A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—4 AND 5 DECEMBER 1991

COURT OF APPEAL—29 JUNE AND 15 JULY 1993

B

HOUSE OF LORDS—30 AND 31 OCTOBER AND 1 NOVEMBER 1995 AND 14 MARCH 1996

C

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES—14 OCTOBER AND 16 DECEMBER 1997 AND 16 JULY 1998

D

HOUSE OF LORDS—29 JUNE AND 18 NOVEMBER 1999

E

Imperial Chemical Industries plc *v.* Colmer (H.M. Inspector of Taxes)(1)

F

Corporation tax—Group relief—Consortium relief—Losses of subsidiary of holding company owned by consortium—Some subsidiaries of holding company not bodies corporate resident in UK—Whether consortium relief available—Whether interpretation of statute affected by considerations of European Community Law (freedom of establishment)—Income and G *Corporation Taxes Act* 1970, *s* 258, *Treaty of Rome, Arts* 52, 56 *and* 58, *European Communities Act* 1972, *s* 2

ICI and WF comprised a consortium which owned CAHH, a holding company of whose subsidiaries four were incorporated and resident in the United Kingdom and nineteen were incorporated or registered, and resident H overseas (six in other member states of the European Union, and thirteen elsewhere). CAH, one of the United Kingdom subsidiaries, sought to surrender trade losses to ICI to enable ICI to claim group relief.

The Inspector of Taxes refused ICI's claim on the grounds that, by virtue I of s 258(7) Income and Corporation Taxes Act 1970, a company could not be a holding company within s 258(5)(b) of that Act unless all its subsidiaries were bodies corporate resident in the United Kingdom, and CAHH was not, therefore, such a holding company.

(1) Reported (Chd) [1992] STC 51; (CA) [1993] 4 All ER 705; [1993] STC 710; (HL) [1996] 1 WLR 469; [1996] 2 All ER 23; [1996] STC 352; (ECJ) [1999] 1 WLR 108, Case C-264/96; [1998] All ER (ECJ) 585; [1998] STC 874; (HL) [1999] 1 WLR 2035; [2000] 1 All ER 129; [1999] STC 1089.

On appeal by ICI, the Special Commissioners upheld the Inspector's refusal of the claim. ICI appealed.

The Chancery Division held, allowing ICI's appeal, that CAHH was a holding company within s 258(5)(b) because the opening words of s 258(7) are not a definition but merely cut down the operation of s 258 to cases where the surrendering company and the claimant company are bodies corporate resident in the United Kingdom.

The Crown appealed.

The Court of Appeal held, dismissing the Crown's appeal, that the definition of "holding company" in s 258(5) and the opening words in s 258(7) requiring companies to be resident in the United Kingdom are independent "qualifications": those opening words are satisfied by being applied to the surrendering company, the claimant company and the holding company under s 258(2) and do not have to be infused into the definition in s 258(5).

The Crown appealed. By way of a new point ICI contended that the Crown's construction of s 258 conflicted with the obligations of the UK under European Community Law, viz. Articles 52 and 58 of the Treaty of Rome (freedom of establishment).

The House of Lords held, not determining the appeal, but making a reference to the European Court of Justice under Article 177, that:—

(1) apart from considerations of European Community law, the Crown's construction of s 258 should be upheld, because:—

(a) the language of the Act did not permit the construction for which ICI contended; that construction would confine the scope of the opening words of s 258(7) to s 258(1) and (2), which would be hard to reconcile with the broad requirement that those words should apply "in this and the following sections of this Chapter" and would be impermissibly selective and unnatural; the provisions of s 258(1) and (2) inevitably incorporated the provisions of s 258(5) and (8) and, as the former could not be understood without reference to the latter, it followed that the opening words of s 258(7) should be read into all of them;

(b) consequential propositions, so far as consortium relief was concerned, were not surprising, let alone absurd or unjust;

(c) whatever the difficulties might be of applying s 258(5)(b) in particular cases on the basis of the Crown's construction, the result could not be characterised as either unjust or absurd; the task of deciding whether the business of a particular company consisted wholly or mainly in the holding of shares in 90 per cent. UK resident trading subsidiaries was not inherently so difficult as to be beyond the competence of appeal Commissioners; that question should be answered by reference to all the factors, considered over a reasonable period of time;

F.P.H. Finance Trust, Ltd. (in liquidation) v. *Commissioners of Inland Revenue* [1944] AC 285: 26 TC 131 considered. *Davies, Jenkins & Co. Ltd.* v. *Davies* [1968] AC 1097: 44 TC 273 distinguished.

A (2) the conditions which required reference to the European Court of Justice were satisfied because:—

(a) the 1970 Act should be construed in a manner which would avoid conflict with European Community law, if such a construction were possible;

B (b) the judgments in the Courts below would have the effect, if only incidentally, of avoiding such a conflict, and they plainly constituted a possible view of the law;

(c) the applicability of Articles 52 and 58 in the circumstances of the case was undeniably a matter for the consideration of the European C Court of Justice, as the answer was not so obvious as to leave no scope for any reasonable doubt (the doctrine of *acte clair*).

For the purposes of the case, though not as a universal proposition, it was assumed that the "wholly or mainly" requirement in s 258(5)(b) should be judged on the basis of a simple head count of the subsidiaries, so that if D all or a majority of the subsidiaries satisfied the residence condition, CAHH would qualify but otherwise not.

Following an opinion from the Advocate General, the European Court of Justice held that:—

E (1) it was necessary for the Court to consider the questions referred by the House of Lords; a request for a preliminary ruling from a national court may be rejected only if it is manifest that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the true facts or the subject-matter of the main proceedings, neither of which conditions applied in the present case;

F

(2) Article 52 precluded legislation of a member state which, in the case of companies established in that state belonging to a consortium through which they controlled a holding company, by means of which they exercised their right to freedom of establishment in order to set up subsidiaries in other member states, made a particular form of tax relief subject to the G requirement that the holding company's business consisted wholly or mainly in the holding of shares in subsidiaries that were established in the member state concerned;

(3) in respect of the particular legislation concerned, there was no justification for the inequality of treatment under the Treaty's provisions on H freedom of establishment; diminution of tax revenue was not one of the justificatory grounds listed in Article 56; and, while the need to maintain the cohesion of tax systems could, in certain circumstances, provide sufficient justification for maintaining rules restricting fundamental freedoms, there was no such justification in the present instance because there was no direct link between the consortium relief granted for losses incurred by a resident I subsidiary and the taxation of profits made by non-resident subsidiaries;

(4) where a holding company controlled mainly subsidiaries having their seat in non-member countries, the UK Courts were not obliged under Article 5 to disapply the legislation, or to construe it in a way conforming with Community law, because the issue concerned a situation which lay outside the scope of Community law; where a particular provision must be

disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the state concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules.

Held, in the House of Lords, allowing the Crown's appeal, that:—

(1) in the light of the judgement of the European Court of Justice, it was clear that, in the circumstances of the present case, Community law presented no obstacle to the application of s 258 in accordance with the construction placed upon it by the House of Lords on the previous occasion;

(2) it was not possible to return to the construction adopted by the High Court and the Court of Appeal; s 258 could not properly be described as ambiguous; and, more fundamentally, the construction adopted by those Courts could scarcely be described as conforming with Article 52, because it drew no distinction between companies resident within and those resident outside the Community;

(3) the effect of s 2 of the European Communities Act 1972 is the same as if a subsection were incorporated in s 258 which in terms enacted that the definition of "holding company" was to be without prejudice to the directly enforceable Community rights of companies established in the Community.

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. Sitting alone on 18 January 1990 at Turnstile House I, a Commissioner for the Special Purposes of the Income Tax Acts, heard the appeal of Imperial Chemical Industries plc ("ICI") brought pursuant to Taxes Management Act 1970, s 42(2) and (3) against the Inspector's refusal of group relief in respect of the accounting periods of ICI ending at the end of December, 1984, 1985, 1986 and 1987.

2. Shortly stated the question for determination was whether ICI was entitled to claim group relief having regard to the conditions for surrender of relief contained in the Income and Corporation Taxes Act 1970, s 258, and in particular to the definition of "holding company" in s 258(5) and whether (on the facts not in dispute) Coopers Animal Health (Holdings) Ltd. (a company partly owned by ICI) was a "holding company".

3. No evidence was tendered. An agreed statement of facts and a binder containing the copies of agreed documents was provided to me. The said statement is annexed hereto and forms part of this Case. The binder is not so annexed but is available for inspection if required.

4. I took time to consider my decision and gave it in writing on 31 January 1990 determining the appeal by refusing ICI's claim for group relief,

but not determining the figures. A copy of my decision is annexed hereto and forms part of the Case.

5. Immediately after my decision ICI declared to the Special Commissioner their dissatisfaction therewith as being erroneous in point of law, and on 27 February 1990 required me to state a Case, which I now state and sign.

6. The question of Law for the opinion of the Court is whether, on the facts agreed, and upon the true construction of s 258, Coopers Animal Health (Holdings) Ltd. was at the material times a "holding company", so as to enable ICI to found a valid claim for group relief.

D.C. Potter Q.C. } Commissioner for the Special Purposes of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1 6LQ

Decision

On Thursday 18 January 1990 I heard the appeal of Imperial Chemical Industries plc ("ICI") brought pursuant to Taxes Management Act 1970, s 42(2)(3) against the decisions given in April and August 1989 in respect of the accounting periods of ICI ending at the end of December 1984, 1985, 1986, and 1987. By those decisions the Inspector refused claims for group relief under the Income and Corporation Taxes Act 1970, s 258 as amended, in particular subs (2) thereof which makes group relief available where a claimant company is a member of a consortium and the surrendering company is a trading company which is a 90 per cent. subsidiary of a holding company which is owned by the consortium. At the request of the parties I give my decision in principle, deferring a final determination until after the relevant figures shall have been agreed.

There is no dispute as to the facts, and the parties provided me with an agreed statement of facts, to which was added the further obvious fact that ICI was at all material times a body corporate resident in the United Kingdom. The agreed statement of facts was one of the documents in a binder to which reference was made at the hearing. In particular, reference was made to the financial statements of the company Coopers Animal Health (Holdings) Ltd. ("CAHH"), page 24, which lists the principal subsidiaries of CAHH, 23 in number, all being agreed to be resident in the country of incorporation. Reference was also made to the financial statements of Coopers Animal Health Ltd. ("CAH"), the facts set out in the first paragraph in s 2 "review of business developments" on page 3 being agreed. I refer to the agreed statement of facts so as to incorporate the same in this decision without setting it out. A short summary of the facts suffices for present purposes.

From and after 17 May 1984, when it was incorporated, the issued share capital of CAHH was owned beneficially as to 51 per cent. by D Wellcome

Foundation Ltd. and as to 49 per cent. by ICI who together formed a consortium owning CAHH within the meaning of Income and Corporation Taxes Act 1970, s 258(8) as amended. CAHH carried on no business save the owning of shares in its subsidiary companies trading in many countries of the world, totalling over 23, 4 being resident in the United Kingdom, the others being resident elsewhere. The aggregate of the turnovers of the trades of the 4 United Kingdom subsidiaries came to about one third of the aggregate turnovers of the trades of all the subsidiaries of CAHH. CAH incurred substantial trading losses in its 3 accounting periods to 31 August 1985, 30 August 1986 and 29 August 1987. Provided that the conditions for group relief in relation to consortiums were satisfied, these losses were in part available to be surrendered by CAH as "the surrendering company" to ICI as "the claimant company". Appropriate elections for Consortium relief were made, so that, provided the statutory conditions were satisfied, substantial amounts of losses were surrendered to ICI in respect of each of the 4 accounting periods under appeal. The question I have to determine is whether in law the conditions were present to enable relief to be available to ICI in respect of the trading losses of CAH.

I was referred in Particular to Income and Corporation Taxes Act 1970 ss 258 and 262. The parts of s 258 having particular relevance are the following:

> "(2) Group relief shall also be available in accordance with the said provisions in the case of a surrendering company and a claimant company where either of them is a member of a consortium and the other is—
>
> ...
>
> (b) a trading company—
>
> (i) which is a 90 per cent. subsidiary of a holding company which is owned by the consortium ...
>
> (5) For the purpose of this section and the following sections of this Chapter—
>
> ...
>
> (b) 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies ...
>
> (7) References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this and for following sections of this Chapter whether one company is a 75 per cent. subsidiary of another, the other company shall be treated as not being the owner—
>
> ...
>
> (c) of any share capital which it owns directly or indirectly in a body corporate not resident in the United Kingdom;"

All the companies referred to in the agreed statement of facts are bodies corporate. Were they all resident in the United Kingdom, group relief would

clearly be available because CAH is a trading company which is a 90 per cent. subsidiary of CAHH which is owned by the consortium and which would be the "holding company" being a company the business of which would consist wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries and which would be trading companies. However, the present dispute arises because the "holding company" namely CAHH holds 4 subsidiaries resident in the United Kingdom and more than 19 not so resident.

I suggested during the hearing that possibly the references "to a company" mentioned in subs (7) were restricted to the surrendering company and the claimant company as defined in subs (1); but that suggestion was, quite rightly, rejected by both parties.

Mr. P.G. Whiteman Q.C., appearing for ICI, submitted that the obvious purpose of s 258 in relation to consortiums was to allow group relief to the extent that the companies in the holding company's group are resident in the United Kingdom. He submitted that the language of s 258 plainly carried out that purpose, and pointed to the anomalies that would arise where a holding company has shares in both resident and non-resident subsidiaries, and either some of those residents become non-resident, or vice versa, or the size or importance of resident or non-resident companies varies between themselves. He submitted that an interpretation must be given to the statutory wording that produces consistency and certainty and avoids anomaly and caprice. He submitted that general guidance could be gained from the speeches in the House of Lords in *F.P.H. Finance Trust Ltd. (in Liquidation)* v. *Commissioners of Inland Revenue*[1] 26 TC 131, at page 142. There the question was whether a company was or was not an "investment company" and the Lords decided that its character must be arrived at by considering a tract of time, so that it does not go on "popping in and out of the Inland Revenue pigeon-holes as trade was bad or good", to adopt the language of Lord Atkin at page 151. The interpretation of s 258 that avoided the possibility of a company popping in and out of the status of "holding company" was one which concentrated on those subsidiaries of the holding company that were resident in the United Kingdom and excluded other subsidiaries. Mr. A.G. Williams of the Office of the Solicitor of Inland Revenue submitted that the plain wording of the statutory provisions concluded the matter in favour of the Inland Revenue, and that the claim for group relief was bizarre. As respects "popping in and out" s 262 provided certainty for just that contingency. The matter is plain; one reads into s 258(5)(*b*) the opening words of subs (7) so that it reads as follow:

> "'Holding Company' means a body corporate resident in the United Kingdom the business of which consists wholly or mainly in the holding of shares or securities of bodies corporate resident in the United Kingdom which are its 90 per cent. subsidiaries and which are trading companies."

It was clear that CAHH was not a holding company; therefore CAH could not be a surrendering company.

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(1) (CA) [1943] KB 345; (HL) [1944] AC 285.

I intend no disrespect to the advocates in not more fully setting out their submissions. I should however note that s 532(1) defines "75 per cent. subsidiary" and "90 per cent. subsidiary".

I consider that in construing a taxing statute I must primarily have regard to the plain wording; but if that meaning produces, while some other meaning avoids, injustice uncertainty or capriciousness, that other meaning may be preferred.

The view that I have formed is that, as Mr. Williams submits, CAHH is not a "holding company" because it cannot be shown that at any material time its business consisted wholly or mainly in the holding of shares or securities of bodies corporate resident in the United Kingdom. I find that meaning sufficiently plain and certain. Whatever injustice or capriciousness it may produce in particular cases is not clearly avoided by any other meaning.

If I look for a purpose in the requirement that restricts the concept of "company" to bodies corporate resident in the United Kingdom, it is that the concept of a group for group relief is deliberately made more narrow than the concept for other purposes. Generally, in tracing ownership in order to determine whether one body corporate is a subsidiary of another, ownership may be traced through bodies corporate wherever resident, albeit that the tracing would become important for tax only if the two bodies corporate whose relationship is thus traced are resident in the United Kingdom. That one perceives from s 532. However, for group relief both as respects groups properly so called and consortiums, more stringent requirements are imposed. I was pressed to take account of the second limb of s 258(7), para (c) of which directs one to ignore ownership of share capital in a non resident body corporate; but that applies only to the concept of "75 per cent. subsidiary" and not "90 per cent. subsidiary". I therefore dismiss the appeals. I determine that CAHH is not a "holding company". I record that although this determination is in principle only, the Special Commissioners would, if the parties agreed, be willing to state a Case for the opinion of the court, following the now established practice.

D.C. Potter } Commissioner for the Special Purposes of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

31 January 1990

AGREED STATEMENT OF FACTS

1. Coopers Animal Health (Holdings) Ltd. (hereinafter called "CAHH") was incorporated on 17 May 1984 and was the corporate vehicle used to merge from 3 October 1984 the animal health interests of The Wellcome Foundation Ltd. (hereinafter called "Wellcome") and Imperial Chemical Industries PLC (hereinafter called "ICI") throughout the world outside

Australia and New Zealand. On 3 October 1984, 5,099,999 ordinary shares of £1 each were issued to Wellcome and 4,899,999 ordinary shares of £1 each to ICI. As a result of further increases in capital and allotments on 27 June 1986 and 20 February 1987, at 29 August 1987 of the 21,500,000 £1 ordinary shares of CAHH, Wellcome owned 10,965,000, such shares representing 51 per cent. of the share capital and ICI owned 10,535,000, such shares representing 49 per cent. of the share capital.

2. At the time of the merger, it was the intention of Wellcome and ICI that the merger of their respective animal health interests would be so structured that they would be able to obtain the benefits of United Kingdom corporation tax consortium relief. In order to achieve that objective, CAHH was formed as a United Kingdom resident holding company to own investments in subsidiary companies trading in many countries of the world. By 1986 there were at least 23 subsidiary companies and of these, 4 were resident for tax purposes in the UK. Nearly all the subsidiaries were 100 per cent. owned by CAHH.

3. During the accounting periods under appeal, there were four 100 per cent. subsidiaries of CAHH which were resident in the United Kingdom, namely Coopers Animal Health Ltd. (hereinafter called "CAH"), Wellcome Argentina Ltd. (hereinafter called "Wellcome Argentina"), Ark Products Ltd. and Tasman Vaccine Laboratory (UK) Ltd. (hereinafter called "Tasman").

4. CAH was in all the accounting periods under appeal the principal operating company for the Group (the "Group" being CAHH and its subsidiaries and certain related companies). It carried on the trade of researching, developing, manufacturing and selling animal health products.

Wellcome Argentina carried on the trade of selling pharmaceutical products in Argentina in all the accounting periods under appeal.

Ark Products Ltd. was incorporated on 17 September 1984 under the name Megatime Ltd. and changed its name to Ark Products Ltd. (hereinafter called "Ark") on 31 October 1984. It did not carry on a trade during the accounting period to 30 August 1985. In the accounting period to 30 August 1986 Ark acquired a 5 per cent. interest in Coopers Colombia SA and a 0.16 per cent. interest in Coopers Veterinaria Limitada. Tasman ceased to trade on 1 December 1984.

5. In the accounting periods:—

to 31 August 1985, the consolidated turnover of CAHH was £141,198,000; the turnover of CAH was £38,892,000, the turnover of Wellcome Argentina £2,400,000, and Ark £nil;

to 30 August 1986, the consolidated turnover of CAHH was £150,059,000, that of CAH was £44,715,000, that of Wellcome Argentina £2,213,000 and the investment income of Ark £8,000;

to 29 August 1987, the consolidated turnover of CAHH was £161,996,000, that of CAH was £49,840,000, that of Wellcome Argentina was £2,620,000 and the investment income of Ark £7,000.

All monetary figures in this paragraph 5 are stated to the nearest £1,000. The accounts of CAHH for each year are shown at Appendix(1) and the accounts of CAH for the three years are at Appendix 2(1).

6. CAH incurred substantial trading losses in its Accounting Periods to 31 August 1985, 30 August 1986 and 29 August 1987. Accordingly, corporation tax computations were submitted to the Inland Revenue for the three Accounting Periods in question showing losses available for consortium relief as follows:—

	£
Accounting Period ended 31 August 1985	9,900,836
Accounting Period ended 30 August 1986	10,269,714
Accounting Period ended 29 August 1987	872,608

7. Appropriate elections for consortium relief were made under which ICI, Wellcome and CAH agreed that ICI should claim, and CAH should surrender to ICI, 49 per cent. of the total losses available for surrender in respect of the Accounting Periods ended 31 August 1985, 30 August 1986 and 29 August 1987. ICI's Accounting Period ends on 31 December and accordingly the claims for relief were made in respect of ICI's Accounting Period ended 31 December 1984, and the years ended 31 December 1985, 1986 and 1987. The letters submitted to the Inland Revenue claiming consortium relief and which were dated 21 August 1987, 10 August 1988 and 14 August 1989, are annexed hereto as Appendix 3(1).

8. The claims for consortium relief were refused by HM Inspector of Taxes dealing with the taxation affairs of ICI by letters dated 6 April 1989 and 25 August 1989. Those letters are annexed hereto as Appendix 4(1). Appeals against the Inspector's decision were lodged by ICI on 20 April 1989 and 30 August 1989, and those Appeals are annexed hereto as Appendix 5(1).

9. The question for determination is whether CAHH is a holding company within s 258 of the Income and Corporation Taxes Act 1970.

The case was heard in the Chancery Division before Millett J. on 4 December 1991 when judgment was reserved. On 5 December 1991 judgment was given against the Crown, with costs.

Peter Whiteman Q.C. for the Company

Roger Ter Haar for the Crown.

The following case was cited in argument:— *Hirsch* v. *Crowthers Cloth Ltd.* 62 TC 759; [1990] STC 174.

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(1) Not included in the present print.

A **Millett J.**:—This is an appeal by the taxpayer Imperial Chemical Industries plc from a decision of the Special Commissioner given on 18 January 1990 by which he dismissed the taxpayer's appeal against the Inspector's refusal of group relief from corporation tax in respect of the accounting periods of the taxpayer ending on 31 December 1984, 1985, 1986 and 1987. The question of law for the opinion of the Court is whether on the B facts agreed and on the true construction of s 258 of the Income and Corporation Taxes Act 1970 a subsidiary of the taxpayer called Coopers Animal Health (Holdings) Ltd. ("CAHH") was at the material times a holding company within the meaning of the section so as to enable the taxpayer to make a valid claim for group relief. The figures have not been agreed and the question has been argued as a pure question of law.

C

The facts are agreed and can be shortly summarised as follows. At all material times CAHH was a company incorporated and resident in the United Kingdom. Forty-nine per cent. of its share capital was held by the taxpayer and the remaining 51 per cent. was held by another company called Wellcome Foundation Ltd. CAHH was a holding company with 23 D subsidiaries, all but one of which were wholly owned by CAHH. Four of the subsidiaries were incorporated and resident in the United Kingdom; 19 were incorporated or registered overseas.

One of the subsidiaries incorporated and resident in the United Kingdom was a company called Coopers Animal Health Ltd. ("CAH"). E CAH was the principal operating subsidiary of CAHH. It was the largest single operating subsidiary, although at all material times its turnover represented only between 29 per cent. and 32 per cent. of the aggregate turnover of all the subsidiaries of CAHH.

F During the relevant accounting periods CAH made trading losses which it wishes to surrender to the taxpayer in order to enable the taxpayer to claim group relief. It can do so only if CAHH was "a holding company" within the meaning of s 258. That depends on whether its business consisted wholly or mainly in the holding of shares or securities of companies which were its 90 per cent. subsidiaries and were trading companies. That condition is satisfied, and accordingly if that were the only requirement it is common G ground that CAHH was a holding company within the meaning of s 258. The Crown, however, submits that there is a further requirement; the business of CAHH must have consisted wholly or mainly in the holding of shares or securities of companies which were not only its 90 per cent. subsidiaries and trading companies but which were also bodies corporate resident in the United Kingdom. It is common ground that, if that is a H requirement of the section, it was not satisfied. This raises a short question of statutory construction.

Section 258 confers group relief from corporation tax which can be of two kinds. The first, which is generally described as group relief, is conferred I by subs (1). So far as material, that reads as follows:

> "(1) Relief for trading losses ... from corporation tax may ... be surrendered by a company (called 'the surrendering company') which is a member of a group of companies and, on the making of a claim by another company (called 'the claimant company') which is a member of the same group, may be allowed to the claimant company by way of a relief from corporation tax called 'group relief'."

Subsection (5)(a) provides that two companies shall be deemed to be members of a group of companies if one company is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company. CAHH was not a 75 per cent. subsidiary of the taxpayer, and accordingly, while subs (1) would permit CAH to surrender its losses to CAHH, it would not permit CAH or CAHH to surrender their respective losses to the taxpayer.

Subsection (2) confers a second form of group relief, usually described as consortium relief. So far as material, it provides as follows:—

> "(2) Group relief shall also be available...(b) where the surrendering company is a trading company (i) which is a 90 per cent. subsidiary of a holding company which is owned by a consortium, and (ii) which is not a 75 per cent. subsidiary of a company other than the holding company and the claimant company is a member of the consortium."

If CAHH was a holding company within the meaning of s 258, then subs (2) is satisfied in the present case since the taxpayer (the claimant company) was a member of a consortium and CAH (the surrendering company) was a trading company which was a 90 per cent. subsidiary of CAHH (a holding company owned by the consortium).

Subsection (5) (*inter alia*) defines "holding company". So far as material it provides:—

> "(5) For the purposes of this section and the following sections of this Chapter ... (b) 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies."

It is common ground that at all material times CAHH would qualify as a holding company as defined by subs (5)(b).

Subsection (7), however, opens with the following words:

> "(7) References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom..."

The Crown submits that that is a definition of the word "company" wherever used in the section. Accordingly, wherever the word "company" appears, it is submitted, it is to be treated as a reference only to a body corporate resident in the United Kingdom. The Special Commissioner accepted that submission. Accordingly, he construed subs (5)(b) as if the words "body corporate resident in the United Kingdom" were substituted for "company", so that the paragraph read as follows:—

> "(b) 'holding company' means a body corporate resident in the United Kingdom the business of which consists wholly or mainly in the holding of shares or securities of bodies corporate resident in the United Kingdom which are its 90 per cent. subsidiaries, and which are trading companies ..."

It is common ground that if subs (5)(b) is read in that way CAHH was not a holding company since its business did not consist wholly or mainly in

A the holding of shares or securities of bodies corporate resident in the United Kingdom.

The first question is whether the word "companies" (in the plural) in subs (5)(b) is a reference to "a company" (in the singular) for the purpose of subs (7). I agree with the Crown that it is. A holding company must have B more than one subsidiary, or it cannot be a holding company for tax purposes. Accordingly, the use of the plural is deliberate and the Interpretation Act cannot be prayed in aid. Nevertheless, there is an implied reference to each of the relevant subsidiary companies, each of which must qualify as a 90 per cent subsidiary and a trading company. In my judgment, therefore, there is a sufficient reference to "a company" to bring in subs (7). C

The next, and critical, question is whether the opening words of subs (7) are a definition of the word "company", so as to require the substitution, wherever the words "a company" or "companies" appears, of the words "a body corporate resident in the United Kingdom". Here I part company with D the Crown. In my judgment the opening words of subs (7) are not a definition. Subsection (7) does not say: "References in this and the following sections of this Chapter to a company *are to be taken to be references to* a body corporate resident in the United Kingdom". It says: "References ... to a company *apply only* to bodies corporate resident in the United Kingdom". In my judgment the Crown's submission confuses the meaning of the E statutory language with its application. Statutes are not academic exercises in linguistics. They have external application, affecting real people and actual situations. If Parliament wishes to limit the scope of a statute so as to exclude a given situation from its application, it can do so in either of two ways. It can employ suitably restricted words in the operative provisions so that the particular situation does not come within them; or it can employ F words apt to include the situation but direct that they should nonetheless not apply to it. In the opening words of subs (7) Parliament has adopted the latter technique.

In my judgment, the opening words of subs (7) cut down the operation of s 258 to cases where the surrendering company and the claimant company G are bodies corporate resident in the United Kingdom. If the claimant company were not a body corporate resident in the United Kingdom any claim to group relief whether under subs (1) or subs (2) would be met by the response that the references in those subsections to a claimant company did not apply to it. In order to claim group relief, the claimant company must bring itself within one or other of those subsections. It is no good bringing H itself within the language of the relevant subsection if Parliament has directed that the subsection shall nonetheless not apply to it. Similarly with the surrendering company. In order to surrender its losses, it is no good bringing itself within the language of the relevant subsection if Parliament has directed that the subsection shall nonetheless not apply to it.

I But subs (5)(b) is a definition subsection, not an operative subsection. It has no external application. It defines the term "holding company". It does not apply to any actual company. In so far as it has any "application" at all, it applies to the words "holding company" in subs (2). The word "companies" does not even have this kind of "application". Like the words "shares or securities" in para (b), it is merely part of the definition of the term "holding company".

In my judgment, subs (5)(b) is unaffected by the opening words of subs (7), which are not a definition in which words or phrases are found on both sides of the equation. On one side is the term "a company", but on the other side "bodies corporate resident in the United Kingdom" is not the term but the things themselves. That is emphasised by the otherwise unexplained switch from the singular "a company" to the plural "bodies corporate", which would be inappropriate in a definition. The use of the plural "references" is not a sufficient explanation.

Accordingly, I am of the opinion that the Special Commissioner was wrong in reading subs (5)(b) with the substitution of the words "bodies corporate resident in the United Kingdom" for "companies". It follows that CAHH was a "holding company" within the meaning of s 258, and the taxpayer is entitled to group relief by virtue of subs (2).

I have reached this conclusion with some diffidence because it was not in the forefront of the argument presented by counsel for the taxpayer and was rejected by the very experienced Special Commissioner, although he too was troubled by the language of subs (7). He suggested that references to "a company" might be restricted to the surrendering company and claimant company, only to reject his own suggestion without giving any reason.

This makes it unnecessary to consider other arguments presented on behalf of the taxpayer, but I reject the argument based on the concluding words of subs (7) for the reason given by the Special Commissioner, viz: that those words are relevant only to the determination of the question whether one company is a 75 per cent. subsidiary of another. That is not a question which is relevant to the availability of consortium relief.

I allow the appeal.

Appeal allowed, with costs.

[Solicitors:—V. O. White; Solicitor of Inland Revenue.]

The Crown's appeal was heard in the Court of Appeal (Dillon, Stuart-Smith and Evans L.JJ.) on 29 June 1993 when judgment was reserved. On 15 July 1993 judgment was given unanimously against the Crown, with costs.

Christopher McCall Q.C. and *Rabinder Singh* for the Crown.

Peter Whiteman Q.C. for the Company.

No cases were cited in argument.

Dillon L.J.:—This is an appeal by the Crown against a decision of Millett J., given on 5 December 1991(1), in a Tax Case. By his decision, the

(1) Page 11*ante*.

A Judge reversed a decision in favour of the Crown which had been given by Mr. Charles Potter Q.C., as a Special Commissioner, on a question of statutory construction of provisions, relating to the form of group relief called consortium relief, which are contained in s 258 of the Income and Corporation Taxes Act 1970 as amended and in force in the years of assessment with which these proceedings are concerned. To be fair to Mr. B Potter, the point of construction on which the Judge decided the case in favour of the taxpayer, ICI, was a point which Mr. Potter himself had suggested during the course of the argument before him, but both of the advocates appearing before him rejected the suggestion and he did not pursue it. It is also a point which was not in the forefront of the argument of the taxpayer on the appeal to the Judge.

C

Section 258 has been replaced by ss 402 and 413 of the Income and Corporation Taxes Act 1988, but with that we are not concerned in this case.

Section 258 provided by subs (1) for the ordinary group tax relief and then by subs (2) for consortium relief which had originally been introduced D into tax law by the Finance Act 1967. Subsections (3) and (4) of s 258 do not matter, and then in subss (5) to (8) there are a number of provisions, some introduced by amendment since the section was originally enacted, which are said to apply "for the purposes of this and the following sections of this Chapter".

E

For the purposes of consortium relief as claimed in the present case, there has to be a consortium, which owns the share capital of a holding company which has a subsidiary which is at least a 90 per cent. subsidiary and is a trading company. If in such circumstances the subsidiary makes tax losses, the subsidiary can assign a due proportion of the tax losses to a F member of the consortium and that member can claim relief for the assigned losses against its own trading profits.

In the present case there is a consortium, which consists of the taxpayer and the Wellcome Foundation. The consortium owns the share capital of a company, Coopers Animal Health (Holdings) Ltd. ("Holdings"), which the G taxpayer claims is a holding company within the meaning of s 258, and Holdings had a wholly-owned direct subsidiary, Coopers Animal Health Ltd. ("CAH") which was a trading company and had made trading losses in the relevant years. CAH had assigned appropriate amounts of its losses to the taxpayer and the taxpayer had claimed consortium relief in respect of the losses.

H

The only issue, which lies in a very small compass, is whether Holdings qualifies as a "holding company" under s 258 and that depends on whether provisions in the opening words of subs (7) are to be applied to the definition of "holding company" in subs (5) of s 258.

I Subsection (2) of s 258 provides, so far as material, as follows:—

> "(2) Group relief shall also be available in accordance with the said provisions in the case of a surrendering company and a claimant company where either of them is a member of a consortium and the other is—
>
> (*a*) a trading company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company; or

(*b*) a trading company—

(i) which is a 90 per cent. subsidiary of a holding company which is owned by the consortium; and

(ii) which is not a 75 per cent. subsidiary of a company other than the holding company; or

(*c*) a holding company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company ..."

Of the three alternatives (a), (b) and (c), (b) is the one relevant to the present case.

Subsections (5) to (8) provide as follows:—

"(5) For the purpose of this section and the following sections of this Chapter—

(*a*) two companies shall be deemed to be members of a group of companies if one is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company,

(*b*) 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies,

(*c*) 'trading company' means a company whose business consists wholly or mainly of the carrying on of a trade or trades.

(6) In applying for the said purposes the definition of '75 per cent. subsidiary' in section 532 of this Act any share capital of a registered industrial and provident society shall be treated as ordinary share capital.

(7) References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this and the following sections of this Chapter whether one company is a 75 per cent. subsidiary of another, the other company shall be treated as not being the owner—

(*a*) of any share capital which it owns directly in body corporate if a profit on a sale of the shares would be treated as a trading receipt of its trade, or

(*b*) of any share capital which it owns indirectly, and which is owned directly by a body corporate for which a profit on the sale of the shares would be a trading receipt, or

(*c*) of any share capital which it owns directly or indirectly in a body corporate not resident in the United Kingdom.

(8) For the purposes of this and the following sections of this Chapter, a company is owned by a consortium if three-quarters or more of the ordinary share capital of the company is beneficially owned between them by companies of which none beneficially owns less than one-twentieth of that capital, and those companies are called the members of the consortium."

A Since the relevant alternative in subs (2) in the present case is alternative (b), we are not directly concerned with 75 per cent. subsidiaries, but there is a provision in relation to 75 per cent. subsidiaries under para (c) of subs (7) to which I shall have to come; it does not apply to 90 per cent. subsidiaries.

B The key question, however, is whether the opening words of subs (7):— "References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom" is to be applied throughout the definition of "holding company" in subs (5)(b) so that that should read:—

C > "(*b*) 'holding company' means a company [resident in the United Kingdom] the business of which consists wholly or mainly in the holding of shares or securities of companies [resident in the United Kingdom] which are its 90 per cent. subsidiaries, and which are trading companies..."

D It is common ground that if the opening words of subs (7) do have to be read into subs (5) in that way, the Crown succeeds on this appeal and the claim for consortium relief fails, because 19 of the 23, 90 per cent., subsidiaries (in fact 100 per cent. subsidiaries) of Holdings, being also a significant majority of such subsidiaries in value, were not at any relevant time resident in the United Kingdom.

E The Crown's case is thus very simple. On the clear wording of subs (7), which must be read into the definition of "holding company" in subs (5), Holdings does not satisfy the definition.

F Mr. McCall Q.C. sought to support the case by reference to a discussion in Hansard on the bill which became the Finance Act 1967 and which first introduced consortium relief. He establishes clearly that the view as to the effect of the opening words of what is now subs (7) on the definition of "holding company" in what is now subs (5) which was held in 1967 by the chief opposition spokesman, Mr. Patrick Jenkin, was the same as the view which the Crown now contends is correct. But that does not help him, as he does not establish that the Government of the day shared that view. The G answer on which Mr. McCall relies by the Minister concerned, Mr. John Diamond, amounts to no more than that a batch of amendments which Mr. Jenkin had proposed would be considered to see whether the Government could move a little further in the following year. Mr. Diamond did not comment on the particular amendment, to which Mr. McCall has directed our attention, and the interpretation of the wording of the bill which was the H reason for that amendment, very possibly because that amendment was not put forward in isolation from others. It is not necessary to pursue the excursion into Hansard further.

I Millett J. draws attention to the use of the word "apply" as the operative word in the opening words of subs (7). He draws a distinction between the meaning of statutory language and its application and says in effect, as I understand him, that the opening part of subs (7) is concerned with application and not with definition, and is not a definition section; therefore the provisions in the opening part of subs (7) fall to be applied only to those provisions in the section, such as subs (1) and subs (2), which have external application and not to those provisions which are mere definition sections, such as paras (b) and (c) of subs (5).

This is a somewhat difficult concept to express in words. There are certain difficulties about it, because it is not desirable to prescribe too rigid canons for the construction of an Act of Parliament—particularly an Act like the Taxes Act whose provisions may be subject to fairly frequent amendments, and may have initially come about by *ad hoc* amendments without extensive redrafting, in the course of the passage of a bill through Parliament. Some support for the Judge's distinction between "application" and "definition" is at first glance supplied by subs (6) where the governing phrase is "... in applying—... the definition of '75 per cent. subsidiary' in section 532"; but that seems to be the same concept as the opening phrase in the second half of subs (7) "... in determining whether one company is a 75 per cent. subsidiary of another".

As I see it, all the provisions in subss (6) to (8) could well have been set out as additional paras (d) onwards in subs (5), under the general heading in subs (5) "For the purpose of this and the following sections of this Chapter". The whole constitutes a mixture of definitions and qualifications which have to be worked out in applying the operative subsections. But it could be dangerous to apply too rigid a distinction between "definitions" and "qualifications"; indeed if the "definitions" were expanded to include all the "qualifications" in a definition the result would be formidable, and clarity for the reader would be lost.

The views expressed by Millett J. represent, however, the same instinctive reaction to the wording as do the views expressed by the House of Lords in *Davies Jenkins & Co. Ltd.* v. *Davies* 44 TC 273; [1968] AC 1097, to which Millett J. was in fact not referred.

That case was concerned with an area of tax law which preceded group relief and is now obsolete, *viz*:—subvention payments between associated companies. The idea was that if there were two associated companies and one had made trading losses, the other could make a subvention payment to the one which had made losses, and the subvention payment would be treated as a trading receipt of the company which had made losses and would be allowed as a deduction to the company which made the payment as if it were a trading expense.

There were two "qualifications" which had to be satisfied, under subss (9) and (10) of the relevant section, s 20 of the Finance Act 1953. Subsection (9) provided that for the purposes of the section "company" included any body corporate, but references to a company should be taken only to apply to a company resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom. Subsection (10) provided that a company making a subvention payment to another should be treated as the other's associated company if, but only if, at all times between the beginning of the payee company's accounting period in respect of which the payment was made and the making of the payment, one of them was a subsidiary of the other or both were subsidiaries of a third company.

The question that arose was whether the qualification in subs (9) that a company had to be a trading company had to be read into subs (10) with the result that for the relief to apply the payee company had to continue to be a trading company up to the time when the subvention payment was actually made; the payee company had in fact ceased trading after the end of the accounting period in the course of which the losses were made but before the

A subvention payment was made. After a remarkable difference of judicial opinion in the lower courts, the House of Lords held by a majority that subs (9) did not have to be read into subs (10) in that way and therefore there was no continuing obligation to satisfy subs (9) (as opposed to (10)) up to the date of payment.

B In that case the majority of their Lordships took the view that subss (9) and (10) set forth two qualifications, both of which had to be satisfied but which were independent of each other. Viscount Dilhorne illustrated this by saying at [1968] AC 1097, at page 1111D–F, not as a general rule, but as a conclusion on the particular section, that if both had been included in a single subsection it would be clear that they were each intended to apply to C the other subsections of s 20, and not to each other. Lord MacDermott at the foot of page 1115 shared the view that subss (9) and (10) were independent of each other and should be read and applied accordingly. Lord Morris agreed with that at 1119G; 44 TC 273, at page 293F–G:—

> D "There is force ... in the contention that subs (9) and subs (10) should be read as imposing separate independent qualifications and that subs (9) should not be infused into subs (10)."

Lord Upjohn rejected as wrong, at [1968] AC 1097, at page 1128B, the method of construction of slavishly reading in the definition whenever and E wherever the word defined occurs; regard had to be had to the context. He concluded at 1129D–E that subss (9) and (10) were quite independent of each other and could not be read as a whole to produce the result claimed by the Crown. In reaching that conclusion he paid regard to the fact that there seemed to be no reason in principle why it should be necessary to achieve the relief that the subsidiary which had been a resident trading company when it F incurred the losses in respect of which the subvention payment was made should still have to be trading at the, necessarily later, date when the payment was made.

Of course *Davies* case does not automatically conclude the present case and the reasoning in the House of Lords which was valid on the terms of the G section in *Davies* case is not an inevitable path to the same conclusion on the different wording of the section in the present case.

But the starting point must be to consider whether the opening words of subs (7) and the definition of "holding company" in subs (5) are independent qualifications. In considering that, it is relevant to consider whether there is H any apparent reason in the statute why the other subsidiaries of the holding company which are referred to in the definition of "holding company" should have to be bodies corporate resident in the United Kingdom. The tax affairs of those other subsidiaries do not appear to form any part of any possible calculation under the section, save in that actual remittals by a non-resident subsidiary to the holding company would be included in the taxable I receipts of the holding company.

The fact that the definition of "holding company" in para (b) of subs (5) necessarily imports the definition of "trading company" in para (c) does not help either way. It is normal for a definition in a definition clause to import other definitions in the same clause, and that does not necessarily require that all other "qualifications" are imported into the definition.

Paragraph (c) in the latter part of subs (7) does indicate that, in determining whether one company is to be treated as a 75 per cent. subsidiary of another, shareholdings of the other directly or indirectly in non-resident subsidiaries are to be disregarded. Thus UK resident subsidiaries held through non-resident subsidiaries of the parent do not come into the scheme for relief. That does not apply to 90 per cent. subsidiaries, since under s 532 of the Act a 90 per cent. subsidiary has to be directly owned by its parent, the "other" company, although a 75 per cent. subsidiary can be owned directly or indirectly. A possible reason for having para (c) in relation to subsidiaries held by a company through non-resident subsidiaries may be that dividends would pass upward from the 75 per cent. subsidiaries through non-resident intervening subsidiaries and could thus be affected by foreign tax laws. This scheme is clearly designed to be applied only to companies which are resident in the United Kingdom. It is the intention to exclude companies not so resident, no doubt because they are subject to foreign and not United Kingdom tax law. But I do not see that makes it necessary that the subsidiaries that a holding company has to have to qualify as a holding company under subs (5) must be wholly or mainly resident in the United Kingdom. The trading subsidiary which is the surrendering company under subs (2) must be resident in the United Kingdom and so must the claimant company and the holding company itself, because the effect on subs (2) of the opening words in subs (7) so requires. But where other subsidiaries of the holding company, in no way involved in the surrender of losses and claim for relief, are resident seems to be a matter of indifference. Indeed the use of the words "wholly or mainly" in the definition of "holding company" in subs (5) would seem to indicate that even on the Crown's argument relief would not be lost if the holding company had a minority of subsidiaries which were not resident in the United Kingdom. I cannot see why it should be relevant and make a difference in the result, if a majority and not a minority, of the holding company's subsidiaries are resident outside the United Kingdom; none of the subsidiaries not resident in the United Kingdom will be surrendering tax losses or making claims to consortium relief.

In my judgment the definition of "holding company" in subs (5) and the opening words in subs (7) requiring companies to be resident in the United Kingdom are independent "qualifications" just as the requirements of subss (9) and (10) in the section in *Davies* case were independent qualifications. That being so, since to require all or the majority of 90 per cent. subsidiaries of a holding company to be resident in the United Kingdom seems to be an irrational restriction in the scheme, I would hold that, in the context, the opening words of subs (7) are satisfied by being applied to the surrendering company, the claimant company and the holding company under subs (2) and do not have to be infused (as Lord Morris put it) into the definition in subs (5).

For these reasons, I agree with the result reached—albeit by not entirely the same reasoning—by Millett J. and I would dismiss this appeal.

Stuart-Smith L.J.:—I have had the advantage of reading the judgments in draft of Dillon and Evans L.JJ. and I agree that the appeal should be dismissed for the reasons they give.

Evans L.J.:—This appeal raises a short point of statutory construction in the context of the provisions for group relief from corporation tax under

s 258 of the Income and Corporation Taxes Act 1970. These provisions were introduced in 1967. Section 258(1) permits "relief for trading losses" i.e. the right to set trading losses against profits, to be surrendered by one member of a group of companies to another company in the same group. The two companies are described as the "surrendering company" and the "claimant company", respectively.

Section 258(2) extends the same concept to include consortium relief. It provides:—

> "(2) Group relief shall also be available in accordance with the said provisions in the case of a surrendering company and a claimant company where either of them is a member of a consortium and the other is—
>
> (*a*) a trading company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company; or
>
> (*b*) a trading company—
>
> (i) which is a 90 per cent. subsidiary of a holding company which is owned by the consortium; and
>
> (ii) which is not a 75 per cent. subsidiary of a company other than the holding company; or
>
> (*c*) a holding company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company.
>
> Provided that ... ."

Subsection (2) presupposes, therefore, a consortium which owns either a trading company or a holding company with a trading company subsidiary, subject to the stated restrictions, and that the claim for tax relief is made by either the consortium member or the trading company, and is surrendered by the other.

The phrase "holding company" in subs (2) is defined in subs (5) which I should quote in full:—

> "(5) For the purpose of this section and the following sections of this Chapter—
>
> (*a*) two companies shall be deemed to be members of a group of companies if one is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company,
>
> (*b*) 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies,
>
> (*c*) 'trading company' means a company whose business consists wholly or mainly of the carrying on of a trade or trades."

It is common ground that both the claimant and the surrendering company must be resident in the United Kingdom. This is because subs 7 provides as follows:—

"(7) References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom; ... ."

The terms of subs (7) are such, that if they provide a definition of "company" which applies not only to the definition of "holding company" in subs (5)(b) but also to the subsidiaries of the holding company which are referred to in that definition, then the right to claim relief is excluded unless the holding company and the necessary preponderance of its subsidiaries all are resident in this country.

In the present case, the Respondent Taxpayer ICI is the consortium member. The consortium, consisting of itself and Wellcome Foundation PLC, owns the holding company, CAHH, which has a trading company subsidiary, CAH. Both CAHH and CAH are resident in the United Kingdom. The trading subsidiary, CAH, seeks to surrender trading losses to ICI, which of course is also resident here. But the holding company has 19 trading subsidiaries which are non-resident, as opposed to 4 including CAH which are, and therefore it does not satisfy the definition of "holding company" in subs (5)(b) if the residence of its subsidiaries has to be taken into account. The Appellant submits that this is the plain meaning of the first two lines of subs (7), quoted above. It is agreed that the difference between the singular "a company" in subs (7) and the plural "companies" in subs (5)(b) is irrelevant to the question of construction which thus arises. The learned Special Commissioner upheld the Appellant's contention.

Millett J., however, allowed the taxpayer's appeal. He did so on a ground which had not been argued before the Special Commissioner, although a similar point was raised and then rejected by him. Essentially, the ground is that subs (7) does not provide a definition of "company" or "companies" which must be read into the section whenever those words appear, in particular in subs 5(b). Rather, it identifies the companies who may take advantage of the section, whether by claiming or surrendering trading losses under its provisions, and it limits these to companies resident in the United Kingdom.

There is no difficulty in identifying the legislative purpose behind the statute, if it has the effect for which the Respondent Taxpayer contends. Both the claimant and the surrendering companies if resident in the UK will be subject to corporation tax in the UK, and they are the only two companies whose tax affairs are affected by the transfer of relief. It is irrelevant whether the holding company, if there is one, interposed between the consortium and the trading company, or the other member or members of the consortium, are UK resident, or not. But there is no obvious justification in terms of legislative purpose for the further limitation for which the Appellant contends. His construction simply has the effect of limiting consortium relief to cases where all the consortium members (subject to the requirements of subs (8)) and the holding company and the majority of its subsidiaries (subject to the requirements of subs 5(b)) are resident in the UK., as well as the claimant and surrendering companies themselves. He submits that this is the plain meaning of the words, to which effect must be duly given.

Millett J. resolved the issue in favour of the Respondents by holding that subs (7) does not provide a definition of the word "company"; rather, it

A is concerned with the application of subs (2). Thus, only the claimant and the surrendering companies are subject to the restriction regarding UK residence. This involves drawing a fine distinction between the words "References ... apply only to" and words which might have been used, if a definition was intended, for example, "References ... are to be taken to be references to ...".

B

I have reached the same conclusion as Millett J., but by what may be a different route. This route has been mapped out by the speeches of Viscount Dilhorne and Lord Upjohn in *Davies Jenkins & Co. Ltd.* v. *Davies* 44 TC 273; [1968] AC 1097, to which Millett J. was not referred. Before citing their speeches, I will summarise what is in my judgment the correct interpretation of
C the section.

Section 258(2) refers expressly to three companies; a claiming company, a surrendering company, and a holding company which may be interposed between them. Either the surrendering company or the claiming company is the member of a consortium, but there is no express reference to other
D consortium members.

Section 258(5)(b) provides the definition of "holding company" which must be read into subs (2); likewise, subs (5)(c) as regards "trading company".

Subsection (7) then provides "References ... to a company shall apply
E only to" UK resident companies. If this is treated as a definition section, then it provides a definition of "company" for the purposes of subs (2) which certainly governs "surrendering company" and "claiming company" and which may also govern "holding company", though it is unnecessary to decide this latter question in the present case, because the holding company CAHH is resident in the UK.

F

Since there is no express reference in subs (2) to other companies which are members of the consortium, even on a strict and literal interpretation, subs (7) does not introduce a requirement into that subsection that those other companies must be UK residents also.

G

The Appellant submits, however, that other consortium members are referred to as "companies" in subs (8), both in its original and its amended forms, with the result that subs (7) on the literal construction which the Appellant supports applies to those other companies as a result of subs (8). I find it strange that something so fundamental as the question whether tax relief is only available when all the consortium member companies are
H resident in the UK. should only be answered in this oblique way. It seems much more likely that such a limitation on the application of the section, if that was intended, would be expressly or at least directly stated. This factor militates strongly, in my judgment, against the interpretation of subs (7) for which the Appellant contends.

I

We were told that statutory provisions corresponding with s 258(1) and (2) introduced, first the concept of group relief and then of consortium relief, within the limits provided for. The question which naturally arises is, who may take advantage of these provisions? Put another way, to whom do the provisions apply? In my judgment, that is the question to which subs (7) gives the answer. The section applies only to UK resident companies. "References ... to a company" are to UK resident companies only.

In the result, therefore, subs (7) is concerned with the application of the section and it may be said to provide a definition of "company" which applies to the companies claiming and surrendering the tax relief and perhaps the holding company also. But it does not follow that it also defines "companies" where that word appears in the definition of "holding company", and in my judgment it does not.

The judgment of the House of Lords in *Davies Jenkins & Co. Ltd.* v. *Davies* [1968] AC 1097; 44 TC 273 is relevant, in my view, for a number of reasons. First, s 20 of the Finance Act 1953 which was there under consideration contained "the enacting subsection (1)" (*per* Lord Upjohn at [1968] AC 1097, at page 1127F) and two definition subss (9) and (10), each of which began with the words "For the purposes of this section". The Revenue argued that the ensuing definition of "company" in subs (9) should be read into the whole of the section whenever that word appeared, and that it applied in particular to a reference in subs (10). The argument was rejected. Both Viscount Dilhorne and Lord Upjohn held that it was wrong as a matter of construction to apply the definition in this mechanical way. "Regard must be had to the context" (*per* Lord Upjohn at 1128B). The correct approach was to apply the definition in subs (9) to the enacting subs (1), but not to subs (10) which was itself a parallel definition, and which might have been contained either in the same subsection or in a different section of the Act, where it would not have had the effect which the Revenue sought.

Secondly, Lord Upjohn distinguished between a definition subsection properly so called and subs (9) which was intended as "no more than a qualification section. It merely defines those companies who are qualified to obtain the benefits of subsection (1)" [1968] AC 1097, at page 1129C; 44 TC 273, at page 300D. The same distinction was recognised by Millett J. in the present case, and in my judgment he was right to do so.

Thirdly, Viscount Dilhorne commented as follows:—

> "There appears to be no good reason for so restricting the application of the section. The revenue was not able to suggest one, but they contended that, on its true construction, the section had that effect." ([1968] AC 1097, at page 1109G; 44 TC 273, at page 287A)

The same applies here.

Finally, the judgment in *Davies Jenkins & Co. Ltd.* v. *Davies* was given in March 1967. The statutory predecessors of s 258 of the 1970 Act were before Parliament in June 1967, as the Hansard extracts relied upon by the Appellant show. If it was intended that what is now s 258(7) should be applied differently from the method described by the House of Lords, then it was incumbent upon the draftsman to make that clear, particularly having regard to the comments made in the last paragraph of Lord Upjohn's speech (1130A).

With regard to the Hansard references, in my view this is not a case where they are admissible in accordance with *Pepper* v. *Hart* 65 TC 421; [1992] STC 598 and in any event they do not assist the Appellant.

A There is nothing in the provision for group relief under subs (1) or the deeming provisions of subss 5(a) and (7)(a) to (c) which in my judgment affects the construction of subss (2), 5(b) and (7) for the purposes of this appeal.

For these reasons, I conclude that the judgment of Millett J. was correct
B and that this appeal should be dismissed.

Appeal dismissed, with costs.

C The Crown's appeal was heard in the House of Lords (Lords Keith of Kinkel, Browne-Wilkinson, Mustill, Nolan and Nicholls of Birkenhead) on 30 and 31 October and 1 November 1995 when judgment was reserved. On 14 March 1996 the appeal was not determined and reference to the European Court of Justice was made on 24 July 1996 under Article 177 of the Treaty of Rome.

D

Alan Moses Q.C. and *Rabinder Singh* for the Crown.

Peter Whiteman Q.C. and *Christopher Vajda* for the Company.

The following cases were cited in argument in addition to the cases
E referred to in the judgment:—*Finanzamt Köln-Alkadt* v. *Schumacher* (Case C-279/93)(ECJ); *Bachmann* v. *Belgian State* (Case C-204/90)(ECJ) [1992] ECR -1 249; [1994] STC 855; *Biehl* v. *Administration des contributions du grand-duché de Luxembourg* (Case C-175/88)(ECJ) [1990] ECR-1 1779; [1991] STC 575; *Bond van Adventeerders & others* v. *Netherlands State* (Case 352/85)(ECJ) [1988] ECR 2085; *Duke* v. *GEC Reliance Ltd.* [1988] AC 618; [1988] 1 All ER 626;
F *Commission of the European Communities* v. *French Republic* (Case 270/83) (ECJ) [1986] ECR 273; *Commission of the European Communities* v. *Hellenic Republic* (Case 305/87)(ECJ) [1989] ECR 1461; *Foglia* v. *Novello* (Case 104/79)(ECJ) [1980] ECR 745; *Halliburton Services BV* v. *Staatssecretaris van Financiën* (Case C-1/93)(ECJ) [1994] ECR-1 1137; [1994] STC 655; *Hurd* v. *Jones* (Case 44/84)(ECJ) [1986] QB 892; [1986] STC 127; *Irish Creamy Milk*
G *Suppliers Association & Others* v. *Government of Ireland & Others* (Joined Cases 36 & 71/80)(ECJ) [1981] ECR 735; *Knoors* v. *Secretary of State for Economic Affairs* (Case 115/78)(ECJ) [1979] ECR 399; *Marleasing SA* v. *La Commercial Internacional de Alimentación SA* (Case 106/89)(ECJ) [1990] ECR 1–4135; *Morson & Jhanjan* v. *Netherlands State* (Cases 35 &
H 36/82)(ECJ) [1982] ECR 3272; *Pepper* v. *Hart & Others* 65 TC 421; [1993] AC 593; *Regina* v. *H.M. Treasury & Commissioners of Inland Revenue* ex parte *Daily Mail & General Trust plc* (Case 81/87)(ECJ) [1988] ECR 5483; [1989] QB 446; *Regina* v. *Immigration Appeal Tribunal & Surinder Singh* ex parte *Secretary of State for the Home Department* (Case C-370/90)(ECJ) [1992] ECR 4265; [1992] 3 All ER 798; *Regina* v. *Inland Revenue Commissioners* Ex
I parte *Commerzbank A.G.* (Case C-330/91)(ECJ); [1994] QB 219; [1993] 4 All ER 37; *Regina* v. *Secretary of State for the Home Department* ex parte *Wynne* [1993] 1 WLR 115; [1993] 1 All ER 574; *Factortame Ltd. & Others* v. *Secretary of State for Transport* [1990] 2 AC 85; [1989] 2 All ER 692; *Reyners* v. *Belgian State* (Case 2/74)(ECJ) [1974] ECJ 631; *Salonia* v. *Poidomani & Baglieri, née Giglio* (Case 126/80)(ECJ) [1981] ECR 1563; *Von Colson & Kamann* v. *Land Nordhein-Westfalen* (Case 14/83)(ECJ) [1984] ECR 1891; *Webb* v. *EMO Air Cargo (U.K.) Ltd.* (Case C-32/93)(ECJ); [1994] QB 718;

[1993] ICR 175; *Werner* v. *Finanzamt Aachen-Innenstadt* (Case C-112/91) (ECJ) [1993] ECR 429.

Lord Keith of Kinkel:—My Lords, for the reasons given in the speech to be delivered by my noble and learned friend Lord Nolan, which I have read in draft and with which I agree. I would make a reference to the European Court of Justice under Article 177 of the Treaty of Rome. The parties are invited to submit their proposals as to the precise form which the reference should take.

Lord Browne-Wilkinson:—My Lords, I have read the speech of my noble and learned friend Lord Nolan, with which I agree. For the reasons which he gives, I too would refer the matter to the European Court of Justice under Article 177 of the Treaty of Rome.

Lord Mustill:—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nolan, with which I agree. For the reasons which he gives, I too would refer the matter to the European Court of Justice under Article 177 of the Treaty of Rome.

Lord Nolan:—My Lords, the facts of this case are straightforward and are not in dispute. They are as follows.

Coopers Animal Health (Holdings) Ltd. ("Holdings") was incorporated on 17 May 1984. From that date its issued shares were owned beneficially as to 51 per cent. by the Wellcome Foundation Ltd. and 49 per cent. by the Respondent Imperial Chemical Industries plc ("ICI").

Holdings carried on no business save that of holding shares in subsidiary companies trading in many parts of the world. Those subsidiaries were 23 in number. Four of them were resident in the United Kingdom, six resident in other Member States of the European Union and the remaining 13 resident outside the European Union.

One of the four United Kingdom resident companies was Coopers Animal Health Ltd. ("CAH"), which incurred substantial trading losses in carrying on its United Kingdom trade in each of its three accounting periods ending on 31 August 1985, 30 August 1986 and 29 August 1987. Holdings, ICI and the Wellcome Foundation Ltd. were, like CAH, all resident in the United Kingdom at all material times. The question at issue is whether ICI is entitled to claim tax relief in respect of the trading losses of CAH during those periods. The precise claim by ICI is that it is entitled to set 49 per cent. of the losses for those periods (the proportion corresponding to its shareholding in Holdings) against its chargeable profits for its accounting periods ending on 31 December 1984, 1985, 1986 and 1987.

The relief which ICI seeks is that conferred by ss 258–264 Income and Corporation Taxes Act 1970. (These provisions have been replaced by similar provisions in the Income and Corporation Taxes Act 1988.) It is common ground that the claim by ICI must succeed if Holdings is a holding company as defined by s 258(5)(b) which reads as follows:

A " 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies ... "

The Crown contends that Holding does not fall within this definition because
B of the opening words of s 258(7) which read as follows:—

"References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom ... "

C The Crown submits that, as a result of these words, any reference to a company or to companies in the relevant sections must be read as applying only to a company or companies resident in the United Kingdom. On that basis, although Holdings itself is a company resident in the United Kingdom, it does not fall within the terms of subs (5)(b) because 19 of its 23 subsidiaries are resident outside the United Kingdom. Therefore, it is submitted, the
D business of Holdings cannot be said to consist wholly or mainly in the holding of shares or securities of United Kingdom resident companies. This submission was upheld by the Special Commissioner, Mr. D. C. Potter Q.C.,[1] but was rejected by Millet J.[2] (as he then was) and by the Court of Appeal[3].

E The Crown now appeals to your Lordships' House. In its response, ICI submits that the contentions of the Crown are in conflict not only with the provisions of the Act of 1970 read by themselves, but also with those provisions when construed in accordance with European Community law.

F No reliance had been placed by ICI upon Community law in the proceedings hitherto. I propose to approach the matter by first considering the opposing arguments in the light of the relevant provisions of the Act of 1970 when read by themselves, as did the Courts below, and then turning to the implications, if any, of Community law.

G Like all questions of construction, the question in the present case has to be answered by reference to the relevant statutory provisions as a whole. The full terms of s 285 are as follows:—

"(1) Relief for trading losses and other amounts eligible for relief from corporation tax may in accordance with the following provisions of this Chapter be surrendered by a company (called 'the surrendering
H company') which is a member of a group of companies and, on the making of a claim by another company (called 'the claimant company') which is a member of the same group, may be allowed to the claimant company by way of relief from the corporation tax called 'group relief'.

I (2) Group relief shall also be available in accordance with the said provisions in the case of a surrendering company and a claimant company where either of them is a member of a consortium and the other is—

(*a*) a trading company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company; or

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(1) Page 4 *ante*. (2) Page 11 *ante*. (3) Page 14 *ante*.

(*b*) a trading company— A

(i) which is a 90 per cent. subsidiary of a holding company which is owned by the consortium; and

(ii) which is not a 75 per cent. subsidiary of a company other than the holding company; or B

(*c*) a holding company which is owned by the consortium which is not a 75 per cent. subsidiary of any company:

Provided that a claim shall not be made by virtue of this subsection if the share in the consortium of the member in the relevant accounting period of the surrendering company (or, where that company is a trading company falling within paragraph (*b*) above, its holding company) is nil or if a profit on a sale of the share capital of the other company or its holding company which the member owns would be treated as a trading receipt of that member. C

(3) Subject to the following sections of this Chapter, two or more claimant companies may make claims relating to the same surrendering company, and to the same accounting period of that surrendering company. D

(4) A payment for group relief—

(*a*) shall not be taken into account in computing profits or losses of either company for corporation tax purposes, and E

(*b*) shall not for any of the purposes of the Corporation Tax Acts be regarded as a distribution or a charge on income.

and in this subsection 'payment for group relief' means a payment made by the claimant company to the surrendering company in pursuance of an agreement between them as respects an amount surrendered by way of group relief, being a payment not exceeding that amount. F

(5) For the purpose of this section and the following sections of this Chapter—

(*a*) two companies shall be deemed to be members of a group of companies if one is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company, G

(*b*) 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries and which are trading companies, H

(*c*) 'trading company' means a company whose business consists wholly or mainly of the carrying on of a trade or trades.

(6) In applying for the said purposes the definition of '75 per cent. subsidiary' in section 532 of this Act any share capital of a registered industry and provident society shall be treated as ordinary share capital. I

(7) References in this and the following section of this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this and the following sections of this chapter whether one company is a 75 per cent. subsidiary of another, the other company shall be treated as not being the owner—

A

(*a*) of any share capital which it owns directly in a body corporate if a profit on a sale of the shares would be treated as a trading receipt of its trade, or

(*b*) of any share capital which it owns indirectly, and which is owned directly by a body corporate for which a profit on the sale of
B the shares would be a trading receipt, or

(*c*) of any share capital which it owns indirectly, and which is owned directly or indirectly in a body corporate not resident in the United Kingdom.

(8) For the purposes of this and the following sections of this
C Chapter, a company is owned by a consortium if three-quarters or more of the ordinary share capital of the company is beneficially owned between them by companies of which none beneficially owns less than one-twentieth of that capital, and those companies are called the members of the consortium."

D Section 259, so far as relevant, reads as follows:—

"(1) If in any accounting period the surrendering company has incurred a loss, computed as for the purposes of subsection (2) of section 177 of this Act, in carrying on a trade, the amount of the loss may be set off for the purposes of corporation tax against the total
E profits of the claimant company for its corresponding accounting period ..."

Subsections (2), (3) and (6) extend the relief to cases where the surrendering company is entitled to capital allowances, or has incurred expenses of management or charges on income (such as interest payments) in
F excess of its income. Subsection (8), dealing with members of a consortium, provides as follows:—

"(8) In applying any of the preceding subsections in the case of a claim made by virtue of section 258(2) above—

(*a*) where the claimant company is a member of a consortium
G only a fraction of the loss referred to in subsection (1) above, or of the excess referred to in subsection (2), (3) or (6) above, as the case may be, may be set off under the subsection in question;

(*b*) where the surrendering company is a member of a consortium that loss or excess shall not be set off under the
H subsection in question against more than a fraction of the total profits of the claimant company;

and that fraction shall be equal to that member's share in the consortium in the accounting period referred to in section 258(2) above ..."

I Thus it will be seen that, in the terms of s 258(8), Holdings is owned by a consortium consisting of ICI and the Wellcome Foundation. ICI is, therefore, entitled by virtue of s 258(2) and s 259(1) and (8)(a) to relief in respect of its 49 per cent. share in the consortium for the trading losses suffered by CAH provided, and provided always, that Holdings is a holding company within the meaning of s 258(5)(b). And this, as I have said, depends upon whether s 258(7) requires the word "companies" at the end of subs

(5)(b) to be read as meaning "... bodies corporate resident in the United Kingdom". A

Was this the purpose that Parliament intended to achieve by the words used? The evident purpose of s 258(1) was to enable a parent company and its 75 per cent. subsidiaries to be treated as a single entity for tax purposes, merging the profits and the losses of individual members of the group in order to arrive at the taxable profit (if any). It is to be noted that in the case of what might be called ordinary group relief under s 258(1) the relief which may be claimed is not limited to the extent of the equity participation: a claim for 100 per cent. of the loss may be made under s 259(1) even if the equity participation is no more than 75 per cent. Thus to take the simple case where company A holds 75 per cent. and company B holds 25 per cent. of the shares in company C, company A can claim group relief in respect of the whole of company C's losses, irrespective of the 25 per cent. holding of company B, and irrespective, for that matter, of whether company B is resident or non-resident in the United Kingdom. B C

The extension of the concept of group relief to a consortium of companies under s 258(2) was presumably intended to encourage and facilitate the *ad hoc* merger of a number of different corporate interests in a single common enterprise. Under the terms of s 258(2) and (8) the relief depends upon the members of the consortium owning between them at least 75 per cent. of the shares in a company (which I shall call the "consortium company") with none of them owning less than 5 per cent. of those shares. In this instance, however, the relief available is limited by s 259(8) by reference to the share in the consortium owned by the surrendering or claimant company. That is why ICI's claim in the present case is limited to 49 per cent. of the losses of CAH. But even so, the amount of the loss in respect of which relief is claimed could in certain cases be greater than the consortium member's share. Thus in the present case—and subject always to Holdings qualifying as a holding company within the meaning of s 258(5)(b)—ICI could still have made a claim in respect of 49 per cent. of the whole of the losses of CAH even if CAH had been owned as to only 90 per cent. by Holdings: (see s 258(b)(i)). Once again, the interest, and for that matter the residence, of the minority shareholder or shareholders would be ignored. D E F G

Thus both ordinary group relief under s 258(1) and consortium group relief under s 258(2) produce the result that the claimant and surrendering company may merge their profits and losses for United Kingdom tax purposes at least to the extent of the equity participation, direct or indirect, of the one in the other and sometimes to a somewhat greater extent. But this can only be done if they are both resident in the United Kingdom, because the opening words of s 258(7) make it plain that ss 258 and 259 only apply to such bodies. This has the effect of ruling out a claim by a body corporate which, although trading in the United Kingdom and, therefore, liable to United Kingdom tax, is not a United Kingdom resident. H I

Do the opening words of subs (7) have any wider effect? The Crown contends that, on their plain meaning, they have the effect of qualifying every reference to a company, or companies, in s 258 and the following sections. It follows that this qualification applies to the companies which are to be deemed to be members of a group under subs (5)(a), to each of the companies which form a consortium within the meaning of subss (2) and (8),

and to the holding company and the 90 per cent. subsidiary trading companies in the holding of whose shares its business wholly or mainly consists as described in subs (5)(b).

Millett J., [1992] STC 51, as he then was, rejected the argument for the Crown because, in his view, it wrongly treated the opening words of subs (7) as definitive. He said, at page 58([1]):

> "In my judgment the Crown's submission confuses the meaning of statutory language with its application. Statutes are not academic exercises in linguistics. They have external application, affecting real people and actual situations. If Parliament wishes to limit the scope of a statute so as to exclude a given situation from its application, it can do so in either of two ways. It can employ suitably restricted words in the operative provisions so that the particular situation does not come within them, or it can employ words apt to include the situation but direct that they should none the less not apply to it. In the opening words of sub-s (7) Parliament has adopted the latter technique.
>
> In my judgment, the opening words of sub-s (7) cut down the operation of s 258 to cases where the surrendering company and the claimant company are bodies corporate resident in the United Kingdom."

In other words, Millett J. treated the opening words of subs (7) as identifying the companies which could take advantage of the section, rather than as a definition of the word "company" whenever it appeared in the section. In the Court of Appeal Dillon and Evans L.JJ., with both of whom Stuart-Smith L.J. agreed, reached the same conclusion though on slightly different grounds. Both were strongly influenced by the views expressed in your Lordships' House in *Davies Jenkins & Co. Ltd.* v. *Davies* 44 TC 273; [1968] AC 1097, a case decided under s 20 of the Finance Act 1953. Subsection (9) of that section provided that for the purposes of the section "company" included any body corporate, but that references to a company should be taken to apply only to a company resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom. Subsection (10) provided, again "for the purposes of this section", that a company making a subvention payment to another should be treated as the other's associated company if, but only if, at all times between the beginning of the payee company's accounting period in respect of which the payment was made and the making of the payment, one of them was a subsidiary of the other or both were subsidiaries of a third company. The question that arose was whether the requirement in subs (9) that references to a "company" should be taken to apply only to a trading company had to be read into subs (10), with the result that, for the section to apply, both the payer and the payee company had to continue to be trading companies up to the time when the subvention payment was actually made, a condition which the payee company in that case failed to satisfy.

The majority of their Lordships took the view that subss (9) and (10) set forth two qualifications, both of which had to be satisfied but which were independent of each other. It followed that the provisions of subs (9) should not be read into subs (10).

([1]) Page 13D *ante*.

Adopting the same approach to the provisions of s 258(5)(b) and the opening words of subs (7) in the present case, Dillon and Evans L.JJ. concluded that they represented independent qualifications, and that the latter should not be read into the former.

I confess that I, for my part, cannot derive the same assistance from the views expressed in *Davies Jenkins*. It certainly provides an illustration, in a context not very far removed from that of the present case, of the proposition that two qualifying clauses in the same section need not necessarily be read together even though both are introduced by the words "for the purposes of this section". The question remains whether the language of the relevant provisions in the present case allows or requires that result to be reached.

In argument before us, each of the parties pointed to the surprising and apparently inexplicable results which would follow from the construction advocated by the other. The strongest points made by Mr. Moses Q.C., for the Crown, in this connection appeared to me to be these.

First, he said, the Respondent's construction made nonsense of the ordinary group relief provisions of s 258(1). For, if one ignored the opening words of subs (7) in determining whether the claimant and the surrendering company were members of a group of companies within the meaning of subs (5)(a), then it would follow that two resident subsidiaries of a non-resident parent company could qualify as members of a group: but, if the shares of the non-resident parent were held by a UK resident company, the provisions of subs (7)(c) would exclude that company from the group relationship. This, submitted Mr. Moses, was a result which Parliament could hardly have intended to achieve. Put positively, his submission was that the opening words of subs (7) could not sensibly be confined to the surrendering company and the claimant company referred to in subs (1) but must also govern the question whether the two companies were members of a group of companies within the meaning of the subsection. They must, therefore, be read into subs (5)(a) no less than subs (1).

Secondly, turning to the case of consortium relief under subs (2) Mr. Moses submitted that ICI's argument could not be reconciled with the apparent legislative purpose. If ICI were right, the opening words of subs (7) applied to the claimant company and the surrendering company, and possibly to the holding company, but not to the other members of the consortium. From that it would follow that a UK resident member of the consortium could claim relief even if it only held 5 per cent. of the shares in the consortium company and the rest were held by non-resident companies. But that would make nonsense of the requirement, in subs (8), that the other members should be companies. There could be no reason why they should not be individuals or partnerships. Further, there would be no sense in the requirement that 75 per cent. of the ordinary shares in the consortium company should be owned by the members of the consortium. But, if the Crown were right, consortium relief was confined to the case where at least 75 per cent. of the consortium company was held by a consortium which consisted entirely of UK resident bodies corporate, and which could thus be equated to a single composite United Kingdom resident company. This, submitted Mr. Moses, was an intelligible concept in itself, and was in line with the concept of 75 per cent. ownership by a United Kingdom resident company which, in the Crown's submission, formed the basis of ordinary

group relief. I notice, incidentally, though Mr. Moses placed no reliance upon it, that the group income provisions which form part of the same Chapter as the group relief provisions (Chapter I of Part XI of the Act), and which also deal with consortia, require all consortium members to be resident in the United Kingdom: (see s 256(6)(c)).

The contrary view is summarised in the following passage from the judgment of Dillon L.J., at [1993] STC 715h([1]):

> "This scheme is clearly designed to be applied only to companies which are resident in the United Kingdom. It is the intention to exclude companies not so resident, no doubt because they are subject to foreign and not United Kingdom tax law. But I do not see that that makes it necessary that the subsidiaries that a holding company has to have to qualify as a holding company under sub-s (5) must be wholly or mainly resident in the United Kingdom. The trading subsidiary which is the surrendering company under sub-s (2) must be resident in the United Kingdom and so must the claimant company and the holding company itself, because the effect on sub-s (2) of the opening words in sub-s (7) so requires. But where other subsidiaries of the holding company, in no way involved in the surrender of losses and claim for relief, are resident seems to be matter of indifference. Indeed the use of the words 'wholly or mainly' in the definition of 'holding company' in sub-s (5) would seen to indicate that even on the Crown's argument relief would not be lost if the holding company had a minority of subsidiaries which were not resident in the United Kingdom. I cannot see why it should be relevant and make a difference in the result if a majority and not a minority of the holding company's subsidiaries are resident outside the United Kingdom; none of the subsidiaries not resident in the United Kingdom will be surrendering tax losses or making claims to consortium relief.
>
> In my judgment the definition of 'holding company' in sub-s (5) and the opening words in sub-s (7) requiring companies to be resident in the United Kingdom are independent 'qualifications' just as the requirements of sub-ss (9) and (10) in the section in the *Davies'* case were independent qualifications. That being so, since to require all or the majority of 90 % subsidiaries of a holding company to be resident in the United Kingdom seems to be an irrational restriction in the scheme, I would hold that, in the context, the opening words of sub-s (7) are satisfied by being applied to the surrendering company, the claimant company and the holding company under sub-s (2) and do not have to be infused (as Lord Morris put it in the *Davies'* case [1968] AC 1097 at page 1119, 44 TC 273 at page 293) into the definition in sub-s (5)."

Evans L.J. put the point succinctly in the earlier part of this judgment, before he considered the effect of the *Davies* case, in these terms([2]):

> "We were told that statutory provisions corresponding with s 258(1) and (2) introduced first the concept of group relief and then of consortium relief, within the limits provided for. The question which naturally arises is, who may take advantage of these provisions? Put another way, to whom do the provisions apply? In my judgment, that is the question to which subs (7) gives the answer. The section applies only

([1]) Page 20C *ante*. ([2]) Page 231 *ante*.

to UK resident companies. 'References ... to a company' are to UK resident companies only.

In the result, therefore, subs (7) is concerned with the application of the section and it may be said to provide a definition of 'company' which applies to the companies claiming and surrendering the tax relief and perhaps the holding company also. But it does not follow that it also defines 'companies' where that word appears in the definition of 'holding company' and in my judgment it does not."

The force of these considerations is much enhanced, to my mind, when one comes to consider the practical difficulties to which the Crown's construction of s 258(5)(b) may give rise. In the present case it appears to have been accepted by ICI from the outset that, if the Crown were right in saying that account could only be taken under subs (5)(b) of 90 per cent. subsidiaries resident in the United Kingdom, then Holdings was disqualified simply on the basis of a head count. That is to say, since 19 of its 23 subsidiaries were non-resident, its business could not be said to consist "wholly or mainly" in the holdings of shares in UK resident companies. But what if the numbers had been more evenly balanced? What if there were, say eight resident and eight non-resident subsidiaries? Mr. Moses acknowledged that mere numbers could not be decisive and that other factors, such as turnover, might be taken into account. But there remains the difficulty that turnover will fluctuate from one period to another. As Mr. Whiteman Q.C. submitted on behalf of ICI, it would be highly unsatisfactory if subs (5)(b) produced the result that the company in question could be a holding company one year and not the next, "... popping in and out of Inland Revenue pigeon holes as trade was good or bad", to adopt the memorable phrase used by Lord Atkin in *F.P.H. Finance Trust Ltd. (in liquidation)* v. *Commissioners of Inland Revenue* [1944] AC 285; 26 TC 131, at page 151.

I was at first inclined to think that this consideration must be regarded as determining this issue in favour of ICI. For as Lord Donovan said in *Mangin* v. *Inland Revenue Commissioners* [1971] AC 739, at page 746:

> " ... the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."

On reflection, however, I have concluded that whatever the difficulties may be of applying subs (5)(b) in particular cases on the basis of the Crown's construction the result cannot be characterised as either unjust or absurd. The task of deciding whether the business of a particular company consists wholly or mainly in the holding of shares in 90 per cent. UK resident trading subsidiaries is not, to my mind, inherently so difficult as to be beyond the wit of appeal Commissioners. The question should, of course, like that in the *F.P.H.* case *supra*, be answered by reference to all the factors, considered over a reasonable period of time.

Further, I am not satisfied that the language of the Act permits the construction for which ICI contends. That construction can only be upheld by confining the scope of the opening words of subs (7) to subss (1) and (2) of s 258, a limitation which is very hard to reconcile with the broad requirement that they should apply "in this and the following sections of this

Chapter". To confine their application to subss (1) and (2) seems to me to be impermissibly selective, and unnatural. The provisions of subss (1) and (2) seem to me inevitably to incorporate those of subss (5) and (8). The former cannot be understood without reference to the latter and from this it must follow, to my mind, that the opening words of subs (7) should be read into all of them. The consequential proposition, so far as consortium relief is concerned, that all members of the consortium must be United Kingdom resident companies, appears to me, for the reasons given by Mr. Moses, to be less surprising than the proposition that a 5 per cent. participation by a UK resident company was intended to suffice as a qualification. The proposition that the business of the holding company must consist at least mainly in the holding of shares in UK resident subsidiaries is also one which I find difficult to describe as surprising, let alone absurd or unjust. The fact that relief may be obtained despite some limited non-resident participation in the corporate structure is in no way inconsistent with the principle that the UK resident element should predominate throughout that structure. And the final requirement in subs (5)(b) that the subsidiaries should be trading companies again suggests that only United Kingdom resident subsidiaries were intended to be included. For, if they were non-resident, it would be irrelevant whether they were trading or not. Accordingly, apart from considerations of European Community law, I would hold that the Crown's construction should be upheld.

It remains to consider whether this construction conflicts with the obligations of the United Kingdom under Community law. The argument that it does so is put forward in reliance upon Articles 52 and 58 of the Treaty of Rome which are directed against restrictions upon the freedom of establishment of nationals (including companies) of one Member State in the territory of another.

The argument may be illustrated in the context of the present case by assuming that Holdings had been formed with two 90 per cent. UK resident trading subsidiaries. At that stage it would clearly be a holding company within the meaning of subs (5)(b) and consortium relief would be available. If, however, it formed three further trading subsidiaries resident respectively in France, Germany and Italy then on the basis of the Crown's construction it would cease to be a holding company and ICI and Wellcome could no longer claim consortium relief. (This example assumes that the "wholly or mainly" test depends merely on the number of resident and non-resident subsidiaries, which is an over-simplification for the reasons which I have given, but which will serve for the purposes of illustration.) It is submitted that this represents the imposition of a discriminatory tax regime upon ICI and Wellcome—and, for that matter, upon Holdings—and thus a restriction upon their freedom of establishment.

In reply, Mr. Moses submitted firstly that the point did not arise, because, although a majority of subsidiaries of Holdings were non-resident, only a minority of them were resident in the European Union. The issue raised by ICI was, therefore, hypothetical, and should not be addressed unless and until it arose in practice.

More generally, Mr. Moses submitted that the difference in treatment, which was shown in the example put forward by ICI, was simply a difference in the treatment of United Kingdom resident companies under United Kingdom tax law. It resulted from the establishment of non-resident

subsidiaries, but it was wholly immaterial for this purpose whether the subsidiaries were resident in the European Union or elsewhere. Accordingly, no question of Community law arose.

On behalf of ICI, Mr. Whiteman Q.C. and Mr. Vajda submitted that the point must be addressed in order to determine the scope and validity of s 258(5)(b), irrespective of the factual position in the present case. It must be addressed because, if the construction placed by the Crown upon s 258(5)(b) were correct, then it would follow that, in the submission of ICI, the United Kingdom was in breach of its obligations under Community law. Reliance was placed in this connection upon the approach adopted by the European Court of Justice in *Commission of the European Communities* v. *French Republic* [1974] ECR 359. It was unnecessary, continued counsel, to refer the matter to the European Court of Justice under Article 177 of the EC Treaty because, in the words used by the Court in *Srl CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health* [1982] ECR 3415, at page 3431, the answer was " ... so obvious as to leave no scope for any reasonable doubt". In other words, the doctrine of *acte clair* applied. But, if there were any doubt about the matter, a reference fell to be made.

For my part, I am quite unable to accept that ICI are entitled to invoke the doctrine of *acte clair*. On the contrary, I have considerable sympathy with the submissions of Mr. Moses on both of the points which he raises. I feel compelled, however, to accept that the conditions which require us to refer the matter to the European Court of Justice are satisfied. For in the first place, there can be no doubt of our obligation to construe the 1970 Act in a manner which avoids conflict with Community law, if such a construction is possible.; Secondly, the judgments in the Courts below have the effect, if only incidentally, of avoiding any risk of such a conflict; and they plainly constitute a possible view of the law albeit one which, with some hesitation, I have felt unable to accept. And finally, the applicability of Articles 52 and 58 in the circumstances of the present case seems to me to be undeniably a matter for the consideration of the European Court of Justice.

At the close of argument counsel for ICI put before us a draft of the questions which might form the subject of a reference, but the draft was not discussed in any detail. I would propose, accordingly, subject to your Lordships' views, that the parties be invited to discuss and, if possible, agree upon the precise form of the questions, and to present a draft or drafts to your Lordships for consideration at a further hearing. The question of costs might conveniently form the subject of submissions at the same time.

Lord Nicholls of Birkenhead:—My Lords, for the reasons set out in the speech of my noble and learned friend Lord Nolan, with which I agree, I too would make a reference to the European Court of Justice.

Appeal not determined. Reference to the European Court of Justice made.

The reference was heard before the European Court of Justice on 14 October 1997. Imperial Chemical Industries plc, the United Kingdom Government and The Commission of the European Communities made written and oral observations to the Court. The Advocate General (G Tesauro) delivered his opinion on 16 December 1997. Judgment was given by

A the Court (Judges Rodriguez Iglesias (President), Ragnemalm, Wathelet, Schintgen, Mancini, Moitinho de Almeida, Murray, Edward, Jann, Sevón and Ioannou) on 16 July 1998.

Peter Whiteman Q.C. and *Christopher Vajda* for the Company.

B *Derrick Wyatt Q.C.*, *Rabinder Singh* and *John Collins*, agent, for the United Kingdom.

The cases cited were referred to in the Advocate General's opinion and in the Judgment.

C

Opinion of Mr. Advocate General Tesauro delivered on 16 December 1997(1)

D **Case C-264/96**

(Reference for a preliminary ruling from the House of Lords)

(Right of establishment—Corporation tax—Discriminatory tax treatment by reason of the establishment of subsidiaries in other States
E *—Duties of the national courts—Article 5 of the EC Treaty)*

Advocate General (G. Tesauro):—

1. The points at issue in these proceedings are, first, the compatibility with Article 52 of the EC Treaty of domestic legislation which makes a particular form of tax relief available to companies belonging to a consortium subject to the condition that, where the consortium controls a holding company, most of the subsidiaries thereof are resident in the national territory, and, secondly, in the event that such legislation is incompatible, the importance and extent of the national court's obligation under Article 5 of the Treaty to adopt an interpretation which is consistent with Community law. The reference has been made by the House of Lords, and the relevant legislation is that of the United Kingdom.

The national legislation

2. The legislation applicable in the present case is to be found in ss 258 to 264 of the Income and Corporation Taxes Act 1970 (hereinafter "the Act"), which have since been replaced by similar provisions in the Income and Corporation Taxes Act 1988.

Those provisions govern, inter alia, "consortium relief" (The expression "consortium" is used here to refer to an agreement between undertakings to form a joint venture to operate at international level.). This essentially enables a company which is a member of a consortium to use losses incurred by subsidiaries controlled through a holding company to offset tax on its profits. Thus, pursuant to the legislation in question, the company belonging to the consortium may set losses incurred by a subsidiary against its chargeable profits—in proportion to the size of its shareholding—for the purposes of computing tax liability. The reasons why the legislation makes

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(1) Original language: Italian.

this option available have been explained in the course of the proceedings. However, they need not be considered here, save in order to assess whether the domestic legislation gives rise to a restriction on freedom of establishment, contrary to the prohibition laid down in Article 52 of the Treaty, and, if so, whether that restriction is capable of being justified.

3. Specifically, pursuant to s 258(1) of the Act, relief to which companies are entitled "for trading losses" may be surrendered by a company which is a member of a group of companies (the surrendering company) to another company in the same group (the claimant company). Under s 258(2), group relief is also available in situations involving consortia. For instance, it is available where one of the companies involved is a member of a consortium and the other is a company controlled by a holding company which is in turn owned by a consortium. (Pursuant to s 258(8), a company is owned by a consortium

> "if three-quarters or more of the ordinary share capital of the company is beneficially owned between them by companies of which none beneficially owns less than one-twentieth of that capital, and those companies are called the members of the consortium".)

In accordance with s 259(1) and (8)(a) of the Act, in cases where the claimant company is a member of a consortium, only a fraction of the losses incurred by the surrendering company may be set off, that fraction being equal to the claimant company's share in the consortium.

The availability of "consortium relief" is also conditional on the company owned by the consortium being a "holding company" as defined in s 258(5)(b) of the Act, namely "a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies".

4. Lastly, s 258(7) provides that "references in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom". This is the provision whose interpretation and application have given rise to these proceedings.

The facts and the questions referred

5. Coopers Animal Health (Holdings) Ltd. (hereinafter "Holdings") was set up on 17 May 1984, its shares being beneficially owned by a consortium formed by Wellcome Foundation Ltd. and Imperial Chemical Industries plc (hereinafter "ICI") which, respectively, have a 51 per cent. and a 49 per cent. interest in Holdings. The latter carries on no business save that of holding shares in subsidiaries. Of its 23 subsidiaries, only 4 are resident in the United Kingdom, 6 being resident in other Member States and the remaining 13 in non-member countries.

6. One of the companies controlled by Holdings and resident in the United Kingdom is Coopers Animal Health Ltd. (hereinafter "CAH"), which incurred considerable losses, particularly in the accounting periods ending, respectively, in 1985, 1986 and 1987. ICI accordingly applied to the Inland Revenue under s 258 of the Act for relief in respect of 49 per cent. of CAH's losses (the fraction corresponding to ICI's shareholding in Holdings).

The Inland Revenue refused to grant the relief sought, on the ground that, although all the companies involved (ICI, Holdings and CAH) were resident in the United Kingdom, most of the companies controlled by Holdings were resident abroad. In the light of s 258(7) of the Act—according to the Inland Revenue—that fact precluded Holdings from meeting the requirements for recognition as a "holding company" and, accordingly, for securing the related tax relief.

7. ICI brought an action challenging that interpretation. Both the High Court([1]) and the Court of Appeal([2]) upheld its claim owing to their adoption of a different interpretation of the relevant legislation and, in particular, of s 258(7), from that proposed by the Inland Revenue. In brief, both Courts took the view that access to tax relief cannot be denied in cases such as this, where both the surrendering company and the claimant company are resident in the United Kingdom. It was not intended that, whenever the term "company" is used in the text of s 258 (including, that is to say, references to the holding company or the subsidiaries), it must be read in conjunction with the reference to "company" in the opening words of s 258(7), which merely defines the companies which may take advantage of the relief provided for in that section. Thus, according to that construction, companies resident in the United Kingdom cannot be denied relief in respect of losses incurred by subsidiaries which are also resident there.

8. On appeal by the Inland Revenue, however, the House of Lords([3]) in its capacity as Court of last instance upheld the tax authorities' interpretation, thereby finding—solely on the basis of domestic law—that ICI was not entitled to the tax relief sought.

Before the House of Lords, however, ICI introduced a fresh argument—based on Community law—to challenge the denial of relief. In short, ICI claimed that the legislation at issue—or at least the Inland Revenue's interpretation thereof—was incompatible with Articles 52 and 58 of the EC Treaty in so far as the requirement that most of the companies controlled by Holdings had to be resident in the United Kingdom constituted a restriction (albeit an indirect one) on ICI's freedom of establishment and in particular of its right to own shares through a holding company in subsidiary companies resident in another Member State. In any event, according to ICI, in view of the fact that the relevant legislation was open to two possible interpretations—that adopted by the Courts at first and second instance, and that favoured by the Inland Revenue—Article 5 of the Treaty placed the national Court under a duty to choose the first, if it enabled any conflict, actual or potential, with Community law to be avoided.

9. Taking the view that an interpretation of the aforesaid provisions of Community law was necessary in order to enable it to give judgment in the dispute before it, the House of Lords referred the following two questions to the Court for a preliminary ruling:

"1. In a situation where:—

(i) a company (Company A) is resident in a Member State of the European Union;

([1]) Page 11 *ante*. ([2]) Page 14 *ante*.. ([3]) Page 26 *ante*.

(ii) Company A is part of a consortium with another company (Company B) also resident in that Member State;

(iii) Company A and B jointly own a holding company (Company C) also resident in the Member State;

(iv) Company C has a number of trading subsidiaries, which are resident either in that Member State, other Member States of the European Union or elsewhere in the world; and

(v) Company A is precluded from being entitled to claim against its corporation tax liability relief in respect of trading losses incurred by a trading subsidiary (also resident in that Member State) of Company C because the national legislation, construed as a matter of national law, required that the business of Company C should consist wholly or mainly in the holding of shares in subsidiaries which are resident in that Member State:—

Does the requirement identified at (v) constitute a restriction on the freedom of establishment under Article 52 of the EC Treaty? If so, is such treatment nevertheless justified under Community law?

2. If the requirement under (v) is an unjustified restriction under Community law, does Article 5 of the EC Treaty require a national court to interpret the relevant national legislation, so far as is possible, so as to comply with Community law, even though neither Company A, Company B nor Company C is itself seeking to exercise any rights under Community law, and even if an interpretation of national legislation which would comply with Community law would have the effect of giving relief where the business of Company C consisted mainly in the holding of shares in subsidiaries established outside the EC/EEA? Or does Article 5 have the consequence only that the national legislation, despite its interpretation, takes effect subject to the requirements of Community law in a case where these requirements are in point?"

Question 1

10. By its first question, the House of Lords asks the Court whether Article 52 of the Treaty precludes application of legislation such as that described above. In particular, on the assumption that the interpretation advocated by the Inland Revenue is correct, the House of Lords asks whether the pre-condition for tax relief—that most of the subsidiaries controlled by the holding company must be resident in the United Kingdom—entails an unjustified restriction on the freedom of establishment guaranteed by Article 52.

Relevance

11. First of all, I should point out that doubts have been expressed in the course of the proceedings as to whether this question has any bearing on adjudication of the dispute in the main proceedings.

Specifically, the United Kingdom Government maintained that even if the legislation at issue were found to entail a restriction on freedom of establishment, incompatible with a proper interpretation of Article 52, that would have no relevance for the purposes of resolving the dispute in the main proceedings. ICI would in any event be denied the tax relief provided for by the Act, since the majority of the companies controlled by Holdings

A (as many as 13 out of 23) are resident, not in other Member States of the Community, but elsewhere.

12. The Commission has taken a different view. Given that the Court declines only in exceptional circumstances to give a ruling on questions referred under Article 177 of the Treaty, the Commission has pointed out B that, in the light of s 258(5), the House of Lords itself acknowledged that the "quantitative" criterion is not the only test which can be applied in order to evaluate the business of a holding company; other yardsticks may be used, such as the turnover of the companies controlled. According to the Commission, the reference in s 258(5)(b), read in conjunction with s 258(7), to business consisting "wholly or mainly" in the holding of shares or C securities of trading companies resident in the United Kingdom is not open to only one interpretation. In any event, it is for the national court to decide which test to apply, while the Court must provide any guidance which would be of assistance in resolving the dispute.

13. The first point I would make in that connection is that, according to D established case-law, it is for the national court to assess the relevance of and the need for a preliminary ruling. Given its direct knowledge of the facts of the case and the relevant points of law, that court is in the best position to gauge the relevance of any questions concerning Community law raised in the dispute. (See (Case 83/78) *Pigs Marketing Board* v. *Redmond* [1978] ECR 2347, para 25, and (Case C-146/93) *McLachlan* v. *Caisse Nationale* E *d'Assurance Viellesse des Travailleurs Salariés (CNAVTS)* [1994] ECR I-3229, para 20.) In principle, therefore, the Court considers itself bound to answer, except in cases where the questions referred are purely hypothetical or where it is quite obvious that the requested interpretation or ruling on the validity of a provision of Community law has no bearing on the facts or purpose of the main action (See order of 16 May 1994 in (Case C-428/93) F *Monin Automobiles-Maison du Deux-Roues* [1994] ECR I-1707; (Case C-415/93) *Union Royal Belge des Sociétés de Football Association ASBL* v. *Bosman* [1996] All ER (EC) 97; [1995] ECR I-4921, para 61; (Case C-134/95) *Unita Socio-Sanitaria Locale No 47 di Biella (USSL)* v. *Istituto Nazionale per l'Assicurazione Contro gli Infortuni sul Lavoro (INAIL)* [1997] ECR I-195, para 12; and (Case C-291/96) *Grado and Bashir (Criminal proceedings* G *against)* [1997] ECR I-5531, para 12.).

14. However, although I am somewhat sceptical as to whether an interpretation of Article 52 is really necessary in order to resolve the dispute before the House of Lords, it must be said that the present case does not fall within one of the admittedly exceptional situations described above. In H particular, this case does not to my mind exhibit the characteristics which have hitherto led the Court to regard a reference as manifestly irrelevant to a decision on the dispute in the main proceedings. It is apparent from the order for reference that the proper construction of s 258(5) of the Act remains an open question. Indeed, it is only if the availability of tax relief is based on a I quantitative criterion related to the residence of subsidiaries that it could appear fruitless to seek an interpretation of Article 52 since the majority of the companies in question are established outside the Community. The position would be different if, as contemplated in the order for reference itself, the national court were to use turnover as a criterion or apply some other test. In that case, appraisal of the compatibility of the legislation in question with Article 52 of the Treaty could well have a bearing on the decision as to whether or not ICI is entitled to the relief sought, if it

transpired, for example, on the basis of the information available, that the turnover of the companies controlled were *essentially* attributable to those resident in the Community.

Accordingly, in so far as, for the purpose of evaluating the business of a holding company, factors other than the quantitative criterion may be taken into account when interpreting the domestic legislation, I consider it useful to provide the House of Lords with an answer to the first question.

Substance

15. That said, I would first of all observe that, as the Court itself has stated on several occasions, "although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community Law": (See also (Case C-246/89) *EC Commission* v. *United Kingdom* [1991] ECR I-4585, para 12; (Case C-279/93) *Finanzamt Köln Altstadt* v. *Schumacker* [1995] ECR I-225, para 21; [1996] QB 28; (Case C-107/94) *Asscher* v. *Staatssecretaris van Financiën* [1996] All ER (EC) 757; [1996] ECR I-3089, para 36; (Case C-250/95) *Futura Participations SA* v. *Administrations des Contributions* [1997] ECR I-2471, para 19; See also, however, EC Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries in different Member States (OJ 1990 L 225, page 6)). In the field of direct taxation, therefore, Member States may not adopt measures which would have the effect of unjustifiably impeding freedom of movement for natural or legal persons carrying on an activity in a self-employed capacity: (*Opinion of Advocate General Léger* of 15 February 1996 in *Asscher* v. *Staatssecretaris van Financiën* [1996] All ER (EC) 757; [1996] ECR I-3089; point 55 of the Opinion). It scarcely needs to be mentioned that taxation which is discriminatory or which somehow impedes or limits the exercise of the right of establishment is undoubtedly caught by Article 52: (See (Case C-330/91) *R.* v. *IRC*, ex parte *Commerzbank AG* [1994] QB 219, [1993] ECR I-4017, ECJ, para 20).

It is therefore necessary to determine, in relation to the present case, whether Article 52 of the Treaty precludes the legislation at issue from making consortium relief conditional on the holding company's business consisting, wholly or mainly, in the holding of shares of subsidiaries resident in the United Kingdom.

16. The requirement that most of the subsidiaries must be resident in the United Kingdom appears prima facie to be a restriction on freedom of establishment, prohibited by the first paragraph of Article 52. Relief is thereby precluded in all cases where the holding company's business consists, wholly or mainly, in the holding of shares of companies resident outside the United Kingdom, and thus even where such companies are established in other Member States. It is the latter aspect which is of significance for Community law, since in those circumstances the legislation at issue limits, or at least discourages, the exercise by British companies of the right to create corporate structures in other Member States.

17. To my mind there can be no doubt that such legislation is restrictive. On that point, suffice it to recall the judgment in *Reg.* v. *HM Treasury & IRC*, ex parte *Daily Mail and General Trust plc* (Case 81/87); [1989] QB 446;

A [1989] 1 All ER 328; [1988] ECR 5483, para 15, in which the Court reaffirmed that "freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period", before going on to explain that

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> "even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58":

C (See [1988] ECR 5483, para 16.).

18. This is typical of restrictions on "exits". Tax disincentives undoubtedly make the creation of cross-border corporate structures a less attractive prospect for companies established in the United Kingdom. In so far as such a restriction applies to subsidiaries resident in other Member

D States, the United Kingdom legislation entails—I repeat—an obstacle to the freedom of establishment guaranteed by Article 52 of the Treaty. Furthermore, the legislation at issue appears particularly unfavourable to companies which belong to a consortium as opposed to a group, since in the latter case the setting-off of losses against profits would still be possible (a point made by the Commission and not disputed).

E

Nor is it a valid objection to argue—as does the United Kingdom Government—that a distinction based on the residence of a company's subsidiaries does not amount to discrimination since the situations involved are not comparable. The legislation at issue concerns companies which are liable to tax in the United Kingdom and makes tax relief conditional on the

F manner in which the right of establishment is exercised in other Member States of the Community as well.

19. In those circumstances, it only remains to determine whether the restriction in question may be justified in the light of Community law.

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In that connection, both ICI and the Commission have ruled out that possibility. According to the United Kingdom, on the other hand, it is a measure justified in terms of its objective, which is to prevent the creation of foreign subsidiaries from being used as an easy means of depriving the United Kingdom Treasury of tax revenue.

H

20. The first difficulty which arises in this connection is whether or not to class the restriction at issue as giving rise to discrimination based on the place of establishment. The implications in respect of a possible justification will vary according to the solution adopted. The Court has consistently held that a discriminatory measure is compatible with Community law only if it

I falls within the scope of one of the derogations expressly provided by the Treaty: (See (Case 352/85) *Bond van Adverteerders* v. *Netherlands* [1988] ECR 2085, para 32, in which the Court stated that "[discriminatory] national rules ... are compatible with Community law only if they can be brought within the scope of an express derogation"). Where, however, the measure in question applies without distinction to all persons including foreigners, the measures restricting freedom of establishment are compatible if they are in furtherance of imperative requirements in the general interest, if they are

suitable for securing the attainment of the objective pursued and if they do not go beyond what is necessary to attain it: (See, most recently, (Case C-55/94) *Gebhard Consiglio dell 'Ordine degli Avvocati e Procuration di Milano* [1996] All ER (EC) 189; [1995] ECR I-4165, para 37, in which the Court referred without distinction to all the fundamental freedoms guaranteed by Community law).

21. Once again, the answer to the question referred depends on where emphasis is placed. It is apparent, for example, that the legislation at issue discriminates between companies resident in the United Kingdom, according to whether or not they have exercised their freedom of establishment in other Member States, through a holding company, for instance. In other words, the distinction affects companies whose registered office is in the same Member State and is linked to their decision whether or not to avail themselves of the possibility, guaranteed by Article 52 of the Treaty, of setting up branches or subsidiaries in other countries, even if they are Member States of the Community.

22. Admittedly, even if Article 52 of the Treaty ensured that all subsidiaries resident in the Community were placed on an equal footing with those resident in the United Kingdom, a further level of discrimination evidently cannot be ruled out. That is to say, there would still be discrimination between the companies which exercise the right of establishment, depending on the precise form this takes: tax relief would be granted where the holding company's business consisted, wholly or mainly, in holding shares of companies established in the territory of Member States, but denied where only a minority of the companies were resident in the territory concerned.

That detail is especially significant in the present case, where some of the companies controlled by Holdings are resident in Member States other than the United Kingdom. However, that form of discrimination clearly cannot be challenged on the basis of Article 52 of the Treaty, since there is no restriction on freedom of establishment in the Community. Although discrimination based on the place of establishment might have been eliminated in compliance with Article 52 in respect of the United Kingdom or other Member States of the Community, the United Kingdom legislation discourages, if anything, the creation of subsidiaries in countries outside the Community. That is why, as we shall have occasion to verify when examining the second question, ICI seeks to rely on Article 5 of the Treaty with a view to securing in any event the tax relief provided by the Act.

23. The domestic legislation, in so far as it gives rise to discrimination, may clearly be justified only in the exceptional circumstances envisaged by the Treaty. This is the approach taken by the Commission, which has made a short study of the problem of justificatory grounds, from which it concludes that none of the derogations provided for in Article 56 (public policy, public security or public health) applies in the present case. Considerations of a purely economic nature, such as loss of tax revenue, cannot justify restrictions of a discriminatory character which fall within the scope of Article 52 of the Treaty: (See the judgment in *Bond van Adverteerders* v. *Netherlands* [1988] ECR 2085; (Case C-288/89) *Stichting Collectieire Antennevoorziening Gouda* v. *Commissariaat Voor de Media* [1991] ECR I-4007, para 11. In the judgment in (Case C-484/93) *Svensson and Gustafsson* v. *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, para 15, given

A that the Luxembourgish legislation on interest rate subsidies in respect of loans for the construction of housing entailed discrimination based on the place of establishment, the Court added that "such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty [...] which do not include economic aims". It should be noted, however, that on the same occasion the Court also considered whether the B legislation at issue, albeit classed as discriminatory, was necessary in order to safeguard the cohesion of the tax system. In so doing, however, the Court also determined whether the measure in question could be justified in terms of requirements which may be taken into account only in the case of measures which apply without distinction. In my Opinion of 16 September 1997 in (Case C-120/95) (*Decker* v. *Casse de Maladie des employées Privés* C [1998] ECR I-1831) and (Case C-158/95) (*Kohl* v. *Union des Caisses de Maladie* [1998] ECR I-1931), still pending, I have already explained the difficulties in regard to consistency, raised by the Court's recent case-law (see, in particular points 49 and 50).

24. However, even if the measure at issue were to be regarded as D applying without distinction, in view of the fact that the requirement is imposed on companies which are in any event liable to taxation in the United Kingdom, it would still be incompatible with the rules regarding freedom of establishment. I have no hesitation in stating that the arguments put forward in this case to justify the legislation at issue are devoid of substance.

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25. Admittedly, on a number of occasions the Court has acknowledged that the need for cohesion in the application of tax systems can constitute sufficient justification, linked to mandatory requirements in the general interest, for imposing a restriction on freedom of establishment: (See (Case C-204/90) *Bachmann* v. *Belgium* [1992] ECR I-249, para 21; *Finanzamt Köln* F *Altstadt* v. *Schumacker* (Case C-279/93) [1996] QB 28, [1995] ECR I-225, para 47; (Case C-80/94) *Wielockx* v. *Inspecteur der Directe Belastingen* [1995] All ER (EC) 769, [1995] ECR I-2493, para 25; and *Asscher* v. *Staatssecretaris van Financiën* (Case C-107/94) [1996] All ER (EC) 757, [1996] ECR I-3089, para 59. See also my Opinion in (Case C-118/96) *Safir* v. *Skattemyndighten i Dalarnas Län, formally Skattemyndigheten i Kopparbergs Län* [1999] 2 WLR G 66, [1998] ECR I-1897, point 20 et seq.). It is also true, however, that the problem, in question has in general arisen in respect of domestic legislation which distinguished between legal or natural persons on grounds of their being resident or having their registered office in the territory of another Member State.

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In *Bachmann* v. *Belgium* [1992] ECR I-249, which concerned the application to residents of domestic legislation making the deduction of certain contributions from taxable income conditional on those contributions having been paid in that Member State, the Court stated that the aim of the Belgian legislation was to enable the loss of tax revenue resulting from the deduction of life assurance contributions to be offset by the taxation of I pensions, annuities or capital sums payable by the insurers. The cohesion of the tax system would thus have been undermined if the Belgian State had been compelled to offer the same tax advantages to persons insured with companies established abroad, in view of the difficulty of collecting tax on earnings paid abroad: (See *Bachmann* v. *Belgium* (Case C-204/90) [1992] ECR I-249, paras 22 and 23). Given that the domestic legislation was expressly stated to be non-discriminatory, the Court therefore concluded that it could

not be regarded as incompatible with Article 59 since it was justified by requirements in the general interest.

26. Returning to the instant case, it therefore remains to be determined whether the objective of preventing the creation of subsidiaries outside the United Kingdom, and thus in other Member States as well, depriving the United Kingdom Treasury of tax revenue is capable of justifying the restriction on freedom of establishment resulting from the legislation on consortium relief.

27. According to the United Kingdom, that question should be answered in the affirmative. Obviously, there is no United Kingdom tax charge on a non-resident subsidiary. Accordingly, relief on losses incurred by a subsidiary resident in the United Kingdom would not be compensated by taxation of the profits made by other subsidiaries, resident in other States. In the United Kingdom's view, that is incompatible with the rationale underlying *consortium relief*, which is to extend the same tax treatment to a company when it is a member of a consortium as it would receive if it participated directly in the business undertaken by the joint venture.

28. I have serious reservations regarding that argument. The objective is not so much that of preserving the cohesion of the tax system as, quite simply, of preventing a fall in tax revenue. If that is indeed the position, I do not believe that it can justify a derogation from a fundamental principle guaranteed by the Treaty.

That is not all, however. Even if the objective pursued were deemed to be valid under Community law, it would still have to pass the proportionality test. Here, too, I have misgivings. It is highly doubtful whether the restrictive measure in question is suited to attaining the objective pursued. Indeed, in circumstances where tax relief is denied solely on account of Holdings' exercise of freedom of establishment in other Member States, I do not believe it can seriously be maintained that the legislation at issue is an effective means of ensuring the cohesion of the tax system.

29. I find it difficult to reconcile the need to prevent tax evasion in order to preserve the cohesion of the tax system with the fact that consortium relief is granted whenever only a minority of companies is resident outside the United Kingdom, and denied whenever such companies are in the majority. To my mind the risk of evasion, if indeed it exists, is also present in the former set of circumstances, albeit—according to the proportion of non-resident companies—to a lesser degree.

30. Furthermore, it remains to be demonstrated that no other measures, equally effective but less restrictive of freedom of establishment, are available. On that point, I would suggest that neither the Inland Revenue nor the United Kingdom Government in its observations has established that the measures at issue are the only ones available and that the objective could not be effectively pursued by other means.

31. It seems to me that all the foregoing observations adequately support the conclusion that domestic legislation which makes consortium relief available to companies only if the business of the holding company controlled by the company seeking relief consists, wholly or mainly, in holding shares of subsidiaries resident in the Member State concerned

A constitutes a restriction on freedom of establishment, which is prohibited by the Treaty and cannot otherwise be justified.

Question 2

32. Once again I would refer to the particular features of the present
B case and its implications for Community law. Article 52 of the Treaty is relevant in so far as a requirement imposed by domestic legislation in respect of tax relief also affects companies availing themselves of the right of establishment in other Member States of the Community. What this means in practice is that, in the present case, the domestic legislation is contrary to Article 52 in so far as it restricts freedom of establishment in other Member
C States of the Community.

As regards the further difficulty, namely discrimination against companies which choose to set up subsidiaries *mostly* in non-member countries, Article 52 of the Treaty is of no avail, since the matter falls outside
D the scope of Community law.

If that is indeed the position, as I believe it undoubtedly is, not even the interpretation of Article 5 of the Treaty sought by the House of Lords can be of any assistance. In the first place, in so far as one aspect of the present case is covered by Article 52 of the Treaty, which has direct effect, the national
E court's duty to interpret domestic legislation consistently with Community law is irrelevant. (Although the duty to adopt interpretations which are consistent with Community Law has hitherto expressly concerned provisions of Directives which have not been implemented within the periods prescribed (see *Von Colson* v. *Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891; *Marleasing S.A.* v. *La Commercial Internacional de Alimentación S.A.* (Case
F C-106/89) [1990] ECR I-4135; *Faccini Dori* v. *Recreb SrL* (Case C-91/92) [1994] ECR I-3325, and *Criminal proceedings against Arcaro* (Case C-168/95) [1996] ECR I-4705), it may without difficulty be extended to provisions of the Treaty; clearly, where a Treaty provision has direct effect, as in the present case, that duty is no longer relevant.) The result sought by harmonisation of national and Community law is already achieved by virtue
G of the fact that individuals may rely on Community law in proceedings before the national courts.

Secondly, nor can the duty of consistent interpretation laid down by Article 5 of the Treaty be relied on in relation to the aspect of the present case which is not covered by Article 52 of the Treaty. The discrimination
H against companies which choose to hold shares in subsidiaries, the majority of which are resident in non-member countries, by comparison with those whose subsidiaries are all resident in the United Kingdom (or in the Community) or which have only a *minority* of subsidiaries resident outside the United Kingdom (or the Community), is not relevant for the purposes of Community law. It follows that neither Article 52 nor Article 5 applies.
I Accordingly, the national court is under no obligation pursuant to Article 5 of the Treaty to adopt an interpretation consistent with Community law in respect of a situation, or, as in the present case, aspects of a situation to which Community law does not apply.

33. In the light of the foregoing, I therefore propose that the Court should reply as follows to the questions referred by the House of Lords:

(1) Article 52 of the Treaty is to be interpreted as precluding the application of legislation of a Member State which prevents a company established in the territory of that State from obtaining tax relief in respect of losses incurred by another company, established in the same State and controlled by the first company through a holding company, in cases where the holding company's business consists, wholly or mainly, in holding shares of subsidiaries resident outside that State, in so far as such legislation constitutes a restriction on the exercise of the right of establishment in other Member States of the European Union.

(2) Article 5 of the Treaty does not require the national courts to interpret domestic legislation consistently with Community law in respect of a situation, or aspects of a situation, falling outside the scope of Community law.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
JUDGMENT OF THE COURT—16 JULY 1998(1)

THE COURT(2)

Composed of: G.C. Rodriguez Iglesias, President, H. Ragnemalm, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward, P. Jann, L. Sevón and K.M. Ioannou, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

Imperial Chemical Industries plc (ICI), by Peter Whiteman QC and Christopher Vajda, Barrister;

the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, with Derrick Wyatt QC and Rabinder Singh, Barrister;

the Commission of the European Communities, by Peter Oliver and Hélène Michard, of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of Imperial Chemical Industries plc (ICI), the United Kingdom Government and the Commission at the hearing on 14 October 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1997(3),

gives the following

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(1) Case C-264/96. (2) The Language of the Court was English. (3) Page 37 *ante*.

Judgment

1. By order of 24 July 1996, received at the Court on 29 July 1996, the House of Lords referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 52 of the EC Treaty.

2. Those questions were raised in proceedings between Imperial Chemical Industries plc (hereinafter "ICI") and the United Kingdom tax authorities (hereinafter "the Inland Revenue") concerning the latter's refusal to grant to ICI tax relief in respect of trading losses incurred by a subsidiary of the holding company beneficially owned by ICI through a consortium.

3. ICI and Wellcome Foundation Ltd., both of which are companies resident in the United Kingdom, together form a consortium through which they beneficially own 49 per cent. and 51 per cent. respectively, of Coopers Animal Health (Holdings) Ltd. (hereinafter "Holdings").

4. The sole business of Holdings is to hold shares in some 23 trading companies which are its subsidiaries and which operate in many countries. Of those 23 subsidiaries, 4—including Coopers Animal Health Ltd. (hereinafter "CAH")—are resident in the United Kingdom, 6 in other Member States and 13 in non-member countries.

5. CAH incurred losses on its United Kingdom trade in the accounting periods ending in 1985, 1986 and 1987. ICI sought, pursuant to ss 258 to 264 of the Income and Corporation Taxes Act 1970 (hereinafter "the Act"), to set 49 per cent. of CAH's losses for those periods (the proportion corresponding to its shareholding in Holdings) against its chargeable profits for the corresponding periods by way of tax relief.

6. As regards the conditions for and the detailed rules governing tax relief as claimed by ICI, the Act provides as follows:—

Section 258:

"1. Relief for trading losses and other amounts eligible for relief from corporation tax may in accordance with the following provisions of this Chapter be surrendered by a company (called 'the surrendering company') which is a member of a group of companies and, on the making of a claim by another company (called 'the claimant company') which is a member of the same group, may be allowed to the claimant company by way of relief from corporation tax called 'group relief'.

2. Group relief shall also be available in accordance with the said provisions in the case of a surrendering company and a claimant company where either of them is a member of a consortium and the other is—

(a) a trading company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company; or

(b) a trading company—

(i) which is a 90 per cent. subsidiary of a holding company which is owned by the consortium; and

(ii) which is not a 75 per cent. subsidiary of a company other than the holding company; or

(c) a holding company which is owned by the consortium and which is not a 75 per cent. subsidiary of any company: ...

5. For the purpose of this section and the following sections of this Chapter—

(a) two companies shall be deemed to be members of a group of companies if one is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company,

(b) 'holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies,

(c) 'trading company' means a company whose business consists wholly or mainly of the carrying on of a trade or trades ...

7. References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this and the following sections of this Chapter whether one company is a 75 per cent. subsidiary of another, the other company shall be treated as not being the owner—

(a) of any share capital which it owns directly in a body corporate if a profit on a sale of the shares would be treated as a trading receipt of its trade, or

(b) of any share capital which it owns indirectly, and which is owned directly by a body corporate for which a profit on the sale of the shares would be a trading receipt, or

(c) of any share capital which it owns directly or indirectly in a body corporate not resident in the United Kingdom.

8. For the purposes of this and the following sections of this Chapter, a company is owned by a consortium if three-quarters or more of the ordinary share capital of the company is beneficially owned between them by companies of which none beneficially owns less than one-twentieth of that capital, and those companies are called the members of the consortium."

Section 259:

"1. If in any accounting period the surrendering company has incurred a loss, computed as for the purposes of subsection (2) of section 177 of this Act, in carrying on a trade, the amount of the loss may be set off for the purposes of corporation tax against the total profits of the claimant company for its corresponding accounting period."

7. The Inland Revenue refused ICI's application for tax relief on the ground that Holdings does not constitute a holding company within the meaning of s 258(5)(b) read together with s 258(7). Even though Holdings' sole business is to hold shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies, the majority of its subsidiaries (19 out of 23) are not bodies corporate resident in the United

Kingdom as required by the opening words of s 258(7) and therefore Holdings' main business cannot be recognised as that of a holding company within the meaning of subs 5(b).

8. Contesting that interpretation of the domestic legislation, ICI brought an action against the decision rejecting its claim. The High Court([1]) found in ICI's favour and its decision was subsequently affirmed by the Court of Appeal([2]).

9. On appeal, the House of Lords([3]) concluded that the Inland Revenue's refusal was justified in terms of the Act, but felt it necessary to consider the arguments, based on Community law, advanced by ICI to contest the refusal.

10. In ICI's submission, the requirement that a holding company's business consist wholly or mainly in the holding of shares or securities of companies resident in the United Kingdom amounts to a restriction, in the form of a discriminatory tax regime, on freedom of establishment for companies and firms, and therefore infringes Articles 52 and 58 of the EC Treaty.

11. It claims that the discrimination arises from the fact that tax relief for losses incurred by a resident company which is a subsidiary of a resident holding company is granted to a member of a consortium where all, or most of, the subsidiaries controlled by the holding company are resident, whereas, other things being equal, it will be refused where the holding company—because it has exercised its right to freedom of establishment conferred by the EC Treaty—controls mainly subsidiaries resident in other Member States.

12. ICI maintains that, faced with such discrimination, it is the national court's duty, even in a case such as that before the House of Lords, where the holding company controls 23 subsidiaries, of which only 10 are resident in the United Kingdom or another Member State, to set aside the residence requirement laid down by the Act as being contrary to Community law.

13. The House of Lords considered an interpretation of Community law to be necessary as regards both the compatibility of the residence requirement laid down by the Act for the grant of tax relief as claimed by ICI with the rules of the Treaty and, should the Act prove to be contrary to Community law, the approach to be taken by national courts in such a situation. It therefore decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

"1. In a situation where:—

(i) a company (Company A) is resident in a Member State of the European Union

(ii) Company A is part of a consortium with another company (Company B) also resident in that Member State

(iii) Company A and B jointly own a holding company (Company C) also resident in the Member State

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([1]) Page 11 *ante*. ([2]) Page 14 *ante* ([3]) Page 26 *ante*.

(iv) Company C has a number of trading subsidiaries, which are resident either in that Member State, other Member States of the European Union or elsewhere in the world, and

(v) Company A is precluded from being entitled to claim against its corporation tax liability relief in respect of trading losses incurred by a trading subsidiary (also resident in that Member State) of Company C because the national legislation, construed as a matter of national law, required that the business of Company C should consist wholly or mainly in the holding of shares in subsidiaries which are resident in that Member State:—

Does the requirement identified at (v) constitute a restriction on the freedom of establishment under Article 52 of the EC Treaty'? If so, is such treatment nevertheless justified under Community law?

2. If the requirement under (v) is an unjustified restriction under Community law, does Article 5 of the EC Treaty require a national court to interpret the relevant national legislation, so far as is possible, so as to comply with Community law, even though neither Company A, Company B nor Company C is itself seeking to exercise any rights under Community law, and even if an interpretation of national legislation which would comply with Community law would have the effect of giving relief where the business of Company C consisted mainly in the holding of shares in subsidiaries established outside the EC/EEA? Or does Article 5 have the consequence only that the national legislation, despite its interpretation, takes effect subject to the requirements of Community law in a case where these requirements are in point?"

Admissibility

14. The United Kingdom Government has expressed doubts as to the relevance of the first question in determining the issue in the main proceedings. It argues that, even if the Act were found to entail a restriction on freedom of establishment, incompatible with Article 52 of the Treaty, this would have no bearing on the determination of the proceedings. ICI would in any event be denied the tax relief provided for under the Act, since the majority of the companies controlled by Holdings (13 out of 23) are resident, not in other Member States, but in non-member countries.

15. According to established case-law, it is solely for the national courts before which proceedings are pending, and which must assume responsibility for the judgment to be given, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they submit to the Court (see, *inter alia*, Case C-127/92 *Enderby* v. *Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, para 10; joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* v. *Ente Nazionale Risi* [1994] ECR I-711, para 17; and Case C-146/93 *McLachlan* v. *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS)* [1994] ECR I-3229, para 20). A request for a preliminary ruling from a national court may be rejected only if it is manifest that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the true facts or the subject-matter of the main proceedings (Case C-62/93 *BP Supergas Anonimos Elaira Geniki Emporiki-Viomichaniki Kai Antipross-Opeion* v. *Greece* [1995] ECR I-1883, para 10, and Case C-143/94 *Furlanis Costruzioni*

General SpA v. *Azienda Nazionale Autonoma Strade (ANAS) and Itinera Co. Ge SpA formerly Edilvie SRL* [1995] ECR I-3633, para 12).

16. However, that is not the situation in the present case. The House of Lords observes that opinion differs as to the proper construction of s 258(5), in terms of which, in order to qualify as a holding company within the meaning of the Act, it is necessary to hold shares wholly or mainly in companies which are resident in the United Kingdom, and, more specifically, as to the notion of control of a majority of subsidiaries resident in the United Kingdom, one interpretation of which makes it necessary to determine whether the Act is compatible with Article 52 of the Treaty.

17. In those circumstances, it is necessary to consider the questions referred by the House of Lords.

Substance

The first question

18. By its first question, the House of Lords asks essentially whether Article 52 of the Treaty precludes legislation of a Member State which, in the case of companies established in that State belonging to a consortium through which they control a holding company, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the Member States concerned.

19. Although direct taxation is a matter for the Member States, they must nevertheless exercise their direct taxation powers consistently with Community law (see Case C-279/93 *Finanzamt Köln Altstadt* v. *Schumacker* [1995] ECR I-225, para 21; Case C-80/94 *Wielockx Inspecteur der Directe Belastingen* [1995] ECR I-2493, para 16; Case C-107/94 *Asscher* [1996] ECR I-3089, para 36; and Case C-250/95 *Futura Participations and Singer* v. *Administrations des Contributions* [1997] ECR I-2471, para 19).

20. According to established case-law, the freedom of establishment which Article 52 grants to nationals of the Member States and which entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, includes, pursuant to Article 58 of the Treaty, the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons (Case 270/83 *EC Commission* v. *France* [1986] ECR 273, para 18, and Case C-330/91 *R.* v. *IRC*, ex parte *Commerzbank AG* [1994] QB 219; [1993] ECR I-4017, para 13).

21. It should also be pointed out that, even though, according to their wording, the provisions concerning freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also

prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 (Case 81/87 *R.* v. *H.M. Treasury and IRC*, ex parte *Daily Mail and General Trust PLC* [1989] 1 All ER 328; [1988] ECR 5483, para 16.).

22. It should be noted here that, under the legislation at issue in the main proceedings, companies belonging to a resident consortium which have, through a holding company, exercised their right to freedom of establishment in order to set up subsidiaries in other Member States are denied tax relief on losses incurred by a resident subsidiary where the majority of the subsidiaries controlled by the holding company have their seat outside the United Kingdom.

23. Such legislation, therefore, applies the test of the subsidiaries' seat to establish differential tax treatment of consortium companies established in the United Kingdom. Consortium relief is available only to companies controlling, wholly or mainly, subsidiaries, whose seats are in the national territory.

24. It is therefore necessary to determine whether there is any justification for such inequality of treatment under the Treaty's provisions on freedom of establishment.

25. The United Kingdom Government maintains that, for the purposes of direct taxation, the respective situations of resident and non-resident companies are not, as a general rule, comparable. It puts forward two types of justification. First, the legislation at issue is designed to reduce the risk of tax avoidance arising, in the present case, from the possibility for members of a consortium to channel the charges of non-resident subsidiaries to a subsidiary resident in the United Kingdom and to have profits accrue to non-resident subsidiaries. The purpose of the legislation at issue is therefore to prevent the creation of foreign subsidiaries from being used as a means of depriving the United Kingdom Treasury of taxable revenues. A further objective is to prevent a reduction in revenue caused by the mere existence of non-resident subsidiaries, since the Inland Revenue cannot tax profits made by subsidiaries located outside the United Kingdom in order to offset the revenue lost through the granting of relief on losses incurred by resident subsidiaries.

26. As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment.

27. Furthermore, the risk of charges being transferred, which the legislation at issue is designed to prevent, is entirely independent of whether or not the majority of subsidiaries are resident in the United Kingdom. The existence of only one non-resident subsidiary is enough to create the risk invoked by the United Kingdom Government.

28. In answer to the argument that revenue lost through the granting of tax relief on losses incurred by resident subsidiaries cannot be offset by taxing the profits of non-resident subsidiaries, it must be pointed out that diminution of tax revenue occurring in this way is not one of the grounds listed in Article 56 of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 52 of the Treaty.

29. It is true that in the past the Court has accepted that the need to maintain the cohesion of tax systems could, in certain circumstances, provide sufficient justification for maintaining rules restricting fundamental freedoms (see to this effect, Case C-204/90 *Bachmann* v. *Belgium* [1992] ECR I-249 and Case C-300/90 *EC Commission* v. *Belgium* [1992] ECR I-305). Nevertheless, in the cases cited, there was a direct link between the deductibility of contributions from taxable income and the taxation of sums payable by insurers under old-age and life assurance policies, and that link had to be maintained in order to preserve the cohesion of the tax system in question. In the present case, there is no such direct link between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries.

30. Consequently, the answer to be given to the first question must be that Article 52 of the Treaty precludes legislation of a Member State which, in the case of companies established in that State belonging to a consortium through which they control a holding company, by means of which they exercise their right to freedom of establishment in order to set up subsidiaries in other Member States, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the Member State concerned.

The second question

31. By its second question the House of Lords essentially asks the Court to explain the scope of the duty to cooperate in good faith, laid down by Article 5 of the Treaty. More specifically, if it were to follow from the reply to the first question that the legislation at issue in the main proceedings is incompatible with Community law in not granting tax relief where the holding company owned by the consortium controls mainly subsidiaries having their seat in the Community, in a case where this condition is not fulfilled by subsidiaries resident in the United Kingdom, the House of Lords asks whether it must likewise disapply that legislation, or construe it in a way conforming with Community law, where the holding company controls mainly subsidiaries having their seat in non-member countries.

32. It must be emphasised that the difference of treatment applied according to whether or not the business of the holding company belonging to the consortium consists wholly or mainly in holding shares in subsidiaries having their seat in non-member countries lies outside the scope of Community law.

33. Consequently, Articles 52 and 58 of the Treaty do not preclude domestic legislation under which tax relief is not granted to a resident consortium member where the business of the holding company owned by that consortium consists wholly or mainly in holding shares in subsidiaries

which have their seat in non-member countries. Nor does Article 5 of the Treaty apply.

34. Accordingly, when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or to disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules.

35. Consequently, in circumstances such as those in point in the main proceedings, Article 5 of the Treaty does not require the national court to interpret its legislation in conformity with Community law or to disapply the legislation in a situation falling outside the scope of Community law.

Costs

36. The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, THE COURT, in answer to the questions referred to it by the House of Lords by order of 24 July 1996, hereby rules:

1. Article 52 of the EC Treaty precludes legislation of a Member State which, in the case of companies established in that State belonging to a consortium through which they control a holding company, by means of which they exercise their right to freedom of establishment in order to set up subsidiaries in other Member States, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the Member State concerned.

2. In circumstances such as those in point in the main proceedings, Article 5 of the EC Treaty does not require the national court to interpret its legislation in conformity with Community law or to disapply the legislation in a situation falling outside the scope of Community law.

[Solicitors:—Hammond Suddards; Treasury Solicitor]

The Crown's appeal was referred back to the House of Lords (Lords Nicholls of Birkenhead, Keith of Kinkel, Mustill and Nolan) on 29 June 1999 when judgment was reserved. On 18 November 1999 judgment was given in favour of the Crown. The Crown to pay the taxpayer company's costs.

Rabinder Singh for the Crown.

Peter Whiteman Q.C. and *Christopher Vajda Q.C.* for the Company.

A The following cases were cited in oral/skeleton argument in addition to the cases referred to in the judgment:—*Bachmann* v. *Belgium* (Case C-204/90) [1992] ECR I-249; ECJ; [1994] STC 855; *EC Commission* v. *Belgium* (Case C-300/90) [1992] ECR I-305; ECJ; *Commission of the European Communities* v. *French Republic* (Case 167/73); [1974] ECR 359; ECJ; *Salomon* v. *Customs & Excise Commissioners* [1967] 2 QB 166; [1966] 3 All ER 871; *R* v. *Secretary of* B *State for the Home Department* ex parte *Brind* [1991] AC 696; [1991] 1 All ER 720; *R* v. *Hammersmith & Fulham LBC* ex parte *M* Times 19.2.97; *Fitzpatrick* v. *Sterling Housing Association Ltd.* [1998] Ch 304; [1997] 4 All ER 991; *DPP* v. *Hutchinson* [1990] 2 AC 783; [1990] 2 All ER 836; *Al-Sabah* v. *Immigration Appeal Tribunal* [1992] Imm AR 223; *R* v. *Secretary of State for the Home Department* ex parte *Bibi* [1995] Imm AR 157.

C

Lord Nicholls of Birkenhead—My Lords,

I have had the advantage of reading in draft the speech of my noble and D learned friend Lord Nolan. For the reasons he gives I too would allow this appeal.

Lord Keith of Kinkel—My Lords,

For the reasons contained in the speech to be delivered by my noble and learned friend Lord Nolan, which I have read in draft and with which I E agree, I too would allow this appeal.

Lord Mustill—My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Nolan. For the reasons he gives I too would F allow this appeal.

Lord Nolan—My Lords,

The facts of this matter are fully set out in the speech which I made in your Lordships' House on 14 March 1996[1] [1996] 1 WLR 469, when the case was first considered. It concerns a claim by the Respondents for G consortium tax relief. The crucial question was (and is) whether Coopers Animal Health (Holdings) Ltd. ("Holdings"), a company in which the Respondent taxpayer holds 49 per cent. of the shares, was during the relevant period a holding company as defined by s 258(5)(*b*) of the Income and Corporation Taxes Act 1970. The definition, so far as material, reads as follows: (now s 413(3)(*b*) of the Income and Corporation Taxes Act 1988).

H

> "'... holding company' means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent. subsidiaries, and which are trading companies,"

I and the opening words of s 258(7) provide that (see now s 413(5) of the Act of 1988)

> "References in this and the following sections of this Chapter to a company apply only to bodies corporate resident in the United Kingdom ..."

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(1) Page 26–36 *ante*.

Your Lordships held that the opening words of s 258(7) applied to the words "company" and "companies" in s 258(5)(*b*) with the result that Holdings could only qualify as a "holding company" if its business consisted wholly or mainly in the holding of shares or securities of companies which were not only trading companies but also resident in the United Kingdom. This had been the view of the Special Commissioner, Mr. D. C. Potter Q.C.([1]), but the contrary view had been taken by Millett J. (as he then was)([2]) and by the Court of Appeal([3]). The significance of the point lay in the fact that Holdings has 23 wholly-owned trading subsidiaries of which 19 are resident outside the United Kingdom.

It was accepted by the parties and by your Lordships that for the purposes of the present case—though not as a universal proposition—the "wholly or mainly" requirement should be judged on the basis of a simple head count of the subsidiaries, so that if all or a majority of the subsidiaries satisfied the United Kingdom residence condition Holdings would qualify, but otherwise not. On this basis, of course, Holdings clearly failed to qualify.

In your Lordships' House the Respondents raised for the first time the further argument that the construction of s 258 adopted by your Lordships was in conflict with European Community law, since in so far as it discriminated against companies holding shares in subsidiaries resident in other member states it militated against the rights of establishment conferred by articles 52 and 58 of the European Community Treaty (now articles 43 and 48 of the Treaty as amended by the Treaty of Amsterdam). In consequence, argued the Respondents, your Lordships were obliged by article 5 (now article 10) to construe s 258 in a manner which avoided the conflict, or, in other words, to uphold the construction adopted by Millett J. and the Court of Appeal. In fact only six of the subsidiaries of Holdings are resident in other member states, which leaves a majority resident not merely outside the United Kingdom but outside the European Union and therefore unaffected by the Treaty: but the Respondents contended that the Treaty point must nonetheless be addressed in order to determine the scope and validity of s 258(5)(*b*)

Accepting this last contention, and unable to regard the matter as acte clair, your Lordships referred the questions raised by the Respondents' arguments to the Court of Justice on 24 July 1996. By its decision given on 16 July 1998; [1999] 1 WLR 108 the Court of Justice upheld the first argument of the Respondents. In paragraph 30 of its judgment the Court of Justice declared that([4]):

> "... Article 52 of the Treaty precludes legislation of a member State which, in the case of companies established in that State belonging to a consortium through which they control a holding company, by means of which they exercise their right to freedom of establishment in order to set up subsidiaries in other member states, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the member state concerned."

It did not follow, however, that the United Kingdom legislation, as interpreted by your Lordships, conflicted with Community law in the

([1]) Page 4 *ante*. ([2]) Page 11 *ante*. ([3]) Page 14 *ante*. ([4]) Page 55E *ante*.

circumstances of the present case. As to that, the Court of Justice ruled as follow(1):

> "32. It must be emphasised that the difference of treatment applied according to whether or not the business of the holding company belonging to the consortium consists wholly or mainly in holding shares in subsidiaries having their seat in non-member countries lies outside the scope of Community law.
>
> 33. Consequently, Articles 52 and 58 of the Treaty do not preclude domestic legislation under which tax relief is not granted to a resident consortium member where the business of the holding company owned by that consortium consists wholly or mainly in holding shares in subsidiaries which have their seat in non-member countries. Nor does article 5 of the Treaty apply.
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> 34. Accordingly, when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or to disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules.
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> 35. Consequently, in circumstances such as those in point in the main proceedings, Article 5 of the Treaty does not require the national court to interpret its legislation in conformity with Community law or to disapply the legislation in a situation falling outside the scope of Community law."

It is thus clear that, in the circumstances of the present case, Community law presents no obstacle to the application of s 258 in accordance with the construction placed upon the section by your Lordships on the last occasion.

The Respondents have sought, however, to persuade your Lordships that the decision of the Court of Justice upon the first point makes that construction unsustainable as a matter of domestic law. The effect of that decision is undeniably that if a majority of the subsidiaries of Holdings had been resident in countries within the European Community then the consortium tax relief which is claimed by the Respondents could not have been denied. Therefore, submitted Mr. Whiteman Q.C. for the Respondents, it was no longer permissible to draw the line around companies resident in tlre United Kingdom as your Lordships had done on the last occasion.

He submitted that there were two alternative solutions to the problem. The first, which was to be preferred, was to return to the construction adopted by Millett J. and the Court of Appeal and abandon United Kingdom residence as the criterion for the subsidiaries. The second was, in effect, to admit defeat and disapply that criterion in cases which were within the scope of the decision of the Court of Justice on the first point, a course which would create obvious anomalies between groups of companies with different and possibly changing numbers of subsidiaries established inside or outside the Community.

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(1) Page 55H *ante*.

In support of the former alternative Mr. Whiteman argued that s 258 was ambiguous, that the ambiguity should be resolved in a manner which conformed with Community law, and that this result would be achieved by accepting the construction adopted in the courts below.

My Lords, there appear to me to be two objections to this argument. The first is that the section is not to my mind properly described as ambiguous. It is difficult to construe, but that is another matter. An ambiguity is a word or phrase fairly open to diverse meanings, the classic example being "twelve o'clock" which, save for users of the twenty-four hour clock, could equally mean midday or midnight. The crucial words in the present case might arguably bear the meaning attached to them by the courts below or that attached to them by your Lordships. They cannot on any view of the matter bear both.

The second and more fundamental objection is that, while the construction adopted by the courts below would certainly avoid the difficulty raised by article 52, it can scarcely be described as conforming with the article, because it draws no distinction between companies resident within and those resident outside the Community. There is no way in which such a distinction can be read into the words used. It is impossible to construe s 258 as permitting a company such as Holdings to include in the head count non-United Kingdom resident subsidiaries which are established in other Community countries in conformity with article 52, but not to include those established outside the Community which are unprotected by Community law. For substantially the same reasons Mr. Whiteman's argument that the doctrine of severance could be invoked to separate the permissible from the impermissible elements of s 258 cannot in my judgment succeed. The language of the crucial provisions is indivisible.

It remains to consider the question of disapplication in accordance with the provisions of ss 2(1) and (4) of the European Communities Act 1972. Explaining the effect of the section in *Reg.* v *Secretary of State for Transport*, Ex parte *Factortame Ltd.* [1990] 2 AC 85(1), Lord Bridge of Harwich said, at page 140B–D:

> "By virtue of section 2(4) of the Act of 1972 Part II of the Act of 1988 [the Merchant Shipping Act] is to be construed and take effect subject to directly enforceable Community rights, and those rights are, by section 2(1) of the Act of 1972, to be, 'recognised and available in law, and ... enforced, allowed and followed accordingly ...'. This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to the registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the E.E.C."

So, in the present case, the effect of s 2 of the Act of 1972 is the same as if a subsection were incorporated in s 258 of the Act of 1970 which in terms enacted that the definition of "holding company" was to be without prejudice to the directly enforceable Community rights of companies established in the Community. As the concluding paragraphs of the judgment of the Court of Justice make plain, this in no way affects the

(1) [1989] 2 WLR 997; [1989] 2 All ER 692.

application of the definition to companies established outside the Community; cf in this connection the comments of Lord Keith of Kinkel on the effect of the *Factortame* decision in *Reg.* v. *Secretary of State for Employment,* Ex parte *Equal Opportunities Commission* [1995] 1 AC 1 at page 27D–E.

Mr. Whiteman pointed out with justification that, with or without disapplication, the decision of the Court of Justice on the first point undermined the dichotomy between companies resident and those non-resident in the United Kingdom upon which I had relied in my earlier speech as suggesting a legislative purpose which supported the construction adopted by your Lordships. The possibility remains, however, that Parliament based s 258 of the Act of 1970 upon that dichotomy but simply and understandably failed to anticipate the effects upon it of the Act of 1972. It is not altogether surprising that the latter Act should prevent the criterion of United Kingdom residence from prevailing over the Community rights conferred by article 52. It is true that the result is to increase the number of oddities and anomalies which the definition of "holding company" creates, and which are referred to in my earlier speech. That, however, is a matter for the consideration of the legislature rather than your Lordships.

To return to the facts of the present case, I am satisfied for the reasons given that the decision of the Court of Justice does not assist the Respondents. Holdings does not in my judgment qualify as a "holding company," and so the claim of the Respondents for consortium tax relief must fail. Accordingly I would allow the appeal. The Crown must nonetheless pay the costs in accordance with the order of Your Lordships' House granting leave to appeal.

Appeal allowed. The Crown to pay the Taxpayer company's costs.

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