Privy Council Appeal No. 50 of 1982

The Commissioner of Income Tax *Appellant*

v.

Esperance Company Limited *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER 1983

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD SCARMAN
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
SIR DENYS BUCKLEY

[Majority Judgment Delivered by ***Lord Templeman****]*

By the Income Tax (Amendment No.2) Act 1971 the legislature of Mauritius introduced into the Income Tax Ordinance of 1950 provisions whereby *inter alia* income tax became chargeable on any repayment on or after 1st July 1971 of share capital to a shareholder if and to the extent that the company repaying the share capital at or before or after the repayment converted profits into paid-up bonus shares. The respondent company Esperance Co. Ltd. held shares in Mon Loisir S.E. Co. Ltd. which converted profits amounting to Rs25,000,000 into fully-paid bonus shares and distributed Rs22,000,000 by way of repayment of the capital of those bonus shares between 1963 and 1969; the 1971 Act did not affect these repayments which were made before 1st July 1971.

By the Income Tax Act 1974 the provisions of the 1950 Ordinance as amended by the 1971 Act relating to the charge of tax on repayment of share capital ceased to have effect from 1st July of the year of assessment 1974/1975 and those provisions were replaced by similar provisions of the 1974 Act which

applied to any repayment of share capital made after that 1st July.

In 1981 the Mon Loisir S.E. company, then in course of voluntary winding up, made further repayments of share capital to the holders of bonus shares. The appellant Commissioner of Income Tax claimed that those repayments were taxable under the 1974 Act. The Supreme Court of Mauritius (Espitalier-Noel and Ahmed JJ.) rejected this claim on the grounds that the 1974 Act did not apply to the repayment of share capital made after 1st July of the year of assessment 1974/1975 in respect of bonus shares issued before 1st July 1971. This somewhat surprising result flowed from the view taken by the Supreme Court of the effect of the 1974 Act (which was expressed to be an Act to amend and consolidate the law relating to income tax) and from the fact that the Supreme Court felt justified in limiting the operation of the 1971 Act not only to the repayment of share capital made on or after 1st July 1971, but also to the issue of that share capital on and after 1st July 1971. The Commissioner of Income Tax now appeals.

It is common ground that if the 1971 Act charged tax on the repayment of share capital made on or after 1st July 1971 in respect of bonus shares issued before or after that date, then the provisions of the 1974 Act were apt to charge repayment of share capital made on or after 1st July of the year of assessment 1974/1975. Their Lordships turn therefore to consider the 1971 Act.

Section 2 of the 1971 Act amended section 5 of the 1950 Ordinance and thereby brought into charge for income tax "distributions" a term which was defined by section 5(6)(i)(d) of the 1950 Ordinance as amended by the 1971 Act to include:-

> "(d) Any repayment of share capital to a shareholder where at or before or after the time of that repayment the company repaying the share capital issues as paid up otherwise than by the receipt of new consideration any share capital, except in so far as the amount repaid exceeds the amount or aggregate amounts of share capital previously or subsequently issued as paid up otherwise than by the receipt of new consideration;"

Thus for tax purposes the repayment of share capital is treated as an income distribution if the capital subscribed for the shares was derived from the resources of the company itself.

Section 5(1) of the 1971 Act provided that:-

> "(1) The amendment made by section 2 shall not affect any distribution made before the 1st July 1971."

For present purposes a relevant distribution is any repayment of share capital made on or after 1st July 1971 in any of the events mentioned in paragraph (d). The first event is "where at....the time of that repayment the company repaying the share capital issues as paid up....any share capital". In that event a repayment of share capital and an issue of share capital are contemporaneous so that the word "issues" appropriately describes the happening of the event. The second event is "where....before....the time of that repayment the company repaying the share capital issues as paid up....any share capital". In that event the word "issues" refers to an issue of shares which precedes a repayment of share capital. The word "issues" correctly describes the process involved, although if the draftsman had not compressed paragraph (d) and made the word "issues" serve the purposes of three separate and different events, he might have provided that "where..... before....the time of that repayment the company repaying the share capital has issued as paid up.... any share capital...". But no recognised canon of construction permits the addition of a further requirement which is not expressed in paragraph (d) and which would require the "issues" to be made on or after 1st July 1971.

It is said that the word "issues" is a word of futurity but that observation is meaningless in the context of paragraph (d). By section 5 any repayment of share capital described by paragraph (d) is limited to a repayment made on or after 1st July 1971. If such a repayment is made, and if before the date of that repayment the company issues share capital then tax becomes chargeable on the repayment. In the present case a repayment of share capital made after 1st July 1971 was preceded by an issue of paid up share capital and tax is therefore charged on the repayment. The third event prescribed by paragraph (d) is "where....after the time of that repayment the company repaying the share capital issues as paid up....any share capital". In that event the repayment is followed by the issue so that the word "issues" appropriately describes the process.

In a persuasive and skilful submission, Mr. Kentridge who appeared for the respondent company submitted, in effect, that tax is only charged under paragraph (d) "where at or before or after the time of that repayment the company repaying the share capital issues on or after the 1st July 1971 ....any share capital". There is no justification for inserting the words "on or after the 1st July 1971" into paragraph (d). The legislature by section 5 expressly introduced those words in relation to the date of repayment of share capital, but did not do so

in relation to the date of the issue of share capital. The Supreme Court of Mauritius assumed that the draftsman of the 1971 Act was familiar with the United Kingdom Finance Act 1965 and in particular with the provisions which are now to be found in sections 233 to 235 of the Income and Corporation Taxes Act 1970. But section 235 of the United Kingdom Act of 1970 expressly limits the tax charged by that section to distributions made after "a company issues share capital as paid up....or has done so after 6th April 1965". For the purposes of the United Kingdom Act, bonus issues made on or before 6th April 1965 must be disregarded because that Act expressly so provides. The 1971 Act of Mauritius made no such provision. The 1971 Act of Mauritius only requires the repayment of share capital to be made on or after 1st July 1971 if tax is to be charged.

Mr. Kentridge submitted that the language of the 1971 Act was ambiguous and that it was necessary to construe the Act as not applying to share capital issued before 1st July 1971 in order to avoid giving retrospective effect to the Act. He said that any purchaser of a share before 1st July 1971 would have been entitled to assume and would have assumed that income tax would not be chargeable on any repayment of share capital. A similar argument was presented to the House of Lords in *Customs and Excise Commissioners v. Thorn Electrical Industries Ltd.* [1975] 1 W.L.R. 1661. In that case payments under a hire agreement entered into before the date when value added tax was imposed were held to be liable to that tax so far as those payments were made after the date of imposition of the tax. Lord Morris of Borth-y-Gest, at page 1672, said:-

> "It was submitted that if the tax is chargeable in the present cases there would be a retrospective element and further it was submitted that tax should not be chargeable if the words imposing it are ambiguous. In no true sense is there a retrospective element. The terms of the contracts of hiring are in no way altered even though a future tax is imposed upon the service agents. The fact that as from a future date tax is charged upon a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed. Nor is the tax in the present case being imposed by ambiguous words. In my opinion the words now under consideration bear clearly the meaning which I have expressed. An ambiguity is not created merely because an unsuccessful argument as to the meaning of words has been skilfully presented."

These words apply in the present case. In no true sense is there a retrospective element. Nor is the tax in the present case being imposed by ambiguous words. An ambiguity is not created merely because an unsuccessful argument as to the meaning of words has been skilfully presented.

Mr. Kentridge was correct in complaining that the 1971 Act which was designed to counter tax avoidance might operate to charge tax after 1971 on a purchaser of shares prior to 1971 who had no intention of avoiding tax and who paid a price for his shares which reflected the then current law which did not impose income tax on any repayments of share capital. This complaint, the practical consequences of which must remain a matter of speculation, does not justify the Court in doing violence to the language of the 1971 Act by inserting a requirement which would partially defeat the expressed intention of the legislature to impose tax on repayments of share capital made after 1st July 1971.

The Court has no power to grant a special exemption to shareholders of those companies which by accident or design prepared before the 1971 Act opportunities for avoiding tax on profits distributed in the form of repayment of share capital. Tax avoidance of the kind exemplified by the history of the Mon Loisir S.E. company provokes anti-tax avoidance legislation and that legislation may have the effect of imposing tax on shareholders who have not profited from tax avoidance and on other shareholders who were not able to forecast the evolution or the ambit of future tax avoidance legislation. In the construction of tax legislation it is best to avoid the exercise of discretion in favour of an individual tax payer or in favour of the generality of tax payers. In the present case the legislature imposed tax on repayments of share capital made on or after 1st July 1971 where the company issues fully paid bonus shares prior to the repayment. Those conditions were fulfilled so far as the Mon Loisir S.E. company is concerned. Mr. Kentridge submitted that the 1971 Act was so confused in its language and obscure in its effect that a shareholder may not be able to discover whether and how much tax is due, but that complaint (which may or may not be justified) does not enable the Court, by an act of judicial legislation, to read the 1971 Act as though it did not apply where fully paid bonus issues were issued prior to 1st July 1971.

The Income Tax Act 1974 repealed the 1950 Ordinance with effect from 1st July of the year of assessment 1974/1975. The 1974 Act imposed income tax on subsequent repayments of share capital in terms slightly different but indistinguishable in meaning from the

language of the 1950 Ordinance as amended by the 1971 Act. The 1974 Act does not contain any provision which exempts from tax repayment of share capital made in respect of shares issued before the coming into force of the 1974 Act or in respect of shares issued before 1st July 1971. Such a provision could only be implied by analogy with the 1971 Act but no such analogy arises because, for the reasons already advanced, the 1971 Act itself did not contain expressly or by implication any exemption in respect of fully paid bonus shares issued before 1st July 1971.

In the result their Lordships will humbly advise Her Majesty that the Judgment of the Supreme Court ought to be set aside and the assessment restored. The respondent company must pay the appellant's costs before the Board.

Dissenting Judgment by Lord Bridge of Harwich

Under the Mauritius Income Tax Act 1974 ("the Act of 1974") dividends are chargeable to income tax: section 11 (1)(d). "Dividends" are defined by section 2(2) as including:-

> "(d) Any repayment of share capital to a shareholder where at or before or after the time of that repayment the company repaying the share capital issued as paid up, otherwise than for the receipt of new consideration, any share capital, except in so far as the amount repaid exceeds the amount or aggregate of amounts of share capital previously, simultaneously or subsequently issued as paid up otherwise than for the receipt of new consideration."

The question to be decided in the appeal is whether this provision applies to the repayment of share capital to shareholders, in consequence either of an authorised reduction of capital or of the liquidation of the company, when the history of the company discloses that it has capitalised profits by the issue of fully paid-up bonus shares at any date before 1st July 1971. The significance of that date will shortly become apparent.

It will be convenient to use the shorthand expression "relevant bonus issues" to describe the issues of share capital as paid-up, otherwise than for the receipt of new consideration, to be taken into account in calculating the aggregate of such issues which must be exceeded before a repayment of share capital will qualify for exemption from the charge to income tax which section 2(2)(d) has the effect of imposing. It is important, at the outset,

to appreciate how, in general terms, section 2(2)(d) operates. Whenever a company repays share capital to those who happen to be its shareholders for the time being, one must calculate the aggregate of the relevant bonus issues made by the company. If the total repayment is equal to or less than the aggregate of relevant bonus issues, the repayment will be fully chargeable to income tax in the hands of the shareholders. If the total repayment exceeds the aggregate of relevant bonus issues, the excess alone will qualify for exemption from tax, of which, presumably, individual shareholders will be entitled to the benefit *pro rata*. It is also to be noted that an originally exempt repayment may be retrospectively converted into a taxable repayment by a subsequent bonus issue, but this throws little light on the question the Board has to decide. The appellant contends that all bonus issues are relevant at whatsoever date they were made. The respondent contends, as the Supreme Court of Mauritius held, that the only relevant bonus issues are those made since 1st July 1971.

The critical words in section 2(2)(d) of the Act of 1974 are: "Any repayment of share capital to a shareholder where at or before or after the time of that repayment the company repaying the share capital issued...." bonus shares. The drafting is obviously inept since the past tense "issued" cannot be appropriate to cover the past, present and future events contemplated. This results not so much in ambiguity as in total obscurity as to the draftsman's intention with regard to the date of relevant bonus issues. This can only be resolved by looking at the legislative history.

The provision in question was first introduced by the Income Tax (Amendment No. 2) Act, 1971 ("the Act of 1971"). Section 2 of the Act of 1971 amended the Income Tax Ordinance, 1950 by adding to the categories of receipts chargeable to income tax a new category called "distributions" and providing a definition of "distribution" in lettered paragraphs from (a) to (f). Paragraph (d) of the definition of "distribution" in the Act of 1971 is in terms identical with the definition of "dividends" in section 2(2)(d) of the Act of 1974, save only that, where the word "issued" first appears in the 1974 definition, the 1971 definition used the word "issues". The Act of 1971 came into force on 1st July 1971. The Mauritius fiscal year runs from 1st July. Section 5(1) of the Act of 1971 provides:-

> "The amendment made by section 2 shall not affect any distribution made before the 1st July 1971."

I understand that all members of the Board are agreed on two points: first, that the disputed

question turns primarily on the construction of the relevant provisions of the Act of 1971; secondly, that the change of tense in the relevant definition from "issues" in the Act of 1971 to "issued" in the Act of 1974 (an Act "to amend and consolidate" the law) cannot have been intended to effect any change in the law.

In the judgment of the Supreme Court of Mauritius, section 5(1) of the Act of 1971 is relied on as an indication that the only relevant bonus issues are those made after 1st July 1971. In the judgment of the majority of the Board, the same provision is relied on as an indication to the opposite effect. With respect, I cannot agree with either view. Section 5(1), which applies to each of the several varieties of distribution defined in paragraphs (a) to (f), is, in my judgment, entirely neutral on the point in question. Whether a distribution of the kind defined by paragraph (d) requires that both bonus issue and repayment of capital should have been made after 1st July 1971 or whether it is sufficient to constitute such a distribution that a company repays capital after 1st July 1971, if it has at any time in its previous history made an issue of bonus shares, must depend entirely on the construction of paragraph (d) itself. If the bonus issue is made at or after the time of the repayment of capital, the question does not arise. The relevant words to be construed, therefore, read: "Any repayment of share capital to a shareholder where .... before .... the time of that repayment the company repaying the share capital issues" bonus shares. I can find nothing whatever in the context which authorises, still less compels, the Board to rewrite this provision by substituting "has issued" for "issues". Accordingly, the words used in this part of the definition, in their ordinary grammatical meaning, require a present issue of bonus shares followed by a repayment of capital to constitute a distribution.

It follows that a bonus issue before the Act of 1971 came into force is not a relevant bonus issue. This interpretation is powerfully reinforced by the fact that the draftsman of the Act of 1974 thought it was necessary to change the tense in the relevant definition from "issues" to "issued". If the majority are right, the definition, exactly as it stood in the Act of 1971, already embraced all past bonus issues, whenever made. On this view, if no change of law was intended, no change of tense was required, and there can be no plausible explanation for the change save possibly that it was a typographical error in the Mauritius equivalent of H.M. Stationery Office. This possibility was not canvassed in argument. If, on the other hand, under the 1971 definition, relevant bonus issues were only those

made since 1st July 1971, on repeal and re-enactment of the Income Tax Ordinance 1950, as amended by the Act of 1971, by the consolidating Act of 1974, which took effect on 1st July 1974, it was necessary to provide for the case of a relevant bonus issue made between 1st July 1971 and 1st July 1974, followed by a repayment of share capital after 1st July 1974. As a drafting device to cover this contingency the mere change of tense from "issues" to "issued" is far from felicitous. Looking at the legislative history, however, it it capable of being read in this sense. Moreover, the Supreme Court of Mauritius so read it and it seems entirely right to attribute to that Court a greater familiarity than this Board can claim with the somewhat imprecise style of draftsmanship which appears to characterise legislation in Mauritius. Purely as a matter of construction, therefore, I reach the conclusion that relevant bonus issues are limited to those made since 1st July 1971.

But if the language is not clear, it is at the very least ambiguous and, if both constructions are possible, it is legitimate to consider their respective fiscal consequences. The analagous United Kingdom legislation, originally in the Finance Act 1965, now in the Income and Corporation Taxes Act 1970, drafted with great precision, applies only to repayments associated with bonus issues made since 6th April 1965. Previously the issue of bonus shares, which was held by the House of Lords in *Commissioners of Inland Revenue v. Blott* [1921] 2 A.C. 171 not to attract liability to income tax, had become an increasingly popular method of tax avoidance in the distribution of company profits. Here the 1965 legislation, without affecting pre-1965 bonus issues, has been effective to close that loophole. If, after 6th April 1965, a company chose to issue bonus shares, everyone could appreciate the fiscal consequences.

In considering the Mauritius legislation much of the argument before the Board turned on whether the acceptance of the construction urged by the appellant would give to the provision under consideration a retrospective operation of the kind on which the courts have always frowned. On this aspect of the matter, I derive, with respect, no assistance from the decision of the House of Lords in *Customs and Excise Commissioners v. Thorn Electrical Industries Ltd.* [1975] 1 W.L.R. 1661, which held that the clear language of the Finance Act 1972, which introduced value added tax, was effective to impose the tax on instalments of hire of television sets paid after the commencement of the Act under contracts concluded before the commencement of the Act, nor from the suggested analogy, canvassed in argument, with the introduction of capital gains tax. It may be that

the test of retrospective operation is not the true test by which the fiscal equity of the provision under consideration requires to be judged. The provision is intended to defeat a particular form of tax avoidance and if, on the majority's construction, it struck only at those who had benefited from the issue of bonus shares in the past and still held those shares on 1st July 1971 it would, I recognise, not be open to criticism as retrospective in its operation. But it clearly cannot be so limited. If relevant bonus issues include all bonus shares whenever issued, then every Mauritius resident who has purchased before 1st July 1971 shares in any company whose shares are traded in the stock exchanges of the world at any time after that company has, however long ago, made a bonus issue is discriminated against by a potential liability to pay income tax on the whole or part of the capital value of his shares, which must, in practice, have the immediate effect of depreciating the market value of those shares, at all events in dealings with other Mauritius residents.

This consideration was very much in the minds of the judges of the Supreme Court of Mauritius, as the following exchanges between the Court and counsel (Mr. Matadeen) appearing for the Commissioner of Income Tax will show:-

> "Mr. Matadeen: My learned friend referred to the case where before 1971 there had been an issue of bonus shares, and again before 1971 or even after 1971, a third party, a *bona fide* purchaser, would come in, would buy the bonus shares. My learned friend was contending that this would offend the principles of fiscal equity if that *bona fide* purchaser would have to pay tax when the capital would be repaid to him. This is not so, my Lords. We are dealing with reasonable people. A third party who buys bonus shares is taking the risk and he must take the rap.
>
> Court: How?
>
> Mr. Matadeen: He is buying bonus shares which have been issued by the company, *caveat emptor*, he is taking the risk, he is buying bonus shares, it is for him to pay, to run the risk if at the end of the day he finds that he has got to pay tax when the capital is being returned to him.
>
> Court: In fact, that *bona fide* purchaser, he is buying what has become capital of the company, and you say that he should be careful of what?
>
> Mr. Matadeen: Perhaps I have not made myself clear enough, my Lords. In the course of his arguments, my learned friend referred to a hypothetical case where after the issue of bonus

shares a third party steps in and buys the bonus from the shareholder. My learned friend - he will no doubt correct me if I am wrong - stated that it would have been unfair if that third party would have to pay tax when there was a return of capital to him subsequently for the simple reason that this was preceded by an issue of bonus shares. My answer to this is that it is not offensive to the principles of fiscal equity because that third party before buying the shares should enquire, it is his duty to enquire.

Court: To find out what?

Mr. Matadeen: To find out what was the transaction of the company before the purchase of shares, whether there has been an issue of bonus shares or not, this is the fundamental principle of our law.

Court: And he finds out that there are bonus shares, what are his fears?

Mr. Matadeen: Then it is for him to decide what is going to be the price he would pay for the shares: this is my simple answer to it."

On the footing, which is common ground, that the law in Mauritius before 1971 was the same as the law in the United Kingdom before 1965, as declared in *Commissioners of Inland Revenue v. Blott* (supra), Mr. Matadeen's "simple answer" is no answer at all to the Court's succinct and penetrating questions. Indeed, there can be no effective answer to them.

This discrimination against the pre-1971 purchaser of shares in a company with a history of one or more bonus issues provokes me to say that the construction favoured by the majority would produce arbitrary and capricious fiscal consequences. It would require the clearest possible language to persuade me that, in aiming at tax avoiders, any civilised legislature had used a legislative blunderbuss which must inevitably also hit other citizens who have neither participated in nor benefited from any scheme to avoid payment of tax. I find no such language in the relevant legislation of Mauritius.

Accordingly, I would be in favour of dismissing this appeal.

Dissenting Judgment by Sir Denys Buckley

The decision of this appeal depends upon the proper interpretation of section 2(2)(d) of the Mauritius Income Tax Act 1974. The question is whether monies distributed amongst shareholders of a company by way of repayment of share capital at a date after the

commencement of the Act constitutes a "dividend" within the meaning of the sub-section by reason of the fact that the company had at various dates all earlier than 1st July 1971 issued bonus shares to its shareholders credited as paid-up otherwise than for cash or other equivalent consideration.

The language of the sub-section is awkward and upon any construction, so far as I can see, produces some surprising results. For example, although this is not relevant to the present appeal, it seems that in the event of a company making any repayment of share capital to any of its shareholders the question whether that repayment will give rise to a charge to income tax, and the extent to which this occurs, may and, as regards the extent of the charge, will remain in doubt as long as there remains any possibility of the company making any bonus issue of shares in the future.

The problem in the present appeal arises out of the use in the sub-section of the word "issued" in the perfect tense. Any relevant repayment must *ex hypothesi* have occurred after the commencement of the 1974 Act: a bonus issue relevant to the sub-section may have taken place "at or before or after the time of that repayment". The use of the word "issued" in the perfect tense must be grammatically inaccurate if the bonus issue is made simultaneously with the repayment, in which case the proper tense would strictly be the present tense or possibly a future tense. The perfect tense must, perhaps even more clearly, be inaccurate if the bonus issue is made after the repayment, in which case some form of future tense would be required.

Mr. Kentridge for the respondent has presented an argument, which I regard as a cogent one, to the effect that in these circumstances the word "issued" must be regarded as grammatically inappropriate and that it should be read in a form which is capable of applying accurately to all three of the envisaged contingencies. This, he suggests, should be and can only be "shall have issued". This is, in my view, a perfectly acceptable exercise in construction and one which I am quite ready to accept. Indeed I see no other way of giving section 2(2)(d) a coherent meaning.

If the sub-section is read in this way only bonus issues made after the commencement of the 1974 Act will, in my judgment, be relevant to it. My reason for so saying is not associated with any judicial disapprobation of "retroactive" legislation, for there is, I think, no retroactive element in any strict sense in this legislation, however it is construed: the Act only raises a charge to tax in

respect of repayments of capital made after its commencement, down to which time the subject was regulated by the Income Tax (Amendment No. 2) Act 1971. My reason for thinking that the sub-section does not extend to bonus issues made before the commencement of the 1974 Act is that the language of the sub-section, as I would construe it, excludes these bonus issues as a matter of grammar.

The use of the word "issued" in the perfect tense at the very least renders the legislature's intention equivocal and entitles a court of construction to have regard to the legislation which the 1974 Act was to consolidate. The provision which is now to be found in section 2(2)(d) of the 1974 Act was first introduced to the Mauritius income tax code by the Income Tax (Amendment No.2) Act 1971 section 2(d), which was in substance identical with the language of section 2(2)(d) of the 1974 Act except that it used the word "issues" where section 2(2)(d) of the 1974 Act first uses the word "issued". In this context the word "issues" in the present tense is capable of applying to any bonus issue made after the commencement of the 1971 Act, whether it was made at or before or after the time of the relevant repayment, but it is, in my judgment - and in this I differ from the majority of the Board - incapable of applying to any bonus issue made before the commencement of that Act. This is not, to my mind, at all surprising, for section 5(1) of the 1971 Act provided that the amendment made by section 2 thereof should not affect any "distribution" (the word used in the 1971 Act to describe what is described in the 1974 Act as a "dividend") made before 1st July 1971, which was the date on which the 1971 Act came into operation and the Mauritian fiscal year 1971/2 commenced.

A "distribution" as defined in the 1971 Act can, in my judgment, only be made when the relevant repayment of share capital was made. Consequently, in my judgment, the 1971 Act did not apply to any repayment of share capital made before 1st July 1971 nor (because of the use of the present tense in the word "issues") to any bonus issue made before that date. The Act created a new charge to tax capable of arising only out of conditions occurring after its creation. This is a rational and eminently fair concept. The members of the company, when considering whether or not to create a bonus issue after 1st July 1971 would be able to appreciate the fiscal consequences. The construction favoured by the majority of the Board on the other hand results in what, with deference, appear to me to be most arbitrary and capricious consequences.

Bonus issues made perhaps many years before 1st July 1971 might occasion liability to income tax to

arise in the event of any repayment of share capital made after that date in respect not merely of the holders of the bonus shares, who may have bought them in the market for a price which envisaged no such liability, but also of the holders of other shares who, until 1971, could have had no ground for thinking that any tax liability would ever attach to them by reason of the bonus issue. This consideration inclines me very much to prefer the construction of the 1971 Act which I have indicated. I believe that all the members of the Board concur in the view that the adoption in the 1974 Act of the perfect tense in the word "issued" was not intended to alter the law. In these circumstances my preference for the construction of section 2(d) of the 1971 Act which I have indicated reinforces in my mind the view that "issued" in section 2(2)(d) of the 1974 Act should be construed as "shall have issued", which results, in my opinion, in a coherent sequence of the legislative provisions. It leaves all that occurred before 1st July 1971 untouched. It creates a charge to tax under the 1971 Act in respect of any repayment of capital made after 1st July 1971 where the company has issued any bonus shares after 1st July 1971, whether at or before or after the date of the repayment. It re-enacts that charge under the 1974 Act in respect of any repayment of capital made after 1st July 1974, and a possible explanation of the change of tense from "issues" to "issued" may have been an awareness on the part of the draftsman that some bonus issues between 1st July 1971 and 1st July 1974 might be relevant to a repayment of capital affected after 1st July 1974. If this was the case, the use of the perfect tense was not, in my view, a very happy one, but for reasons which I have given earlier, I think that "issued" in the 1974 Act should be construed as "shall have issued".

For these reasons I also would be in favour of dismissing this appeal.