A HIGH COURT OF JUSTICE
(CHANCERY DIVISION)—26 AND 29 JUNE AND 6 JULY 1981

COURT OF APPEAL—23 MARCH AND 15 APRIL 1983

HOUSE OF LORDS—30 NOVEMBER AND 1 DECEMBER 1983
B AND 26 JANUARY 1984

Gubay *v.* Kington (H.M. Inspector of Taxes)[1]

Capital gains tax—Disposal from husband to wife—Whether relief governed by condition as to residence of spouses—Whether person resident in
C *U.K. for a year of assessment when so resident for part only of year—Whether relief applied even if one spouse not resident in U.K.—Finance Act* 1965, *s* 45(3) *and Sch* 7, *para* 20(1)*—Income and Corporation Taxes Act* 1970, *s* 42(2).

G disposed of assets by gift to his wife on 7 July 1972. The wife was not resident in the UK in the fiscal year 1972–73. G was resident in the UK until 28
D October 1972, but elsewhere thereafter.

On appeal to the Special Commissioners against an assessment to capital gains tax for 1972–73, G contended that he was entitled to the relief provided by para 20(1), Sch 7, Finance Act 1965, under which a disposal of assets between spouses does not give rise to a charge to capital gains tax. The Special Commissioners rejected G's contention and dismissed his appeal. G appealed.

E The Chancery Division, dismissing G's appeal, held that:

(1) the condition of relief under para 20(1), that in the particular year of assessment the wife must be "a married woman living with her husband", applied not only to a disposal by a wife to her husband but also to a disposal by a husband to his wife, because to construe para 20(1) otherwise was impossible and, in any event, because that construction was at least a possible
F construction and it should be preferred as it would avoid an anomaly; and

(2) under s 42(2)(*a*) of the Income and Corporation Taxes Act 1970, G and his wife were to be treated for tax purposes as not living together in relation to 1972–73 because G was, but his wife was not "resident in the United Kingdom *for* [that] year of assessment": that phrase referred to the

[1] Reported (ChD) [1981] STC 721; 125 SJ 590; (CA) [1983] 1 WLR 709; [1983] 2 All ER 976; [1983] STC 443; 127 SJ 411; (HL) [1984] 1 WLR 163; [1984] 1 All ER 513; [1984] STC 99; 128 SJ 100.

status or quality of being resident in the United Kingdom for tax purposes during a year of assessment and did not mean continuous residence throughout a year of assessment, with the result that G was so resident despite his departure from the United Kingdom on 28 October 1972. A

On appeal to the Court of Appeal G did not pursue the contention in relation to (1) above but, with the leave of the Court, advanced the new contention dealt with in (1) below. B

The Court of Appeal dismissing G's appeal by a majority (Sir Denys Buckley dissenting), held that:

(1) the reference in s 45(3) of the Finance Act 1965 to s 42(2) of the Income and Corporation Taxes Act 1970 was not mere surplusage, but had the effect that a married woman is for capital gains tax purposes not to be treated as living with her husband if their circumstances are covered by either para (*a*) or (*b*) of s 42(2), and C

(2) Vinelott J. was correct in holding as he did in (2) above. G appealed.

Held, in the House of Lords, allowing G's appeal by a majority (Lord Scarman dissenting), that the argument (not taken in the Courts below) that the effect of s 45(3) of the Finance Act 1965 is that s 42, Income and Corporation Taxes Act 1970, is to be read into the capital gains tax legislation in its entirety but with the substitution of "capital gains tax purposes" for "income tax purposes", was correct. Accordingly G was entitled to relief under the proviso to s 42(2). D

CASE

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

1. On 28 and 29 February 1980 the Commissioners for the Special Purposes of the Income Tax Acts heard the appeal of Albert Gubay (hereinafter called "Mr. Gubay") against an assessment to capital gains tax for the year of assessment 1972–73 in the sum of £7,250,000. F

2. At the conclusion of the hearing we reserved our decision and gave it in writing on 18 August 1980. A copy of that written decision (hereinafter called "the decision") is annexed hereto and forms part of this Case.

3. The questions which we had to determine are summarised in para 2 of the decision.

4. All the relevant facts were common ground between the parties and an agreed statement of facts was put before us. The agreed facts are set out in para 3 of the decision. G

5. The contentions of the parties are set out in paras 4 to 6 of the decision.

A 6. Paragraphs 7 to 11 of the decision contain our decision on questions of law and para 12 our conclusion that the appeal be dismissed and the assessment be determined by reducing it to the agreed figure of £1,399,965.

7. Mr. Gubay, immediately after the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and on 21 August 1980 required us to state a Case for the opinion of the High B Court pursuant to s 56 of the Taxes Management Act 1970 which Case we have stated and do sign accordingly.

8. The question of law for the opinion of the Court is whether our decision is correct in law.

J.D.R. Adams
B. James
} Commissioners for the Special Purposes of the Income Tax Acts

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

28 January 1981

Decision

D 1. This case concerns an appeal by Mr. Albert Gubay ("Mr. Gubay") against an assessment to capital gains tax for the year of assessment 1972–73 in the sum of £7,250,000. Mr. Gubay was represented by Mr. J.E. Holroyd Pearce Q.C. and Mr. R. Venables; the case for the Inland Revenue was presented by Mr. P.L. Ridd of the Office of the Solicitor of Inland Revenue.

2. The case may be summarised as follows. On 7 July 1972 Mr. Gubay E made a disposal of some shares by way of a gift to his wife, Mrs. Gubay ("Mrs. Gubay"). On 4 April 1972 Mrs. Gubay's residence and ordinary residence in the United Kingdom had ceased with the result that in 1972–73, the year of assessment in which the disposal took place, Mrs. Gubay was neither resident nor ordinarily resident in the United Kingdom. Mr. Gubay's residence and ordinary residence in the United Kingdom continued until 28 F October 1972, though it ceased thereafter. Accordingly, unlike his wife, Mr. Gubay was resident and ordinarily resident in the United Kingdom for part of the year of assessment 1972–73, and he was so resident at the time when the disposal occurred in July. It is common ground that Mr. Gubay is chargeable to capital gains tax in respect of that disposal to Mrs. Gubay (if it gave rise to a chargeable gain accruing to him) because he was resident for part of the year G of assessment 1972–73, (see s 20(1) of the Finance Act 1965; all statutory provisions referred to hereafter are provisions in the Finance Act 1965 unless otherwise indicated). The case for Mr. Gubay is that the disposal did not give rise to any chargeable gain because the special provisions in Sch 7, para 20 (dealing with disposals between husband and wife) apply to this disposal. Where para 20 applies to a disposal by one spouse to the other spouse, the H consideration, for capital gains tax purposes, is deemed to be such an amount as will produce neither a gain nor a loss to the spouse making the disposal. That has two practical results: first, no chargeable gain accrues to the disponor spouse, and secondly, the disponee takes over the disponor's base cost.

The facts are all agreed (see para 3 below). The following issues of law fall to be decided in this case:

(1) Does para 20 of Sch 7 apply only if Mrs. Gubay was "living with her husband" (as statutorily defined) in 1972–73, the year of assessment in which the disposal occurred? For Mr. Gubay it is contended that the words "in the case of a woman who in that year of assessment is a married woman living with her husband" in para 20(1) apply only where the wife is the disponor. The Revenue maintain that this requirement must be satisfied in the case of disposals by husbands as well as disposals by wives.

(2) If the Revenue view is correct on point (1), was Mrs. Gubay "living with her husband", in the statutory sense, in 1972–73? Section 45(3) requires that issue to be determined by applying the provisions in s 42 of the Income and Corporation Taxes Act 1970 ("the 1970 Act"). It is common ground that Mrs. Gubay was "living with her husband" in 1972–73, unless s 42(2)(*a*) of the 1970 Act applies. The effect of s 42(2)(*a*) (combined with s 42(1)) is that, where one of the spouses is, and the other one is not, resident in the United Kingdom "for a year of assessment", the woman is deemed *not* to be "living with her husband" throughout that year of assessment. The Revenue's case is that s 42(2)(*a*) of the 1970 Act applies here because Mr. Gubay was resident in the United Kingdom for part of 1972–73 and Mrs. Gubay was non-resident throughout that year. If that is correct, Mrs. Gubay was not "living with her husband" in 1972–73. For Mr. Gubay it is contended that s 42(2)(*a*) does not apply because Mr. Gubay was resident in the United Kingdom for part only of 1972–73; i.e. the case for Mr. Gubay is that the words "resident in the United Kingdom *for* a year of assessment" mean for the whole of that year. If that is correct, Mrs. Gubay was "living with her husband" in 1972–73 and para 20 of Sch 7 will therefore apply, even if point (1) is decided in favour of the Revenue.

3. No witnesses gave evidence before us. The only document put before us was the agreed statement of facts (which included some agreed additions) and that was, of course, an agreed document. The agreed facts were as follows:

(1) On July 1972 Mr. Gubay made a disposal of 479,638 shares in Kwik Save Discount Group Ltd. by way of gift to Mrs. Gubay.

(2) Before 4 April 1972 Mrs. Gubay was resident and ordinarily resident in the United Kingdom. From 4 April 1972 and at all material times thereafter she was neither resident nor ordinarily resident in the United Kingdom.

(3) Before 28 October 1972 Mr. Gubay was resident and ordinarily resident in the United Kingdom. From 28 October 1972 and at all material times thereafter he was neither resident nor ordinarily resident in the United Kingdom.

(4) Until 4 April 1972 Mr. Gubay and Mrs. Gubay lived together in the same house in Flintshire. On 4 April 1972 Mrs. Gubay took up residence at "Glenhaven" Isle of Man. Between that date and 28 October 1972 Mr. Gubay visited his wife and lived with her at that address on most weekends and bank holidays.

(5) Mr. Gubay spent 17 to 26 June and 26 August to 4 September 1972 in New Zealand. On 28 October 1972 Mr. Gubay travelled to the United States of America and then to New Zealand where he arrived on 4 November 1972. Mrs. Gubay travelled from the Isle of Man to New Zealand, where she arrived also on 4 November 1972. Mrs. Gubay returned to the Isle of Man on 2 December. Mr. Gubay returned to the Isle of Man on 6 December 1972. On 13 December

1972 Mr. Gubay and his wife travelled to New Zealand where they remained until 2 May 1973.

(6) During the visits to New Zealand mentioned in para (5) Mr. and Mrs. Gubay lived together at 21 Red Bluff Rise, Campbell's Bay, Auckland, which Mr. Gubay had purchased in December 1971. During the times Mr. and Mrs. Gubay were in the Isle of Man they lived together at "Glenhaven". Throughout 1973–74 Mr. and Mrs. Gubay lived together in the Isle of Man and New Zealand. Mrs. Gubay was charged to tax in the Isle of Man for 1972–73 as a person resident in the Isle of Man. Mr. Gubay was also resident in the Isle of Man in 1972–73 for Isle of Man tax purposes. Mr. Gubay was also, for New Zealand tax purposes, treated as resident in New Zealand for 1972–73. Mr. Gubay was also resident in the United Kingdom in 1972–73 so as to render him liable to income tax and surtax for 1972–73.

(7) The sole dispute between the parties to this appeal is whether Sch 7, para 20(1) applies to the disposal referred to in para (1) above. If the Commissioners find that it does, the parties are agreed that the appeal shall be allowed and the chargeable gains assessed shall be reduced from £7,250,000 to £7,650 with a corresponding reduction in the tax payable thereon. If the Commissioners find that the said provision does not apply to the disposal, the appeal is to be dismissed and the chargeable gains assessed shall be reduced to £1,399,965 with a corresponding reduction in the tax payable thereon.

Contentions

4. Mr. Holroyd Pearce's contentions in opening the case for Mr. Gubay were as follows:—

(1) It is common ground that, applying only subs (1) of s 42 of the 1970 Act, Mrs. Gubay would be treated as "living with her husband". Subsection (2), however, qualifies subs (1). The Revenue rely on subs (2)(*a*). They say that Mrs. Gubay was not resident in the United Kingdom for 1972–73, whereas Mr. Gubay was resident "for that year". It is accepted that Mrs. Gubay was not resident for that year of assessment, but it is not accepted that Mr. Gubay was resident in the United Kingdom "for that year of assessment". The year of assessment 1972–73 ran from 6 April 1972 to 5 April 1973. Mr. Gubay was resident from 6 April to 28 October 1972; that is part only of the year of assessment 1972–73. It is contended for Mr. Gubay that, in the context of s 42, "for a year of assessment" means for the whole year of assessment concerned and not part only. Before s 42(2)(*a*) can apply, a contrast has to exist between the residence of the husband and the residence of the wife for the whole of the year of assessment concerned. When a judge sentences a person to imprisonment "for a year", it means a full year and not part only of a year.

(2) "Residence" is a situation of fact in relation to a person which always has to exist *for a period.* It may be a whole year of assessment, a number of years of assessment, a lifetime, or part of a year of assessment. The expression "resident for" always connotes a period. Both the statutory provisions and the cases recognise that a person can be resident for part of a year of assessment. Indeed s 20(1) comes within the scope of the charge to capital gains tax in 1972–73 because he was resident in the United Kingdom for part of that year of assessment.

(3) The word "for" can mean either "in respect of" or "for the duration of a period". Section 2(2) of the 1970 Act, which imposes the charge to income tax "for a year commencing on the 6 April and ending on the following 5 April" is an example of "for" being used in the sense of "in respect of". The

phrase "my holidays for 1980" is another example of "for" being used in that sense. On the other hand, a prison sentence "for 6 months" means a period of 6 months' duration. The Shorter Oxford English Dictionary, 3rd edn, sets out a wide variety of meanings in the article dealing with the word "for" used as a preposition. Meaning X is given as "marking actual or intended duration". It is submitted that the word "for" is used in that sense in s 42(2)(*a*).

(4) It is anticipated that the Revenue will say that "resident for a year of assessment" is a recognised concept of United Kingdom income tax law and that, if a person is resident in the United Kingdom during part of a year of assessment, he is regarded as "resident for that year of assessment" for income tax purposes. For Mr. Gubay it is contended that there is no such concept. "Resident for a year of assessment" is not an expression which is used in the income tax charging sections.

(5) The basic income tax charging provisions use the expression "a person residing *in* the United Kingdom", and not the phrase "resident for a year of assessment". The following sections in the 1970 Act are examples of the use of that expression "residing in the United Kingdom": s 49, s 51, s 108, Sch D, para 1(*a*)(i)(ii) (part of the basic charging provisions for Schedule D), and s 181 (the basic charging section for Schedule E). The income tax cases show that a person who is resident in the United Kingdom for part of a year of assessment is "a person residing in the United Kingdom" in that year of assessment and he is accordingly taxable on the whole of his income accruing during that year of assessment. In support of that Mr. Holroyd Pearce cited the following cases: *Colquhoun* v. *Brooks* 2 TC 490; *Cooper* v. *Cadwalader* 5 TC 101; *Levene* v. *Commissioners of Inland Revenue*(1) 13 TC 486; *Mitchell* v. *Commissioners of Inland Revenue* 33 TC 53; and *Neubergh* v. *Commissioners of Inland Revenue*(2) [1978] STC 181. As a matter of ordinary language, "in" means "in the whole or any part of" the year concerned.

(6) The decision in the case of *Nugent-Head* v. *Jacob*(3) 30 TC 83 resulted in the enactment of s 34 of the Finance Act 1950, which is now s 42 of the 1970 Act. The draftsman of what is now s 42 has answered clearly the point raised by Viscount Simon (at page 101), namely: how long do they have to live apart? The words in s 42(2), just before the proviso, are: "the same consequences shall follow for income tax purposes as would have followed if, *throughout that year of assessment,* they had in fact been separated in such circumstances that the separation was likely to be permanent". The use of that phraseology shows that the whole year of assessment is being considered. The expression "throughout that year" is also used in s 42(2)(*b*). Looking back at s 42(2)(*a*), it is submitted that the contrast between the residence of one spouse and the residence of the other has to exist throughout the whole year of assessment. Where the statute means part of a year of assessment, it says so; for example s 20(1) of the Finance Act 1965.

(7) If the Revenue's construction is right, it leads to this result. Suppose a man's wife left the United Kingdom permanently on 4 April 1972, but he did not leave the United Kingdom and join her until 7 April 1972. Suppose further that he made a gift to his wife on 4 April 1973. If the Revenue view is correct, Sch 7, para 20 does not apply to that gift. Yet, it is ridiculous if he loses the

(1) [1928] AC 217. (2) 52 TC 79. (3) [1948] AC 321.

A exemption even though he has lived with his wife abroad for 364 days. Section 42(2) must be given a sensible meaning.

(8) The normal meaning of the words in parenthesis in Sch 7, para 20(1)—"and in the case of a woman who in that year of assessment is a married woman living with her husband"—is that they qualify the case mentioned below, namely where "the wife disposes of an asset to the man". B Against that it may be argued that it is odd. In answer it is submitted, first, that women are discriminated against in tax statutes; and secondly, that, if that is the plain meaning, it must be applied even though anomalous, (see *Restorick* v. *Baker* 47 TC 116).

5. Mr. Ridd's contentions on behalf of the Inland Revenue were as follows:—

C (1) A person is "resident for a year of assessment" within the meaning of s 42(2)(*a*) if he is chargeable to income tax for that year. A person is chargeable to income tax if he is resident for part only of that year. Accordingly s 42(2)(*a*) applies to this case, with the result that Mrs. Gubay is treated as a married woman who is *not* "living with her husband" in 1972–73.

(2) It is conceded that, as a matter of ordinary language, the expression D "resident for a year" is capable of meaning resident during the whole of that year. Mr. Holroyd Pearce relies on meaning X in the Shorter Oxford English Dictionary in support of the construction for which he contends. It is accepted that the words in s 42(2)(*a*) are capable of meaning that. But the Revenue contend that meaning X in the Oxford English Dictionary—"as regards"—is the relevant one. Reliance is also placed on the article dealing with "for" as a E preposition in the Chambers Twentieth Century Dictionary, 1972 edn, which shows that the word "for" is capable of meaning "in respect of" and "in reference to". Even if one takes "for" to mean "during", "during" can mean at some point in the course of a period. In the context of s 42(2), the more appropriate meaning to be attributed to the word "for" is "in respect of", rather than "throughout". Section 42(2)(*b*) uses the word "throughout"; if F the draftsman had intended that meaning, he could quite easily have used the word "throughout" in subs (2)(*a*).

(3) Section 2 of the 1970 Act uses the expression "for a year". Section 45 of the Finance Act 1965 defines a "year of assessment". Both of those sections deal with the year of assessment and a year of assessment is an indivisible concept. You do not have a month of assessment; you just have a year of G assessment. There is no authority in the statute or cases for the proposition that years can be split. In practice problems do not normally arise where a person permanently ceases to be resident part way through a year of assessment, because, by concession, the Revenue do not tax him on income or capital gains arising after he has emigrated.

(4) This case concerns capital gains tax, and s 20(1) charges a person who H is resident for part only of a year of assessment. Mr. Gubay is liable to capital gains tax in 1972–73 because he was resident in the United Kingdom for part of that year. It is submitted that Mr. Gubay was resident "for that year of assessment" within the meaning of s 42(2)(*a*), because he was a taxable person for that year. There is nothing offensive to commonsense in that construction.

The statute equates residence and chargeability and it is, therefore, sensible to give the same meaning to the word "for" in s 42 of the 1970 Act. A

(5) Suppose you were asked the question: "For the purposes of capital gains tax, was Mr. Gubay resident in the United Kingdom for 1972–73?". It is submitted that the proper anwer is, "Yes". If you gave the answer, "No" you would get into a tangle; that would be an incorrect answer and you would therefore have to give an elaborate answer. B

(6) Mr. Holroyd Pearce referred to producing a sensible meaning. The meaning for which the Revenue contends is sensible. If s 42 of the 1970 Act had not been incorporated into the capital gains tax legislation, there could have been tax avoidance in cases where one spouse was resident in the United Kingdom and the other spouse was non-resident. The resident spouse who wished to sell chargeable assets to a third party, would give the assets to the C non-resident spouse who would then sell them to the third party. Section 42 was incorporated into the capital gains tax legislation to prevent such "gain washing". There is no relevant distinction between the case where the resident spouse is resident for the whole of the year of assessment, and the case where the resident spouse is resident for only part of that year. The hardship element in Mr. Holroyd Pearce's example about the husband who left on 7 April 1972 D and made the gift on 4 April 1973 is in s 20(1), not s 42 of the 1970 Act. The husband is liable in that example because s 20(1) has the effect that, once a person has been resident for part of a year of assessment, he remains chargeable to capital gains tax for the rest of that year of assessment. Given that a person remains chargeable even after he has left, it is logical that the legislation should prevent any loophole. E

(7) There appears to be no section, apart from s 42 of the 1970 Act, which uses the expression "resident in the United Kingdom *for* a year of assessment". The following income tax cases, although not binding authorities directly on the point, provide some guidance: *Lloyd* v. *Sulley* 2 TC 37; *Back* v. *Whitlock*[1] 16 TC 723—in this case Rowlatt J. clearly thought that residence for only two days made you liable to income tax for that year; *Levene* v. F *Commissioners of Inland Revenue*[2] 13 TC 486; *Elmhurst* v. *Commissioners of Inland Revenue*[3] 21 TC 381; in that case Lawrence J. said that residence for 7 months rendered the taxpayer resident "for that year", which illustrates the usage of "*for*" for which the Revenue contends; *Lord Inchiquin* v. *Commissioners of Inland Revenue* 31 TC 125; and *Miesegaes* v. *Commissioners of Inland Revenue* 37 TC 493. It is also submitted that the cases of G *Neuburgh*[4] and *Mitchell*[5] are some slight support for the Revenue's construction, rather than the taxpayer's.

(8) The income tax policy behind s 42 of the 1970 Act is that there should be no aggregation of the spouses' incomes where one spouse is a taxable person and the other is not. It is an exception to the normal rule that their incomes should be aggregated, justified on the basis that they are geographi- H cally separated.

(9) The Revenue contend that the requirement that the wife should be "living with her husband" applies where the husband is the disponor as well as

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(1) [1932] 1 KB 747. (2) [1928] AC 217. (3) [1937] 2 KB 551.
(4) 52 TC 79. (5) 33 TC 53.

where the wife is the disponor. That is the only proper grammatical construction of the words used in para 20(1). The words following the word "If" in para 20 are the criteria which have to be satisfied for the paragraph to apply. If Mr. Holroyd Pearce's construction is right, and the words in parenthesis apply only to cases where the wife is the disponor, you should be able to omit them when applying the paragraph to the case of a husband who disposes of an asset to his wife; but then it does not make sense. It would read: "If, in any year of assessment, ... the man disposes of an asset to the wife..." these questions would arise: What man? What wife? The word "and" immediately before the words "in the case of a woman" merely conjoins the two conditions.

6. Mr. Holroyd Pearce made the following further submissions in reply to the Revenue's case:—

(10) Section 34 of the Finance Act 1950 (the predecessor of s 42 of the 1970 Act) was a clearing-up operation after the *Nugent-Head*(1) decision; it was designed to make matters clear. If the draftsman had meant s 42(2)(*a*) to apply to a spouse who was resident for only part of a year, he would have said "resident in" as in the special charge legislation which was under discussion in the *Neuburgh*(2) case.

(11) The issue here depends upon analysis of the precise words of s 42. Any other cases decided on different words must be viewed in the light of the language of the legislation under discussion in those cases.

(12) It is common ground that a person is chargeable to income tax for a year of assessment if he is resident for part, but there is no authority for the proposition that a person is resident for the whole year if he is chargeable to income tax for that year.

(13) The word "throughout" is used in s 42(2) to make it clear that there is deemed to be a separation which does not in fact exist. It is submitted that "resident for" is clear; it is as clear as the statement: "I sentence you to imprisonment for 12 months".

(14) Mr. Ridd submits that "year of assessment" is an indivisible concept. In answer to that, it is submitted that whether it is an indivisible concept depends upon the context. In relation to the charge to income tax it is, (see s 2 of the 1970 Act). But in the case of residence it is not indivisible; for example s 30 of the Finance Act 1950 (now s 37 of the 1970 Act) splits up the year of assessment; see also s 20(1) of the Finance Act 1965.

(15) As far as the avoidance aspect is concerned, it is submitted that this case is nothing to do with avoidance. To become non-resident you have to break the factual nexus; that involves emigration permanently. Avoidance could only arise in a split year. The biggest avoidance is the Revenue concession, namely letting off those who dispose after the date upon which they emigrated. Although concessions cannot be used to construe statutory language, the existence of the concession can be taken into account when considering whether precluding tax avoidance is the purpose behind incorporating s 42 of the 1970 Act into the capital gains tax legislation.

(1) 30 TC 83. (2) 52 TC 79.

(16) Turning to the cases relied upon by Mr. Ridd: *Lloyd* v. *Sulley*[1], *Back* v. *Whitlock*[2], and *Levene* v. *Commissioners of Inland Revenue*[3] merely establish that residence for part of a year makes one chargeable to income tax for the whole year. That is not disputed, (see submission (11) above). In the *Elmhurst*[4] case Lawrence J. at page 386 uses different phrases: he uses "during" which can mean either "in" or "throughout" and he also says "in", which is correct. At page 387 he does use the expression ordinarily resident in the United Kingdom "for that year", but it is clear what the judge meant. In the *Inchiquin*[5] case the taxpayer had to prove that he was not resident "for the year of assessment". It is submitted that he would have to prove that he was not resident for the whole year. In the *Miesegaes*[6] case the Special Commissioners in paras 1, 4, 7 and 8 of their Stated Case correctly refer to "resident in the United Kingdom". In para 9 of that Stated Case, there is a slide from 'in" to "for", but it is clear from the context what the Special Commissioners really meant. Chance usage should not be erected into a fundamental principle. In the *Mitchell*[7] case the Court of Session made it clear that they did not agree with the Special Commissioners' construction of the second half of the subsection under discussion in that case.

(17) As regards the construction of para 20 of Sch 7, it is submitted that there are not two conditions, but only one and that the phrase "and in the case of a woman who..." is an extra element which applies only where the wife is the disponor.

Decision of questions of law

7. There are no disputed facts in this case; all the matters for our determination are questions of law. The following propositions of law are common ground between the parties to these proceedings:—

(*a*) Since Mr. Gubay was resident in the United Kingdom for part of 1972–73, he is within the territorial scope of the charge to capital gains tax for that year by virtue of s 20(1).

(*b*) Since the disposal of the shares by Mr. Gubay to Mrs. Gubay was a gift, the consideration for that disposal is deemed, for capital gains tax purposes, to be the market value of those shares at the date of the disposal, (see s 22(4)(*a*)), *unless* para 20 of Sch 7 applies.

(*c*) If subs (1) of s 42 of the 1970 Act stood by itself, Mrs. Gubay would have been "living with her husband" (in the statutory sense) in 1972–73.

(*d*) A person who is resident in the United Kingdom for part of a year of assessment is liable to income tax on all the income which accrues to him in that year; i.e. if a person is resident for part of a year of assessment he is chargeable to income tax for the whole of that year.

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(1) 2 TC 37. (2) 16 TC 723; [1932] 1 KB 747. (3) 13 TC 486; [1928] AC 217.
(4) 20 TC 381; [1926] 1 KB 487. (5) 31 TC 125. (6) 37 TC 493.
(7) 33 TC 53.

(*e*) Section 34 of the Finance Act 1950 (the predecessor of s 42 of the 1970 Act) was passed as a result of the decision of the House of Lords in *Nugent- Head* v. *Jacob* 30 TC 83.

8. That leaves two issues to be decided: (1) in cases where the husband is the person making the disposal, does para 20(1) of Sch 7 apply even if the wife is *not* "living with her husband" in the relevant sense? (2) If it is held that the requirement that the wife should be "living with her husband" applies to disposals by husbands as well as disposals by wives, was Mrs. Gubay "living with her husband" in the statutory sense in 1972–73? That second issue turns on the construction of s 42(2)(*a*). Thus, the Inland Revenue can only succeed in this case, if they win on both issue (1) and issue (2). We shall consider then in that order.

9. Our conclusion on the construction of para 20(1) of Sch 7 is that the requirement that the wife must be "living with her husband" (in the income tax sense) applies to all disposals made by one spouse to the other spouse, whether the disposal is made by the husband or by the wife. The following are our reasons for arriving at that conclusion. Although the language of para 20(1) is somewhat clumsy and inelegant, it seems to us that the whole conditional clause (i.e. the words "If, in any year of assessment... the wife disposes of an asset to the man") set out the criteria which have to be satisfied if the benefit of para 20 is to be obtained. Those criteria are: (i) there must be a disposal by a husband to his wife, or *vice versa*; (ii) the disposal must occur in a year of assessment; and (iii) the wife must be "living with her husband" (in the statutory sense) in that year of assessment. We consider that there is force in Mr. Ridd's submission that, if the words "a married woman living with her husband" apply only where the wife is the disponor, it should be possible to read and apply para 20(1) to a case where the husband is the disponor omitting entirely the words "and in the case of a woman" down to "living with her husband". As he pointed out, if one does that, the paragraph does not make sense. It would read "If, in any year of assessment the man disposes of an asset to the wife"; that would give rise to the unanswerable question: "What man?" In our opinion, the highest that the case for the taxpayer can be put is to say that the paragraph is ambiguous. We have reached the conclusion that it is not ambiguous and have adopted the construction set out above. If, however, it is ambiguous, we still prefer the interpretation contended for by the Inland Revenue, because that produces a more sensible result. In our judgment, in the absence of very clear words to the contrary, it cannot be supposed to have been Parliament's intention that the relief in para 20 should apply to all disposals by husbands, but only to some disposals by wives. We hold that para 20 will only apply to the disposal of the shares made by Mr. Gubay in this case if Mrs. Gubay was "living with her husband" in 1972–73.

10. In order to determine whether Mrs. Gubay was "living with her husband" we have to construe and apply s 42 of the 1970 Act. The point at issue between the parties concerns the construction of s 42(2)(*a*). The provisions which are now in s 42 were first enacted by the Finance Act 1950, s 34. In 1952 the statute law relating to income tax was consolidated in the Income Tax Act 1952. In that consolidating act s 34 of the Finance Act 1950 was re-enacted as s 361 of the Income Tax Act 1952. The 1970 Act was also a consolidating act and s 42 of the 1970 Act was a re-enactment of s 361 of the Income Tax Act 1952. The wording of what is now s 42(2)(*a*) has remained exactly the same throughout. There have been changes of phraseology in other parts of what is now s 42, but these are minor and wholly immaterial to the question of construction which arises in this case. Thus what is now s 42 was

originally enacted in 1950 as part of the income tax code, and it was not until 1965 that it was incorporated into the, then new, capital gains tax legislation. As we indicated in the course of argument, it seems to us that what is now s 42 of the 1970 Act must be construed in its income tax context. Having considered the matter further, we adhere to that view, because the provisions concerned were originally enacted as part of the income tax code in 1950 (when capital gains tax did not exist) and, in our opinion, the meaning of those provisions cannot change when, 15 years later, they are incorporated by reference into the capital gains tax legislation. Accordingly, we hold that, in construing s 42(2)(*a*), we should consider not what interpretation would produce sensible results for capital gains tax purposes, but what would produce sensible results for income tax purposes.

11. It is accepted by the parties to this appeal that the words in s 42(2)(*a*) are capable of either construction. The word "for" in para (*a*) could mean, either "in respect of" a year of assessment or "for the duration of" a year of assessment. There is no authority on the construction of this part of s 42 and, in our view, no assistance can be derived from any of the cases to which we were referred in argument. It is a question of construing s 42(2) and we have found the arguments finely balanced. Indeed we have wavered both in the course of hearing argument and in the course of arriving at our decision.

Having considered the matter very carefully, we have reached the conclusion that the construction contended for by the Inland Revenue is to be preferred. We hold that "resident in the United Kingdom for a year of assessment" in subs (2)(*a*) of s 42 means "resident in the United Kingdom in respect of a year of assessment". We further hold that a person is resident in the United Kingdom in respect of a year of assessment, if, by reason of residence (whether for the whole or part of that year) he is chargeable to income tax on the income which accrues to him in that year of assessment. Putting the matter another way, our opinion is that the words "resident in the United Kingdom *for* a year of assessment" denote a spouse who is "a person residing *in* the United Kingdom" within the meaning of the various income tax charging sections. The following are our reasons for arriving at that conclusion.

First, in our view, the use of the word "throughout" in the rest of s 42(2) is an indication that the word "for" in subs (2)(*a*) means "in respect of" rather than "throughout" or "for the duration of". Mr. Holroyd Pearce sought to meet that point by contending that the word "throughout" is used to make it clear that the deemed separation is treated as existing during the whole year of assessment concerned. That may be true of the use of the word "throughout" in the body of s 42(2) immediately before the proviso, but that argument does not apply to the use of the word "throughout" in para (*b*) of subs (2). In para (*b*) "throughout" is used to describe an *actual* physical absence from the United Kingdom for the whole of a year of assessment. If para (*a*) was intended to have the meaning for which Mr. Holroyd Pearce contends, why did the draftsman not use the word "throughout" in that paragraph also?

In answer to that point, Mr. Holroyd Pearce said that it is fundamental to his submissions that residing "for" means "for a period" and that the factual nexus must exist throughout that period. In our opinion, that is true, if "for" means "for the duration of". If, however, "for a year of assessment" means "in respect of a year of assessment", then it is perfectly feasible to say that the expression "resident in respect of a year of assessment" includes anyone who,

A by reason of residence in the United Kingdom, is chargeable to tax on the income accruing to him in that year of assessment.

Secondly, Mr. Holroyd Pearce's submissions involved saying that, although Mr. Gubay was admittedly "a person residing *in* the United Kingdom" in 1972–73 and chargeable to income tax for that year accordingly, nevertheless he was not resident in the United Kingdom "*for* that year of B assessment". It seems to us unlikely that Parliament intended such a result. In our view, the suggested distinction between being "a person residing *in* the United Kingdom" and being "resident in the United Kingdom *for* a year of assessment" is excessively refined.

Thirdly, we are of the opinion that the construction of s 42(2)(*a*) advocated by Mr. Holroyd Pearce would not produce sensible results as far as C the application of the income tax code is concerned. If Mr. Holroyd Pearce's construction of para (*a*) of s 42(2) is correct, any income which a wife in Mrs. Gubay's position had from United Kingdom sources(1) in 1972–73 would have been aggregated with the income of her husband and taxed accordingly. That seems to us to be a surprising result and one which is unlikely to have been intended. We would add that the proviso to s 42(2) would not provide any D relief, because, on Mr. Holroyd Pearce's interpretation Mrs. Gubay was "living with her husband" in 1972–73 by virtue of subs (1) of s 42 and subs (2) would be inapplicable. The principal significance, for income tax purposes, of a woman being "a married woman living with her husband" is that her income is aggregated with his for income tax purposes, (see s 37 of the 1970 Act). In our judgment, the only sensible reason one can deduce for enacting s 42(2) is E that it was felt that, where one spouse was (by reason of residence) within the territorial scope of the charge to income tax, but the other spouse was either non-resident or physically absent for the whole year of assessment concerned, aggregation of their incomes would be inappropriate. That supports Mr. Ridd's interpretation of s 42(2). Thus, we hold that Mrs. Gubay was not "living with her husband" in 1972–73.

F Conclusion

12. Accordingly, our judgment is that the appeal fails. The agreed statement of facts contains agreed figures in the alternative, (see para 3(7) above). We determine the assessment by reducing it to the agreed figure of £1,399,965.

J.D.R. Adams
G B. James } Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
94–99 High Holborn
London WC1V 6LQ

18 August 1980

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(1) As we understand it, no matter which way s 42(2) is interpreted, any income which a wife in Mrs. Gubay's position had from foreign sources would by virtue of the proviso to s 37(1) of the 1970 Act, escape aggregation and, being foreign source income of a non-resident, it would not be taxable in her hands either.

The case was heard in the Chancery Division before Vinelott J. on 26 and 29 June 1981 when judgment was reserved. On 6 July 1981 judgment was given in favour of the Crown, with costs. A

J. Holroyd Pearce Q.C. and *R. Venables* for the taxpayer.

Robert Carnwarth for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:— *Back* v. *Whitlock* 16 TC 723; *Mitchell* v. *Commissioners of Inland Revenue* 33 TC 53; *Neubergh* v. *Commissioners of Inland Revenue* 52 TC 79; *Heasman* v. *Jordan* 35 TC 518; *Lloyd* v. *Sulley* 2 TC 37. B

Vinelott J.—This appeal raises a short but interesting question as to the construction and effect of para 20 of Sch 7 to the Finance Act 1965. Until 4 April 1972, the appellant taxpayer, Mr. Albert Gubay, and his wife lived C together in a house in Flintshire. On 4 April 1972, Mrs. Gubay left the United Kingdom and took up residence at a house called "Glenhaven" in the Isle of Man. She and her husband were not separated. He remained in the United Kingdom for a short period, no doubt to tidy up his business and other affairs. Between 4 April 1972 and 28 October of that year, Mr. Gubay visited his wife and lived with her at "Glenhaven" for most weekends and bank holidays save D that between 17 and 26 June and between 26 August and 4 September when he visited New Zealand. On 28 October 1972, Mr. Gubay left the United Kingdom. He went first to the United States of America and then on to New Zealand, where he arrived on 4 November. Mrs. Gubay went direct from the Isle of Man to New Zealand, where she also arrived on 4 November. She returned to the Isle of Man on 2 December, and he followed a few days later, E arriving on 6 December. They stayed together in the Isle of Man until 13 December, when they travelled together to New Zealand. They stayed in New Zealand until 3 May 1973, when they returned to the Isle of Man. As I have said, while in the Isle of Man they lived together at "Glenhaven": while in New Zealand they lived together at a house which Mr. Gubay had bought in 1971. They continuted to live together in the Isle of Man and New Zealand F during the following fiscal year; that is, the year 1973–74. Thus, from 4 April 1972, in the case of Mrs. Gubay, and from 28 October 1972, in the case of Mr. Gubay, she or he as the case may be was neither resident nor ordinarily resident in the United Kingdom. On 7 July 1972, Mr. Gubay transferred 479,638 shares of a comapny called Kwik Save Discount Group Ltd. to Mrs. Gubay by way of gift. That was, of course, a disposal for capital gains tax G purposes, and tax is payable on the difference between the market value of the shares on 6 April 1965, and their market value at the date of the gift unless the gift falls within the terms of para 20(1) of Sch 7. Tax is payable on that gain (unless the gift falls within para 20(1)) because under s 20(1) of the 1965 Act capital gains tax is chargeable in respect of chargeable gains accruing to a person "in a year of assessment during any part of which he is resident in the H United Kingdom, or during which he is ordinarily resident in the United Kingdom", and Mr. Gubay was resident in the United Kingdom for part of the year of assessment in question.

Paragraph 20(1) reads as follows:

> "If in any year of assessment, and in the case of a woman who in that year of assessment is a married woman living with her husband, the man I disposes of an asset to the wife, or the wife disposes of an asset to the

A man, both shall be treated as if the asset was acquired from the one making the disposal for a consideration of such amount as would secure that on the disposal neither a gain or a loss would accrue to the one making the disposal"

Section 45(3) of the 1965 Act provides: "References in this Part of this Act to a married woman living with her husband should be construed in accordance B with section 361(1)(2) of the Income Tax Act 1952." Section 361 has been replaced by s 42 of the Income and Corporation Taxes Act 1970. Subsections (1) and (2) of that section read as follows:

"(1) A married woman shall be treated for income tax purposes as living with her husband unless—(*a*) they are separated under an order of a court of competent jurisdicition, or by deed of separation, or (*b*) they are C in fact separated in such circumstances that the separation is likely to be permanent. (2) Where a married woman is living with her husband and either—(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment, or (*b*) both of them are resident in the United Kingdom for a year of assessment, but one of them is, and one of them is not, absent from the United Kingdom throughout that year, the D same consequences shall follow for income tax purposes as would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent."

There follows a proviso under which, in effect, if separate assessments would result in an increase in the aggregate amount of the tax payable by both E spouses (because, for instance, the husband does not get the full married man's allowance) relief is to be given by reduction of the assessments or by repayment.

The first point taken on behalf of Mr. Gubay is that the words "and in the case of a woman who in that year of assessment is living with her husband" impose a condition which governs the application of the sub-paragraph to a F disposal of an asset by a wife to her husband and that where, as here, the disposal is by the husband to the wife it is irrelevant to inquire whether they were or were not living together within the meaning of s 42 of the 1970 Act. The argument advanced is that as para 20(1) starts with the word "If" it is natural to read it as prescribing conditions which must be satisfied if the paragraph is to apply, that the use of the word "and" which introduces the G words "in the case of a woman who in that year of assessment is a married woman living with her husband" shows that the words I have just cited are an additional condition which must be satisfied as well as some other condition, and that that other condition can only be the condition embodied in the words "the wife disposes of an asset to the man", since both identify the wife (or woman) as the subject of the condition. Despite Mr. Holroyd Pearce's H tenacious and subtle advocacy, I find this an impossible construction. If it had been intended that the words "and in the case of a woman who in that year of assessment is a married woman living with her husband" should operate as a condition which has to be satisfied only in the case of a disposal by a wife to her husband, the draftsman would, I think, have put those words (deleting the opening word "and") after the word "or" and before the words "the wife I disposes of an asset to the man". Placed where they are, those words are, I think, apt and intended to impose a condition applicable to a gift by a husband to his wife or by a wife to her husband. No doubt that intention could have been more clearly expressed by using the words "and in the case of spouses

who in that year of assessment are living together". But the reason why the draftsman chose another and clumsier formulation is to my mind plain: by doing so he was able to adopt directly and without modification the elaborate provisions in what was then s 361 of the 1952 Income Tax Act. That seems to me at the very least a possible construction of para 20(1), and if it is a possible construction it should, I think, plainly be preferred to a construction which produces the anomaly that a gift by a husband to a wife is, and a gift by a wife to a husband is not within the exception if in the year of assessment in which the gift was made they were not living together.

The more substantial question is whether under s 42 of the 1970 Act Mr. and Mrs. Gubay, who were in fact living together in the ordinary sense of those words during the whole of the fiscal year 1972–73 must be treated for fiscal purposes as if they were living apart. Paragraphs (*a*) and (*b*) of s 42(1) and para (*b*) of subs (2) clearly do not apply. Thus, Mr. and Mrs. Gubay must be treated as living together unless para (*a*) of subs (2) applies; that is, unless one of them was and one of them was not "resident in the United Kingdom *for*" the year of assessment 1972–73. Mrs. Gubay was not resident in the United Kingdom for the year of assessment 1972–73 whatever meaning is attributed to those words. The question therefore is whether Mr. Gubay was so resident.

Mr. Holroyd Pearce's submission is that in the context of the expression "resident in the United Kingdom for a year of assessment" the word "for" is used in the sense of "during" or "for the duration of"—that is, is used in the sense in which the word is used by, for example, a judge who sentences an offender to prison for a year or for a term of a year—and that para (*a*) is satisfied only if one of a husband and wife is and the other is not resident in the United Kingdom during the whole of a year of assessment. The phrase "resident for a year of assessment" is not one commonly used in fiscal legislation. The expressions "charged for" or "chargeable for" a year of assessment are, of course, frequently so used: see, for instance, s 1 of the 1970 Income and Corporation Taxes Act, which refers to any Act which enacts "that income tax shall be charged for any year", and s 2(2) which provides that every assessment and charge to income tax shall be made for a year commencing on 6 April. There, the word "for" is clearly used in the sense of "in respect of". Counsel's researches have discovered only two relevant contexts apart from s 42 in which the expression "resident for" is used. The first is s 502 of the Income and Corporation Taxes Act 1970, which is part of a group of sections governing relief from double taxation by way of credit and which disallows a credit "for any chargeable period" unless the person chargeable to United Kingdom tax is "resident in the United Kingdom for that period". The second is Sch 2 to the Finance Act 1926, which sets out the terms of the first double taxation agreement between the British Government and the Irish Free State. Paragraph 1(*a*) of that agreement gave exemption to a person who could prove that "for any year of assessment he is resident in the Irish Free State and is not resident in Great Britain or Northern Ireland". The terms of that paragraph were considered by the Court of Appeal in *Lord Inchiquin* v. *Commissioners of Inland Revenue* 31 TC 125. I shall return to these contexts and to that decision later in this judgment. Mr. Holroyd Pearce's starting point is that the construction of s 42 gives rise (in the words of Lord Wilberforce in *Farrell* v. *Alexander* [1977] AC 59 at page 73) to "a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve", and that it is accordingly permissible and necessary in order to resolve that ambiguity to look at the legislative history of s 42 and to the anomaly which that section, or the group of sections of which it is part, was

originally designed to remove. The legislative predecessor of s 42—and of the sections which are now in Chapter IV of the Income and Corporation Taxes Act—is of course to be found in the Income Tax Act 1952 (where s 42 appeared as s 361). That Act, like the 1970 Act, was a consolidating Act. The legislation consolidated in 1952 included ss 30 to 34 of the Finance Act 1950. Section 361 of the 1952 re-enacted s 34 of the 1950 Act. During the course of these successive consolidations there have been some additions to the code now contained in Chapter IV of Part I of the Taxes Act (which were introduced between 1952 and 1970) but the language of the principal provisions and in particular of s 42 has not been materially altered.

It is common ground that s 34 of the 1950 Act and its allied sections were passed as a result of the decision of the House of Lords in *Nugent-Head* v. *Jacob*[1] 30 TC 83, which threw into sharp relief the anomalous effect of earlier fiscal legislation stemming from the Income Tax Act of 1805, when the social and economic position of women was very different from what it was in 1947. In that case a wife entitled to trust income arising in the United States of America was assessed to tax on income remitted to her in the United Kingdom. Under the legislation then in force she was assessable to tax on the remitted income only if she was a married woman living separate from her husband and not if she was living with her husband. In fact, although she and her husband were happily married he went on active service overseas in November 1941 and was still abroad when an appeal by the wife (who had been assessed on the footing that she was living separate from her husband) was heard by the Commissioners on 20 September 1944. The House of Lords held that she was not a married woman living separate from her husband. Following that decision a new code governing the circumstances in which a married woman is to be separately assessed and in which tax assessed on the husband can be recovered from his wife was included in the Finance Act 1950.

The starting point of Mr. Holroyd Pearce's argument is that the basic principle embodied in that code is that (subject to specific exceptions, allowing, for instance, a husband or a wife to elect for separate assessments) as under the earlier legislation the income of a married woman who is living with her husband is taxable as her husband's income and he is assessable to tax on it. Section 42(1) starts by prescribing a general rule that a married woman is to be treated as living with her husband and then sets out special circumstances in which she is to be treated as not living with her husband. Under paras (*a*) and (*b*) they are not to be treated as living together if "(*a*) they are separated under an order of a court... or by deed of separation, or (*b*) they are in fact separated in such circumstances that the separation is likely to be permanent". Subsection (2) then equates the position of spouses where

> "(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment, or (*b*) both of them are resident in the United Kingdom for a year of assessment, but one of them is, and one of them is not, absent from the United Kingdom throughout that year"

with the situation where "throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent". Mr. Holroyd Pearce's argument is that looked at in the context of s 42 as a whole and having regard to its historical antecedents it is clear that the draftsman intended to deal in subs (2) with cases where there is a real

(1) [1948] AC 321.

geographical separation between the spouses for the duration of a year of assessment and not a mere notional fiscal separation arising from the circumstance that one does and the other does not fall to be treated as resident in the United Kingdom in respect of a year of assessment. He submitted that the concept embodied in subs (2) is of an enduring geographical separation such that the spouses would be regarded by ordinary well-informed citizens as having been separated, albeit against their wishes, in circumstances having some degree of permanence (as happened in *Nugent-Head* v. *Jacob*[1]). He stressed that in para (*b*) the absence which results in spouses being treated as if they were separated in such circumstances that the separation was likely to be permanent must endure throughout the year, and submitted that the words "resident... for a year" were intended to convey the corresponding sense of residence which was a continuing attribute during the year albeit that the praepositus might not be physically present in the jurisdiction where he was resident throughout the year. Mr. Holroyd Pearce also referred me to the side-note to s 34 of the 1950 Finance Act, which read, "Construction of references to married women living with their husbands, and special provisions as to certain spouses geographically separated", which he submitted reinforces the view that para (*a*) is directed to cases where there is real geographical separation throughout a year of assessment. He relied upon the observations of Lord Upjohn in *Regina* v. *Schildkamp* [1971] AC 1, as authority for the proposition that a side-note can be resorted to in order to resolve uncertainty as to the meaning of a statute. At page 28, Lord Upjohn said:

> "In *Chandler* v. *Director of Public Prosecutions* [1964] AC 763 at page 789, Lord Reid said the marginal or side-note to a statute affords no guidance to the construction of a statute and I believe that to be a sound working general rule. A side-note is a very brief precis of the section and therefore forms a most unsure guide to the construction of the enacting section, but it is as much a part of the Bill as a cross-heading and I can conceive of cases where very rarely it might throw some light on the intentions of Parliament just as a punctuation mark."

I feel considerable doubt whether it is permissible to look at the side-note to a section of a statute which has subsequently been repeated in a consolidating statute in which the same side-note is note reproduced. The side-note to s 42 says simply, "Construction of references to married women living with their husbands, etc.". Reference to the side-note to the repealed section could throw at best only an indirect light on the meaning of the corresponding section of the consolidating statute. But even if resort to the side-note is permissible the reference to "special provisions as to certain spouses geographically separated" does not, I think, throw any clear light on the question whether in subs (2)(*a*) the draftsman had in mind cases where spouses are resident in different jurisdictions continuously during the whole of a year of assessment or cases where they fall to be treated as resident one within and one without the United Kingdom in respect of a year of assessment. Mr. Holroyd Pearce's main argument is a formidable one. It is, I think, clear that the word "for" when it precedes a word denoting a period normally means "during". In the full Oxford English Dictionary the primary meaning of "for" when used to mark duration or extension is given as, "marking actual duration: during, throughout". But it does not, I think, follow that in the context of s 42(2)(*a*) the words "resident in the United Kingdom for a year of assessment" can be satisfied only if the quality of being resident in the United Kingdom can be attributed to one of two spouses continuously during every part of the year of

(1) 30 TC 83.

A assessment. The words "resident in the United Kingdom for a year of assessment" are frequently used by judges and text-book writers to describe the situation of a taxpayer who, because he was resident in the United Kingdom for part of a year of assessment, is assessable to tax from all sources arising during that year of assessment. In effect, the words "resident in the United Kingdom for a year of assessment" are used to predicate of the B taxpayer that he had the status or quality of being a resident in the United Kingdom for tax purposes during the year of assessment. For instance, in *Elmhirst* v. *Commissioners of Inland Revenue*(1) 21 TC 381, Lawrence J. after referring to a contention that although the taxpayer "resided for seven months of that year in the United Kingdom" she was not ordinarily so resident, went on to say:

C > "I find myself unable... to say that the Commissioners were not entitled to find that Mrs. Elmhirst's residence for seven months during that year rendered her ordinarily resident in the United Kingdom for that year."

Mr. Carnwath also referred me to Whiteman and Wheatcroft on Income Tax (2nd edn). In the paragraphs dealing with the residence of an individual D the authors state (in para 2.02): "The question whether an individual is or is not resident *in* a particular year of assessment is a question of degree and therefore of fact". They continue (in para 2.03): "The determination of an individual's residence must be made *for* each relevant year of assessment". But the clearest use of the phrase "resident for a year of assessment" in this sense is, I think, to be found in Vol 23, 4th edn, page 632 of Halsbury's Laws E of England. The authors observe in the body of the text:

> "Residence is an important factor in determining liability to income tax, inasmuch as a resident in the United Kingdom is assessable in respect of income arising from all sources (whether the source is situated in the United Kingdom or abroad), where as a non-resident is generally assessable only in respect of income arising from sources in the United F Kingdom."

In a foot-note to the text they add:

> "No provision is made for splitting a tax year in relation to residence, and an individual who is *resident in the United Kingdom for a year of assessment* is chargeable on the basis that he is resident for the whole year."

G The words which I have stressed are, of course, the precise words which appear in s 42(2)(*a*). Mr. Holroyd Pearce pointed out that these are all non-statutory contexts and that in the Taxes Act and in other fiscal legislation where the draftsman wishes to refer to the situation of a taxpayer who is liable to United Kingdom tax as a resident in the United Kingdom in respect of a year of assessment he uses the expression "residing in the United Kingdom in the year H of assessment", or simply "residing in the United Kingdom", and not the expression "resident in the United Kingdom for a year of assessment". I do not think that comparisons of the different phraseology used in different sections of the Taxes Act affords any real assistance in construing s 42(2)(*a*). To my mind, in the context of a fiscal statute the expression "resident in the United Kingdom for a year of assessment" is a quite natural way of describing

(1) [1937] 2 KB 551.

a person who has the status or quality for the purposes of liability to tax of being so resident for the year of assessment. If the draftsman had intended by those words to describe only a person of whom it could be said that he possessed the quality of being resident in the United Kingdom continuously for a year of assessment, I think he would have made his meaning clear by using the phrase "throughout a year of assessment", as he did in relation to absence in para (*b*). A B

Further, consideration of the context and historical antecedents of s 42 to my mind militates if anything against the construction contended for by Mr. Holroyd Pearce. It must be borne in mind that the main purpose of s 42 is to provide a rule to determine whether a husband can be assessed to tax in respect of his wife's income. The proviso to subs (2) makes it clear that a notional separation under subs (2) is not to increase the aggregate amount of the tax chargeable on the income of both husband and wife. It seems to me quite natural in the context of a provision of this limited scope for the draftsman to have adopted as a criterion or test whether the spouses separately considered, fell to be treated in accordance with ordinary principles in the case of one as resident and in the case of the other as non-resident for the purposes of United Kingdom tax. That very question would normally have to be considered in any event in order to ascertain the extent of the income of each spouse chargeable to United Kingdom tax. Of course, the application of that test to the exception in para 20(1) may result in a husband and wife falling outside the exception even though (an example given by Mr. Holroyd Pearce) the wife left on 4 April in one year, the husband followed on 7 April of that same year and made a gift to his wife on 4 April of the following year, notwithstanding that during the whole period they were living together and after 7 April were living together continuously outside the United Kingdom. But that unfairness, if unfairness it be, results from the adaptation to the capital gains tax of a rule designed for a more limited purpose and throws no light on the construction of the rule. C D E

It remains to consider the two contexts in which the same expression "resident in the United Kingdom for" a period has been used in other fiscal contexts. The opening words of s 502 are: F

> "Credit shall not be allowed under any arrangements against any of the United Kingdom taxes for any chargeable period unless the person in respect of whose income the United Kingdom tax is chargeable is resident in the United Kingdom for that period." G

Mr. Holroyd Pearce submitted that in s 502 the words "resident in the United Kingdom for that period" are similarly satisfied only in the case of a person who is resident in the United Kingdom continuously throughout the relevant period. Mr. Carnwath submitted that as in s 42 the draftsman is describing a person whose income is chargeable to United Kingdom tax as a person who falls to be treated as a United Kingdom resident for or in respect of the period in question. As that construction enlarges the scope of double taxation relief it is unlikely that it will ever be challenged. There appears to me to be nothing in s 502 which points clearly in favour of the one rather than the other construction, and I say no more about it. H

I have already set out the terms of para 1(*a*) of Sch 2 to the Finance Act 1926. The question in *Lord Inchiquin* v. *Commissioners of Inland Revenue*[1] was whether for the years of assessment 1940–41 and 1941–42 Lord Inchiquin I

(1) 31 TC 125.

A was not resident in Great Britain or Northern Ireland. It was conceded by the Crown that he was resident during those years in the Irish Free State. The facts and the issues argued on appeal from the Special Commissioners are succinctly summarised by Singleton J. at page 130 of the report, where he said:

> "Now Lord Inchiquin sought and seeks exemption from British Income Tax for the years 1940–41 and 1941–42. He is the sixteenth
B holder of the peerage, and the ancestral home of the family is Dromoland Castle, County Clare, in Eire. He succeeded to the title and the estates on the death of his father in 1929. He had lived for some years before that and did live for some years afterwards in England. He married in the year 1921 and he lived in England and nowhere else up to the outbreak of war in 1939. He had two children, and he and his wife and children on the
C outbreak of war were living in a flat, 119 George Street, W.1. He had been in the regular army and was on the reserve of officers, and in due course he was called up for service. He gave up his flat and thenceforwad he moved about from one place to another. He had no house at which he lived regularly. Sometimes he lived in clubs, sometimes in camps, as was necessary for the performance of his military duties, and Lady Inchiquin
D and the children for some time followed him about to various places in which he had to live. On 5th June, 1940, his mother died. She was living at Dromoland Castle and there were circumstances arising which made it desirable that he should, when he could, go to live there in order to look after the estate and, in particular, to avoid being called an absentee landlord. It was desirable that he should go, and he intended so to do
E when he could, but in fact his military duties occupied him and he was not relieved of those for any length of time until January, 1942, when he was granted a release for two months. He then went to the Castle in County Clare and remained there for that leave, and a little later he was granted indefinite release and he went to live there. Prior to that time, namely, on 12 August, 1941, Lady Inchiquin had gone to live at Dromoland Castle
F permanently. In those circumstances it was contended on his behalf that he was not resident in Great Britain or Northern Ireland in either of those years, and the submission of Mr. Mustoe was that he had no house in Great Britain or Northern Ireland, that most of the time he was moving about, and the only reason he was there was because his military duties kept him there."

G I should add that it appears from the Case Stated that it was conceded by Lord Inchiquin that he remained resident in England up to 5 June 1940, and it was also found by the Commissioners that he returned to Dromoland Castle on 1 April 1942 "and thereafter remained in Eire continuously". The argument was largely directed to the question whether a man who was here only as a result of the exigencies of military service could be said as a result of his enforced
H presence to be resident here. Singleton J. said at page 131[1]:

> "I was told that both years were treated as the same for all purposes at the hearing before the Special Commissioners. I would only add that it might have been possible for the Special Commissioners to have seen a difference between the two years, because of the finding that Lady Inchiquin went to live permanently in Dromoland Castle on 12 August,
I 1941, that is, in the second of the two years with which the case deals. If they had no home in this country and if she went to reside permanently there, with his approval and his desire, and he went whenever his leave

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[1] 31 TC 125.

permitted him and went finally as soon as he could, there was, I think, some evidence on which the Commissioners might have found other than in the way they did find". A

In the Court of Appeal the argument again seems mainly to have been directed to whether Lord Inchiquin's physical presence here as a result of military service amounted to residence here. Tucker L.J. said at page 133:

"It is said that there is nothing in the facts, except the physical presence of Lord Inchiquin in this country during the years in question, and that physical presence is not in itself sufficient, and it is contended that the Case, on a proper reading of it, involves a finding that his presence here was involuntary and compulsory, in the sense that he, being a soldier, was not a free agent to give effect to the intention which he had formed in 1929 of going permanently to Dromoland Castle as his only place of residence when his mother died." B C

Then, after referring to *Levene* v. *Commissioners of Inland Revenue*(1) [1928] AC 217, and *Lysaght* v. *Commissioners of Inland Revenue*(2) [1928] AC 234, he said at page 134(3):

"... it appears to me that unless it can be shown (in the words of Lord Buckmaster) that the conditions under which he was staying in this country were such that it could not be regarded as constituting residence, it is impossible to upset the finding of the Commissioners. For myself I do not think it is possible to show that. Although there is a finding that long before the war Lord Inchiquin had formed the intention of going to Dromoland Castle when his mother died and although he was in a sense prevented by reason of his service in the army from putting that into effect, I cannot find in this case a specific finding that, but for his being subject to military law, he would, in fact , war or no war, have gone to Dromoland Castle." D E

He concluded:

"... I am quite unable to say that where you find a man has at all times before the war been resident in this country and you find him continuing to serve in this country in His Majesty's Forces during the war, the mere fact that he had, before the outbreak of war, formed the intention of going to live elsewhere makes it impossible to say, as the Commissioners have found, that he was resident in this country during the period of his military service." F

Mr. Carnwath submitted that this case impliedly supports the Crown's construction of the words "resident in the United Kingdom for a year of assessment" in that, the Special Commissioners having found that Lord Inchiquin left the United Kingdom on 1 April 1942, and thereafter remained in Eire continuously, it could not be said that he was resident in Great Britain or Northern Ireland for the year of assessment 1941–42 (as the Commissioners found) if those words are construed in the sense contended for by Mr. Holroyd Pearce. But the question before the Commissioners was not whether Lord Inchiquin was resident in Great Britain or Northern Ireland for the year 1941–42; the question was whether he could show that he was not so resident for that year, and clearly he could not show that he was not resident (in the G H

(1) 13 TC 486. (2) 13 TC 511. (3) 31 TC 125.

sense of continuously not resident contended for by Mr. Holroyd Pearce) by showing that he was continuously not resident after 4 April.

It seems to me that the decision, if anything, militates against the Crown's construction of the words "resident for a year". The reason is that Lord Inchiquin was admittedly resident in England until 5 June 1940 so that he was clearly resident in Great Britain or Northern Ireland for tax purposes for the year 1940–41. The fact that the question whether he was not resident in Great Britain or Northern Ireland for the year 1941–42 was treated as open to argument before Singleton J. and in the Court of Appeal indicates that Singleton J. and the Court of Appeal must have given the words "not resident in Great Britain or Northen Ireland for" the year 1941–42 a meaning other than "falls to be treated for the purposes of tax as non-resident for" that year. But there is no discussion in the judgments of the meaning of the words "for any year" in para 1(*a*), and I do not think that I am compelled by this decision to construe s 42 otherwise than in the way I have indicated.

For the reasons I have given I am of the opinion that the Commissioners reached the right conclusion in this case, and I must dismiss the appeal.

Appeal dismissed, with costs.

The taxpayer's appeal was heard in the Court of Appeal (Sir Denys Buckley, Dillon L.J. and Sir John Donaldson M.R.) on 23 March 1983 when judgment was reserved. On 15 April 1983 judgment was given in favour of the Crown, with costs (Sir Denys Buckley dissenting).

J. Holroyd Pearce Q.C. and *R. Venables* for the taxpayer.

Robert Carnwath for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Levene* v. *Commissioners of Inland Revenue* 13 TC 486; [1928] AC 217; *Back* v. *Whitlock* 16 TC 723; [1932] 1 KB 747; *Mitchell* v. *Commissioners of Inland Revenue* 33 TC 53; *Neubergh* v. *Commissioners of Inland Revenue* 52 TC 79; [1978] STC 181; *Elmhirst* v. *Commissioners of Inland Revenue* 21 TC 381; [1937] 2 KB 551.

Sir Denys Buckley—This is an appeal by a taxpayer (Mr. Gubay) from the dismissal by Vinelott J. of Mr. Gubay's appeal from a decision of the Special Commissioners for Income Tax on an assessment made on Mr. Gubay for capital gains tax for the year of assessment 1972–73. Mr. Gubay had been assessed to capital gains tax for that year in a sum of £7,250,000. The Special Commissioners affirmed that assessment but in an agreed reduced sum of £1,399,965. It was from that decision that Mr. Gubay appealed. The appeal came before Vinelott J. in the form of a Case Stated by the Special Commissioners under the Taxes Management Act 1970, s 56.

The facts, which were not in dispute, are set out in para 3 of the Commissioners' decision annexed to the Case. They are also summarised in the judgment of the learned Judge. I need not set them out in any detail, but to render this judgment more easily understood I may summarise them as follows.

Mr. Gubay and his wife were both of them resident and ordinarily resident in the United Kingdom and living together until 4 April 1972. Mrs. Gubay then ceased to be resident or ordinarily resident in the United Kingdom and so continued throughout the year of assessment 1972–73. She was absent from the United Kingdom throughout that year. Mr. Gubay continued to be resident or ordinarily resident in the United Kingdom until 28 October 1972 when he left the United Kingdom and was neither resident nor ordinarily resident there for the remainder of the year of assessment 1972–73; but throughout the period from 4 April to 28 October 1972 he made frequent visits to Mrs. Gubay in the Isle of Man where she then resided. At all relevant times Mr. and Mrs. Gubay were living together in the common acceptance of that expression. At all relevant times from and after 28 October 1972 Mr. Gubay was physically absent from the United Kingdom.

On 7 July 1972 Mr. Gubay transferred to his wife by way of gift 479,638 shares of Kwik Save Discount Group Ltd. It is this disposal which gives rise to the claim to tax which is in question in this case.

By virtue of the Finance Act 1965, s 20(1), capital gains tax (which was a new tax imposed for the first time by that Act and regulated by the provisions contained in Part III of the Act) is chargeable in respect of any capital gain accruing to a person in a year of assessment during any part of which he is resident in the United Kingdom or during which he is ordinarily resident in the United Kingdom. Mr. Gubay was resident or ordinarily resident in the United Kingdom during part of the year of assessment 1972–73 and accordingly is liable to capital gains tax in respect of the disposal in question if it gave rise to a chargeable gain. This it did, unless the case falls within para 20(1) of Sch 7 of the 1965 Act. That para provides as follows:

> "20(1) If, in any year of assessment, and in the case of a woman who in that year of assessment is a married woman living with her husband, the man disposes of an asset to the wife, or the wife disposes of an asset to the man, both shall be treated as if the asset was acquired from the one making the disposal for a consideration of such amount as would secure that on the disposal neither a gain or a loss would accrue to the one making the disposal."

Section 45(3) of the Act provides as follows: "References in this Part of this Act to a married woman living with her husband should be construed in accordance with section 361(1)(2) of the Income Tax Act 1952." Section 361 of the Income Tax Act 1952 has been replaced in identical terms by the Income and Corporation Taxes Act 1970, s 42, which reads thus:

> "S.42(1) A married woman shall be treated for income tax purposes as living with her husband unless—(a) they are separated under an order of a court of competent jurisdiction, or by deed of separation, or (b) they are in fact separated in such circumstances that the separation is likely to be permanent. (2) Where a married woman is living with her husband and either—(a) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment, or (b) both of them are resident in the United Kingdom for a year of assessment, but one of them is, and one of

A them is not, absent from the United Kingdom throughout that year, the same consequences shall follow for income tax purposes as would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent: provided that, where this subsection applies and the net aggregate amount of income tax (including surtax) falling to be borne by
B the husband and the wife for the year is greater than it would have been but for the provisions of this subsection, the Board shall cause such relief to be given (by the reduction of such assessments on the husband or the wife or the repayment of such tax paid (by deduction or otherwise) by the husband or the wife as the Board may direct) as will reduce the said net aggregate amount by the amount of the excess."

C Neither para (a) nor para (b) of subs (1) of that section is applicable to the circumstances of the present case. Consequently subject to subs (2), if it is applicable, Mrs. Gubay was a married woman living with her husband in the year of assessment 1972–73. That section is imported by s 45(3) of the 1965 Act into Part III of that Act for purposes of construction only, that is, for interpreting references in Part III to "a married woman living with her
D husband". Section 42(1) is not in conventional form a definition clause but it does make clear in what circumstances a woman is to be regarded for income tax purposes as living with her husband. Section 42(2) is couched in different terms. It first postulates that the woman in question is a married woman living with her husband and goes on to provide that in two distinct contingencies set out in paras (a) and (b) of the subsection certain consequences shall follow for
E income tax purposes, viz., the same consequences as would have followed if the case had fallen within subs (1)(*b*).

The Appellant was permitted by leave of this Court to amend his notice of appeal so as to introduce an additional ground of appeal to the effect that, in construing para 20 of Sch 7 to the 1965 Act, s 42(2) of the 1970 Act (formerly s 361 of the 1952 Act) has no application as it is not a construction provision
F and as its effect is to ensure that certain consequences shall flow in certain circumstances for income tax purposes, but not for capital gains tax purposes. The point was not taken before the learned Judge.

Section 361 of the 1952 Act (like its successor s 42 of the 1970 Act) comprised only two subsections. The language of the proviso, I think, makes clear that that proviso forms part of subs (2). Accordingly, the reference in
G s 45(3) of the 1965 Act to "section 361(1)(2)" of the 1952 Act is a reference to the whole of that section. What reason can the draftsman have had for specifically mentioning the two subsections? No doubt a court of construction, when attempting to construe a reference to "a married woman living with her husband" in Part III of the 1965 Act, must look not merely at subs (1) of s 361 of the 1952 Act or of s 42 of the 1970 Act, but also at subs (2) to see what
H guidance he can obtain from the whole section; but, if subs (2) affords no guidance on construction, the court can, in my judgment, have no alternative to treating the reference to subs (2) as surplusage. Having regard to the express reference to subs (2) one should, no doubt, make a valiant effort to find some guidance in subs (2). As I have already remarked, the subsection postulates that in any case to which it applies the lady in question is a married woman
I living with her husband. The subsection enacts that, notwithstanding that fact, she shall in some circumstances be treated for certain fiscal purposes as though she were not a married woman living with her husband. So read and understood—and I can see no other way of reading it or understanding it—the subsection, in my judgment, gives no guidance or assistance as to how the

expression "a married woman living with her husband" is to be interpreted. It follows that, in my judgment, no part of s 42(2) has any bearing on the present case. So the primary proposition of s 42 that a married woman shall be treated as living with her husband remains in unabated force in the instant case and Mrs. Gubay was at all relevant times to be treated as a married woman living with her husband.

I turn now to para 20(1) of Sch 7 to the 1965 Act. In the Court below Counsel for Mr. Gubay submitted that on the true construction of this clumsy sentence the words "and in the case of a woman who in that year of assessment is a married woman living with her husband" are applicable only to a case in which the disponor is the wife. Mr. Holroyd Pearce has not pursued that argument in this Court and, in my view rightly, has conceded that the words in question are operative whether the disponor be the husband or the wife. If the conclusion which I have reached about the way in which s 42 of the 1970 Act operates in this case is correct, the condition contained in the words in para 20(1) now under consideration is satisfied and the disposal must be treated as having been made for a consideration of such an amount that the disponor makes neither a gain nor a loss on the disposal in question. So if my conclusion on s 42 is correct, this appeal succeeds. I should, however, consider what the outcome of this appeal should be if my conclusion on s 42 is not correct. This involves considering the words in s 42(2):

> "Where a married woman is living with her husband and either—(a) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment, or (b) both of them are resident in the United Kingdom for a year of assessment, but one of them is, and one of them is not, absent from the United Kingdom throughout that year"

and particularly the words "*for* a year of assessment". Mr. Holroyd Pearce contends that these words should be interpreted as meaning "throughout" or "for the whole of" a year of assessment. Mr. Carnwath on the other hand submits that the words mean "for the purposes of" or "in respect of", and that they apply in any case in which a propositus is amenable to UK tax legislation by reason of residence in the United Kingdom during any part of a relevant year of assessment.

The expression "resident for" some particular period is not, I think, a term of art in income tax or capital gains tax legislation. It must be construed in any particular context in that context, and may have different significations in different contexts. I consequently do not get any assistance for present purposes from language used in charging provisions in the relevant statutes under which a person who has been resident in the United Kingdom during part only of a year of assessment is chargeable to tax on his income or chargeable gains accruing during the whole of that year. Section 42 of the 1970 Act is concerned with the circumstances in which the incomes of a husband and a wife should be aggregated. The policy of the group of sections dealing with this subject seems to be that the incomes should be aggregated so long as the parties are married and "living together". One would expect that aggregation would cease so soon as the husband and wife should cease to be "living together". Under s 42(1) if a formal separation takes place the wife is thereupon no longer to be treated as living with the husband (s 42(1)(*a*)). If no formal separation takes place but the parties are in fact living separately in such circumstances that the separation is likely to be permanent, the parties are no longer to be treated as living together (s 42(1)(*b*)). Section 42(2) equates with this last situation, the situations described in s 42(2)(*a*) and (*b*). It seems

A to me that Parliament by using the language of s 42(2) must have had in contemplation a significant interruption of the parties living together in an untechnical sense of that expression.

As I understand the Respondent's argument, if either the husband or the wife were resident for tax purposes in the United Kingdom for any part of a year of assessment, however small, and the other were not so resident for any B part of that year, s 42(2)(*a*) would apply; and if each of them were resident for tax purposes in the United Kingdom for some part, however small, of a year of assessment but one of them were physically absent from the United Kingdom throughout (i.e., during the whole of) that year whereas the other of them was "not absent from the United Kingdom throughout that year", s 42(2)(*b*) would apply. On the facts Mrs. Gubay was not resident in the United Kingdom C for any part of the assessment year 1972–73 but Mr. Gubay was so from 6 April 1972 to 28 October 1972. Consequently, according to the Respondent's argument, Mrs. Gubay was not, but Mr. Gubay was resident in the United Kingdom "for" the assessment year 1972–73 within the meaning of s 42(2)(*a*). The result would have been the same if Mr. Gubay had ceased to be resident in the United Kingdom on 7 April 1972, although there might in that case have D been no significant interruption in the parties living together.

On the Appellant's argument, on the other hand, s 42(2)(*a*) would only have applied if, contrary to the facts, Mr. Gubay had been resident in the United Kingdom throughout the assessment year 1972–73 and Mrs. Gubay had, as was the case, not been resident in the United Kingdom during any part of that year; in other words, s 42(2)(*a*) could only apply if the facts were such E that one of the parties was resident in the United Kingdom whereas the other was resident out of the United Kingdom for at least twelve months, so that there must have been at least a year's interruption of the parties actually living together.

A person may be resident in the United Kingdom for tax purposes during all or part of a year of assessment notwithstanding that he or she may be F physically absent from the United Kingdom during all or some part of that period. Section 42(2)(*b*) of the 1970 Act can apply only if one or other of a married couple, who are living together and both of whom are resident in the United Kingdom "for a year of assessment", is absent from the United Kingdom throughout that year and the other of them is not absent from the United Kingdom throughout that year. Mrs. Gubay was not physically present G in the United Kingdom at any time during the year of assessment 1972–73; nor was she resident or ordinarily resident in the United Kingdom at any time after 4 April 1972, that is, at any time during the year of assessment 1972–73. So whether Mr. Gubay was or was not resident in the United Kingdom "for" that year of assessment, s 42(2)(*b*) cannot apply to the present case because Mrs. Gubay was not resident in the United Kingdom at any time during that year. H But let me suppose for the sake of argument that Mrs. Gubay, although she was physically absent from the United Kingdom for the whole of the assessment year 1972–73, had remained technically resident in the United Kingdom until 7 April 1972 or until 5 April 1973 for tax purposes. In neither of these cases could s 42(2)(*b*) apply because Mr. Gubay was not absent from the United Kingdom throughout the assessment year 1972–73. The expression "is I not absent from the United Kingdom throughout that year" is an equivocal one, capable of meaning either "is present in the United Kingdom during at least some part of that year" or "is throughout that year in a state of not being absent from (i.e., of being present in) the United Kingdom". The words "and one of them is not absent from the United Kingdom throughout that year"

cannot, in my judgment, seriously be supposed to be capable of applying to a case in which the party in question was absent from the United Kingdom for 364 days of the relevant year but not the 365th. If the subsection were susceptible of that meaning the married couple in question might fall to be treated as if throughout the year in question they were in fact separated in such circumstances that the separation was likely to be permanent, notwithstanding that they might have spent 364 days of that year in matrimonial harmony outside the United Kingdom.

Although the question what construction of s 42(2)(*b*) should be preferred does not arise for decision in this case, I am inclined to think that the latter of the two suggested constructions (i.e., the Appellant's) is to be preferred. If so, s 42(2)(*b*) must require the husband and wife to be physically separated throughout the year in question in such a way that there would be a significant interruption in their living together. Consequently, although the expression "for a year of assessment" and "throughout" that year are both used in s 42(2), I do not regard this as significant. The draftsman seems to have regarded the one form of words as appropriate to residence and the other as appropriate to absence, but I find it hard to suggest why. These considerations relating to s 42(2)(*b*) do not appear to me to help to discover how the expression "for a year of assessment" should be construed in s 42(2)(*a*).

For the reasons which I have given earlier in this judgment I prefer the Appellant's construction of s 42(2)(*a*) to that of the Respondent.

Accordingly, in my judgment, this appeal succeeds either for the reasons I have given earlier for regarding s 42(2) as mere surplusage for the purpose of construing the expression "a married woman living with her husband", or, if I am wrong about that, for the latter reasons set out in this judgment.

I would allow this appeal.

Dillon L.J.—The Appellant, Mr. Gubay, has taken two points on this appeal:

The first point, taken by leave of this Court and not argued in either of the lower Courts, is that as s 45(3) of the Finance Act 1965 merely provides that references to a married woman living with her husband shall be construed in accordance with s 361(1)(2) of the Income Tax Act 1952 (now s 42(1)(2) of the Income and Corporation Taxes Act 1970) the effect is merely to import s 361(1), now s 42(1), into the capital gains tax legislation and not s 361(2), now s 42(2).

The second point is that if s 42(2) is applicable at all then it only applies where one of the spouses is resident in the United Kingdom for the whole of a year of assessment, from 6 April to the following 5 April, because that is the natural meaning of the words "resident in the United Kingdom for a year of assessment", and so it cannot apply to the year from 6 April 1972 to 5 April 1973, since neither spouse was resident in the United Kingdom for the whole of that year.

As to the first point, I regret that I am unable to concur in the conclusion which my Lord Sir Denys Buckley has reached.

In s 45(3) of the 1965 Act Parliament has, in clear terms, imported into the capital gains tax legislation both subs (1) and subs (2) of s 361 of the 1952

A Act, now s 42 of the 1970 Act, which were originally only concerned with income tax. In my judgment this must involve a greater reliance on subs (2) than merely looking at it to see that it is not concerned with construction and therefore disregarding it altogether.

Section 42(1) provides that a married woman shall be treated for income tax purposes as living with her husband unless they are separated in the B circumstances indicated in sub-heads (a) and (b). It is common ground that those circumstances did not apply to Mr. and Mrs. Gubay. Subsection (2) then provides that in certain other circumstances indicated in sub-heads (a) and (b) the same consequences shall follow for income tax purposes as would have followed if they had been separated in circumstances in effect within subs (1)(*b*). The effect of this is that in the given circumstances they are to be C deemed for tax purposes to be separated and not living together. Since therefore s 45(3) of the 1965 Act expressly refers to subs (2) as well as subs (1) of s 361, now s 42, I have for my part no doubt that a married woman is for capital gains tax purposes not to be treated as living with her husband if either she is actually separated from him in the circumstances covered by sub-heads (a) or (b) of subs (1) of s 42 or she is to be treated for tax purposes as separated D from him in the circumstances covered by sub-heads (a) or (b) of subs (2) of s 42. I do not think that this conclusion places any undue weight on the word "construed" in s 45(3). I would therefore reject this point taken by the Appellant.

I turn to the second question, namely whether in sub-head (a) of subs (2) the phrase "resident in the United Kingdom for a year of assessment" means E resident throughout the whole year from 6 April to the following 5 April, or means resident for tax purposes for the year, i.e. resident in any part of the year.

We are told that the original statutory predecessor of s 42 was introduced to change and clarify the law in the light of the decision of the House of Lords in *Nugent-Head* v. *Jacob*[1] 30 TC 83. That information does not, however, F help very much since that was a case where both the spouses were resident in the United Kingdom for a year of assessment, but one of them was, and one of them was not, absent from the United Kingdom throughout that year. That is the case now covered by sub-head (b) of subs (2) of s 42 and it therefore does not indicate why it was thought desirable to include sub-head (a) in the enactment as well. One may conjecture that the draftsman, having in mind to G deal with a de facto situation where both spouses were resident in the United Kingdom but one was absent, thought it logical to deal also with the situation where one was resident and one was not, but that conjecture does not cast much light on the meaning of "resident for a year of assessment".

It is conceded by the Crown that the term "resident in the United Kingdom for a year of assessment" is not a term of art in tax law. Because of H this I have not found any assistance in citations where these or similar words happen to have been used in judgments or statutory provisions concerned with other aspects of tax law. In particular I have not found any help in the case of *Lord Inchiquin* v. *Commissioners of Inland Revenue* 31 TC 125 where the statutory provision under consideration was concerned with any person who

(1) [1948] AC 321.

could prove that "for any year of assessment he is resident in the Irish Free State and is not resident in Great Britain or Northern Ireland". A

Mr. Holroyd Pearce contends that the phrase in subs (2) "resident in the United Kingdom for a year of assessment" means resident for the whole year. So far as sub-head (a) is concerned, this, whether correct or not, is an intelligible conception in relation in the spouse who is resident in the United Kingdom. But it raises an ambiguity as to the spouse who is not resident in the B United Kingdom for the whole year of assessment. Is it sufficient, to satisfy sub-head (a), if that spouse was resident in the United Kingdom for a part of the year in quesiton but not resident for the whole year, or does that spouse have to have been non-resident for the whole year? On the natural meaning of the words, I would adopt the former alternative—viz. that it is enough if one is resident for part of the year, but non-resident for the rest of the year. That C would however give a bizarre result in relation to Mr. and Mrs. Gubay in that (i) they would not be assessed separately for the year of assessment from 6 April 1972 to 5 April 1973 since neither of them was resident in the United Kingdom for the whole of that year, but (ii) they would be assessed separately, as spouses separated from each other, for the year of assessment from 6 April 1971 to 5 April 1972 because, though Mr. Gubay was resident in the United D Kingdom throughout the whole of that year, Mrs. Gubay was only resident for a part of the year, viz. from 6 April 1971 to 4 April 1972.

If, contrary to my preferred view, not resident in the United Kingdom for a year of assessment means non-resident throughout the whole year, there would still be possible anomalies. Sub-head (a) would not apply at all unless there was a year of assessment througout which one spouse was resident and E one was continually non-resident (e.g. if Mrs. Gubay had gone abroad on 4 April 1971 instead of 4 April 1972). But even if sub-head (a) did apply for one year of assessment, it would cease to apply for the following year, if e.g. the spouse who had been resident ceased to be resident in the course of the following year of assessment as Mr. Gubay did in October 1972. Thus on assumed facts that Mrs. Gubay ceased to be resident on 4 April 1971 but Mr. F Gubay remained resident until October 1972, their incomes, though assessed separately for the year of assessment from 6 April 1971 to 5 April 1972, would have been aggregated for tax purposes for the year of assessment from 6 April 1972 to 5 April 1973 since neither was resident in the United Kingdom throughout the whole of that year.

These difficulties and anomalies are, in my judgment, avoided by the G construction for which the Crown contends, viz. that resident for the year of assessment means resident for tax purposes for that year, i.e. resident for any part of the year. The contention can be re-phrased in various ways, e.g. resident in relation to the year or in respect of the year. The object of such paraphrasing is, of course, to bring out and underline the differences between the rival contentions, each of which is said by its proponent to be the sole H natural meaning of the simple wording used in the statute, not to suggest that either contention requires an alteration of the wording actually used in the statute.

I agree with Vinelott J. that in the context of a fiscal statute the expression "resident in the United Kingdom for a year of assessment" is a natural way of describing a person who has the status or quality for the purposes of liability to I tax of being so resident for the year of assessment. It therefore includes the person resident for part of the year. If the draftsman had intended by these

A words only to describe a person who was resident in the United Kingdom throughout the whole of the year of assessment, he would naturally have said "resident in the United Kingdom throughout the year of assessment" both in sub-head (a) and sub-head (b) of subs (2), just as in sub-head (b) he referred to a person being absent from the United Kingdom throughout the year.

For these reasons, albeit with no little hesitation as my Lord Sir Denys
B Buckley takes a different view on both points, I would dismiss this appeal.

Sir John Donaldson M.R.—I would dismiss this appeal, but since we are divided I will express my reasons in my own words, albeit briefly, the facts and arguments having been deployed in the judgments of my brethren.

Section 45(3) of the Finance Act 1965—The essence of the interpretation of statutes is an earnest seeking after the intention of Parliament or perhaps,
C more accurately, the deemed intention of Parliament. Parliament or perhaps, sometimes more accurately, parliamentary Counsel make the task more difficult on some occasions than on others as this appeal well illustrates. A reference to "section 361(1)(2) of the Income Tax Act 1952" invites the reaction that there must have been a typographical omission between (1) and (2) and when you discover that the section has only two subsections, the
D mystery deepens. The explanation, which in my judgment has in the end to be accepted, is that Parliament's instruction was to construe the phrase "a married woman living with her husband" in accordance with both subss (1) and (2), but not to take account of the proviso which contains a direction to the Board to grant a statutory concession in the circumstances contemplated by subs (2). There is a measure of logic in this appraoch, since the fact that the
E proviso does or does not apply has no obvious bearing on who is to be considered as "a married woman living with her husband".

Whilst I appreciate that the two subsections employ different phraseology, I am not convinced that subs (1) is more of an interpretation provision than subs (2). The difference stems, I think, from the fact that subs (1) is designed to produced a deemed reconciliation between certain hushands and
F wives who are not in fact living together, whereas subs (2) is designed to produce a deemed separation between certain husbands and wives who are so living. Whether this be right or wrong, the mandate contained in s 45(3) of the 1965 Act seems to me to be clear—for capital gains tax purposes the concept of a married woman living with her husband has to accord with both subs (1) and subs (2) of s 361 of the 1952 Act, now s 42 of the Income and Corporation
G Taxes Act 1970.

Section 42(2) of the 1970 Act—Like Dillon L.J. I have not derived any assistance from the authorities cited to us, save to note with interest that para (*b*) was probably introduced as a result of the unusual circumstances revealed in *Nugent-Head* v. *Jacob*[1] 30 TC 83. Nor have I derived any assistance from citations from statutory provisions concerned with other aspects of tax law.

H Being resident in the United Kingdom may be a status or a fact. Where it is a status, it is somethng which is either enjoyed (if that be the right word) or not enjoyed for a whole tax year, subject perhaps to an exception in the case of a woman who marries and ceases to be resident on her wedding day. Where it is a fact, residence can be for the whole or any fraction of a tax year.

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(1) [1948] AC 321.

If the statute was intended to refer to factual residence, I should have expected it to make it clear whether residence or non-residence was required for the whole or only part of a year, particularly since the draftsman has used appropriate words—"throughout that year of assessment"—where the factual length of absence was material. I therefore have no doubt that what is referred to is status as a resident or, as the case may be, non-resident for fiscal purposes in relation to a particular year of assessment.

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

The taxpayer's appeal was heard in the House of Lords (Lords Fraser of Tullybelton, Scarman, Bridge of Harwich, Brandon of Oakbrook and Brightman) on 30 November and 1 December 1983 when judgment was reserved. On 26 January 1984 judgment was given against the Crown, with costs (Lord Scarman dissenting).

S. Bates Q.C. and *R. Venables* for the taxpayer.

R. Morritt Q.C. and *Robert Carnwath* for the Crown.

The following case was cited in argument in addition to the case referred to in the judgment:—*Nugent-Head* v. *Jacob* 30 TC 83; [1948] AC 321.

Lord Fraser of Tullybelton—My Lords, this appeal is concerned with a claim by the Inland Revenue for capital gains tax from the Appellant ("Mr. Gubay") in respect of a gift of shares made by him to his wife. Mr. Gubay's liability to the tax depends on whether Mrs Gubay was, at the date of the gift, "a married woman living with her husband" within the meaning of the provisions of the Finance Act 1965 relating to capital gains tax. If she was, Mr. Gubay is not liable for capital gains tax on the gift. If she was not, Mr. Gubay is liable for tax on chargeable gains of some £1.4 million in respect of the gift. So far, the Inland Revenue have been successful in upholding the assessment in principle before the Special Commissioners, before Vinelott J. and before the Court of Appeal (the Master of the Rolls and Dillon L.J., with Sir Denys Buckley dissenting).

Both Mr. Gubay and his wife were resident and ordinarily resident in the United Kingdom up to 4 April 1972. On that date Mrs. Gubay ceased to be resident or ordinarily resident in the United Kingdom, and she was not so resident at any time during the year of assessment 6 April 1972 to 5 April 1973. She was absent from the United Kingdom throughout that year. Mr. Gubay continued to be resident or ordinarily resident in the United Kingdom until 28 October 1972 when he left the United Kingdom and was neither resident nor ordinarily resident here for the remainder of the year of assessment 1972–73. Between 4 April and 28 October 1972 Mrs. Gubay lived mainly in the Isle of Man, where Mr. Gubay visited her frequently. At all relevant times Mr. and Mrs. Gubay were living together in the ordinary sense of that expression. The gift of shares was made on 7 July 1972.

A Capital gains tax, of the long term type with which this appeal is concerned, was introduced by the Finance Act 1965, s 19. A person is chargeable to the tax in respect of chargeable gains accruing to him in a year of assessment during "any part of which" he is resident or ordinarily resident in the United Kingdom—s 20. Mr. Gubay, having been resident in the United Kingdom for part of the year of assessment 1972–73, is in principle chargeable B in respect of gains accruing during that year. Assets which are disposed of by way of gift are deemed to have been disposed of by the donor for a consideration equal to their market value—s 22(4)(*a*). Mr. Gubay will therefore be chargeable to tax on the gain which was realised on the disposal of the shares, unless he can rely on the exemption under para 20 of Sch 7 to the Finance Act 1965, in favour of disposals between spouses where the wife is a C married woman living with her husband. That paragraph provides as follows:

> "20.—(1) If, in any year of assessment, and in the case of a woman who in that year of assessment is a married woman living with her husband, the man disposes of an asset to the wife . . . both shall be treated as if the asset was acquired from the one making the disposal for a consideration of such amount as would secure that on the disposal neither D a gain nor a loss would accrue to the one making the disposal." Section 45(3) of the Finance Act 1965 provides as follows: "(3) References in this Part of this Act to a married woman living with her husband should be construed in accordance with section 361(1)(2) of the Income Tax Act 1952."

Section 361 of the Income Tax Act 1952 has been repealed and replaced in E almost identical terms by s 42 of the Income and Corporation Taxes Act 1970, which was a consolidating Act. Section 42 was the section in force during the tax year 1972–73, but I think it is simpler to refer to s 361 as if it had not been superseded. It is in the following terms:

> "361.—(1) A married woman shall be treated for income tax purposes as living with her husband unless either—(*a*) they are separated F under an order of a court of competent jurisdiction or by deed of separation; or (*b*) they are in fact separated in such circumstances that the separation is likely to be permanent. (2) Where a married woman is living with her husband and either—(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment; or (*b*) both of them are resident in the United Kingdom for a year of assessment but one G of them is, and one of them is not, absent from the United Kingdom throughout that year, the same consequences shall follow for income tax purposes as would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent: Provided that where this subsection applies and the net aggregate amount of income tax (including surtax) falling to H be borne by the husband and the wife for the year is greater than it would have been but for the provisions of this subsection, the [Commissioners of Inland Revenue] shall cause such relief to be given (by the reduction of such assessments on the husband or the wife or the repayment of such tax paid (by deduction or otherwise) by the husband or the wife as [the Board] may direct) as will reduce the said net aggregate amount by the amount of I the excess."

The only question is whether on 7 July 1972 Mrs. Gubay fell under the description of a married woman living with her husband if that expression is construed in accordance with s 361(1)(2) of the 1952 Act. The question can be narrowed down considerably. It is common ground, and is indeed obvious,

that neither paragraph of subs (1) of s 361 applies because Mr. and Mrs. Gubay were not separated by order of the court or by deed, nor were they in fact separated permanently or at all. So there is nothing in that subsection to prevent Mrs. Gubay being treated as living with her husband in 1972–73. It is also common ground that para (*b*) of subs (2) is not applicable because one of the spouses (Mrs. Gubay) was not resident in the United Kingdom for the year of assessment 1972–73. The live issue is whether para (*a*) of subs (2) of s 361 applies, on the basis that Mr. Gubay was, and Mrs. Gubay was not, resident in the United Kingdom for the year of assessment 1972–73, and, if it does apply, what consequences follow for the purposes of capital gains tax, having regard to the later provisions of subs (2).

In the Court of Appeal Sir Denys Buckley decided in favour of Mr. Gubay on the ground that no part of subs (2) gives any guidance as to the proper construction of the expression "a married woman living with her husband". He therefore treated the reference in s 45(3) to subs (2) of s 361 as mere surplusage. I cannot agree with that course, for two reasons. In the first place Parliament has referred in s 45(3) not merely to s 361 but expressly to "section 361(1)(2)". Parliament must therefore have considered that it was possible to obtain guidance as to the construction of the expression from both subsections. The court is therefore, in my opinion, not entitled to dismiss the reference to subs (2) as surplusage. Secondly, if we were to treat subs (2) as having no bearing on the construction of the expression, we would be giving an unduly limited meaning to the word "construed" in s 45(3). It is evidently not used there in a very strict sense. Even subs (1) of s 361 does not, strictly speaking, deal with construction; it does not provide that the expression married woman living with her husband "means" so and so, but only that a married woman shall be "treated for income tax purposes as" living with her husband unless she is separated in one of the ways there specified. By way of contrast examples of provisions for construction in the strict sense are found in s 45(2) of the Finance Act 1965 which provides in several places that a certain expression "has the meaning assigned to it" in another section. The word "construed" should, I think, be read in relation to subs (2) in the same rather broad sense as it is in relation to subs (1).

Subsection (2) deals with cases which are the opposite of those dealt with in subs (1), that is to say with cases where a married woman *is* living with her husband in fact, and it provides that in the circumstance there mentioned "the same consequences shall follow for income tax purposes" as would have followed if they had been separated. The practical effect of that provision seems to me to be not very different from that of a provision that, in the circumstances mentioned, the woman is to be "treated for income tax purposes as" separated from her husband. Regarded in that way, subs (2) gives just as much guidance on construction as subs (1). I am therefore of opinion that, subject always to any effect the proviso to s 361(2) may have, the effect of the main part of subs (2) is that Mrs. Gubay is to be treated for income tax purposes, and therefore also for capital gains tax purposes, as not living with her husband for the year 1972–73 because they fall within para (*a*) of s 361(2). Were it not for the proviso, I would therefore agree with the conclusion of Dillon L.J. on this point at [1983] 1 WLR 709 page 718 F(1).

I turn now to consider the proviso to subs (2) of s 361. It has been suggested that the proviso should be disregarded, for one of two reasons. The first reason was that it was said to be excluded by the terms of s 45(3) of the

(1) Page 629 *ante*.

A Finance Act 1965. This argument derives such plausibility as it has from the unusual style in which s 45(3) has been drafted, in respect that it refers to "section 361(1)(2)". The omission of "and" between (1) and (2) is unusual, though not unique (see Capital Gains Tax Act 1979 s 60(*c*)) but, so far as I can see, it is irrelevant for present purposes. A more substantial point is that s 361 only has two subsections, and it is difficult to see why the draftsman did not B simply refer to "section 361". A suspicion even arose in the course of argument that "361(1)(2)" might have been a misprint but I am satisfied that that is not so. We have confirmed with the Clerk of the Parliaments that s 45(3) is printed exactly as it was enacted. But it does seem possible that "section 361(1)(2)" is intended to mean something different from simply "section 361" and the suggestion was that it was intended to cut out the C proviso to subs (2). This view seems to have commended itself to Sir John Donaldson M.R. (see page 720 F-G[1]) but he did not consider it at any length. I do not think it can be right. In the first place the proviso is part of subs (2). If there were any doubt about that, the doubt is removed by the terms of the proviso itself which opens with the words "provided that, where *this subsection* applies . . . ". Secondly, disregard of the proviso on this ground D seems to me to involve making two highly speculative suppositions—(1) that Parliament intended to exclude some part of s 361 and (2) that the particular part to be excluded was the proviso to subs (2). I am not aware of any convention of statutory draftsmanship that would support these speculations and in my view the conclusion is unwarranted.

The second reason why it is said that the proviso should be excluded is E that it does not give guidance on construing the expression in question. That is literally correct, but I have already explained why in my view the direction to construe the expression in accordance with s 361(1)(2) has to be taken in a broad sense. I think its effect is that s 361 is to apply to capital gains tax as nearly as possible in the same way as it applies to income tax. That is the same as saying that wherever the section refers to income tax it is to be read as F referring also to capital gains tax. If that is correct then the whole of the section must apply including the proviso so far as it can be applied, and any benefit that would be conferred by the proviso for income tax purposes must also be conferred for capital gains tax purposes. Where subs (2) applies, with the consequence that a married couple are to be treated for tax purposes as separated, the result (apart from the proviso) may be advantageous to them G for capital gains tax purposes in some respects (for example they may not be limited to one main residence—see Finance Act 1965, s 29(8)) and disadvantageous in other respects, for example in the present case. The effect of the proviso as originally drafted is that where the subsection would operate to the disadvantage of the spouses by increasing the amount of income tax payable by them, relief is to be given to the husband or to the wife so as to cancel out H the excess. The effect of s 45(3) is, in my opinion, that the same relief must be given where the subsection would operate to their disadvantage in respect of capital gains tax.

Having regard to the views I have expressed it is unnecessary for me to consider the argument for Mr. Gubay which apparently occupied a large part of the time in the Court of Appeal and turned upon the meaning of the I expression "for a year of assessment" in s 361(2)(*a*).

For these reasons I would allow this appeal.

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(1) [1983] 1 WLR 709; page 631 *ante*.

Lord Scarman—My Lords, Part III of the Finance Act 1965, introduced into the fiscal law the capital gains tax as we now know it. The question in this appeal is what meaning is to be attributed to references in Part III of that Act to "a married woman living with her husband". Section 45(3) purports to answer the question by referring the questioner to s 361(1)(2) of the Income Tax Act 1952. If the draftsman believed, as he surely did, that the reference would provide the answer to the question, the progress of this litigation will have sadly disappointed him. The true meaning of s 45(3) is obscure: and s 361 of the 1952 Act, in the interpretative role which it was given in 1965, answers no questions but poses several problems. At the end of the day this little piece of legislation by reference has given rise to a prolonged and confusing litigation, which would be laughable if it were not for the serious waste of the time and money of the taxpayer and the Crown which has been its consequence.

My Lords, I have the misfortune to differ from the rest of your Lordships on the related problems of the construction of these two sections to which the question in the appeal gives rise. Since, as I understand it, the case raises no important question of legal principle, I shall be brief, conscious that my view, however tenaciously I may hold it, is not the law.

The issue arises in respect of a year of assessment (1972–73) which was subsequent to the consolidation of the income tax statutes in 1970 but before the consolidation of the capital gains tax legislation in 1979. Neither consolidation altered the provisions which fall to be construed. To avoid confusion, I will discuss the issue by reference to the Income Tax Act 1952 and Part III of the Finance Act 1965.

On 7 July 1972 Mr. Gubay, the Appellant, made a gift of shares to his wife. It is this disposal which gives rise to the claim for tax. Mr. Gubay was resident, or ordinarily resident, in the United Kingdom during part of the year of assessment (1972–73) and is, therefore, liable to capital gains tax on the disposal, if it gave rise to a chargeable gain. Mr. Gubay submits that it did not, and relies on para 20(1) Sch 7 to the 1965 Act, which provides, so far as material, that if in a year of assessment, and in the case of "a woman who in that year was a married woman living with her husband", a man disposes of an asset to his wife, the disposal shall be treated as for a consideration of such amount as would secure that neither a gain nor a loss would accrue to him. Put very simply, the effect of the paragraph is that the wife steps into the position of her husband: he is deemed to make no gain or loss: if later she disposes of the asset or part of it, she will be treated for the purposes of the tax as having acquired the asset for the price her husband originally paid for it. No chargeable gain (or loss), therefore, arises on the disposal: but a chargeable gain will arise if later the wife sells the asset or any part of it for more than her husband gave to acquire it.

Mrs. Gubay was a married woman living with her husband during the fiscal year 1972–73. Their married life had not then, nor has it since, suffered a breakdown. They live a united married life. Though not separated, they were in 1972–73 physically apart for substantial periods of the year. She ceased to be resident in the United Kingdom on 4 April 1972 when she went to live in the Isle of Man: he continued to make his ordinary residence in the United Kingdom until 28 October 1972, after which date he also ceased to reside here. During the months April to October 1972 he paid frequent visits to the Isle of Man where she resided.

If the term "a married woman living with her husband" means in the context of the 1965 Act what in common speech it says, Mrs Gubay was living with her husband, and para 20(1) of Sch 7 to the Act applies. The Appellant would, therefore, succeed: for there would be no chargeable gain. But the term does not have its ordinary meaning in the context of the capital gains tax legislation: for s 45(3) of the 1965 Act, provides: "References in this Part of this Act to a married woman living with her husband should be construed in accordance with section 361(1)(2) of the Income Tax Act 1952."

Section 45 is an interpretation section. Subsection (3) offers guidance, but no definition. Note two points; the term "a married woman living with her husband" "*should*" (not "shall") be construed in accordance with specific provisions of the 1952 Act, and those provisions are specified as "*section 361(1)(2)*" of that Act. The choice of the auxiliary word "should", which denotes possibility, probability, preference, or desire rather than a mandatory command, reveals, I think, no more than the draftsman's awareness that he was directing that the term ("a married woman living with her husband") when used in Part III of the 1965 Act should be construed in accordance with a section which was not itself a defining or interpretative provision.

But what the draftsman intended by the words "in accordance with section 361(1)(2)" of the 1952 Act is wrapped in mystery. That section contains two subs, (1) and (2), to which a proviso is attached. The proviso qualifies subs (2). A reference to s 361 simpliciter would have sufficed. Why did he trouble to specify, therefore, the two subsections? Did he intend to exclude the proviso? But he cannot have so intended, since the proviso is part of subs (2) which he expressly includes, its effect being to limit the consquences of the subsection. Or did he, knowing that s 361 was not designed as an interpretative section, include a reference to the two subsections so as to emphasise that *both* "should" be regarded in construing references in the 1965 Act to a married woman living with her husband. I was attracted at one stage of the argument by the proposition that the reference to the two subsections, when a reference to the section simpliciter would have sufficed, must mean that the proviso should be disregarded. But I am satisfied that this will not do: the proviso is part of subs (2) which it qualifies. Section 45(3), therefore, refers us to the whole of section 361, the full terms of which I now set out:

> "361.—(1) A married woman shall be treated for income tax purposes as living with her husband unless either—(*a*) they are separated under an order of a court of competent jurisdiction or by deed of separation; or (*b*) they are in fact separated in such circumstances that the separation is likely to be permanent. (2) Where a married woman is living with her husband and either—(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment; or (*b*) both of them are resident in the United Kingdom for a year of assessment but one of them is, and one of them is not, absent from the United Kingdom throughout that year, the same consequences shall follow for income tax purposes as would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent: Provided that where this subsection applies and the net aggregate amount of income tax (including surtax) falling to be borne by the husband and the wife for the year is greater than it would have been but for the provisions of this subsection, the Commisioners of Inland Revenue shall cause such relief to be given (by the reduction of such assessments on the husband or the wife or the repayment of such tax paid (by deduction or otherwise) by the husband or the wife as those Commissioners may direct) as will reduce the said net aggregate amount by the amount of the excess."

Subsection (1) gives the ordinary meaning of a married woman living with her husband. Standing by itself, it would include Mrs. Gubay's situation in the fiscal year 1972–73. Subsection (2) is a very strange provision to be given an interpretative function. It begins by asserting and assuming what is in issue—"where a married woman is living with her husband"—and then declares that in certain specified circumstances the same consequence shall follow for income tax purposes as would have followed if the man and wife had in fact separated, the separation being likely to be permanent. Confronted with the section, Sir Denys Buckley in the Court of Appeal could find no guidance in it as to the construction of the term "a married woman living with her husband" when used in the 1965 Act and rejected it as surplusage. I have been greatly tempted to follow him. But to do so would, I think, be flatly to contradict the express reference in s 45(3) to the subsection. Parliament intended the courts (and others) to have regard to subs (2).

If one does what Parliament has plainly said one should do, I do not doubt that the subsection, when transplanted into its role of guidance for the purposes of the 1965 Act, is saying that for capital gains tax purposes there are circumstances, which it sets out, in which a married woman who is living with her husband is to be treated as one who is not. It is, however, suggested that this is altogether too subtle an interpretation of the words of the subsection. But to my mind it is the suggestion which is too subtle. If the "same consequences" are to follow as if she were separated, she is to be treated for the purposes of the subsection as if she were separated.

The circumstances in which she is to be so treated are set out in (*a*) and (*b*) of the subsection. Mrs. Gubay falls within (*a*); for her husband was, but she was not, resident in the United Kingdom for the year of assessment. Once it is accepted that regard must be paid to the subsection in construing Part III of the 1965 Act, it follows from the body of the subsection that for capital gains purposes Mrs. Gubay should be treated as "separated" from her husband in the year of assessment 1972–73.

But it has been submitted by the Appellant (for the first time in this House) that the proviso indicates the contrary: that is to say, it cancels out any guidance towards "separation" which might be found in the body of the subsection. Like the Master of the Rolls in the Court of Appeal, I do not find the proviso any help in construing the capital gains tax legislation. The proviso merely imposes a specific duty upon the Revenue to give relief for income tax purposes against a consequence of treating a woman as separated from her husband under (*a*) or (*b*) of the subsection. It offers no guidance as to the meaning of "a married woman living with her husband": on the contrary, it assumes for its purpose that "the subsection applies". It accepts without contradiction what the subsection says, namely that a woman who falls within (*a*) or (*b*) is to be treated as if she was separated from her husband save in one respect only.

Accordingly, in my view, we must construe para 20(1) of Sch 7 to the Finance Act 1965, as not covering the disposal of shares on 7 July 1972. Mrs. Gubay, on the proper construction of the Schedule, was not, for the purposes of the capital gains tax, to be treated as a married woman living with her husband at the relevant time. I would dismiss the appeal.

Lord Bridge of Harwich—My Lords, until 1972 Mr. and Mrs. Gubay were both ordinarily resident in the United Kingdom. During the year 1972 both ceased to be so resident, ordinarily or at all, but the effective date of cesser in the wife's case was 4 April, in the husband's 28 October. There was

never any kind of rift in their matrimonial relationship and between the two dates mentioned Mr. Gubay made frequent visits to his wife, then residing in the Isle of Man. On 7 July 1972 he gave her a block of shares which, had he sold them at their market value, would have realised for him a gain of nearly £1.4 millon chargeable to tax under the Finance Act 1965.

Married couples do not enjoy many fiscal advantages over those who live together unmarried—indeed, the reverse is normally the case—but at least, as is well known, spouses can ordinarily make gifts of capital assets to each other without incurring any liability to capital gains tax. It must, therefore, I think, have occasioned as much surprise to the officials of the Inland Revenue as to Mr. Gubay himself to discover that, as the Crown contend, he had chosen to make the gift of shares to his wife in circumstances which temporarily deprived him of this immunity. Had he made the gift before 4 April 1972, or after 5 April 1973, there would clearly have been no capital gains tax liability. By making it on 7 July 1972, he was, the Crown say, voluntarily though no doubt unwittingly, making a handsome gift to them as well as to his wife. If the Crown are right, the unfortunate Mr. Gubay must feel that he has fallen into a trap for the unwary set for him by the extreme obscurity of the legislative provisions which fall to be applied. The extent of the obscurity is perhaps best illustrated by the fact that the point which the majority of your Lordships find decisive of the appeal was first taken before your Lordships' House, and does not seem to have occurred to the mind of any of the Special Commissioners, the learned Judge, the members of the Court of Appeal (except possibly Sir John Donaldson M.R.), or the learned Counsel engaged at any of the three earlier stages of this litigation.

For the purpose of assessing chargeable gains and allowable losses under the Act of 1965, a disposal by way of gift is "deemed to be for a consideration equal to the market value of the asset": s 22(4)(*a*). But by para 20(1) of Sch 7, in the case of "a married woman living with her husband", the disposal of an asset by one spouse to the other is treated as a "disposal for a consideration of such amount as would secure that on the disposal neither a gain or a loss would accrue to the one making the disposal." Section 45(3), as amended by the Income and Corporation Taxes Act 1970, provides: "References in this Part of this Act to a married woman living with her husband should be construed in accordance with section 42(1)(2) of the Income and Corporation Taxes Act 1970." Section 42 of the Act of 1970 re-enacts without amendment provisions first enacted by s 34 of the Finance Act 1950 and re-enacted by s 361 of the Income Tax Act 1952. The section provides:

> "(1) A married woman shall be treated for income tax purposes as living with her husband unless—(*a*) they are separated under an order of a court of competent jurisdiction or by deed of separation, or (*b*) they are in fact separated in such circumstances that the separation is likely to be permanent. (2) Where a married woman is living with her husband and either—(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment, or (*b*) both of them are resident in the United Kingdom for a year of assessment but one of them is, and one of them is not, absent from the United Kingdom throughout that year, the same consequences shall follow for income tax purposes as would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent: Provided that, where this subsection applies and the net aggregate amount of income tax (including surtax) falling to be borne by the husband and the wife for the year is greater than it would have been but for the provisions of this subsection, the Board shall cause such relief

to be given (by the reduction of such assessments on the husband or the wife or the repayment of such tax paid (by deduction or otherwise) by the husband or the wife as the Board may direct) as will reduce the said net aggregate amount by the amount of the excess."

The question is whether Mrs. Gubay in the year of assessment 1972–73, when Mr. Gubay undoubtedly remained liable to United Kingdom income and capital gains tax, was or was not "a married woman living with her husband" construed "in accordance with section 42(1)(2) of the Act of 1970". If she was, the appeal succeeds; if not, it fails.

The first puzzling feature of s 45(3) of the Act of 1965 is the omission of the conjunctive "and" between the references to subs (1) and (2) of s 42. But Mr. Morritt has drawn our attention to other examples, both in the Act of 1965, and in other revenue statutes, of this style of draftsmanship being used, albeit not consistently. No doubt we must read the provision as a reference to s 42(1) and (2). But what is the point of referring by number to the two subsections of a section which has only two? If the reference were to s 42 simpliciter, there would be no problem at all. Subsection (1) does, in effect, provide what amounts to a definition, albeit expressed to be "for income tax purposes", of the phrase "a married woman living with her husband". She is a woman who is not separated by court order, by deed, or in such circumstances that the separation is likely to be permanent. Subsection (2), on the other hand, does not purport to add to, subtract from, or in any way to qualify that definition. On the contrary, as its opening words show, it is dealing throughout with a woman who is within the definition. What it provides is that, although she *is* "a married woman living with her husband", in certain circumstances certain limited tax consequences are to follow as if she were not. Thus, apart from the express reference to subs (2) in s 45(3) of the Act of 1965, no one would dream of looking beyond subs (1) in construing references in that Act to "a married woman living with her husband".

In the Court of Appeal, the first ground of Sir Denys Buckley's dissenting judgment in favour of the Appellant taxpayer was that it was impossible to obtain from subs (2) any guidance as to the construction of the phrase "a married woman living with her husband", and that the court was therefore constrained to reject the express reference to subs (2) as surplusage. I am much impressed by this view. I find the principle concisely stated by Brett J. in *Stone* v. *Yeovil Corporation* (1876) 1 C.P.D. 691, at page 701, where he said:

"It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated."

No doubt it is a strong application of this principle to hold that it renders nugatory in a statute not merely a word or a phrase but the express incorporation by reference of a whole subsection. I am far from saying that Sir Denys Buckley was wrong to do so. But the point is a difficult one. In the end I prefer to reach no conclusion on this ground but to proceed on the basis that, however intractable the problem, subs (2) must somehow be forced to yield up its arcane meaning as an aid to the construction of the relevant words in the Act of 1965.

A view which may possibly (but not certainly) be implicit in the short passage in the judgment of Sir John Donaldson M.R. at [1983] 1 WLR 709 at

page 720 F-G(1), is that the reference to subs (2) should be read as a reference only to so much of the subsection as precedes the colon, on the ground that the proviso is printed as a separate paragraph following on, but distinct from, what, on this view, may be regarded as the body of the subsection. The difficulty about this view is that the proviso, as the opening words "Provided that, where this subsection applies" make clear beyond doubt, is itself part and parcel of the subsection. Hence, this view attributes to the draftsman a degree of incompetence or obscurantism, or both, of which I find it impossible to suppose he could have been guilty.

A very much more subtle argument is advanced by Mr. Morritt in an attempt to extract from subs (2) so much of the subsection as the revenue wish to treat as an aid to construction, but without reference to the tax consequences contemplated by the subsection, subject as those consequences are to the limitation imposed by the proviso, which is fatal to the Crown's contention. According to Mr. Morritt's argument, to distill from subs (2) so much of the language as is relevant to the construction of the words "a married woman living with her husband" and to exclude the rest, it is necessary to strike out the words "the same consequences shall follow for income tax purposes as would have followed if", and to substitute the words "they shall be treated as if". On the same principle, so runs the argument, the proviso can be disregarded as irrelevant to construction.

Ingenious as this argument undoubtedly is, I cannot accept it. Not only does it require the subsection to be radically rewritten, but it also depends on what I regard as a false antithesis between parts of the subsection which are, and parts of the subsection which are not, capable of giving guidance in construing the words "a married woman living with her husband" in the capital gains tax legislation. If the subsection can be looked at for that purpose at all, it must be looked at as a whole. Whatever the form of s 42(2) of the Act of 1970 and its predecessors, its substance has always been clear. Where a married woman living with her husband is temporarily separated from him in the circumstances contemplated by subs (2)(*a*) or (*b*), they are to be treated as permanently separated to the extent that separate tax assessment will be to their advantage, but not so as to increase their aggregate liability to tax. In short, the subsection is essentially a relieving, not a taxing, provision. If this provision has to be applied with reference to a married woman living with her husband in construing the capital gains tax legislation, the only sensible meaning which, in my opinion, can be attributed to it, is that it was intended to be applied to a married couple's capital gains tax liability by analogy with its application to their income tax liability. This result can be achieved without doing any violence to the statutory language. All that is necessary is that s 42 of the Act of 1970 is to be read into the capital gains tax legislation in its entirety, but with the substitution of the phrase "capital gains tax purposes" for the phrase "income tax purposes" wherever the latter occurs. In the result, in a year of assessment to which subs (2)(*a*) or (*b*) applies, each spouse can profit from separate assessment, e.g. by realising gains without liability to tax up to the limit of the current statutory exemption, but their aggregate capital gains tax liability cannot exceed what it would have been if there had been no temporary separation.

If any reinforcement of this conclusion in favour of the Appellant taxpayer is needed, I find it in the time-honoured principle that the subject is not to be taxed except by clear words. At all material times, Mrs. Gubay was a

(1) Page 631 *ante*.

married woman living with her husband both in the ordinary meaning of that phrase and in accordance with the definition provided by s 42(1) of the Act of 1970. Her husband's gift of shares to her in 1972 was, therefore, on the face of it, a disposal governed by para 20(1) of Sch 7 to the Act of 1965, not by s 22(4). If the Crown are to make good their claim to charge capital gains tax in respect of that disposal pursuant to s 22(4), they must show that the incorporation by reference of s 42(2) of the Act of 1970 clearly entitles them to do so. I must accept, in deference to my noble and learned friend, Lord Scarman, that the statutory language can arguably be read so as to lead to this result. I cannot understand, however, how it can possibly be said to do so clearly.

The only issue argued before the Special Commissioners and the learned Judge, and the main issue argued in the Court of Appeal, turned on the construction of the words in s 42(2)(*a*) of the Act of 1970, "resident in the United Kingdom for a year of assessment". On the view I take this issue ceases to be relevant, but I should add that, in my opinion, the Special Commissioners, the learned Judge, and the majority of the Court of Appeal reached the right conclusion on this point for the reasons given in the judgment of Dillon L.J. In this House we have had the advantage of being referred to *Browning* v. *Duckworth*[1] [1935] 1 KB 605. This shows the previous state of the law which s 34(2)(*a*) of the Finance Act 1950 was plainly intended to reverse. It entirely supports the conclusion on the point of the Special Commissioners and the learned Judge, affirmed by the majority of the Court of Appeal.

I would allow the appeal.

Lord Brandon of Oakbrook—My Lords, this appeal concerns a married couple, Mr. and Mrs. Gubay, to whom I shall refer collectively as "the spouses", and individually as "the husband" and "the wife" respectively. More particularly the appeal concerns the liability of the husband for capital gains tax for the year of assessment 1972–73 ("the relevant year").

During the relevant year the wife was neither resident nor ordinarily resident in the United Kingdom. The husband on the other hand was, during part of the relevant year, namely, from 6 April to 28 October, both resident and ordinarily resident there. Although the spouses were geographically separated for substantial parts of the relevant year, their marriage was at all material times a happy one, and, when circumstances permitted, they lived together in a shared home in either the Isle of Man or New Zealand.

On 7 July in the relevant year the husband made a gift to the wife of 479,638 shares in Kwik Save Discount Group Ltd. ("the gift"). It is common ground between the husband and the Inland Revenue that, during the relevant year, he became liable for capital gains tax on £7,650, that being the amount of chargeable gains arising out of transactions other than the gift. It is contended for the Inland Revenue, but disputed by the husband, that he became liable for further capital gains tax on chargeable gains of £1,392,315 arising out of the gift, making a total of chargeable gains of £1,399,965.

Having been assessed for capital gains tax for the relevant year on chargeable gains which included those alleged to arise out of the gift, the

(1) 19 TC 149.

A husband appealed unsuccessfully against such assessment, first to the Special Commissioners, secondly by Case Stated to the High Court (Vinelott J.), and, thirdly, to the Court of Appeal (Sir John Donaldson M.R., Dillon L.J. and Sir Denys Buckley). The decision of the Court of Appeal was, however, a majority one only, with Sir Denys Buckley dissenting. The husband now brings a fourth appeal, with the leave of the Court of Appeal, to your B Lordships' House.

My Lords, liability for capital gains tax is dealt with in Part III of the Finance Act 1965 ("the Act"). It is not in dispute that, unless the wife was, during the relevant year, living with the husband within the meaning of that expression in Part III of the Act, the further assessment in respect of the gift was correctly made by the Inland Revenue pursuant to ss 20(1), 22(1) and 22(4) C of the Act.

The Act, however, contains a special provision relating to spouses living together during any particular year of assessment. This provision, which is made applicable by s 29(9) of the Act, is to be found in para 20 of Sch 7 to it. That paragraph provides:

> "20.—(1) If, in any year of assessment, and in the case of a woman who D in that year of assessment is a married woman living with her husband, the man disposes of an asset to the wife, or the wife disposes of an asset to the man, both shall be treated as if the asset was acquired from the one making the disposal for a consideration of such an amount as would secure that on the disposal neither a gain or a loss would accrue to the one making the disposal.

E The effect of this provision, in the case of spouses who are living together during any particular year of assessment, even though both are resident or ordinarily resident in the United Kingdom, is that disposals of assets between the two of them, whether by gift or otherwise, can never give rise to chargeable gains for the purposes of capital gains tax for that year.

If the matter stopped there, it may well be that no problem would arise, F The legislature, however, thought it necessary to deal expressly with the meaning to be given, for the purposes of Part III of the Act, to the expression "a married woman living with her husband". The method adopted by the legislature to achieve this end was to enact s 45(3) of the Act, which provides: "45.—(3) References in this part of this Act to a married woman living with her husband should be construed in accordance with section 361(1)(2) of the G Income Tax Act 1952." Section 361 of the Income Tax Act 1952 ("the Act of 1952") has since been repealed and re-enacted in almost identical terms in s 42 of the Income and Corporation Taxes Act 1970 ("the Act of 1970"). I shall, however, for convenience treat the relevant provisions as being those of s 361 of the Act of 1952. Section 361 of that Act is in these terms:

> "361.—(1) A married woman shall be treated for income tax purposes as H living with her husband unless either—(*a*) they are separated under an order of a court of competent jurisdiction or by deed of separation; or (*b*) they are in fact separated in such circumstances that the separation is likely to be permanent. (2) Where a married woman is living with her husband and either—(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment; or (*b*) both of them are I resident in the United Kingdom for a year of assessment but one of them is, and one of them is not, absent from the United Kingdom throughout that year, the same consequences shall follow for income tax purposes as

would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent: Provided that where this subsection applies and the net aggregate amount of income tax (including surtax) falling to be borne by the husband and the wife for the year is greater than it would have been but for the provisions of this subsection, the Commissioners of Inland Revenue shall cause such relief to be given (by the reduction of such assessments on the husband or the wife or the repayment of such tax paid (by deduction or otherwise) by the husband or the wife as those Commissioners may direct) as will reduce the said net aggregate amount by the amount of the excess."

There are certain significant features of both s 45(3) of the Act and s 361 of the Act of 1952 to which attention should be drawn. Dealing first with s 45(3) of the Act, there are the following significant features. First, it is, in form at least, a provision relating, and relating only, to construction; it is not, in form at least, a provision incorporating into and applying to Part III of the Act, s 361 of the Act of 1952. Secondly, in so far as it is a provision relating to construction, it is concerned, and concerned only, with the meaning to be given to the expression "a married woman living with her husband" in Part III of the Act. Thirdly, it provides that the meaning to be given to that expression in that part of the Act is to be in accordance with, s 361(1)(2) of the Act of 1952. Fourthly, the reference to s 361(1)(2) of the Act of 1952 is peculiar in two ways: first, s 361 only has two subsections, namely subs (1) and subs (2), so that a reference to s 361 simpliciter would, one would have thought, have been sufficient; and, secondly, the word "and", which one would have expected to find between "(1)" and "(2)", is absent.

Turning, secondly, to s 361 of the Act of 1952, its significant features are these. First, the only part of the section which contains or consists of a provision relating to construction is subs (1). That subsection defines the circumstances in which a married woman will, and those in which she will not, for income tax purposes and during a particular year of assessment, be treated as living with her husband. Secondly, subs (2) is not, either in substance or in form, a provision relating to construction; it is rather a provision relating to deeming a state of affairs to be other than it actually is, and to the consequences, for certain specified purposes, of such deeming process. It requires that a married woman, who is in fact living with her husband within the definition contained in subs (1), should in certain specified circumstances be treated, for income tax purposes and for a particular year of assessment, as if she was not so living. One of those sets of circumstances is specified in para (*a*) of subs (2) and they are these: when one of two spouses is, and the other is not, resident in the United Kingdom for a particular year of assessment. Thirdly, the part of subs (2) which deals with the consequences of a married woman being deemed not to be living with her husband when she is in fact doing so has two parts: first, a part containing the requirement the nature of which I have set out above; and, secondly, a part containing a proviso of some length imposing a crucial limitation or qualification on the effect of such requirement. These two parts are, however, not separate, either from each other or from paras (*a*) and (*b*) which precede them. On the contrary, the two parts, along with paras (*a*) and (*b*), constitute together subs (2) as a whole.

I have not found it altogether easy to discover, with any degree of certainty, the precise nature of the argument for the Inland Revenue which has prevailed so far with the Special Commissioners, Vinelott J. and the majority in the Court of Appeal. The nature of the argument, as I believe it to be, is

this. The effect of s 45(3) of the Act, on its true interpretation, is to incorporate into and apply to Part III of the Act the whole of s 361 of the Act of 1952, except the proviso which forms the last part of subs (2) of that section; and further, where there occurs, in the provisions so incorporated and applied, the expression "for income tax purposes", to substitute for it the different expression "for capital gains tax purposes".

The result of giving that effect to s 45(3) of the Act, so the argument goes, is this. On the facts of the case the spouses were, during the relevant year, in the situation specified in s 361(2)(*a*) of the Act of 1952, in that one of them, the husband, was, and the other of them, the wife, was not, resident in the United Kingdom for that year. This was so because the expression "resident in the United Kingdom for a year of "assessment", as used in subs (2)(*a*), did not necessarily mean resident in the United Kingdom throughout the year of assessment concerned, but included in its meaning resident in the United Kingdom for only a part of such year. Therefore the wife was to be treated, for capital gains tax purposes for the relevant year, as not living with her husband. Therefore the exemption from liability to capital gains tax in respect of disposals between spouses contained in para 20 of Sch 7 to the Act did not apply to the gift. Therefore the Inland Revenue were right in assessing the husband to capital gains tax on the chargeable gains arising out of it.

Sir Denys Buckley was not prepared to accept that s 45(3) of the Act had the effect set out above, and he had two alternative reasons for being unwilling to do so. His primary reason was this. Section 45(3) of the Act is (as I indicated earlier) a provision relating, and relating only, to construction. It provides that references in Part III of the Act to "a married woman living with her husband" should be construed in accordance with s 361(1)(2) of the Act of 1952. That can only mean that the expression concerned must be given the same meaning in Part III of the Act as is assigned to it by s 361(1)(2) of the Act of 1952. The only part of s 361 of that Act, however, which assigns a meaning to the expression concerned is subs (1) of that section. Subsection (2) is not (as I also indicated earlier) a provision relating to construction at all, but is of quite a different character. Having regard to these matters, the reference in s 45(3) of the Act to subs (2), as well as subs (1), of s 361 of the Act of 1952 is a reference to which no sensible or effective meaning can be given, with the consequence that such reference should be treated as surplusage and wholly disregarded. It is, however, necessarily to be implied that, when applying the meaning of the expression concerned assigned to it by s 361(1) of the Act of 1952, there should be substituted for the words "for income tax purposes", where they occur in the first two lines of that subsection, the words "for capital gains tax purposes".

The second alternative reason why Sir Denys Buckley was not prepared to accept the argument for the Inland Revenue with regard to the effect of s 45(3) of the Act was this. Even assuming that that argument was correct in principle, the expression "resident in the United Kingdom for a year of assessment", as used in s 361(2)(*a*) of the Act of 1952, meant resident in the United Kingdom throughout such year, and did not mean resident in the United Kingdom for only a part of it. The husband was only resident in the United Kingdom from 6 April to 28 October in the relevant year, and therefore the spouses did not come within s 361(2)(*a*) of the Act of 1952 at all. On that basis, the exemption contained in para 20 of Sch 7 to the Act did apply to the gift, and the Inland Revenue were again wrong in assessing the husband to capital gains tax on the chargeable gains arising from it.

My Lords, both the argument for the Inland Revenue, and that on which Sir Denys Buckley founded his primary reason for not being prepared to accept it, present difficulties. So far as the argument for the Inland Revenue is concerned, the main difficulty can be expressed in this way, that, while s 45(3) by its terms only requires the expression "a married woman living with her husband" to be construed in accordance with s 361(1)(2) of the 1952 Act, the argument for the Inland Revenue involves reading s 45(3) as if it said something like this:

> "the provisions of section 361 of the Income Tax Act 1952 are to be incorporated into and applied to Part III of this Act, as if, first, the expression 'for capital gains tax purposes' were substituted for the expression 'for income tax purposes' wherever it occurs, and, secondly, subsection (2) of the section did not include the proviso to it"

With regard to the exclusion of the proviso to subs (2), it was suggested during the course of the argument before your Lordships that the legislature, by using the peculiar expression "section 361(1)(2)", was indicating its intention of referring to both subsections of the section, but at the same time of excluding the proviso to subs (2). This suggestion appears to me to be entirely speculative, and my reaction to it is to say that, if the legislature had intended to convey any such intention, it could easily have used plain words in which to express it. In fact, however, it chose not to do so.

So far as Sir Denys Buckley's primary argument is concerned, it involves wholly disregarding the presence of "(2)" after "section 361(1)" in s 45(3) of the Act. To do this would be contrary to the fundamental principle that, whenever it is possible to do so, effect should be given to each and every part of a statutory provision.

As regards Sir Denys Buckley's alternative reason for rejecting the argument for the Inland Revenue, which it is only fair to say that he expressed with considerable hesitation, I do not, with great respect, share his view. In my opinion, the expression "resident in the United Kingdom for a year of assessment", does not necessarily mean resident in the United Kingdom throughout such year, but includes in its meaning resident there for only a part of it. In this connection it is, to my mind, significant that in s 361(2)(*b*) both the expression "for a year of assessment" and the expression "throughout that year" are used. This indicates what one would expect, namely, that, when the legislature meant to say "throughout a year" it took care to express its meaning in plain words.

My Lords, as I have indicated earlier, both the argument for the Inland Revenue which found favour below, and that on which Sir Denys Buckley founded his primary reason for rejecting it, involve substantial difficulties. It is your Lordships' good fortune, however, not to be compelled to opt for either the one argument or the other.

This is because Counsel for the husband raised for the first time in your Lordships' House, with your Lordships' leave, a third view of the effect of s 45(3) of the Act, which, while not free of all difficulty, presents less difficulty than either of the two views which have until now been under consideration, and moreover produces a result which appears reasonably fair from the point of view of taxation policy. The third view so put forward is that the effect of s 45(3) of the Act is indeed, as the Inland Revenue has contended, to incorporate into and apply to Part III of the Act subs (2), as well as subs (1), of s 361 of the Act of 1952, and, for the purposes of such incorporation and application, to

A substitute the expression "for capital gains tax purposes" for the expression "for income tax purposes" wherever the latter occurs, but that such incorporation into and application to Part III of the Act of subs (2) of s 361 of the Act of 1952 extends to the whole of subs (2), including the proviso to it.

The result of giving s 45(3) of the Act this effect does not, as I have already said, get over all the difficulties involved in the other two views. It does B not get over the difficulty of treating a provision, which by its terms relates only to construction, as if it were a provision relating to incorporation and application. That difficulty must, I think, be accepted and disregarded. The result does, however, get over two difficulties: first, that of wholly disregarding the "(2)" in s 45(3) of the Act (which Sir Denys Buckley's reasoning requires); and, secondly, that of arbitrarily treating the insertion of C "(2)" after "section 361(1)" as bringing in subs (2) but without the proviso, which, if the subsection is given its ordinary and natural meaning, is an integral and fundamental part of it.

As for the third view producing a result which appears reasonably fair and sensible from the point of view of taxation policy, the situation resulting from the third view is that where spouses, while not separated in circumstances D which are likely to be permanent, are nevertheless separated geographically for the whole or part of a particular year of assessment, they are not, on account of that geographical separation alone, to be liable to a greater aggregate amount of capital gains tax than if they had not been so separated geographically. In substance the third view has the result that the situation of spouses for capital gains tax purposes is made similar to that which already E existed for income tax purposes.

My Lords, I am clearly of the opinion that the third view of the effect of s 45(3) of the Act which I have just been discussing is the correct one, and, as a consequence of that, that the two different views of that effect previously put forward by the Inland Revenue on the one hand and preferred by Sir Denys Buckley on the other, must be rejected.

F **Lord Brightman**—My Lords, the facts essential to the decision in this case can be stated in a few words. The wife ceased to be resident in the United Kingdom at the end of the fiscal year 1971–72. Her husband remained resident in the United Kingdom in the next fiscal year until 28 October 1972. On 7 July that year he made to his wife a gift of shares in regard to which there was an unrealised capital gain. Capital gains tax is claimed on that disposal.

G The gift had no tax saving objective. If the gift had been made some three months earlier or nine months later there would have been no arguable claim to tax. The tax, if rightly payable, has properly been described as a windfall to the Exchequer. The liability, if any, was purely adventitious. It would however be wrong to criticise the Revenue for claiming this windfall and no one does. The Revenue has, in genaral, no option but to claim such tax as a statute says H shall be payable. If the statute is obscure, as is here the case, the Revenue has in general no option but to ask the court to interpret it.

The general rule is contained in s 20 of the Finance Act 1965. Subject to exceptions provided by the Act, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during I which he is ordinarily resident in the United Kingdom. The husband was resident and ordinarily resident in the United Kingdom during part of the fiscal year 1972–73. A gift is a disposal which is deemed to take place at

market value. Therefore the husband is liable to capital gains tax in respect of the gift to his wife unless there is an exception provided by the Act. A

An important exception is provided. It is to be found in para 20(1) of Sch 7. The language is convoluted but the meaning is plain. If "a married woman [is] living with her husband" and the husband gives an asset to his wife, or vice versa, the disposition shall be deemed to be made for a consideration which yields neither gain nor loss. The policy of the Act is clear. Dispositions between husband and wife, if living together, are exempt. Their aggregate assets are totally unaffected by the disposition. B

The Act took the precaution of defining what was meant by the conception of "a married woman living with her husband". Some situations would be crystal clear. Others might give rise to doubt. What amounts to a separation? Must there be an order of the court? Is a separation pursuant to a deed of separation sufficient? What if there is a de facto separation, which might be temporary or permanent? C

These questions were sought to be answered by s 45(3) of the Act. Unfortunately the answer was delphic. Section 45 is an interpretation section in the widest sense. It states what particular words mean; what particular words include; what particular words do not include; how particular words shall be construed; and how particular situations shall be treated. To define when a married woman is living with her husband the draftsman chose the "shall be construed" formula by reference to a section in another Act dealing with a different tax. The clarification, as it was supposed to be, of the simple conception of a married woman living with her husband, was achieved by the following provision (as amended): "(3) References in this Part of this Act to a married woman living with her husband should be construed in accordance with section 42(1)(2) of the Income and Corporation Taxes Act 1970." D E

This piece of drafting is an oddity. First, the subsection adopts the word "should", which can only mean "ought to", instead of the usual imperative "shall". Secondly, when referring to two subsections in conjunction, the draftsman omits the conjunctive word. Thirdly, in referring to a section which consists of only two subsections, he refers to the section by its number and then to the only two subsections by their numbers. F

These oddities, however, only give rise to niggling criticisms. The reader will have no difficulty in substituting "shall" for "should". He will mentally supply the word "and" between the two subsection numbers. He will know that he must construe the conception of a married woman living with her husband in accordance with both subsections of s 42, even if he would have reached the same conclusion had the section number stood alone. But if he approaches s 42 with confidence that all will then be made clear, he will be disappointed because he will find that subs (2) of s 42, unlike subs (1) has nothing whatever to do with construction. G

Subsection (1) of s 42 is indeed a construction provision, as the marginal note rightly states. It is a definition of the "shall be treated as" type. It reads as follows: H

> "42-(1) A married woman shall be treated for income tax purposes as living with her husband unless—(*a*) they are separated under an order of a court of competent jurisdiction or by deed of separation, or (*b*) they are in fact separated in such circumstances that the separation is likely to be permanent." Subsection (2) is not a construction provision. It reads as I

follows: "(2) Where a married woman is living with her husband and either—(*a*) one of them is, and one of them is not, resident in the United Kingdom for a year of assessment, or (*b*) both of them are resident in the United Kingdom for a year of assessment but one of them is, and one of them is not, absent from the United Kingdom throughout that year, the same consequences shall follow for income tax purposes as would have followed if, throughout that year of assessment, they had been in fact separated in such circumstances that the separation was likely to be permanent. Provided that, where this subsection applies and the net aggregate amount of income tax (including surtax) falling to be borne by the husband and the wife for the year is greater than it would have been but for the provisions of this subsection, the Board shall cause such relief to be given (by the reduction of such assessments on the husband or the wife or the repayment of such tax paid (by deduction or otherwise) by the husband or the wife as the Board may direct) as will reduce the said net aggregate amount by the amount of the excess."

Subsection (2) assumes that a married woman *is* living with her husband. Nothing in subs (2) alters that fact. It is the basic assumption upon which subs (2) proceeds. The subsection then provides that in certain circumstances of geographical separation "the same consequences shall follow" for income tax purposes as would have followed if, contrary to the fact, the spouses had been separated except that, put shortly, the net aggregate income tax payable by the spouses shall not be increased.

To sum up the scheme of s 42, subs (1) clarifies precisely what is meant by a "married woman living with her husband". Subsection (2) provides that, given the existence of that situation, spouses geographically separated are in certain circumstances to enjoy, so far as the aggregate quantum of tax is concerned, the advantages of marital separation without the disadvantages.

The Crown's approach is, in effect, to substitute for "where a married woman is living with her husband and either" the very opposite, namely "a married woman shall not be treated as living with her husband if" and to ignore everything else including the proviso. Paragraphs (*a*) and (*b*) of subs (2) would thereby be converted into an exception to subs (1). Or, as the Crown prefer to express it, the words "the same consequences shall follow for income tax purposes as would have followed if" should be deleted together with the proviso, and there should be substituted "they shall be treated for capital gains tax purposes as if", again disregarding the proviso.

The taxpayer's approach is to leave subs (2) intact but to substitute references to capital gains tax for references to income tax. The effect will be to give to geographically separated spouses possible advantages, e.g. two tax free allowances, but they will not be penalised for their geographical separation.

My Lords, I choose without hesitation the second approach, for the following reasons. First, it does less violence to s 45(3) of the Finance Act 1965, which contains no sufficient warrant for ignoring the proviso to subs (2) of s 42; the proviso is a part of that subsection. And it involves the minimum alteration to s 42 when its provisions are applied referentially. Secondly, it preserves what seems to me to be the policy of the Act, namely, that disposals between spouses, which *ex hypothesi* do not realise a gain and which leave the matrimonial assets unaltered, are exempt from capital gains tax. Thirdly, it equates the capital gains tax position with the income tax position, and that

seems to me to answer the "accordance" which s 45(3) expressly seeks to achieve. Fourthly, if geographically separated spouses are not to be prejudiced by their separation for income tax purposes, I see no logic in assuming that Parliament intended them to be prejudiced for capital gains tax purposes. All the pointers which I can discern are in favour of the second approach. A

For these reasons I would allow the appeal.

Appeal allowed, with costs in the House of Lords but no order for costs in the Courts below. B

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