HIGH COURT OF JUSTICE (CHANCERY DIVISION)—13 AND 14 MARCH 1986

COURT OF APPEAL—28 AND 29 OCTOBER AND 2 AND 25 NOVEMBER 1987

HOUSE OF LORDS—13, 14 AND 15 MARCH AND 13 APRIL 1989

Collard (H.M. Inspector of Taxes) *v.* Mining & Industrial Holdings Ltd.[1]

Double taxation relief—UK resident company in receipt of dividends from companies resident abroad—Whether relief by way of credit to be given for foreign taxes on such dividends before or after advance corporation tax in respect of distributions made by it is set against its liability to corporation tax—Double Taxation Relief (Taxes on Income) (Australia) Order 1968, *(S.I.* 1968 *No.*305*), Article 19(1); Income and Corporation Taxes Act* 1970, *ss* 497(1), 501, 505*; Finance Act* 1972, *s* 85(1), *s* 100(4) *and* (6)*—Construction of Act—Whether legislative gap to be filled.*

Mining and Industrial Holdings Ltd. ("the company"), a United Kingdom resident company, carried on the business of making and realising investments in companies engaged in the mining and energy industry. During its accounting period ended 30 June 1980 its profits included dividends received from companies resident in territories outside the United Kingdom as well as income from United Kingdom sources. Tax was paid to the authorities of the overseas territories either by being withheld from the dividends or on the underlying profits out of which the dividends were paid. In the same period the company made distributions to its parent company, Consolidated Gold Fields PLC, in respect of which it accounted to the Revenue for advance corporation tax.

The company claimed relief, under s 497(1) Income and Corporation Taxes Act 1970 and the relevant double taxation agreements, by way of credit for the tax paid to the overseas territories against the United Kingdom corporation tax for the accounting period in question which was attributable to the dividends. It submitted computations showing a deduction for overseas tax from the corporation tax chargeable on an amount of its income equal to the dividends before set-off of advance corporation tax against the remaining corporation tax to which it was liable on its income as a whole. No further corporation tax was payable by the company on the basis of this computation.

The Inspector contended that the company was required by s 100(6) Finance Act 1972 to allocate advance corporation tax, in such manner as it thought fit, to the corporation tax attributable to its income from each source

[1] Reported (ChD) [1986] STC 230; (CA) [1988] STC 15; (HL) [1989] STC 384.

before it could be determined how much corporation tax was attributable to the overseas dividends against which credit for overseas tax was to be given. If the computation were carried out in this order, and the advance corporation tax were set against its corporation tax liability on the overseas dividends and its income from United Kingdom sources in the most beneficial manner, further corporation tax of £254,137 would be payable by the company. The Inspector, therefore, refused the claim in part and the company appealed.

The Special Commissioner who heard the appeal held that the company was under no obligation to exercise the power conferred by s 100(6) and that the language and scheme of the statutory provisions made it clear that credit for overseas tax should be given before set-off of advance corporation tax. Accordingly he allowed the appeal. The Crown appealed to the High Court.

The Chancery Division, dismissing the Crown's appeal, held that:

(1) upon its true construction s 100(6) conferred a power on the company which it might or might not use as it chose and since it had not chosen to do so in this case the appeal failed—

Julius v. *Lord Bishop of Oxford* (1880) 5 App Cas 214 applied; and

(2) the provisions of s 501 Income and Corporation Taxes Act 1970 and s 85(1) Finance Act 1972 made it abundantly clear that double taxation relief was to be brought into account before advance corporation tax.

The Crown appealed. In the Court of Appeal the Crown accepted that the company was not required by s 100(6) to allocate advance corporation tax but contended that, in the absence of an allocation by the company, the advance corporation tax fell, by implication, to be allocated pro rata amongst the tranches of income.

The Court of Appeal, dismissing the Crown's appeal, held that there was nothing in s 100(6) which could fairly be construed as a sufficiently plain indication of what Parliament intended, implicity, should be the position if a taxpayer chose not to make an allocation; and the Court could not fill the legislative gap as a legitimate part of the process of interpretation, because the gap was simply too big for the Court to be justified in doing so. The Crown appealed.

Held, in the House of Lords, dismissing the Crown's appeal, that the structure and language of the legislation lead to the opposite conclusion to that contended for by the Crown in that they point strongly to the conclusion that the deduction of double taxation relief is intended to precede the set-off of advance corporation tax.

CASE

Stated under the Taxes Management Act 1970, s 56 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a hearing on 11 and 12 March 1985 before a single Commissioner for the Special Purposes of the Income Tax Acts, Mining & Industrial Holdings Ltd. (hereinafter called "MIH") appealed against a decision on a claim for relief from corporation tax by way of credit for foreign tax pursuant to s 497(1) Income and Corporation Taxes Act 1970 in respect of its accounting period ended 30 June 1980. A

2. The questions for decision by me, the issues which emerged during the hearing, my findings of fact, the respective contentions of Mr. A.E.W. Park Q.C. on behalf of MIH and Mr. R.J. Alderman on behalf of the Appellant and my conclusions are set out in my decision, which was issued on 11 April 1985 and a copy of which is annexed as part of this Case. B C

3. No witnesses gave evidence before me.

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

1. Report of the Directors of MIH for the year ended 30 June 1980 D

2. Agreed Statement of Facts

3. Computation in accordance with MIH's submission(1)

4. Computation in accordance with the Appellant's submission.(2) E

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

5. The cases cited to me are referred to in my decision. F

6. Immediately after the determination of the appeal dissatisfaction therewith as being erroneous in point of law was expressed on behalf of the Appellant and on 30 April 1985 I was required to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56 which Case I have stated and do sign accordingly. G

7. The question of law for the opinion of the Court is whether, upon the agreed facts as found, my decisions that:—

(a) s 100(6) of the Finance Act 1972 has no application in the circumstances of this appeal; and H

(b) credit for double taxation relief should be allowed before set-off is given for advance corporation tax paid in computing the corporation tax liability of MIH in the accounting period in question;

were erroneous in point of law. I

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(1) Page 482 *post*. (2) Page 483 *post*.

A

T.H.K. Everett } Commissioner for the Special Purposes of the Income Tax Acts

Turnstile House
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8 July 1985

C

DECISION

Mining & Industrial Holdings Ltd. ("MIH") has been resident in the United Kingdom for tax purposes at all material times. In its accounting period ended 30 June 1980 MIH was in receipt of certain dividends paid by overseas companies. MIH has claimed relief, pursuant to s 497(1) Income
D and Corporation Taxes Act 1970 ("ICTA"), from double taxation, by way of credit for foreign withholding tax and foreign underlying tax, against the United Kingdom corporation tax chargeable in respect of those dividends. Such claim to relief was allowed in part and rejected in part by a letter from H.M. Inspector of Taxes dated 15 November 1983. MIH now appeals against the Inspector's refusal to allow in full its claim to relief.

E

Having paid dividends in the relevant accounting period, MIH has paid advance corporation tax by reference to the distribution which it has made.

In considering the claim of MIH to relief two questions arise for my decision in relation to the computation of MIH's liability to corporation tax
F for the relevant accounting period:—

1. Should double taxation relief be allowed as a credit pursuant to s 501 ICTA, before allowing set-off of advance corporation tax, pursuant to s 85(1) Finance Act 1972 ("FA 72")?

2. What is the effect of s 100(6) FA 72 in its original form: does
G MIH have a discretion in accordance with s 100(6) (a) FA 72, whether or not to make an allocation of the advance corporation tax which it has paid?

The facts are not in issue in this case. They are the subject of an agreed statement. The appendices to that statement are attached to this decision as
H Annexes 1 and 2[1].

The relevant facts are as follows:—

1. During the accounting period ended 30 June 1980 ("the accounting period") MIH carried on the business of a mining finance house, i.e. it made
I and realised investments in companies which were carrying on a mining business or which were otherwise engaged in the energy industry. Its income from investments and profits on the realisation of investments were taxable under Case I of Sch D in line with the taxation treatment accorded to MIH by H.M. Inspector of Taxes for many years. For the sake of completeness I

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[1] Pages 458/459 *post*.

record that the directors' report contained in the accounts of MIH for 1980 stated that the company's principal activity at that time was that of an investment company. It is agreed that nothing turns on this apparent discrepancy.

MIH is and was during the accounting period a wholly owned subsidiary of Consolidated Gold Fields PLC ("CGF"). Since 30 June 1980 MIH has ceased to trade, but that fact has not affected its corporation tax position for the accounting period.

2. The taxable profits of MIH for the accounting period consisted of the following components:

(a) items of income not subject to double taxation, comprising profits on the realisation of investments, interest, balancing charges and other miscellaneous items;

(b) non-control dividends, i.e. dividends from foreign companies in which MIH (together with other members of the CGF group) controlled less than 10 per cent. of the voting power;

(c) control dividends, i.e. dividends from foreign companies in which MIH (together with other members of the CGF group) controlled not less than 10 per cent. of the voting power.

3. MIH made a formal claim for double taxation relief for the accounting period by a letter dated 11 November 1983 addressed to H.M. Inspector of Taxes, but MIH has not exercised the power conferred by s 100(6) (a) FA 72 (as originally enacted) to allocate advance corporation tax in accordance with the provisions of that section.

4. The basic figures for the accounting period were as follows:

(a) income not subject to double taxation: £1,635,817

(b) non-control dividends: £221,452.06. The foreign tax attributable to such dividends was £32,709.76. Details of the sources and amounts of foreign taxes attributable to individual non-control dividends are contained in Annex 1 to this decision(1).

(c) Control dividends: £2,145,221.74. This figure is obtained after grossing up each dividend for its foreign underlying tax, as required by s 503(2)(b) ICTA, at the rate of foreign tax borne in respect of each dividend. The sum of the maximum reliefs attributable to each control dividend is £1,004,036.86. That figure is obtained by applying the restriction to an effective rate of tax of 52 per cent., as required by s 505 ICTA. Details of the sources and amounts of foreign taxes attributable to individual control dividends are contained in Annex 2 to this decision(2).

(d) Interest charges of £553,412 were paid by MIH. Such payment related to three advances made by CGF to MIH for the purposes of its business.

(e) Advance corporation tax of £983,262 was paid by reference to a dividend or dividends of £2,294,278 paid by MIH in the accounting

(1) Page 458 *post*. (2) Page 459 *post*.

A period. The total distribution by MIH in the accounting period was £2,335,000.

I was advised during the course of the hearing that although the appeal was not a test case, my decision would have a bearing on similar appeals which were pending in relation to the affairs of CGF and other companies in
B the CGF group.

Although MIH had received dividends during the accounting year from companies resident in Australia, the United States of America, Canada, The Netherlands and South Africa, it was common ground that the relevant parts of the double taxation treaties operating between the United Kingdom and
C each of those countries were similar in content. Accordingly I was referred only to Article 19(1) of the double taxation agreement dated 7 December 1967 made between the United Kingdom and Australia, which is scheduled to the Double Taxation Relief (Taxes on Income) (Australia) Order 1968, (SI 1968 No. 305). Article 19(1) provides:

D "

Article 19

(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof)—

E

(a) Australian tax payable under the laws of Australia and in accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from sources within Australia (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid), shall be allowed as a credit
F against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Australian tax is computed; and

(b) in the case of a dividend paid by a company which is a resident of Australia and is not resident in the United Kingdom to a
G company which is resident in the United Kingdom and which controls directly or indirectly at least 10 per cent. of the voting power in the first-mentioned company, the credit shall take into account (in addition to any Australian tax creditable under (a)) the Australian tax payable by the company in respect of the profits out of which such dividend is paid."

H

Mr. A.E.W. Park Q.C. made the following submissions on behalf of MIH:

1. Which is the correct order of set-off?

Both the language and the scheme of the relevant statutory provisions
I make it perfectly clear that the double taxation credit should be taken before the advance corporation tax set-off.

(i) The language of the statutes. The vital section in relation to the double taxation credit is s 501(1) ICTA. It provides that the amount of United Kingdom taxes chargeable shall be reduced by the amount of the credit. In relation to advance corporation tax, s 85(1) FA 72 provides that advance corporation tax shall be set against a company's liability to

corporation tax and such set-off discharges its liability. Accordingly for the purposes of s 85(1) FA 72 the starting point is that the company's liability to corporation tax is known. Such liability can only be known after the operation of s 501(1) ICTA. The discharging process contemplated in s 85(1) FA 72 can occur only when the amount of tax chargeable has been ascertained. It should be noted that s 85(1) FA 72 provides for the discharge of corporation tax liability and not for a reduction of such liability. It follows therefore that the double taxation credit must be taken first and before the advance corporation tax set-off.

(ii) The scheme of the statutes. Control dividends include foreign underlying tax (and foreign withholding tax). The process of grossing up the dividend and crediting the underlying tax against corporation tax on the grossed up income is a totally integrated one: the grossing up and crediting must follow one after the other. The Inland Revenue's view that advance corporation tax should be set-off before allowing double taxation relief distorts the logic of the system.

2. What is the effect of s 100(6) FA 72?

The combined effect of s 505 ICTA and s 100(4) FA 72 is to limit the maximum double taxation relief obtainable by MIH to 52 per cent. The Crown contends for a further limitation.

MIH has made no allocation pursuant to s 100(6) FA 72 and accordingly that section has no application to the instant case. Section 100(6) (a) contains a power exercisable in this case by MIH and no-one else. The provisions of s 100(6)(b) FA 72 can operate only when an allocation is made pursuant to para (a). Paragraph (b) contains the words "(if any)" and can refer only to that advance corporation tax as is *so* allocated, pursuant to the provisions of para (a). As no allocation has been made by MIH, s 100(6) FA 72 has no application.

3. A heavy tax charge has been suffered by MIH, giving an effective rate of 59.92 per cent. If the Crown is correct in its contentions, the effective rate of tax would rise to 67.29 per cent. as compared with the United Kingdom rate of corporation tax for the accounting period of 52 per cent.

4. The claim of MIH should be allowed in full.

Mr. R.J. Alderman of the Inland Revenue Solicitor's Office made the following submissions on behalf of the Revenue:

1. MIH says that double taxation relief should be allowed before advance corporation tax set-off in view of the language and the scheme of the statutory provisions but that approach is wrong. Section 85(1) FA 72 makes reference to the income of a company charged to corporation tax. Such income is defined in s 85(6) FA 72 in terms of the profits of the company. By s 110(4) FA 72 profits are defined as those profits which remain after making all deductions and giving all reliefs. Having made that calculation, capital gains and development gains are excluded and the resultant figure is the income of the company chargeable to corporation tax. Accordingly double taxation relief must be shown to be a deduction against profits or a relief reducing profits. Section 501 ICTA does not have that effect as it provides for a credit to be given against tax. It will be seen therefore that both

A the language and the scheme of the statutes show that advance corporation tax must be taken into account before double taxation relief is allowed.

2. Section 100(6) FA 72 was introduced to deal with advance corporation tax. Companies were given a limited discretion as to the way in which advance corporation tax might be attributed to certain items of income. The B inclusion of the words "(if any)" in para (b) is to take account of the fact that an allocation by a company may exhaust its advance corporation tax, leaving some income to which advance corporation tax has not been allocated.

If a company has complete discretion it will never take advantage of C s 100(6) and the section would be superfluous. The use of the word "may" in para (a) of s 100(6) FA 72 does not operate to give the company a complete discretion. The use of permissive words may impose a duty: *Julius* v. *Bishop of Oxford* (1880) 5 App Cas 214 at pp 222/3 and *Peterborough Corporation* v. *Holdich* [1956] 1 QB 124 at pp 129, 130 and 131. Accordingly the discretion in s 100(6) is as to the manner of allocation by the company and not as to D whether or not allocation should take place. If no allocation is made by the company, H.M. Inspector of Taxes is entitled to allocate either in the way most beneficial to the company or in equal proportions.

3. The claim of MIH to relief over and above that allowed by H.M. Inspector of Taxes should be refused. E

Conclusions

I am asked to decide two questions and it will be convenient to deal first with the second question, relating to the applicability to this appeal of s 100(6) FA 72. This provides:

F "(6) Where in accordance with section 85 above any advance corporation tax falls to be set against the company's liability to corporation tax on its income for the relevant accounting period—

(a) the company may for the purposes of this section allocate that advance corporation tax in such amounts and to the corporation tax attributable to such of its income for that period as it thinks G fit; and

(b) the amount of corporation tax attributable to the relevant income as determined in accordance with subsections (4) and (5) above shall be reduced by so much (if any) of that advance corporation tax as is allocated to the corporation tax attributable to that H income;

but the amount of advance corporation tax allocated under this subsection to the corporation tax attributable to any income shall not exceed the advance corporation tax that would have been payable (apart from section 89 above) in respect of a distribution made at the end of the relevant accounting period of an amount which, together with the advance I corporation tax so payable in respect of it, is equal to that income."

Mr. Park concedes that the ground conditions for the operation of s 100(6) FA 72 are laid and it is agreed that s 100(5) FA 72 comes into operation, by virtue of the interest charges of £553,412 paid by MIH to CGF. It is also common ground that no allocation of advance corporation tax has been

made by MIH pursuant to s 100(6) (a) FA 72. Mr. Park says that MIH had power to make such allocation but declined to do so. He freely admits that under the legislation in force until the passing of the Finance Act 1984 (which amended s 100 FA 72) neither MIH nor CGF would make any allocation such as is envisaged by s 100(6) (a) FA 72 as it would not be in their interests to do so. He contends however that para (a) of the subsection confers only a power on MIH and that it is free to decide whether or not to exercise such power. "May" means "may" and not "shall". In support of this contention he points to the inclusion of the words "(if any)" in para (b) of the subsection contending that they envisage the possibility that no allocation would be made. He contends further that the latter part of para (b) of the subsection should be read "... shall be reduced by so much (if any) of that advance corporation tax as is *so* allocated to the corporation tax attributable to that income;"

The Revenue contend that para (a) of the subsection confers only a limited discretion on MIH as to the manner of allocation and not as to whether or not to allocate. They place reliance upon a dictum of the Lord Chancellor in *Julius* v. *Bishop of Oxford* and the decision in *Peterborough Corporation* v. *Holdich.*

In the case of *Julius* v. *Bishop of Oxford* the words to be construed were "it shall be lawful" which Mr. Alderman equates with the word "may" in s 100(6) (a) FA 72. It is clear from the speeches of the House of Lords that their Lordships regarded the words in question as permissive only, creating a power which the donee was free to exercise or leave unused as he saw fit. The Lord Chancellor made the position plain at p 223:

> "And the words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

In the event the application for mandamus failed.

The case of *Peterborough Corporation* v. *Holdich* concerns an order made by a Magistrates' Court and subject to control on appeal. It is clear that in deciding whether or not to allocate, pursuant to s 100(6) (a) FA 72, MIH did not exercise any judicial function.

I reject the Revenue's interpretation of s 100(6) FA 72. If I were to accept the Revenue's submission I would need to accept also its contention that, in the absence of any allocation by MIH, the Inspector may undertake the allocation. There is no authority permitting such an allocation by the Revenue nor any provision as to how it should be done.

Accordingly I hold that in the circumstances of this appeal s 100(6) FA 72 has no application.

Turning to the other question which I am asked to decide, as to whether the double taxation credit should be allowed before advance corporation tax set-off, I prefer the arguments of Mr. Park. In dealing with the submissions of the Revenue in his reply he accepted that double taxation relief is not within s 110(4) FA 72. Deductions are to be made as set out in s 110(4), but

pursuant to the provisions of s 85(1) FA 72, one arrives by that route not at the income charged to corporation tax, but at the liability to corporation tax on any income charged to corporation tax. It is against that liability that payments of advance corporation tax are to be set.

Section 85(1) FA 72 provides:

> "85.—(1) Subject to subsection (2) below, advance corporation tax paid by a company (and not repaid) in respect of any distribution made by it in an accounting period shall be set against its liability to corporation tax on any income charged to corporation tax for that accounting period and shall accordingly discharge a corresponding amount of that liability."

The language of s 85(1) FA 72 is to be contrasted with the language of s 501(1) ICTA, which in my judgment, is the vital section dealing with double taxation relief. It states:—

> "501.—(1) Subject to the provisions of this Chapter, where under any arrangements credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income, the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit."

In the latter section it is clear that the amount of the United Kingdom tax chargeable is to be reduced by the amount of the double taxation credit, whereas advance corporation tax is to be set-off, under the provisions of the former section, against the company's liability to corporation tax. Chargeability is to be contrasted with liability and giving the words their natural meaning in their context, chargeability must come before liability in the relevant computation.

It seems to me that both the language and the scheme of the statutory provisions support the contentions advanced on behalf of MIH in this appeal.

I hold that credit for double taxation relief should be allowed before set-off is given for advance corporation tax paid in computing the corporation tax liability of MIH in the accounting period.

The appeal therefore succeeds and I allow MIH's claim to relief in full.

T.H.K. Everett } Commissioner for the Special Purposes of the Income Tax Acts

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11 April 1985

ANNEX 1

NON-CONTROL DIVIDENDS

Company	*Net Dividend*	*Withholding Tax*	*DTA Dividend Article*	*Country of Residence*
	£	£		
Western Mining	4,479.49	790.51	1968 DTA Art. 19(1)	Australia
Conoco	12,723.11	2,245.26	1980 DTA Art. 23(2)	USA
Shell Canada	1,432.31	159.15	1980 DTA Art. 21(2)	Canada
Amax	37,862.53	6,681.62	1980 DTA Art. 23(2)	USA
Bethlehem Steel	3,055.93	539.28	1980 DTA Art. 23(2)	USA
Kaiser Resources	7,713.18	857.02	1980 DTA Art. 21(2)	Canada
National Mine Service	1,433.23	252.93	1980 DTA Art. 23(2)	USA
Newmont Mining	2,560.07	451.78	1980 DTA Art. 23(2)	USA
Inland Steel	12,062.69	2,128.71	1980 DTA Art. 23(2)	USA
Phillips Petroleum	13,745.10	2,425.60	1980 DTA Art. 23(2)	USA
Research–Cottrell	585.80	103.38	1980 DTA Art. 23(2)	USA
St Joe Minerals	25,971.87	4,583.27	1980 DTA Art. 23(2)	USA
Standard Oil of California	17,885.49	3,156.26	1980 DTA Art. 23(2)	USA
Texasgulf	18,321.21	3,233.15	1980 DTA Art. 23(2)	USA
Union Oil of California	25,319.34	4,468.14	1980 DTA Art. 23(2)	USA
Pittston	3,590.95	633.70	1980 DTA Art. 23(2)	USA
	188,742.30	32,709.76		

ANNEX 2

CONTROL DIVIDENDS

I	H	G	F	E	D	C	B	A
Company	Percentage Holding *MIH*	Percentage Holding *CGF group*	*Dividend**	*With-holding Tax*	*Attributable Underlying Tax*	*Gross Amount (s. 505 TA 1970)*	*Gross Amount (s. 503(2)(b) TA 1970)*	*Effective rate of foreign tax***	*Maxi-mum Relief*	*DTR Provision*	*Country of Residence*
Consolidated Gold Fields B.V.	0.70	100.00	204,792.00	30,719.00	238,480.22	404,574.55	443,272.22	60.73%	230,501.55	1980 DTA Art. 22(1)	Netherlands
West Driefontein Gold Mining Co. Ltd.	0.103	19.00	23,348.00	3,502.20	34,867.90	50,118.07	58,215.90	65.91%	30,272.27	1969 DTA Art. 22(1)	South Africa
North Broken Hill Holdings Ltd.	9.30	10.00	536,273.87	80,441.08	389,839.05	926,112.94	926,112.92	50.78%	470,280.15	1968 DTA Art. 19(1)	Australia
North Broken Hill Holdings Ltd.	9.30	10.00	523,103.30	78,465.49	194,517.40	717,620.70	717,620.70	38.04%	272,982.89	1968 DTA Art. 19(1)	Australia
			1,287,517.10	193,127.77	857,704.57	2,098,426.26	2,145,221.74		1,004,036.86		

*Before deducting withholding tax.
**Withholding tax and underlying tax as a percentage of the gross amount.

The case was heard in the Chancery Division before Walton J. on 13 March 1986 when judgment was reserved. On 14 March 1986 judgment was given against the Crown, with costs.

Steven Oliver Q.C. and *Alan Moses* for the Crown.

Andrew Park Q.C. for the Company.

The following case was cited in argument in addition to the case referred to in the judgment: *Regina* v. *Sampson* ex parte *Lansing Bagnall Ltd.* 61 TC 112; [1986] STC 117.

Walton J.:—This case, although I understand not a test case, may affect other pending cases, which is why I shall deliver a somewhat longer judgment than the merits of the matter really warrant.

What arises in this case is a curious point on the inter-relationship of what at first blush one would think were two entirely disparate matters: first of all, double taxation relief, and, second, advance corporation tax. Double taxation relief arises under the Income and Corporation Taxes Act 1970, Part XVIII, beginning with s 497. Section 497(1) reads:

> "If Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to income tax or corporation tax and any taxes of a similar character imposed by the laws of that territory, and that it is expedient that those arrangements should have effect, then, subject to the provisions of this Part of this Act, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide—(a) for relief from income tax, or from corporation tax in respect of income,"

and I do not think that para (b) or para (c) arise. Subsection (2): "The provisions of Chapter II below shall apply where arrangements which have effect by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the United Kingdom". So the basic idea is very simply that the relief, whatever form it takes, is to be a credit against tax payable in the United Kingdom. It will be observed that s 497(1) refers to "arrangements", and those are in fact defined in s 500(1), which is the first section in Chapter II; and "arrangements" simply means "any arrangements having effect by virtue of section 497".

In the present case there are a number of different countries affected by the taxpayer's claim to double taxation relief, but it has been agreed on all hands that the arrangements with each of the countries concerned are basically the same and therefore I take the only article of the only double taxation agreement to which I have been referred; namely, Article 19(1) of the double taxation agreement dated 7 December 1967, made between the United Kingdom and Australia, which is scheduled to the Double Taxation Relief (Taxes on Income) (Australia) Order 1968 (Statutory Instrument 1968 No. 305). Article 19(1) provides:

A "Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof)—(a) Australian tax payable under the laws of Australia and in accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from B sources within Australia (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid), shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Australian tax is computed; and (b) in the case of a dividend paid by a company which is a resident of Australia and is not resident in C the United Kingdom to a company which is resident in the United Kingdom and which controls directly or indirectly at least 10 per cent. of the voting power in the first-mentioned company, the credit shall take into account (in addition to any Australian tax creditable under (a)) the Australian tax payable by the company in respect of the profits out of which such dividend is paid."

D

So that, as will be seen, provides different rules for different types of income. Both types are in fact in issue in the claim in the present case, the second type being dubbed "control dividends", but for the purposes of this decision the differences, although important in themselves, are I think really immaterial.

E

I now turn to s 501 of the 1970 Act. Subsection (1):

"Subject to the provisions of this Chapter, where under any arrangements credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income"—and now come what really F are the first important words—"the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit". Subsection (2): "Nothing in subsection (1) above authorises the allowance of credit against any United Kingdom tax against which credit is not allowable under the arrangements."

G So subs (1) enforces the basic idea already noted, which is that one will work out the corporation tax in respect of the chargeable income of the taxpayer and then the amount of that corporation tax will be reduced by the amount of the credit, leaving the taxpayer liable to pay only the difference.

Now there are in fact some limits on the amount of double taxation H relief which can be claimed. Section 503(1) provides:

"Where credit for foreign tax falls under any arrangements to be allowed in respect of any income, and income tax or corporation tax is payable by reference to the amount received in the United Kingdom, the amount received shall be treated for the purposes of income tax or corporation tax as increased by the amount of the foreign tax in respect of I the income, including, in the case of a dividend, any underlying tax which, under the arrangements, is to be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend."

So that provides for "grossing up" (if one may use that phrase compendiously) the dividend received from the foreign company for the purpose of

working out what the United Kingdom corporation tax thereon is going to be.

Subsection (2) provides:

> "Where credit for foreign tax falls under any arrangements to be allowed in respect of any income, and subsection (1) above does not apply, then, in computing the amount of the income, for the purposes of income tax or corporation tax—(a) no deduction shall be made for foreign tax, whether in respect of the same or any other income, and (b) the amount of the income shall, in the case of a dividend, be treated as increased by any underlying tax which, under the arrangements, is to be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend". Subsection (3): "The amount of any income shall not be treated as increased under this section by reference to any foreign tax which, although not payable, falls to be taken into account for the purposes of credit by virtue of section 497(3) above."

So there are undoubted limits to, and restrictions upon, the amount which may be recovered.

Section 505 is a very important limitation: "The amount of the credit for foreign tax which, under any arrangements, is to be allowed against corporation tax in respect of any income shall not exceed the corporation tax attributable to that income." In other words, one cannot use double taxation relief to reduce the amount of domestic income upon which one must pay corporation tax.

Then, I think I need only read, so far as underlying tax is concerned, s 506(1):

> "Where, in the case of any dividend, arrangements provide for underlying tax to be taken into account in considering whether any, and if so what, credit is to be allowed against the United Kingdom taxes in respect of the dividend, the tax to be taken into account by virtue of that provision shall be so much of the foreign tax borne on the relevant profits by the body corporate paying the dividend as is properly attributable to the proportion of the relevant profits represented by the dividend."

So there are a considerable number of restrictions and limitations when one works out the amount for which double taxation relief must in the end be given. At the relevant time corporation tax was 52 per cent., and so the limitation in s 505 would be to 52 per cent. of the income on which the double taxation relief was being given.

Pausing at this stage in the legislative history—that is, before the system of advance corporation tax was anything more than a twinkle in the eye of the Chancellor of the Exchequer—the steps to be gone through are fairly clear. You ascertain the income of the company according to the principles set out in the Income and Corporation Taxes Act 1970; you determine the amount of the corporation tax which would be payable on that income at the current rate, which will yield a figure of £X; you deduct from that figure of £X the double taxation relief of £Y, which is subject to all the restrictions in

A working it out that I have already indicated; and the balance is the liability—and the only liability at that stage—upon the company.

Advance corporation tax was introduced by the Finance Act 1972. It is in Part V of that Act, starting at s 84. Section 84(1) reads:

B "Where a company resident in the United Kingdom makes a qualifying distribution after 5th April 1973 it shall be liable to pay an amount of corporation tax (to be known as 'advance corporation tax') in accordance with this section." Subsection (2): "Subject to section 89 below, advance corporation tax shall be payable on an amount equal to the amount or value of the distribution, and shall be so payable at a rate (to C be known as 'the rate of advance corporation tax') which for the period beginning with 6th April 1973 and ending with 31st March 1974 shall be three-sevenths and thereafter such fraction as Parliament may from time to time determine." Subsection (4) defines "qualifying distribution", which for present purposes may simply be taken as an ordinary dividend.

D

Section 85(1) then says: "Subject to subsection (2) below, advance corporation tax paid by a company (and not repaid)"—and again I need not go into the circumstances in which it may be repaid—"in respect of any distribution made by it in an accounting period shall be set against its liability to E corporation tax on any income charged to corporation tax for that accounting period and shall accordingly discharge a corresponding amount of that liability". So already, under the prior code, the liability of the company to pay corporation tax has been reduced by means of double taxation relief, and here we now have a further sum which may be set against the remaining liability to corporation tax. That liability (to repeat it) is the liability for the F balance after deducting double taxation relief; and the advance corporation tax paid by the company is to be set against that liability.

But, again, there is a limitation. Subsection (2) reads: "The amount of advance corporation tax to be set against a company's liability for any accounting period under subsection (1) above shall not exceed the amount of G advance corporation tax that would have been payable (apart from section 89 below)"—and I need not bother about s 89, because that is where the company received what is called franked investment income, which does not concern us in the slightest in this case—"in respect of a distribution made at the end of that period of an amount which, together with the advance corporation tax so payable in respect of it, is equal to the company's income H charged to corporation tax for that period". So once again there is a limit upon the amount which can properly be used. I think I have already stressed the point, but perhaps I ought to stress again, that s 85(1) represents a global operation. The advance corporation tax goes against the total remaining liability for corporation tax.

I

I perhaps ought to notice s 86. Subsection (1) says:

"Where a company resident in the United Kingdom makes a qualifying distribution after 5th April 1973 and the person receiving the distribution is another such company or a person resident in the United Kingdom, not being a company, the recipient of the distribution shall be entitled to a tax credit under this section."

I think Mr. Oliver dearly wanted to submit that that provision had some influence upon the really crucial matter to which I shall be coming very shortly indeed. If so, all I can say is that the relevance of s 86(1) to anything I have to decide escapes me entirely. It is a provision which comes automatically into play whenever a company now pays a dividend and in consequence pays advance corporation tax, but it has no bearing whatsoever so far as I can see upon the company's own liability to pay tax; nor does it mean anything more than that the person receiving the distribution is saved from being put into the very unfortunate and unfair position of having to pay income tax upon the distribution without getting any credit for the tax which undoubtedly will have had to be paid by the company. Therefore, as I say, I do not think that that in any way affects the matter at all.

The conclusion which I have clearly indicated above and which is totally inescapable as a result of the legislation is said by the Revenue not to be a complete view of the matter. They say—and I shall come in a moment to the reasons why they say it—that that is not the order of events at all; that the double taxation relief is only applicable after, and not before, the advance corporation tax has been taken into account, and that the advance corporation tax has to be taken into account in a particular way. The effect of it is that, after this has been done, and applying the various rules I have already noted in relation to the limits on double taxation relief available and on the amount of advance corporation tax available, more tax, to the extent of some £254,137, will be paid. This is simply because the Revenue maintain that the advance corporation tax must be spread rateably across, in this particular case, three forms of income, that is to say domestic income and some income under the first head of the Australian double taxation agreement and some under the second, leaving some domestic income available to be taxed, instead of being applied globally.

I may note that, if the Revenue are right, the result is that, because the company has in fact paid a dividend, it is liable to pay some £254,137 more in tax than if it had not paid a dividend. That is a most curious and surprising result, because even if it had not paid a dividend the company would have had to pay, and would have paid, corporation tax upon its profits, liability being relieved in the way that I have already noted but there being no question of advance corporation tax. Of course, if one is driven to it by the language of the statute, that is a conclusion, then, which one must reach. But if one is not driven to it, or if there were to be (which in fact there is not) the slightest dubiety about it, I do not think there can be any doubt whatsoever but that such a monstrously unjust result should not be reached if there is any reasonable method of construction which would reach a contrary conclusion.

Now how do the Revenue reach their conclusion?—because it is not, as it never is in the case of the Revenue, a merely arbitrary whim of theirs: they think they have a peg upon which they can hang this conclusion. It comes in under s 100 of the Finance Act 1972. The first subsection of that section is immaterial for present purposes but I will read it just to show that it is trying to link the two systems together. It says:

> "The provisions of Chapters I and II of Part XVIII of the Taxes Act"—which relate to double taxation relief—"applicable to corporation tax in respect of income shall apply also to corporation tax in respect of chargeable gains, and for that purpose (a) references in those Chapters

A to income shall be construed as references to chargeable gains; and (b) in sections 497(1) and 498(6) references to taxes of a similar character, or corresponding, to corporation tax shall be construed as references to taxes on chargeable gains; and sections 517 and 518 of that Act (regulations and information) shall have effect accordingly."

B Then, I need not trouble with subs (2). Subsection (3) is the first of the three crucial subsections. It provides:

"For the purposes of section 505 of the Taxes Act"—and then there is an explanation of it which I will read but which I have already noticed—"(which limits the credit for foreign tax allowable against corC poration tax in respect of any income to the corporation tax attributable to that income and, by virtue of subsection (1) above, applies similarly in relation to chargeable gains) the corporation tax attributable to any income or gain ('the relevant income or gain') shall be determined in accordance with subsections (4) to (6) below."

D Subsection (4) says:

"Subject to subsections (5) and (6) below, the amount of corporation tax attributable to the relevant income or gain shall be treated as equal to such proportion of the amount of that income or gain as corresponds to the rate of corporation tax payable by the company (before any credit under the said Part XVIII) on its income or chargeable gains E for the accounting period in which the income arises or the gain accrues ('the relevant accounting period')."

Pausing there, although if it were not there subs (5) would give rise to a difficulty—not, I think, an insurmountable difficulty—subs (4) can stand completely on its own. It does not need in any way reference to subs (6): it is F completely, or could be completely, self standing. Subsection (5) tidies up a point, I think:

"Where in the relevant accounting period there is any deduction to be made for charges on income, expenses of management or other amounts which can be deducted from or set against or treated as reducG ing profits of more than one description—(a) the company may for the purposes of this section allocate the deduction in such amounts and to such of its profits for that period as it thinks fit; and (b) the amount of the relevant income or gain shall be treated for the purposes of subsection (4) above as reduced or, as the case may be, extinguished by so much (if any) of the deduction as is allocated to it."

H That, obviously, is a very useful tidying-up provision which, although it is of course a power in the company—it merely says "the company may"—so far as I can see any company would undoubtedly choose to exercise in almost every circumstance that I can think of.

I Now I come to the subsection which provokes the dispute between the parties. Subsection (6):

"Where in accordance with section 85 above any advance corporation tax falls to be set against the company's liability to corporation tax on its income for the relevant accounting period—(a) the company may for the purposes of this section allocate that advance corporation tax in such amounts and to the corporation tax attributable to such of its

income for that period as it thinks fit; and (b) the amount of corporation tax attributable to the relevant income as determined in accordance with subsections (4) and (5) above shall be reduced by so much (if any) of that advance corporation tax as is allocated to the corporation tax attributable to that income; but the amount of advance corporation tax allocated under this sub-section to the corporation tax attributable to any income shall not exceed the advance corporation tax that would have been payable (apart from section 89 above)"—and that, again, does not concern us—"in respect of a distribution made at the end of the relevant accounting period of an amount which, together with the advance corporation tax so payable in respect of it, is equal to that income."

The point which arises—and it really is only one, and is a very simple point indeed—is this. Although, of course, it is quite clear on the wording that subs (6) confers a power on a company—it uses the words "the company 'may' do something"—is it mandatory in the sense that the company comes under a duty to exercise that power? The Revenue say that that is indeed the situation: the taxpayer says it is not; that it does truly confer a power, but that there is no context of any description which makes it mandatory upon the company in fact to exercise that power. So, the company not having exercised the power, there is no such allocation as is provided for in that subsection, the result being that at the end of the day in accordance with s 85(1) the advance corporation tax is to be put against the totality of the liability of the company to pay corporation tax, which in this instance not only reduces the amount of corporation tax payable to nil but in fact gives the company a certain amount of advance corporation tax in hand which, if it can find a use for it, it can use. On the other hand, applying the mechanics of subs (6) literally—and, indeed, when one comes to work it out there is only one way in which, if it applies, it could in the present case be worked out—the Revenue come up with the figure of additional tax payable of £254,137.

What has happened so far is that the company, Mining & Industrial Holdings Ltd., appealed against a decision on a claim for relief from corporation tax by way of credit for foreign tax pursuant to the provisions I have been looking at in respect of its accounting period dated 30 June 1980. That appeal was heard on 11 and 12 March 1985, before a single Commissioner. There was no question of any witnesses; the facts were all agreed. In fact, both computations are agreed in the sense that the Revenue agree that if the company are right and subs (6) does not apply, there is no further tax to be paid, and the taxpayer agrees that if the Revenue are right the sum of £254,137 remains payable. The learned Special Commissioner decided in favour of the company. Immediately after the determination he was required, in the usual way, to state a Case, and he set out the question of law for the decision of this Court as (a) whether s 100(6) of the Finance Act 1972, has any application in the circumstances of this appeal, and (b) the more general question as to whether one gives credit for double taxation relief before set-off is given for advance corporation tax or, really, vice versa.

The facts are set out very briefly and succinctly in the Stated Case, but I think that in order to make the judgment complete I must refer to them. The company has been resident in the United Kingdom for tax purposes at all material times, and in its accounting period ended 30 June 1980, it was in receipt of certain dividends paid by overseas companies. It claimed relief. Having paid dividends in the relevant accounting period, it has paid advance

A corporation tax by reference to the distribution which it has made. Then the two questions which arise are set out.

The facts are(1):

> "During the accounting period ended 30 June 1980" the company
B "carried on the business of a mining finance house; i.e., it made and realised investments in companies which were carrying on a mining business or which were otherwise engaged in the energy industry. Its income from investments and profits on the realisation of investments were taxable under Case I of Schedule D."

C It was during the accounting period a wholly-owned subsidiary of Consolidated Gold Fields plc. Since 30 June 1980, the company has ceased to trade, but that fact does not affect its corporation tax position for the accounting period. The taxable profits of the company were in the three tranches we have already noted—domestic, foreign dividends and control foreign dividends.
D

The basic figures are as follows. The income not subject to double taxation was £1,635,817. The non-control dividends were £221,452.06, and the foreign tax attributable to such dividends was £32,709.76. The control dividends were £2,145,221.74. The maximum relief attributable to the control dividend is £1,004,036.86. Interest charges of £553,412 were paid by the company relating to advances made to it. Advance corporation tax of £983,262 was paid by reference to a dividend or dividends of £2,294,278 paid by the company in the accounting period. Those are the facts.

The submissions were the submissions which have been repeated to me
F very skilfully by Mr. Park on behalf of the taxpayer. He says that the correct order of set-off is that which I have already indicated and that there is nothing in the general code for advance corporation tax to affect that. So far as s 100(6) of the Finance Act 1972, is concerned, he says that that is purely a power which the company is at liberty to exercise or not to exercise as it thinks fit. It has not exercised it here, and the Revenue are not entitled to do
G what in substance they have done; that is to say, exercise it in the way in which the company, if it had exercised it, would have had to exercise it.

The solicitor for the Crown submitted that the scheme was really the other way round: that the approach was wrong, and that one ought to arrive at a different conclusion as to the order in which one applied the double tax-
H ation relief and the advance corporation tax credit. So far as s 100(6) is concerned, I think the submission actually was that the use of permissive words may impose a duty. That, I think, is quite true; but the duty, of course, is to exercise the power which has been given to one, and I do not think that there is any question but that in suitable circumstances the word "may" contained in s 100(6)(a) may have that effect. The Revenue submit that the company is
I bound to operate that subsection, with the result that their computation is right.

What the learned Special Commissioner said is(2):

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(1) Page 451H/I *ante*. (2) Pages 455E/I–456B *ante*.

"I am asked to decide two questions and it will be convenient to deal first with the second question ... Mr. Park concedes that the ground conditions for the operation of section 100(6) ... are laid and it is agreed that section 100(5) ... comes into operation ... It is also common ground that no allocation of advance corporation tax has been made by" the company "pursuant to section 100(6)(a) ... Mr. Park says that" the company "had power to make such allocation but declined to do so. He freely admits", as he has admitted in front of me, "that under the legislation in force until" subsequent changes "neither the company nor any other member of the Consolidated Gold Fields group would make any allocation such as is envisaged by section 100(6)(a) ... as it would not be in their interests to do so."

But, he said, it gives only a power. Having set out Mr. Park's argument, the learned Special Commissioner simply comes to this conclusion[1]:

"I reject the Revenue's interpretation of s 100(6) ... If I were to accept the Revenue's submission I would need to accept also its contention that, in the absence of any allocation by" the company "the Inspector may undertake the allocation. There is no authority permitting such an allocation by the Revenue nor any provision as to how it should be done. Accordingly I hold that in the circumstances of this appeal s 100(6) ... has no application. Turning to the other question which I am asked to decide, as to whether the double taxation credit should be allowed before advance corporation tax set-off, I prefer the arguments of Mr. Park. In dealing with the submissions of the Revenue in his reply he accepted that double taxation relief is not within s 110(4) ... Deductions are to be made as set out in s 110(4), but pursuant to the provisions of s 85(1) ... one arrives by that route not at the income charged to corporation tax, but at the liability to corporation tax on any income charged to corporation tax. It is against that liability that payments of advance corporation tax are to be set."

Then the Special Commissioner sets out s 85(1) of the Finance Act 1972, and contrasts it with s 501(1), and he says[2]:

"In the latter section it is clear that the amount of the United Kingdom tax chargeable is to be reduced by the amount of the double taxation credit, whereas advance corporation tax is to be set off, under the provisions of the former section, against the company's liability to corporation tax. Chargeability is to be contrasted with liability and giving the words their natural meaning in their context, chargeability must come before liability in the relevant computation. It seems to me that both the language and the scheme of the statutory provisions support the contentions advanced on behalf of" the company.

The appeal therefore succeeded, and he allowed the company's claim for relief in full. Mr. Park says that perhaps the long paragraph which I have read would have been clearer if the Special Commissioner had put, before the word "liability", the words " 'discharge of the' liability", and perhaps it might.

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[1] Pages 456H–457A/B *ante*. [2] Page 457E–F/G *ante*.

Now the first question (and when I say "the first question" it really is in a sense the complete answer to the matter) is: is subs (6) of s 100 a subsection which imposes a duty upon the company to exercise the power thereby conferred? I cannot for the life of me see the slightest reason why it should. It is perfectly true, as Mr. Park has frankly conceded, that he cannot imagine a case at the moment in which it would be to the company's advantage to exercise that power. Let that be granted, and let it be granted that Mr. Park's perception, as so often, in fact embraces every possible, conceivable set of circumstances. It is really astonishing, if it had been intended that the taxpayer should be forced to exercise a power which could benefit only the Revenue and never himself, that the matter would have been cast in the way that it has been cast.

One never knows what dark thoughts stir in the minds of parliamentary draftsmen, especially parliamentary draftsmen drafting Finance Acts, and one therefore does not know and has no clue as to what this was really getting at, but I cannot for the life of me conceive that any draftsman who had an acquaintance with the word "shall"—because in fact he had used it in subs (3) and subs (4)—would not, when drafting subs (6) if it was intended to have the effect for which the Revenue now contend, have used the word "shall" again there, thus providing, "the company 'shall' for the purposes of this section allocate that advance corporation tax in such amounts and to the corporation tax attributable to such of its income for that period as it thinks fit". It would have preserved the flexibility of the company—subject, of course, to para (b), which restricts it; but it would have preserved such flexibility as the subsection in fact confers upon it—while making it perfectly clear that the company had to do it. But it does not: it simply says "may".

The precise scope of the word "may" has over a large number of years been dealt with by a very large number of distinguished judges, and it seems to me that there is no dubiety at all as to what their unanimous conclusions are, voiced by Cotton L.J. as long ago as the 1880s. So long as the English language remains the English language—and, of course, today one must realise that it is under attack, not only from our American cousins but from all kinds of other sources—"may" does not mean "must". The word "may" means "may", and therefore confers a power. But as has been recognised for a very long time—and, indeed, as was dealt with in the case of *Julius* v. *Lord Bishop of Oxford* (1880) 5 App Cas 214—it may be that although a power is conferred the circumstances are such that it is a power which the donee is bound for some reason or other to exercise.

If I may quote from Earl Cairns at page 222 of the report of the case to which I have just referred, he said:

> "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one cou-

pled with a duty such as I have described in a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus." A

I think that Mr. Park was not being wholly fanciful when he said that if the Crown's case really seriously was that this was a power coupled with a duty, the remedy of the Crown ought to have been to go for an order of mandamus or possibly a mandatory injunction, and not merely to take it upon themselves to do something which they have no power themselves whatsoever to do. B

But let us see the conditions which Earl Cairns laid down. He said, "there may be something in the nature of the thing empowered to be done". I cannot think that making an allocation is such a vitally important matter that it has to be done, and as I have already pointed out subs (4) is quite capable of standing on its own feet without any assistance from subs (5) or subs (6). Then, "something in the object for which it is to be done". Here, the only object for which it is to be done is to increase the taxpayer's liability. What the Crown are really contending is that there is a duty upon the taxpayer to take action which will increase its own liability. Well, taxpayers have to learn to cope with a large number of things, but they are not that masochistic. I do not think that any parliamentary draftsman can really be credited with having produced that result, but that is what the Crown have been submitting. Then, "something in the conditions under which it is to be done". There is nothing in particular in the conditions under which it is to be done. Finally, "something in the title of the person or persons for whose benefit the power is to be exercised". What additional is there in the title of the Revenue, being the persons for whose benefit the power is to be exercised? The Revenue are already our unsleeping sleeping partner. C D E

Those are the matters which the Lord Chancellor referred to in that case, and not one of them comes within miles of meeting the circumstances of the present case. The sort of cases in which there is a duty to exercise a power is where the exercise of that power will have some beneficial, or possibly beneficial, result upon a person who could not otherwise achieve that result, and I decline to equate that with the Revenue's thirst for yet more corporation tax. F G

Now if s 100(6) is, as it most clearly is, a section which merely upon its true construction confers a power upon the company, then the company may or may not use it just as it chooses so to do. It has not chosen so to do in the present case, and on that ground the appeal must therefore fail. H

But also it seems to me that Mr. Park's other point is absolutely unanswerable. Section 501 of the Income and Corporation Taxes Act 1970, and s 85(1) of the 1972 Act make abundantly clear in what order the double taxation relief and advance corporation tax are to be brought into account, and I decline to come to the conclusion that the clearly stated provisions of s 85(1) are to be set aside without any reference to their being set aside in this particular case as a result of subs (6) of s 100. Although I must acknowledge that Mr. Oliver did his very best—and, as usual, it is always a valiant best—to submit a contrary argument, it is really virtually unarguable. I

Under those circumstances, it appears to me there can be no question whatsoever but that this appeal of the Inspector of Taxes must be dismissed.

A *Appeal dismissed, with costs.*

The Crown's appeal was heard in the Court of Appeal (Sir Nicolas
B Browne-Wilkinson V.-C., Nourse and Nicholls L.JJ.) on 28 and 29 October and 2 November 1987 when judgment was reserved. On 25 November 1987 judgment was given against the Crown, with costs.

Steven Oliver, Q.C. and *Alan Moses* for the Crown.

C *Andrew Park Q.C.* for the Company.

The following case was cited in argument:—*Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* 12 TC 358; [1921] 2 KB 403.

D

Nicholls L.J.: [delivering the judgment of the Court]—This is the judgment of the court on an appeal which visits an esoteric corner of the tax field. It concerns the inter-action of double taxation relief and advance corporation tax. Sacrificing accuracy for brevity and simplicity, we can identify the general nature of the issue as follows. A United Kingdom company
E receives income from United Kingdom sources and also from foreign sources. In the same accounting period the company pays a dividend. It will be to the fiscal advantage of the company to obtain the maximum amount of double taxation relief available to it in respect of its foreign income, and that will be achieved by setting as much double taxation relief as possible against its foreign income. To that end the company wishes, and claims to be enti-
F tled, to offset double taxation relief against its foreign income chargeable to corporation tax before making any deduction in respect of the advance corporation tax payable, and paid, by it in respect of the dividend paid by it. The contrary contention of the Crown is that if the taxpayer company does not exercise the option given to it by s 100(6) of the Finance Act 1972, the advance corporation tax paid by the company falls to be deducted pro rata
G from the corporation tax payable in respect of the company's various sources of income before any allowance is given in respect of double taxation relief. In the present case the difference between these two rival approaches is a sum of the order of £254,137. On the Crown's contention corporation tax of that amount is payable by the taxpayer company, Mining & Industrial Holdings Ltd., in respect of its accounting period ending 30 June 1980. On
H the taxpayer company's construction of the legislation no corporation tax is payable by it in respect of that period. The Special Commissioner held in favour of the taxpayer. On 14 March 1986 Walton J. dismissed an appeal by the Crown. The Crown has now further appealed to this court.

The legislation

I It will be convenient to refer to the legislation first. Under ss 238 and 243 of the Income and Corporation Taxes Act 1970 corporation tax is charged on profits of companies, and (subject to exceptions) a company is chargeable to corporation tax on all its profits wherever arising. Profits include income. Part XVIII of the Taxes Act concerns double taxation relief. Chapter I, comprising ss 497 to 499, introduces the principal reliefs. So far as material to the present appeal, s 497(1) provides that arrangements made

with the government of any other country with a view to affording relief from double taxation in relation to corporation tax shall, if an appropriate Order in Council is made, have effect in relation to corporation tax insofar as they provide for relief from corporation tax in respect of income. Section 497(2) provides that in such cases the provisions in Chapter II shall apply. Chapter II extends from ss 500 to 512 and contains the rules governing the giving of the relief. Section 501(1) sets out the manner in which double taxation relief is given. It provides:

> "Subject to the provisions of this Chapter, where under any arrangements credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income, the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit."

"United Kingdom taxes" in this section, and throughout Chapter II, includes corporation tax.

Section 503 takes this calculation one step further. Section 501(1) provides for the amount of the United Kingdom taxes chargeable in respect of "any income" to be reduced by the amount of the credit to be allowed under the double taxation arrangement in question. Section 503 provides how the amount of that income is to be calculated for this purpose. Omitting immaterial words, the relevant subsection (subs (2)) provides:

> "Where credit for foreign tax falls under any arrangements to be allowed in respect of any income ... then, in computing the amount of the income for the purposes of income tax or corporation tax—(a) no deduction shall be made for foreign tax, whether in respect of the same or any other income, and (b) the amount of the income shall, in the case of a dividend, be treated as increased by any underlying tax which, under the arrangements, is to be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend."

Thus under this subsection a "grossing up" exercise has to be undertaken. "Foreign tax" means tax chargeable under the laws of the territory for which credit is allowable under the double taxation arrangements. "Underlying tax" means, in relation to a dividend, tax not chargeable in respect thereof directly or by deduction.

Section 505 is of prime importance on this appeal. This section sets a limit, a ceiling, on the amount of the credit for foreign tax which, under any double taxation arrangements, is to be allowed against corporation tax, in these terms:

> "The amount of the credit for foreign tax which, under any arrangements, is to be allowed against corporation tax in respect of any income shall not exceed the corporation tax attributable to that income."

In thus limiting the amount of credit for foreign tax allowed against corporation tax in respect of "any income" (viz., any particular item of income) to the corporation tax which is attributable to that income, s 505 requires one to look at the income of the company item by item (for example, at each particular dividend received by the taxpayer company from a foreign company).

A We need not refer to any other section in Chapter II of Part XVIII but, before turning to the provisions of the other statute relevant on this appeal, the Finance Act 1972, we should mention briefly the material provision of the double taxation agreements. In the present case there are several countries affected by the taxpayer company's claim to double taxation relief, but it was common ground that the arrangement made with each of the countries B is substantially the same. Hence it is sufficient to mention only one Article, Article 19(1) of the double taxation agreement dated 7 December 1967, made between the United Kingdom and Australia which is scheduled to the Double Taxation Relief (Taxes on Income) (Australia) Order 1968 (S.I. 1968 No.305). Article 19(1) provides:

C "(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof)—

(a) Australian tax payable under the laws of Australia and in D accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from sources within Australia (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid), shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Australian tax is E computed; and

(b) in the case of a dividend paid by a company which is a resident of Australia and is not resident in the United Kingdom to a company which is resident in the United Kingdom and which controls directly or indirectly at least 10 percent of the voting power in the first-mentioned F company, the credit shall take into account (in addition to any Australian tax creditable under (a)) the Australian tax payable by the company in respect of the profits out of which such dividend is paid."

Thus, in respect of dividends paid by an Australian company to a United Kingdom company the relief available in respect of Australian taxes G is more extensive where the United Kingdom company has the specific degree of control over the Australian company (para (b)) than where it does not (para (a)). Dividends falling within para (b) have conveniently been referred to in these proceedings as "control dividends" and those which fall within para (a) but not within para (b) as "non-control dividends". Nothing turns on the distinction in this case, but both types of dividend were received H by the taxpayer company in the present case and the agreed figures embrace this distinction.

Advance corporation tax was introduced by Part V (ss 84 to 111) of the Finance Act 1972. Shorn of qualifications immaterial for present purposes, the effect of s 84(1) is to provide that where a company resident in the United I Kingdom pays a dividend ("makes a qualifying distribution") it shall be "liable to pay an amount of corporation tax (to be known as 'advance corporation tax')." Under subs (2) advance corporation tax is payable on the amount of the dividend at a rate to be known as 'the rate of advance corporation tax'. This was fixed as 3/7ths for the period from 6 April 1973 to 31 March 1974 and thereafter was to be such fraction as Parliament might determine.

Advance corporation tax has fiscal consequences for recipients of the dividend. Under s 86 recipients of such a dividend resident in the United Kingdom are entitled to a tax credit, which is available for specified purposes, in the familiar way. Advance corporation tax also has fiscal consequences for the company which has distributed the dividend and paid the advance corporation tax, and it is the latter consequences that are material in the present case. Section 85(1) provides:

> "(1) Subject to subsection (2) below, advance corporation tax paid by a company (and not repaid) in respect of any distribution made by it in an accounting period shall be set against its liability to corporation tax on any income charged to corporation tax for that accounting period and shall accordingly discharge a corresponding amount of that liability."

Of course, a company may pay a large dividend and, hence a substantial amount of advance corporation tax, even though it has little (or, indeed, no) income charged to corporation tax in the particular accounting period. With this type of situation in view, s 85(2) fixes a self-explanatory ceiling on the amount of advance corporation tax which may be set against a company's liability to corporation tax:

> "(2) The amount of advance corporation tax to be set against a company's liability for any accounting period under sub-section (1) above shall not exceed the amount of advance corporation tax that would have been payable ... in respect of a distribution made at the end of that period of an amount which, together with the advance corporation tax as payable in respect of it, is equal to the company's income charged to corporation tax for that period."

The rigour of this provision is softened by provisions in s 85(3) and (4), which we need not further mention, enabling surplus advance corporation tax to be carried backwards (to a limited extent) to earlier accounting periods or forward to later accounting periods. Surplus advance corporation tax may also be surrendered to a subsidiary company in certain circumstances (s 92).

Section 100 of the 1972 Act is concerned with double taxation relief. Section 100(1) extends the double taxation relief provisions in Chapters I and II of Part XVIII of the Taxes Act applicable to corporation tax in respect of income to corporation tax in respect of chargeable gains. Subsections (3) to (6) of s 100 are the crucial provisions on this appeal. (I omit some immaterial words):

> "(3) For the purposes of section 505 of the Taxes Act (which limits the credit for foreign tax allowable against corporation tax in respect of any income to the corporation tax attributable to that income and, by virtue of sub-section (1) above, applies similarly in relation to chargeable gains) the corporation tax attributable to any income or gain ('the relevant income or gain') shall be determined in accordance with subsections (4) to (6) below.
>
> (4) Subject to subsections (5) and (6) below, the amount of corporation tax attributable to the relevant income or gain shall be treated as equal to such proportion of the amount of that income or gain as corresponds to the rate of corporation tax payable by the company (before any credit under the said Part XVIII) on its income or chargeable gains

for the accounting period in which the income arises or the gain accrues ('the relevant accounting period').

(5) Where in the relevant accounting period there is any deduction to be made for charges on income, expenses of management or other amounts which can be deducted from or set against or treated as reducing profits of more than one description—(a) the company may for the purposes of this section allocate the deduction in such amounts and to such of its profits for that period as it thinks fit: and (b) the amount of the relevant income or gain shall be treated for the purposes of sub-section (4) above as reduced or, as the case may be, extinguished by so much (if any) of the deduction as is allocated to it.

(6) Where in accordance with section 85 above any advance corporation tax falls to be set against the company's liability to corporation tax on its income for the relevant accounting period—(a) the company may for the purposes of this section allocate that advance corporation tax in such amounts and to the corporation tax attributable to such of its income for that period as it thinks fit; and (b) the amount of corporation tax attributable to the relevant income as determined in accordance with subsections (4) and (5) above shall be reduced by so much (if any) of that advance corporation tax as is allocated to the corporation tax attributable to that income; but the amount of advance corporation tax allocated under this subsection to the corporation tax attributable to any income shall not exceed the advance corporation tax that would have been payable ... in respect of a distribution made at the end of the relevant accounting period of an amount which, together with the advance corporation tax so payable in respect of it, is equal to that income."

We shall refer to the concluding words in subs (6), from "but the amount of advance corporation tax allocated under this subsection" onwards, as "the closing words of s 100(6)". Section 100 has subsequently been amended, but on this appeal we are concerned with the section in its original, unamended form.

On its face the language of s 100(3)–(6) is clear enough and gives rise to no apparent difficulty. Section 100(3) introduces three subsections in accordance with which the s 505 ceiling is to be determined. Section 100(4) provides, in short, that the ceiling, namely, the amount of corporation tax attributable to "the relevant income", shall be treated as equal to the proportion of that income corresponding to the rate of corporation tax payable by the company on its income for the relevant accounting period. Whether this subsection brought about a change in the law from the existing position under s 505 is not of moment in the present case. This general provision is subject, expressly, to subss (5) and (6). Each of those two subsections confers a power on the company. As already noted, s 505 sets a ceiling, on the credit allowable for foreign tax, in relation to each item of a company's income. There are certain types of charges or expenses and other items which may be deducted from or set against profits of more than one description: for example, charges on income, such as interest (s 248 of the Taxes Act). Section 100(5)(a) empowers the company to allocate such deductions to such of its profits for the period, and in such amounts, as it thinks fit, and s 100(5)(b) spells out the consequence of such an allocation. That is the first exception from the general rule enunciated in s 100(4). The second exception concerns advance corporation tax. Section 85 envisages a simple set off of advance

corporation tax against the company's overall liability to corporation tax on income. It makes no provision for this set off being allocated to the corporation tax attributable to any particular item or items of income. Section 100(6)(a) empowers the company to make such an allocation, and s 100(6)(b) spells out the consequence of such an allocation. The closing words of s 100(6) then set a limit on the amount of advance corporation tax which may be allocated "under this subsection". Thus, unambiguously, the ambit of the closing words of s 100(6) is confined to limiting what may be done by way of allocation by a company when exercising the power conferred on it by that subsection.

The facts

The taxpayer company, a wholly-owned subsidiary of Consolidated Gold Fields plc., carried on the business of a mining finance house. As such it made and realised investments in companies carrying on a mining business or otherwise engaged in the energy business. Its income from investments and profits on the realisation of investments were taxable under Case I of Sch D. The rate of corporation tax payable by the taxpayer company on all its profits for the relevant accounting period (ending 30 June 1980) was 52 per cent.

The taxpayer company's taxable profits for the period consisted of the following. First, items of income which were not taxed doubly, comprising profits on realisation of investments, interest, and other items, totalling £1,635,817. Second, non-control dividends from foreign companies, totalling (as grossed up under s 503(2)) £221,452. The foreign tax attributable to those dividends was £32,710. Third, control dividends from foreign companies, totalling £2,145,222. The foreign tax, including underlying tax, attributable to those dividends was £1,050,832, but the amount allowable as a credit against corporation tax was restricted by s 505 to £1,004,037.

Interest charges of £553,412 were paid by the taxpayer company in the period. The taxpayer company allocated the whole of this sum to the non-doubly taxed income pursuant to s 100(5). In the period the taxpayer company also paid advance corporation tax of £983,262 by reference to dividends totalling £2,294,278 paid by the taxpayer company in the period. The company made no allocation of any of this tax under s 100(6).

The taxpayer company's computation

The taxpayer company's computation is this. Corporation tax at the rate of 52 per cent. on the grossed up amount of the non-control dividends is £115,155. Deducting from this tax liability the amount of the credit allowable for foreign taxes paid on those dividends, £32,710, leaves a corporation tax liability under this head of £82,445. Likewise with the control dividends. Deducting from the corporation tax (£1,115,515) payable on those dividends the amount of the credit allowable for foreign tax attributable to those dividends (£1,004,037) leaves a corporation tax liability under this head of £111,478. Corporation tax on the non-doubly taxed profits of £1,635,817, after deducting the allocated charges of £553,412, amounts to £562,850. The total corporation tax liability under these three heads is £756,773. Against this sum is to be set a like amount of advance corporation tax paid by the taxpayer company (being, in fact, considerably less than the amount of advance corporation tax paid in the period). Setting this sum of advance corporation tax against the company's corporation tax liability is within the

limit prescribed by s 85(2). Thus no corporation tax is payable. The computation is set out, in tabular form, as Appendix 1 at the end of this judgment(1).

The Crown's computation

The essential difference in the Crown's computation is that the set off for advance corporation tax is made before deducting double taxation relief. On this footing, if the taxpayer company had made an allocation of advance corporation tax pursuant to s 100(6) in the manner most favourable to itself, viz., by allocating advance corporation tax primarily, up to the maximum permitted by the closing words of s 100(6), to the non-doubly taxed income, the figures would be as follows. The corporation tax liability of £562,850 on the non-doubly taxed income would be reduced, by the set off of advance corporation tax of £324,722, to £238,128. The corporation tax liability on the non-control dividends would be reduced by set off of advance corporation tax of £66,436, being the limit permissible under the closing words of s 100(6), to £48,719. The balance of advance corporation tax (£592,104) would be deducted from the corporation tax liability on the control dividends, reducing that liability to £523,411. Double taxation relief would then be deducted, reducing the liability for corporation tax on the control dividends to nil, and on the non-control dividends to £16,009. To this latter sum would be added the unrelieved corporation tax liability of £238,128 on the non-doubly taxed income, leaving the taxpayer company with an ultimate liability for corporation tax in the sum of £254,137. That is the sum claimed by the Crown in these proceedings. The computation is set out in Appendix 2(2).

That computation assumes that the taxpayer company made an allocation of advance corporation tax under s 100(6) in the way most favourable to it. In the present case the taxpayer company made no allocation under that subsection. In this court the Crown's argument, which was not presented in quite the same form before the Judge or the Special Commissioner, was that if the company did not make an allocation under s 100(6), the advance corporation tax fell to be allocated to the corporation tax, attributable to the various classes of income, pro rata to "the relevant income" as defined in s 100(3) after making any adjustments permitted by s 100(5), but subject always to the limit prescribed by the closing words of s 100(6). If such a pro rata allocation were made in this case the taxpayer company's ultimate liability to corporation tax would be roughly £20,000 higher than the sum of £254,137 already mentioned. The Crown, however, does not seek payment in this case of more than the sum which would be due if the taxpayer company had made an allocation under s 100(6) in the manner most favourable to it, so we need not elaborate further on the detailed figures thrown up by the Crown's revised computation, based on a pro rata allocation.

The Crown's case

The Crown's case on this appeal fails unless, on the true construction of s 100(6), a pro rata allocation of advance corporation tax as described in the preceding paragraph is to be implied in the absence of any allocation duly made by the company under that subsection. This was accepted by counsel for the Crown in the course of argument, in our view rightly so. If such an implication cannot be spelled out of s 100(6), read in its context, it cannot be spelled out of s 100(4) or any other section.

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(1) Page 482 *post.* (2) Page 483 *post.*

In support of its contention on the construction of s 100(6) the Crown relied principally on two points. First, if the implication contended for by the Crown is not made, s 100(6) is superfluous because there will be no circumstances in which it will be to a company's fiscal advantage to make an allocation under s 100(6). At best such an allocation would leave the s 505 ceiling in respect of any relevant, foreign income, unaffected and, in all other circumstances, it would lower that ceiling, thereby reducing the amount of allowable double taxation relief. Further, if an allocation were made under s 100(6) the company would bring into play the ceiling prescribed by the closing words of s 100(6). Although Mr. Park, for the taxpayer company, marshalled all his immense experience in an attempt to reduce the force of this argument, he failed to satisfy us of the purpose which, on the taxpayer company's construction of s 100(6), Parliament can be supposed to have had in mind when enacting this subsection.

This is a powerful argument. The court will lean against the construction of a statute which would give no significant scope for the operation of a whole subsection such as s 100(6). However, in this case the force of that argument is weakened by the consideration that, as it seems to us, on either of the rival constructions something must have gone awry in the drafting of s 100(6). Section 100(6) confers a power on a taxpayer. In drafting such a subsection the draftsman must be supposed to have directed his mind at what the position would be under the legislation if the taxpayer chose not to exercise the power. However, the terms of this legislation strongly suggest that he cannot have done so. The legislation contains no express provision regarding the allocation of advance corporation tax for the purposes of s 505 if the taxpayer makes no allocation under s 100(6). Had the draftsman understood, and had Parliament intended, that in such a case there was to be a pro rata allocation, as contended by the Crown, surely express provision would have been made to that effect. We find it inconceivable that such a result can have been intentionally left to be implied in a taxing statute. But, on the other hand, on the alternative construction of the subsection contended for by the taxpayer company, the subsection has little or no purpose.

The Crown's second main point was that, on the taxpayer company's construction, a company is at liberty to opt out of the restriction contained in the closing words of s 100(6). Those words were intended to ensure that a double taxation relief claim did not result in an excessive set off of advance corporation tax against corporation tax. Thus in the present case the taxpayer company's non-doubly taxed income ought, in accordance with the principle to be deduced from s 85(2), at least to bear "residual mainstream corporation tax" (corporation tax at 52 per cent., minus advance corporation tax). That principle is carried through to cases involving double taxation relief by the closing words of s 100(6). But on the taxpayer company's argument, the United Kingdom source of income of the taxpayer company escapes altogether from corporation tax.

This point also has force. It is implicit in s 100(6) that by an exercise of the power of allocation in a suitable case a taxpayer company will be able to improve its tax position. But the allocation permissible is confined within the limit set by the closing words of s 100(6). It is very odd if by not exercising this power a taxpayer can obtain a greater benefit by way of set off of advance corporation tax than that permitted by the exercise of what is intended to be a *relieving* power.

We should mention a further point arising out of a submission made by the taxpayer company on the language and structure of Part XVIII of the Taxes Act and Part V of the 1972 Act. Section 501(1) of the Taxes Act provides for the amount of the foreign tax credit to operate as a reduction in the amount of corporation tax "chargeable". In contrast, s 85(1) of the 1972 Act assumes that the amount of corporation tax chargeable has been ascertained and provides for advance corporation tax to be set against the company's "liability" to corporation tax and accordingly to "discharge" a corresponding amount of that liability. As to the general structure, it was submitted that calculation of the amount of the credit for foreign tax should take place immediately after the grossing up which is made under s 503 for the purpose of calculating that amount, without there being slotted in the middle a deduction in respect of advance corporation tax.

The taxpayer company relied on these matters in support of a submission that, disregarding s 100(6), the language and structure of the legislation show that in making the necessary tax computations the reduction of double taxation relief precedes the advance corporation tax set off. We need not pursue this particular point, in the light of the acceptance by the Crown that it must fail on this appeal unless it succeeds in its argument on the implication implicit in s 100(6). But, in our view, in the scheme of the Act there is a point telling against the taxpayer company on the crucial question of construction. The exercise of grossing up income under s 503 is carried out for the purpose of computing the amount of corporation tax when a credit for foreign tax falls to be made. But, having grossed up the income, and having computed the amount of corporation tax payable on the grossed up income, an essential pre-requisite to giving any credit for foreign tax is to calculate and apply the s 505 ceiling. That limits the amount of the foreign tax credit which is allowable. The s 505 ceiling is to be determined in accordance with s 100(3)–(6) of the 1972 Act. Section 100(6) is the only statutory provision which addresses the question of how the advance corporation tax set off, provided for in s 85, is to be made in a case where double taxation relief is also involved. Section 100(6) envisages that in calculating the s 505 ceiling in a case where an advance corporation tax set off is to be made, the advance corporation tax may fall to be brought into the tax calculations *as part of the process of calculating the s 505 ceiling*. Where it is so brought into the tax calculations, viz., where a taxpayer makes an allocation under s 100(6), that subsection has the effect of reducing the corporation tax attributable to "relevant income". Thus in such a case the advance corporation tax set off against corporation tax is made, not after the deduction of double taxation relief, but before, in that the set off is made against corporation tax as part of the process of calculating the s 505 ceiling which, as we have noted, needs to be arrived at before the credit for foreign tax can be given. Clearly, once an amount of advance corporation tax has been set against corporation tax in this way, viz., as part of a s 505 calculation, it is spent.

This, as we understand it, is the manner in which s 100(6) envisages that the advance corporation tax set off will work in a case where double taxation relief is also in point. Indeed, that is precisely the process carried out in the Crown's computation in the present case.

Given that as the prescribed sequence and process when the power of allocation under s 100(6) is exercised, the effect of implying a pro rata allocation in the absence of an exercise of the power would not be discordant. Far from it. If such an implication were made the basic sequence and process

would be the same in a case where the taxpayer did not choose to make an allocation as in a case where it did. This contrasts with the position if, as contended by the taxpayer company, no implication is made: on an allocation under s 100(6) advance corporation tax would be set off, so far as "the relevant income" is concerned, as part of the process of calculating the s 505 ceiling and, hence, before the credit for foreign tax is deducted, but if no allocation were made the order of things would be quite different and the advance corporation tax set off would be made after the foreign tax credit had been deducted.

Conclusion

In our view, these points, put together, make a formidable case for the Crown. In particular, we are most reluctant to construe this statute in such a way as to give little or no purpose to s 100(6). However, in the end the insuperable obstacle confronting the Crown is that, unequivocally, s 100(6) confers a power of allocation on a taxpayer, and there is nothing in the subsection which can fairly be construed as a sufficiently plain indication of what Parliament intended, implicitly, should be the position if a taxpayer chose not to make an allocation. Courts are increasingly robust in their construction of statutes and documents, and *casus omissus* is not a satisfying basis for a decision. But the legislative gap which the Crown is seeking to fill in this case by a process of necessary implication, is simply too big for the court to be justified in doing so as a legitimate part of the process of interpretation of this subsection. In referring to a gap we are not to be taken as criticising the draftsman. Part V of the 1972 Act introduced a new tax in a difficult field, and what is obvious with the benefit of hindsight, gained after extensive argument, may be very different from what would have been obvious in 1972. Nevertheless, however it came about, there is no provision in the 1972 Act on what impact advance corporation tax should have on the calculation of the s 505 ceiling if the taxpayer did not make an allocation under s 100(6).

That being so, in our view, the taxpayer company in the present case was entitled to calculate its s 505 ceiling without setting off any advance corporation tax against corporation tax attributable to "relevant income" and it was entitled also, having deducted its credits for foreign taxes, then to set advance corporation tax against its resultant reduced global corporation tax liability.

We therefore dismiss the appeal.

A power and not a duty

It only remains for us to note one point. Throughout this judgment we have referred to s 100(6) as conferring a power on a taxpayer. Before the Special Commissioner and before Walton J. the Crown contended otherwise. Before them the Crown argued that s 100(6) imposes an obligation on a taxpayer to make an allocation of advance corporation tax to its several classes of income, although it gives the taxpayer a discretion as to the manner of allocation. Neither the Special Commissioner nor Walton J. felt any difficulty in rejecting that contention. In this court the primary argument of the Crown was the one we have considered above. When opening this appeal for the Crown Mr. Oliver advanced this "obligation" construction of s 100(6) as a second, alternative argument. However, as the hearing proceeded Mr. Oliver found himself constrained to accept, in our view rightly, that if the

Crown did not succeed on its primary argument it would not succeed on the "obligation" construction either. Accordingly, on this second point we need say only that we agree with the conclusion reached by Walton J. and the Special Commissioner.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

APPENDIX 1: THE COMPANY'S COMPUTATION

	Non-Doubly Taxed		Non-Control Dividends		Controls Dividends		Total	
Case 1 Profit		1,635,817		221,452		2,145,222		4,002,491
Less: Charges		(553,412)		—		—		(553,412)
Proft after charges		1,082,405		221,452		2,145,222		3,449,079
CT @ 52%	(562,850)		(115,155)		(1,115,515)		(1,739,520)	
Less DT relief	—		32,710		1,004,037 (a)		1,034,747 (b)	
CT liability before ACT set-off	(562,850)			(82,445)		(111,478)		(756,773)
ACT set-off								756,773(c)
CT payable								nil

Notes: (a) £1,050,832 of foreign tax was suffered on control dividends, but only £1,004,037 is available for relief owing to the limit of s 505 TA 1970.

(b) A maximum of £1,036,747 of foreign tax credits is permitted to be relieved and can be relieved.

(c) £983,262 of ACT credit is available for set-off, but only £756,773 can be used. This is less than the maximum limit under FA 1972, s 85(2):

I H G F E D C B A

APPENDIX 2: THE REVENUE'S COMPUTATION

	Non-Doubly Taxed		Non-Control Dividends		Controls Dividends		Total	
Case 1 Profit		1,635,817		221,452		2,145,222		4,002,491
Less: Charges		(553,412)		—		—		(553,412)
Proft after charges		1,082,405		221,452		2,145,222		3,449,079
CT @ 52%	(562,850)		(115,155)		(1,115,515)		(1,739,520)	
ACT set-off	324,722 (a)		66,436 (b)		592,104 (c)		983,262	
CT before DT relief		(238,128)		(48,719)		(523,411)		(810,258)
DT relief		—		32,710		523,411		556,121
CT payable		(238,128)		(16,009)		nil		(254,137)

Notes: (a) ACT allocated to non-doubly taxed income is maximum £1,082,405 x 30%) = £324,722. (See FA 1972 section 100(6).)

(b) ACT allocated to non-control dividend is maximum (£221,452 x 30%) = £66,436. (See *ibid.*)

(c) Balance of ACT is allocated to control dividends.

The Crown's appeal was heard in the House of Lords (Lords Bridge of Harwich, Brandon of Oakbrook, Oliver of Aylmerton, Jauncey of Tullichettle and Lowry) on 13, 14 and 15 March 1989 when judgment was reserved. On 13 April 1989 judgment was given unanimously against the Crown, with costs.

Steven Oliver Q.C. and *Alan Moses* for the Crown.

Andrew Park Q.C. and *David Goy* for the Company.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Partington* v. *Attorney-General* (1869) 4 E I App Cas 100; *Tennant* v. *Smith* 3 TC 158; [1892] AC 150; *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] AC 1014; *Mangin* v. *Commissioners of Inland Revenue* [1971] AC 739; *Shell Petroleum Co. Ltd.* v. *Jones* 47 TC 194; *Ben-Odeco Ltd.* v. *Powlson* 52 TC 459; [1978] 1 WLR 1093; *Fothergill* v. *Monarch Airlines Ltd.* [1981] AC 251; *W.T. Ramsay Ltd.* v. *Commissioners of Inland Revenue* 54 TC 101; [1982] AC 300.

Lord Bridge of Harwich:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Oliver of Aylmerton.

I agree with it and, for the reasons he gives I too would dismiss this appeal.

Lord Brandon of Oakbrook:—My Lords, for the reasons set out in the speech to be delivered by my noble and learned friend, Lord Oliver of Aylmerton, I would dismiss this appeal.

Lord Oliver of Aylmerton:—My Lords, this appeal, like so many tax appeals, raises what is, in essence, a very short point, but one which involves the consideration of the interrelation of some very complex statutory provisions. It will, I think, be more convenient, before referring to those provisions, to set out briefly the relevant factual background against which the problem presented by this appeal has arisen. The Respondent, Mining & Industrial Holdings Ltd. ("MIH") was at the material time a wholly-owned subsidiary of Consolidated Gold Fields Plc and it carried on business as a mining finance house. Its income from investments and profits on the realisation of investments was taxable under Sch D Case I and in the relevant accounting period, which ended on 30 June 1980, it was liable to corporation tax on its profits at the rate of 52 per cent. In this period it earned total profits of £3,449,079 after deducting charges of £553,412 in respect of interest payments made on loans from the parent company. The gross profit of £4,002,491 was made up as to £1,635,817 of income from sources in respect of which there was no double taxation relief, £221,452 from dividends paid by foreign companies in which it had control of less than 10 per cent. of the voting power (non-control dividends) and £2,145,222 from foreign companies in respect of which it controlled more than 10 per cent. of the voting power (control dividends). Dividends from both the latter sources qualified for double taxation relief (DTR), the distinction between control and non-control dividends being significant only in relation to the amount of credit allowed

for the foreign tax payable. Foreign tax attributable to non-control dividends was £32,710. Foreign tax attributable to control dividends was £1,050,832, but, as a result of the statutory provisions to which I shall have to refer later, the amount of this allowable as a credit was restricted to £1,004,037.

During the relevant accounting period, MIH made distributions out of profits totalling £2,294,278 on which it paid advance corporation tax of £983,262. It is common ground that the statutory provisions to which I will refer enable this sum of advance corporation tax (ACT) to be set off at least to some extent against MIH's liability to corporation tax for the period in question, but the question posed by this appeal is the way in which this should be done. It is the taxpayer's contention that, in calculating the amount available for set off, there should first be deducted from the control dividends and non-control dividends the DTR attributable to them. Thus, on the non-control dividends the corporation tax liability at 52 per cent. on the grossed up amount is £115,155 against which there is a credit of £32,710 DTR, leaving a corporation tax liability of £82,445. On the grossed up control dividends of £2,145,222 the liability was £1,115,515 against which there was a maximum credit for DTR of £1,004,037, leaving a liability of £111,478. On the non-doubly taxed profits of £1,082,405 (that is to say £1,635,817 less charges of £553,412) there was a corporation tax liability of £562,850. Thus the total outstanding corporation tax liability for the period after crediting DTR was £756,773 against which can be set off the ACT already paid, so that MIH's liability is reduced to nil.

The Revenue's contention is that the ceiling within which DTR is available to be set off has to be ascertained by reference to the amount of corporation tax payable after crediting ACT and on the footing that MIH had made an allocation of the ACT under s 100(6) of the Finance Act 1972 to the maximum amount permitted by the closing words of that subsection. It will be necessary to trace the reasoning behind this through the statutory provisions, but I am at present concerned only to set out the result. On this footing, the maximum amount of ACT available to be credited against the non-doubly taxed income is £324,722 (that is to say the amount (three-sevenths) which would have been payable on the sum which, together with the advance corporation tax payable on it, is equal to the non-doubly taxed profits). Adopting the same formula, the maximum amount available for credit against tax on the non-control dividends (£115,155) would be £66,436 and the maximum amount available for credit against tax on the control dividends (£1,115,515) would be £592,104. Thus, on the non-doubly taxed income, there would be an outstanding liability for corporation tax of £238,128 against which no ACT credit could be claimed; on the non-control dividends there would be an outstanding liability of £48,719 against which DTR of £32,710 would be available, reducing it to £16,009; and on the control dividends there would be an outstanding liability for corporation tax of £523,411 which would be reduced to nil by the available DTR of £1,004,037. So, on this footing, there remains an outstanding unrelieved liability for corporation tax of £254,137.

This, I hope, sufficiently summarises the fiscal results of the parties' several contentions which can be seen in a more readily assimilable form in the

tables comprising Appendices 1 and 2(1) to the report of the judgment of the Court of Appeal in Simons Tax Cases [1988] STC 15 at pages 26 and 27.

Turning now to the statutory provisions upon which the rival contentions are based, it is not, I think, necessary for present purposes to recite the provisions of the Income and Corporation Taxes Act 1970 imposing corporation tax. It is sufficient for present purposes to say that the company is chargeable to corporation tax on all its profits wherever arising and that s 248 of the Act authorises the deduction of charges on income so far as paid out of profits in computing the corporation tax chargeable for any accounting period. The important provisions in the present context are those contained in Part XVIII of the Act relating to double taxation relief. Section 497 provides, in subs (1), for giving effect to arrangements made with foreign governments with a view to affording relief from double taxation. Subsection (2) of the same section provides that:

> "The provisions of Chapter II below shall apply where arrangements which have effect by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the United Kingdom."

The relevant provisions of Chapter II for present purposes are contained in ss 501, 503 and 505. Section 501(1) provides as follows:

> "Subject to the provisions of this Chapter, where under any arrangements credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income, the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit."

"United Kingdom taxes" include corporation tax. Section 503 deals with the method of calculating, for the purposes of United Kingdom tax, income in respect of which credit for foreign taxes is to be allowed. The relevant provisions for present purposes are those contained in subs (2) which is, so far as material, in the following terms:

> "Where credit for foreign tax falls under any arrangements to be allowed in respect of any income, ... then, in computing the amount of the income for the purposes of income tax or corporation tax—*(a)* no deduction shall be made for foreign tax, whether in respect of the same or any other income, and, *(b)* the amount of the income shall, in the case of a dividend, be treated as increased by any underlying tax which, under the arrangements, is to be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend."

"Underlying tax" is defined in, s 500 as meaning, in relation to any dividend, tax which is not chargeable in respect thereof directly or by deduction. A ceiling is imposed by s 505 on the amount of credit for foreign tax to be allowed against corporation tax in respect of any income. It is not to exceed the corporation tax attributable to that income. Section 506 deals with the computation of underlying tax and provides, in subs (1):

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(1) Pages 482/483 *ante*.

A "Where, in the case of any dividend, arrangements provide for underlying tax to be taken into account in considering whether any, and if so what, credit is to be allowed against the United Kingdom taxes in respect of the dividend, the tax to be taken into account by virtue of that provision shall be so much of the foreign tax borne on the relevant profits by the body corporate paying the dividend as is properly B attributable to the proportion of the relevant profits represented by the dividend."

It is not, I think, necessary to refer to any of the other provisions of this chapter, but I should say a word about the double taxation agreement relevant to MIH's overseas income. MIH's claim to DTR in fact relates to several countries but it is common ground that the arrangements made with each of the countries concerned are substantially the same and that the double taxation agreement made between the United Kingdom and Australia may be taken to typify such arrangements. This agreement was made on 7 December 1967 and is scheduled to The Double Taxation Relief (Taxes on Income) (Australia) Order 1968 (S.I. 1968/305). The only article of this agreement necessary to be referred to for present purposes is article 19(1) which explains the distinction already observed between control and non-control dividends and is in the following terms:

> "Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof)—*(a)* Australian tax payable under the laws of Australia and in accordance with this agreement whether directly or by deduction, on profits, income or chargeable gains from sources within Australia (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid), shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Australian tax is computed; and *(b)* in the case of a dividend paid by a company which is a resident of Australia and is not resident in the United Kingdom to a company which is resident in the United Kingdom and which controls directly or indirectly at least ten per cent of the voting power in the first-mentioned company, the credit shall take account (in addition to any Australian tax creditable under (a)) the Australian tax payable by the company in respect of the profits out of which such dividend is paid."

So much for DTR. I turn now to the provisions relating to ACT, which were introduced by the Finance Act 1972. Section 84(1) of that Act imposed on a company resident in the United Kingdom a liability, where it made what was described as a "qualifying distribution" to pay an amount of corporation tax known as "advance corporation tax." A "qualifying distribution" is defined in the Act but for present purposes can be equated to a dividend. The computation was regulated by s 84(2) which provided, omitting immaterial words, as follows:

> "... advance corporation tax shall be payable on an amount equal to the amount or value of the distribution, and shall be so payable at a rate ... which for the period beginning with 6th April 1973 and ending with 31st March 1974 shall be three-sevenths and thereafter such fraction as Parliament may from time to time determine."

In fact, three-sevenths was the rate also in the accounting period relevant to the present appeal. Subsections (1) and (2) of s 85 are in the following terms so far as material:

> "(1) Subject to subsection (2) below, advance corporation tax paid by a company (and not repaid) in respect of any distribution made by it in an accounting period shall be set against its liability to corporation tax on any income charged to corporation tax for that accounting period and shall accordingly discharge a corresponding amount of that liability.
>
> (2) The amount of advance corporation tax to be set against a company's liability for any accounting period under subsection (1) above shall not exceed the amount of advance corporation tax that would have been payable ... in respect of a distribution made at the end of that period of an amount which, together with the advance corporation tax so payable in respect of it, is equal to the company's income charged to corporation tax for that period."

Subsections (3) and (4) contain provisions enabling the surplus of ACT which cannot be set against the liability for an accounting period (for instance, where the income of the company concerned and which is subject to charge is less than the amount of the distribution) to be carried forward or backwards and set against tax chargeable for other accounting periods.

The only other provisions of the Act which call for mention are the critical provisions for the purposes of the present appeal, which deal with DTR and are contained in s 100. Subsection (1) applies the provisions of Chapters I and II of Part XVIII of the Act of 1970 already referred to and applicable to corporation tax on income also to corporation tax on chargeable gains. For present purposes, however, we are concerned only with tax on income. Subsections (3) (4) and (5) provide as follows:

> "(3) For the purposes of section 505 of the Taxes Act (which limits the credit for foreign tax allowable against corporation tax in respect of any income to the corporation tax attributable to that income and, by virtue of subsection (1) above, applies similarly in relation to chargeable gains) the corporation tax attributable to any income or gain ('the relevant income or gain') shall be determined in accordance with subsections (4) to (6) below.
>
> (4) Subject to subsections (5) and (6) below, the amount of corporation tax attributable to the relevant income or gain shall be treated as equal to such proportion of the amount of that income or gain as corresponds to the rate of corporation tax payable by the company (before any credit under the said Part XVIII) on its income or chargeable gains for the accounting period in which the income arises or the gain accrues ('the relevant accounting period').
>
> (5) Where in the relevant accounting period there is any deduction to be made for charges on income, expenses of management or other amounts which can be deducted from or set against or treated as reducing profits of more than one description—*(a)* the company may for the purposes of this section allocate the deduction in such amounts and to such of its profits for that period as it thinks fit; and *(b)* the amount of the relevant income or gain shall be treated for the purposes of subsec-

A tion (4) above as reduced or, as the case may be, extinguished by so much (if any) of the deduction as is allocated to it."

I come finally to the crucial provision which is subs (6) and which provides as follows:

B "(6) Where, in accordance with section 85 above any advance corporation tax falls to be set against the company's liability to corporation tax on its income for the relevant accounting period—*(a)* the company may for the purposes of this section allocate that advance corporation tax in such amounts and to the corporation tax attributable to such of its income for that period as it thinks fit; and *(b)* the amount of corpo-
C ration tax attributable to the relevant income as determined in accordance with subsections (4) and (5) above shall be reduced by so much (if any) of that advance corporation tax as is allocated to the corporation tax attributable to that income; but the amount of advance corporation tax allocated under this subsection to the corporation tax attributable to any income shall not exceed the advance corporation tax that would
D have been payable ... in respect of a distribution made at the end of the relevant accounting period of an amount which, together with the advance corporation tax so payable in respect of it, is equal to that income."

To summarise shortly the philosophy behind these provisions, so far as
E it can be gathered from the words used, that behind the double taxation provisions of the Act of 1970 is that, where a double taxation convention exists and applies, foreign tax suffered on dividends paid to a United Kingdom resident company is to be added back for the purpose of ascertaining that company's gross income for the purpose of U.K. corporation tax. The corporation tax is then ascertained on the grossed-up income so produced
F and the foreign tax is then credited up to a ceiling of the amount of that corporation tax for the purpose of ascertaining the company's liability to corporation tax. Thus the foreign tax credit may result in there being no liability for corporation tax at all on the relevant income (where, for instance, the foreign tax suffered is at a rate equal to or greater than the rate of corporation tax) but it can never exceed the amount of corporation tax which would
G be payable had there been no such credit. There can therefore be no question of any repayment to the taxpayer of foreign tax suffered.

The broad philosophy behind the provisions of ss 84 and 85 of the Act of 1972 is that, whenever a company makes a distribution (other than a capital distribution) it pays to the Revenue a sum of ACT which is calculated by
H reference to the amount distributed at a rate equal to the basic rate of income tax for the time being payable. Originally this was brought about by fixing annually the fraction referred to in s 84(2) so as to correspond with the current basic rate of income tax, but the two have now been statutorily linked together by s 17 of the Finance Act of 1986 so that the fraction goes up or down annually and automatically with the rate of income tax. The
I ACT so paid is then available for credit against the corporation tax which actually becomes payable in respect of the company's profit income earned for the accounting period in which the distribution takes place—that amount having nothing to do with the amount of profit income distributed. When the corporation tax for the relevant period becomes payable, the amount of ACT paid is then set against the company's ascertained liability for payment and discharges a corresponding amount of that liability. There is, however, a

ceiling which, for practical purposes, may be expressed simply as an amount equal to the basic rate of income tax in force at the end of the year calculated on the total income of the company for that period. Thus, if, for example, in a year in which the basic rate of tax was 30 per cent., a company distributed out of accumulated profits an amount which exceeded 70 per cent. of its income for the year, it would pay ACT of three-sevenths of the amount of the actual distribution but could credit against its final corporation tax liability for the year of 52 per cent., only such part of the ACT paid as was equal to 30 per cent. of that income. It cannot reclaim the surplus in the year, but under subss (3) and (4) of s 85 the surplus is available for credit in previous or subsequent years. This contrasts with DTR where any set-off not utilised during a year is no longer available for credit in any other year.

The philosophy behind s 100 is more difficult to detect. It is clearly directed—indeed it says so expressly—to ascertaining the ceiling within which, where a sum of ACT has been paid in respect of an accounting period, DTR is to be allowed as a credit. Subsection (4), which is the first subsection "in accordance with" which the ceiling is to be determined, appears to do no more (though it does so in rather more obscure language) than reproduce the effect of s 505 of the Act of 1970. It simply limits the DTR to the amount of the company's liability to pay corporation tax on the income arising in the relevant period upon which the foreign tax has been paid (i.e. in the relevant period to 52 per cent. of the relevant income). So the foreign tax (if more than 52 per cent.) may extinguish the corporation tax which the company would otherwise be able to pay on that income but if and so far as it exceeds that amount it cannot be reclaimed or credited elsewhere. Subsection (5) is concerned not with the rate of corporation tax nor, directly, with the ceiling, but merely with the ascertainment of the relevant slice of income upon which the corporation tax, and thus the ceiling figure, is to be calculated. The problem arises in relation to subs (6) where a different philosophy becomes evident. Here is, apparently, a privilege accorded to the company to vary the amount which would otherwise be available for DTR credit by allocating any ACT which the company has paid to any source of income that it chooses, but the effect of sub-para (b) is that such allocation can only have the effect of reducing the ceiling within which DTR credit is available from the 52 per cent. ceiling which appears to be available under subs (4). Mr. Park, for the taxpayer company, frankly acknowledges that he can think of no readily conceivable circumstances in which this would be to the taxpayer's advantage and it is this curious circumstance that is the foundation of the Crown's argument.

The Crown's calculation of the taxpayer's liability, to which I have already referred, is based upon the contention that there is to be found somewhere in the legislation a provision that, for the purposes of the ascertainment of the ceiling for DTR credit under s 505 of the Act of 1970, any advance corporation tax paid by the company in a relevant accounting period is attributed to income in respect of which DTR is available pro rata in the proportion that that income bears to the total income of the company for the relevant period. Thus if, for instance, one quarter of the company's total income for the period derives from a single foreign source in respect of which DTR is available, one quarter of the ACT paid by the company in that period is to be treated as allocated to that income up to the maximum available for credit, so reducing in the same way as is provided for in subs (6), the ceiling of corporation tax "attributable" to that income under s 505. Before the Special Commissioner and, in the High Court, before Walton J.,

A the argument advanced was that the word "may" in sub-para *(a)* of subs (6) meant "shall" and that the company was therefore obliged to make an allocation of the ACT paid which, in the absence of an actual allocation, would be deemed to be made on a pro rata basis. That contention was rejected both by the Special Commissioner and by Walton J. and was expressly abandoned in the Court of Appeal and before this House. The Crown's alternative sub-
B mission is now put in two different ways. First, it is said that, reading s 100 as a whole, there can be discerned a necessary implication of a pro rata allocation and reduction amounting, in effect, to an express enactment to this effect. Secondly, and if that be unacceptable, it is said that subs (6) clearly is framed on the assumption that there is already a position created in which the allocation of ACT has had (or will, if undisturbed, have) the effect of
C reducing the s 505 ceiling by the amount of ACT allocated and that subs (6) was inserted with the manifest intention of conferring on the company, if it wished to exercise it, an option to improve that position by re-allocating the ACT The legislature, by an oversight, omitted in fact to create the position which it was intended to give the opportunity of relieving and accordingly the court must construe the Act by reading in the words which it is com-
D pelled to infer that the legislature itself forgot or omitted to include.

The logical or rational justification for this is said to be (a) that it is the only way in which any sensible purpose can be attributed to s 100(6) and (b) that if such an implication is not made the result can be produced—as MIH
E claim it is produced in this case—that, by a global application of the ACT credit against global income of the company, after crediting DTR to the maximum extent permissible, the company escapes payment of corporation tax altogether on its non doubly-taxed income.

The Court of Appeal, though much impressed by the anomaly created
F by what appears to be the otherwise irrational insertion of subs (6) of s 100, found itself in the end unable to supply the legislative gap. My Lords, for my part, so do I, but I go further than the Court of Appeal in that I feel compelled to accept the argument which was addressed to your Lordships by Mr. Park on behalf of the taxpayer, that the structure and language of the legislation lead to quite the opposite conclusion to that contended for by the
G Crown. They point, Mr. Park submits, strongly to the conclusion that in making the necessary tax computations, the deduction of double taxation relief is intended to precede the set-off of advance corporation tax. The Court of Appeal rejected this argument in the following passage [1988] STC 15 at p. 23g)([1]):

H "... in our view, in the scheme of the Act there is a point telling against the taxpayer company on the crucial question of construction. The exercise of grossing up income under s 503 is carried out for the purpose of computing the amount of corporation tax when a credit for foreign tax falls to be made. But, having grossed up the income, and having computed the amount of corporation tax payable on the grossed-
I up income, an essential pre-requisite to giving any credit for foreign tax is to calculate and apply the s 505 ceiling. That limits the amount of foreign tax credit which is allowable. The s 505 ceiling is to be determined in accordance with s 100(3)—(6) of the 1972 Act. Section 100(6) is the only statutory provision which addresses the question of how the

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([1]) Page 479D/E–H/I *ante*.

advance corporation tax set-off, provided for in s 85, is to be made in a case where double taxation relief is also involved. Section 100(6) envisages that in calculating the s 505 ceiling in a case where an advance corporation tax set-off is to be made, the advance corporation tax may fall to be brought into the tax calculations *as part of the process of calculating the s 505 ceiling.* Where it is so brought into the tax calculation, viz., where a taxpayer makes an allocation under s 100(6), that subsection has the effect of reducing the corporation tax attributable to 'relevant income.' Thus in such a case the advance corporation tax set-off against corporation tax is made, not after the deduction of double taxation relief, but before, in that the set-off is made against corporation tax as part of the process of calculating the s 505 ceiling which, as we have noted, needs to be arrived at before the credit for foreign tax can be given. Clearly, once an amount of advance corporation tax has been set against corporation tax in this way, viz., as part of a s 505 calculation, it is spent."

In my judgment, there are two critical points in this passage in which, if I may say so respectfully, the analysis is at fault. In the first place, it is not correct to say that s 100(6) is "the only statutory provision which addresses the question of how the advance corporation tax set-off is to be made where double taxation relief is also involved." Section 100(6) does not in fact deal with the question of how the set-off is to be made but with the ascertainment of the ceiling for the purposes of s 505 of the Act of 1970. As to *that* matter, there is an anterior *general* provision in subs (4) which is displaced if, but only if, the option in s 100(6) is exercised. Secondly, it is incorrect to say that the set-off of ACT is "*made* as part of the process of calculating the section 505 ceiling." The allocation of ACT under the subsection is not itself the setting off of ACT but merely the ascertainment of the availability of set-off and it is incorrect to speak of it as having been "made" and therefore "spent." It seems to me plain from the words of s 501 that what the DTR is to be credited against is the potential liability of the company to pay corporation tax which, by reason of the DTR credit, does not in fact become chargeable to the extent of the credit. The amount "so chargeable shall be reduced". Whilst, in s 505, the "corporation tax attributable" to the foreign income obviously has to be ascertained before the DTR deduction, s 85, dealing with the setting-off of ACT clearly refers to a liability to pay which has been finally ascertained and, since it refers to "any income charged to corporation tax," to a global liability for payment which is to be "discharged" to a corresponding amount. I can see no context, apart from such implication as can be derived from s 100 (6), for reading the expression "corporation tax attributable to any income" as meaning anything different in s 100 from the same expression used in s 505, i.e. the tax which would become chargeable before relevant deductions or set-offs.

There was before your Lordships considerable discussion about the precise formula which requires to be supplied in the section before it can be made to produce the result for which the Crown contends. Mr. Oliver suggested the insertion into the first part of subs (6), after the word "period" where it first occurs, of the words "and apart from the exercise of the power conferred on the company by this subsection would fall to be allocated rateably between the relevant income and any other income." This, however, merely succeeds in begging the question of where there is to be found the enactment of a provision for rateable allocation between relevant income and other income. There is none. In the end, it became apparent that nothing

short of the formula suggested by Mr. Park (or some such equally complete provision) would do and I set it out merely for the purpose of indicating the extent of the implication which the Crown urges the court to make. To achieve the Crown's sought for result would involve the wholesale redrafting of subs (6) so as to read as follows:

> "(6) Where in accordance with section 85 above any advance corporation tax falls to be set against the company's liability to corporation tax on its income for the relevant accounting period—(i)that advance corporation tax shall for the purpose of this section be allocated rateably between the corporation tax attributable to the relevant income and the corporation tax attributable to the remainder of the company's income (the relevant income and the remainder of the income being taken to be the amounts after the operation of subsection (5) above); and (ii) the amount of corporation tax attributable to the relevant income as determined in accordance with subsections (4) and (5) above shall be reduced by so much of that advance corporation tax as is allocated to the corporation tax attributable to that income except that—. . ." (there follows the remainder of the subsection as drawn from the beginning of sub-para (a) to the end of the subsection).

This is a fair and convincing exposition of the amount of rewriting which requires to be done and it has to be stressed that sub-para (i) by itself would be insufficient. Sub-paragraph (ii) is also essential.

Mr. Oliver relies upon the passage from the speech of Lord Diplock in *Jones* v. *Wrotham Park Settled Estates* [1980] AC 74 at p. 105E, as authority for the proposition that the court may, in an appropriate case, imply words into a statute, but it has to be borne in mind that before this can be done, the essential conditions mentioned by Lord Diplock must exist. That something has gone wrong with the drafting of this statute is, I think, clear, but I am far from satisfied that the essential conditions exist for so radical an implication as that which is necessary here. It is true that the courts are more prone than in the past to adopt a purposive construction, more particularly, where the purpose is to give effect to the United Kingdom's treaty obligations or to the mandatory provisions of European Community legislation, where the purpose can be clearly seen and has been expressly or by necessary implication declared. But to make such an implication in a taxing statute for the purpose of imposing a tax which the legislature has not sought to enact in express terms must be almost, if not completely, unheard of. It is not for the court to usurp the function of the legislature (see *Magor and St. Mellon's Rural District Council* v. *Newport Corporation* [1952] AC 189 *per* Viscount Simonds at p. 190). In this particular case, moreover, the meaning of subs (6) is perfectly clear and the court is not reduced to what Lord Normand (in *Ayrshire Employees Mutual Insurance* v. *Inland Revenue Commissioners*, 1944 SC 421, 432) described as "that last refuge of judicial hesitation when confronted with a difficulty of interpretation, the doctrine that no tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him."

Finally, I can, for my part, see no rational or practical justification for the scheme of the Act for which the Crown so strenuously contends, beyond a desire to extract the maximum amount of tax. It is agreed that MIH in this case has already borne tax on this income to a total of 59 per cent. (since some of the foreign tax was at rates exceeding 60 per cent.) and the manipu-

lation of the available reliefs so as to impose an extra burden of some 7 to 8 per cent. seems, to use Mr. Park's rather emotive expression, little short of preposterous. For my part, I can see no logical or rational justification for imposing in the absence of compelling statutory words, an additional tax burden on a company simply because it has made distributions on which it has paid tax in advance. It is apparent on the Crown's own figures that in the instant case the tax liability of the company, if it had made no distribution, would be some £756,173—that is some £225,000 odd less than the amount of ACT actually paid. What is contended, by the Crown, is that because it made a distribution and paid this sum in advance, it suffers additional corporation tax to the tune of £254,137. That seems, to me at any rate, so unreasonable a conclusion that I should require the most compulsive statutory provision before reaching it. There is certainly none in this case and I would, accordingly, dismiss the appeal.

Lord Jauncey of Tullichettle:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Oliver of Aylmerton.

I agree with it and, for the reasons he gives I too would dismiss this appeal.

Lord Lowry:—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Oliver of Aylmerton.

I agree with it and, for the reasons given by noble and learned friend, I, too, would dismiss this appeal.

Appeal dismissed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Messrs. Freshfields.]