HIGH COURT OF JUSTICE (CHANCERY DIVISION)—28 AND 29 JUNE AND 23 JULY 1976

COURT OF APPEAL—29 AND 30 NOVEMBER AND 1 DECEMBER 1977

HOUSE OF LORDS—6 AND 7 NOVEMBER AND 13 DECEMBER 1978

Tyrer *v.* Smart (H.M. Inspector of Taxes)(1)

Income tax, Schedule E—Public flotation of company—Offer for sale of shares by tender—Right of employee to take up shares at minimum price rather than "striking" price—Whether advantage an emolument—Value of advantage.

The parent company of a group, of which the Appellant's direct employer was a member, decided in 1969 to become a public quoted company and to offer its shares by tender. In such cases the public is invited to tender for shares at or over a "minimum price" fixed by the offerer; when the tenders are in, a price is struck which is near the average of the tenders but is also designed to promote an active market; those who have tendered at or above this price are allotted shares at the "striking price". In the present case, 10 per cent. of the shares in issue were reserved for employees within the group with a qualifying period of service for subscription at the minimum price, namely 20*s.* per share, and the employee could choose the number of shares for which he wished to apply. After tender, the striking price was fixed at 25*s.* and the public's and employees' applications were formally accepted on 17 March 1969. Dealings started on 18 March 1969 and on that day the price of the shares varied between 26*s.* and 27*s.* 6*d.* This was against the trend of the market, which had fallen between the date when the striking price was fixed and 17 March. The Appellant, having purchased 5,000 shares at 20*s.* each, appealed to the Special Commissioners against an additional assessment to income tax under Schedule E raised on the basis that the Appellant's price advantage as compared with members of the public was an emolument accruing to him from his employment. Before the Commissioners expert evidence was adduced to the effect that on 17 March the value of the Appellant's shares was between 23*s.* and 24*s.* The Appellant contended before the Commissioners (i) that there was no taxable emolument because his financial advantage had arisen from market forces rather than from his employment; (ii) alternatively, that the value of any emolument was the difference between the minimum price and market value (23*s.* to 24*s.*) on 17 March. On behalf of the Crown it was contended (i) that the right to acquire shares at a special price given to the Appellant by his employer was an emolument from his office or employment, and (ii) that such emolument was 5*s.* per share, being the difference between what an employee (buying at the minimum price) and a member of the public (buying at the striking price) had to pay for the same shares on 17 March 1969. The Special Commissioners decided that the Appellant had received a taxable emolument which they valued at 4*s.* per share. Both parties demanded Cases (but the Crown's cross-appeal on the valuation point was not pursued in the High Court).

(1) Reported (Ch D) [1977] 1 WLR 1; [1976] 3 All ER 537; [1976] STC 521; 120 SJ 635; (CA) [1978] 1 WLR 415; [1978] 1 All ER 1089; [1978] STC 141; 122 SJ 34; (HL) [1979] 1 WLR 113; [1979] 1 All ER 321; [1979] STC 34; 123 SJ 65.

The Chancery Division, allowing the Appellant's appeal and discharging the assessment, held (1) that the benefit accruing to the Appellant of 3*s.* to 4*s.* per share was not an emolument from his employment for the following reasons: (*a*) the benefit was an isolated one with no past history; (*b*) every eligible employee had the same opportunity of benefiting; (*c*) the purpose of the company was to encourage employees to identify with, and become shareholders in, the parent company; (*d*) the opportunity to apply for shares was not represented to the employees as being of financial advantage to them; and (*e*) the Appellant had no particular confidence that the value of the shares would exceed the minimum price of 20*s.*; (2) accordingly, that the benefit to the Appellant, while it would not have arisen but for his employment, was the result of his venturing his own money and his judgment of the market and the Special Commissioners' decision was not one to which they could reasonably come on the facts.

The Court of Appeal, dismissing the appeal, held that the Judge's conclusion that the Special Commissioners' decision was not one to which they could reasonably come was correct.

The House of Lords, unanimously allowing the Crown's appeal and restoring the determination of the Commissioners, held that (i) there was a clear finding by the Commissioners that the offer to the Appellant was made as a reward for past and more particularly for future services and so was made to him in return for acting as or being an employee; (ii) that finding was one of fact to which the Commissioners were entitled to come; (iii) the Court of Appeal and Brightman J. had wrongly held that the only reasonable conclusion contradicted the Special Commissioners' determination. *Edwards* v. *Bairstow* 36 TC 207; [1956] AC 14 applied.

CASE

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

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21, 22 and 23 January 1975 Mr. A. A. A. Tyrer (hereinafter called "the Appellant") appealed against the following additional assessment to income tax under Schedule E: 1968–69 £625.

2. Shortly stated the questions for our decision were:

(*a*) whether when the Appellant applied to purchase 5,000 shares in Rentokil Group Ltd. for £5,000 on 9 March 1969 and on 17 March 1969 his application was accepted an emolument accrued to the Appellant from his employment; and if so, (*b*) the amount of such emolument.

3. The following witnesses gave evidence before us:

(*a*) Mr. R. N. Wadham, a partner in the firm of Messrs. Rowe & Pitman who acted as brokers in connection with an offer for sale by tender of shares in Rentokil Group Ltd. made in March 1969;

(*b*) Mr. W. Johnston, currently chief executive of County Bank Ltd., who at the time of the offer for sale by tender of shares in Rentokil Group Ltd. in March 1969 was manager of the Capital Issues Department of Westminster Bank Ltd., which made the offer;

(*c*) the Appellant, currently a managing director of Rentokil Ltd., a subsidiary company of Rentokil Group Ltd., who in March 1969 was deputy managing director of Rentokil Ltd;

(*d*) Mr. K. A. Bridgman who at all material times was secretary and a director of Rentokil Group Ltd. and of Rentokil Ltd.

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

(1) Memorandum and articles of association of Rentokil Group Ltd.

(2) Extracts of minutes of meetings of directors of Rentokil Group Ltd.;

(i) Meeting of 24 September 1968.

(ii) Meeting of 24 October 1968.

(iii) Meeting of 3 December 1968.

(iv) Meeting of 18 February 1969.

(v) Meeting of 5 March 1969.

(3) Inter-office communications;

(i) Communication dated 12 December 1968.

(ii) Communication dated 3 February 1969.

(iii) Communication dated 6 February 1969.

(iv) Communication dated 17 February 1969.

(4) Copy of letter of 5 March 1969 from the registrars of Rentokil Group Ltd. to existing shareholders at the time of the public offer, enclosing bonus share certificates.

(5) Copy of letter dated 6 March 1969 from the secretary of Rentokil Group Ltd. to all staff eligible for preferential blue share application forms.

(6) Schedule of United Kingdom preferential applicants allotted shares.

(7) Copy of the original blue application form completed by the Appellant.

(8) Copy of contract between Sophus Berendsen A-S and Westminster Bank Ltd. et al dated 5 March 1969.

(9) Copy of offer for sale by tender.

(10) Copies of press cuttings;

(*a*) Daily Telegraph 7 March 1969.

(*b*) Financial Times 7 March 1969.

(*c*) Observer 9 March 1969.

(*d*) Birmingham Post 14 March 1969.

(*e*) Daily Telegraph and Daily Mail 18 March 1969.

(11) Copy of specimen fully paid renounceable letter of acceptance.
Copies of the above are available for inspection by the Court if required.

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

(*a*) Rentokil Group Ltd. ("the Company") is the parent company of a group of companies operating both in the United Kingdom and overseas. The group provides services for the eradication of woodworm and dry rot, for the control of rodents and pests, for preventing rising and penetrating damp in the walls of buildings, and for conserving heat in buildings, and, in addition, manufactures and sells a wide range of associated products.

(*b*) At the relevant time the Company was itself a subsidiary of Sophus Berendsen A-S, a private company incorporated in Denmark. Immediately before the offer of shares to the public to which reference is made below, the Danish company owned approximately 77 per cent. of the issued share capital of the Company.

(*c*) At a meeting of the Company in September 1968 it was reported that the Danish parent company had indicated that it would be willing that the Company should become a public quoted company provided that the Danish company could retain at least 50·5 per cent. of the issued share capital. The overriding reason for seeking a quotation was to increase the Company's liquidity and thereby provide adequate funds to maintain a favourable rate of expansion. Westminster Bank Ltd. was to make an offer of shares to the public such shares being in part provided by the Danish parent company and in part by way of an issue of new shares to be issued at market value. The chairman indicated that he would support a recommendation that a preferential allocation of shares should be granted to the staff. Stock Exchange requirements limited the number of shares which could be so offered to 10 per cent. of the shares to be marketed.

(*d*) At the meeting in September 1968 it was resolved to appoint Westminster Bank Ltd. as the issuing house and Messrs. Rowe & Pitman as brokers to the issue.

(*e*) At a subsequent meeting of the Company in October 1968 the method of making the proposed offer for sale and the position of employees were two topics discussed. The chairman favoured giving preference to employees of the Company with suitable service or seniority applying for shares. If it were decided to offer the shares by tender he would favour the Company's allowing employees to enjoy a price preference as well. The representative of the Danish parent company indicated sympathy with the aim to spread the ownership of an equity stake in the Company. It was formally agreed at this meeting that: (i) up to 10 per cent. of the shares being offered should be earmarked for the staff; (ii) if it was decided to offer shares by tender, employees should be allowed to purchase at the minimum, and not at the "striking", price (see para (1) below); (iii) those who would be granted preference would be United Kingdom employees with five years' service and those of managerial status overseas. (In this and other discussions reference to the staff and to employees embraced the staffs and employees of subsidiary companies. The Company had a responsibility for all employees employed by companies within the group and drew no distinction between employees of different United Kingdom companies in the group.)

(*f*) On 12 December 1968 Mr. E. M. Buchan, a director of the Company, addressed a memorandum to certain executives and managers within the group entitled "Going Public—What's It All About?". This memorandum included the following paragraphs dealing with the position of employees:

> "A further reason for the decision [to go public] is the question of employee shareholdings. We have over the years arranged shareownership for a much larger number of our staff than is common in private companies. This is in line with our attitude of regarding staff as responsible partners in a common effort. However, with the restrictions on transferability of shares normal to any private company one arrives at a point where the marketability of such shares becomes rather a problem, the only complete solution to which is to have our shares quoted on the Stock Exchange. By this means all members of the staff will have the opportunity of purchasing readily marketable shares through the Stock Exchange and for that matter will be able to sell them quickly at the market rate if they so wish. Of the total number of shares to be offered for sale I am pleased to say that the Board has received the consent in principle of the Stock Exchange for a proportion to be made available for preferential subscription by certain senior members of the overseas staff, and also all United Kingdom

staff of the Company who have completed 5 or more years full-time service as at 1 January 1969. All such staff will be treated equally and will be able to apply for as many shares as they wish and can afford. Only in the event of over-subscription for these particular shares will there be any need to scale down applications.

As I write, my friend and colleague, Bob Westphal, is 12,000 miles away in Australia concentrating on the reorganisation of our major interests there. I know he would wish his name to be joined with mine in thanking you for your past contribution to our progress. It is the sum of all our efforts which has made possible our exciting plans for 1969 and we look forward to your continued support in the future."

(*g*) The Company's purpose in making shares available for employees was to encourage employees to identify with the Company and to induce loyalty towards the Company. Five years service was adopted as the necessary qualification for no particular reason other than that it was desired to encourage "established" employees to become shareholders. It was difficult to predict how many employees would take up shares. In the event approximately one half of those eligible took up shares. In fixing remuneration it was and would continue to be the Company's practice to take account of the length of service and the merits of individual employees. Rates of salary paid by the Company were in fact generous. But in making shares available no distinction was drawn between different employees—apart from the initial service qualification. No maximum limit was put on the number of shares for which any employee could apply. In the event no particular pattern emerged: some less highly paid employees applied for and received more shares than some more senior employees.

When the arrangements were under discussion there was no certainty as to how they would work out from the point of view of employees. Some time before the offer was made, the chairman had predicted that the shares would sell at 23*s*. a share. Others were less sanguine. It was apparent at that stage that if sold at a fixed price, the shares would have to be offered at £1 a share and in the event it was found impossible to underwrite the shares at a figure in excess of £1 per share.

(*h*) By an agreement dated 5 March 1969 made between the Danish parent company of the first part, the directors of the Company of the second part, the Company of the third part and Westminster Bank Ltd. of the fourth part, Westminster Bank Ltd. agreed to purchase from the Danish parent company 3,600,000 ordinary shares of the Company of 2*s*. each and to subscribe for 2,000,000 new ordinary shares of 2*s*. each with a view to making an offer for sale by tender of such shares to the public. By clause 3(a) of the agreement the Company authorised and requested Westminster Bank Ltd. to sell to the employees of the Company and its subsidiaries who should be entitled to apply for shares under the offer on preferential application forms at the minimum price at which the said shares might be applied for under the offer such number of the said shares as should be required to meet applications from such employees up to a maximum of 560,000 shares, being 10 per cent. of the total number of shares to be offered to the public.

The agreement next provided that 64 per cent. of the shares to be sold to employees should be provided out of the 3,600,000 shares acquired from the Danish parent company and the remaining 36 per cent. out of the 2,000,000 shares acquired by subscription. The price per share to be paid by Westminster Bank Ltd. for those of the 3,600,000 shares which were to be sold to employees was 19*s*. 9*d*. and for the balance 3*d*. less than the striking price, being the price at which the shares would in the event be sold to the public under the offer for

sale by tender. The same formula was to be applied in fixing the amount to be subscribed for the 2,000,000 shares. A

The agreement fixed the date on which Westminster Bank Ltd. would advertise the offer as 7 March 1969 and the date on which the application list for the shares on offer would be opened as 12 March 1969. It was expressly provided that the directors (parties to the agreement) should arrange for copies of the offer (together with preferential forms) to be made available to the B employees of the Company and its subsidiaries entitled to receive such forms. In the event of the number of shares applied for on preferential forms exceeding 560,000 shares Westminster Bank Ltd. was to consult with the chairman of the Company with a view to obtaining his recommendations as to the basis of accepting such applications. In the event of the number of shares applied for on preferential forms not reaching 560,000 shares two directors agreed to take up C the balance (see para (*k*) below).

(*i*) The Appellant, being an employee of a subsidiary of the Company with more than five years' service, received a special application form on 6 March 1969. This was accompanied by a notice from the secretary, Mr. Bridgman, addressed "To all staff eligible for special application Forms" and which contained the following two paragraphs: D

> "You will see from the enclosed Prospectus that United Kingdom employees with five years' service or more by 1st January 1969 are entitled to receive special application forms and that any allotment of shares in respect of such applications will be made at the minimum price.
>
> According to our records you are eligible for a special application form which is enclosed strictly for your personal use should you intend to E purchase shares. It is not to be used by you as nominee for another person. You may wish to discuss the matter with your Bank Manager or other adviser before deciding to take any action. Please note, however, that your special application form duly completed together with a supporting cheque payable to Westminster Bank Limited must reach me at Felcourt not later than 10 am on Wednesday, 12 March, 1969." F

(*j*) The prospectus referred to, of which a copy was supplied to the Appellant, was the offer for sale by tender by Westminster Bank Ltd. of 5,600,000 ordinary shares of 2*s*. each of the Company. The offer document was dated 5 March 1969 and provided, *inter alia*, that:

(1) all the shares offered (other than the 560,000 earmarked for employees) would be sold at the same price ("the sale price") which would be not less than G the minimum price of 20*s*. per share;

(2) the sale price would be the highest price at or above which sufficient applications for all the shares offered (other than as aforesaid) were received, or such lower price as, in the opinion of Westminster Bank Ltd., would result in a satisfactory market being established;

(3) applicants for shares at prices less than the sale price would receive no H allocation of shares; if applications were received for less than the total number of shares offered, the sale price would be the minimum price of 20*s*. per share; Westminster Bank Ltd. reserved the right to reject any application in whole or in part regardless of the application price;

(4) 560,000 of the shares offered were initially to be reserved to meet applications at the minimum price of 20*s*. per share from certain overseas I employees of the group of managerial status and United Kingdom employees with five years' service or more by 1 January 1969, including the executive directors of the Company, on special forms (coloured blue) available to them.

A The prospectus or offer document also indicated that the offer for sale had been underwritten at the minimum price of 20*s.* per share.

(*k*) On 9 March 1969 the Appellant completed a blue employees' application form for 5,000 shares and forwarded it with his cheque for £5,000 to the secretary of the Company. It was stated on the form that Westminster Bank Ltd. would present the cheque for payment on 12 March 1969. A fully paid
B renounceable letter of acceptance relating to 5,000 shares was forwarded to the Appellant on 17 March 1969. (It was common ground between the parties that the Appellant's legal right to 5,000 shares arose when his application was accepted and the acceptance was posted to him on 17 March 1969. The application was not revocable by the Appellant until Monday, 17 March, by virtue of the provisions of s 50(5) of the Companies Act 1948.)

C Of the 560,000 shares earmarked for employees two directors took up 151,018 shares being the balance not applied for by employees which the two directors in question had agreed to take under the arrangement referred to in para (*h*) above.

(*l*) In the language of bankers and brokers familiar with offers for sale by tender the sale price at which the 5,600,000 shares offered (less the 560,000
D reserved for employees) would be sold to applicants was referred to as "the striking price". This was fixed on 12 March 1969 and announced on 13 March 1969. The application list opened and closed on 12 March 1969. In the event the striking price was fixed at 25*s.* a share. When those responsible for fixing the striking price took the decision to fix the price at 25*s.* a share, they had details of the applications made and of the prices at which applicants were offering to
E buy shares. There were 40 applicants for over 100,000 shares totalling 7,970,000 shares, and there were in all 11,281 applicants for a total of 21,792,800 shares. Thus, on the basis that 5,600,000 shares were on offer, the offer for sale was four times over-subscribed, but at a striking price of 25*s.* a share, the offer was only three times over-subscribed. The object of those fixing the striking price was to estimate what would be the highest price at which a satisfactory "after-
F market" (in which the buyers would slightly exceed the sellers) would be likely to obtain. (We understand the reference to an "after-market" to be a reference to the market for the Company's shares once dealings on the Stock Exchange commenced and a satisfactory market to be one in which buyers and sellers could both be accommodated at prices not diverging widely from the striking price.)

G (*m*) Dealings on the Stock Exchange in the Company's shares commenced at 9.30 a.m. on 18 March 1969. By the end of the morning the price was about 26*s.* This is an indication that "stags" (i.e. speculative buyers) among successful applicants were parting with their shares at a premium of 1*s.* a share over the striking price. At the close on 18 March 1969 the price had risen to 27*s.* 6*d.*, an indication that there were still unsatisfied buyers in the market. All this was an
H indication that those who had fixed the striking price at 25*s.* a share "had got it about right": but, clearly, this was not something which could be known with certainty on 17 March 1969 when the Appellant became entitled to 5,000 shares at a price of £1 a share.

(*n*) On the question of the market value of the Appellant's shares on 17 March 1969 expert opinions differed. Those who had particular confidence in
I the Company tended to think in terms of a higher value, those who paid particular regard to market trends in terms of a lower. Mr. Wadham's view was that on 17 March 1969 the shares were probably worth 24*s.* (though, on that day, there was no mechanism which enabled the shares to be sold through the Stock Exchange since official trading did not begin until the following day).

He pointed out, however, that on that date there was available to him confidential information which would not have been available to all potential purchasers, namely that certain institutional clients of his firm had been advised that the Company was a company with an almost uniquely good and consistent growth record, that it was a much larger company than those normally offered for sale, and that the prospects of continued growth seemed excellent. These institutional clients had been advised to tender at around 24*s.* 6*d.* to 25*s.* 6*d.* a share. Mr. Wadham also mentioned, when expressing a view as to the value of the shares on 17 March 1969, that the press comments which had been made might justify a 2*s.* discount on the striking price of 25*s.* On 18 March, the date on which dealings commenced, the Daily Telegraph comment was:

> "Yesterday's sharp deterioration in market conditions does not augur well for this morning's debut of Rentokil. Issued by the tender method at 25/- and handsomely over-subscribed, the 2/- ordinaries are likely to start life at around 2/- discount as dealers guard against 'stag' selling."

The Daily Mail's comment on 18 March was:

> "What price Rentokil today? Last week's big success has failed to stop the new issue rot. Dealers expect dealings to begin at a shilling or two below the 25/- striking price."

Mr. Johnston's view of the value of the Appellant's shares on 17 March 1969 was much influenced by economic factors and market trends. On that date, 17 March, the Financial Times index in fact fell 11·8 points during the day to close at 458·4. On 7 March 1969 it had been 474. Mr. Johnston had recommended a sale by tender and at that point of time considered that the demand for good quality investments (and the size and quality of the Company was exceptional) probably exceeded supply. But by 17 March he described himself as beginning to get cold feet. Between 12 and 17 March changes took place in the market and there appeared to be what Mr. Johnston called a classic topping out of a bull market. He would hesitate to value the shares on 17 March 1969 at above 23*s.* a share. The Appellant, when he had applied for his shares, had no particular confidence that the shares would have a value in excess of the minimum price. He thought that they might go either way.

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

(i) the most which the Company could be said to have provided for the Appellant or other employees to whom blue application forms were sent, was an opportunity to apply for shares at a price which might or might not prove favourable;

(ii) any profit which accrued to the Appellant—being the excess in value of his 5,000 shares over 20*s.* a share—was derived from the normal operation of the market and not from the Appellant's office or employment;

(iii) the Company's selection of the Appellant as a recipient of a blue application form in no way indicated an arrangement designed to remunerate the Appellant since neither the nature of the opportunity offered to employees nor the method of allocating shares to those who chose to apply bore any relationship to the rendering of services or to being or acting as an employee;

(iv) if, contrary to the Appellant's submission, he did receive an emolument on 17 March 1969 the striking price was irrelevant to any calculation of the value of the emolument and for the purpose of calculating any profit which accrued the value of the shares should be taken at no more than 23*s.* a share;

(v) the assessment should be discharged.

7. It was contended on behalf of the Inspector of Taxes that:

(i) the right to acquire shares at a special price given to the Appellant by his employer by reason of his qualifying period of service was an emolument from his office or employment;

(ii) the source of the advantage which accrued to the Appellant when he took up shares at a price more favourable than the price at which the public could acquire shares was the Appellant's office or employment;

(iii) the advantage so enjoyed by the Appellant was given to him for being an employee and for no other reason;

(iv) the measure of the advantage was the difference between the minimum price and the striking price, either because this was the measure of the advantage which his employer, in effect, intended to confer upon the Appellant, or because this was the measure of the advantage which he received;

(v) alternatively, there being no reasonable method of disposing of the Appellant's shares on 17 March, their value on that day, in the sense of the price at which they could be turned into money, fell to be measured by their market value on the first day of dealing (i.e. 18 March), which value on the evidence exceeded 25*s*.;

(vi) the assessment should be increased to £1,250.

8. The following cases were referred to in the course of argument: *Weight* v. *Salmon* 19 TC 174; *Ede* v. *Wilson* 26 TC 381; *Bridges* v. *Bearsley* 37 TC 289; [1957] 1 WLR 674; *Hochstrasser* v. *Mayes* 38 TC 673; [1960] AC 376; *Abbott* v. *Philbin* 39 TC 82; [1961] AC 352; *Bentley* v. *Evans* 39 TC 132; *Laidler* v. *Perry* 42 TC 351; [1966] AC 16; *Pritchard* v. *Arundale* 47 TC 680; [1972] Ch 229.

9. We, the Commissioners who heard the appeal, found as follows:

On the basis of the submissions made to us two questions fall to be answered:

First, was the source of the advantage which accrued to the Appellant on 17 March 1969 when his offer to purchase 5,000 shares in the Company for £5,000 was accepted, his office or employment as a deputy managing director of Rentokil Ltd., or was that advantage attributable to some other source, or to adventitious circumstances unconnected with his employment? Second, if the advantage was derived from the Appellant's office or employment, what was the value for tax purposes of the profit which arose?

We accept that the purpose of the Company, as indeed of the principal shareholder, Sophus Berendsen A-S, in so far as it was a party to the arrangements, in arranging for shares to be offered on favourable terms to established employees of the Company and of companies within the group on the occasion of the parent Company of the group becoming a public company, was to encourage such employees to become shareholders of, or to increase their shareholdings in the parent company. Indeed, it has not been suggested that there was any other reason why shares should be earmarked for sale to employees of companies within the group on terms which it was hoped—there could be no certainty—would, in the event, prove favourable. If employees became members of the parent company, they would identify with the group. The aim, we were told, was to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of the Rentokil group.

In these circumstances, and having regard to the context in which the opportunity to apply for shares on favourable terms was made available to the Appellant and all the other group employees with the necessary minimum period of qualifying service, we conclude that the advantage which accrued to the Appellant when he availed himself of that opportunity and his offer to purchase 5,000 shares for £5,000 was accepted, was an advantage afforded to him in return for acting as or being an employee within the meaning of that expression as used by Lord Radcliffe in *Hochstrasser* v. *Mayes*[1].

It seems clear from the notice addressed "To all staff eligible for special application Forms", (to which reference has been made in para 5(*i*) above), that in making arrangements for employees to have an opportunity to apply for shares on preferential terms, the Company was, in effect, acting as the employer of those to whom the notice was addressed and it was as employees that they were intended to respond if they wished to take advantage of the opportunity offered. The Appellant's office or employment was, in our view, the source of the advantage which, in the events which happened, the Appellant was able to turn to account.

As to the value, various factors including the state of the market affected the value of the advantage when realised. After weighing the evidence and considering the submissions made, our view is that the opportunity, when realised on 17 March 1969, to acquire 5,000 shares for £5,000 was worth 4*s*. a share—the difference between the price paid by the Appellant and what we, on the evidence, find to have been the market value of the shares on that day.

The appeal, therefore, fails and our determination is that the assessment should be increased to £1,000.

10. The Appellant and the Inspector of Taxes immediately after the determination of the appeal, declared to us their dissatisfaction therewith as being erroneous in point of law and on 5 February and 31 January 1975 respectively required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly.

The questions of law for the opinion of the Court are:

(*a*) whether we made an error of law in holding that an emolument arose to the Appellant from his office or employment when he acquired 5,000 shares in the Company for £5,000; and (*b*) whether in law the value of that emolument should be taken to be some figure other than the £1,000 which we estimated it to be on the basis of the evidence submitted to us.

H. H. Monroe
J. B. Hodgson
} Commissioners for the Special Purposes of the Income Tax Acts.

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18 June 1975

The case came before Brightman J. in the Chancery Division on 28 and 29 June 1976, when judgment was reserved. On 23 July 1976, judgment was given against the Crown, with costs.

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(1) 38 TC 673; [1960] AC 376.

A *Michael Nolan Q.C.* and *J. Holroyd Pearce* for the taxpayer.

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

The following cases were cited in argument in addition to those referred to in the judgment:—*Pritchard* v. *Arundale* 47 TC 680; [1972] Ch 229; *Moore* v. *Griffiths* 48 TC 338; [1972] 1 WLR 1024; In re *Lynall decd.* 47 TC 375; [1972] AC 680.

B

Brightman J.—This is an appeal from a decision of the Special Commissioners confirming an assessment to tax under Schedule E on an emolument of the Appellant from his employment. Under para 1(1) of Sch 2 to the Finance Act 1956 the word "emoluments" includes "all salaries, fees, wages, perquisites and profits whatsoever". The emolument claimed to have been received in the C present case arises out of a preferential right to apply for shares in a company on the occasion of its going public.

The company is Rentokil Group Ltd. This was a 77 per cent. subsidiary of a Danish company. As a result of deliberations in late 1968 and early 1969 the Danish parent company decided that a proportion of the shares of the company should be offered for sale to enable the company to be quoted on the D London Stock Exchange. The sale was to be by tender through Westminster Bank Ltd. 5,600,000 ordinary shares of 2*s.* each were put out to tender at a minimum price of 20*s.* per share payable in full on application. In accordance with the usual practice, the bank announced its intention to sell at a uniform price, which would be the highest price at or above which sufficient applications for all the shares offered were received, or such lower price as would result in a E satisfactory market being established. This uniform price is usually called the striking price. The striking price would therefore be 20*s.* or something in excess of 20*s.* per share. All tenders at a figure which turned out to be below the striking price would be eliminated. The object or one of the objects of offering shares in this way is to secure for the company the major part of the profit which would otherwise enure for the benefit of persons successfully stagging F the issue. There was, however, one exception to the elimination of tenders below the striking price. Ten per cent. of the shares were reserved at a price of 20*s.* each for United Kingdom employeesof the group with at least five years' service and those of managerial status overseas. The United Kingdom employees received a letter from the secretary of the company in the following terms. The letter is dated 6 March 1969 and it reads, so far as relevant, as follows:

G "To all staff eligible for special application Forms. As you will have learned Rentokil Group Limited is becoming a public company with its shares quoted on The Stock Exchange, London. You will see from the enclosed Prospectus that United Kingdom employees with five years' service or more by 1st January 1969 are entitled to receive special application forms and that any allotment of shares in respect of such applications H will be made at the minimum price. According to our records you are eligible for a special application form which is enclosed strictly for your personal use should you intend to purchase shares. It is not to be used by you as a nominee for another person. You may wish to discuss the matter with your Bank Manager or other adviser before deciding to take any action."

I One of such employees was the Appellant, Mr. Tyrer, a general manager. Two of the directors undertook to take up any of the shares comprised in the preferential offer which were not applied for by employees.

(Brightman J.)

The sequence of events was as follows. The Appellant received his preferential application form on 6 March 1969. On 9 March he returned it, applying for 5,000 shares and enclosing his cheque for £5,000. The offer for sale in respect of all shares on offer closed on 12 March. On 13 March a striking price of 25*s.* per share was announced. On 17 March the Appellant's application was accepted and a fully paid renounceable letter of acceptance relating to 5,000 shares was forwarded to him. On 18 March dealings started. The shares opened at 26*s.* and closed at about 27*s.* 6*d.* Preferential applications were received from United Kingdom employees and overseas general managers to an amount of approximately 350,000 shares, leaving about 150,000 shares to be taken up by the two directors under their guarantee. To put the matter shortly, the Appellant became the owner on 17 March of 5,000 shares in the company at a price of 20*s.* per share. On the following day, such shares were traded in the open market at 26*s.* to 27*s.* 6*d.* a share. According to the evidence before the Special Commissioners the shares had a value on 17 March of between 23*s.* and 24*s.* a share. Therefore, on the day when the Appellant's offer was accepted by the company he acquired 5,000 shares at 3*s.* or 4*s.* less than their value on that day. Leaving aside at this stage the true value to be ascribed to the shares on 17 March and accepting that the notional profit as at 17 March was either 3*s.* or 4*s.* per share, the question to be decided is whether the Appellant was properly assessed to tax in respect of the advantage which he gained from his preferential right to apply for shares.

Before I turn to the contentions of the parties and to the reasoning of the Commissioners, I will summarise the law as I understand it. The question to be decided is whether the benefit accruing to the Appellant was "an emolument from" his employment, "emolument" being a word which is defined as including "all salaries, fees, wages, perquisites and profits whatsoever". The guidelines which have been laid down by the decided cases for the purpose of providing assistance in the task of construing the statutory wording in the context of a particular set of facts are these. It may be asked whether the benefit was a remuneration or reward or return for the services of the taxpayer. If so, the reward is an emolument from the employment: see, for example, *Hochstrasser* v. *Mayes*[1] 38 TC 673, *per* Lord Simonds at page 706 and Lord Denning at page 711 and *Laidler* v. *Perry*[2] 42 TC 351, *per* Lord Denning M.R. at page 360 and Danckwerts L.J. at page 361. It may also be asked whether the employment was the *causa causans* or merely the *causa sine qua non* of the reward. If the former, the reward is an emolument from the employment: see, for example, the *Hochstrasser* case, *per* Lord Simonds at page 705 and Lord Cohen at page 709, and the *Laidler* case *per* Lord Reid at page 365. Another equally important piece of law is this, which I take from the judgment of Pennycuick J. in the *Laidler* case, at page 358:

> "Where an employer, or as here the parent company of the employer, makes payments to every member of a group of employees in such circumstances that the employment is clearly a *causa sine qua non* of the payments, it is for the Commissioners to determine on the particular facts found by them whether or not the payments represent a reward for the services of the employees. It is the duty of the Court to review the decision of the Commissioners and to reverse it if, and only if, the conclusion is not a reasonable one upon the particular facts."

(1) [1960] AC 376. (2) [1966] AC 16.

A Before the Special Commissioners the principal contentions of the Appellant were as follows. The most which the company could be said to have provided for the Appellant or other employees to whom the preferential forms were sent was an opportunity to apply for shares at a price which might or might not prove favourable. Any profit which accrued to the Appellant, being the excess in value of his 5,000 shares over 20*s.* a share, was derived from the B normal operation of the market and not from the Appellant's office or employment. The company's selection of the Appellant as a recipient of a preferential application form in no way indicated an arrangement designed to remunerate the Appellant, since neither the nature of the opportunity offered to employees nor the method of allocating shares to those who chose to apply bore any relationship to the rendering of services or to being or acting as an employee.

C The Crown, on the other hand, contended before the Special Commissioners as follows. The source of the advantage which accrued to the Appellant when he took up shares at a price more favourable than the price at which the public could acquire shares was the Appellant's office or employment. The advantage so enjoyed by the Appellant was given to him for being an employee and for no other reason.

D In their decision, the Special Commissioners said this:

"We accept that the purpose of the company, as indeed of the principal shareholder, Sophus Berendsen A-S, in so far as it was a party to the arrangements, in arranging for shares to be offered on favourable terms to established employees of the company and of companies within the group on the occasion of the parent company of the group becoming a E public company, was to encourage such employees to become shareholders of, or to increase their shareholdings in the parent company. Indeed, it has not been suggested that there was any other reason why shares should be earmarked for sale to employees of companies within the group on terms which it was hoped—there could be no certainty—would, in the event, prove favourable. If employees became members of the parent F company, they would identify with the group. The aim, we were told, was to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of the Rentokil group." After that statement the Special Commissioners continued as follows: "In these circumstances, and having regard to the context in G which the opportunity to apply for shares on favourable terms was made available to the Appellant and all the other group employees with the necessary minimum period of qualifying service, we conclude that the advantage which accrued to the Appellant when he availed himself of that opportunity and his offer to purchase 5,000 shares for £5,000 was accepted, was an advantage afforded to him in return for acting as or H being an employee within the meaning of that expression used by Lord Radcliffe in *Hochstrasser* v. *Mayes*(1)."

The Special Commissioners concluded by saying that the Appellant's office or employment was, in their view, the source of the advantage which, in the events which happened, the Appellant was able to turn to account.

(1) 38 TC 673.

(Brightman J.)

Counsel for the taxpayer relied in this Court, in particular, on the following facts as indicating that the preferential right to subscribe did not partake of the character of a reward for services. The reason why the company and its shareholders gave certain group employees the opportunity to apply for an allotment of shares on preferential terms was to encourage them to identify themselves with the group rather than to remunerate them. The arrangements formed part of the flotation of the company, a unique event in that company's existence. The number of shares for which an eligible employee could apply was unrelated to the length or value of his services; it depended on how much of his own money he was prepared to subscribe. Only about one-half of the eligible employees, in fact, applied for shares, and of the 560,000 shares reserved for employees about 150,000 were left to be taken up by two directors who had agreed to apply for them in default of other applicants. The benefit which the Appellant received was caused by his willingness to put his money at risk, the acceptance in full of his application and the state of the market on 17 March 1969. Had he not been an employee he could not have obtained it, but he did not obtain it merely by being or acting as an employee.

I must now decide whether the Special Commissioners made an error of law in holding that an emolument arose to the Appellant from his office or employment when he acquired 5,000 shares in the company for £5,000. There can be no doubt that the employment of the Appellant was a *causa sine qua non* of the benefit he received. It is my duty to review the decision of the Special Commissioners and to reverse it if, but only if, the conclusion which they reached was not a reasonable one upon the particular facts. So, I ask myself, was the Commissioners' determination unreasonable having regard to the facts found by them? In my view, the important characteristics of this case are as follows. I do not list them in order of importance, nor do I suggest that any one characteristic would necessarily be decisive on its own. (1) The benefit was an isolated one with no past history or foreseeable recurrence. This characteristic, by itself, would be nowhere nearly decisive in favour of the Appellant. (2) Every employee had precisely the same opportunity of benefiting. This again would be nowhere nearly decisive in favour of the Appellant: see the *Laidler* case[1]. (3) The purpose of the company was to encourage employees to identify with the company and to encourage such employees to become shareholders of, or to increase their shareholdings in, the parent company. Both purposes (or, rather, both definitions of the same purpose) are spelt out in the findings and decision of the Special Commissioners. To put the matter somewhat crudely, and I hope not offensively, it was the intention of the company to induce employees to part with their money so that employees would feel that their well-being was not only identified with the prosperity of the company in the context of their livelihood but also in the context of their personal savings. (4) The opportunity to apply for shares was not represented to the employees as being of financial advantage to them. In fact, 20*s*. was the price at which the issue was underwritten, and it was also found by the Commissioners that the shares could not have been offered for sale (as opposed to an invitation to tender) at a price in excess of 20*s*. a share. (5) The Appellant, for his part, had no particular confidence that the shares would have a value in excess of the minimum price of 20*s*. This attitude must have been prevalent among employees, since the two underwriting directors were left with over a quarter of the preferential shares. As I have said, this emolument, if it were an emolument, was a benefit to the employees which was not represented as such by the company and not recognised as such by all the employees. It was a benefit which an employee would

(1) 42 TC 351.

A secure only if he were prepared to take a certain view of the market and to back his judgment with his own money. The benefit was not one which was by any means certain to enure to him. He might indeed suffer a loss. He had no means of knowing for certain. In this respect the case has nothing in common with its predecessors such as *Weight* v. *Salmon* 19 TC 174; *Ede* v. *Wilson* 26 TC 381; *Abbott* v. *Philbin*(1) 39 TC 82 and *Bentley* v. *Evans* 39 TC 132.

B In my judgment, the Appellant received a benefit of 3*s*. or 4*s*. a share not merely because he was an employee but because he took a certain view of the market and backed his judgment with his own money, and his judgment proved to be correct. This leads me to the conclusion that the employment, though clearly the *causa sine qua non*, was not the *causa causans*. The *causa causans* was a combination of facts which consisted of or included the view which the C Appellant took of the market, his willingness to risk his own money in a venture which was a speculation in a sense that its outcome was uncertain, and his completion of an application form accordingly. In my judgment, the only reasonable inference which can be drawn from the facts is that the benefit accruing to the Appellant was not an emolument from his employment.

I was told that this case was a test case. So it may be, but I would not wish D my decision to be misunderstood. It certainly is not, to my mind, a test case in relation to the large number of shares secured by the two directors, Mr. Westphal and Mr. Buchan. Mr. Westphal secured 85,108 shares at 20*s*. per share, and Mr. Buchan secured 66,000 shares at 20*s*. a share. They did not acquire their shares in the same manner as the ordinary preferential applicants but by virtue of some different arrangement which was made with the company. I do not know when E that arrangement was made, in what circumstances it was made and, in particular, why it was made. Clearly, totally different considerations apply. Perhaps the decision in their case ought to be the same, but if so it would not be for the same reasons as I have indicated in this judgment.

Appeal allowed with costs.

F The Crown's appeal came before the Court of Appeal (Buckley and Eveleigh L.JJ. and Sir John Pennycuick) on 29 and 30 November 1977, when judgment was reserved. On 11 December 1977, judgment was given against the Crown, with costs.

Patrick Medd Q.C. and *Michael Hart* for the Crown.

Michael Nolan Q.C. and *J. Holroyd Pearce* for the taxpayer.

G The following cases were cited in argument in addition to those referred to in the judgments:—*Weight* v. *Salmon* 19 TC 174; *Pritchard* v. *Arundale* 47 TC 680; [1972] Ch 229.

Buckley L.J.—This is an appeal from a decision of Brightman J. given on 23 July 1976, when he allowed an appeal from the Special Commissioners in H relation to an assessment upon the taxpayer, Mr. Tyrer, in respect of a benefit which he obtained as the result of subscribing for shares under the scheme which is referred to in the Case Stated by the Commissioners, Mr. Tyrer being

(1) [1961] AC 352.

(Buckley L.J.)

a deputy managing director of a company called Rentokil Ltd., which was one of a number of subsidiary companies in a group the parent of which was called Rentokil Group Ltd., which was itself a subsidiary company of a Danish company. We are not I think concerned with the Danish company, but we are concerned with the scheme formulated by the English parent company, Rentokil Group Ltd., for offering shares to employees of that company and of its subsidiary companies, being U.K. employees of five years' standing, or employees abroad of managerial status, at the price of 20*s*. a share upon the occasion of Rentokil Group Ltd. going public.

The facts of the case are set out in the Case Stated and it is unnecessary for me to recapitulate them, but I think it would be useful for me just to state a short catalogue of dates. On 6 March 1969, as is found in para 5(*i*) of the Case Stated, the taxpayer received a special application form, accompanied by a covering letter which is set out in that paragraph of the Case. On 9 March 1969 the taxpayer applied for 5,000 shares and sent his cheque for £5,000 in payment for them (para 5(*k*)). That application was accepted on 17 March 1969 and it is common ground that the application was not revocable at any date between 9 March 1969 and 17 March 1969. There were no dealings upon the Stock Exchange in these shares on 17 March 1969 because dealings in the shares of the company did not begin until the following day; but on the following day, by the end of the morning, the shares were changing hands at 26*s*. and at the close of business at 27*s*. 6*d*. Members of the general public who had applied for shares upon the issue which is in question had subscribed at 25*s*.; the employees were invited to, and were permitted to, apply at the price of 20*s*.

I would draw attention to certain important findings of fact in the Case which are relevant to the decision of the point which we have to determine. In para 5(*g*) the Commissioners found as a fact that

> "The company's purpose in making shares available for employees was to encourage employees to identify with the company and to induce loyalty towards the company. Five years' service was adopted as the necessary qualification for no particular reason other than that it was desired to encourage 'established' employees to become shareholders."

A little lower down in the same paragraph there is the finding that

> "No maximum limit was put on the number of shares for which any employee could apply. In the event no particular pattern emerged: some less highly paid employees applied for and received more shares than some more senior employees. When the arrangements were under discussion there was no certainty as to how they would work out from the point of view of employees."

In para 5(*n*) the Commissioners found as a fact that "The Appellant, when he had applied for his shares, had no particular confidence that the shares would have a value in excess of the minimum price."—I interpose to say that that means the 20*s*.—"He thought that they might go either way."

In their decision the Commissioners referred to the terms of the offer to employees—this is at para 9—as ". . . terms which it was hoped . . . would, in the event, prove favourable" though there could be no certainty. The Commissioners went on to say:

> "We accept that the purpose of the company, as indeed of the principal shareholder, Sophus Berendsen A-S"—that is the Danish company—"in so far as it was a party to the arrangements, in arranging for shares to be

A offered on favourable terms to established employees of the company and of companies within the group on the occasion of the parent company of the group becoming a public company, was to encourage such employees to become shareholders of, or to increase their shareholdings in the parent company."

There is a finding of what the purpose of the company was in embarking upon
B this scheme of making shares available to employees. They said: "If employees became members of the parent company they would identify with the group." The aim, we are told, was to obtain a better relationship with the employees so that they would become, and continue to be, loyal employees having an understanding of, and a sense of involvement in, the affairs and fortunes of the Rentokil group.

C The Commissioners reached their conclusion in the following terms, in para 9:

"In these circumstances, and having regard to the context in which the opportunity to apply for shares on favourable terms was made available to the Appellant and all the other group employees with the necessary minimum period of qualifying service, we conclude that the advantage
D which accrued to the Appellant when he availed himself of that opportunity and his offer to purchase 5,000 shares for £5,000 was accepted, was an advantage afforded to him in return for acting as or being an employee within the meaning of that expression as used by Lord Radcliffe in *Hochstrasser* v. *Mayes*[1]."

The Commissioners went on:

E "It seems clear from the notice addressed 'To all staff eligible for special application Forms', . . . that in making arrangements for employees to have an opportunity to apply for shares on preferential terms, the company was, in effect, acting as the employer of those to whom the notice was addressed and it was as employees that they were intended to respond if they wished to take advantage of the opportunity offered."

F So they reached the conclusion that: "The Appellant's office or employment was, in our view, the source of the advantage which, in the events which happened, the Appellant was able to turn to account." They went on to consider the value of that advantage having regard to evidence which had been called before them, and to the market which developed on 18 March, and they arrived at a value of 4*s*. per share and accordingly held the taxpayer assessable in the sum of £1,000.

G The taxpayer appealed against that decision. The appeal came before Brightman J. and is reported at [1977] 1 WLR 1. The *ratio decidendi* of the learned Judge is I think to be found in a passage in his judgment at page 6, starting from near the letter G, to page 7 at B[2]: I shall not spend time reading that. The learned Judge reversed the decision of the Special Commissioners and concluded that the taxpayer was not liable to any tax on this benefit, advantage
H or right. The Crown appeals from that decision to this Court.

Under Schedule E, "Tax is exigible in respect of any office or employment on emoluments therefrom" and the word "emoluments" is defined as including all salaries, fees, wages, perquisites and profits whatsoever. The argument in this case and other cases to which we have been referred revolves round the significance of the word "therefrom".

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(1) 38 TC 673; [1960] AC 376. (2) Pages 546–7 *ante*.

(Buckley L.J.)

It is common ground in the present case that the emolument, if there be one within the meaning of the Statute, arose on 17 March 1969 and that its value should be measured by reference to the difference between the value of the shares on that date and the price of 20*s.* per share paid by the taxpayer. It is not contended in this case that any right accrued to the taxpayer at any earlier date which could constitute an emolument for the purposes of Schedule E, in which respect the present case is to be distinguished from *Abbott* v. *Philbin*(1) [1961] AC 352, where the emolument was held to have arisen when the taxpayer was granted an option in 1954 and not, as the Crown there claimed, when he exercised that option in 1956.

Mr. Medd put forward his argument upon the basis of two questions—or perhaps it would be more fair to him to say that he divided the question with which the Court is presented into two parts. First, was the advantage which the taxpayer obtained a perquisite or profit within the meaning of the Schedule; second, if so, did it arise from the taxpayer's employment? I think that in truth, as was pointed out in *Brumby* v. *Milner*(2) [1976] 1 WLR 29, in the Court of Appeal, by Russell L.J. at page 35 E, there is really only one question involved in cases of this nature, which is whether the receipt or benefit has the quality of remuneration or reward for services.

On the facts found it must be accepted that the acceptance of the taxpayer's offer to take 5,000 shares at 20*s.* per share was beneficial to him; he could have realised a profit by selling them on 18 March 1969 at the earliest opportunity to make a sale after his application had been accepted. The question for decision is whether that benefit was a perquisite or profit which arose from his office or employment as a deputy managing director of Rentokil Ltd. The fact that the taxpayer could not have offered to take 5,000 shares at 20*s.* each had he not been an employee of Rentokil Ltd. is undoubtedly a factor to be taken into account in answering that question; but it does not itself provide an answer. An employer may confer a benefit on an employee which does not arise from the latter's employment; he may for instance make him a present for purely personal reasons, such as affection or compassion; or he may confer a benefit on an employee for commercial reasons which have no relation to the latter's services as an employee. Thus, the benefits conferred on employees in *Hochstrasser* v. *Mayes* 38 TC 673; [1960] AC 376 were of a kind which were calculated to benefit the company in its business by facilitating the mobility of its staff and were consequently, from the company's point of view, related to good employer/employee relations.

Lord Radcliffe, at page 708, said this:

> "It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What he wanted was to ease the mind and mitigate the possible distress of an employee, who having sunk money in buying a house, might find himself called upon at short notice to put it on the market without any assurance of getting the whole of his money back."

(1) 39 TC 82. (2) 51 TC 583, at p 608.

A Lord Cohen, at page 710, said:

> "... the housing scheme pursuant to which the housing agreement was made was introduced by I.C.I., not to provide increased remuneration for employees, but as part of a general staff policy to secure a contented staff and to ease the minds of employees compelled to move from one part of the country to another as the result of the company's action."

B But, in spite of the fact that the motives of the employer in that case were of that character, it was held that the nature of the benefits was such that they were not emoluments from the employees' employment, because those benefits were not in the nature of rewards for services past, present or anticipated (*per* Lord Simonds [1960] AC, at page 388(1)) or conferred in return for acting as or being an employee (*per* Lord Radcliffe, at pages 391–2(2)). The relationship of employer C and employee was not the *causa causans* of the benefit (*per* Lord Simonds, at page 388(3) and Lord Cohen at page 395(4)): it arose out of the personal situation of the employee as a householder (*per* Lord Radcliffe, at page 392(5)). The amount paid to an employee to indemnify him against loss upon a sale of his house was paid to him as a householder who in consequence of the exigencies of his employment had been compelled to sell his house at a loss. That was held D not to be an emolument from the employment.

On the other hand in *Laidler* v. *Perry*(6) [1966] AC 16 small benefits conferred on employees in the nature of Christmas presents were held to be perquisites or profits from their employment because they were found to have been made to maintain good employer/employee relations and so to have been conferred in return for anticipated services rather than as purely gratuitous E gifts. In that case Lord Reid propounded a test which I find helpful in the present case. At page 30 he said(7):

> "There is a wealth of authority on this matter and various glosses on or paraphrases of the words in the Act appear in judicial opinions including speeches in this House. No doubt they were helpful in the circumstances of the cases in which they were used, but in the end we must always return F to the words of the statute and answer the question—did this profit arise from the employment? The answer will be 'no' if it arose from something else."

To answer the question which we have to determine, we must, I think, look at all the circumstances of the case having regard to their substance rather than their form, to determine whether on a true appreciation of those facts the G right to have 5,000 shares allotted at 20*s.* each, which accrued to the taxpayer on 17 March 1969 arose from his office or employment. If it was a benefit conferred on him in return for acting as deputy managing director of Rentokil Ltd.—that is to say, in respect of services rendered, whether in the past, or being rendered at 17 March 1969, or then anticipated—the Commissioners' conclusion that it arose from the employment would be justifiable. If, on the other hand, the H benefits arose from something else—that is, from some other cause or source—this fact must in my opinion demonstrate that it did not arise from the employment. It is manifest that the acceptance of 17 March, which gave rise to the taxpayer's right to have 5,000 shares allotted to him, would not have occurred unless the taxpayer had applied for those shares. The taxpayer's decision to make

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(1) 38 TC 673, at p 705. (2) *Ibid*, at p 707. (3) *Ibid*, at p 705.
(4) *Ibid*, at p 709. (5) *Ibid*, at p 708. (6) 42 TC 351.
(7) *Ibid*, at p 363.

(Buckley L.J.)

that application was not, in my opinion, one made by him in his capacity as an employee of Rentokil Ltd. He would not have had the opportunity to make it if he had not been an employee of that company, but the considerations which affected his mind in making the decisions must have been personal to him as a private individual: how much money he could afford to invest in shares of Rentokil Group Ltd.; would the investment be a wise one from his point of view; would the shares in the short term or the long term be likely to be worth what he was going to pay for them; what income would they be likely to yield—and so on? Upon the findings of the Commissioners there was no certainty about these matters when the taxpayer made his decision; they were matters upon which he had to make judgment. I think the decision involved a real commercial risk. They were matters quite unrelated to his relation with Rentokil Ltd., as an employee of that company, or his remoter relationship with Rentokil Group Ltd. as an employee of one of its subsidiaries.

In my judgment the right to the shares arose from the fact that the taxpayer made judgments in these respects which led him to apply for 5,000 shares. He might have applied for more, or less, or none; he decided to apply for 5,000 and he paid £5,000 for them. The opportunity for him to do so no doubt arose from the company's scheme of allotments to employees of the group at what was likely to be a preferential price, and that scheme was prompted by a desire to foster good employer/employee relations, as was the housing scheme in *Hochstrasser* v. *Mayes*[1]; but I think it is important to bear in mind precisely what it was that the Commissioners found in that respect. I would draw particular attention to the fact that they found that the purpose of the company was to encourage employees "to become shareholders of, or to increase their shareholdings in the parent company"; that is in para 9 of the Case. In my judgment the right to the shares arose, not from the opportunity afforded by the company's scheme, but from the taxpayer's decision to take advantage of it. That decision was a decision which exactly accorded with the purpose of the company in propounding the scheme; that is to say, the scheme had the effect of persuading the taxpayer to take up shares in the company, the holding of which would be like to cement and strengthen his relations with the company and his interest in the well-being of the company.

As Brightman J. put it at [1977] 1 WLR 1, at page 7A[2]:

> "The causa causans was a combination of facts which consisted of or included the view which the taxpayer took of the market, his willingness to risk his own money in a venture which was a speculation in a sense that its outcome was uncertain, and his completion of an application form accordingly. In my judgment, the only reasonable inference which can be drawn from the facts is that the benefit accruing to the taxpayer was not an emolument from his employment."

In my judgment the benefit which accrued to the taxpayer on 17 March was something which resulted from his decisions and his actions taken not in his role as an employee of Rentokil Ltd. but as a private individual considering his own investment interests. For these reasons I would agree with the conclusion arrived at by the learned Judge. It seems to me, with deference to them, that the conclusion reached by the Commissioners does not follow from the findings which they have made beforehand, for while I accept that the company was acting as the employer in putting forward the scheme, I do not think that the

(1) 38 TC 673. (2) Page 547 *ante*.

A taxpayer was intended to respond to it as an employee. I think he was intended to respond to it as a prospective shareholder in the company whom the company was particularly anxious to attract as a shareholder because he happened to be an employee of a company in the group; but I do not think in those circumstances that it is right to deduce as a consequence of that situation that the advantage was afforded to the taxpayer in return for his acting as, or being an employee, B to use the language of Lord Radcliffe in *Hochstrasser* v. *Mayes*[1].

For these reasons I think that the Commissioners arrived at a conclusion which the facts that they found did not support; I think that the conclusion reached by Brightman J. is the proper inference to draw from the facts as found, and I agree with the learned Judge in thinking that it is the only reasonable inference to be drawn from those facts.

C Accordingly, I would dismiss this appeal.

Eveleigh L.J.—I can understand that a benefit given to an employee with the intention of achieving a better relationship between the employer and the employee can be regarded as an emolument arising out of the employment. It is possible to regard it as Lord Donovan did in *Laidler* v. *Perry* [1966] AC 16, at page 35[2]:

D "The admitted facts are that the company disbursed these sums to 'help maintain a feeling of happiness among the staff and to foster a spirit of personal relationship between management and staff'. In less round-about language that simply means in order to maintain the quality of service given by the staff. Looked at in this way, the payments were an inducement to each recipient to go on working well."

E In that case I think it is important to bear in mind that each employee received the sum of £10. In the present case it has been found specifically that

"the purpose of the company . . . in arranging for shares to be offered on favourable terms to established employees of the company and of companies within the group on the occasion of the parent company of the group becoming a public company, was to encourage such employees to F become shareholders of, or to increase their shareholding in, the parent company."

Then there follow what I regard as very important words:

"Indeed, it has not been suggested that there was any other reason why shares should be earmarked for sale to employees of companies within the group on terms which it was hoped—there could be no cert-G ainty—would, in the event, prove favourable."

It seems to me that the findings there are to the effect that the object was to induce the employee to become a shareholder, and that from the employers' point of view there was no intention to confer a benefit that would produce the *quid pro quo* of a higher, or maintained, quality of service. The company, as I understand that finding, are not seen as being concerned to confer a benefit as H such at all; what they wished to do was to have the employee as a shareholder.

For those reasons, and for the reasons stated by my Lord, I agree that this appeal should be dismissed.

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(1) 38 TC 673. (2) 42 TC 351, at p 366.

Sir John Pennycuick—I too agree that this appeal should be dismissed. The law is not in doubt. A profit derived by an employee from his employer is taxable if and only if the profit arises from the employment. One must look at all the circumstances and decide whether or not the relevant profit represents a reward or return for the employee's services: see *per* Lord Simonds at page 706 and *per* Lord Radcliffe at page 707 in *Hochstrasser* v. *Mayes* 38 TC 673. In tax language, is the employment the source of the profit?

In the present case it is clear that these shares were issued to the employees in their capacity of employees. I shall further assume, as seems to me to be the case, that there was an excess in the value of the shares over par at whatever was the relevant date, which has been taken as the date when the shares were allotted, namely 17 March. The question then arises: What was the source of the advantage represented by this excess? Did the advantage constitute a reward or return for the services of the employee? A reward or return for services may, of course, be a reward or return for services in the present, the future or, I think, the past. The immediate source was a contract whereby the employees subscribed for the shares, but it is not in doubt that the Revenue is entitled to look behind the contract in such circumstances, and if it is shown that the contract is in whole or in part a vehicle for conferring upon the employee a reward for his services, then the advantage is taxable as a profit arising from the employment. In the present case, however, I do not think the facts warrant this conclusion.

As the Commissioners found, the company offered these shares to its employees with the view expressed by the Commissioners in the following terms (Case Stated, para 5(*g*)):

> "The Company's purpose in making shares available for employees was to encourage employees to identify with the company and to induce loyalty towards the company. Five years' service was adopted as the necessary qualification for no particular reason other than that it was desired to encourage 'established' employees to become shareholders."

Then in their reasons the Commissioners say:

> "We accept that the purpose of the company, as indeed of the principal shareholder, Sophus Berendsen A-S, in so far as it was a party to the arrangements, in arranging for shares to be offered on favourable terms to established employees of the company and of companies within the group on the occasion of the parent company of the group becoming a public company, was to encourage such employees to become shareholders of, or to increase their shareholdings in the parent company. Indeed, it has not been suggested that there was any other reason why shares should be earmarked for sale to employees of companies within the group on terms which it was hoped—there could be no certainty—would, in the event, prove favourable. If employees became members of the parent company they would identify with the group. The aim, we were told, was to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and sense of involvement in the affairs and fortunes of the Rentokil group."

The purpose of the company was thus to institute a relation between the company and its employees broadly analogous to that of a partnership rather than to confer upon the employees a benefit in money's worth. It is true that any of the employees might have made a quick cash profit by selling his shares immediately after issue, but the purpose of the company was that the shares should be retained for richer or poorer, and immediate sale would plainly have run contrary to this purpose. Then, this being a bilateral contract, one should also

look at the purpose for which those of the employees who subscribed for the shares did so subscribe. Here there is not much assistance from the findings of the Commissioners; of course, they could only have regard to the purpose of the one employee before them, namely, the Appellant. So far as the Appellant was concerned, they said: "The Appellant, when he had applied for his shares, had no particular confidence that the shares would have a value in excess of the minimum price. He thought that they might go either way." This much is clear, that the subscription for the shares represented a risk to be taken at the judgment of each employee in his own interest, and that many employees did not elect to take that risk. This does not suggest an advantage conferred by an employer in return for the services of the employee.

Looking at all the circumstances of this case, and having regard in particular to the finding as to the purpose of the company in issuing the shares at par, I do not think that the issue of these shares at par can properly be regarded as involving any reward to the employees for services rendered, or to be rendered, by them to the company. The transaction can better be described as an inducement to the employees to enter into a closer relation with the company. If one asks what was the source of whatever advantage was received by the employees, the answer is, I think, the contract for the purchase of the shares, and nothing else.

It is, of course, true that in almost any possible case of an advantage conferred by employer upon employee as such, the ultimate objective of the employer is to obtain improved services from the employee. But it is clear, in particular in *Hochstrasser* v. *Mayes*(1) that this consideration is not of itself sufficient to render every advantage derived by an employee from his employer as an advantage to be treated as given in return for the employment. I have been much preoccupied as to whether one is entitled to set aside this decision of secondary fact on the part of the Commissioners—and I would add, very experienced Commissioners. The Court can, and should, only set aside a finding of the Commissioners upon secondary facts in the circumstances outlined by Lord Radcliffe in the often-quoted passage in his speech in *Edwards* v. *Bairstow*(2) 36 TC 207, at page 229. Lord Radcliffe said:

> ". . . it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been an error in point of law. I do not think it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three . . ."

At page 231 Lord Radcliffe says that the duty of a Court

> "is no more than to examine those facts" found by the Commissioners "with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

(1) 38 TC 673. (2) [1956] AC 14.

(Sir John Pennycuick)

In the present case it seems to me that we should set aside the decision of the Commissioners. The facts as admitted and found point only to two possible conclusions, namely, that the advantage was an advantage which was conferred in return for the services, or an advantage which was not conferred in return for services. In my view the facts point quite plainly to the latter conclusion and I mean no disrespect to the Commissioners when I say that I think that the true and only reasonable conclusion contradicts their determination.

It seems to me, therefore, that Brightman J. came to the right conclusion, and I would dismiss the appeal.

Appeal dismissed, with costs. Leave to Appeal to the House of Lords granted.

The Crown's appeal came before the House of Lords (Lords Diplock, Salmon, Edmund-Davies, Fraser of Tullybelton and Russell of Killowen) on 6 and 7 November 1978, when judgment was reserved. On 13 December 1978, judgment was given unanimously in favour of the Crown, with costs.

Patrick Medd Q.C. and *Michael Hart* for the Crown.

Michael Nolan Q.C. and *J. E. Holroyd Pearce* for the taxpayer.

The following cases were cited in argument in addition to those referred to in the speeches:—In re *Lynall decd.* 47 TC 375; [1972] AC 680; *Brumby* v. *Milner* 51 TC 583; [1976] 1 WLR 1096.

Lord Diplock—My Lords, this adds another to the long series of cases which raise the question whether a particular benefit, capable of being turned into money and granted to an employee by his employer or a parent company of his employer, forms part of the employee's emoluments from his employment so as to be taxable under Schedule E. "Emoluments" in this context include, in addition to all salaries, fees and wages, all "perquisites and profits whatsoever". The test to be applied is well established. It is whether the benefit represents a reward or return for the employee's services, whether past, current or future, or whether it was bestowed upon him for some other reason. The borderline may be a fine one, as is illustrated by two cases in this House: *Hochstrasser* v. *Mayes*[1] [1960] AC 376, in which the benefit was held not to be part of the employee's emoluments, and *Laidler* v. *Perry*[2] [1966] AC 16, in which a benefit granted by the parent company of the employer was held to be part of the employee's emoluments. Where the benefit is granted by and at the expense of the employer or its parent company, as distinct from benefits derived from third parties, such as a huntsman's field money or a taxi driver's tips, the purpose of the employer in granting the benefit to the employee is an important factor in determining whether it is properly to be regarded as a reward or return for the employee's services. The employer's motives in conferring the benefit may be mixed and the determination of what constitutes his dominant purpose is a question of fact for the Commissioners to determine. Their findings on this matter is therefore one with which a court whose jurisdiction on appeal is limited to correcting errors of law by the Commissioners should be slow to interfere.

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(1) 38 TC 673. (2) 42 TC 351.

In the instant case the taxpayer was a senior employee of a company called Rentokil Ltd. which was one of a number of subsidiary companies in a group, the parent of which was called Rentokil Group Ltd. ("the parent company") a private company in which the major shareholder was a Danish company. Early in 1969 it was decided for good commercial reasons that the parent company should go public. The scheme put up for this was that the Danish company should sell to the Westminster Bank part of its holding of shares in the parent company and that a further block of shares should be issued by that company to the bank. Nine-tenths of those shares were to be offered by the bank to the public by tender at a price not less than 20*s.* per share: the remaining tenth was to be offered at the fixed price of 20*s.* per share to employees of the parent company and its subsidiaries who had been employed for five years or more. The shares to be offered to the public by tender were underwritten at 20*s.* per share and an arrangement had been reached with two executive directors of Rentokil Group Ltd. that they would take up any balance of the shares offered to employees which were not applied for. For the shares made available by the Danish company and the newly issued shares the price to be paid by the bank was to be for those that were sold by the bank by tender, 3*d.* less than the tender price struck: for those sold to employees it was to be 3*d.* less than the price of 20*s.* at which they were made available to employees. Applications by employees for shares at the price of 20*s.* had to be made by 12 March 1969 before the tender price was struck. They had to be accompanied by a cheque for the full price and, once made, were irrevocable. The tender price was in fact struck on 13 March at 25*s.* per share.

The taxpayer, Mr. Tyrer, who had duly applied on 9 March for 5,000 shares received a fully paid renounceable letter of acceptance for them on 17 March, the day before the market on the Stock Exchange opened. It was held by the Commissioners that the value of the shares on 17 March 1969, when the taxpayer's legal right to them arose, was 24*s.* When dealings started on the Stock Exchange on the following day there was a stag market; the price at the close of dealings had risen to 27*s.* 6*d.* The benefit of which the taxpayer availed himself was the right to subscribe at what it was expected would prove to be a preferential price. The expectation was realised and, on the finding of the Commissioners, the value of the benefit obtained by the taxpayer was 4*s.* on each share allotted to him, making a total of £1,000, on which they held him to be assessable to tax. The value was considerably higher once the market had opened.

The crucial finding of fact by the Commissioners as to the company's purpose in making the shares available to employees is that it was to encourage established employees of the company and of companies within the group to become shareholders in the parent company. The aim, said the Commissioners, was "to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of the Rentokil group". This the Commissioners held was an advantage afforded to the taxpayer in return for acting as or being an employee, within the meaning of that expression as used by Lord Radcliffe in *Hochstrasser* v. *Mayes*, *ubi sup*(1).

The Commissioners stated a Case for the opinion of the High Court upon two questions of law:

"(*a*) whether we made an error of law in holding that an emolument arose

(1) 38 TC 673.

(Lord Diplock)

to the Appellant from his office or employment when he acquired 5,000 shares in the company for £5,000; and (*b*) whether in law the value of that emolument should be taken to be some figure other than the £1,000 which we estimated it to be on the basis of the evidence submitted to us."

Brightman J. answered the first question in favour of the taxpayer; so, the second did not arise. His judgment was upheld by the Court of Appeal (Buckley and Eveleigh L.JJ. and Sir John Pennycuick). From their decision this appeal is brought by the Crown to your Lordships' House.

It was contended by the Crown in the light of the Commissioners' finding as to the purpose of the parent company in making the offer to its subsidiaries' employees that there was no relevant distinction between the instant case and two other cases which were decided by this House, in which employees of companies availed themselves of an offer to acquire shares in the company at a preferential price. The first is *Weight* v. *Salmon* 19 TC 174, in which the taxpayer was granted a right to subscribe at par for shares in a well-known public company whose market value at the time the right was granted was higher than their par value. In that case it was expressly stated in the resolutions by the board of directors to grant the taxpayer this right that the right was granted "having regard to the eminent and special services rendered" by the taxpayer in the preceding year. In the instant case the absence of a similar explicit statement in the resolution of the board of the parent company is made good by the finding of fact by the Commissioners as to what the purpose of the parent company was in granting to employees the right to acquire shares on preferential terms. The second case is *Abbott* v. *Philbin*(1) [1961] AC 352 where the taxpayer, who was a senior employee of a company, was granted in October 1954 the right to acquire, at the price of £20, an option to subscribe for up to 2,000 shares of the company at the price of 68*s*. 6*d*. per share. He paid his £20 in 1954 but did not exercise the option until a few years later when the market price of the shares was 82*s*. per share. The question in the appeal to this House in that case was whether he was assessable in the year in which he exercised the option for the difference between the market price at which the shares then stood and the 68*s*. 6*d*. at which he acquired them or was assessable on the value of the option in the year 1954 when he acquired, less, in either case, £20 which was the cost to him of acquiring it. It was taken for granted in this House that the option given to the taxpayer was a perquisite or profit from his employment and it was held that it fell to be assessed at the value at the date at which he acquired it for the price of £20. A corresponding basis, the value of the shares, when the Respondent taxpayer acquired them, was adopted by the Commissioners in the instant case.

Brightman J. considered that these two cases and others like them (*Ede* v. *Wilson* 26 TC 381 and *Bentley* v. *Evans* 39 TC 132) had nothing in common with the instant case because when the taxpayer availed himself of the proffered opportunity to subscribe for shares at 20*s*. it was by no means certain that the tender price would be struck at a figure higher than 20*s*. or that the shares would command a higher price than that in the market when it opened. To avail himself of the benefit the taxpayer had to be prepared to take a certain view of the market and to back his judgment with his own money of which he also had to have some available for investment. It was possible, as Brightman J. pointed out, for him to have incurred a loss by taking up the shares.

(1) 39 TC 82.

My Lords, whenever marketable securities are offered to favoured individuals on terms more advantageous than those on which they are offered to the public (in the instant case, at a price which could not be more and was likely to be less than that at which the public was able to acquire them) the individual accepting the special offer runs some risk, however small the risk may be, that he will lose by accepting it. In *Weight* v. *Salmon*[1] the risk that the taxpayer might lose by accepting the offer to subscribe was minimal. In the report of *Abbott* v. *Philbin*[2] in this House there is no material on which to assess the risk that the taxpayer's £20 which he paid for the option to buy shares might have proved to be a bad investment. The very fact that he accepts the offer is a strong indication that the risk is one which the taxpayer thinks is worth taking. In the instant case, looked at with the benefit of hindsight, there can be no question that the preferential terms offered to the taxpayer did not, in the result, secure for him a substantial financial benefit; and a reading of the prospectus which accompanied the offer of the shares and the fact that four days after his application the tender price was struck at 25*s*. suggests that it would be quite unrealistic to suppose that when he applied for 5,000 shares there was not a strong probability that the market in them would open, as in the result it did, at a figure substantially higher than the price of 20*s*. at which they were offered to the employees of the company. My Lords, it does not seem to me that the fact that there was some element of risk when the Appellant applied for his shares and that, as found by the Commissioners, he himself had at that time "no particular confidence that the shares would have a value in excess of the minimum price" can affect the finding of fact of the Commissioners that the purpose of the offer of shares to employees at a preferential price was so that the offerees "would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of the Rentokil group". That seems to me a clear finding that the offer was made as a reward for past (since he had to have served five years to qualify for the offer) and more particularly for future services and accordingly was made to him in return for acting as or being an employee. In my view it is not possible to bring the Commissioners' finding to this effect within the well-known principle stated by Lord Radcliffe in *Edwards* v. *Bairstow*[3] [1956] AC 14, at page 36, that the court has power to interfere with a determination of Commissioners if the facts found "are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal". It is only in these circumstances that the Court "has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination".

It may be that different conclusions of fact as to the purpose of the company's offer might have been reached upon the evidence by different deciders of the facts. The borderline between a profit which is an emolument from an employment and one which is not may, in some cases, be a narrow one. Even if it were the case that any of your Lordships might not necessarily have reached a same conclusion on the evidence before them as the Commissioners did in the instant case if this were a field in which it lay within the jurisdiction of the courts of justice to decide questions of fact, I can see no ground for saying that there was any error of law involved in the Commissioners' determination. I would accordingly allow this appeal.

On the question of the value of the emolument, as the Commissioners heard evidence as to the value of the shares on the day that they were issued,

(1) 19 TC 174. (2) 39 TC 82. (3) 36 TC 207, at p 229.

(Lord Diplock)

which was the day before the market opened and was agreed to be the date on which the value of the emolument was to be assessed, their finding was clearly one of fact and I can see no grounds at all for interfering.

Lord Salmon—My Lords, all the relevant facts in this appeal have been fully and lucidly set out by my noble and learned friend Lord Diplock. I shall only briefly draw attention to what I regard as some of the most cardinal facts.

In 1969 it was agreed that Rentokil Group Ltd., then a private company, should go public with a capital of 5,600,000 ordinary shares of 2*s*. each. Permission was obtained from the Stock Exchange to reserve and offer 10 per cent. of these shares for sale at 20*s*. a share to all employees of the company and of its subsidiaries in the United Kingdom of five years' standing, and to employees abroad of managerial status. An offer for sale by tender of the balance of 90 per cent. of the shares at a minimum price of 20*s*. per share (which was the price at which the shares had been underwritten) was made to the public on 12 March 1969 and closed on that date. The "striking price" of 25*s*. a share was announced on 13 March 1969. At that figure the shares were three times oversubscribed. In the meantime special application forms had been issued to all the employees to whom I have referred, one of whom was Mr. Tyrer. He filled in his form applying for 5,000 shares and returned it with his cheque for £5,000 to the company's secretary on 9 March 1969. The acceptance of his application reached him on 17 March 1969; and on that day he became the legal owner of the 5,000 shares. Dealings in the company shares on the Stock Exchange did not open until the following day. It is now undisputed that the value of the shares on 17 March was 24*s*. a share. Accordingly, the 5,000 shares which Mr. Tyrer had acquired on that day for £5,000 were then worth £1,000 more than the price he had paid for them. The question is whether Mr. Tyrer is assessable to income tax on that £1,000. This depends upon whether that sum was an emolument from Mr. Tyrer's employment. Income tax under Schedule E is assessable on all emoluments derived from employment. See Finance Act 1956, s 10(1). Schedule 2 to that Act provides by para 1(1) that "the expression 'emoluments' shall include all . . . perquisites and profits whatsoever". A perquisite is, in my view, any advantage which has a money value and which the employee receives from his employer for services he has rendered or is expected to render in the course of his employment.

It is clearly impossible to foretell the future price of any shares with certainty. Accordingly, no one can ever have been certain when the employees were given the opportunity of making an application to buy the shares at 20*s*. each that these shares would be worth more than that figure on the day of their acquisition. Nevertheless, it is not surprising that 20*s*. a share was regarded as an advantageous price and that the shares would fetch a substantially higher price when the market opened. The accountants' report in the prospectus showed that the company had a remarkably successful growth record. Its pre-tax profits had risen steadily from £273,000 for the year ending 31 December 1959 to £1,525,000 for the year ending 31 December 1968. As I have already pointed out, the "striking price" was 25*s*. a share on 13 March and the Special Commissioners found that the 5,000 shares acquired by Mr. Tyrer on 17 March were then worth £6,000. Incidentally, their closing price on the Stock Exchange on 18 March was 27*s*. 6*d*. per share. Accordingly, I am certainly not surprised that the Special Commissioners, Brightman J. and the Court of Appeal all apparently accepted that the advantage of being enabled to acquire 5,000 shares at 20*s*. a share was a benefit conferred on Mr. Tyrer by the company. The Special Commissioners, however, found that this benefit was a perquisite which

A arose from Mr. Tyrer's employment, whilst Brightman J. and the Court of Appeal held that it was not.

The Special Commissioners' finding was a finding of fact. No appellate tribunal may reverse such a finding merely on the ground that they might probably have arrived at a different conclusion. The Commissioners' finding can be reversed on appeal only if the appellate tribunal is convinced that, on
B the evidence recorded in the Case Stated, no reasonable Commissioners could have arrived at such a finding.

Edwards v. *Bairstow* [1956] AC 14, Viscount Simonds at page 29(1): "... it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that
C course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

And Lord Radcliffe said, at page 36(2):

"... it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must
D intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or
E as one in which the true and only reasonable conclusion contradicts the determination."

In the present case the Commissioners said in their Case Stated:

"We accept that the purpose of the company ... in arranging for shares to be offered on favourable terms to established employees ... was to encourage such employees to become shareholders of, or to increase
F their shareholdings in the parent company.... If employees became members of the parent company they would identify themselves with the group. The aim, we were told, was to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of [the company]."

G The facts in *Laidler* v. *Perry*(3) [1966] AC 16 (in which your Lordships' House found in favour of the Inland Revenue) were different from those in the present case. In *Laidler* v. *Perry* each employee from the lowest to those holding high executive positions were given £10 every Christmas. An observation of Lord Donovan in that case seems to me to be very much the point in the present. Lord Donovan said, at pages 35–6(4):

H "The admitted facts are that the company disbursed these sums to 'help maintain a feeling of happiness among the staff and to foster a spirit of personal relationship between management and staff'. In less roundabout language that simply means in order to maintain the quality of service given by the staff. Looked at in this way, the payments were an inducement to each recipient to go on working well."

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(1) 36 TC 207, at p 224. (2) *Ibid*, at p 229.
(3) 42 TC 351. (4) *Ibid*, at p 366.

(Lord Salmon)

The underlining is mine. It is only necessary to substitute for the words "the payments", the words "the benefit or perquisite of being able to obtain the shares at an advantageous price" to make Lord Donovan's comment as applicable to the passage from the Case Stated, which I have recited above, as it was to the Case Stated in *Laidler* v. *Perry*(1). Speaking for myself, I think that I would have been likely to have come to the same conclusion as did the Commissioners. I certainly have no doubt that it is impossible to say that no reasonable Commissioners could have come to that conclusion. Even discounting the exceptional experience and distinction of these Commissioners, I find it equally impossible to agree that their findings of fact could support the argument that they must have misdirected themselves on the law. I have no doubt that the perquisite afforded to each employee was an inducement to go on working well. The company could have received 25*s*. a share for each of the 560,000 shares allotted to the staff. Accordingly, the company deprived itself of upwards of £100,000 and distributed that sum amongst the staff "to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of [the company]".

I have therefore come to the conclusion, with some reluctance, that no grounds exist on which the decision of the Commissioners could properly be reversed. I say with reluctance because, in my view, the company's scheme was excellent. If generally adopted, it might well be of great advantage to industry and to the country's economy in general. It seems a pity to discourage employees from participating in such schemes by assessing them to income tax on the comparatively small profit they would gain on acquiring their shares—particularly as such a tax would produce only a derisively small sum of money in comparison with the substantial benefits which the public economy might well derive from such schemes. This policy consideration, however, can, of course, carry no weight with this House sitting in its judicial capacity. It might, however, perhaps deserve examination in other quarters.

My Lords, I would allow this appeal.

Lord Edmund-Davies—My Lords, there is less to this appeal than meets the eye. And, with respect to those who have thought differently, my conclusion is that it poses a simple question of law calling for nothing more than a short answer. That does not, however, mean that the appeal can properly be disposed of in a sentence. The relevant facts have been related in the speech of my noble and learned friend Lord Diplock. In considering them, it is important to have in mind throughout that this is an appeal from a decision of the Special Commissioners confirming an assessment to tax under Schedule E "in respect of any office or employment on emoluments therefrom" (Finance Act 1956, s 10(1)), Sch 2 providing by para 1(1) that "the expression 'emoluments' shall include all salaries, fees, wages, perquisites and profits whatsoever".

Taxability in such cases as the present accordingly depends upon the answers to two questions: (1) Has the employee received an "emolument"? (2) If he has, was it an emolument *from* his office or employment? Unless both questions demand an affirmative answer, it is common ground that the finding of Brightman J. and of the Court of Appeal in favour of the taxpayer must be upheld and the appeal dismissed.

As to the first question, it was contended for the taxpayer before the Special Commissioners that the most which the company could be said to have provided for him or for any other employees to whom application forms were

(1) 42 TC 351.

A sent was an opportunity to apply for shares at a price which might or might not prove favourable. As to the second question, the contention then raised was that any profit accruing to the taxpayer (i.e. the excess in value of his 5,000 shares over 20*s.* a share) was derived from the normal operation of the market and not from his office or employment. Before Brightman J. and the Court of Appeal discussion was, understandably enough, concentrated largely, if not
B entirely, upon the second question. In this, as in many other cases, they cannot be separately considered and, indeed, they were coalesced in the first question of law raised by the Special Commissioners in their Stated Case. In my judgment the taxpayer here (in common with all other employees who had served for the minimum period of five years) was the recipient of an advantage (or "emolument") which was not enjoyed by the public at large, viz., the right to subscribe
C for shares at what was expected would prove a preferential price, the employers undertaking to issue sufficient shares at 20*s.* to meet employees' applications regardless of how the market behaved.

Accordingly, as I think, the second question is the only one which may reasonably have presented the Special Commissioners with any difficulty. Was the advantage conferred upon employees of five years' service and upon nobody
D else attributable to their employment? The obvious fact that the Appellant would not have enjoyed this benefit had he not been such an employee is not decisive (*Hochstrasser* v. *Mayes*(1) [1960] AC 376, *per* Lord Radcliffe at page 391) and, for myself, I respectfully accept as correct Brightman J.'s summary of the "guidelines" laid down by decided cases in dealing with this second question. He said ([1977] 1 WLR 1, at page 4D)(2):

E "It may be asked whether the benefit was a remuneration or reward or return for the services of the taxpayer. If so, the reward is an emolument from the employment: see for example, *Hochstrasser* v. *Mayes* [1960] A.C. 376, *per* Viscount Simonds at p.389(3), and Lord Denning at pp.396, 397(4) and *Laidler* v. *Perry* [1965] Ch. 192, *per* Lord Denning M.R. at p.198(5) and Danckwerts L.J. at p.199(6). It may also be asked whether
F the employment was the causa causans or merely the causa sine qua non of the reward. If the former, the reward is an emolument from the employment: see, for example, the *Hochstrasser* case *per* Lord Simonds at p.389(7) and Lord Cohen at p.395(8) and *Laidler* v. *Perry* [1966] A.C. 16 *per* Lord Reid at p.32(9)."

Applying those tests to the facts of the instant case, the taxpayer contends that
G the proper conclusion is that the opportunity afforded certain employees to apply for an allotment of shares on preferential terms was to encourage them to identify themselves with the employer company rather than to remunerate or reward them for services and depended solely upon how much of their own money they were prepared to invest; and, indeed, that only about one-half of the eligible employees in fact applied, leaving 151,018 out of the 560,000 shares
H reserved for employees to be taken up by directors. Such contentions prevailed before Brightman J. and in the Court of Appeal. Dealing with the taxpayer's application for 5,000 shares, Buckley L.J. said ([1978] 1 WLR 415, at page 421 C)(10):

"He would not have had the opportunity to make it if he had not been an employee of that company, but the considerations which affected his

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(1) 38 TC 673, at p 707. (2) Page 544 *ante*.
(3) 38 TC 673, at p 706. (4) *Ibid*, at p 711. (5) 42 TC 351, at p 360.
(6) *Ibid*, at p 361. (7) 38 TC 673, at p 705. (8) *Ibid*, at p 709.
(9) 42 TC 351, at p 365. (10) Page 552 *ante*.

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> mind in making the decision must have been personal to him as a private individual: how much money he could afford to invest in shares of Rentokil Group Ltd.; would the investment be a wise one from his point of view; would the shares in the short term or the long term be likely to be worth what he was going to pay for them; what income would they be likely to yield—and so on? Upon the findings of the Commissioners there was no certainty about these matters when the taxpayer made his decision; they were matters upon which he had to make judgments. I think the decision involved a real commercial risk. They were matters quite unrelated to his relation with Rentokil Ltd., as an employee of that company, or his remoter relationship with Rentokil Group Ltd., as an employee of one of its subsidiaries . . . In my judgment the right to the shares arose, not from the opportunity afforded by the company's scheme, but from the taxpayer's decision to take advantage of it."

I have to say, with respect, that I see much force in these words and in the similarly expressed views of Eveleigh L.J. and Sir John Pennycuick. And it has to be borne in mind that the conclusion of the Court of Appeal was arrived at after express adversion to the finding of the Special Commissioners that

> ". . . the purpose of the company . . . in arranging for shares to be offered on favourable terms to established employees . . . on the occasion of the parent company of the group becoming a public company, was to encourage such employees to become shareholders of, or to increase their shareholdings in, the parent company. . . . If employees became members of the parent company they would identify with the group. The aim, we were told, was to achieve a better relationship with the employees so that they would become and continue to be loyal employees, having an understanding of and a sense of involvement in the affairs and fortunes of the Rentokil group."

Upon this basis, did the advantage conferred upon eligible employees constitute a reward or return for their services, bearing in mind that (in the words of Sir John Pennycuick, *ibid*, at 423 E(1)), "A reward or return for services may, of course, be a reward or return for services in the present, the future or, I think, the past"? The Special Commissioners concluded that "the advantage which accrued to the Appellant . . . was an advantage afforded to him in return for acting as or being an employee within the meaning of that expression as used by Lord Radcliffe in *Hochstrasser* v. *Mayes*(2)". My Lords, not everyone would have so concluded. Indeed, I have been and remain dubious that I myself would have done so. But such is not the proper approach. On the contrary, your Lordships have no entitlement to differ from the Special Commissioners' finding of fact regarding attributability unless, in the words of Lord Radcliffe in *Edwards* v. *Bairstow*(3) [1956] AC 14, at page 36, ". . . the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal". Only then may an appellate court hold that "It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination". There can be no room for thinking that the highly distinguished Special Commissioners who stated this Case were under any misconception regarding the relevant law, nor, indeed, has it been suggested that they were. And so, after considerable expenditure of space and the use of many words, we come to that "simple question of law calling for nothing more than a short answer" to which I adverted in my opening remarks. *Can* it be said that the

(1) Page 554 *ante*. (2) 38 TC 673. (3) 36 TC 207, at p 229.

A conclusion of fact arrived at by the Special Commissioners regarding the attributability of the advantage conferred on the taxpayer in the present case was one which no person acting judicially could have come to? Put more specifically, did the only reasonable conclusion contradict their determination that the advantage the taxpayer enjoyed was extended as a reward for past services and as an inducement for the future? I have to say that I think these B questions demand a negative answer and that I am accordingly obliged to hold that this appeal should be allowed.

Lord Fraser of Tullybelton—My Lords, at the end of the hearing of this appeal I was inclined to dismiss it on the ground that the conclusion of the Special Commissioners was unreasonable in the sense explained by Lord Radcliffe in *Edwards* v. *Bairstow*(1) [1956] AC 14, at page 36. But further C reflection, and consideration of the speech prepared by my noble and learned friend Lord Diplock, which I have seen in draft, has convinced me that, even though the Special Commissioners' conclusion is one that many Judges might disagree with, it cannot properly be described as unreasonable. It is therefore not one that I am entitled to interfere with.

The facts of this case differ in several respects from those in *Weight* v. D *Salmon* 19 TC 174 and these differences, taken together, would certainly have justified the Special Commissioners if they had found that the cases were distinguishable and that the advantage which the taxpayer obtained by acquiring 5,000 shares in the company at 20*s*. each did not arise from his employment. The advantage accrued only when shares were allotted to him at a price lower than the striking price for allotment to members of the public. Before allotment E he had no right to any shares and no other legal right of any relevant kind—see *Salmon, supra, per* Lord Atkin at page 193. But shares could not have been allotted to him unless he had applied for them, and his application required an investment decision on his part. There is therefore, in my opinion, clearly room for the view that the advantage is attributable to, or caused by, the taxpayer's own decision to apply for 5,000 shares. He had to take a view of the F company's prospects and of his own willingness to risk his money and he might quite well have decided not to apply for any shares, as many of the other employees who were entitled to apply did in fact decide. The decision was unlike that in *Salmon's* case where, in a practical sense, there can have been little doubt that the taxpayer would take up the limited number of shares for which he was entitled to apply. The number of shares to be applied for in this case was G a matter for the individual judgment of the taxpayer. These were the considerations that weighed with the learned Judge, and also in the Court of Appeal with Buckley L.J. who said, at page 421G(2): "In my judgment the right to the shares arose, not from the opportunity afforded by the company's scheme, but from the taxpayer's decision to take advantage of it." While I sympathise with that view, I have reached the opinion that it depends upon weighing the relative H importance to be attached to the various primary facts, and that it cannot be said to raise a question of law. Even in *Salmon's* case the decision to apply for the shares must have involved some element of risk and some personal decision by the taxpayer, and so must have the decision to take up the option in *Abbott* v. *Philbin*(3) [1961] AC 352. The most that can be said is that the decisions in those cases were much easier than the decision in this case. But that is a difference I only of degree.

For these reasons I also would allow this appeal and restore the order of the Special Commissioners on both questions.

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(1) 36 TC 207, at p 229. (2) Page 552 *ante*. (3) 39 TC 82.

Lord Russell of Killowen—My Lords, ordinarily, since your Lordships are differing from the conclusion reached by Brightman J. and the three members of the Court of Appeal, I would feel it incumbent upon me to express my conclusions in my own words. But I have had the advantage of studying in draft the speech prepared by my noble and learned friend Lord Diplock, and I trust that it will not be thought disrespectful to the views expressed below if I content myself with saying that I am in entire agreement with it and do not attempt to paint the lily.

Appeal allowed.

[Solicitors:—Denton, Hall & Burgin; Solicitor of Inland Revenue.]