

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE CHANCERY DIVISION (REVENUE)

ROBERT WALKER
(HM INSPECTOR OF TAXES)

Respondent

- v -

CENTAUR CLOTHES GROUP LIMITED

Appellant

BEFORE:

LORD JUSTICE NOURSE

LORD JUSTICE PETER GIBSON

and

SIR PATRICK RUSSELL

Mr David Goldberg QC and Mr Conrad McDonnell (instructed by Legal Department,
Wm Baird plc) on behalf of the Appellant

Mr Michael Furness (instructed by The Solicitor for the Inland Revenue) on behalf of
the Respondent

Judgment: 25 June 1998

Peter Gibson LJ:

The taxpayer company, The Centaur Clothes Group Limited ("Centaur"), is a wholly owned subsidiary of William Baird plc. For many years Centaur carried on trade as a manufacturer, distributor and retailer of men's outerwear. But by two agreements on 6 January 1992 it transferred its business assets and liabilities to another wholly owned subsidiary of William Baird plc, Baird Textile Holdings Ltd ("Textile"), the purchase price being the net book value of the assets transferred. That price, amounting to £4,290,242, was to be paid on a date to be agreed between the parties, but it has been left outstanding, with no express agreement about the payment of interest. Also on 6 January 1992 by an agency agreement Textile appointed Centaur as its agent to manage and conduct the business transferred by Centaur to Textile. No remuneration for Centaur was provided for by that agreement.

On 5 April 1993 Centaur declared a dividend of £2,087,113. Payment of this dividend to William Baird plc was achieved by that amount being set against the debt of £4,290,249 which was thereby reduced. £695,704.10 Advance Corporation Tax ("ACT") attributable to that dividend was paid to the Revenue by Textile on behalf of Centaur. On 30 September 1993 Centaur opened an interest-bearing account with the Midland Bank, paying in £2,000, and £8 interest was credited to it in December 1993. On 8 December 1993 Centaur paid a second dividend of £915,000 and £265,645.16 ACT was paid to the Revenue, again by Textile on behalf of Centaur. Centaur drew up accounts for the year ended 31 December 1993. The balance sheet at 31 December 1993 showed as its assets the debt owned by Textile and £2,008 cash at the bank and its profit and loss account for the year showed that it had only received £8 bank interest. The Directors' Report of 17 January 1994 stated that Centaur was now only a holding company.

Centaur submitted to the Revenue computations of its corporation tax position for the year ended 31 December 1993. It claimed a carry-back of ACT under s.239(3) Income and Corporation Taxes Act 1988 ("the 1988 Act") in respect of the ACT relating to the two dividends. That claim was refused by the Revenue in respect of the ACT relating to the first dividend on the ground that that dividend was not paid during an accounting period of Centaur as required by s.239(3), but allowed in respect of the second dividend on the basis that a new accounting period commenced when the bank account was opened. The difference in the treatment of the ACT for the two dividends demonstrates the somewhat haphazard way in which on the Revenue's approach the relief in respect of ACT will operate, the mere opening of an interest-bearing account, producing a negligible amount of interest, being sufficient to allow a very substantial sum of tax wholly unrelated to that account or interest to be recovered by an otherwise dormant company.

Centaur appealed against that refusal and on 1 April 1996 a Deputy Special Commissioner allowed the appeal. The Revenue, appealed and on 13 November 1996 Sir John Vinelott, sitting as a judge of the High Court, allowed the appeal ([1997] STC 72). Centaur now appeals to this court.

To make the point in issue understandable, I must essay a summary of the relevant fiscal provisions.

Prior to 1965 the profits of companies were chargeable to income tax and profits tax. By the Finance Act 1965 corporation tax on a company's profits (not being income arising to it in a fiduciary or representative capacity) was introduced in lieu, but it was engrafted onto the structure of income tax. A company resident in the UK is chargeable to corporation tax on all its profits (meaning income and chargeable gains) wherever arising (ss.6(1), (2) and (4) and 8(1) of the 1988 Act). By s.11(1):

"A company not resident in the United Kingdom shall not be within the charge to corporation tax unless it carries on a trade in the United Kingdom through a branch or agency but, if it does so, it shall, subject to any exceptions provided for by the Corporation Tax Acts, be chargeable to corporation tax on all its chargeable profits wherever arising."

By subsection (2) its chargeable profits are limited to, in effect, UK profits. A company is not chargeable to capital gains tax in respect of chargeable gains, they being chargeable to corporation tax (s.6(3)).

Section 8 contains the general scheme of corporation tax. It includes within the profits for which the company is chargeable to corporation tax profits accruing for its benefit under any trust or arising under any partnership in any case in which it would be so chargeable if the profits accrued to it directly, and profits arising in the winding up of the company, but excludes profits arising to it in a fiduciary or representative capacity except as respects its own beneficial interest therein (s.8(2)). By s.8(3) corporation tax for any financial year shall be charged on profits arising in that year, but assessments to corporation tax shall be made on a company by reference to accounting periods, the amount chargeable of the profits arising in an accounting period being apportioned between financial years, where necessary.

Section 9 prescribes the general rule that the amount of any income is to be computed in accordance with income tax principles, all questions as to the amounts to be taken into account as income or in computing income or charged to tax as a person's income or as to the time when any such amount is to be treated as arising being determined in accordance with income tax law and practice as if accounting periods were years of assessment (s.9(1)). Accordingly for corporation tax purposes income is to be computed and the assessment made under the like Schedules and Cases as apply for income tax purposes and in accordance with the provisions applicable to those Schedules and Cases; but, subject to the provisions of the Corporation Tax Acts, the amounts so computed for the several sources of income, together with any amount for chargeable gains, are to be aggregated to arrive at the total profits (s.9(3)).

Section 12, which is headed "Basis of, and periods for, assessment", is in the following form (so far as material):

"1) Except as otherwise provided by the Corporation Tax Acts, corporation tax shall be assessed and charged for any accounting period of a company on the full amount of the profits arising in the period (whether or not received in or transmitted to the United Kingdom) without any other deduction than is authorised by those

Acts.

(2) An accounting period of a company shall begin for purposes of corporation tax whenever-

(a) the company, not then being within the charge to corporation tax, comes within it, whether by the company becoming resident in the United Kingdom or acquiring a source of income, or otherwise; or

(b) an accounting period of the company ends without the company then ceasing to be within the charge to corporation tax.

(3) An accounting period of a company shall end for the purposes of corporation tax on the first occurrence of any of the following-

(a) the expiration of 12 months from the beginning of the accounting period;

(b) the accounting date of the company or, if there is a period for which the company does not make up accounts, the end of that period;

(c) the company beginning or ceasing to trade or to be, in respect of the trade or (if more than one) of all the trades carried on by it, within the charge to corporation tax;

(d) the company beginning or ceasing to be resident in the United Kingdom;

(e) the company ceasing to be within the charge to corporation tax.

(4) For the purposes of this section a company resident in the United Kingdom, if not otherwise within the charge to corporation tax, shall be treated as coming within the charge to corporation tax at the time when it commences to carry on business

...

(6) If a chargeable gain or allowable loss accrues to a company at a time not otherwise within an accounting period of the company, an accounting period of the company shall then begin for the purposes of corporation tax, and the gain or loss shall accrue in that accounting period.

(7) Notwithstanding anything in subsections (1) to (6) above, where a company is wound up, an accounting period shall end and a new one begin with the commencement of the winding up, and thereafter, subject to section 342(6), an accounting period shall not

end otherwise than by the expiration of 12 months from its beginning or by the completion of the winding up."

By section 14 a company resident in the UK making a qualifying distribution (as therein defined) such as a dividend is liable to pay ACT. Section 239 provides for the set-off of ACT against liability to corporation tax. By subsection (1):

"Subject to ... (2) below, [ACT] paid by a company (and not repaid) in respect of any distribution made by it in an accounting period shall be set against its liability to corporation tax on any profits charged to corporation tax for that accounting period and shall accordingly discharge a corresponding amount of that liability."

Subsection (2) limits the amount of ACT to be set off to the amount of ACT that would have been payable in respect of a distribution of an amount which together with the ACT in respect of it is equal to the company's profits charged to corporation tax for the accounting period. By subs. (3):

"Where in the case of any accounting period of a company there is an amount of surplus [ACT], the company may, within two years after the end of that period, claim to have the whole or any part of that amount treated for the purposes of this section ... as if it were [ACT] paid in respect of distributions made by the company in any of its accounting periods beginning in the six years preceding that period (but so that the amount which is the subject of the claim is set, so far as possible, against the company's liability for a more recent accounting period before a more remote one) and corporation tax shall, so far as may be required, be repaid accordingly."

By s.208 corporation tax is not generally chargeable on distributions of a company resident in the UK nor are the distributions to be taken into account for computing income for corporation tax. Section 832 contains definitions for the 1988 Act, except in so far as the context otherwise requires. Subsection (1) ends with what has been called "the tailpiece", which I have divided into two numbered limbs for ease of reference:

"(1) and a source of income is within the charge to corporation tax or income tax if that tax is chargeable on the income arising from it, or would be so chargeable if there were any such income, and (2) references to a person, or to income, being within the charge to tax, shall be similarly construed."

It is not in dispute that when Centaur ceased to trade on 5 January 1992 an accounting period ended (s.12(3)(c)). What is very much in dispute is whether for the purposes of s.12(2)(B) the accounting period ended "without the company then ceasing to be within the charge to corporation tax". If the accounting period ended on 5 January

1992 without Centaur then ceasing to be within the charge to corporation tax, another accounting period would have begun by reason of s.12(2)(b). If, on the ending of the accounting period on that date Centaur ceased to be within that charge, then the payment of the first dividend on 5 April 1993 would not have been made in an accounting period and s.239 would not be applicable, with the result that there could be no carry-back of the ACT to set off against corporation tax paid earlier.

The nub of the dispute before the judge turned on the meaning to be given to the reference to the company being within the charge to corporation tax. Should it be interpreted in such a way that the company had to have a source of income within that charge for the company to be within that charge, as the Revenue contended? Or was that reference to be understood as meaning that the company was within that charge if corporation tax was chargeable on the income arising to it or would be so chargeable if there were any such income, as Centaur argued?

In resolving that dispute the judge identified two issues which he said it was important to keep separate. The first was whether Centaur had a source of income between 6 January 1992 and 30 September 1993. The second was whether, if it did not, it was brought within the charge to corporation tax between those two dates by the tailpiece, with the consequence that the accounting period current on 6 January 1992 was not brought to an end by s.12(3) and a new accounting period did not start by virtue of s.12(2)(a) when the bank account was opened.

On the first issue the judge said Centaur had only one asset, the debt owed by Textile, and only one activity, the agency business carried on pursuant to the terms of the agency agreement. The debt he found not to be a source of income, nor was the agency agreement. He said that the true position was that Centaur had no source of income though it had two potential sources of income. The judge disagreed with the Deputy Special Commissioner, who had relied on the tailpiece in concluding that the fact that the sources were not income-producing did not prevent the sources from being within the charge to corporation tax. The judge said that the Deputy Special Commissioner had confused two questions: (1) whether during the relevant period Centaur had a source of income and, (2) if not, whether the fact that it had potential sources of income brought it within the charge.

The second of those questions, he said, was the central issue in the case. The judge said that the first limb of the tailpiece enabled a source of income chargeable to corporation tax (e.g. trading income) to be distinguished from a source of income chargeable to income tax (e.g. franked investment income). The judge said that the second limb of the tailpiece required the same principles to be applied to persons and income. A person was within the charge to corporation tax if that person had a source of income within the charge to corporation tax and the person was within the charge to income tax if the person had a source of income within the charge to income tax. The judge rejected an argument that the Revenue's construction produced results which were so arbitrary and unjust that they could not have been intended by the draftsman or the legislature. He accepted that on the Revenue's construction there were arbitrary consequences, but said that they stemmed from the radical changes in corporation tax introduced by the Finance Act 1972 by which ACT became payable in respect of distributions. He said that the problem in the present case arose because the ability of the company to set ACT against corporation tax was, as it were, bolted onto

the existing structure of the Corporation Tax Acts; but that was an inherent fault in the structure and one which a court sitting as a court of construction could not rectify. Accordingly he allowed the appeal.

Before us Mr Goldberg QC for Centaur has not advanced any argument on whether it had a source of income between 6 January 1992 and 30 September 1993, but he has not conceded the point. It is, in the circumstances, sufficient that I should say that I agree with the judge that Centaur did not. The findings of fact by the Deputy Special Commissioner that neither the debt nor the agency agreement produced, or was intended to produce, income for Centaur, as well as the fact that neither gave Centaur the right to any income, seems to me to make it impossible to contend to the contrary.

The dispute before us has centred on whether Centaur has at all times been within the charge to corporation tax so that the end of an accounting period of Centaur on 5 January 1993 was not accompanied by Centaur ceasing to be within the charge. Mr Goldberg submits that the real question is whether Centaur was within the scope of s.6. He submits that all companies resident in the U.K. are within the charge and he stresses that Centaur remained such a company not entitled to any exemptions from tax. He says, rightly, that, if one leaves aside distributions from U.K. companies which because of s.208 are not taken into account in the computation of income, there is no income receipt or chargeable gain which could have accrued to Centaur at any time without a charge to corporation tax then arising. He points out that if the Revenue is right, there is the oddity that a company may be liable to pay corporation tax (in the form of ACT) under s.14(1) on a distribution and yet not be within the charge to corporation tax. He further argues that the purpose of s.239 to enable ACT to be set off against liability to corporation tax, and that the purpose will be frustrated if the Revenue is right.

Mr Furness for the Revenue does not suggest that there is some discernible legislative purpose in the denial to a company in Centaur's position of the recovery of the ACT paid. Just as the judge accepted (at p.89) that the statutory provisions operate in an arbitrary way on the Revenue's construction, and that a company which like Centaur has ceased to trade may move in and out of the charge to corporation tax according to whether or not its cash is invested in a way calculated to produce income within the charge to corporation tax, so Mr Furness frankly accepted that the result was anomalous in Centaur's case. But, he submitted, the judge was right to conclude that the provisions of the 1988 Act and in particular the tailpiece in s.832(1) could not be construed otherwise than in accordance with the Revenue's construction.

I start with the general point taken by Mr Goldberg on the purpose of s.239. It is, of course, correct that the court should construe statutory provisions so far as possible in a way which will further the statutory purpose of those provisions. But where Parliament has chosen to attach conditions to the right of a company to set off ACT against corporation tax, the court must respect those conditions. Thus on the face of s.239(1) ACT cannot be set off against corporation tax unless there is an accounting period of the company in which the distribution attracting the ACT paid by it is made, and consistently therewith in subsection (3) the surplus ACT to be carried back must be in respect of an accounting period of the company from which period time is measured as provided for in that subsection. The times when an accounting period begins and ends are those specified in subsections (2) and (3) respectively of s.12. and

are unaffected by other considerations such as the time when the company is required to pay ACT, unless that is comprehended within the reference to a company being within the charge to corporation tax. But the meaning of such a reference is given by the tailpiece in the absence of a contrary requirement in the context in which the reference is found, and no such requirement can be seen in the context of s.12(2)(b). Similarly the apparent oddity that a company may be liable to Act and yet not be within the charge to corporation tax is explained by the fact that being within the charge to corporation tax is a defined term not linked to the making of distributions and the concomitant liability to pay ACT or to chargeability in general under s.6 or otherwise.

We have heard much argument on the true construction of the tailpiece, purporting as it does to give the meaning of a person being within the charge to corporation tax or income tax. It is unfortunate that the draftsman did not spell out what was meant when he said that the phrase in question was to be construed "similarly" to a source of income being within the charge to corporation tax or income tax if that tax is chargeable on the income arising from it, or would be so chargeable if there were any such income. Mr Goldberg's submission is that it means that a person is within the charge to corporation tax if that is chargeable on the income arising to it or would be so chargeable if there were any such income. In other words he would construe those words "similarly" by changing the subject of the definition from "a source of income" to "a person" and in lieu of "the income arising from it", he substitutes "the income arising to it". Mr Furness on the other hand submits that on the similar construction required by the tailpiece, income is within the charge to corporation tax or income tax if it is derived from a source of income within the charge to that tax and a company is within the charge to corporation tax or income tax if it is possessed of a source of income within the charge to that tax. Thus, on Mr Furness' construction, for a company or income to be within the charge to corporation tax or income tax there must be a source of income within the charge to that tax, as defined in limb (1) of the tailpiece.

There is no dispute between Mr Goldberg and Mr Furness as to the purpose of limb (1) of the tailpiece. They are both agreed that the judge was right to say (at p.88) that its purpose is to discriminate between the sources so as to make clear that a source of income is within the charge to corporation tax if corporation tax is chargeable on the income arising from it, or would be so chargeable if there was any such income, and within the charge to income tax if income tax was chargeable on such income, or would be so chargeable if there were income arising from it. Both are agreed, however, that the judge was wrong when he instanced a case where a company has a source of income chargeable to income tax a company which has franked investment income: such income is chargeable neither to income tax nor corporation tax in the hands of a UK resident company. Both are further agreed that in the tailpiece "income" means income chargeable to tax.

They differ however in the scope of the application of limb (1). Mr Furness submits that a company which receives income in a fiduciary capacity as well as receiving trading income for itself is a company which has a source of income chargeable to income tax and a source of income chargeable to corporation tax. Strictly, that is correct but I also accept Mr Goldberg's submission that in such a case, as the company does not receive the money beneficially. quite different considerations

therefore apply. It is as though the company in its two capacities were two persons. However, Mr Goldberg accepted that a non-resident company may have sources of income chargeable to income tax as well as sources of income chargeable to corporation tax. But he rightly emphasised the modest scope for the discriminating function performed by the tailpiece and its lack of importance for the ordinary resident company like Centaur, which in respect of any income or chargeable gain would be chargeable to corporation tax.

Nevertheless the fact remains that s.832(1) requires references to a person or to income being within the charge to corporation tax to be construed similarly to the meaning of a source of income being within that charge. Mr Goldberg criticised the draftsman for treating the source as being within the charge, because, as he pointed out, tax is chargeable on persons, not sources. That may demonstrate that the concept of being within the charge and chargeability are not identical. Whether one likes it or not, the draftsman has treated as subjects properly to be described as being within the charge to income tax or corporation tax a source, a person and income.

I am not able to accept Mr Goldberg's construction of limb (2) of the tailpiece. He accepts that the simple substitution of "a person" for "a source of income" requires the substitution of the preposition "to" for the preposition "from" in the phrase "income arising from it", and whilst the requirement of similar construction plainly does not require identical construction, Mr Goldberg's construction does mean that the reference to a person being within the charge because of that alteration. More significantly, there can be no like substitution of "income" for "a source of income", as that requires the deletion of the words "arising from it, or would be so chargeable if there were any such income", and one would be left merely with the income being within the charge of income tax or corporation tax if that tax is chargeable on the income. That is not similar construction but radical surgery.

It seems to me that the similar construction required by the tailpiece is achieved in this way. Limb (1) refers to the source, income arising from it and, implicitly, the person to whom the income arises. Limb (2), in my view, requires that references to income or a person being within the charge should be construed consistently with and in a similar manner to a source of income as defined in the first limb. The source, income arising from it and the person to whom the income arises are interconnected. Thus a person is within the charge to income tax or corporation tax if has a source of income within the charge to that tax (because that tax is chargeable on the income arising to him from it or would be so chargeable if there were any such income), and income is within the charge to income tax or corporation tax if the income arises to a person from a source within the charge to that tax (because that tax is chargeable on that income arising to that person from that source or would be so chargeable if there were any such income). In effect therefore I agree with the judge on his construction which treats a source as being necessary ingredient of the definitions of a person and income respectively being within the charge to income tax or corporation tax.

That view is supported in my view by the following further considerations. First, s.9 clearly indicates that for corporation tax purposes the computation of income is in accordance with income tax principles and that one must look at the like Schedules and Cases as apply for income tax purposes. The Schedules and Cases reflect the differing sources from which taxable income is derived. As is stated by Viscount

Haldane in *Brown v. The National Provident Institution* [1921] 2 AC 22 at p.233: "There was imposed under the Schedules ... one tax, with standards for assessment which varied according to the sources from which the taxable income was derived." He observed at p.235: "the general principle of the Acts is to make the tax apply only to a source of income existing in the year of assessment." Hence the decision of the House of Lords in that case that where no profits had been derived from transactions in Treasury Bills in the year of assessment the taxpayer was not assessable to income tax by reason of the fact that he had made a profit in such transactions in the preceding year, the same source of profits not continuing to exist in the year of charge. It matters not that, in addition to income, chargeable gains (which are not sourced-based) are included in profits on which a company is chargeable to corporation tax. That is irrelevant to the construction of the tailpiece, referring as it does only to income. As that is a reference to income arising from a source within the charge to tax. The significance of a source of income for corporation tax purposes is recognised in s.12(2)(a), the acquisition of a source causing an accounting period to commence.

Second, on the Revenue's construction, requiring as it does the existence of a source of income within the charge to tax, no problems can arise as to whether corporation tax or income tax would be chargeable on any income, actual or potential. On Centaur's construction, as the judge recognised, difficulties may arise with no source identified. Take a non-resident company which may have sources of income chargeable to corporation tax and sources of income chargeable to income tax. What income does one predicate as arising to it? Income chargeable to corporation tax or income chargeable to income tax? Mr Goldberg's answer was to say that where it is not possible to say that corporation tax would be so chargeable if there were any such income, then the source would not be within that charge for that limb of the tailpiece. But that is to acknowledge that the obvious purpose of the tailpiece was not being fulfilled satisfactorily in such a case. Take a company which enjoys partial exemption from tax for specific sources of income. Such a company is not within the charge to corporation tax if it has no source of income within that charge, on the Revenue's view, but is within that charge if it has such source even if no income actually arose. On Centaur's approach, even if the company had no source within that charge, is one really required to predicate income chargeable to corporation tax so that it is within that charge?

Third, on Centaur's construction, because it is immaterial whether a person has a source within the charge to income tax or corporation tax, and income arising to such a person must be predicated, the scope of persons within the charge is extraordinarily wide. Within the charge to income tax every individual in the world, as well as every non-resident company not excluded by s.11(1), would fall, whilst every company resident in the UK as well as non-resident companies included by s.11(1) would be within the charge to corporation tax. That is because on Centaur's approach only taxable income would accrue to such a person. To legislate so widely appears to me an unlikely intention of Parliament. It would seem to me to be singularly improbable that the reference in limb (1) of the tailpiece to the hypothesis "if there were any such income" required the attribution of taxable income to the person in question regardless of whether such person actually has a source of income within the charge to corporation tax or income tax. A statutory hypothesis should be constructed in as close a manner to reality as is possible. that being more likely to accord with the

intention of Parliament. Further, para. 8 of Sch. 3 to the Taxes Management Act 1970, referring as it does to "a company resident in the United Kingdom and within the charge to corporation tax" (my emphasis), shows that elsewhere in legislation governing the taxation of companies, a resident company is not treated as necessarily within the charge to corporation tax.

Both sides sought to derive assistance from s.12. Mr Goldberg pointed to the concluding words of s.12(2)(a), "or otherwise", as indicating that it was contemplated by the draftsman that it was possible to come within the charge to corporation tax other than by the company becoming resident in the UK or by it acquiring a source of income. But those concluding words would apply, for example, to a case where a non-resident company which already had a source of income, established a trading branch or agency in the UK or to the case covered by s.12(4). Mr Goldberg further suggested that para. (a) shows that for a company merely to become resident in the U.K. necessarily brings it within the charge to corporation tax. That seems to me to give the reference to becoming resident a wider significance than it can reasonably have. The statutory words only provide illustration of the way in which a company may come within the charge. For example, a non-resident company, with sources not within the charge while so resident, would on becoming resident come within the charge.

Mr Goldberg said that section 12(4), with its words "if not otherwise within the charge to corporation tax", shows that a company which has not commenced business can be within the charge to corporation tax. Mr Furness accepted that the subsection caused difficulty on his construction. He said that its purpose was to enable a company carrying on investment business but not trading in investments and having no income other than distributions from U.K. resident companies to have accounting periods. He said that it worked satisfactorily when the company commenced business, but he acknowledged that on his construction he had to say that it was implicit that once it had commenced business it continued to be within the charge, notwithstanding its lack of source, and that if the company then acquired a chargeable source but subsequently ceased to be within the charge because it lost that source, s.12(4) could not thereafter be reactivated. However the subsection also does not accord well with Mr Goldberg's thesis. If all U.K. resident companies are automatically within the charge to corporation tax, the subsection serves no purpose whatever.

Mr Furness relied on s.12(6) as showing that a company can be resident in the UK and not within the charge to corporation tax, a gain or loss accruing to a company not within an accounting period. Similarly, para. 9 of Sch. 13 recognises that a distribution can be made by a company, which ex hypothesi is a UK resident, on a date not falling within an accounting period. Mr Goldberg's answer was to say that the references to UK resident companies not having accounting periods are explicable to non-resident companies becoming resident here or exempt companies losing their exemption.

Mr Goldberg also pointed to s.12(7) as showing that the draftsman assumed that any company resident in the UK had an accounting period when it came to be wound up. Mr Furness replied that some companies which might be wound up would not have accounting periods, and in any event the subsection can readily be understood as applying to an accounting period, if any, of the company when it was wound up.

In truth, as it seems to me, and as both Mr Goldberg and Mr Furness fairly conceded, the provisions of s.12 are not determinative of the question before us. Nor for that matter is what was said in this court in Earlspring Properties Ltd. v. Guest [1995] STC 479 at 483 although the Deputy Special Commissioner had thought it assisted Mr Goldberg's construction of s.832. The judge did not agree and Mr Goldberg has not sought to contend otherwise.

At the end of the day, I have reached the conclusion that the Revenue's construction is to be preferred. I confess that I do with considerable unease, primarily because there has been no attempt by Mr Furness to produce an explanation of why Parliament might have wanted to deny a company in Centaur's position the recovery of the ACT paid. But in holding that that construction better accords with the language of s.832 and with the scheme of corporation tax, I take comfort from the fact that I am agreeing with the judge who has great experience in the field of taxation. I also note that an experienced Special Commissioner, Mr David Shirley, in Aproline Ltd. v. Littlejohn [1995] STC (SCD) 201 found that the taxpayer company could not carry back surplus ACT under s.239(3) because it did not have an accounting period on the date when it paid a dividend and became liable to ACT. Although the judge said (at p.85) that Mr Shirley was not referred to the tailpiece, Mr Furness was able to tell us on instructions that the Revenue had referred to and relied on s.832 in Aproline.

For these reasons, despite Mr Goldberg's careful and well-sustained arguments, I would dismiss this appeal.

Sir Patrick Russell:

I agree.

Nourse LJ:

I also agree.