HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
30 NOVEMBER, 1 AND 21 DECEMBER 1977

COURT OF APPEAL—19, 20, 21, 22, 23 AND 26 FEBRUARY 1979

HOUSE OF LORDS—23, 24 AND 25 JUNE, AND 30 JULY 1980

Williams and Others *v.* Commissioners of Inland Revenue[1]

Income tax and surtax—Tax advantage—Transactions in securities—Counteraction—Exchange of shares in one company for shares in another company—Subsequent loan to taxpayers by a third company before taxpayers became shareholders in that company—Whether relevant circumstances present—Whether a tax advantage obtained—Whether a tax advantage obtained in consequence of one or more transactions in securities—Income and Corporation Taxes Act 1970, *ss* 460(1), (9), 461 C, D *and* E *and* 466(1).

The four Appellants and the wife of Mr. A. D. Williams ("the shareholders") were the shareholders in K Ltd. K Ltd. had acquired freehold farmland in Sussex; and had, during the late 1960s, obtained planning permission to develop part of it. The shareholders, with a view to minimising the expected tax liability, entered into a tax avoidance scheme which was described by the promoters as an "overall scheme . . . basically divided into three stages".

The first stage comprised a number of transactions ("the property transactions") as a result of which the title to the farmland was vested in another company (also controlled by the shareholders), whilst K Ltd. was left with a distributable profit of £422,255 which it was hoped would be free from betterment levy.

In the second stage ("the share transactions") the shareholders exchanged their shares in K Ltd. for shares in G Ltd. (K Ltd. thus became the wholly-owned subsidiary of G Ltd., whilst G Ltd. was owned by the shareholders.) K Ltd. and G Ltd. had made an election under s 48, Finance Act 1965 (the relevant portions of which were later re-enacted as s 256, Income and Corporation Taxes Act 1970), and K Ltd. then paid a gross dividend of £422,000 to G Ltd.

In the third stage ("the loan transactions") D Ltd. was incorporated. D Ltd. was not, initially, controlled by the shareholders; but D Ltd. agreed to lend £84,200 to each of the shareholders personally (i.e., some £421,000 in all) on terms, *inter alia,* that no interest should be paid after the first seven days, and that, although each loan was to be repayable on demand, no demand should be made unless repayment was demanded from all the shareholders.

(1) Reported (Ch D) [1978] STC 379; (CA) [1979] STC 598; (HL) [1980] 3 All ER 321; [1980] STC 535.

The share capital of D Ltd. was later sold to G Ltd. for £421,250 and the shareholders became D Ltd.'s directors. The shareholders were thus left with the interest-free use of the loans made to them by D Ltd. in their individual capacities.

The taxpayers were issued with notifications under s 460(6), Income and Corporation Taxes Act 1970, and, later, with notices under s 460(3) of that Act. Since the property transaction and the share transactions had taken place between January and April 1970 and the loan transactions during January and February 1971, the notices issued specified two alternative recomputations of the liability to tax:

(*a*) (relating to the year 1969–70) on the basis of a tax advantage allegedly obtained by receiving the shares in G Ltd.;

(*b*) (relating to the year 1970–71) on the basis of a tax advantage allegedly obtained by receiving the loans made by D Ltd.

The Special Commissioners upheld the notices and the consequential assessments for 1969–70 and dismissed the consequential assessments for 1970–71. The taxpayers appealed, and the Crown cross-appealed.

In the High Court it was common ground that the property transactions and the share transactions were indistinguishable on their facts from those in *Anysz* v. *Commissioners of Inland Revenue* 53 TC 601. The Appellants also reserved the right to argue that the notifications were invalid; they further argued that if betterment levy was ultimately held to be payable then the consequential tax assessments should be correspondingly reduced.

The Chancery Division, dismissing the appeals, held (1) that the notices and the consequential tax assessments for 1969–70 should be upheld for the reasons given in *Anysz* v. *Commissioners of Inland Revenue*; (2) that the relevant tax advantage should be quantified by reference to what had in fact been done and not by reference to what ought to have been done; and, consequently, that no adjustments fell to be made in respect of any potential liability to betterment levy. (*Anysz* v. *Commissioners of Inland Revenue* followed.)

The taxpayers appealed, and the Crown cross-appealed.

In the Court of Appeal the taxpayers took a new point and contended that, even if a tax advantage was obtained in the circumstances mentioned in s 461D, s 461E(2) precluded counteraction of that tax advantage unless and except to the extent that the share capital of G Ltd. was repaid.

In relation to the cross-appeal it was contended on behalf of the Crown (1) that the taxpayers had obtained tax advantages since they had received interest-free loans from D Ltd. (which were, in substance, the moneys available for distribution by K Ltd.) and the actual receipt of these loans could be contrasted with a hypothetical receipt consisting of a dividend paid directly by K Ltd. to the shareholders; (2) that the circumstances set out in ss 461C and 461D were present; and (3) that the taxpayers had obtained tax advantages in consequence of transactions in securities either (*a*) because the tax advantages were obtained in consequence of transactions in securities even if the loans

were not themselves transactions in securities or, (*b*) because the loans were transactions in securities since they were transactions "relating to securities", the shareholders being required to deposit Government stock as security for the loans.

It was contended on behalf of the taxpayers (1) that the taxpayers had not obtained tax advantages because (*a*) the money received by the shareholders was received by way of loan, and a receipt by way of loan could not be compared with money paid by way of dividend, and (*b*) the taxpayers had not avoided any assessment to tax since the Crown had made other assessments upon the taxpayers for the purpose of attacking the same profit in an alternative way; (2) that none of the circumstances set out in s 461 was present; and (3) that the taxpayers had not obtained tax advantages in consequence of transactions in securities.

The Court of Appeal, allowing both the taxpayers' appeals and the Crown's cross-appeal, held (1) that the shareholders' appeal would be allowed because where a taxpayer received non-taxable consideration under the first part of s 461E it must have been intended that the taxpayer should be entitled to the benefit of the deferment of liability provided by s 461E(2); (2) that the Crown's cross-appeal would also be allowed because (*a*) the taxpayers had obtained tax advantages because (i) it was not necessary to compare like with like as regards the receipt obtained, and (ii) s 460(9) made plain the independence of s 460 from all other income tax legislation, so even if it was right that there was a possibility of double taxation there was nothing in s 460 to exclude its application in that event; (*b*) the circumstance set out in s 461C was satisfied; and (*c*) tax advantages were obtained in consequence of transactions in securities because the requirement for the deposit of Government Stock made the loans transactions "relating to securities". The taxpayers appealed and the Crown cross-appealed.

Held, in House of Lords, unanimously dismissing the taxpayers' appeals and finding it unnecessary to decide the Crown's cross-appeals (which they therefore dismissed) (1) that by receiving cash in a non-taxable form from D Ltd. in the form of interest-free loans the taxpayers avoided possible assessments which could have been made had equivalent sums been received by way of dividend from K Ltd., and thus obtained or were in a position to obtain tax advantages; (2) that the circumstances in s 461D were present; (3)(*a*) that the tax advantages were obtained in consequence of the combined effect of two or more transactions in securities (namely, the many transactions constituting transactions in securities entered into from the inception of the scheme) notwithstanding that one or more links in the chain of operations may not have been transactions in securities; (3)(*b*) that the making of the interest-free loans were themselves transactions in securities.

(The House of Lords based their decision as regards the obtaining of tax advantages on the wider ground in (3)(*a*) above. They did not find it necessary to decide the case on the narrower ground relied on in the Court of Appeal, namely, that the tax advantages were obtained in consequence of the receipt of the interest-free loans, but Viscount Dilhorne, with whom the rest of their Lordships agreed, was "far from saying that the Court of Appeal's decision cannot be sustained on the narrower [ground]".)

CASE

Stated under s 56, Taxes Management Act 1970, 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 14, 15, 16, 17, 18 and 22 June 1976 Aubrey Dan Williams (hereinafter called "Mr. Aubrey Williams") appealed against a notice issued to him by the Commissioners of Inland Revenue (hereinafter called "the Board") under s 460(3), Income and Corporation Taxes Act 1970, and against the following surtax assessments made on him in accordance with adjustments (specified on alternative bases) in the said notice: 1969–70, £170,105, including £168,902 as the adjustment specified in the notice; 1970–71, £168,400 (further assessment). Mr. Aubrey Williams had also appealed against the following income tax assessments made on him in accordance with adjustments (specified on alternative bases) in the said notice: 1969–70, Case VI of Schedule D, £168,902; 1970–71, Case VI of Schedule D, £168,400. His appeals against these income tax assessments were not formally made to the Commissioners for the Special Purposes of the Income Tax Acts but, for the reasons given in our written decision, we the Commissioners who heard the appeals against the notice and the surtax assessments regarded ourselves as empowered to deal with the income tax appeals.

2. References hereinafter to sections of the Income and Corporation Taxes Act 1970 are by section numbers only, omitting any reference to the Act.

3. Shortly stated the question for our decision was whether in such circumstances as are mentioned in s 461 and in consequence of transactions in securities Mr. Aubrey Williams obtained or was in a position to obtain a tax advantage as defined in s 466.

4. The following witnesses gave evidence before us: Bernard Faber (hereinafter called "Mr. Faber"), a chartered accountant, who gave up public practice in the latter half of 1970, and a director of a number of companies; Peter Alexander Neville Wilson (hereinafter called "Mr. Wilson"), a solicitor and a partner in the firm of Messrs. Malcolm Wilson & Cobby.

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

(1) Bundle of correspondence in 1973 between Messrs. Pollins Flavell Powell and the Inland Revenue.

(2) Bundle of documents produced on behalf of the four notified persons, including:

(*a*) Kithurst's accounts to 15 February 1970 (exhibit 11);

(*b*) Dolerin's fully paid allotment letter to Retsor dated 24 February 1971 (exhibit 17);

(*c*) agreement dated 24 February 1971 for sale of shares in Dolerin (Retsor and Gristrim) (exhibit 18);

(*d*) statutory declaration by Mr. Aubrey Williams (exhibit 19);

(*e*) counter-statement by the Board (exhibit 20);

(*f*) notice of appeal dated 24 March 1975 against notice under s 460 (exhibit 21);

(*g*) notice of appeal dated 27 March 1975 against income tax assessments (exhibit 22);

(*h*) notice of appeal dated 3 July 1975 against surtax assessments (exhibit 23).

(3) Assessment of levy under ss 44 and 45, Land Commission Act 1967, (exhibit 24).

(4) Bundle of documents produced on behalf of the Board including:

(*a*) lease dated 30 January 1970 (Kithurst to Parlev) (exhibit 1);

(*b*) deed dated 5 November 1971 (Kithurst and Berkrol) (exhibit 2);

(*c*) agreement for lease dated 31 January 1970 (Kithurst to Metallic) (exhibit 3);

(*d*) lease dated 31 January 1970 (Kithurst to Metallic) (exhibit 4);

(*e*) agreement dated 2 February 1970 for conveyance of freehold reversion (Kithurst and Developments) (exhibit 5);

(*f*) agreement dated 3 February 1970 for sale of lease (Metallic to Developments) (exhibit 6);

(*g*) agreement dated 4 February 1970 for surrender of lease (Developments and Parlev) (exhibit 7);

(*h*) surrender of lease dated 5 February 1970 (Parlev, Metallic and Developments) (exhibit 8);

(*i*) memorandum dated 6 February 1970 of loan (Metallic to Lekos) (exhibit 9);

(*j*) letter from Lekos to Metallic dated 6 February 1970 offering to purchase right to receive instalments of premium (exhibit 10);

(*k*) agreement dated 20 March 1970 for exchange of shares (Mr. Aubrey Williams, Mrs. Eleanor Isabella Williams and Gristrim) (exhibit 12);

(*l*) minutes of Gristrim directors' meetings on 20 March 1970 (exhibit 13);

(*m*) letter dated 16 February 1971 from Dolerin to Sandelson confirming loan agreement (exhibit 15);

(*n*) loan agreement dated 17 February 1971 (Dolerin and Mr. Aubrey Williams) (exhibit 16).

(5) Bundle of correspondence produced by Mr. Faber including:

(*a*) Mr. Faber's letters of 20 February 1970 and 10 February 1971 which are set out in full in sub-paras (20) and (31) respectively of para 6 below. (The enclosures with the letter of 10 February 1971 are annexed hereto as exhibit 14(1));

(*b*) Mr. Wilson's letter of 9 December 1970 which is set out in full in para 6(27) below.

(6) Bundle of documents produced by Mr. Wilson.

(7) Agreed list of legal charges created on Hormare Farm.

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

(1) Not included in the present print.

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

(1) In this statement of facts Michael Charles Williams (son of Mr. Aubrey Williams) is called "Mr. Michael Williams", John Lewis Bowron, a solicitor, who at the material time was a partner in the firm Messrs. Malcolm Wilson & Cobby is called "Mr. Bowron", Mr. Aubrey Williams, Mr. Michael Williams, Mr. Wilson and Mr. Bowron are together called "the four notified B persons", Eleanor Isabella Williams (wife of Mr. Aubrey Williams) is called "Mrs. Williams", Godfrey Bradman, a chartered accountant and a partner of Mr. Faber is called "Mr. Bradman", G. F. Haydon, a chartered accountant, who at the material time was accountant and auditor for Kithurst is called "Mr. Haydon", Kithurst Park Estates Ltd. is called "Kithurst", A. D. Williams Developments Ltd. is called "Developments". (At all material times the C directors of Developments were the four notified persons and Mrs. Williams and they each owned one-fifth of the issued capital.) Gristrim Investment Co. Ltd. is called "Gristrim"; Dolerin Investment Co. Ltd. is called "Dolerin"; Lekos Investment Co. Ltd. is called "Lekos"; Parlev Property Co. Ltd. is called "Parlev"; Metallic Property Trading Co. Ltd. is called "Metallic". (At the material times the directors of Lekos, Parlev and Metallic were Mr. Bradman D and Mr. Faber and the three companies were ultimately owned by a charitable trust, the trustee of which was a corporation which had as its two directors Mr. Bradman and Mr. Faber.) Retsor Trading Co. Ltd. is called "Retsor"; Berkrol Property Trading Co. Ltd. is called "Berkrol". (At the material times Mr. Bradman and Mr. Faber were the owners and directors of Retsor and Berkrol.) Messrs. Sandelson & Co., stockbrokers, 85 London Wall, London, E.C.2 are E called "Sandelson".

(2) In January 1960 Kithurst acquired at low cost the freehold property Hormare Farm, Storrington, Sussex.

(3) In 1966 Mr. Wilson and Mr. Bowron, partners in Messrs. Malcolm Wilson & Cobby (Kithurst's solicitors), and personal friends of Mr. and Mrs. Aubrey Williams were invited to take up shares in Kithurst and to join its F board of directors. At all material times thereafter the four notified persons and Mrs. Williams were directors of Kithurst and, up to 20 March 1970, were beneficially entitled to its entire share capital—each owning 205 shares.

(4) At some time prior to 1969 the planning authorities, who had previously refused planning consent for the development of Hormare Farm released 31 acres of it for residential development, thereby increasing its G value substantially.

(5) At all material times Mr. and Mrs. Aubrey Williams and Mr. Michael Williams were shareholders in a number of other property development companies. In about 1969 these companies needed finance for various development projects and one of them obtained on mortgage a loan of £200,000 from County Bank Ltd.—Hormare Farm also being charged to the bank by way of H collateral security. Kithurst and the associated development companies were, however, still short of the cash they needed. It was thought that if Hormare Farm were to be sold there would not be enough left after payment of betterment levy, corporation tax, shortfall income tax, and surtax under apportionments, to repay the loans and finance the various development projects of the group. I

(6) In the autumn of 1969 the shareholders in Kithurst were introduced to Mr. Bradman and Mr. Faber. These two gentlemen were directors of a number of companies which Mr. Faber described as property dealing and share dealing

companies and were experts in certain tax avoidance devices (on which they had received Counsel's advice) and were prepared, in return for a large commission, to make these devices available to clients. The services which Mr. Bradman and Mr. Faber were willing to provide included the co-operation, as necessary, of companies which they directed and the furnishing of appropriate documentation based on stock drafts which had been settled by Counsel. After some of the shareholders in Kithurst had met Mr. Bradman, who put certain proposals to them about the reduction of Kithurst's and its shareholders' potential liability to tax and betterment levy on the disposal of Hormare Farm, the shareholders decided (as they had been advised to do by Mr. Bradman) to consult their own Counsel on the tax consequences if the proposals were to be put into effect. Mr. Faber was present at Counsel's chambers when the conference took place. As a result of Counsel's advice and their negotiations with Mr. Faber the shareholders in Kithurst decided to participate in what we find was accurately described in Mr. Faber's letter of 20 February 1970 (which is reproduced in full at para 6(20) below) as an

> "overall scheme . . . basically divided into three stages: (i) The transactions designed to enable Kithurst to dispose of Hormare Farm without any liability to betterment levy and without any material liability to taxation. (ii) The transactions involving the extraction of the tax free monies from Kithurst by way of a tax free dividend to an interposed holding company controlled by the same shareholders. (iii) The final transaction designed to enable the shareholders personally to obtain the benefit of the tax free monies in the form of interest free loans made to them by a company which they ultimately control, so that no liability arises under the provisions of section 75 of the Finance Act 1965."

As each stage of the overall scheme was completed the position of the relevant participants in the scheme was, generally speaking, as follows:

Stage (i): Kithurst's valuable freehold interest in Hormare Farm had by diverse means been vested in Developments. The method of disposal by Kithurst took advantage of s 80(6) and was such that a substantial liability to corporation tax that would otherwise have arisen in respect of the profit (some £500,000) on the disposal was expected to be eliminated and replaced by a minimal liability by reference to instalments of a premium payable under a contrived lease over a period of 250 years. Kithurst, however, might prove to be vulnerable in as much as it could be subjected to substantial tax liabilities (i) under the shortfall and surtax provisions in Chapter III of Part XI of the Income and Corporation Taxes Act 1970 if contrary to its expectation the said profit was immediately liable to corporation tax and if it failed to make the necessary distribution of its profit within 18 months after the end of the accounting period in which it arose, or (ii) if legislation should be introduced with retrospective effect withdrawing the benefits expected to accrue to it under s 80(6) (such legislation was in fact introduced with effect from 11 April 1972 by the Finance Act 1972, s 81(1), (6) and Sch 13). To attempt to avoid such liabilities it would be necessary to implement stage (ii) of the overall scheme. Another purpose of implementing stage (ii) was to enable the shareholders of Kithurst, which had a corporation tax liability over 250 years, to dispose of the shares, the value of which would then be reduced to a nominal amount, to one of Mr. Faber's companies for a nominal sum (in the event the shares were not disposed of and Kithurst went into liquidation).

Stage (ii): Kithurst had, by declaring and paying a dividend of £422,000 in favour of Gristrim after Gristrim had acquired the shares in Kithurst in exchange for shares in itself and both companies had made a joint election

under s 48(3) and (7), Finance Act 1965, which enabled the dividend to be paid gross without any deduction of tax, made a distribution which would satisfy the shortfall provisions without depriving the shareholders of Kithurst of their control over that sum (by virtue of their shareholdings in Gristrim) and at the same time had left Kithurst with an investment of 3½ per cent. Liverpool Corporation Stock (at a cost of £1,924.66) which was sufficient to satisfy its minimal intended liability to corporation tax. Gristrim was considered to be free from any liability under the said shortfall provisions as the Gristrim shares were, having regard to the Companies Act 1948, s 56, to be treated as having been issued at a premium reflecting the value of the Kithurst shares and that premium was not available for distribution to the shareholders.

Stage (iii): The funds thus made available in Gristrim had found their way into the hands of the former shareholders of Kithurst by means of loans to them by Dolerin made before the shareholders had become shareholders and directors of Dolerin. It was considered that thereby any possibility of liability to tax on the loans by Dolerin to its shareholders under Finance Act 1965, s 75, would have been avoided and that the provisions in the Companies Acts prohibiting the making of loans to directors would not have been infringed by Dolerin. The transactions which took place in pursuance of the overall scheme are set out in the following sub-paragraphs.

Stage (i): the property transactions.

(7) By a lease dated 30 January 1970 (exhibit 1) Kithurst demised Hormare Farm to Parlev for a term of six years from 30 January 1970 at the following rent: (i) in respect of the first three months of the term £100 (which was duly paid on 30 January 1970); (ii) during the remainder of the term £62,550 per annum by quarterly instalments in advance the first such payment to be made on 30 April 1970. Parlev was granted an option in the lease to renew the tenancy on similar terms for successive periods of six years until 29 January 2066. This lease was made as part of a scheme intended to reduce liability to betterment levy.

(8) By an oral agreement made on 31 January 1970 Berkrol and Kithurst agreed that in consideration of £59,000 paid by Kithurst to Berkrol, Berkrol would procure a person to take a lease from Kithurst on the terms mentioned in the next following sub-paragraph. This agreement was later embodied in a deed dated 5 November 1971 (exhibit 2).

(9) By an agreement dated 31 January 1970 between Kithurst and Metallic (exhibit 3) Kithurst agreed to grant a lease of Hormare Farm (subject to the lease granted to Parlev on 30 January 1970) to Metallic for a term of 250 years from 31 January 1970. The lease was to be in consideration of a rent of £100 per annum and of a premium of £521,000 payable by annual instalments of £100 commencing on 31 January 1970 (with interest at 12 per cent. per annum on the amount of premium outstanding) until 31 January 2219 when the balance of £496,200 would be payable. Kithurst covenanted to pay the stamp duty on this agreement and £1,000 in respect of Metallic's solicitors' charges.

(10) By a lease dated 31 January 1970 (exhibit 4) Kithurst in consideration of a rent of £100 per annum and a premium of £521,000 demised Hormare Farm (subject to the lease granted to Parlev on 30 January 1970) to Metallic for a term of 250 years from 31 January 1970. Kithurst had an option under the lease to determine the term at the expiration of the forty ninth year thereof or at the expiration of any subsequent twenty first year thereof.

(11) By an agreement dated 2 February 1970 between Kithurst and Developments (exhibit 5) Kithurst agreed to sell the freehold reversion of Hormare Farm to Developments for £1,000, completion to take place on or before 6 February 1970.

(12) By an agreement dated 3 February 1970 between Metallic and Developments (exhibit 6) Metallic agreed to sell to Developments for £521,600 the leasehold interest in Hormare Farm under the lease of 31 January 1970, completion to take place on or before 6 February 1970. The sale was conditional on Developments' having before 6 February 1970 procured the surrender by Parlev to Metallic of its lease dated 30 January 1970.

(13) By an agreement dated 4 February 1970 between Developments and Parlev (exhibit 7) Parlev in consideration of £500 paid to it by Developments agreed to surrender its lease of Hormare Farm to Metallic, completion to take place on 5 February 1970.

(14) By a deed of surrender dated 5 February 1970 between Parlev, Metallic and Developments (exhibit 8) Parlev surrendered to Metallic its said lease in Hormare Farm. For the purpose of these proceedings only it is agreed between the parties that the said lease merged in the lease which Kithurst granted to Metallic on 31 January 1970 and was extinguished.

(15) On 6 February 1970: (*a*) Metallic lent Lekos £521,000. The loan was evidenced by a memorandum of that date (exhibit 9); (*b*) Lekos wrote to Kithurst (exhibit 10) offering to purchase for £521,000 the right to receive the instalments of premium payable to Kithurst by Metallic under the agreement dated 31 January 1970 (see sub-para (9) above). This offer was accepted orally; (*c*) Kithurst lent £522,102 9*s*. 3*d*. to Developments.

(16) On 7 February 1970 Developments mortgaged Hormare Farm to the trustees of F. Stubbs deceased for £44,000.

(17) On 15 February 1970 Kithurst ceased trading. The company's accounts drawn up to that date (exhibit 11) showed a credit balance on profit and loss account of £422,255.

(18) On 4 March 1970 Developments mortgaged to County Bank Ltd., for £200,000 a further part of Hormare Farm.

(19) On 11 March 1970 Developments mortgaged to Mr. K. A. B. Wilson for £6,000 a further part of Hormare Farm.

(20) On 20 February 1970 Mr. Faber had written to Mr. Haydon as follows:

> "[Kithurst] [Developments] I understand that Mr. [Aubrey] Williams will have advised you of certain transactions which have been entered into by [Kithurst] designed to enable that company to dispose of the land at Hormare Farm for approximately £520,000 without any liability to Betterment Levy and without any material liability to taxation. The proposed transactions were approved by Mr. C. N. Beattie, Q.C. in Conference on the 17th November, 1969 and subsequent in his Written Opinion of the 18th November.
>
> 1. You have not unfortunately been involved in these transactions till now and as it is necessary to finalise the accounts of Kithurst and deal with certain further stages of the overall taxation scheme which can be carried out now the property transactions have been implemented, I consider it essential that details of the transactions which have already been

implemented should be made available to you together with an indication of the further transactions now to be carried out so that these can be dealt with by you.

2. I accordingly enclose herewith a copy of the Instructions to Taxation Counsel . . . and a copy of his Written Opinion which I trust you will find self explanatory and which set out in detail the form of the transactions and the taxation and betterment levy legislation upon which these transactions are based. You will see that the overall scheme is basically divided into three stages:—(i) The transactions designed to enable Kithurst to dispose of Hormare Farm without any liability to betterment levy and without any material liability to taxation. (ii) The transactions involving the extraction of the tax free monies from Kithurst by way of a tax free dividend to an interposed holding company controlled by the same shareholders. (iii) The final transaction designed to enable the shareholders personally to obtain the benefit of the tax free monies in the form of interest free loans made to them by a company which they ultimately control, so that no liability arises under the provisions of Section 75 of the Finance Act 1965.

3. I feel that it might be helpful to you for me to outline the final form of the property transactions and then deal with the matters which will require attention in finalising the accounts of Kithurst and the interposing of the holding company, these being matters which I now feel should be dealt with as a matter of urgency.

4. Property Transactions

A. The nature and taxation advantages of these transactions are, I feel, clearly set out in the Instructions to Counsel and Counsel's Opinion and I do not feel that there is any need for me to repeat them. I merely confine myself to the actual transactions which were as follows:—(i) On the [30th] January, 1970 Kithurst granted a lease for a term of 6 years, with a lessees option to renew, to one of our companies [Parlev] at a rent of £62,550 per annum reducing to £100 for the first quarter following the grant. For the sake of simplicity I refer to this lease subsequently as the betterment levy lease. (ii) On the 31st January, 1970 Kithurst granted a lease for a term of 250 years to [Metallic] at a rent of £100 per annum, in return for a premium of £521,100 payable by instalments at the rate of £100 per annum for 249 years with the balance in 250 years. Interest at 12% was payable by Metallic on the outstanding instalments of premium and the first instalment of £100 being due on completion. The lease contained a lessor's right to determine at the 49th year and was granted subject to and with the benefit of the betterment levy lease. I refer to this lease subsequently in this letter as the Corporation Tax Lease. (iii) On the 5th February 1970, Parlev surrendered the betterment levy lease to [Metallic] in return for a sum of £500 paid to it by Developments. (iv) On the 6th February 1970 Kithurst sold its freehold reversionary interest in the land to [Developments] for £1,000 subject to the Corporation Tax Lease. The sale of the freehold did not carry with it an entitlement to the outstanding instalments of premium due from Metallic and merely entitled the purchaser to receive a rental of £100 per annum. (v) On the same date, 6th February, 1970 [Developments] paid Metallic £521,600 for the surrender of its leasehold interest and accordingly at that stage it had acquired the freehold for £1,000 and the long leasehold interest for £521,600. The two interests have now been merged and A. D. Williams (Developments) Ltd. accordingly now owns precisely the same freehold interest in the land as was previously held by Kithurst. For taxation purposes it will be treated as

having acquired the land for £523,100 this being the sum of £1,000 paid to Kithurst for the freehold, £521,600 paid to Metallic for the leasehold and £500 paid to Parlev for the surrender of the betterment levy lease to Metallic. (vi) On the 6th February 1970, Kithurst assigned its entitlement to the premium for £521,000 to one of our companies [Lekos]. In this way Kithurst received virtually the total disposal proceeds which would otherwise have arisen on the sale of the land.

5. It will of course be necessary to incorporate these transactions into the books of Kithurst and [Developments] and in this connection I enclose herewith copies of completion statements relating to these two companies which will form the basis of the Journal entries recording the various transactions in the books of the two companies. I also enclose herewith a copy of our 'final relevant particulars' form and 'calculation sheet' which were utilised by us to instruct our Solicitors in the preparation of the documents and which indicate the nature of the transactions, the companies taking part in them and the way in which each of the prices has been calculated.

6. You will see from the enclosed Instructions and Opinion that the purpose of the betterment levy [lease] was to increase the current use value of Hormare Farm to its full market value without itself being credited as a chargeable disposition for betterment levy purposes. The purpose of the Corporation Tax lease was to enable Kithurst effectively to dispose of its land in return for premium on what for commercial purposes is long lease but for taxation purposes as a result of the lessor's right to determine, will be treated as a short lease. The result is that Kithurst for taxation purposes, is in the position of being a dealer in land in receipt of a premium payable by instalments on a short lease and accordingly it can make an Election under Section 22(6) of the Finance Act 1963 to pay tax on the instalments of premium as and when they are payable over 250 years rather than on the total amount of the premium immediately. As a result of the Election the whole of the premium will fall out of the Case I taxation computation and the transactions will give rise to Case I dealing loss calculated basically by reference to the difference between the cost of the land and the disposal proceeds resulting from the sale of the freehold reversion to [Developments] for £1,000. Kithurst received its money by assigning its entitlement to the outstanding instalments of premium to Lekos this transaction not involving any taxation liability for the reasons set out in the Instructions to Counsel and Counsel's Opinion.

7. I should mention that an Election under Section 22(6) of the Finance Act 1963 has to be made within one year from the end of the accounting period during which Kithurst becomes entitled to the first instalment of the premium. As the first instalment was paid on the 31st January, 1970 the Election must be made within one year from the end of the current accounting period.

B. Finalisation of Accounts

8. Now that the property transactions have been completed it is proposed to interpose a holding company in the manner referred to in paragraph 15 of the Instructions to Counsel and to arrange for a gross dividend to be paid by Kithurst to the holding company equivalent to the whole of the tax free profits arising on this disposal after provision has been made for the small annual and substantial ultimate liability to taxation in 250 years.

9. I see no reason to delay the interposition of the holding company until the accounts have been finalised and accordingly have arranged for Just & Co. Ltd. to send to [Mr. Wilson] of Messrs. Malcolm Wilson & Cobby an investment company to be utilised as the holding company in this transaction. I am today writing to Messrs. Brecher & Co. our solicitors, asking them to prepare the appropriate share exchange agreement and to draft Minutes for both of the companies, so that the interposition of the holding company can take place and an Election made immediately under Section 48(3) of the Finance Act 1965 between the holding company and Kithurst for dividends to be paid gross without deduction of tax.

10. I would suggest that the accounting period of Kithurst be brought to an end at say the 15th February and that accounts be prepared up to that date incorporating all the property transactions. These accounts will then indicate the total profit properly available for extraction by way of dividend to the holding company.

11. As this will be the first time that you are dealing with a transaction of this nature, I think the following comments may be helpful when dealing with the accounts:—(a) The completion statements enclosed herewith should form the basis of Journal entries to incorporate these transactions into the books of Kithurst. (b) The grant of the betterment levy lease will only be reflected in the accounts of Kithurst by the receipt of rental income from Parlev for the period between the date on which Kithurst granted the betterment levy lease and that on which it granted the Corporation Tax lease to Metallic subject to and with the benefit of the lease to Parlev. (c) The grant of the Corporation Tax lease at a premium payable by instalments to Metallic should be dealt with by crediting disposal of property with the total amount of the premium of £521,100 and debiting Metallic with the same amount. The first instalment of £100 paid by Metallic on completion will then serve to reduce the balance due from that company to £521,000. The amount of £521,000 received from Lekos on the assignment of the debt should then be credited to the account of Metallic and debited to cash and in this way the balance due from Metallic will be extinguished. (d) As you will see from the Kithurst completion statement, effectively the total amount received by Kithurst after allowing for apportionment of rents has been lent by Kithurst to [Developments] to enable that company to acquire the freehold and leasehold interests in the property. Accordingly the accounts will show this loan as being outstanding at the accounting date. (e) The completion statements for Kithurst and [Developments] indicate apportionments of rents on the betterment levy and corporation tax leases and it is important that these apportionments should be incorporated into the relevant accounts. (f) The following amounts will have been paid or are payable by Kithurst in connection with these transactions:—

Legal fees Messrs. Brecher & Co.	£1,000
Stamp duties on agreement for lease to Metallic	651. 7. 6.
Stamp duty on lease to Parlev	313. 0. 0.
Counsel's fees (Mr. C. N. Beattie, Q.C.)	500. 0. 0.
Counsel's fees (Mr. Sophian)	Mr. Wilson will advise you of this figure.

Legal fees Messrs. Malcolm Wilson Cobby. (This amount will be divided by Mr. Williams between Kithurst & [Developments] in the appropriate proportions.	£1,000
Commission—[Berkrol]	£59,000. 0. 0.

(g) As a result of the property schemes, there should be no liability to betterment levy and accordingly no provision need be made for this. Similarly, as there will be a Case I loss during the period, there will be no need to provide for taxation in respect of the current accounting period, but I would draw your attention to paragraph 15(c) of the Instructions to Counsel which indicates the basis on which Kithurst, as it will now cease to trade, should prudently provide for the minimal annual taxation liability on the instalments of premium for 249 years and for the ultimate substantial liability in 250 years. Our Consultant Actuary has prepared calculations of the amount required to be invested in an irredeemable stock in order to give rise to a net amount sufficient to meet the annual liability for the next 249 years and also to accumulate to the ultimate liability in 250 years. I accordingly enclose herewith a calculation sheet which indicates in relation to Liverpool Corporation 3½% Irredeemable Stock the nominal amount of stock which will require to be purchased to meet the taxation liability in future years, the cost of purchasing this stock and based on this figure the amount of provision which should be made in Kithurst's current account for the future taxation liability. Arrangements have been made with our stockbrokers for the purchase of this stock and I shall be pleased to advise you of the procedure in due course. The balance of the company's profit arising on the disposal of the land will then be available for dividend after retaining sufficient profit to cover the company's share capital. I notice that at the 31st March 1969, there was in fact a debit balance on profit and loss account and accordingly the balance of the company's profits after providing for future taxation must be reduced in arriving at the amount available for dividend by an amount sufficient to cover the debit balance on profit and loss and a further amount sufficient to cover the company's issued share capital of £1,025. (h) I understand that Kithurst will be required to pay certain valuation fees and Mr. Wilson will be able to supply you with the amount of the provision which should be made for them. (i) Messrs. Brecher & Co. have prepared Minutes for Kithurst and [Developments] relating to these transactions and I believe that these have been forwarded to Mr. Wilson and should be inserted into the Minute books of the companies. (j) There were certain mortgages secured on the land involved in the property transactions and these were re-paid prior to implementation of the scheme and were subsequently I understand, re-advanced to [Developments]. Mr. Wilson will no doubt be able to provide you with completion statements indicating the basis on which these mortgages were repaid. (k) I have not dealt in detail with the accounting position of [Developments] as the position of this company will be relatively simple and the entries from the completion statement should incorporate the relevant transactions into the books of that company. (l) Mr. Wilson has copies of all the documents involved in the transactions.

12. Subject to your agreement, I would suggest that the accounts of Kithurst be prepared in draft form by your firm and that we then have a meeting to agree on the basis for finalising them.

13. The accounts for the period ending 15th February 1970 should not show any provision for the dividend which is subsequently to be paid to the holding company.

C. Holding Company Scheme.

14. In order to avoid any delay in obtaining the Inspector of Taxes agreement to the Election under Section 48(3) of the Finance Act 1965, I would suggest that as soon as the share exchange agreement has been implemented, you write to the Inspector of Taxes dealing with the affairs of Kithurst advising him of the incorporation of holding company and that it is about to commence in business and ask him to let you have the usual initial enquiry form. This can then be returned to him duly completed with details of the shareholders and directors and at the same time an Election under Section 48(3) of the Finance Act 1965 can be submitted to him. In this connection I enclose herewith a draft form of Election which we utilise in our own companies.

15. It is of the utmost importance to the position of H. Ltd. and its shareholders that the shares in Kithurst acquired by it by way of share exchange should be valued at the full asset value of Kithurst resulting from the disposal of the land by that company for over £520,000 without any material liability to taxation. I envisage that the shares to be issued by the holding company to the shareholders in Kithurst in exchange for their shares will be issued on say a one for five basis so that the total share capital of Holdings Ltd. will be £205 and these shares will be allotted at a premium so as to reflect in the account of Holdings the cost of acquisition of Kithurst of say £450,000. The gross dividend which will be paid by Kithurst to the Holding Company will be credited to the account for Cost of Acquisition of Shares in Subsidiary in the books of the holding company and will serve to reduce the cost of the subsidiary. Care must be taken to ensure that the cost of the shares exceeds the dividend received from Kithurst as any excess of dividend over cost will be distributable to the shareholders and there will be no restriction in law precluding its distribution.

16. I would suggest that the preparation of the account of Kithurst and the interposition of the holding company be dealt with as matters of urgency and as soon as these have been completed we can then deal with the payment of dividend by Kithurst to the holding company and the loans subsequently to be made to the shareholders in Kithurst by one of our companies.

17. I should mention that the interposition of the holding company should be dealt with under the provisions of Section 55 of the Finance Act 1927 in order to avoid the stamp duty which would otherwise be involved in the transfer of shares in Kithurst to the Holding Company and accordingly the share transfers from the shareholders of Kithurst should indicate that their shares are being transferred to the Holding Company in return for the issue of shares. These transfers together with the share exchange agreement and a statutory declaration in the form prescribed by Section 55 of the Finance Act 1927 should be forwarded to the Adjudication Section of the Inland Revenue at Worthing for Adjudication. You will no doubt be able to deal with this aspect of the interposition together with Mr. Wilson to ensure that exemption is obtained.

18. I look forward to hearing from you in due course as and when the accounts of Kithurst have been prepared in draft form, and a mutually convenient meeting can then be arranged.

A 19. I would finally take this opportunity to place on record that the taxation and betterment levy schemes which are set out in the enclosed Instructions to Counsel have been devised by my Partner and myself and are made available to you on the understanding that they will not be discussed with, disclosed to or utilised by any other person without our prior consent.

B If there is any further information which you require in connection with this letter or the enclosures please do not hesitate to let me know. I am sending a copy of this letter to Mr. Wilson who will no doubt be discussing the transactions and the accounts of Kithurst with you within the next day or two. Yours sincerely, Bernard Faber."

Stage (ii): the extraction of tax-free moneys by payment of a dividend to C an interposed holding company.

(21) Shortly before 20 March 1970 the four notified persons and Mrs. Williams each acquired one share in Gristrim (which had been incorporated for the purpose on the instructions of Mr. Faber), these five shares being Gristrim's entire issued capital. At all material times the directors of Gristrim were the four notified persons and Mrs. Williams. Mr. Bowron resigned on 1 December D 1973.

(22) On 20 March 1970 Mr. and Mrs. Aubrey Williams on behalf of themselves and the other shareholders in Kithurst entered into an agreement with Gristrim (exhibit 12) to exchange all their shares in Kithurst for ordinary shares in Gristrim to be issued to them. In pursuance of this agreement and on the same day the four notified persons and Mrs. Williams transferred their shares E in Kithurst to Gristrim and Gristrim issued its shares to them—making the total shareholding of each of them in Gristrim 20 shares.

(23) The minutes of a meeting of the directors of Gristrim recorded as having been held on 20 March 1970 (exhibit 13) stated that the directors had valued the whole of the issued capital of Kithurst at £423,280 and that it was resolved that this be accepted as the fair market value. It was further resolved F that the sum of £423,180 (being the excess of the value of the shares in Kithurst over the nominal amount of shares to be issued by Gristrim) should be credited in Gristrim's books to a share premium account and that each of the 95 ordinary shares to be issued to the former shareholders in Kithurst be issued as fully paid shares at a premium of £4,455. 11*s.* 7*d.* per share.

(24) On 24 March 1970 Gristrim and Kithurst wrote to the Inspector of G Taxes making a joint election under s 48(3) and (7), Finance Act 1965, for dividends and interest paid between them to be excluded from s 47(3) of that Act, so that dividends and interest might be paid between them gross without deduction of income tax. The Inspector by letter dated 9 April 1970 accepted this election as valid.

(25) On 13 April 1970: (*a*) Developments repaid to Kithurst part of the H loan made on 6 February 1970; (*b*) Kithurst paid a dividend of £422,000—drawing a cheque on its bank account for that amount in favour of Gristrim. Income tax was not deducted from the dividend because s 256 applied; (*c*) Gristrim lent to Developments a sum equal or approximately equal to the amount of the dividend which it had received from Kithurst.

(26) On 1 September 1970 Developments mortgaged a further part of I Hormare Farm to County Bank Ltd. for further sums in addition to the first £200,000 (see sub-para (18) above).

Stage (iii): The loan transactions.

(27) On 9 December 1970 Mr. Wilson wrote to Mr. Faber as follows:

"[Kithurst] 30 acres of land at Hormare Farm, Storrington. I am pleased to report that at last Contracts for the sale of the above land to Maylands Green Estate Co. Limited at the price of £400,000 have to-day been exchanged with completion to take place on the 29th January 1971. In your letter of the 21st July last you suggested that it was preferable to wait until the sale had been completed and monies received from the outside purchaser before proceeding to implement the further transactions designed to enable the shareholders in [Gristrim] to receive personally the tax-free monies which originally accrued to Kithurst as a result of the implementation of the taxation and betterment levy schemes, provided that completion of the sale was not delayed. As you know, this sale has not gone through as quickly as we had hoped, and I shall be glad if you would let me know whether the advice you gave in July still holds good. [Developments] has charged the land to County Bank Limited to secure a loan of £200,000 which will have to be repaid on completion, together with accrued interest."

(28) On 10 December 1970 Mr. Faber replied to Mr. Wilson as follows:

"[Kithurst] I thank you for your letter of 9th December and am pleased to note that completion of the sale of part of the land at Hormare Farm, Storrington is to take place on 29th January, 1971. In view of what you say, I would prefer to delay implementation of the loan scheme until the disposal proceeds have been received. The loan scheme itself should take approximately 7 days to implement and there would accordingly appear to be adequate time to implement the scheme after completion of the sale. I would suggest that you notify me as soon as completion has taken place and that we then have a meeting at which I can outline to you the precise transactions which will be involved and the way in which these are to be implemented."

(29) On 29 January 1971: (*a*) Developments sold a substantial part of Hormare Farm to Maylands Green Estates Co. for £400,000. The net proceeds of sale were used to pay off the mortgage debt to County Bank Ltd., to pay the balance of commission due to Berkrol by Kithurst (see sub-para (8) above) and by one of its associated companies, as to £2,000 to purchase stock to meet what was considered to be the future tax liability of Kithurst and the balance of the proceeds amounting to some £58,000 was paid into Developments' bank account. (*b*) Kithurst wrote to the Inspector of Taxes claiming that the tax chargeable by reference to the premium payable under the lease dated 31 January 1970 (see sub-paras (9) and (10) above) should be computed in accordance with s 80(6).

(30) On 5 February 1971 Dolerin was incorporated on the instructions of Mr. Faber with an authorised share capital of £100 divided into 100 shares of £1 each. On 8 February 1971 the capital was increased to £1,000 by the creation of 900 additional £1 shares. On 10 February 1971 Mr. Bradman and Mr. Faber were appointed as directors.

(31) On 10 February 1971 Mr. Faber wrote to Mr. Wilson as follows:

"In the matter of [Kithurst] [Grimstrim]. As arranged with you I enclose diagrams indicating the Loan Transactions which are to take place, under which one of my Share Dealing Companies [Retsor] will

arrange for one of its wholly owned subsidiaries [Dolerin] to make loans to your Clients. I also enclose a Relevant Particulars Sheet relating to the loan transactions which indicate the division of the loans to be made to the individuals by the investment company. [Dolerin] is a newly incorporated investment company which has never carried on any business and has no assets or liabilities at the present time whatsoever. You will observe from the diagrams that the individuals will acquire British Government Short Dated 6¾% Exchequer Stock 1971 at a total cost of £421,000 and will charge the stock as security for the loans made by [Dolerin] to them. [Dolerin] will receive the sum of £10,525 from its parent company by way of loan and will borrow the balance of the money required by it upon the security of the Stock which is to be acquired by your Clients. I also enclose the following documents, and I should be grateful if you would deal with them as indicated below:—(a) A letter addressed to the Stockbrokers, Messrs. Sandelson & Co. instructing that firm to purchase the British Government Short Dated Stock and authorising the brokers to charge the stock as security for the loan. The letter should be signed by your Clients and returned to me as soon as possible. (b) A schedule listing the cheques which are required. Please arrange for the cheques shown on the enclosed schedule, which are to be drawn upon the bank accounts of your Clients, to be in my possession not later than 12 o'clock midday on Monday, 15th February 1971. (c) Loan Agreements. These Agreements deal with the loans which are to be made by [Dolerin] to your Clients, and are in a form which was settled by Leading Counsel Mr. Raymond Walton, Q.C., in consultation with Mr. Martin Buckley. The Agreements should be signed by your Clients in the places indicated and should then be returned to me. In view of the postal difficulties, the cheques should be left undated and the relevant date will be inserted as soon as you are able to return the enclosures to me. Would you please confirm that all the borrowers will be available for the next ten days. I enclose an additional copy of this letter, together with copies of the various enclosures, and I would ask you to be good enough to forward this to Mr. G. F. Haydon."

The enclosures with this letter are annexed hereto as exhibit 14(1).

(32) On 11 February 1971 Mr. Faber wrote to the manager of the National Westminster Bank Ltd. (Chancery Lane and Holborn Branch) requesting that a current account be opened in Dolerin's name—all charges etc. being debited to Retsor's account.

(33) On 15 February 1971 Mr. Wilson replied to Mr. Faber's letter of 10 February and returned the loan agreements, the letter addressed to Sandelson and the cheques signed by the four notified persons and Mrs. Williams.

(34) On 16 February 1971: (*a*) Sandelson agreed to lend Dolerin £410,475 on 17 February 1971. Dolerin agreed to repay the loan on call but, in any event, unless otherwise agreed in writing within seven days of the date of the loan and to pay interest thereon at a rate of 4 per cent. per annum over bank rate. Mr. Faber gave a personal guarantee of the due performance of the loan agreement. A letter confirming this agreement is annexed hereto as exhibit 15(1); (*b*) the four notified persons and Mrs. Williams wrote to Sandelson requesting the purchase of 6¾ per cent. Exchequer Stock 1971 (hereinafter called "the Stock") at a cost of £421,000, such Stock to be held, if Sandelson made a loan to Dolerin, to the order of Sandelson as security for repayment of the loan.

(1) Not included in the present print.

(35) On 17 February 1971: (*a*) Retsor acquired the two subscriber shares in Dolerin at a cost of £2 and agreed to lend Dolerin £10,525; (*b*) Dolerin agreed to lend £84,200 to each of the four notified persons and Mrs. Williams (a total of £421,000). A copy of the agreement between Mr. Aubrey Williams and Dolerin is annexed hereto as exhibit 16(1). Agreements in similar form were entered into on the same date between Dolerin and the other borrowers. Each of the agreements was conditional on all the prospective borrowers' jointly depositing with Dolerin within three days thereof short-dated British Government stocks of a value of not less than £421,000. Each of the agreements stipulated that the borrower should not be liable to repay any of the loan unless Dolerin at the same time as it demanded such repayment demanded like repayment from all the other borrowers; (*c*) Sandelson purchased £422,839.73 of the Stock on behalf of the aforesaid borrowers at a cost of £421,000; (*d*) the following cheques in respect of the transactions mentioned in sub-paras (34) and (35)(*a*) and (*b*) above were, at the request of Mr. Faber cleared simultaneously by the National Westminster Bank Ltd., Chancery Lane and Holborn Branch:

Name of drawer	Name of payee	Amount £	Details of payment
Retsor	Dolerin	2	Subscription for shares
Retsor	Dolerin	10,525	Loan
Dolerin	Each of the four notified persons and Mrs. Williams	84,200 (each of five cheques)	Loan
Each of the four notified persons and Mrs. Williams	Sandelson	84,200 (each of five cheques	Purchase of the Stock
Sandelson	Dolerin	410,475	Loan.

On the same day the Stock was deposited with Dolerin; and Dolerin in turn deposited it with Sandelson.

(36) On 23 February 1971: (*a*) Gristrim by special resolution amended its memorandum of association to include as an object of the company the purchase of the share capital of Dolerin; (*b*) Dolerin at the request of the four notified persons and Mrs. Williams agreed to permit the sale by them of the Stock deposited as security for their loans from Dolerin and to release its rights over the said security; (*c*) the four notified persons and Mrs. Williams instructed Sandelson to sell the Stock and, after the repayment to Sandelson of its loan of £410,475 to Dolerin, to pay 20 per cent. of the net proceeds of sale of the Stock to each of the four notified persons and Mrs. Williams.

(37) On 24 February 1971: (*a*) Retsor applied to Dolerin for the allotment to it of a further 998 shares of £1 each of Dolerin at a total price of £420,998 which was paid on that same day. On that same day Dolerin accepted such application and issued to Retsor a fully paid allotment letter for the shares (exhibit 17) entitling Retsor, if it so wished, to dispose of the shares by renunciation; (*b*) Dolerin paid Sandelson £411,340.93 in repayment of the loan of £410,475 made on 17 February 1971 together with interest thereon; (*c*) Dolerin repaid to Retsor the loan of £10,525; (*d*) the four notified persons and Mrs. Williams each paid to Dolerin interest of £177.63 on the loan referred to in sub-para (35)(*b*) above; (*e*) Mr. Bradman and Mr. Faber resigned as directors of Dolerin; (*f*) Developments repaid to Gristrim the sum of £421,250 in reduction of the loan referred to in sub-para (25)(*c*) above; (*g*) Retsor

(1) Not included in the present print.

entered into an agreement with Gristrim (exhibit 18) to sell to Gristrim the whole of the authorised share capital of Dolerin of 1,000 shares at the price of £421,250. On the same day Retsor transferred the two issued shares in Dolerin as to one share to Gristrim and as to the other to Gristrim and Mr. Aubrey Williams jointly (the latter as nominee for Gristrim) and renounced its rights to the shares comprised in the said fully paid allotment letter in favour of Gristrim. (*h*) The four notified persons and Mrs. Williams were appointed as directors of Dolerin. (Mr. Bowron resigned on 1 December 1973.) (*i*) Sandelson, having sold the Stock, paid the net proceeds of sale amounting to £421,083.69 as to £84,216.74 to each of the appellants and as to £84,216.73 to Mrs. Williams. (*j*) The four notified persons and Mrs. Williams applied the said proceeds of sale of the Stock in its entirety by making loans to Developments. The lenders were under no legal obligation to make these loans but it was commercially desirable that they should do so (Developments having had no other source of money to repay its debt to Gristrim) and it was envisaged by all parties to the scheme that such loans should be made. (*k*) The following cheques in respect of the transactions mentioned above in this sub-paragraph were, at the request of Mr. Faber cleared simultaneously by the National Westminster Bank Ltd., Chancery Lane and Holborn Branch:

Name of drawer	Name of payee	Amount £	Details of payment
Retsor	Dolerin	420,998	Subscription for shares
Dolerin	Retsor	10,525	Repayment of loan
Gristrim	Retsor	421,250	Payment for shares
Developments	Gristrim	421,250	Repayment of loan
Dolerin	Sandelson	411,340.93	Repayment of loan and interest
Sandelson	Each of the four notified persons	84,216.74	Payment for the Stock sold
Sandelson	Mrs. Williams	84,216.73	Payment for the Stock sold
Each of the four notified persons	Developments	84,216.74	Loan
Mrs. Williams	Developments	84,216.73	Loan
Each of the four notified persons and Mrs. Williams	Dolerin	177.63	Interest.

(38) On 29 September 1972 Developments sold the remainder of Hormare Farm to Mayland Green Estate Co. Ltd. for £120,000. After discharging outstanding mortgage debts and legal costs, the net proceeds amounting to about £89,000 were paid into Developments' bank account.

(39) On 24 October 1973 the Board issued notifications under s 460(6) to the four notified persons that the Board had reason to believe that the said s 460 might apply to them in respect of transactions described therein. The transactions specified in the notification issued to Mr. Aubrey Williams were:

> "1. The acquisition by you and your wife on or about 16 March 1970 of 2 ordinary shares of £1 of [Gristrim] for cash at par. 2. The transfer by you and your wife to Gristrim on or about 20 March 1970 of 410 ordinary shares of [Kithurst] in consideration for the issue of 38 ordinary shares of Gristrim at a premium of £169,272. 3. The declaration by

Kithurst of a dividend of £422,000 for the year ended 15 February 1971 and the payment of that dividend to Gristrim. 4. The subscription by [Retsor] in February 1971, for shares in [Dolerin] (a company incorporated on 5 February 1971) for cash at a premium. 5. The payment to you and your wife by Dolerin subsequently (but before the transaction referred to in 6 below) of a sum of cash by way of loan. 6. The acquisition by Gristrim on or about 22 February 1971 of the whole of the issued share capital of Dolerin for a cash consideration of £421,250."

The notifications issued to the other three notified persons were in similar form except that there was no reference to any wife of any of them, and all figures in the first two numbered paragraphs in each notification were one-half of the figures in the notification to Mr. Aubrey Williams.

(40) On 13 November 1973 Mr. Aubrey Williams made a statutory declaration under s 460(6). A copy thereof is annexed hereto as exhibit 19(1). Statutory declarations in similar form except for the omission of any reference to wives, were made by the other three notified persons on 20 November 1973.

(41) The Board sent to the Tribunal constituted under s 463 of the Act a certificate to the effect that they saw reason to take further action, and they also sent to the Tribunal a counter-statement, a copy whereof is annexed hereto as exhibit 20(1). The Tribunal took into consideration the statutory declarations, the certificate and the counter-statement, and on 14 January 1975 determined that there was a *prima facie* case for proceeding.

(42) On 4 March 1975 the Board served notices on the four notified persons under s 460(3) that it was of the opinion that s 460 applied to them in respect of the transactions in question (which were described in the notices in terms identical with those used in the notifications issued on 24 October 1973 except that in five of the notice to Mr. Aubrey Williams there were substituted for the words "subsequently (but before the transaction referred to in 6 below) of a sum of cash" the words "on or about 17 February 1971 of £168,400" and in the notices to the other three appellants a similar substitution (but of one-half of the amount of £168,400) was made). The said notices specified that the following adjustments were requisite for counteracting the tax advantage obtained or obtainable from the transactions: (*a*) In the case of Mr. Aubrey Williams:—

"1. In accordance with [Section 466 of the Act] (a) an assessment to income tax under Case VI of Schedule D for the year 1969–70 in the sum of £168,902 tax on which at the standard rate amounts to £69,627.07* being the income tax which would have been payable by Kithurst under Section 232(2) ICTA 1970 on a distribution to you and to your wife of £168,902 (£84,451 each) or, in the alternative; (b) an assessment to income tax under Case VI of Schedule D for the year 1970–71 in the sum of £168,400 tax on which at the standard rate amounts to £69,465 being the income tax which would have been payable by Kithurst under Section 232(2) ICTA 1970 on a distribution to you and to your wife of £168,400 (£84,200 each). 2. The computation or recomputation of your liability to surtax on the basis that the said sum of £168,902 forms part of your total income for the year 1969–70, or in the alternative that the said sum of £168,400 forms part of your total income for the year 1970–71, and any assessments which may be required to give effect to such computations or recomputations."

*Sic—a patent error, recte £69,672.07."

(1) Not included in the present print.

(*b*) In the cases of the other three notified persons—the adjustments were similar to those in the case of Mr. Aubrey Williams except that there was no reference to a wife of any of them and the figures for the amounts of the assessment and tax were one-half of those for Mr. Aubrey Williams.

(43) On 24 March 1975 the four notified persons jointly gave notice of appeal against the said notices. A copy thereof is annexed hereto as exhibit 21(1).

(44) On 17 March 1975 income tax assessments for the years 1969–70 and 1970–71 in accordance with the adjustments specified in the said notices were made on the four notified persons.

(45) On 27 March 1975 Mr. Aubrey Williams appealed against the said income tax assessments made on him. A copy of his notice of appeal is annexed hereto as exhibit 22(1). Notices of appeal in similar form were also given by the other three notified persons.

(46) Subsequently in 1975 surtax assessments for the years 1969–70 and 1970–71 in accordance with the adjustments specified in the said notices were made on the four notified persons. On 3 July 1975 Mr. Aubrey Williams appealed against the said assessments and a copy of his notice of appeal is annexed hereto as exhibit 23(1). Notices of appeal in similar form were also given by the other three notified persons.

(47) On 14 January 1976 an assessment of levy under ss 44 and 45, Land Commission Act 1967, was made on Kithurst in the sum of £125,780 in respect of its lease of Hormare Farm to Metallic on 31 January 1970. A copy of the notice of assessment is annexed hereto as exhibit 24(1). At the time of the proceedings before us Kithurst's appeal against this assessment was still outstanding.

(48) In June 1976, shortly before the appeal hearing before us, it was arranged by the four notified persons and Mrs. Williams that Dolerin should call in the loan which it had made to Mr. Wilson on 17 February 1971 (see sub-para (35)(*b*) above). The purpose of this was to bring before us for decision a case in which the loan which was alleged to produce a tax advantage had actually been repaid and was thus a "real" loan. To enable only the loan to Mr. Wilson to be called in, he released Dolerin from the requirement in the agreement of 17 February 1971 that none of the five borrowers should be liable to repay unless Dolerin at the same time as it demanded such repayment demanded like repayment from the other borrowers. Dolerin never did any business other than to make the said loans and receive repayment from Wilson.

7. It was common ground between the parties that:

(1) the circumstances in A and B of s 461 do not exist;

(2) Gristrim received from Kithurst an abnormal amount by way of dividend;

(3) the Gristrim shares issued to the four notified persons and Mrs. Williams were a consideration which represented the value of Kithurst's assets available for distribution by way of dividend;

(4) if (i) the issue of shares in Gristrim conferred on the four notified persons a tax advantage within the meaning of s 466 and (ii) the shares in

(1) Not included in the present print.

Gristrim were received "in consequence of a transaction whereby" Gristrim received the abnormal amount by way of dividend, then s 460 applied by virtue of s 461C; A

(5) Kithurst, Gristrim, Dolerin, Developments, Lekos, Parlev, Metallic, Retsor and Berkrol were all companies to which s 461D applied by virtue of sub-para (2);

(6) if the issue of shares in Gristrim conferred on the four notified persons a tax advantage within the meaning of s 466, the circumstances in E(1) of s 461 exist, but that, by reason of E(2), E(1) does not apply. B

8. It was contended on behalf of Mr. Aubrey Williams and the three other notified persons that:

(i) the specification of alternative bases in the notice under s 460(3) made the notice invalid; C

(ii) section 460(6) excluded the operation of that section, subject only to subs (7) thereof, and there is nothing in subs (7) to cause the section to apply once the four notified persons had sent statutory declarations to the Board;

(iii) it was a requirement of natural justice that the Board should give reasons in their notifications under s 460(6) and that as the Board had not done so the notifications were invalid; D

(iv) (*a*) the receipt by the four notified persons and Mrs. Williams of shares in Gristrim did not confer on the four notified persons any tax advantage within s 466 or, in the alternative, (*b*) (i) the exchange of shares in Kithurst for shares in Gristrim was not a transaction "whereby" Gristrim received the abnormal amount by way of dividend and that the circumstances in C of s 461 do not therefore exist and (ii) the shares in Gristrim were not received by the four notified persons and Mrs. Williams in connection with the dividend subsequently paid by Kithurst to Gristrim and that the circumstances in D of s 461 do not therefore exist; E

(v) the loans by Dolerin to the four notified persons and Mrs. Williams did not confer on the four notified persons any tax advantage within s 466 because—(*a*) loan moneys which are repayable cannot be compared with a dividend which is not repayable or, in the alternative, (*b*) Dolerin could not have paid the loan moneys as dividend as it had no profits available for distribution or, in the further alternative, (*c*) under the scheme the borrowers paid the moneys on by way of loan to Developments and therefore at that time receipts did not accrue, (*d*) there was no way in which the loan moneys could have accrued in taxable form or, in the alternative, F G

(vi) a loan is not a transaction in securities and therefore any tax advantage obtained from the loans from Dolerin were not in consequence of a transaction in securities within s 460(1)(*b*) or, in the alternative,

(vii) as regards the loans from Dolerin neither the circumstances in C nor those in D of s 461 exist because—(*a*) as regards C, the "consideration" in the form of the loan moneys did not fall into any of the categories (i), (ii) or (iii) of C(1) and, (*b*) as regards D the "consideration" in the form of the loan moneys was not of the character mentioned in para C(1) and was not received in connection with the payment of the dividend by Kithurst to Gristrim; H

(viii) the notices under s 460(3) should be cancelled and the assessments to tax quashed;

(ix) in any case, the assessments cannot be affirmed until the notices under s 460(3) have been determined finally and conclusively (by the Tribunal constituted under s 463 or the Courts, as the case may be, if we should affirm the notices and there should be appeals against our decision);

(ix) in any case the quantum of any adjustments or assessments should be reduced by £125,780, being the amount of the assessment on Kithurst to betterment levy, that sum being taken not to be available for the payment of dividends by Kithurst.

9. It was contended on behalf of the Board that:

(A) (i) the specification of alternative bases did not invalidate the notice under s 460(3);

(ii) the meaning of s 460(6) and (7) is that if the Tribunal does not decide that there is no *prima facie* case for proceeding in the matter s 460 is capable of applying;

(iii) there was no reason in law why the Board should give reasons in its notification under s 460(6) and in any event this was a matter not for the Special Commissioners but for the Tribunal;

(B) (i) the words in s 460 and other sections in the same chapter are wide words and must not be given a narrow meaning;

(ii) the question of Kithurst's possible liability to betterment levy is irrelevant to the questions in issue in these proceedings;

(C) (i) each of the four notified persons received in consequence of the issue to him (and in Mr. Aubrey Williams' case also in consequence of the issue to his wife) of shares in Gristrim in exchange for shares in Kithurst, being a transaction whereby Gristrim subsequently received an abnormal amount by way of dividend, a consideration as defined in C(1)(i) of s 461 and that he so received that consideration that he did not pay or bear tax on it as income and, accordingly

(ii) the circumstances in C of s 461 exist; alternatively,

(iii) each of the four notified persons in connection with the distribution of the profits of Kithurst so received as is mentioned in C(1) of s 461 such a consideration as is mentioned in sub-para C(1)(i), namely, shares in Gristrim and, accordingly,

(iv) the circumstances in D of s 461 exist;

(v) on a proper interpretation of *Commissioners of Inland Revenue* v. *Parker*[1] 43 TC 396 and *Commissioners of Inland Revenue* v. *Cleary*[2] 44 TC 399 the receipt of shares in Gristrim, notwithstanding that the shares were issued by Gristrim, conferred on the four notified persons a tax advantage as defined in s 466;

(vi) in such circumstances as are mentioned either in C or D of s 461 and in consequence of the combined effects of two or more transactions in securities each of the four notified persons obtained a tax advantage so that the provisions of s 460 apply to him;

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(1) [1966] AC 141. (2) [1968] AC 766.

(vii) the notices to the four notified persons should be upheld in respect of the adjustments specified for the year 1969–70 and the corresponding tax assessments confirmed; or, alternatively, A

(D) (i) each of the four notified persons received in consequence of a transaction (being either the share exchange or the payment of the dividend by Kithurst) whereby some other person received an abnormal amount by way of dividend a consideration (namely a loan from Dolerin) within either (i) or (ii) of C(1) of s 461 and that he so received that consideration that he did not pay or bear tax on it as income and, accordingly; B

(ii) the circumstances in C of s 461 exist; alternatively,

(iii) circumstances in D of s 461 exist in relation to the receipt by the four notified persons and Mrs. Williams of loans from Dolerin;

(iv) except to the extent that any tax advantage arising from their receipt of shares in Gristrim was nullified by adjustments under s 460 for the year 1969–70 the receipt of the said loans conferred on the four notified persons a tax advantage as defined in s 466; C

(v) the fact that they received the money on loan from Dolerin did not mean that they did not obtain a tax advantage and in any event such loans were irrecoverable under the Moneylenders Acts; D

(vi) in such circumstances as are mentioned either in C or D of s 461 and in consequence of the combined effects of two or more transactions in securities each of the four notified persons obtained a tax advantage so that the provisions of s 460 apply to him;

(vii) the position was unaffected by the repayment by Mr. Wilson of the loan from Dolerin; E

(viii) if the notices to the four notified persons in respect of the adjustments for the year 1969–70 fall to be cancelled and the corresponding tax assessments quashed the notices should be upheld in respect of the adjustments specified for the year 1970–71 and the corresponding tax assessments confirmed.

10. The following authorities were cited before us:—*Ayrshire Employers Mutual Insurance Association, Ltd.* v. *Commissioners of Inland Revenue* 27 TC 331; 1946 SC (HL) 1; *Commissioners of Inland Revenue* v. *Parker* 43 TC 396; [1966] AC 141; *Commissioners of Inland Revenue* v. *Cleary* 44 TC 399; [1968] AC 766; *Wiseman* v. *Borneman* 45 TC 540; [1971] AC 297; *Commissioners of Inland Revenue* v. *Brown* 47 TC 217; [1971] 3 All ER 502; *Greenberg* v. *Commissioners of Inland Revenue and Commissioners of Inland Revenue* v. *Tunnicliffe* 47 TC 240; [1972] AC 109; *Commissioners of Inland Revenue* v. *Joiner* 50 TC 449; [1975] 1 WLR 273. F G

11. We, the Commissioners who heard the appeal, gave our decision in writing on 29 July 1976 as follows:

(1) We have before us appeals by each of four appellants against notices issued by the Board of Inland Revenue ("the Board") under s 460, Income and Corporation Taxes Act 1970. Section 460 is one of a number of sections contained in Chapter I of Part XVII of the 1970 Act and we refer hereafter simply to the number of the particular section or to Chapter I as a whole. We also have before us two appeals by each appellant against consequential surtax assessments—first, against an assessment for the year 1969–70 made to counteract alleged tax advantages and second, against an assessment for the year 1970–71 made in the alternative to counteract other alleged tax H I

A advantages. The four appellants and the wife of one of them (Mrs. Aubrey Dan Williams) were each concerned in identical circumstances. Thus the appeals are all on the same basis, except that Mr. Aubrey Dan Williams (as is common ground) is concerned to the extent of twice the amount with which each of the others is concerned.

(2) We have been much helped by the co-operation of the parties to the B proceedings and of their professional representatives and by the clarity with which the extremely complex facts and legal arguments have been presented before us. We are most grateful.

(3) In the course of the proceedings before us three preliminary points were raised by the appellants and we decided them in favour of the Board as follows:

C (*a*) The specification of alternative bases therein did not invalidate the notice under s 460(3). We found no specific provision in Chapter I and no practical grounds whereby notification of alternative bases was open to objection.

(*b*) As regards the contention that subs (6) of s 460 exclude the operation of that section subject only to subs (7) thereof, and that there was nothing in D subs (7) to cause the section to apply once a statutory declaration had been sent to the Board, we held that the case of *Ayrshire Employers Mutual Insurance Association, Ltd.* v. *Commissioners of Inland Revenue* 27 TC 331 was distinguishable from the present case and that the clear implication of the said subsections was that if the Tribunal appointed under s 463 did not determine that there was no *prima facie* case for proceeding in the matter then s 460 was E capable of applying.

(*c*) That the question whether it was a requirement of natural justice that the Board should give reasons in their notification under subs (6) of s 460 was one for the Tribunal and not for us. In this connection we considered the case of *Wiseman* v. *Borneman* 45 TC 540 and took into account that the appellants had had the opportunity of seeking a prerogative order to set aside the Tribunal's F decision but had not availed themselves of it. If, however, it had fallen to us to decide the points we should have held that subss (6) and (7) should be read literally, that the Board had stated in the notice that they had reason to believe that the section might apply, that no evidence had been adduced before us to cast doubt on the bona fides of that statement, and that it was not contrary to natural justice for the Board to proceed as it had.

G (4) We come now to the first substantive question before us, namely, whether s 460(1) applies to the appellants in respect of transactions described in notices under s 460(3) issued by the Board to each of the appellants on 4 March 1975. The Appellants do not claim the benefit of what we may call the "escape clause" in subs (1). In order to do so they would have had to show that the transactions were carried out either for bona fide commercial reasons or in H the ordinary course of making or managing investments and that none of the transactions had as its main object or one of its main objects to enable tax advantages to be obtained. Any such contention would be manifestly unsustainable.

(5) In approaching the question whether subs (1) applies, we think that we should be guided by the expression of opinion by Lord Reid in *Greenberg* v. I *Commissioners of Inland Revenue* 47 TC 240 at page 272—an opinion which was endorsed by Lord Wilberforce in *Commissioners of Inland Revenue* v.

Joiner(1) [1975] 1 WLR 1701 at page 1706. Thus we proceed on the assumption that in 1960 Parliament in framing the legislation that is now contained in Chapter I to deal with a wide range of ingenious tax avoidance schemes deliberately used words of wide general meaning with the intention that they should be given a wide interpretation but that, nevertheless, s 460 will only apply where the phraseology of the section (albeit interpreted widely) fits the facts of particular cases.

(6) In each of the notices under s 460(3) the Board specify alternative tax advantages, each with a corresponding adjustment requisite to counteract it. The first of the alternative adjustments is to deal with the case that the issue to the appellants of shares in Gristrim Investment Co. Ltd., ("Gristrim") in exchange for their shares in Kithurst Park Estate Ltd. ("Kithurst") conferred a tax advantage within the meaning of s 466. It is contended on behalf of the Board that the appropriate counteraction is an assessment on each of the appellants to income tax under Case VI of Schedule D (with a corresponding recomputation of his surtax) in respect of an amount equivalent to what we may call his "share" of the amount of the credit balance on profit and loss account in Kithurst's balance sheet as at 15 February 1970. In relation to this we consider therefore whether—(1) in such circumstances as are mentioned in s 461 and (2) in consequence of the combined effect of transactions in securities each appellant is in a position to obtain, or has obtained, a tax advantage. It is common ground that the circumstances mentioned in paras A and B of s 461 do not exist. It is also common ground that the circumstances mentioned in para C of that section exist if each appellant received the shares in Gristrim (which he took in exchange for his shares in Kithurst) "in consequence of a transaction whereby" Gristrim received the abnormal amount by way of dividend which it admittedly did receive from Kithurst.

(7) There is no dispute about the primary facts relevant to these appeals. On the basis of these and of the evidence adduced before us we conclude that the appellants participated in what was accurately described in Mr. Faber's letter of 20 February 1970 to Mr. G. F. Haydon as an

> "overall scheme . . . basically divided into three stages: (i) the transactions designed to enable Kithurst to dispose of Hormare Farm without any liability to betterment levy and without any material liability to taxation. (ii) The transactions involving the extraction of the tax free monies from Kithurst by way of a tax free dividend to an interposed holding company controlled by the shareholders. (iii) The final transaction designed to enable the shareholders personally to obtain the benefit of the tax free monies in the form of interest free loans made to them by a company which they ultimately control, so that no liability arises under the provisions of section 75 of the Finance Act 1965."

We are of the opinion that the receipt by Gristrim of the said dividend was so bound up with the share exchange that, giving words their ordinary meaning (even without praying in aid the wide interpretation postulated, as mentioned in para 5 above, by Lord Reid in *Greenberg's* case(2)), it is apposite to say that the share exchange was a transaction *whereby* Gristrim received the said dividend and that the appellants received their shares in Gristrim in *consequence of* that transaction. We therefore hold that the circumstances described in para C of s 461 exist.

(8) In case we are wrong in that conclusion, we also consider the application of para D of s 461. It is common ground that the appellants received such a

(1) 50 TC 449, at p 480. (2) 47 TC 240.

consideration as is mentioned in the said para C (namely, shares in Gristrim) which represented the value of assets available for distribution by way of dividend by Kithurst and that the payment of a dividend by Kithurst was a distribution of profits of a company to which para D applied. The only question therefore is whether the shares in Gristrim were received in connection with the payment of the said dividend. Having regard to the tripartite scheme of tax avoidance to which we have referred in para 7 above, we are of the view, and we so hold, that in the ordinary sense of the word (again without praying in aid any extended construction) there was a *connection* between the appellants' receipt of shares in Gristrim and the distribution of Kithurst's profits; and it does not in our view affect the matter that the receipt of shares preceded the distribution. We hold therefore that the circumstances described in para D of s 461 exist.

(9) We go on therefore to consider whether in the circumstances that we have held to exist (either those in para C or those in para D) and in consequence of the combined effect of transactions in securities, the appellants are in a position to obtain, or have obtained, a tax advantage as defined in s 466. (It is not disputed that if a tax advantage was obtained it was in consequence of the combined effect of transactions in securities.) We find this an exceedingly difficult question.

(10) (*a*) It is common ground that the only type of tax advantage relevant to our consideration is the avoidance of an assessment or possible assessment to tax. There is some difficulty in determining the part intended to be played by the concluding words of s 466, which, so far as relevant are "whether the avoidance . . . is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits". These words seem to us to be explanatory, not restrictive, of the general words that precede them. But whichever view of these words be the correct view the conclusion which we reach hereafter on the question of tax advantage would be the same.

(*b*) It is argued on behalf of the appellants that the receipt of the shares in Gristrim did not represent receipts accruing at all and that it is therefore immaterial that the recipients did not bear tax on them. This contention is based primarily on the speech in *Commissioners of Inland Revenue* v. *Parker* 43 TC 396 of Lord Wilberforce at page 442 (B to D). Counsel for the appellants draws an analogy between the receipt in *Parker's* case of the debentures in 1953 and the allotment to the appellants in these proceedings of shares in Gristrim. In *Parker's* case, Lord Dilhorne (at page 432) and Lord Wilberforce (at page 442) were of the opinion that no tax advantage could have arisen from the receipt of the debentures in 1953 because s 466 required there to be a contrast between a receipt of something in a taxable way and the receipt of something in a non-taxable way and that as a company could not have issued debentures in any taxable way the necessary contrast could not be established. But Counsel for the Board points out that although Lord Guest in *Parker's* case reached the same ultimate conclusion as Lord Dilhorne and Lord Wilberforce he did so by a different route. Lord Guest's speech poses a number of difficulties but, as we understand it, he was of the opinion that tax advantages arose both when the debentures were issued and also when they were redeemed. Lord Hodson, with whom Lord Morton agreed, was of the opinion that the tax advantage arose in 1953. Thus a majority of their Lordships in *Parker's* case held that a tax advantage arose at the time when the debentures were issued. It is therefore open to us to conclude that even if there is an analogy to be drawn such as Counsel suggests the shares in Gristrim were receipts accruing and we so hold.

(*c*) Having considered the decision of the House of Lords in *Parker's* case(1) in the light of its subsequent decisions in *Commissioners of Inland Revenue* v. *Cleary* 44 TC 399 and in *Greenberg's* case(2) we are of the view that in considering the obtaining of a tax advantage within the meaning of s 466 the test to be applied is whether a person who might have received something in a taxable way receives it, or something else that represents it, in a non-taxable way.

(11) (*a*) It was an essential part of the scheme that the profits in Kithurst should be transferred out of that company as soon as possible without the appellants losing control of them because Kithurst might be liable to corporation tax on the full amount of those profits and the appellants could find themselves liable to income tax under Schedule F and to surtax on the undistributed profit as a result of the application of the shortfall provisions. In addition, the appellants were apprehensive, justifiably as it turned out, as to the possibility of the introduction of legislation which would withdraw the advantages expected to accrue to Kithurst under the scheme by use of the legislation deferring liability to tax on premiums payable by instalments. For Kithurst to have taken the normal course of declaring a dividend in favour of the appellants would obviously have defeated the whole purpose of the scheme. The allotment of the Gristrim shares to the appellants and the subsequent declaration of the dividend were intended to ensure that the Kithurst profits remained under the control of the appellants freed from any calls upon Kithurst or upon the appellants for income tax or surtax except for the very small amount of tax for which Kithurst was unavoidably liable in respect of the instalments of premium. The appellants considered themselves to be safe from attack once Gristrim had the profits, on the ground that the creation by that company of the share premium account, pursuant to s 56, Companies Act 1948, prevented the distribution by way of dividend of the amount credited to that account. The allotment of the Gristrim shares and the declaration of the dividend therefore caused receipts to accrue to the appellants in a tax-free form and possible assessments to tax to be avoided. The non-taxable receipts clearly represented the profits of Kithurst which would have been taxable in the hands of the appellants had they received them by way of dividend. The necessary contrast to which Lord Wilberforce referred in *Parker* (43 TC 396, at page 441) is, therefore, satisfied and tax advantages were obtained by the appellants.

(*b*) In case we have over simplified the contrast that has to be made and that it can only be made as Counsel for the Appellants contends, were it possible for the Gristrim shares to have reached the appellants in a taxable form, we hold that in the circumstances that possibility existed. The appellants could, by a modification of the scheme, have taken their controlling interest in Gristrim by first causing Kithurst to take an allotment of shares in Gristrim and then, after causing Kithurst to transfer its profits to Gristrim, procuring the distribution by Kithurst to them by way of dividend of the Gristrim shares. Or Kithurst could have purchased the Gristrim shares and then distributed them by way of dividend. In either case such transfer would have given rise to liabilities to tax which were avoided by the steps in fact taken.

(12) This is sufficient for us to dispose of the appeal. If we are right about the first alternative postulated in the notice under s 460(3), the second alternative which involves a smaller tax advantage disappears automatically. Accordingly we uphold the notices on the basis of the first alternative.

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(1) 43 TC 396. (2) 47 TC 240.

(13) It was contended by Counsel for the appellants that the surtax assessments for 1969–70 were, in any case, excessive because of Kithurst's possible liability to the betterment levy, which was still undetermined. It was said that if the levy was exigible the whole amount standing to the credit of Kithurst's profit and loss acount was not available for distribution as dividend. This is a difficult question but we think that the contention is not well founded. Kithurst had been advised by leading Counsel that no liability to levy arose. On the basis of this advice it proceeded to declare its dividend. It appears to us that the dividend having been declared and paid in such circumstances no part of the dividend would be repayable if the advice should turn out to have been mistaken.

(14) Despite persuasive arguments to the contrary advanced by Counsel for the appellants, we think that subs (4) of s 462, read in its context, enables us not only to "vary or quash" assessments made in accordance with notices under s 460(3) but also to uphold them. Accordingly we uphold the surtax assessments made on the appellants for the year 1969–70 and we quash the surtax assessments for the year 1970–71. Although the Case VI assessments referred to in the notices were not formally put before us the fact remains that they were "made in accordance with [a notice under section 460(3)]" and we think therefore that we are empowered by s 462(4)—if not indeed required—to deal with them. Accordingly we uphold the Case VI assessments for 1969–70 and quash the Case VI assessments for 1970–71.

12. The representative of Mr. Aubrey Williams immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and the representative of the Board immediately thereafter similarly expressed himself to safeguard the position should we be found to have erred in our decision in upholding the adjustments and assessments for the year 1969–70 rather than those for the year 1970–71. In due course the representatives of Mr. Aubrey Williams and the Board each required us to state a Case for the opinion of the High Court pursuant to s 56, Taxes Management Act 1970, which Case we have stated and do sign accordingly.

13. The question of law for the opinion of the Court is whether our decision was correct.

J. G. Lewis
A. K. Tavaré } Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House,
94–99 High Holborn,
London, WC1V 6LQ

23 August 1977

P. A. N. Wilson v. *Commissioners of Inland Revenue; J. L. Bowron* v. *Commissioners of Inland Revenue; M. C. Williams* v. *Commissioners of Inland Revenue.* The Cases stated in these appeals were in all material respects identical to the above Case.

The cases were heard in the Chancery Division by Browne-Wilkinson J. on 30 November and 1 December 1977 when judgement was reserved. On 21 December 1977 judgement was given in favour of the Crown, with costs.

C. N. Beattie Q.C. and *G. R. Bretten* for the taxpayers.

J. E. Vinelott Q.C. and *Brian Davenport* for the Crown.

The following cases were cited in argument in addition to that referred to in the judgement:—*Commissioners of Inland Revenue* v. *Parker* 43 TC 396; [1966] AC 141; *Commissioners of Inland Revenue* v. *Cleary* 44 TC 399; [1968] AC 766; *Commissioners of Inland Revenue* v. *Horrocks* 44 TC 645; [1968] 1 WLR 1809; *Greenberg* v. *Commissioners of Inland Revenue* 47 TC 240; [1972] AC 109; *Commissioners of Inland Revenue* v. *Joiner* 50 TC 449; [1975] 1 WLR 1701.

Browne-Wilkinson J.—These are four appeals by way of Case Stated by Aubrey Dan Williams, Michael Charles Williams, Mr. Wilson and Mr. Bowron against the dismissal by the Special Commissioners of appeals by them against notices under s 460 of the Income and Corporation Taxes Act 1970 (which I shall call "the Taxes Act") and consequential assessments to income tax and surtax. By the notice served on Mr. Aubrey Williams he was also assessed to tax on the amount of the tax advantage alleged to have been obtained by his wife, and for convenience I will refer to the four Appellants and Mrs. Aubrey Williams together as "the taxpayers". The assessments in question on these appeals relate to the year 1969–70. In addition, there are before me four cross-appeals by the Crown against the decision of the Special Commissioners against the Crown on an alternative claim against the taxpayers relating to the tax year 1970–71.

The five taxpayers were equal shareholders in a company, Kithurst Park Estates Ltd. (which I shall call "Kithurst") and A. D. Williams Developments Ltd. (which I shall call "Developments"). The Williams family (but not Mr. Wilson and Mr. Bowron, who are solicitors) were interested in various other property development companies. Kithurst was the owner of a property, Hormare Farm, Storrington, Sussex, which it had bought at a low price. Kithurst obtained planning permission to develop 31 acres of the farm. The Williams family then desired to sell Hormare Farm and to use the proceeds of sale to finance projects of their other development companies. However, it was thought that, after payment of betterment levy, corporation tax, shortfall income tax and surtax apportionments, there would be insufficient left to meet their requirements. Indeed, Mr. Beattie, who appeared for the taxpayers, estimated that the effect of the combined taxes would be to produce a tax liability of between 98 and 99 per cent. on any profit. The Crown, while accepting that the burden would be heavy, thought that the maximum figure would be 91¼ per cent. Not surprisingly with these rates of tax, the taxpayers took steps to see if the tax burden could not be mitigated. They were introduced to two accountants, Mr. Bradman and Mr. Faber, who were experts in tax avoidance schemes, who for a substantial fee offered to make available an "off-the-peg" scheme which, in a letter dated 20 February 1970, Mr. Faber described (as the Commissioners found, accurately) as an

> "overall scheme . . . basically divided into three stages: (i) The transactions designed to enable Kithurst to dispose of Hormare Farm without

A any liability to betterment levy without any material liability to taxation. (ii) The transactions involving the extraction of the tax free monies from Kithurst by way of a tax free dividend to an interposed holding company controlled by the same shareholders. (iii) The final transaction designed to enable the shareholders personally to obtain the benefit of the tax free monies in the form of interest free loans made to them by a company which
B they ultimately control, so that no liability arises under the provisions of Section 75 of the Finance Act 1965."

In the cases in which I have just given judgement(1) Mr. Faber and Mr. Bradman were also the devisers of the scheme in question, and in fact stages (i) and (ii) referred to in Mr. Faber's letter were for all practical purposes identical with those I described as "the property transactions" and "the share trans-
C actions" in my earlier judgement. It is therefore unnecessary for me to repeat the details of the scheme in this case. Suffice it to say that at the end of stage (i), which was carried out between 30 January and 6 February 1970, Kithurst's freehold interest in the farm had become vested in Developments and Kithurst was left with a distributable profit of £422,255, which, it was hoped, was free from any liability for betterment levy. In stage (ii) the taxpayers exchanged
D their shares in Kithurst for shares in Gristrim Investment Co. Ltd. (which I shall call "Gristrim"), each taxpayer holding 20 shares in Gristrim. Gristrim having issued its shares at a premium, created a share premium account. Kithurst and Gristrim having made an election under s 256 of the Taxes Act, on 13 April 1970, Kithurst paid a dividend of £422,000 to Gristrim.

The Special Commissioners (who in this case had the benefit of a much
E fuller investigation of the facts than in the *Anysz* case) state this:

> "Kithurst, however, might prove to be vulnerable inasmuch as it could be subjected to substantial tax liabilitites (i) under the shortfall and surtax provisions in Chapter III of Part XI of the Income and Corporation Taxes Act 1970 if contrary to its expectation the said profit was immediately liable to corporation tax and if it failed to make the necessary
> F distribution of its profit within 18 months after the end of the accounting period in which it arose, or (ii) if legislation should be introduced with retrospective effect withdrawing the benefits expected to accrue to it under s 80(6) (such legislation was in fact introduced with effect from 11 April 1972 by the Finance Act 1972, s 81(1), (6) and Sch 13). To attempt to avoid such liabilities it would be necessary to implement stage (ii) of the
> G overall scheme. Another purpose of implementing stage (ii) was to enable the shareholders of Kithurst, which had a corporation tax liability over 250 years, to dispose of the shares, the value of which would then be reduced to a nominal amount, to one of Mr. Faber's companies for a nominal sum (in the event the shares were not disposed of and Kithurst went into liquidation)."

H Thus, for all practical and fiscal purposes there is no material distinction between this case and the *Anysz* case up to the end of stage (ii). However, stage (iii) did not feature in the *Anysz* case and I must look at it in a little more detail.

On 29 January 1971 the development land was sold for some £400,000. The parties then entered into the loan transaction, the end purpose of which
I was to leave the taxpayers holding moneys representing the profit on the sale on

(1) *Anysz* v. *Commissioners of Inland Revenue; Manolescue* v. *Commissioners of Inland Revenue* 53 TC 601.

indefinite loan, free of tax. The steps taken to achieve this purpose were as follows: (1) Mr. Faber arranged for the taxpayers to purchase Exchequer Stock at a cost of £421,000 through stockbrokers, Sandelsons. The taxpayers directed Sandelsons to purchase the stock on the terms that if Sandelsons made a loan to Dolerin Investment Co. Ltd. (which I shall call "Dolerin") the stock should stand as security for such loan. (2) On 16 February 1971 Sandelsons agreed to lend Dolerin £410,475 for seven days. (3) On 17 February Retsor (another Faber company) acquired the shares in Dolerin and agreed to lend Dolerin £10,525. (4) On the same day, 17 February, Dolerin agreed to lend each of the taxpayers £84,200 on the terms (*a*) that the taxpayers should deposit Government stock to a value of £421,000, (*b*) that interest for the first seven days should be eleven per cent. and thereafter no interest should be paid and (*c*) that, although the loan was to be repayable on demand, no demand should be made except if repayment was demanded from all the taxpayers. (5) Sandelsons purchased the stock. (6) Cheques drawn by Retsor for the acquisition of the Dolerin shares and the loan of £10,525, by the taxpayers for the purchase of the stock (totalling £421,000), by Dolerin for the loan to the taxpayers (totalling £421,000) and by Sandelsons for the loan of £410,475 to Dolerin were all cleared simultaneously at the same branch of the same bank. It was effectively a circular cheque transaction. (7) On 24 February 1971 Retsor subscribed for a further 998 shares in Dolerin at a price of £420,998, which was paid on that day. (8) On the same day, 24 February, Dolerin repaid the loans to Sandelsons and Retsor. (9) On the same day Retsor sold all the shares in Dolerin to Gristrim for £421,250. (10) On the same say Sandelsons sold the stock and paid the net proceeds (£421,083·69) to the taxpayers. (11) Each taxpayer loaned the whole of the proceeds of the sale of the stock to Developments. (12) Mr. Bradman and Mr. Faber resigned as directors of Dolerin and the taxpayers were appointed directors in their place. All the cheques necessary to carry through stages (7) to (12) above were again cleared simultaneously at the same bank.

The hoped for result from stage (iii) was that a company (Dolerin) had made loans to the taxpayers, who were not at that date either its directors or shareholders (thereby avoiding s 75 of the Finance Act 1965) on terms which precluded the loans from becoming repayable unless repayment of all the taxpayers' loans was demanded by Dolerin, and the taxpayers had become the sole directors of Dolerin. Accordingly they had, for most practical purposes, interest-free use of the money for an indefinite period.

Before leaving the facts I should mention one point. The letter of 20 February 1970 from Mr. Faber raises a strong suspicion that the transactions (at least in stages (i) and (ii)) may have been mere paper shams, the relevant minutes of Kithurst and Developments having been prepared after the event by Mr. Faber's solicitors. Because this information came to the knowledge of the Crown only during the hearing before the Commissioners, they did not investigate the matter further, the Crown's case by that stage being based on the premise that the transactions were real, not shams. Accordingly, the Case Stated finds that all the transactions took place as recorded. Although I understand how this has come about, I express regret that the Court is required to treat as genuine certain transactions which may well not have been genuine.

On 24 October 1973 the Board issued notifications under s 460(6) of the Taxes Act: each of the taxpayers (other than Mrs. Williams) made statutory declarations under s 460(6), but the tribunal determined that there was a *prima facie* case. Accordingly, on 4 March 1975 the Board served notices under

s 460(3). Apart from differences consequent upon Mr. Aubrey Williams being assessable on his wife's tax advantage, the notices were in similar form. The transactions in question were identified as follows:

> "1. The acquisition by you and your wife on or about 16 March 1970 of 2 ordinary shares of £1 of (Gristrim) for cash at par. 2. The transfer by you and your wife to Gristrim on or about 20 March 1970 of 410 ordinary shares of (Kithurst) in consideration for the issue of 38 ordinary shares of Gristrim at a premium of £169,272. 3. The declaration by Kithurst of a dividend of £422,000 for the year ended 15 February 1971 and the payment of that dividend to Gristrim. 4. The subscription by (Retsor) in February 1971, for shares in (Dolerin) (a company incorporated on 5 February 1971) for cash at a premium. 5. The payment to you and your wife on or about 17 February 1971 of £168,400. 6. The acquisition by Gristim on or about 22 February 1971 of the whole of the issued share capital of Dolerin for a cash consideration of £421,250."

The consequential tax adjustments were stated as follows (and I read from the notice given to Mr. Aubrey Williams):

> "1. . . . (a) an assessment to income tax under Case VI of Schedule D for the year 1969–70 in the sum of £168,902 tax on which at the standard rate amounts to"—and I read it corrected—"£69,672·07 being the income tax which would have been payable by Kithurst under Section 232(2) Income and Corporation Taxes Act 1970 on a distribution to you and to your wife of £168,902 (84,451 each) or, in the alternative (b) an assessment to income tax under Case VI of Schedule D for the year 1970–71 in the sum of £168,400 tax on which at the standard rate amounts to £69,465 being the income tax which would have been payable by Kithurst under Section 232(2) Income and Corporation Taxes Act 1970 on a distribution to you and to your wife of £168,400 (£84,200 each). 2. The computation or recomputation of your liability to surtax on the basis that the said sum of £168,902 forms part of your total income for the year 1969–70, or in the alternative that the said sum of £168,400 forms part of your total income for the year 1970–71, and any assessments which may be required to give effect to such computations or recomputations."

It will therefore be seen that there are alternative bases of charge, one relating to the year 1969–70 based on stages (i) and (ii), and the alternative basis, relating to stage (iii) and arising from the Dolerin loans, relating to the year 1970–71. The Special Commissioners, in an exceptionally careful and helpful analysis, upheld the notice and the consequential assessments for the year 1969–70, and since, *ex concessis,* the assessment for the year 1970–71 was in the alternative, made no decision on that point.

The Crown's claim in relation to the year 1969–70 is based on the contention that by the end of stage (ii) the taxpayers had obtained a tax advantage by receiving the shares in Gritrim in circumstances falling within s 461, either circumstance C or circumstance D. The argument on this point followed exactly the same course as in the *Anysz* case[1] and it was common ground that the two cases are indistinguishable. In the circumstances, my decision in the *Anysz* case necessarily covers the present case, and I decide that the Crown's argument is correct and that the notices were valid for the same reasons as I have just given in the *Anysz* case; that is to say, the claim in relation to the year 1969–70.

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(1) 53 TC 601.

The cross-appeal by the Crown was based on the contention that the receipt of the loans by the taxpayers was a tax advantage obtained in the year 1970–71. Although the point was fully argued before me, I do not think it is desirable for me to express any view on the point. If, as I have held, a tax advantage was obtained at the end of stage (ii), no further tax advantage could have been obtained at stage (iii). And as the point may be of very great importance in other cases it is undesirable for me to express any view on a point which it is not necessary for me to decide.

Certain subsidiary points arose on the appeals. As in the *Anysz* case(1), Mr. Beattie reserved for a higher Court a contention that the preliminary notice was invalid. He also submitted that the Special Commissioners had no jurisdiction to affirm the assessments. I reject this submission for the reasons I have given in the *Anysz* case.

Finally, a new contention was raised as to the quantum of the assessment. In the course of stage (i) a transaction took place which exposed Kithurst to the risk that betterment levy would be payable, and a claim to the levy has been made by the Crown. Mr. Beattie argues that if the claim to the levy is substantiated, the amount available to Kithurst for distribution by way of dividend would *pro tanto* be reduced, and therefore the tax advantage obtained should be reduced by a like amount. Mr. Beattie contends that the Crown cannot be heard to say at one and the same time both that the levy is payable and that the gross sum without deduction of the amount of the levy was available for distribution. I do not accept this submission. At the date on which Kithurst paid its dividend, it was known that there was a risk that the levy would be payable: yet the directors, in reliance on their legal advice, felt able to pay the dividend. In my judgment, the relevant tax advantage does not fall to be assessed by comparing what was in fact done with what, as one now knows from hindsight, ought to have been done. One must compare what was *then* done with alternative methods which could *then* have been adopted to achieve the same result. If the directors felt able to rely on their legal advice that no levy was payable in order to pay the dividend to Gristrim, they would have felt no more hesitation in using Kithurst's money to subscribe for shares in Gristrim, thereby giving rise to a tax advantage in the whole amount. In my judgment, the Special Commissioners were right on this point also. I therefore dismiss the appeals.

Taxpayers' appeals dismissed, with costs. No order on cross-appeals.

The taxpayers' appeals and the Crown's cross-appeals came before the Court of Appeal (Bridge, Cumming-Bruce and Orr L.JJ.) on 19, 20, 21, 22, 23, and 26 February 1979, when judgment was given, unanimously allowing both the taxpayers' appeals and the Crown's cross-appeals, with costs awarded to the Crown.

C. N. Beattie Q.C. and *G. R. Bretten* for the taxpayers.

D. K. Rattee Q.C. and *Brian Davenport* for the Crown.

The following cases were cited in argument in addition to those referred to in Bridge L.J.'s judgment:—*Commissioners of Inland Revenue* v. *Brown* 47 TC 217; [1971] 1 WLR 1495; *Anysz* v. *Commissioners of Inland Revenue* 53 TC 601; In re *Weir's Settlement Trust* [1971] Ch 145; *Attorney-General* v. *Aramayo* 9 TC 445; [1925] 1 KB 86; *Farrell* v. *Alexander* [1977] AC 59.

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(1) 53 TC 601

Bridge L.J.—During 1960 Kithurst Park Estates Ltd. ("Kithurst") acquired Hormare Farm, Storrington, Sussex. At the time of the transactions with which we are concerned in these proceedings the shareholders in Kithurst were the four Appellants before the Court, ("the taxpayers"), and Mrs. Williams, the wife of the taxpayer Mr. Aubrey Dan Williams. Each of those persons held one fifth of the total share capital of Kithurst. Some time before 1969 Kithurst obtained planning permission for the residential development of 31 acres of Hormare Farm. The company lacked the necessary finance to carry out that development themselves as they would have liked to do, but the mere fact that the permission had been obtained at once enormously enhanced the value of the land and held out the prospect of a profit, if the land should be sold, of the order of £500,000. Unfortunately for the shareholders, if that profit had been realised by a straightforward resale of the land by Kithurst, over 90 per cent. of the profit would have been swallowed up by taxation; first there would have been liability to betterment levy, then what remained would have been liable, first, to corporation tax and, failing timely distribution of dividends to the shareholders, there would have been a liability to a short-fall income tax assessment on the company and consequential surtax apportionments on the shareholders. In these circumstance it is not altogether surprising to discover that the taxpayers decided to embark on an elaborate and highly ingenious tax avoidance scheme. They called in the services of two experts in the field, chartered accountants, Mr. Faber and Mr. Bradman. Mr. Faber and Mr. Bradman had operated similar tax avoidance schemes for other clients. They throughout had been advised by eminent counsel practising at the tax bar. After the tax avoidance scheme had been carried through, the Revenue, having first complied with certain necessary preliminary statutory formalities, details of which do not matter, on 1 March 1975 served on the taxpayers notices under s 460(3) of the Income and Corporation Taxes Act 1970 claiming that the taxpayers had obtained tax advantages by transactions to which s 460 applied and making assessments on the taxpayers to counteract those advantages. The notices of assessment served by the Revenue were based on two alternative contentions. In the first instance the contention was that the tax advantages had been obtained by transactions which constituted an intermediate stage of the whole avoidance scheme and the assessments to counteract those tax advantages were for the fiscal year 1969–70. The alternative contention for the Crown was that the transactions whereby the tax advantages had been obtained were those which constituted the final stage of the whole avoidance scheme and the assessments to counteract those tax advantages were assessments for the fiscal year 1970–71.

The taxpayers appealed against both the notices and assessments to the Special Commissioners. The Special Commissioners upheld the notices and assessments on the basis of the Crown's first alternative contention and found it unnecessary to make any decision on the Crown's second alternative contention. The taxpayers appealed against the Special Commissioners' decision to the High Court. The Crown cross-appealed on the basis that if the taxpayers were entitled to succeed on the appeal then the Crown would be entitled to succeed on their second alternative contention. Browne-Wilkinson J. upheld the decision of the Special Commissioners on the basis that the Crown's first alternative contention was well-founded and he, like the Special Commissioners, found it unnecessary to reach any conclusion on the alternative contention on which the Crown cross-appealed. The matter now comes before this Court by way of appeal and cross-appeal on the basis of similar contentions to those which were advanced before Browne-Wilkinson J.

The full particulars of the tax avoidance scheme as a whole are set out, if I may say so, with admirable clarity in the Case Stated. They are lengthy and extremely complex. Fortunately, it will not, I think, be necessary for the purposes of this judgment to examine them in any very great detail. The overall nature and general purpose of the scheme was described with complete accuracy and with admirable candour in a letter which was written by Mr. Faber to Mr. Haydon, who was Kithurst's accountant, on 20 February 1970. He wrote:

> "You will see that the overall scheme is basically divided into three stages: (i) The transactions designed to enable Kithurst to dispose of Hormare Farm without any liability to betterment levy and without any material liability to taxation. (ii) The transactions involving the extraction of the tax free monies from Kithurst by way of a tax free dividend to an interposed holding company controlled by the same shareholders. (iii) The final transaction designed to enable the shareholders personally to obtain the benefit of the tax free monies in the form of interest free loans made to them by a company which they ultimately control, so that no liability arises under the provisions of section 75 of the Finance Act 1965."

The appeal is essentially concerned with the transactions which constituted what Mr. Faber there described as stage two of the scheme. The cross-appeal is concerned with the transaction which constituted stage three of the scheme.

Stage one of the scheme constituted the transactions which were designed to avoid liability to betterment levy and corporation tax on the part of Kithurst. It is quite unnecessary for the purposes of the present judgment to go into the complex details of stage one at any length. It is sufficient to say that the machinery of stage one consisted essentially in the grant of a lease and a reversionary lease to two companies which were controlled by Mr. Faber and Mr. Bradman and whose role in the scheme was purely a technical one; those leases were eventually surrendered or acquired by the freeholders so that the leasehold interests merged with the freehold. The freehold, in the course of stage one of the scheme was transferred from Kithurst to A. D. Williams Developments Ltd. ("Developments"), another company in which the share capital was held equally between the taxpayers and Mrs. Williams. Developments, in the circumstances of the transactions carried out, acquired Hormare Farm at the full value which it had attained by virtue of the planning permission, so that they in turn had no tax liability. It was by Developments that eventually the land was subsequently sold so that the profits could be realised to enable Developments to finance their part of the transaction. Kithurst, in February 1970, made a loan to Developments in the sum of £522,102 and it was the debt owing to Kithurst from Developments which, at the end of this stage of the avoidance scheme, constituted the main, if not indeed the sole, asset of Kithurst. This stage of the scheme was completed by Kithurst ceasing to trade on 15 February 1970 and when the books of the company were made up to that date they showed a credit balance on profit and loss account of £422,255. That, of course, was the profit which this case is all about. It is quite unnecessary, because it is not in issue before us, to pause to consider whether and to what extent the first stage of the scheme was a success in its tax avoidance objective. The question is now, in any event, an academic one because in the events which happened subsequently Kithurst has successfully divested itself of assets which it might otherwise have had to meet any tax liability. Accordingly I shall pass on to a consideration of the stage of the scheme which is critical for the purpose of the taxpayer's appeal.

We come now to stage two which I shall refer to generally as embracing "the Gristrim transactions". Stage two begins with the formation, under the

A instructions of Mr. Faber, of a company called Gristrim Investment Co. Ltd. (Gristrim), a company with an issued share capital of £100 divided into 100 £1 shares. The role of Gristrim in this stage of the transaction was to become, in the language of Mr. Faber's letter of February 1970, the interposed holding company which would succeed in extracting the tax free moneys from Kithurst. I can describe the circumstances by which this stage of the scheme was carried B into effect, with suitable modification of the language used, by reciting a significant passage from the facts found in the Case Stated. Shortly before 20 March 1970 the taxpayers and Mrs. Williams each acquired one share in Gristrim, these five shares being at that time Gristrim's entire issued capital. On 20 March 1970 Mr. and Mrs. Aubrey Williams, on behalf of themselves and the other shareholders in Kithurst, entered into an agreement with Gristrim to C exchange all their shares in Kithurst for ordinary shares in Gristrim to be issued to them. In pursuance of this agreement and on the same day the taxpayers and Mrs. Williams transferred their shares in Kithurst to Gristrim and Gristrim issued its shares to them, making the total shareholding of each of them in Gristrim 20 shares. The minutes of the meeting of the directors of Gristrim recorded as having been held on 20 March 1970 stated that the directors had D valued the whole of the issued capital of Kithurst at £423,280 and that it was resolved that this be accepted as the fair market value. It was further resolved that the sum of £423,180 (being the excess of the value of the shares in Kithurst over the nominal amount of shares to be issued by Gristrim) should be credited in Gristrim's books to a share premium account and that each of the 95 ordinary shares to be issued to the former shareholders in Kithurst be issued as fully paid E shares at a premium of £4,455 11*s.* 7*d.* per share. On 24 March 1970 Gristrim and Kithurst wrote to the Inspector of Taxes making a joint election, under s 48(3) and (7) of the Finance Act 1965, for the dividends and interest between them to be excluded from s 47(3) of that Act, so that the dividends and interest might be paid between them gross without deduction of income tax. The Inspector, by letter of 19 April 1970, accepted this election as valid. On 13 April F 1970 Developments repaid to Kithurst part of the loan made on 6 February 1970, that was the loan of £522,000 odd, referred to earlier. Kithurst paid a dividend of £422,000, drawing a cheque from its bank account for that amount in favour of Gristrim. Income tax was not deducted from the dividend because s 256 applied. Gristrim lent to Developments a sum equal or approximately equal to the amount of the dividend which it had received from Kithurst. At the G end of stage two of the transaction Gristrim is the holding company. The debt formerly owed by Developments to Kithurst has substantially become now a debt owed by Developments to Gristrim. It is still a debt due from Developments which represents the profit on the sale of Hormare Farm. Kithurst has distributed a dividend to Gristrim in such a way as not, so it is thought, at this stage to incur any liability to tax. The object of the establish- H ment of its share premium account is to escape liability to short-fall income tax assessment and consequential surtax apportionments. Whether that was successful or not is not a matter directly in issue before us. That in essence is all the factual material which is necessary to the determination of the appeal.

I now turn to the relevant statutory provisions. Section 460 of the Act of 1970 provides in subs (1) so far as material:

I "Where—(*a*) in any such circumstances as are mentioned in section 461 below, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide

commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions."

I pause there to observe that in the circumstances of this case it has not been contended, and obviously could not be contended, that the transactions here in question were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments or with any other object than that of obtaining tax advantages. Subsection (3) provides that:

"Where this section applies to a person in respect of any transaction or transactions, the tax advantage obtained or obtainable by him in consequence thereof shall be counteracted by such of the following adjustments, that is to say an assessment, the nullifying of a right to repayment or the requiring of the return of a repayment already made (the amount to be returned being chargeable under Case VI of Schedule D and recoverable accordingly), or the computation or recomputation of profits or gains, or liability to tax, on such basis as the Board may specify by notice in writing served on him as being requisite for counteracting the tax advantage so obtained or obtainable."

Section 461 (reading the relevant parts):

"The circumstances mentioned in section 460(1) above are—. . .C.—(1) That the person in question receives, in consequence of a transaction whereby any other person—(*a*) subsequently receives, or has received, an abnormal amount by way of dividend; . . . a consideration which . . . (i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend . . . and the said person so receives the consideration that he does not pay or bear tax on it as income. . . . D.—(1) That in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in paragraph C(1) above such a consideration as is therein mentioned."

Then D(2) defines the companies to which para D applies. It is common ground that the paragraph applies to both Kithurst and Gristrim. Section 466(1) provides:

"In this Chapter 'tax advantage' means a relief or increased relief from, or repayment or increased repayment of, tax, or the avoidance or reduction of an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains."

The relevant part of the notice served by the Revenue under s 460(3) on the taxpayer, Mr. Aubrey Dan Williams, relating to the Gristrim transactions specified those transactions in the following way. First:

"1. The acquisition by you and your wife on or about 16 March 1970 of 2 ordinary shares of £1 of (Gristrim) for cash at par. 2. The transfer by you and your wife to Gristrim on or about 20 March 1970 of 410 ordinary shares of (Kithurst) in consideration for the issue of 38 ordinary shares of Gristrim at a premium of £169,272. 3. The declaration by Kithurst of a dividend of £422,000 for the year ended 15 February 1971 and the payment of that dividend to Gristrim."

A Similar notices were served on each of the other taxpayers, except that in their case the sums mentioned were in each case half the amount of the sums mentioned in the notice to Mr. Aubrey Dan Williams who was answerable not only for his own, but for his wife's, tax liabilities.

So far as the appeal is concerned it is, and always has been, common ground between the parties that the Gristrim transactions were transactions in B securities within the meaning of s 460(1). The principal issue on the appeal which arose before the Special Commissioners and Browne-Wilkinson J. was whether the transactions were carried out in circumstances falling within s 461C or D and whether in fact a tax advantage was obtained. The Special Commissioners held that transactions were carried out in circumstances which fell within both paras C and D of s 461. The learned Judge doubted, although C he did not finally decide, whether the circumstances were such as to fall within para C of s 461, but he held that they fell within para D of that section and that aspect of his decision is not now challenged before us, albeit that Mr. Beattie for the Appellant taxpayers seeks to escape from the consequences of the concession he makes in relation to the applicability of para D to these transactions by reference to the terms of para E, and I shall have to come to D examine that argument shortly. That is an argument which raises a new ground of appeal which was not raised either before the Special Commissioners or before the learned Judge.

Both the Special Commissioners and the learned Judge held that in consequence of the Gristrim transactions the taxpayers had obtained tax advantages within the meaning of s 466. That has been a matter in issue on the appeal. It E raises a difficult question because of the acute conflict of judicial opinion as to the precise scope of the definition of tax advantage in s 466 which was manifested in their Lordships' decision in *Commissioners of Inland Revenue* v. *Parker*(1) [1966] AC 141. Having regard to the view I take on the new point which has been raised by Mr. Beattie on behalf of the taxpayers, I do not find it necessary to express a concluded opinion in this judgment on the question F whether the taxpayers did obtain a tax advantage in consequence of the Gristrim transactions. I shall go no further than to say that, as at present advised, I am not persuaded that the learned Judge was wrong in the conclusion he reached about that.

I now turn to the new contention. The contention put shortly is that if one looks at the circumstances described in para E of s 461 of the Act of 1970, they G are a particular species of the circumstances which are described in para D and where a case falls fairly and squarely within the circumstances to which para E applies, then the taxpayer in question is entitled to the exception or deferment which in certain defined circumstances is applicable under para E by virtue of para E(2). Accordingly, I turn at once to the provisions of para E of s 461, which reads as follows:

H "E—(1) That in connection with the transfer directly or indirectly of assets of a company to which paragraph D above applies to another such company, or in connection with any transaction in securities in which two or more companies to which paragraph D above applies are concerned, the person in question receives non-taxable consideration which is or represents the value of assets available for distribution by such a company, I and which consists of any share capital or any security (as defined by

(1) 43 TC 396.

section 237(5) of this Act) issued by such a company. (2) So far as sub-paragraph (1) above relates to share capital other than redeemable share capital, it shall not apply unless and except to the extent that the share capital is repaid (in a winding-up or otherwise), and where section 460 above applies to a person by virtue of sub-paragraph (1) above on the repayment of any share capital any assessment to tax under subsection (3) of the said section 460 shall be an assessment to tax for the year in which the share capital is repaid. (3) In this paragraph—'assets available for distribution' means assets which are, or apart from anything done by the company in question would have been, available for distribution by way of dividend, or trading stock of the company, 'non-taxable', in relation to a person receiving consideration, means that the recipient does not pay or bear tax on it as income (apart from the provisions of this Chapter), 'share' includes stock and any other interest of a member in a company, and the references in sub-paragraph (2) above to the repayment of share capital include references to any distribution made in respect of any shares in a winding-up or dissolution of the company."

For the purpose of considering the present argument it is also necessary to read s 467(2) which provides:

> "In section 461 above—(*a*) references to profits include references to income, reserves or other assets, (*b*) references to distribution include references to transfer or realisation (including application in discharge of liabilities), and (*c*) references to the receipt of consideration include references to the receipt of any money or money's worth."

In considering this argument I shall refer, as the first limb of para E, to that part of para E which speaks of a connection with the transfer directly or indirectly of assets of a company to which para D applies to another such company. What I call the second limb of para E, with which we are not concerned, is that part which speaks of a connection with any transaction in securities in which two or more companies to which para D applies are concerned. If one applies all the relevant definitions and cross-references and compares the provisions relating to the circumstances envisaged by para D of s 461, it becomes at once apparent that any case falling within the first limb of para E must necessarily also be a case which falls within the circumstances described in para D. A transfer by one company to which para D applies to another such company of the first company's assets is necessarily also, because of the definitions of profits and distribution a distribution of profits of a company to which para D applies. A non-taxable consideration received by the person in question in the circumstances envisaged by the first limb of para E, having regard to the definition of "non-taxable" in sub-para (3) of that paragraph, is the same as the consideration which is one of the circumstances necessary to the satisfaction of para D, namely the consideration defined by (i) of that para C, representing the value of assets which are (or apart from anything done by the company in question would be) available for distribution by way of dividend and is so received by the person receiving it that he does not pay or bear tax on the consideration as income.

For those reasons it seems to me perfectly clear that Parliament intended that where a person receives a non-taxable consideration under para E's first limb by virtue of a transfer of assets between companies to which para D applies, representing the value of assets available for distribution by such a company, and also consisting of share capital, notwithstanding that those circumstances fall within the wide ambit of para D, it must have been intended that the taxpayer concerned should be entitled to the benefit of the deferment

of his liability to taxation which is specifically provided by para E(2). If it were otherwise then the first limb of para E, coupled with the exemption which sub-para (2) provides, would be totally ineffective, for in every such case it would be open to the Revenue to say, "You may be within para E entitled to deferment under sub-para (2) of that paragraph, but we can make you immediately liable because the circumstances of the transactions in which you have engaged and in consequence of which you have obtained a tax advantage also fall within para D of s 461". The principle applicable here, in my judgment, is that which is fairly stated in Craies on Statute Law, 7th edn. (1971), at page 222:

> "Acts of Parliament sometimes contain general enactments relating to the whole subject-matter of the statute, and also specific and particular enactments relating to certain special matters; and if the general and specific enactments prove to be in any way repugnant to one another, the question will arise, Which is to control the other? In *Pretty* v. *Solly*[1] Romilly M.R. stated as follows what he considered to be the rule of construction under such circumstances. 'The general rules,' said he, 'which are applicable to particular and general enactments in statutes are very clear; the only difficulty is in their application. The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.'"

For those reasons it seems to me that the new point raised for the first time in this Court on behalf of the taxpayers is well-founded and I would allow the appeal on that ground.

Accordingly, I now must turn to examine the transactions in stage three of the scheme which are the subject of the cross-appeal. I will refer to these, for reasons which will become apparent, as "the Dolerin transactions". These transactions involve a still more complicated machinery than any other part of the overall avoidance scheme. I do not find it necessary for the purposes of this judgment to examine the details of that machinery at any length and, at the risk of what may well be a considerable over-simplification, I will attempt to summarise what happened in stage three of the scheme by the carrying out of the Dolerin transactions sufficiently to indicate what were the features of those transactions on which their legal implications depend. Stage three begins with the creation of Dolerin Investment Co. Ltd. ("Dolerin"). In the initial phase of the Dolerin transactions the directors of Dolerin were Mr. Faber and Mr. Bradman. The taxpayers and Mrs. Williams were neither directors nor shareholders in Dolerin at that stage, nor had they any interest in Dolerin by way of a holding company. While this continued to be the position Dolerin made loans to the taxpayers and Mrs. Williams in the sum of £84,200 each. To quote once again that admirable letter of Mr. Faber's, written in February 1970, this was the transaction whereby the interest-free loans were to be made to the taxpayers by a company which they would ultimately control to enable them personally to obtain the benefit of tax-free moneys accruing from stages one and two of the scheme. It was of the essence that these loans in the first place should be made to the taxpayers at a time when they had no interest in Dolerin, either as shareholders or directors. That was to avoid inhibition on loans to directors under the provisions of the Finance Act 1965 (now s 286 of the

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[1] (1859) 26 Beav 606, at p 610.

Act of 1970). The terms of the loans at the time they were made required that the borrowers, that is the taxpayers and Mrs. Williams, should jointly deposit with Dolerin within three days of the receipt of their loans British Government stocks of the value of not less than £421,000. It is to my mind immaterial, though I note it as a fact, that those stocks initially required to be deposited as security for the loans were subsequently realised and released from their role as security. An important feature is that it was a condition of the making of the loans that the stock should be so deposited. The second phase of the Dolerin transactions consisted in the acquisition of the whole share capital of Dolerin by Gristrim for a consideration of £421,250. Dolerin thus became a subsidiary of Gristrim; Gristrim being controlled by the taxpayers and Mrs. Williams, so in the event was Dolerin. Gristrim found the money in order to acquire the share capital in Dolerin by calling in the loan from Developments, which of course represents in substance the Kithurst profits, and this in turn in substance was the money which the taxpayers and Mrs. Williams had been enabled to receive in the form of interest-free loans from Dolerin, the company of which they were now put in control. The final postscript to this phase of the scheme, the Dolerin transactions, was that the taxpayers, having secured their interest-free loans, in fact again lent the money on to their own company, Developments. The Special Commissioners made these findings, that the members were under no legal obligation to make these loans, but it was commercially desirable that they should do so, Developments having had no other source of money to repay its debt to Gristrim. It was envisaged by all parties to this scheme that such loans should be made.

Reverting once again to the Revenue's notices under s 460(3), the notices specified the transactions by which, in the alternative now being alleged, tax advantages had been obtained in the notice to Mr. Aubrey Dan Williams: "4. The subscription by (Retsor) in February 1971, for shares in (Dolerin) (a company incorporated on 5th February 1971) for cash at a premium." I have not thought it necessary in the present judgment to describe the purely technical part in these transactions played by the company called Retsor, one of Mr. Faber and Mr. Bradman's companies.

> "5. The payment to you and your wife by Dolerin subsequently (but before the transaction referred to in 6 below) of a sum of cash by way of loan. 6. The acquisition by Gristrim on or about 22 February 1971 of the whole of the issued share capital of Dolerin for a cash consideration of £421,250."

The issues arising on the cross-appeal are these: Mr. Beattie first takes, as a preliminary objection to the Crown's attack on the Dolerin transactions, the point that the whole of stage three of the tax avoidance scheme was independent of stages one and two and that its sole fiscal purpose was to avoid liability to tax under s 286 of the Act of 1970. With all respect to this contention, the whole answer to it, in my judgment, is found in the terms of Mr. Faber's much-quoted letter to which I have referred earlier in this judgment and to which I need not refer again. In the light of that, it seems to me that, with respect, the contention that stage three was independent of stages one and two is manifestly untenable. In order that the notices served under s 460(3) in relation to the Dolerin transactions should be valid and sustainable, it is necessary that each of the three elements required to satisfy s 460(1) should be shown to be fulfilled. Each of those is challenged. It is in issue whether any tax advantages were obtained by the taxpayers; it is in issue whether the Dolerin transactions were carried out in any such circumstances as are mentioned in s

461; it is in issue whether any tax advantage, if there was one, was obtained in consequence of a transaction in securities or of the combined effect of two or more such transactions.

So far as the first of these issues is concerned, the Crown's case with respect to the obtaining of a tax advantage by the taxpayers, as defined in s 466 which I have already read, is put in the following way, that the taxpayers avoided a possible assessment to tax, namely that assessment which would have been made on them had Kithurst paid a direct dividend to its own shareholders, the dividend which, in fact, it paid to Gristrim. The method whereby that avoidance was effected, according to the argument for the Crown, was by the receipt of what in substance represents the moneys available to Kithurst for distribution as dividend in the form of an interest-free loan from Dolerin, a company which ultimately was controlled by the taxpayers through the holding company Gristrim. Mr. Beattie challenged the contention that the taxpayers received a tax advantage on basically three grounds. First he says that money received by the taxpayers was received by way of loan and that a receipt by way of loan cannot be a relevant receipt accruing within the meaning of s 466. One must, in applying s 466, so runs the submission, compare like with like and money paid as a loan which is liable to be repaid cannot be comparable to money paid to shareholders as a dividend. The reality, of course, of the matter is that Gristrim and Dolerin, being under the full control of the taxpayer and Mrs. Williams, are companies which do not, and never have, carried on any business and which never existed for any other purpose than for the purpose of carrying through this tax avoidance scheme; the practical likelihood of these debts being called in is negligible. Mr. Beattie counters that view of the matter by the second contention which he raises in opposition to the Crown's submission that Dolerin's transactions yielded to the taxpayers a tax advantage. It is a fact, although it was not a fact found by the Special Commissioners, which has been agreed between the parties for the purposes of this appeal that, subsequently to the notices and assessments on the taxpayers under s 460, Gristrim has been the subject of a short-fall income tax assessment under s 289 of the Act of 1970, and consequential surtax apportionments under s 296 and s 297 have been made on the taxpayers and Mrs. Williams. Again, the reality of the matter is that those assessments and apportionments by the Revenue have been made in order to attack in an alternative way the same profit in the hands of the taxpayers. The Crown has given undertakings that if the notices of assessments in issue in the present appeal are upheld, then the assessments and apportionments under ss 289, 296 and 297 will not be proceeded with. But, says Mr. Beattie, the citizen taxpayer is not to be at the mercy of concessions by the Crown. If the taxpayers here technically remain liable to an assessment in respect of the same receipts which is based on some alternative contention under another section, or other sections, of the Act of 1970, then it cannot be said that the taxpayers have avoided a possible assessment within s 466.

The argument raised on the first of these two contentions is very similar to an argument raised in *Commissioners of Inland Revenue* v. *Cleary*(1) [1968] AC 766 upheld at first instance by Pennycuick J. *Cleary* was a case in which two sisters between them owned the entire share capital of two companies, company A and company B. Company A had accumulated profits available for distribution by way of dividend. That accumulated profit was in fact paid to the sisters by company A for the purchase of their shares in company B and it was

(1) 44 TC 399.

found as a fact that the acquisition of those shares by company A represented full consideration for the moneys paid out for the purchase. It was contended there that there had been no tax advantage obtained because the company remained liable to further taxation on distributing the assets it had acquired by the purchase of the sisters' shares in company B and also because, in any event, the purchase of shares was not a transaction which could properly be compared for the purposes of s 466 with the distribution of a dividend. Viscount Dilhorne, having set out the statutory definition of tax advantage in what is now s 466 of the Act of 1970, said([1]):

> "The Appellant has throughout contended that she did not obtain a tax advantage as defined. This contention succeeded before Pennycuick J. He said that([2]): 'the apparent effect of this definition so far as now in point is to treat as a tax advantage a receipt upon which, if the taxpayer had taken it in one way, he would have paid or borne tax, but which he takes in some other way without paying or bearing tax upon it. For this purpose it is necessary to compare like with like; that is to say, one must look at the actual transaction which comprises the receipt and see whether, upon another form of transaction producing the same result, the receipt would have been taxable. One cannot for this purpose look at the actual transaction and then compare it with a transaction which, although containing a common element, produces a different result. So, it seems to me, one cannot look at an actual transaction by way of sale, under which a member of a company transfers to the company property equivalent to the amount paid by the company to the member, and compare that transaction with a simple receipt by the member from the company without consideration.'"

Viscount Dilhorne then points out that Pennycuick J.'s decision was given before the decision of their Lordships' House in *Commissioners of Inland Revenue* v. *Parker*([3]) and quotes from the speech of Lord Wilberforce in that case. Then he continues([4]):

> "The definition does not require the contrast of like with like, as Pennycuick J. held, and to give it such an interpretation would narrow the scope of the section considerably. It is, I think, clear from what Lord Wilberforce said, that Pennycuick J.'s view on this was not correct. That the Appellant received £60,500 in such a way that she did not pay or bear tax on it, is not disputed. It could have been distributed to her by way of dividend and, if it had been, she would have been liable to tax. There is thus in this case the contrast to which Lord Wilberforce referred. It is clear that in consequence of a transaction in securities she avoided a possible assessment to income tax, the possible assessment being that which would have been made if she had received the sum by way of dividend. She therefore obtained a tax advantage within the meaning of the section."

It seems to me that the reasoning whereby Viscount Dilhorne there rejected the argument which had prevailed before Pennycuick J., that one must for the purpose of s 466 compare like with like, is quite fatal to the first contention of Mr. Beattie in this appeal that there was no tax advantage here because the taxpayers received what they received by way of loan. Equally, there is, in my judgment, no substance in the second and allied contention that the taxpayers remain technically liable, notwithstanding the undertakings given by the Crown as to possible assessments to taxation under some other provision of the Act. Section 460(9) provides: "No other provision contained in the Tax Acts shall be construed as limiting the powers conferred by this section."

([1]) 44 TC 399, at p 422. ([2]) *Ibid*, at p 408.
([3]) 43 TC 396. ([4]) 44 TC 399, at p 423.

A Lord Wilberforce in *Parker's* case referred to that provision in the following passage. He said(1):

> "I have already given the reasons why I think that an assessment, or possible assessment, was then avoided, and I would only add that I do not think that the possibility or otherwise of an assessment under s 245 of the Income Tax Act 1952 (as to which the Special Commissioners made no
B finding), has a bearing on the issue before us. Section 28(12) of the Finance Act 1960" (the predecessor of s. 460(9)) "makes plain the independence of s. 28 from all other income tax legislation."

So also in *Cleary's* case Viscount Dilhorne says, at page 784B(2): "Nor, if it be right that there is a possibility of double taxation, is there anything in the section to exclude its application in that event." Accordingly, it seems to me
C that Mr. Beattie's first two grounds, on which he opposes the contention that tax advantages were obtained by the Dolerin transactions, fail.

Mr. Beattie's third ground refers to the fact that, having received their loans from Dolerin, the taxpayers and Mrs. Williams then in fact lent the money on to Developements. I have already cited the factual findings of the Special Commissioners relating to that transaction. The taxpayers and
D Mrs. Williams were under no legal obligation to make those loans to Developments. True it was commercially desirable that they should do so, but it might indeed have been commercially desirable that they should use the money in a hundred ways, and the fact that they chose to use the funds they had received in this way seems to me entirely irrelevant to their liability. I reach without difficulty the conclusion that the taxpayers did obtain tax advantages as
E defined in s 466 in consequence of the Dolerin transactions.

The next question then is, were those advantages obtained in any such circumstances as are mentioned in s 461 below? Mr. Rattee, for the Crown, puts his argument on this part of the case on alternative grounds relying first on para C and secondly on two alternative views of the matter under para D. I do not find it necessary to go further than his contention which is founded on
F para C. He says that each of the elements necessary to make up a set of circumstances to which para C relates were present. The first phrase is: "That the person in question receives . . ."—the person in question here was the taxpayer in each case. The next phrase in para C is: "in consequence of a transaction whereby any other person . . ."—here that is Gristrim—". . . receives" and I read here the material words, "an abnormal amount by way of
G dividend . . ."—Gristrim's dividend from Kithurst—". . . a consideration which either—(i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend". The company in question is Kithurst and the assets which would have been available for distribution by way of dividend to the shareholders in Kithurst are the assets which were in fact used by Kithurst
H for payment of a dividend to Gristrim. Finally: ". . . and the said person so receives the consideration that he does not pay or bear tax on it as income." That is, receipt of the interest-free loan by the taxpayers and Mrs. Williams from Dolerin. Mr. Beattie, if I may respectfully say so, has struggled manfully to find an answer to these contentions of the Crown based on para C, but it seems to me that they are quite unanswerable and para C is plainly applicable
I to the circumstances of the Dolerin transactions.

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(1) 43 TC 396, at p 443. (2) 44 TC 399, at p 424.

Finally, were the advantages here obtained in consequence of a transaction in securities or of the combined effect of two or more such transactions? Mr. Rattee, for the Crown, advanced alternative arguments. He submitted first that the tax advantage was obtained in consequence of the combined effect of two or more transactions in securities, even if the loans to the taxpayers and Mrs. Williams were not such transactions. I am not persuaded that that argument is well-founded. Mr. Rattee's alternative argument was that, if one looks at the definition of transactions in securities, then plainly the loans to the taxpayers and Mrs. Williams fell within that definition. The definition is again to be found in s 467(1) and again I read the relevant words:

> "'securities'—(*a*) includes shares and stock . . . 'transaction in securities' includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

The argument on either side is a simple and straightforward one. Mr. Rattee submits that, having regard to the conditions on which the loans were made, namely that the borrowers should deposit Government stock as security for the loans, the transaction of loan is clearly one relating to securities, namely, relating to the stock which was deposited. Mr. Beattie submits that there was no such relation.

In considering the application of these definitions, one must bear in mind the words of Lord Wilberforce in *Commissioners of Inland Revenue* v. *Joiner*(1) 50 TC 449, at page 480:

> "Upon the enactment of the original s. 28 of the Finance Act 1960 it was possible to contend, and it was contended, that this section (and its associated sections) was directed against a particular type of tax avoidance known generally under such descriptions as dividend-stripping, asset-stripping and bond washing and that the sections and particular expressions used in them, amongst others 'transactions in securities', should be interpreted in the light of this supposed purpose. But this line of argument became unmaintainable after the decisions of this House in *Commissioners of Inland Revenue* v. *Parker*(2) [1966] A.C. 141 and *Greenberg* v. *Commissioners of Inland Revenue*(3) [1972] A.C. 109. It is clear that all the members of this House who decided those cases were of opinion that a wide interpretation must be given to the sections and to the expressions used in them. More than this, it appeared from the opinion of Lord Reid in *Greenberg's* case that the sections called for a different method of interpretation from that traditionally used in taxing Acts. For whereas it is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or ambiguities, Lord Reid made it clear that the scheme of the sections, introducing as they did a wide and general attack on tax avoidance, required that expressions which might otherwise have been cut down in the interest of precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which Judges would normally desire to stop(4). If we are to follow this path, and I see no other open to us, we must continue to give to 'transactions in securities' and 'transactions relating to securities' the

(1) [1975] 1 WLR 1701. (2) 43 TC 396. (3) 47 TC 240. (4) *Ibid,* at p. 272.

A widest meaning: we can neither confine these expressions to the instances given in s. 467(1), nor can we deduce from that enumeration any limitation upon their scope."

Following the path indicated by Lord Wilberforce, I have no doubt that the loans here concerned were "transactions relating to securities" in s 467(1).

For the reasons I have endeavoured to explain, I would allow the appeal
B and quash the notices and assessments so far as they relate to the Gristrim transactions. I would also allow the cross-appeal and restore the s 460 notices and assessments so far as they relate to the Dolerin transactions.

Cumming-Bruce L.J.—I agree with the orders proposed for the reasons stated by my Lord. I would only add a word on the reasons for allowing the appeal. By s 460(1):

C "Where—(*a*) in any such circumstances as are mentioned in section 461 below, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage . . ."

then, as the section provides, the section shall apply to those transactions. Section 461 is drafted so as to comprehend the circumstances mentioned in
D s 460(1). As Mr. Rattee submits, for the purposes of s 460(1)(*a*) it suffices to attract tax if any circumstances mentioned in s 461 apply. When one turns to s 461, one finds that the circumstances are set out in a succession of different paragraphs numbered A to E which are enacted as alternatives, which is emphasised by the fact that between each paragraph one finds the disjunctive word "or". So at first sight there is great force in Mr. Rattee's submission that
E the fact that a particular transaction may fall within the description given in circumstance E does not have the effect that that transaction is disqualified from being treated for the purposes of a transaction within the ambit of circumstance D. The difficulty, however, is as my Lord has stated, that where a transaction is a transaction as described in the first two lines of circumstance E, then circumstance D must apply, and if it is enough for the purposes of
F attraction of tax that in such a situation where E and D both apply, the Inland Revenue can rely upon D as an alternative to E, then in such a case, as far as I can see, there is no content or effect capable of being given to sub-para (2) of circumstance E. Circumstance D is drafted in wider and more general terms than circumstance E. The circumstances described in the first two lines of circumstance E are otiose if it is right, as a matter of construction, that where
G D and the first two lines of E apply the taxpayer may be treated as having come within circumstance D and thus ineligible to claim the benefit of sub-para (2) of circumstance E.

In the matter of the ordinary principles on which the interpretation of statutes proceeds, I can only conclude that it was the intention of Parliament
H that the more specific and particular circumstances described in circumstance E were intended when they applied to restrict the generality of the words in circumstance D and that must be, in my view, the appropriate approach to the construction of s 461 in spite of the fact that, as Mr. Rattee submitted, the plain words of s 460(1)(*a*) state that it is sufficient if any of the circumstances of s 461 apply.

I I therefore agree with the reasoning and orders proposed by my Lord, Bridge L.J.

Orr L.J.—I agree with both judgments and do not wish to add anything. A

Taxpayers' appeals and Crown's cross-appeals both allowed. Costs awarded to Crown. Leave to appeal granted by Appellate Committee of House of Lords.

The taxpayers' appeals and the Crown's cross-appeals came before the House of Lords (Lord Diplock, Viscount Dilhorne, Lords Salmon, Russell of Killowen and Keith of Kinkel) on 23, 24 and 25 June 1980 when judgment was reserved. On 30 July 1980, judgment was given in favour of the Crown, with costs. B

D. K. Rattee Q.C. and *Peter Gibson* for the Crown.

C. N. Beattie Q.C. and *G. R. Bretten Q.C.* for the taxpayers. C

The following cases were cited in argument in addition to that referred to in Viscount Dilhorne's speech:—*Greenberg* v. *Commissioners of Inland Revenue* 47 TC 240; [1972] AC 109; *Commissioners of Inland Revenue* v. *Cleary* 44 TC 399; [1968] AC 766; *Commissioners of Inland Revenue* v. *Parker* 43 TC 396; [1966] AC 141; *Commissioners of Inland Revenue* v. *Garvin* TC Leaflet 2764; [1980] STC 295. D

Lord Diplock—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Viscount Dilhorne. I entirely agree with it and for the reasons he gives I too would dismiss the appeal and the cross-appeal.

Viscount Dilhorne—My Lords, the main question to be determined in this appeal is whether Mr. Aubrey Dan Williams and his wife, Mr. Michael Williams and two solicitors, Mr. Wilson and Mr. Bowron, partners in the firm of Malcolm Wilson and Cobby (hereafter called "the taxpayers") are persons to whom s 460 of the Income and Corporation Taxes Act 1970 applies. If it does, then the Revenue must seek to counteract the tax advantage obtained or obtainable "on such basis as the Board may specify by notice in writing . . . as being requisite for counteracting the tax advantage so obtained or obtainable" (s 460(3)). E F

The taxpayers were the directors and shareholders of a company called Kithurst Park Estates Ltd. ("Kithurst") which owned a farm called Hormare Farm at Storrington in Sussex for which it had paid a low price. Sometime before 1969 planning permission was obtained for the development for residential purposes of 31 acres of the farm with the result that there was an immediate and very substantial increase in its value. The taxpayers wanted to realise that value but they were advised that payment of the betterment levy, corporation tax, shortfall income tax and surtax apportionments would amount to between 98 and 99 per cent. of the profit obtained. The Revenue thought that the maximum figure would be 91¼ per cent. G H

Among the facts found by the Commissioners were the following:

"In the autumn of 1969 the shareholders in Kithurst were introduced to Mr. Bradman and Mr. Faber. These two gentlemen were directors of a number of companies which Mr. Faber described as property dealing and

A share dealing companies and were experts in certain tax avoidance devices (on which they had received Counsel's advice) and were prepared, in return for a large commission, to make these devices available to clients. The services which Mr. Bradman and Mr. Faber were willing to provide included the co-operation, as necessary, of companies which they directed and the furnishing of appropriate documentation based on stock drafts
B which had been settled by Counsel."

The taxpayers embarked on a scheme supplied by Mr. Faber and set out in detail in a letter he wrote on 20 February 1970 in return for a commission of £59,000. They hoped that thereby the payment of tax on the profit which would be realised on the sale of the 31 acres would be avoided and that they would secure the profit for themselves free of tax. Section 460 does not apply if a
C person who is in a position to obtain or has obtained a tax advantage shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained. Not surprisingly, the taxpayers did not attempt to show this in the High Court, the Court of Appeal or this House.
D Mr. Faber began his letter to Mr. Haydon, the accountant for Kithurst, by saying that he understood that Mr. Haydon had been advised of certain transactions which had been entered into by Kithurst

> "designed to enable that company to dispose of the land at Hormare Farm for approximately £520,000 without any liability to Betterment Levy and without any material liability to taxation. The proposed transactions were
> E approved by Mr. C. N. Beattie, Q.C. in Conference on the 17th November 1969 and subsequent in his Written Opinion of the 18th November."

Mr. Faber enclosed a copy of the Instructions to Taxation Counsel and a copy of the written opinion "which set out in detail the form of the transactions" and said that the overall scheme was basically divided into three stages of which the first was "(1) the transactions designed to enable Kithurst to dispose of
F Hormare Farm without any liability to betterment levy and without any material liability to taxation".

On 30 January 1970 Kithurst, in accordance with the scheme, leased the farm to one of Mr. Faber's companies, Parlev Property Co. Ltd., for six years at a rent for the first three months of £100 and thereafter of £62,550 per annum. This was called by Mr. Faber the betterment levy lease. Its object was, as he
G said in his letter, to increase the current use value of the farm to its full market value and so to avoid any betterment levy. It was, Mr. Beattie said in opening the appeal in this House, not contemplated that that rent would be paid by anyone. On 31 January 1970 Kithurst granted to Metallic Property Trading Co. Ltd., another of Mr. Faber's companies, a lease of the farm for 250 years at a rent of £100 per annum in return for a premium of £521,000 payable by
H instalments of £100 per annum for 249 years with the balance in the 250th year. The lease gave the lessors the right to terminate it at the 49th year and was granted subject to and with the benefit of the betterment levy lease. This, Mr. Faber called the corporation tax lease. On 5 February 1970 Parlev surrendered the betterment levy lease to Metallic and the next day Kithurst sold its freehold reversionary interest in the farm to A. D. Williams Developments Ltd.
I ("Developments") for £1,000 subject to the corporation tax lease. The five taxpayers, in addition to being the directors of and shareholders in Kithurst, were directors of and the shareholders in Developments. In his letter Mr. Faber stated that the purpose of the corporation tax lease was to enable Kithurst to

dispose of the land in return for a premium "on what for commercial purposes is a long lease but for taxation purposes, as a result of the lessor's right to determine, will be treated as a short lease" with the consequence that Kithurst could elect to pay tax on the instalments of premium as and when payable over 250 years. These transactions, Mr. Faber said, resulted in a loss.

On 6 February 1970 Developments paid Metallic £521,000 for the surrender of its lease so, as Developments had bought the freehold for £1,000, it then owned the same freehold interest in the land that Kithurst had had. The same day Kithurst assigned its entitlement to the premium to another of Mr. Faber's companies, Lekos Investment Co. Ltd. for £521,000. "In this way" Mr. Faber said "Kithurst received virtually the total disposal proceeds which would otherwise have arisen on the sale of the land." The same day Metallic lent Lekos £521,000, the amount paid to it by Developments and the amount Lekos agreed to pay Kithurst and the same day Kithurst lent £522,102 9*s.* 3*d.* to Developments. On 15 February 1970 Kithurst ceased trading. Its accounts showed a credit balance on profit and loss account of £422,255.

So far, Mr. Beattie said in the course of his opening, no "real" money was involved and there was "a mere circulation of money which really scarcely existed" between companies owned by the taxpayers and those of Mr. Bradman and Mr. Faber in the course of transactions designed to evade liability to betterment levy, corporation tax, shortfall income tax and surtax apportionments.

The second stage of the scheme was described by Mr. Faber as "the transactions involving the extraction of the tax free monies from Kithurst by way of a tax free dividend to an interposed holding company controlled by the same shareholders" and the third stage as "the final transaction designed to enable the shareholders personally to obtain the benefit of the tax free monies in the form of interest free loans made to them by a company which they ultimately control, so that no liability arises under the provisions of Section 75 of the Finance Act 1965".

Shortly before 20 March 1970 the taxpayers acquired all the shares in a company called Gristrim Investment Co. Ltd., another of Mr. Faber's companies, and on that date they agreed to exchange all their shares in Kithurst for shares in Gristrim. On 13 April Developments repaid to Kithurst part of the loan made to it on 6 February 1970 and Kithurst paid a dividend without deduction of tax of £422,000 to Gristrim and Gristrim lent a sum equal or approximately equal thereto to Developments. Still there was not what Mr. Beattie called "real money" involved. Nevertheless these transactions involved a very considerable amount of money which had been Kithurst's and which was paid by that company to Gristrim in a tax free dividend.

The Crown put forward two alternative contentions, the first of which was that the taxpayers had obtained a tax advantage by receiving the shares in Gristrim in exchange for their shares in Kithurst in circumstances to which s 461 of the Act applied and so were persons to whom s 460 applied. Section 460(1) reads as follows:

> "(1) Where—(*a*) in any such circumstances as are mentioned in section 461 below, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then . . . this section shall apply to him in respect of that transaction or those transactions: . . ."

A Section 461 describes five kinds of circumstances. In relation to this case the Crown contended that the circumstances stated in paras C and D of the section were satisfied. They read as follows:

> "C.(1) That the person in question receives, in consequence of a transaction whereby any other person—(*a*) subsequently receives, or has received, an abnormal amount by way of dividend; or (*b*) . . . a consideration which either—(i) is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend . . . and the said person so receives the consideration that he does not pay or bear tax on it as income. D.(1) That in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in paragraph C(1) above such a consideration as is therein mentioned. (2) The companies to which this paragraph applies are—(*a*) any company under the control of not more than five persons . . ."

B C

The Special Commissioners held that the circumstances of this case were covered by paras C and D and that in consequence of transactions in securities the five taxpayers had obtained tax advantages which the Revenue were D entitled under s 460(3) to counteract by the notices they had given and the assessments they had made for 1969–70. The Commissioners therefore did not find it necessary to consider the Crown's alternative contention.

Browne-Wilkinson J., following his decision in *Anysz* v. *Commissioners of Inland Revenue*(1) [1978] STC 296, upheld the Commissioners' decision that the circumstances came within para D. He therefore also found it unnecessary E to consider the Crown's alternative contention.

In the Court of Appeal the taxpayers took and succeeded on a new point. Paragraph E was added by s 39 of the Finance Act 1966 to s 461. It was said that the circumstances set out in this paragraph were a species of those stated in para D and that where para E applied, the taxpayer was entitled to the deferment of liability to tax provided by para E(2). So the Court of Appeal F considered the Crown's alternative case and decided that in their favour. From that decision the taxpayers now appeal and the Crown cross-appeals against the Court of Appeal's decision against them on their first contention. The Revenue had served notices and made assessments under s 460 for the year 1970–71, the year in which the operation of the scheme was completed and in which each of the taxpayers received interest-free loans of £84,200.

G Following upon the loan by Gristrim to Developments, in January 1971 Developments sold 30 acres of the land at Hormare Farm for £400,000 to a company not associated with the taxpayers or with Messrs. Faber and Bradman. All but £58,000 of that was used to discharge indebtedness of Developments. This was the first occasion on which what Mr. Beattie called "real money" came upon the scene. On 5 February 1971 a £100 company, H Dolerin Investment Co. Ltd., was incorporated. Mr. Faber and Mr. Bradman were its directors and it was a wholly-owned subsidiary of another of their companies, Retsor Trading Co. Ltd. It had no assets and no liabilities. On 16 February 1971 Sandelsons, a firm of stockbrokers, agreed to lend Dolerin £410,475 and the next day Retsor agreed to lend that company £10,525, making a total of £421,000. As I have said, the amount standing to Kithurst's credit on I its profit and loss account when it ceased to trade was £422,255. The loan made

(1) 53 TC 601.

by Sandelsons was repayable on call and in any event, unless otherwise agreed, within seven days. On 16 February, in accordance with instructions given by Mr. Faber, the five taxpayers told Sandelsons to buy Government stock at a cost of £421,000 and authorised them to hold the stock as security for the loan to Dolerin. The next day Dolerin entered into agreements with the five taxpayers whereby Dolerin agreed to lend each taxpayer £84,200 interest-free after the first week, making a total of £421,000. The agreements contained a provision that the borrower should not be liable to repay the whole or any part of the loan on demand unless Dolerin at the same time demanded repayment by the other taxpayers. To implement these transactions, 13 cheques were drawn, twelve by Faber companies and the taxpayers and one by Sandelsons for the amount of the loan. All these cheques were cleared simultaneously on 17 February. It is not necessary to refer to them in detail. It suffices to say that five of the cheques, each for £84,200, were drawn by the taxpayers in favour of Sandelsons in payment for the Government stock. The loans to Dolerin were repaid and the stock was sold. Sandelsons then divided the proceeds of sale among the taxpayers, Mrs. Williams getting £84,216.73 and each of the others £84,216.74. Gristrim, in which, as I have said, the taxpayers held all the shares, called in its loan to Developments and on 24 February paid £421,250 for the whole of the authorised share capital of Dolerin which had been increased to 1,000 shares. On the same day the five taxpayers were appointed the directors of Dolerin. At the end of these complicated operations the taxpayers received, as the scheme envisaged, interest-free loans almost equivalent to the sum which had stood to the credit of Kithurst when it stopped trading and loans repayable to a company owned by them through Gristrim and of which they were the directors. The five taxpayers lent the money they had received from Sandelsons to their company Developments, but this does not in my opinion lead to the conclusion that they did not receive interest-free loans from Dolerin.

As a result of these operations did the taxpayers obtain or were they in a position to obtain a tax advantage, that is to say,

> "a relief or increased relief from, or repayment or increased repayment of, tax, or the avoidance or reduction of an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains" (s 466(1))?

The taxpayers each received £84,216 without paying or bearing tax thereon. That was the object of the scheme. By the operations in which they engaged they avoided a possible assessment thereon and it is clear beyond all doubt that they obtained or by virtue of these transactions were in a position to obtain a tax advantage. Did they do so in any of the circumstances mentioned in s 461 and in consequence of a transaction in securities or of the combined effect of two or more such transactions? In my opinion para D of s 461 applies. In connection with the distribution of profits of a company (Kithurst) to which that paragraph applies they received without paying or bearing tax a consideration which represented the value of assets which would have been available for distribution to them by way of dividend but for the steps taken by that company.

The final question for consideration is, was the tax advantage obtained in consequence of a transaction in securities or of the combined effect of two or more such transactions? "Securities" is defined in s 467(1) as including shares and stock and "transactions in securities" as including

> "transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing

A or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

The Court of Appeal held that the loans made to the taxpayers came within this definition. I think that they were right to do so. Counsel for the Crown had put forward alternative contentions, one of which was that it being a condition of the loans that the taxpayers should deposit Government stock as security B for the loan, the transaction related to securities, the other being that the tax advantage was obtained in consequence of the combined effect of two or more transactions in securities. I prefer to base my conclusion on the wider ground, though I am far from saying that the Court of Appeal's decision cannot be sustained on the narrower one. It is not, I think, necessary to list the many transactions coming within the definition which were entered into from the C inception of the scheme. They were all necessary ingredients of it, intended to secure tax-free gains to the taxpayers and those gains do not cease to be in consequence of those transactions if one or more links in the chain of operations does not come within the definition.

In my opinion by the receipts of the loans repayable to a company which they now control, they intended to secure and did secure a tax advantage in D circumstances which brought them within the scope of s 460. It is not therefore necessary to consider whether, contrary to the view of the Court of Appeal, they were in a position to obtain or obtained a tax advantage at an earlier stage. If they did, that is no bar to the conclusion that by the receipt of the loans they secured a tax advantage. The Crown's claim has always been in the alternative. It follows that in my opinion the Revenue were entitled to E counteract that tax advantage by the notices they gave and the assessments they made for 1970–71.

In my opinion this appeal should be dismissed for the reasons I have stated. As it is not necessary to decide the Crown's cross-appeal, that too should be dismissed. In my view the Appellants should pay the costs of the hearing before this House and in the Courts below.

F **Lord Salmon**—My Lords, I entirely agree with the speech of my noble and learned friend Viscount Dilhorne and, for the reasons he gives, I would dismiss the appeal and the cross-appeal.

Lord Russell of Killowen—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Viscount Dilhorne. I agree with it and with his conclusion that the appeal (and the cross-appeal) be G dismissed.

Lord Keith of Kinkel—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Viscount Dilhorne. I agree with it and would dismiss the appeal and the cross-appeal for the reasons which he has given.

Taxpayers' appeals and Crown's cross-appeals dismissed, with costs H *awarded to the Crown.*

[Solicitors:—Berwin Leighton; Solicitor of Inland Revenue.]

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