

Potel v. Commissioners of Inland Revenue⁽¹⁾
Poteliakhoff v. Commissioners of Inland Revenue

Surtax—Total income—Income attributable to a period exceeding a year assessed to surtax in one year—Ordinary dividend—Exclusion of relief for 1965–66—Interim dividend for 15-month period declared in 1964–65 and paid in 1965–66—Whether income of 1964–65 or 1965–66—Income Tax Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 10), ss. 184, 238 and 524(3)(a); Finance Act 1966 (c. 18), s. 24.

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The Appellants were the holders of ordinary shares and “A” convertible shares in S Ltd. The “A” shares ranked initially as deferred shares, but if dividends were paid for any period at the same rate on the ordinary shares and the “A” shares the “A” shares were to be converted into ordinary shares. In March 1965 the board of S Ltd. were minded to acquire the share capital of another company which made up its accounts annually to 31st March and to adopt the same accounting date for S Ltd. On 31st March 1965 the board passed a number of resolutions, including one to send a circular letter to the shareholders on 3rd April and one declaring “an interim dividend of 10 per cent. less Income Tax, as stated in the circular letter” on the ordinary shares and a like dividend on the “A” shares. The circular letter stated (inter alia) that “The Directors intend to prepare accounts of the Company for a fifteen month period to 31st March 1965 . . . your Directors are pleased to declare an interim dividend of 10 per cent. less tax payable on 29th May 1965 . . . It is also your Directors’ intention that all the “A” Convertible Shares should now be converted and they therefore declare an interim dividend of 10 per cent. on these shares . . .” The dividends were paid on 29th May 1965.

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The Appellants were assessed to surtax for the year 1965–66 on the footing that the interim dividends for the said period of 15 months formed part of their total income for that year, so that by virtue of s. 24, Finance Act 1966, relief under s. 238, Income Tax Act 1952, was not allowable. On appeal, the Appellants contended that the words “payable on 29th May 1965” should not be written into the resolution declaring the dividends, and that they became due when declared on 31st March 1965, so as to form part of their total income for 1964–65. For the Crown it was contended that the dividends were not a debt due before 29th May 1965. The Special Commissioners dismissed the appeals.

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Held, that the dividends formed part of the Appellants’ total income for 1965–66, because (1) the resolution declaring them should be read as providing that they were payable on 29th May 1965, and (2) in any event a resolution to pay an interim dividend did not create a debt before the dividend was paid.

Lagunas Nitrate Co. Ltd. v. Schroeder & Co. (1901) 85 L.T. followed on the second point.

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⁽¹⁾ Reported [1971] 2 All E.R. 504.

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CASES

(1) *Potel v. Commissioners of Inland Revenue*

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.

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1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 15th and 16th October 1969, Sion Potel (hereinafter called "the Appellant") appealed against an assessment to surtax for the year 1965-66 in the amount of £7,200.

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2. Shortly stated, the question for our decision was whether interim dividends declared and paid in circumstances hereinafter described should form part of the Appellant's total income for surtax purposes (a) for the year 1964-65, so as to qualify for relief under s. 238 of the Income Tax Act 1952 (as contended on behalf of the Appellant) or (b) for the year 1965-66, in which case no relief would be available under the said s. 238 (as contended on behalf of the Commissioners of Inland Revenue).

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

(1) Copy memorandum and articles of association of Star (Greater London) Holdings Ltd. (hereinafter called "the company").

(2) Copy minutes of meeting of directors of the company (31st March 1965).

(3) Copy circular letter dated 3rd April 1965 to shareholders of the company.

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(4) Extract from Appellant's statement of income for year ending 5th April 1966.

(5) Copy letter dated 30th September 1969 from Solicitor of Inland Revenue to Appellant's solicitors.

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

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4. The following facts were admitted between the parties:

(1) The Appellant was at all material times the holder of certain ordinary and "A" convertible shares of the company.

(2) The company was incorporated on 26th October 1959 as a private company limited by shares, having as its main object the purchase of land for investment.

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(3) The following articles of the company's articles of association were material for the purposes of this Case:

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" 5 (B) (ii) Upon the declaration and payment of dividends for any year or other period on the Convertible Shares at a rate equal to that declared and paid for the same year or other period on all the Ordinary Shares for the time being issued the Convertible Shares shall thereupon be converted into Ordinary Shares and shall thereupon rank *pari passu* in all respects with the existing Ordinary Shares."

" 125. The Directors may from time to time pay to the Members, or any class of Members, such Interim Dividends as appear to the Directors to be justified by the profits of the Company."

(4) The minutes of a meeting of the directors of the company held on 31st March 1965 read as follows: A

"1. It Was Resolved that the Company should forthwith enter into an agreement with Laurie Peter Marsh, J.L.C. Investments Limited, Limited, George William Edward Fortune and Eric Alfred Wakefield for the acquisition by the Company of the whole of the issued share capital of John Laurie & Co. Limited on the terms of the Agreement which had been approved by the Company's Solicitors and is now produced and approved and that the Common Seal of the Company be affixed thereto. B

2. It Was Resolved that a circular letter to shareholders of the Company in the form produced to and carefully considered by the Board be approved and despatched to shareholders on the 3rd April 1965. C

3. It Was Resolved that the Company's Brokers, Messrs. Gow & Parsons be and they are hereby instructed to apply to The Stock Exchange London for permission to deal in and for quotation of the further 850,000 Ordinary Shares of 4s. each in the capital of the Company to be issued as the consideration for the acquisition of John Laurie & Co. Limited and that the Secretary be and he is hereby authorised to sign the appropriate Stock Exchange forms C.A. and G.U. D

4. It Was Resolved that an Extraordinary General Meeting of the Company be convened for the purpose of passing the Resolutions set out in the form of Notice which was then produced by the Secretary and approved and that such Notice be despatched to all the shareholders on the 3rd April 1965. E

5. It Was Resolved that an interim dividend of 10 per cent. less Income Tax, as stated in the circular letter referred to in Item 2 above, be and is hereby declared on the Ordinary Shares and it was also Resolved that a like dividend be and is hereby declared on all the "A" Convertible Shares, excluding the latest issue of 25,000 on the 5th March 1965." F

(5) The circular letter dated 3rd April 1965 referred to in the said resolution 2 contained the following paragraphs material to this Case:

"The Directors intend to prepare accounts of the Company and its subsidiaries for a fifteen month period to 31st March 1965, as this is a more convenient accounting date and also coincides with the date already adopted by the Laurie Group. Subsequent accounts will be prepared to 31st March of each year. G

It is anticipated that the rental income for the fifteen months ended 31st March 1965 will exceed £200,000 (year ended 31st December 1963 £106,283). The net profit for that period before taxation which includes approximately £9,600 gross dividends received on a recent investment in The Cranston London Hotels Company Limited is estimated to be £60,000 (year ended 31st December 1963 £30,730). On the basis of these figures your Directors are pleased to declare an interim dividend of 10 per cent. less tax payable on 29th May 1965, and will recommend a final dividend of 3 per cent. payable on or about 31st October 1965 (year ended 31st December 1963 9 per cent.). H

It is also your Directors' intention that all the "A" Convertible Shares should now be converted and they therefore declare an interim dividend of 10 per cent. on these shares which will thereby be converted and rank *pari passu* with the existing Ordinary Shares for the proposed final dividend." I

A (6) Appropriate amounts in respect of the said interim dividends on the ordinary and "A" convertible shares declared on 31st March 1965 were subsequently paid to the Appellant. No evidence was adduced by or on behalf of the Appellant as to the dates on which the said dividends were paid or received.

B (7) In a schedule attached to his statement of income for the year ended 5th April 1966, and signed on 2nd May 1967, the Appellant returned the gross amount of dividends received from the company.

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

C (1) the minutes of the board meeting held on 31st March 1965, having been signed by the chairman, were conclusive evidence of the proceedings by virtue of s. 145 of the Companies Act 1948 in view of the absence of any rebutting evidence;

(2) the resolution numbered 2 was carried before the resolution numbered 5;

(3) the resolution numbered 2 was limited in its ambit to the approval of the form of the circular which was despatched to shareholders on 3rd April 1965;

D (4) in the events which occurred the circular did not correctly record the resolution which declared the interim dividend on the ordinary shares, whilst it did correctly record the resolution which declared the interim dividend on the "A" convertible ordinary shares;

E (5)(i) the words "payable on 29th May 1965" should not be written into the resolution numbered 5 for the purpose of making it read: "It was resolved that an interim dividend of 10 per cent. less income tax payable on 29th May 1965, as stated in the circular letter referred to in item 2 above, be and is hereby declared . . .";

F (ii) the words "of 10 per cent. less income tax" (i.e. as stated in the circular letter) should not be deleted from the resolution numbered 5 for the purpose of making it read: "It was resolved that an interim dividend as stated in the circular letter referred to in item 2 above be and is hereby declared . . .";

G (iii) if the text of the resolution numbered 5 were altered as in (i) and/or (ii) above, the dividend on the "A" convertible shares could not and would not be properly described as a "like dividend" when comparing it with the interim dividend on the ordinary shares because the circular did not purport to state that the dividend on the "A" convertible shares was to be payable on 29th May 1965;

(6) the resolution numbered 5 pronouncing the aliquot shares of the members of the company at 31st March 1965 in its profits for the 15 months to 31st March 1965 was a necessary preliminary to the payment of such aliquot shares of profits to the members of the company;

H (7) the resolution numbered 5 pronouncing the aliquot shares of the members of the company at 31st March 1965 in its profits for the 15 months to 31st March 1965 did not purport to defer title to such aliquot shares of the said profits until some date in the future, and in any event the articles of association of the company did not enable the board to defer title to the dividends;

I (8) there was no evidence that the resolution numbered 5 was rescinded at any material time after 31st March 1965, and there was no evidence of any circumstances on and/or after 31st March 1965 which would have

entitled the board to carry a *bona fide* resolution rescinding the resolution which was numbered 5 ; A

(9) in the events which occurred the shareholders of the company ratified the resolution numbered 5 which was carried by its board on 31st March 1965, so that the interim dividends became due on 31st March 1965 and/or receivable by the shareholders on 31st March 1965 ;

(10) the interim dividends became due when they were declared on 31st March 1965, and they could not become due when the secretary of the company took the necessary steps to pay them to the shareholders. B

6. It was contended on behalf of the Commissioners of Inland Revenue :

(1) that the amount of the said interim dividends should be included in the Appellant's total income for the year 1965-66, on the ground that it was not a debt due before 29th May 1965 ; C

(2) that there was nothing inconsistent between the said resolution 5 and the said circular letter dated 3rd April 1965, which should be read together.

7. The following cases were cited by the parties: In re *Severn and Wye and Severn Bridge Ry. Co.* [1896] 1 Ch. 559 ; *Lagunas Nitrate Co. Ltd. v. Schroeder & Co.* (1901) 85 L.T. 22 ; *Chelsea Water Co. v. Metropolitan Water Board* (1904) 73 L.J. K.B. 532 ; *Bond v. Barrow Haematite Steel Co.* [1902] 1 Ch. 353 ; In re *Sebright* [1944] Ch. 287 ; *Bradbury v. English Sewing Cotton Co. Ltd.* 8 T.C. 481 ; [1923] A.C. 744 ; *Latilla v. Commissioners of Inland Revenue* 25 T.C. 107 ; [1943] A.C. 377. D

8. We, the Commissioners who heard the appeal, gave our decision orally as follows : E

Having referred to the evidence and arguments, we turned to the point at issue, which was the date on which the interim dividends on the ordinary shares became "due" within the meaning of the word in s. 184(1) of the Income Tax Act 1952 and related sections.

The facts were not in dispute, and the point depended upon the interpretation of the wording of resolutions 2 and 5 recorded in the company's minutes of 31st March 1965. F

It was common ground that, if the income in question properly fell into the year 1965-66, s. 24 of the Finance Act 1966 operated to deny any relief to the Appellant under s. 238 of the Income Tax Act 1952.

In our view the arguments put forward by the Solicitor of Inland Revenue were supported by the authorities and were to be preferred. Looking at the resolutions in question, it seemed to us that the directors had been dealing with the interim dividends in accordance with the proposed circular letter of 3rd April 1965, and that the minutes and circular letter did not have the effect which Counsel for the Appellant maintained. In our view the Company's intention was that the interim dividends should not be payable until 29th May 1965, with the result that there was no obligation on the company to make any distribution before that date. G H

We accordingly dismissed the appeal and left figures to be agreed.

9. Figures were agreed between the parties on 15th December 1969, and on 16th January 1970 we confirmed the assessment in the amount of £7,200.

10. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and on 22nd January 1970 required us to state a Case for the opinion of the High Court pursuant to the Income Tax Management Act 1964, I

A s. 12(5), and the Income Tax Act 1952, s. 64, which Case we have stated and do sign accordingly.

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

B. James }
D. E. Barrett } Commissioners for the Special Purposes
of the Income Tax Acts.

B Turnstile House,
94-99 High Holborn,
London, W.C.1.
29th September 1970.

(2) *Poteliakhoff v. Commissioners of Inland Revenue*

C The Appellant in this case was another shareholder in Star (Greater London) Holdings Ltd. The facts, the contentions of the parties and the decision of the Commissioners were the same as in the first case.

The cases came before Brightman J. in the Chancery Division on 30th November and 1st and 2nd December 1970, when judgment was reserved. On 3rd December 1970 judgment was given in favour of the Crown, with costs.

D *Marcus Jones* for the taxpayers.
I. Edwards-Jones Q.C., Patrick Medd and *Peter L. Gibson* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment: *Commissioners of Inland Revenue v. Whitworth Park Coal Co. Ltd.* 38 T.C. 531; [1961] A.C. 31; *Bradbury v. English Sewing Cotton Co. Ltd.* 8 T.C. 481; [1923] A.C. 744; *Cenlon Finance Co. Ltd. v. Ellwood* 40 T.C. 176; [1962] A.C. 782; *Latilla v. Commissioners of Inland Revenue* 25 T.C. 107; [1943] A.C. 377; *Reg. v. Ward* (1872) 26 L.T. 43; *Parker & Cooper Ltd. v. Reading* [1926] Ch. 975; *Bond v. Barrow Haematite Steel Co.* [1902] 1 Ch. 353; *Commissioners of Inland Revenue v. Henderson's Executors* 16 T.C. 282; 1931 S.C. 681; *Hawley v. Commissioners of Inland Revenue* (1925) 9 T.C. 331; *Leigh v. Commissioners of Inland Revenue* 11 T.C. 590; [1928] 1 K.B. 73; *Lambe v. Commissioners of Inland Revenue* 18 T.C. 212; [1934] 1 K.B. 178; *Commissioners of Inland Revenue v. Hawley* 13 T.C. 327; [1928] 1 K.B. 578; *Burland v. Earle* [1902] A.C. 83; *Commissioners of Inland Revenue v. Gardner Mountain & D'Ambrumenil Ltd.* (1947) 29 T.C. 69; *Grosvenor Place Estates Ltd. v. Roberts* 39 T.C. 433; [1961] Ch. 148; *Fitzgerald v. Commissioners of Inland Revenue* 7 T.C. 284; G [1919] 2 K.B. 154; *Ridge Securities Ltd. v. Commissioners of Inland Revenue* 44 T.C. 373; [1964] 1 W.L.R. 479.

Brightman J.—This appeal involves a short question of construction and a short point of law. The question is whether or not the Appellant taxpayer H is entitled to relief under s. 238 of the Income Tax Act 1952 on interim dividends declared by a company called Star (Greater London) Holdings Ltd. Section 238 gives relief from surtax where income attributable to a period

(Brightman J.)

exceeding a year is received in a year. Section 24 of the Finance Act 1966, however, provides that relief under s. 238 is not available in respect of ordinary dividends of a United Kingdom company which would otherwise fall to be treated as income of the year 1965-66. The dividends in question were resolved to be paid by a board meeting of the company held on 31st March 1965, that is to say, during the qualifying year 1964-65. Payment of the dividend did not take place until 29th May 1965, that is to say, during the non-qualifying year 1965-66.

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Section 524(3)(a) of the Income Tax Act 1952 provides that:

“In estimating the total income of any person—(a) any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year . . . notwithstanding that the income . . . accrued or will accrue in whole or in part before or after that year.”

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Section 184(1) enacts:

“The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying the dividend shall be entitled to deduct tax at the standard rate for the year in which the amount payable becomes due.”

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If these two enactments are put together it follows that, in the case of a United Kingdom dividend, such dividend forms part of the total income of a person for the year by reference to which standard rate tax is deductible, and tax is deductible at the standard rate for the year in which the dividend becomes due. The question in issue on this appeal, therefore, is whether the dividends in question “became due” on 31st March 1965, when the dividends were declared, or on 29th May 1965, when they were paid.

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At the relevant date, namely 31st March 1965, the capital of the company was £460,000 divided into ordinary shares and “A”, “B” and “C” convertible shares. At that date the rights attaching to the “A” convertible shares were those set out in a special resolution passed on 4th April 1962 which substituted a new article 5(B). The new article reads as follows:

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“(i) The ‘A’ Convertible Shares shall not confer upon the holders thereof the right to receive any dividends in respect of any year or other period for which the Company’s accounts are made up unless for that year or for that other period dividends aggregating at least 7 per cent. per annum (before income tax) have been declared and paid on all the Ordinary Shares for the time being issued, but in any event no dividend may be declared or paid on the ‘A’ Convertible Shares for any year or other period at a rate exceeding that declared and paid on the Ordinary Shares for such year or other period. (ii) Upon the declaration and payment of dividends for any year or other period on the ‘A’ Convertible Shares at a rate equal to that declared and paid for the same year or other period on all the Ordinary Shares for the time being issued the ‘A’ Convertible Shares shall thereupon be converted into Ordinary Shares and shall thereupon rank *pari passu* in all respects with the existing Ordinary Shares.” Paragraph (iii) deals with the right to attend meetings. “(iv) In a winding up of the Company the ‘A’

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(Brightman J.)

A Convertible Shares shall rank *pari passu* with the Ordinary Shares with regard to applications of the assets."

I understand this article to mean that (1) if dividends are declared and paid on the "A" convertible shares for an accounting period at a rate equal to the rate at which dividends are declared and paid on the ordinary shares, the "A" convertible shares are thereupon automatically converted into

B ordinary shares; (2) the "A" convertible shares do not confer the right to receive any dividends in respect of any accounting period unless and until dividends aggregating not less than 7 per cent. per annum have been declared and paid on the ordinary shares for the like period; and (3) no dividend may be declared or paid on the "A" convertible shares for any accounting period exceeding that declared and paid on the ordinary shares for the like period.

C It would seem, therefore, that the "A" convertible shares ranked as deferred shares until such time as the profits enabled a dividend of at least 7 per cent. per annum on the ordinary shares and the "A" convertible shares to be declared and paid or the company was liquidated. Thereafter, the "A" convertible shares ceased to be deferred shares.

D In March 1965 Star Holdings, as I will call the company, were minded to acquire the share capital of John Laurie & Co. Ltd. from its two shareholders, a Mr. Marsh and J. L. C. Investments Ltd. On 31st March 1965 the directors of Star Holdings held a board meeting and passed five resolutions which I will partly quote.

E "1. It was resolved that the Company should forthwith enter into an agreement with Laurie Peter Marsh, J.L.C. Investments Limited, George William Edward Fortune and Eric Alfred Wakefield for the acquisition by the Company of the whole of the issued share capital of John Laurie & Co. Limited on the terms of the Agreement which had been approved by the Company's Solicitors and is now produced and approved and that the Common Seal of the Company be affixed thereto.

F 2. It was resolved that a circular letter to shareholders of the Company in the form produced to and carefully considered by the Board be approved and despatched to shareholders on the 3rd April 1965." Resolutions 3 and 4 are not relevant.

G "5. It was resolved that an interim dividend of 10 per cent. less Income Tax, as stated in the circular letter referred to in Item 2 above, be and is hereby declared on the Ordinary Shares and it was also resolved that a like dividend be and is hereby declared on all the 'A' Convertible Shares, excluding the latest issue of 25,000 on the 5th March 1965."

The circular letter of 3rd April 1965 was a long document of over six closely printed pages addressed by the secretary of Star Holdings to its shareholders. It was headed: "John Laurie & Company Limited", and its purpose was conveyed by the first paragraph, which reads as follows:

H "I am instructed by the Board to advise you that Star (Greater London) Holdings Limited"—the company—"has entered into a contract to acquire the whole of the issued share capital of John Laurie & Co. Limited from Laurie Peter Marsh and J.L.C. Investments Limited."

I The circular letter then set out details of the Laurie group of companies, the terms of the contract, an estate agent's report on the properties held by the Laurie group, an accountant's report on the Laurie group and an estimate of the rental income of the Laurie group; and it concluded with a series of paragraphs with the cross-heading "General information on Star (Greater

(Brightman J.)

London) Holdings Limited and its subsidiaries". The first three of such paragraphs read as follows: A

"The Directors intend to prepare accounts of the Company and its subsidiaries for a fifteen month period to 31st March 1965 as this is a more convenient accounting date and also coincides with the date already adopted by the Laurie Group. Subsequent accounts will be prepared to 31st March of each year. It is anticipated that the rental income for the fifteen months ended 31st March 1965 will exceed £200,000 (year ended 31st December 1963, £106,283). The net profit for that period before taxation which includes approximately £9,600 gross dividends received on a recent investment in The Cranston London Hotels Company Limited is estimated to be £60,000 (year ended 31st December 1963, £30,730). B C

On the basis of these figures your Directors are pleased to declare an interim dividend of 10 per cent. less tax payable on 29th May 1965, and will recommend a final dividend of 3 per cent. payable on or about 31st October 1965 (year ended 31st December 1963, 9 per cent.).

It is also your Directors' intention that all the 'A' Convertible Shares should now be converted and they therefore declare an interim dividend of 10 per cent. on these shares which will thereby be converted and rank *pari passu* with the existing Ordinary Shares for the proposed final dividend." D

The following facts are to be noticed. Resolution no. 5, which declared a 10 per cent. dividend on the ordinary and "A" convertible shares, did not in terms state that the dividend should not be payable until 29th May 1965. Secondly, resolution no. 5 did, however, describe the dividend as "an interim dividend of 10 per cent. less income tax, as stated in the circular letter". Thirdly, the second paragraph of the circular letter under the cross-heading "General Information" and so on referred to "an interim dividend of 10 per cent. less tax payable on 29th May 1965" but did not in terms describe that dividend as a dividend payable on any particular class of shares. Fourthly, the third paragraph of the circular letter under that cross-heading expressed three things: (1) the board's intention that all "A" convertible shares should be converted; (2) the declaration of an interim dividend of 10 per cent. thereon, naming no time for payment; and (3) a statement that the "A" convertible shares would thereby be converted and rank *pari passu* with the existing ordinary shares for proposed final dividend. E F G

Paragraph 4(6) of the Case contains the observation that: "No evidence was adduced by or on behalf of the Appellant as to the dates on which the said dividends were paid or received." It was, however, expressly conceded before me that the dividends were received during the second of the two relevant fiscal years, that is, 1965-66, and in the absence of any intention to the contrary I infer that the dividends were in fact paid on the date when it was stated they were going to be paid, namely, 29th May 1965. H

The questions which I have to decide are these: (1) whether on the true construction of resolution no. 5 the dividend on the ordinary shares was resolved upon by the board without any provision as to the time of payment or subject to a provision that the dividend should be payable on 29th May 1965; (2) the like question in relation to the dividend on the "A" convertible shares; (3) if either dividend were resolved upon subject to a provision that I

(Brightman J.)

A it should be payable on 29th May 1965, whether the amount payable to the taxpayer "became due" within the meaning of s. 184 of the Income Tax Act 1952 in the year 1965-66.

The articles of Star Holdings are in a usual form: that is to say, under article 80 the directors may exercise such powers of the company as are not by the Companies Act or the articles required to be exercised by the company in general meeting. Article 125 reads as follows: "The Directors may from time to time pay to the Members, or any class of Members, such Interim Dividends as appear to the Directors to be justified by the profits of the Company."

The following principles are, in my view, correct. (1) If the articles of association of a company contain an article similar to article 80 in the present case, directors who recommend a final dividend have power at the same time to stipulate the date on which such dividend shall be paid: *Thairlwall v. Great Northern Railway Co.* [1910] 2 K.B. 509. (2) If a final dividend is declared by a company without any stipulation as to the date for payment, the declaration of the dividend creates an immediate debt: *In re Severn and Wye and Severn Bridge Railway Co.* [1896] 1 Ch. 559. (3) If a final dividend is declared and is expressed as payable at a future date a shareholder has no right to enforce payment until the due date for payment arrives. This was assumed to be correct in *In re Kidner* [1929] 2 Ch. 121, and, despite a submission to the contrary by the Appellant, it is clear, in my view, beyond argument. (4) In the case of an interim dividend which a board has resolved to pay, it is open to the board at any time before payment to review its decision and resolve not to pay the dividend: *Lagunas Nitrate Co. Ltd. v. Schroeder & Co.* (1901) 85 L.T. 22. In that case the article was in the following form:

"The Directors may from time to time pay to the Members on account of the next forthcoming dividend such interim dividends as, in their judgment, the position of the Company justifies."

F In a reserved judgment Joyce J. said⁽¹⁾:

"As at present advised, I do not see why the board of directors might not before an interim dividend is actually paid, acting *bona fide*, reconsider the question as to whether it ought to be paid at all."

In my view it follows from these principles that, in the case of an interim dividend which the directors resolve shall be paid, they can at or after the time of such resolution decide that the dividend shall be paid at some stipulated future date. If a time for payment is so prescribed, a shareholder has no enforceable right to demand payment prior to the stipulated date.

I turn to the question whether resolution no. 5 on its true construction ought to be read as providing that the dividend on the ordinary shares was payable on 29th May. In my view it should. The dividend which was resolved to be paid was an interim dividend of 10 per cent. less income tax "as stated in the circular letter referred to in Item 2". That circular letter stated that "your Directors are pleased to declare an interim dividend of 10 per cent. less tax payable on 29th May 1965". Therefore, the ordinary dividend resolved upon by the directors was a dividend payable on that date. I am also of the opinion that the same provision was by necessary implication attached to the dividend on the "A" convertible shares. Otherwise, the "A" convertible shares could be in receipt of a dividend in priority to the

(1) 85 L.T., at p. 23.

(Brightman J.)

ordinary shares, which would be a reversal of their proper roles under the terms of the articles of association. Resolution no. 5 stated that "a like dividend" was declared on the "A" convertible shares. Plainly the directors intended the dividend on the "A" convertible shares to be equivalent in all respects to the dividend on the ordinary shares.

On the footing, therefore, that the dividend which the directors resolved on 31st March 1965 should be paid was also resolved by them to be payable on 29th May 1965, I turn to the question on which of these two dates the dividend became due within the meaning of s. 184 of the Income Tax Act 1952. There is some guidance as to the meaning of "becomes due" in *In re Sebright* [1944] Ch. 287. The only facts essential to the citation of this case as an authority are these. A deceased life tenant under a strict settlement drawn in the usual form had appointed a jointure rentcharge in favour of his widow. He was entitled under the terms of the settlement to appoint to her the usual powers and remedies commonly found in a strict settlement, that is to say, a power to distrain, to enter into receipt of the rents and profits and to appoint or administer the settled land upon trusts for securing the jointure. The jointure fell into arrear in 1936. It is not clear from the report whether the jointress did not exercise any powers or remedies for recovering the same because she did not choose to exercise them or because her husband had omitted to appoint such powers and remedies to her in the instrument of appointment. However that may be, income subsequently came to the hands of the trustees available to discharge the arrears of the jointure. The question arose whether on payment of the arrears tax was deductible under what is now s. 169 of the Income Tax Act 1952 at the rate suffered by such income or at the lesser rate applicable when the jointure ought to have been paid under the terms of the instrument of appointment. The formula in s. 169 is the same as that found in s. 184, namely, "the standard rate for the year in which the amount payable becomes due". Vaisey J., in a reserved judgment, held in favour of the second alternative, namely, deduction of tax at the rate applicable when the instalments of the rentcharge ought to have been paid, and he expressed himself as follows, at page 293:

"I have come to the conclusion that the effect of the rule in such a case as the present must be that the person entitled to the annual payment should, in regard to deduction of tax, be placed in the position in which he would have been if the payment had been made on the very day on which it became due. The person liable to make the payment may be in the position of having himself suffered a deduction at one rate while his own right of deduction and retention is at a different rate, that is to say, the rate which ruled at the time when the belated payment ought to have been made."

I think it is clear beyond any reasonable argument that a dividend declared on 31st March and directed to be payable on 29th May and in fact paid on 29th May is not in arrear and belatedly paid when the company pays the dividend on the date upon which it is expressed to be payable. A dividend cannot be said, in my view, to have "become due" until payment thereof is actually enforceable. If a dividend is expressed to be payable at a future date payment is in my view plainly not enforceable until that date. It follows, therefore, on the basis of the construction which I put on resolution no. 5, that the dividends on both the ordinary and the "A" convertible shares form part of the taxpayer's total income for the year 1965-66.

Even if I had not formed the view that payment on 29th May 1965 was an integral part of resolution no. 5 I would still have concluded that the

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(Brightman J.)

- A dividends in question were part of the total income of the taxpayer for that year, and for the following reasons. There is a difference between declaring a dividend and paying a dividend. The declaration of a dividend by a company in general meeting creates a debt enforceable immediately or in the future, according to whether the dividend is or is not expressed to be payable at a future date. The payment of the dividend is a different operation.
- B It is an actual distribution of part of the assets of the company. The two processes, declaration and payment, are quite separate. Article 125 in the present case did not in terms authorise the directors to declare a dividend, that is to say, to create the relationship of debtor and creditors between the company and its members. It only authorised the act of payment. This is usual in the case of an interim dividend: see, for example, article 115 of Table A of the Companies Act 1948, and compare the wording of article 114.
- C I have been referred to no authority that the resolution of a board of directors pursuant to such an article creates the relationship of creditor and debtor between a member and the company. In fact, the law is stated to be precisely the contrary in Buckley's Company Law, 13th edn. (1957), at page 897, and I am told that this is a reflection of what appeared in earlier editions. The note in Buckley reads:

“Where the directors are authorized to pay interim dividends, a mere resolution to pay does not create a debt as between the company and the member so as to prevent the directors from subsequently rescinding the resolution.”

- E I think that is a correct conclusion from the decision in the *Lagunas Nitrate* case⁽¹⁾, which establishes that an interim dividend is, as it were, subject to the will of the directors until it is actually paid.

I therefore reach the conclusion that even if the date 29th May 1965 was not imported, as I think it was, into resolution no. 5, nevertheless that resolution created no debt so that the interim dividends never in fact became due during the year 1964-65.

- F **Edwards-Jones Q.C.**—May we take it, my Lord, that your Lordship's judgment stands in respect of both appeals?

Brightman J.—I have not even opened the papers in the other appeal. I am prepared to assume, owing to the correspondence in the names, that it is the same.

- G **Edwards-Jones Q.C.**—My Lord, the Case is in identical terms, and I do not think your Lordship could have given judgment in respect of it in different terms in those circumstances.

Brightman J.—Do you agree with that, Mr. Marcus Jones?

Jones—My Lord, with respect, yes.

Brightman J.—Very well.

- H **Edwards-Jones Q.C.**—Would your Lordship say, then, that both appeals should be dismissed with costs?

Brightman J.—Mr. Marcus Jones, is that correct?

Jones—My Lord, it is.

Brightman J.—Very well.

[Solicitors:—Hancock & Willis ; Solicitor of Inland Revenue.]

(1) 85 L.T. 22.