental (a Swiss company) and C.I.M., a French company. C.I.M. had been formed to secure an outlet in France for the group's products, which were motor car mechanisms such as door locks and so forth. C.I.M., though a French company, was held by the Special Commissioners to be resident in this country, and so within the scope of s. 20. C.I.M. in the course of its trading sustained considerable losses which by the end of 1963 in fact were over 21,000,000 francs. It also by the end of 1963 owed to the members of the group over 24,000,000 francs. In spite of this poor showing it was considered worth while to mount a rescue operation for C.I.M., for it had good connections with French motor manufacturers including Renault, Peugeot, Simca and Citroen. Individuals concerned in the group were the following. Mr. D. L. Breeden was the chairman of Holdings and of W.B. and also a joint managing director, as was his brother Mr. M. L. Breeden. When C.I.M. was formed it had a board of directors in France, but the board as such had little or nothing to say in the policy or trading activities of C.I.M., which were managed by a committee set up by Holdings operating in and from England with frequent visits to France, whose constitution was in the event the two brothers Breeden and a Mr. Chanaryn. The issued share capital of C.I.M. was 12,200,000 francs of which 94 per cent. was owned by the group—in fact by the Swiss subsidary, W.B. Continental.

The rescue operation involved the four French motor manufacturers that I have mentioned lending 10,000,000 francs to C.I.M. as an interest-free advance against future deliveries by C.I.M. of mechanisms. Not unnaturally those manufacturers required the debts owing by C.I.M. to the group to be waived. If that had been simply done it appears that C.I.M. would have become liable to French tax on the amount. In order to avoid this a scheme was devised by which the group was to subscribe for new shares in C.I.M. to the extent of the indebtedness to the group, paying for those shares by releasing the debt. If this was done there would be two results—neither, it is to be assumed, agreeable

to the French manufacturers, who in certain circumstances were to convert their position as creditors for 10,000,000 francs to shareholders in C.I.M. of approximately that amount nominal. One result would be that the balance sheet of C.I.M. would still show a figure for deficit on profit and loss account, which in the event at December 1963 was over 21,000,000 francs. The second result would be that the shareholding of 10,000,000 francs, if it came about, would be a proportion of the total shareholding much reduced by the increase of 24,000,000 francs odd issued to the group. The scheme therefore provided for the increase to be followed by a reduction of capital to the extent of the deficiency on profit and loss account that should emerge at the end of December 1963.

The first agreement forming part of the scheme was dated 8th July 1963, known as "the protocol agreement". The parties were the four French car manufacturers and Holdings "represented by Mr. D. L. Breeden". It recited that Holdings acted on its own behalf and on behalf of its subsidiary, "whose concurrence it guarantees", C.I.M. It recited that Holdings through its subsidiary W.B. Continental held 94 per cent. of the C.I.M. capital. Provision was made for the loan of 10,000,000 francs to C.I.M. already mentioned. Article 2 was in the following form:

> "WBHL undertakes on behalf of itself and WB Continental and the other shareholders of CIM and Autocoussin, whose concurrence it guarantees: As soon as definitive accounts for 1963 have been prepared for the two latter companies, to increase their capital by an issue of shares which will be paid up in consideration of the cancellation of advances which WBHL and WB Continental have made to these companies, the total of which is quoted as 30,757,000 francs. When this has been done to reduce their new capital in accordance with the total of the losses appearing in the balance sheets of these companies at 31st December 1963 according to current accounting practices. These increases and reductions of capital must be completed by 30th June 1964 at the latest."

For present purposes Autocoussin may be ignored. Other articles provide for the possibility of the four French manufacturers changing from creditors of C.I.M. to shareholders in C.I.M., the details of which do not matter: nor do other details. In due course the accounts showed the total losses of C.I.M. at 31st December 1963 to be 21,635,611 francs (the equivalent of £1,567,798) and owing to the group was 24,400,000 francs approximately.

The next event was a contract in writing dated 1st July 1964 (known as "the shares agreement") between W.B., represented by Mr. D. L. Breeden, so authorised by a resolution of W.B.'s board dated 17th June 1964, and C.I.M. acting by a M. Lestang, chairman of C.I.M., authorised by a board resolution of C.I.M. dated 14th May 1964. This contract (in brief) provided for the issue to W.B. of an increase of C.I.M.'s capital by 24,400,000 francs and the release by W.B. of debts to the same extent, being the amount of C.I.M.'s indebtedness to the group. W.B. appeared on the scene as thus described in para. 5(17) of the Case Stated:

> "Although under the protocol Holdings assumed the obligation to eliminate the indebtedness of C.I.M., it was Wilmot Breeden that proceeded, by arrangement within the group, to discharge that obligation, and towards this end there had been transferred to Wilmot Breeden prior to 1st July 1964 the indebtedness of C.I.M."

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The paragraph then continues as follows: A

> "The board of C.I.M. were never shown the text of the protocol, but were informed of its gist on 9th October 1963. On 14th May 1964 the details of the proposed increase of capital to be effected by set-off against Wilmot Breeden were explained to and approved by the board"

—that is the board of C.I.M. The shares agreement was subject to approval by a general meeting of C.I.M., and this was given on 15th September 1964. B On 14th September 1964 W.B. Continental transferred the original group 94 per cent. shareholding in C.I.M. to W.B.

On 15th September 1964 a further agreement under seal (known as "the subvention agreement") was executed by W.B. and C.I.M. This recited the fact that they were associated companies within s. 20 of the Finance Act 1953, and that C.I.M. had deficits for tax purposes and W.B. had surpluses for tax C purposes in respect of their respective trades for periods ending on 31st December 1962 and 1963. It stated that W.B. "hereby agrees" with C.I.M. to bear the recited deficits. It was further stated that W.B. had upon the execution thereof paid to C.I.M. (as C.I.M. acknowledged) £1,567,798 (equivalent to 21,635,611 francs), being the total of such deficits, to the intent that such payment should be a subvention payment under s. 20. One thing is plain. No such payment D in pursuance of the purported agreement to bear losses was ever made. W.B. was already committed to waive the indebtedness of 24,400,000 francs as payment to subscribe for the increase in share capital at par. The document was no more than a piece of window dressing—we by no means say dishonest—in the hope that it might support a claim under s. 20. It certainly cannot do that: if anything it tends to the contrary, the purported express agreement to bear E losses throwing doubt on the propriety of implying or finding an earlier agreement to that effect. It is not essential to the decision of this case, but we have a suspicion that s. 20 was not thought of until after the shares agreement. It was at least uncertain whether C.I.M. was resident in the United Kingdom, as the Special Commissioners later found.

Finally, on 15th October 1964, at an extraordinary general meeting of F C.I.M., it was resolved to reduce the issued share capital, presumably on the ground that it was lost, by 21,960,000 francs. The figure was not the same as the figure of the debit on profit and loss account in the accounts of C.I.M. at 31st December 1963 (which as stated was 21,635,611 francs): it was a figure chosen for convenience as being 3/5ths of the capital as increased, the reduction affecting all shareholdings including the outside held 6 per cent. The system of G reduction of capital was apparently to cancel all issued shares and issue new shares in the proportion of 2 for 5. It was allocated (see the summary of C.I.M.'s accounts in para. 5(19) of the Case Stated) as to 21,635,611 francs to trading loss and as to the balance of 324,389 francs to part cost of increasing capital, written off. The summary in para. 5(19) contains a number of inaccuracies based on an assumption that the subvention agreement covered only H 21,552,000 francs. These are not explained, but that figure emerges from a statement of "the effect of the transactions" supplied to the Inspector of Taxes by W.B.'s accountants, which would seem to have been the basis for W.B.'s contention that there had been a subvention payment of the amount of loss incurred by W.B. (see para. 5(20) of the Case Stated). It was this sum which was asserted to be the amount of the subvention payment. I

The Special Commissioners found that the terms of the protocol agreement "were then implemented in the following way". They rehearsed the shares agreement, the subvention agreement, the resolution to increase the C.I.M.

A capital to 36,600,000 francs and the resolution to reduce the C.I.M. capital by 21,960,000 francs, such reduction being used to write off the losses of 21,635,611 francs shown in the balance sheet of C.I.M. at December 1963 plus (as stated above) part of the cost of the increase in share capital. When the Special Commissioners arrived at their conclusion they stated that they were of opinion that the obligation undertaken by Holdings under the protocol agreement and B discharged by W.B. under the shares and subvention agreements came within the ambit of s. 20.

The first point to note is that the subvention agreement, as is accepted by the taxpayer, effected nothing and implemented nothing. The Crown disputes no finding of fact at all, save possibly one. The Crown disputes the conclusion or finding of the Special Commissioners that the protocol agreement was in C any way implemented by the subvention agreement. In so far as it could be described as a finding of fact it was an impossible one: in so far as it was a conclusion of law it was plainly wrong. The decision of the Special Commissioners is therefore wide open to attack.

When the matter came before Goff J. the contention of the taxpayer appears to have been that a subvention payment under s. 20 could be discerned D by ascertaining what W.B. had lost as a result of the transactions, which was, it was said, the figure of 21,552,000 francs suggested in the letter in para. 5(20) of the Case Stated. Having stated the contention for the Crown that the payment of 24,400,000 francs as subscription for the equivalent amount of new capital at par could not in law serve also as a subvention payment, the learned Judge then set about destroying the "loss to W.B." basis of the argument. E This he did convincingly, but for our purposes as a work of supererogation, for that basis was sensibly abandoned in this Court.

What was substituted for it? It is difficult to define. It would be interesting to see how, if a pleading were required, it would state the facts relied upon for asserting that the requirements of s. 20 were complied with, and how those facts would be established. It was accepted that it was necessary to show that F there was a subvention payment made under a binding contract, one which either because it was under seal or with some nominal consideration was such. Too much valuable consideration would obviously be outside the contemplation of the section. What really was argued was this. Here was a group which at the direction of Holdings would obey orders. C.I.M. was through the agency of Holdings party to the protocol agreement and knew at all times what was G proposed and intended, including the reduction of capital which would have the effect that C.I.M.'s losses (tax deficit) would be written off because of the waiver by W.B. of the indebtedness of C.I.M. to the group and at the expense of W.B. W.B., who authorised the execution of the shares agreement, must, it was said, have known as a matter of commercial common sense of the intention that the protocol agreement was to be carried through to the subsequent H reduction of capital. All this may be so. But where in all this is the requisite of the section that there must be an enforceable contract under which W.B. is to bear the losses of C.I.M.? We can see no more than a decision by the parent, Holdings, that the protocol agreement should be carried out. Much was said of Mr. D. L. Breeden or Holdings as the puppet master. But a puppet master needs no contract or agreement. He merely gives orders which are obeyed I without question. Here we recur to the point that the subvention agreement would seem to be inconsistent with any earlier agreement to bear losses.

Additional to this is the inescapable fact that such payment as there was by W.B. was not only not under any agreement to bear losses of C.I.M. but

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was in fact a subscription for shares. Try as we may we cannot find that a payment in subscription for shares of an associated company can be described as a payment made under an agreement to bear losses of the issuing company. Recognising as we do that this section is a remedial section deserving of a beneficial construction, we are unable to depart to such an extent from the language of the section as to say that here is a payment made under an agreement to bear losses of an associated company, simply because in the end of the day the payment has resulted in the disappearance from the balance sheet of C.I.M. of its debit on profit and loss account, which could not have been achieved without the initial waiver of indebtedness by W.B. in payment at par for the allotment of shares. In the end we recur to the question how, in terms of a statement of claim, the contentions of the taxpayer could be made to fit the section. This is a question we cannot answer.

Accordingly we dismiss the appeal. In doing so there is not involved any violation of the sanctity of findings of fact by the Special Commissioners.

Medd Q.C.—My Lord, I ask in those circumstances that the appeal should be dismissed with costs.

Russell L.J.—Mr. Miller, you cannot resist that, can you?

Miller Q.C.—No. my Lord, I do not think I can resist that. I have an application to make to your Lordships for leave to appeal to the House of Lords in this matter, which is a matter of great substance to my clients, if they are so advised on consideration of your Lordships' judgment.

Russell L.J.—Are you both prepared to accept the decision of two of us on that application?

Medd Q.C.—Yes, my Lord, indeed.

Russell L.J.—No, we think not, Mr. Miller. You must try to interest somebody else.

The Company having been granted leave by the Appeal Committee of the House of Lords to appeal against the above decision, the case came before the House of Lords (Lords Morris of Borth-y-Gest, Diplock, Simon of Glaisdale, Cross of Chelsea and Edmund-Davies) on 2nd, 3rd, 4th and 5th December 1974, when judgment was reserved. On 12th March 1975 judgment was given unanimously in favour of the Crown, with costs.

Desmond Miller Q.C., *Andrew Park* and *Anthony Sumption* for the Company.

C. N. Beattie Q.C., *Patrick Medd Q.C.*, and *Brian Davenport* for the Crown.

The following cases were cited in argument:—*Cooper* v. *Stubbs* 10 T.C. 29; [1925] 2 K.B. 753; *Edwards* v. *Bairstow* 36 T.C. 207; [1956] A.C. 14; *Davies* v. *Davies, Jenkins & Co. Ltd.* 44 T.C. 273; [1968] A.C. 1097; *Montague L. Meyer Ltd.* v. *Naylor* (1961) 39 T.C. 577; *Commissioners of Inland Revenue* v. *Brebner* 43 T.C. 705; [1967] 2 A.C. 18.

A **Lord Morris of Borth-y-Gest**—My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend Lord Cross of Chelsea, and for the reasons which he gives I would dismiss the appeal.

Lord Diplock—My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Cross of Chelsea, and for the reasons he gives I would dismiss the appeal.

B **Lord Simon of Glaisdale**—My Lords, I have read the speech prepared by my noble and learned friend Lord Cross of Chelsea. I agree with it, save for one point—namely, the meaning to be ascribed to the word "agreement" in s. 20(2) of the Finance Act 1953. I give my reasons for dissenting on this point only out of respect for the Court of Appeal (with whom I concur that "agreement" in that subsection means "legally enforceable contract") and C because the Court of Appeal, understanding this construction to be conceded, did not themselves develop their reasons.

The word "agreement" has both popular and legal senses, which are set out in various general and legal dictionaries. Its most popular senses are "a coming into accord", "an arrangement between two or more persons as to a course of action", "a mutual understanding", "a meeting of minds in D relation to some situation or transaction". There is, I think, little to choose as to primacy between any of these meanings. Its primary legal meaning—indeed, the only legal meaning given in the Oxford English Dictionary, which had authoritative juristic advice on its legal definitions—is "a contract duly executed and legally binding". In In re *Symon* [1944] S.A.S.R. 102, at page 110, Mayo J., construing the word "agreement" in an Australian Statute, said that E it signified:

> "primarily a contract, that is, a legally binding arrangement between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others".

It is true that the word "agreement" may bear various secondary meanings in law, some approaching virtually a popular meaning: see, e.g., Pollock on F Contracts, 13th edn. (1950), page 2; Chitty on Contracts, 23rd edn. (1968), vol. 1, para. 3, citing the Restatement of Contracts of the American Law Institute. But in a Finance Act the presumption is that a word like "agreement" is used in its primary legal sense unless this produces some injustice, absurdity, contradiction or anomaly, or unless its primary legal sense would stultify the purpose of the provision in which the word appears; in which case some G secondary legal sense, or even ultimately some popular sense, may be preferred: see Maxwell on Interpretation of Statutes, 12th edn. (1969), page 28, where it is called "The first and most elementary rule of construction"; *Maunsell* v. *Olins* [1974] 3 W.L.R. 835, at page 845H.

It is therefore necessary to try to ascertain the purpose of the provision in which the word "agreement" appears, in order to see whether it demands a H displacement of the primary legal meaning. I note in passing that it starts with the emphatic words "if, but only if," marking its importance to the draftsman. In the course of argument three reasons were suggested for the requirement that the payment should be "made under an agreement providing for the paying company to bear or share in losses or a particular loss of the payee company". The first suggestion was that the Inland Revenue, for administrative reasons, I would require some formality in order to be satisfied that the payment was a subvention payment for the purposes of s. 20. I think that there is something in this; but it is obviously an insufficient explanation, since it was common ground that an oral agreement between duly authorised agents would suffice.

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The second purpose suggested for the provision was that it is required for the protection of minority shareholders. Although it was not explained how the provision in question would achieve this, again I think there is something in the suggestion: the provision is an essential part of this particular scheme of subvention payments, which was devised specifically as giving protection to minority shareholders. But it is an inadequate explanation of the statutory phrase in s. 20(2): the real protection for minority shareholders lies in the provisions of subs. (1), whereby the subvention payment is treated respectively as a trading receipt and a trading expense: this appears plainly from the Millard Tucker Report on Company Taxation (Cmd. 8189 of 1951), para. 249, on which the entire scheme of s. 20 was based. The third purpose suggested for the provision in question, and as I believe the true one, was that it was designed to preclude a payee company from alleging that it had received the payment other than as a subvention payment which would rank as a trading receipt under s. 20(1), thus counterbalancing the relevant trading loss and preventing such loss from being carried forward to be set against profits in future years: see Income Tax Act 1952, s. 342; now Income and Corporation Taxes Act 1970, s. 177). Not only does this seem to me to be the true purpose of the provision in question, but its subsumes all that is of cogency in the other two suggested reasons. But how can an agreement preclude a payee company from treating the payment other than as a subvention payment for the purposes of the section? Only, surely, if it constitutes a binding contract that the payment shall be treated as a subvention payment and not otherwise. In other words, consideration of the statutory purpose actually reinforces the presumption that the word "agreement" is used in its primary legal sense—which is, indeed, what one would expect.

Although the foregoing is, in my respectful submission, conclusive in favour of the construction put upon the word "agreement" in the Court of Appeal, there is yet a third pointer to this construction. The draftsmen of the income tax code seem generally to use the word "agreement" to connote something enforceable by law. Where they seek to describe some mode of achieving an object which is unenforceable by law, they use some term other than "agreement"—such as "arrangement", "transation" or "scheme" (which sometimes, indeed, stand as significant alternatives to "agreement" or "contract"). I refer to sections in the consolidating Income and Corporation Taxes Act 1970: "agreement or arrangement" (s. 434(2): see also s. 444(2)); "transactions or arrangements" (ss. 487(1) and 490(2)); "contract or arrangements" (s. 405(1)); "arrangement or scheme" (s. 488(2)). Scrutiny of the phraseology in provisions *in pari materia* therefore reinforces the statutory purpose in bearing out the presumption that "agreement" in s. 20(2) of the Finance Act 1953 has its primary legal meaning of "a contract duly executed and legally binding".

It was suggested that "agreement" in s. 20(2) could not bear what I regard as its appropriate (i.e., primary legal) meaning because of difficulties about consideration in relation to subvention payments, which would normally be wholly or partly gratuitous. But consideration is only one of two alternative requirements to make an agreement (in its popular sense) into a legally binding contract. The alternative to consideration is, of course, execution under seal; and a company would normally execute an agreement under its company seal—certainly, there would be no difficulty about its doing so should there be any question whether there was consideration to support a legally binding contract. It was also suggested that "agreement" in s. 20(3) was used in one of its

popular senses, and that there is a presumption against a change of meaning. But there is a crucial difference in terminology, which robs this argument of all cogency: the absence of the article preceding "agreement" in subs. (3) gives it automatically a different, more abstract, shade of meaning than "*an* agreement" in subs. (2). I cannot, therefore, find anything requiring the displacement of the primary legal meaning of "agreement", powerfully reinforced as it is by examination of the statutory purpose of the provision in which it appears and by scrutiny of comparable statutory phrases in the fiscal code.

In the instant case the Appellant Company, Wilmot Breeden Ltd., made no payment to C.I.M. under any contract duly executed and legally binding providing for the Appellant Company to bear or share in losses or any particular loss of C.I.M. Nor, for that matter, did they make any such payment under any such agreement, however "agreement" is defined within permissible limits of legal or popular usage. I therefore concur in dismissing the appeal.

Lord Cross of Chelsea—My Lords, the question to be decided in this appeal is whether the Appellant, Wilmot Breeden Ltd., in computing its profits for the purposes of Case I of Schedule D of the Income Tax Act 1952 for the year 1964–65 is entitled to deduct a payment made by it to an associated company, Compagnie Industrielle de Mécanismes S.A. (hereinafter called "C.I.M."), as being a "subvention payment" within the meaning of that expression as used in s. 20 of the Finance Act 1953. The section, so far as relevant, runs as follows:

> "(1) Subject to the provisions of this section, where a company has a deficit for tax purposes during any accounting period of the company, and receives a subvention payment in respect of that period from an associated company having a surplus for tax purposes in the corresponding period, then in computing for the purposes of income tax the profits or gains or losses of those companies the payment shall be treated as a trading receipt receivable by the one company on the last day of the accounting period during which it has the deficit, and shall be allowed as a deduction to the other company as if it were a trading expense incurred on that day. (2) Subject to the next following subsection, a payment made by one company to another shall be treated as a subvention payment within the meaning of this section if, but only if, it is made under an agreement providing for the paying company to bear or share in losses or a particular loss of the payee company, and is not a payment which (apart from this section) would be taken into account in computing profits or gains or losses of either company or on which (apart from this section and from any relief from tax) the payee company would be liable to bear tax by deduction or otherwise: Provided that a payment in respect of any accounting period of the payee company shall not be treated as a subvention payment unless made in or before the second year of assessment following that in which the period ends. (3) If a company receives subvention payments from one or more associated companies in respect of the same accounting period to an aggregate amount exceeding its deficit for tax purposes during that period, or if a company makes subvention payments to one or more associated companies to an aggregate amount exceeding its surplus for tax purposes in the period which is the corresponding period in relation to those payments, the excess shall be disregarded for the purposes of this section; and, where payments to or from more than one company are in question, the payments shall be treated as abating in such manner as may be agreed between all the companies concerned or, in default of agreement, determined by the

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> Commissioners of Inland Revenue . . . (9) For the purposes of this section, 'company' includes any body corporate, but references to a company shall be taken to apply only to a company resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom . . . (10) For the purposes of this section, a company making a subvention payment to another shall be treated as the other's associated company if, but only if, at all times between the beginning of the payee company's accounting period in respect of which the payment is made and the making of the payment one of them is the subsidiary of the other, or both are subsidiaries of a third company, and for this purpose 'subsidiary' has the meaning assigned to it for certain purposes of the profits tax by section forty-two of the Finance Act, 1938."

The Special Commissioners held that the Appellant (hereinafter called "Wilmot Breeden") was entitled to the deduction claimed, but at the request of the Crown they stated a Case for the opinion of the Court. Their decision was reversed by Goff J., whose decision was upheld by the Court of Appeal, but Wilmot Breeden was given leave by the Appeal Committee to appeal to this House.

Before the Commissioners two questions were in issue, first, whether C.I.M. was resident in the United Kingdom and so a company to which a subvention payment could be made, and, secondly, whether the payment made had the characteristics of a subvention payment. Much of the argument before the Commissioners and many of the facts found related solely to the first question, but the Crown did not attempt to challenge in the Courts the finding of the Commissioners that C.I.M. was resident here. The Case Stated is set out in full in the report of the hearing at first instance ([1973] S.T.C. 38), but for the purposes of this appeal a brief summary of the facts will suffice.

Wilmot Breeden and C.I.M. are members of the Wilmot Breeden group of companies, the parent of which is Wilmot Breeden Holdings Ltd. (hereinafter called "Holdings"); another member of the group which must be mentioned is a Swiss company, Wilmot Breeden Continental S.A. (hereinafter called "Continental"). Wilmot Breeden, which is a wholly-owned subsidiary of Holdings, specialised in the design and production of door locks and window winders (hereinafter called "mechanisms") for motor cars. Holdings had made an investment in a French company, Société Autocoussin Dura (hereinafter called "A.D."), one of the chief French producers of mechanisms, which it made as licensee of the Wilmot Breeden products; but in 1959 Holdings decided to start manufacturing in France itself, and on 22nd December 1959 C.I.M. was incorporated in France for the purpose of taking over the mechanisms side of A.D.'s business. At all material times Holdings controlled more than 75 per cent. of the issued share capital of C.I.M., either directly or indirectly through Wilmot Breeden or through Continental. At the same time another company, Société Autocoussin (hereinafter called "Autocoussin"), was incorporated as a subsidiary of Continental to take over the part of the business of A.D. which consisted in the manufacture of car seats and mattresses. In the course of the following three years C.I.M. and Autocoussin incurred heavy losses, which had to be met by advances made to them by Holdings and Continental, but in that period they had achieved an entry into the French car market and established goods relations with the leading French car manufacturers. After a careful review of the position Holdings decided that it would be worth its while to continue to support C.I.M. and Autocoussin provided that the French car manufacturers would co-operate by providing substantial assistance. In the

result, an agreement (hereinafter called "the protocol") was entered into on 8th July 1963 between Renault, Peugeot, Simca and Citroen (therein called "the constructors") of the one part and Holdings, acting on its own behalf and on that of its subsidiaries C.I.M. and Autocoussin, of the other part. By article 1 the constructors bound themselves to lend to C.I.M. interest-free 10,000,000 francs by six instalments between July and September 1963, part of which C.I.M. was authorised to place at the disposal of Autocoussin. Article 2 of the protocol ran as follows:

> "[Holdings] undertakes on behalf of itself and [Continental] and the other shareholders of C.I.M. and Autocoussin, whose concurrence it guarantees: As soon as definite accounts for 1963 have been prepared for the two latter companies, to increase their capital by an issue of shares which will be paid up in consideration of the cancellation of advances which [Holdings] and [Continental] have made to these companies, the total of which is quoted as 30,757,000 francs. When this has been done to reduce their new capital in accordance with the total of the losses appearing in the balance sheets of these companies at 31st December 1963 according to current accounting practices."

Later articles provided (*inter alia*) that if Renault, Peugeot and Simca were satisfied that there was a reasonable prospect of the two companies achieving what was described as "balanced trading" by the end of 1964 they would convert their loans, amounting to 9,300,000 francs, into shares. It was natural enough that the constructors should make it a condition of their loans that the existing indebtedness of the two companies to Holdings and its other subsidiaries should be waived. A direct release of the indebtedness would, or might, however, have made C.I.M. liable to French tax on the debts released and it was for this reason that it was provided in article 2 that the indebtedness should be used to pay for new shares in the two companies. The three constructors who had the right to exchange their loans for shares would obviously not wish their shareholdings in the companies to be shareholdings in companies whose issued capital had been swollen by the cancellation of the pre-existing indebtedness, and it was no doubt for this reason that it was provided that after its increase the capital of each company should be reduced by the total of the losses appearing in their balance sheets at 31st December 1963.

We are not concerned in this case with the manner in which the terms of this protocol were carried into effect so far as concerns Autocoussin, but only with their implementation so far as concerned C.I.M. Paragraph 5(17) of the Case Stated says (*inter alia*) that:

> "Although under the protocol Holdings assumed the obligation to eliminate the indebtedness of C.I.M., it was Wilmot Breeden that proceeded by arrangement within the group to discharge that obligation, and towards this end there had been transferred to Wilmot Breeden prior to 1st July 1964 the indebtedness of C.I.M. to the remainder of the group other than Wilmot Breeden."

The total indebtedness of C.I.M. to the other members of the group was 24,400,942 francs. The Case Stated does not say on what terms the part of that sum which was owing either to Holdings or to Continental became vested in Wilmot Breeden, but I will assume that that Company became beneficially entitled to the whole of it. The accrued losses of C.I.M. as at 31st December 1963 amounted to 21,635, 611 francs. Immediately before the agreement next mentioned the issue share capital of C.I.M. consisted of 122,000 shares of

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100 francs each, of which 115,200—that is to say, 94 per cent.—was held by Continental and the balance of 6,800 by various outside shareholders.

By an agreement made on 1st July 1964 between Wilmot Breeden and C.I.M. Wilmot Breeden agreed—subject to the approval within four months of the shareholders of C.I.M. in general meeting—to transfer to C.I.M. the said debt of 24,400,942 francs in consideration of the issue by C.I.M. to Wilmot Breeden of 244,000 shares of 100 francs each, fully paid up. On 14th September 1964 Continental transferred its shareholdings in C.I.M. to Wilmot Breeden, and on the next day, 15th September, by a resolution passed at an extraordinary general meeting of the shareholders of C.I.M., its capital was increased from 12,200,000 francs to 36,600,000 francs by the creation of 244,000 shares of 100 francs each, fully paid up "in payment for the consideration introduced by Wilmot Breeden". As a result of that resolution the share capital of C.I.M. became 36,600,000 francs, of which 35,920,000 francs was held by Wilmot Breeden and the balance of 680,000 was held by outside shareholders; on the other hand, the indebtedness of C.I.M. to Wilmot Breeden was reduced from 24,400,942 francs to 942 francs. On the same day, 15th September 1964, an agreement was made between Wilmot Breeden and C.I.M., the relevant parts of which ran as follows:

> "Whereas:—A. Both the parties hereto were on the first day of January 1962 and have since continued to be associated companies within the meaning of subsection (10) of Section 20 of the Finance Act 1953 being subsidiary companies of Wilmot Breeden (Holdings) Limited a company incorporated on the 30th day of December 1948 under the Companies Act 1948 B. The Accounts of both parties hereto are made up to the thirty-first day of December in each year C. C.I.M. has deficits for tax purposes determined in accordance with the provisions of subsection (5) of the said Section 20 in respect of its trade for its accounting periods ended on the 31st day of December 1962 and 31st day of December 1963 respectively D. Wilmot Breeden has surpluses for tax purposes determined in accordance with the provisions of the said subsection (5) of Section 20 in respect of its trade for the corresponding periods
>
> Now This Deed Witnesseth:—1. Wilmot Breeden Hereby Agrees with C.I.M. to bear the above-mentioned deficits suffered by it 2. Pursuant to the said agreement Wilmot Breeden has upon the execution hereof paid to C.I.M. (as C.I.M. hereby acknowledges) the sum of One million five hundred and sixty-seven thousand seven hundred and ninety-eight pounds (£1,567,798) (being the equivalent of Twenty-one million six hundred and thirty-five thousand six hundred and eleven New Francs (21,635,611 New Francs)) being the total of the amounts of the above-mentioned deficits for the accounting periods ended on the thirty-first day of December 1962 and thirty-first day of December 1963 to the intent that such payment shall be a subvention payment under the provisions of the said Section 20".

Finally, at a further extraordinary general meeting of the shareholders of C.I.M. held on 15th October 1964, the capital of C.I.M. was reduced from 36,600,000 francs to 14,640,000 francs by replacing the existing share capital by 146,000 new shares of 100 francs each, issued to the existing shareholders in the ratio of two new shares to five old shares. As a result Wilmot Breeden came to hold 143,680 shares, the remaining 2,720 being held by the outside shareholders. The reduction of 21,960,000 francs in the share capital was used to write off the sum of 21,635,611 francs shown as a loss in its balance sheet as at 31st December

A 1963, the balance of 324,389 francs being placed against the cost of increasing the capital on 15th September 1964.

According to the agreement of 15th September Wilmot Breeden had made a subvention payment equivalent to 21,635,611 francs—that is to say, the total of the accrued losses of C.I.M.—but before the Special Commissioners the sum claimed as a subvention payment was only 21,552,000 francs, that being the B difference between (A) the nominal value of the shares held by Wilmot Breeden before the issue of the new shares, i.e., 11,520,000 francs, and the face value of the indebtedness of C.I.M. at that date, i.e., 24,400,942 francs, making 35,920,942 francs in all, and (B) the nominal value of the shares held by Wilmot Breeden after the reduction, i.e., 14,368,000 francs, and the face value of the subsisting indebtedness, i.e., 942 francs, making 14,368,942 francs in all.

C At this point one must turn to consider what is the meaning of a "subvention payment". Section 20 contains no express definition of the phrase, but the draftsman in effect defined it in subs. (2) by saying that a payment made by one company to another should be treated as a subvention payment "if, but only if" it had the characteristics subsequently set out. He used a similar technique in subs. (10) when he came to describe what was an "associated" company. The D necessary characteristics of a subvention payment with which we are concerned are that it should have been "made under an agreement providing for the paying company to bear or share in losses or a particular loss of the payee company". I agree with Goff J. that an agreement, to satisfy these words, must be one to which both the paying and the payee companies are parties. So far as concerns the paying company, that is made clear by the requirement that the payment E be made "under" the agreement; so far as concerns the payee company it results from the requirement that the agreement is to provide for the paying company bearing or sharing in losses of the payee company. The mere receipt of a payment by the payee company would not satisfy this requirement; the payee company must agree to receive it on the terms that it is so applied. I cannot, however, agree with the view expressed by the Court of Appeal that F the agreement must constitute a legally binding contract. No doubt in many cases the agreement would be under the seals of the two companies; but it might be simply in writing or even oral, and in those cases if it was to be legally binding there would have to be consideration moving from the payee company. But a subvention payment is essentially a voluntary payment, and the idea of a legally enforceable contract by which one party agrees to make a gift to the G other strikes me as absurd. The Court of Appeal was indeed aware of the inconsistency between the two notions, for it remarked(1) that "Too much valuable consideration would obviously be outside the contemplation of the section." To my mind all that is required is a mutual manifestation of assent by the two companies to the making of the payment and to the terms on which, if made, it is to be received. Once the payee company had received the payment H it could not as against the Revenue deny that it had received it on the footing that it was used to extinguish or reduce the loss in question.

There is no doubt that by releasing C.I.M.'s indebtedness in consideration of the issue of the 244,000 new shares Wilmot Breeden made a payment to C.I.M. under the agreement of 1st July 1964, which was ratified by C.I.M. on 15th September. But how is the requirement that the agreement should provide I for Wilmot Breeden bearing or sharing in the losses of C.I.M. satisfied? It is

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(1) *See* page 149 *ante*.

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not suggested that the agreement of 15th September between the two companies assists the Appellant. All that that agreement does is to show that the parties hoped that what had been done would amount to a subvention payment. What, however, is said is that, although the shares agreement of 1st July made no express reference to the reduction of capital which would follow close on the heels of the new issue of shares, everyone concerned knew that it would follow as provided in the "protocol" agreement, and that the shares agreement should be treated as though it contained a provision to that effect. But, for my part, I cannot see how the inclusion in the shares agreement of a term that after the new shares had been issued the whole capital of the company would be reduced to an extent necessary to eliminate the deficit on profit and loss account of 21,635,611 francs would have converted the payment for the new shares into a subvention payment. In consideration for the release of the indebtedness Wilmot Breeden obtained a slightly larger share in the equity of C.I.M. Viewed in isolation that might appear an improvement bargain, but it was entered into in order to obtain essential financial aid from the French motor companies. The subsequent reduction of the capital of C.I.M. did not change Wilmot Breeden's position in the least with regard to the other shareholders. Instead of holding 359,200 out of 366,000 shares it held 143,680 out of 146,400 shares, which is the same proportion. No doubt its position was worsened as against the French manufacturers if they converted their loans into shares—but that again was one of the conditions on which the loans were made. What Wilmot Breeden is really saying—as was made clear in the argument of its junior counsel—is that one should split the payment of 24,400,000 francs for the new shares into two parts. The smaller part, namely 2,845,000 francs, should be treated as a real payment for a corresponding number of new shares which gave Wilmot Breeden its increased share in the equity, but the larger part, namely, 21,552,000 francs, which is the amount by which Wilmot Breeden's total shareholding was reduced, should be treated as though it was a direct payment made to C.I.M. for the purpose of sharing in its loss of 21,635,611 francs. But I can see no warrant whatever for splitting up the released indebtedness in this way. The decision not to release the indebtedness directly to C.I.M. was made deliberately in order to avoid a liability, or possible liability, to French tax; and although it is natural enough for Wilmot Breeden to wish to "have it both ways", I can see no reason why one should treat any part of what was expressed as consideration for the purchase of shares as a direct payment to C.I.M. made for no consideration in order to share in its losses. For these reasons I would dismiss the appeal.

Lord Edmund-Davies—My Lords, for the reasons which appear in the printed speech of my noble and learned friend Lord Cross of Chelsea, I also would dismiss this appeal.

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:—Solicitor of Inland Revenue; Slaughter & May.]