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Case No.:

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Royal Courts of Justice,
5th March 1964

B e f o r e :

LORD JUSTICE WILLMER LORD JUSTICE DANCKWERTS LORD JUSTICE DIPLOCK

THE BRITISH BROADCASTING CORPORATION — **Appellant**

- and -

F.D. JOHNS (H.M. Inspector of Taxes) — **Respondent**

(From the Shorthand Notes of the Association of Official Shorthand Writers Ltd., Room 392, Royal Courts of Justice, and 2, New Square, London, W.C.2.)

MR. F.N. BUCHER, Q.C. and MR. J.E. HOLROYD PEARCE (instructed by Messrs. Richards, Butler & Co., Stone House, 128-140, Bishopsgate, London, E.C.2.) appeared as Counsel on behalf of the Appellant.
MR. JOHN FOSTER, Q.C. and MR. J. RAYMOND PHILLIPS (instructed by the Solicitor of Inland Revenue, Somerset House, Strand, W.C.2) appeared as Counsel on behalf of the Respondent.

HTML VERSION OF JUDGMENT

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LORD JUSTICE WILLMER: This case arises out of an appeal to the Special Commissioners for Income Tax brought by the British Broadcasting Corporation (hereinafter referred to as the B.B.C.) against an assessment to Income Tax for the year 1958-59 under Case 1 or Case 6 of Schedule D. Three points have been put forward on behalf of the B.B.C. as follows:

> (a) It is contended that the B.B.C. is entitled to Crown immunity from taxation because it is a body constituted by the Crown for the purpose of executing functions required and created for the purposes of Government. It is suggested that the B.B.C. should properly be regarded as an "emanation" of the Crown.
>
> (b)Assuming, contrary to the first submission, that the B.B.C. does not enjoy Crown immunity from taxation, it is nevertheless contended that its liability to income tax is restricted to its investment income and to such profits as are derived from its trading activities in relation to its publications, and does not extend to the surplus funds remaining in its hands at the end of the year arising out of the annual grant from Parliament.
>
> (c) Assuming, contrary to the second submission, that the surplus remaining in its hands represents a taxable profit, it is contended that the B.B.C. is entitled in computing the amount of such profit to deduct sums expended annually and representing an additional subscription payable to a company formed by it in conjunction with other organisations for the purpose of obtaining supplies of news film.

The Special Commissioners decided all three of these points adversely to the B.B.C. On appeal Mr. Justice Wilberforce agreed with the Commissioners with regard to points (a) and (b), but he decided that the additional subscription payable in respect of the supply of news film was an expense wholly and exclusively laid out or expended for the purposes of the B.B.C's trade and was therefore properly deductible in computing the profits of such trade. The B.B.C now appeals to this Court against the decision of the learned Judge with regard to points (a) and (b), and there is a cross appeal by the Crown in relation to point (c).

The facts giving rise to the appeals are fully set out in the Case Stated, to which are annexed the current charter and licence of the B.B.C. as well as a number of other documents. In these circumstances I do not think it is necessary to set out again the facts in detail; but it will be desirable to state in outline the effect of the charter and of the licence granted by the Postmaster General under which the B.B.C. operates. The B.B.C. was first established with effect from the 1st January, 1927, by Royal Charter of the 20th December, 1926, and at the same time it received a licence from the Postmaster General laying down the conditions under which it was permitted and required to operate. Subsequent charters and licences have replaced the original ones, those current at the material time being the charter of the 1st July, 1952, and the licence and agreement between the Postmaster General and the B.B.C. of the 12th June, 1952.

The charter, after referring in the recitals to the great value of broadcasting services as a means of disseminating information, education and entertainment, provided that the B.B.C. should be a body corporate with perpetual succession, which might sue and be sued in all Courts and do all matters and things incidental or pertaining to a body corporate, but so that the Corporation should apply the whole of its income solely in promoting its objects. Among the objects prescribed by the charter was that of providing, as public services, broadcasting services both by sound and television for reception in the United Kingdom (called the "Home Services"), and also for reception overseas (called the "External Services"). The Home Services include the three regular sound broadcasting programmes (the Home Service, the Light programme and the Third programme) and also the television service. Power was conferred on the B.B.C. inter alia to publish such periodicals as may be conducive to the objects of the Corporation, to organise and provide concerts and entertainments, to collect news and information, to acquire copyrights in literary, musical and artistic works, to acquire films and gramophone records, to acquire patent rights in relation to any device calculated to serve any useful purpose in connection with any of the objects of the Corporation, and to invest money not immediately required. The B.B.C. was further authorised, empowered and required to provide such broadcasting services as should be required by or under any licence granted by the Postmaster General to the Corporation or any agreement made by the Postmaster General with the Corporation. It was also authorised, empowered and required to receive all funds paid to it by the Postmaster General, out of aids and supplies appropriated by Parliament therefor, in furtherance of the purposes of the charter and to apply such funds in accordance with terms and conditions attached to the grant thereof. The B.B.C. was also authorised, empowered and required to apply all other monies derived from any other source exclusively in furtherance of the purposes of the charter, with power to treat the funds in its hands either as capital or income, but so that no funds derived from any source could in any event be divided by way of profit or otherwise amongst the Governors of the Corporation. The B.B.C. was further required to prepare accounts annually to be audited by an auditor approved by the Postmaster General. Lastly, it was provided that upon the voluntary or compulsory dissolution of the Corporation its property and assets after the discharge of its debts and liabilities should be disposed of in accordance with the directions of the Postmaster General.

By the licence and agreement between the Postmaster General and the B.B.C. a licence was granted by the Postmaster General to the B.B.C. to broadcast from existing stations and from additional stations to be established. The B.B.C. was specifically prohibited from receiving money or any valuable consideration from any person in respect of its broadcasting services. Clause 15 of the licence conferred upon the Postmaster General power to exercise a certain measure of control over the broadcasting services of the B.B.C., and in particular required the B.B.C. to broadcast daily from such stations and during such hours as the Postmaster General might direct. Such broadcasts were to include an impartial account day by day of the proceedings in both Houses of Parliament, and also any special announcement required by any Government department. With regard to the external services, the B.B.C. was specifically required to send programmes to such countries, in such languages and at such times as might be prescribed by Government departments specified by the Postmaster General. For the purposes of financing the Home services the Postmaster General was required to pay to the B.B.C., out of aids and supplies appropriated by Parliament, a sum representing a percentage of the revenue received by him from the issue of wireless and television licences, the percentage being subject to review by the Treasury after the expiration of three years. For the purpose of financing the external services the Postmaster General was required to pay to the B.B.C. each year such a sum as the Treasury might authorise out of such aids or supplies as might be appropriated by Parliament. Power was reserved to the Postmaster General, in the event of any emergency, to direct that any of the B.B.C's broadcasting stations might be taken possession of in the name and on behalf of Her Majesty, and to prevent the B.B.C. from using them. In the event of failure on the

part of the B.B.C. to broadcast efficiently, or of breach on its part of any provision contained in the charter or in the licence and agreement, the Postmaster General reserved power to revoke and determine the licence. It was further provided that the B.B.C should at all times indemnify the Crown against all actions, claims and demands which might be brought against the Crown or any Crown servant arising from any act of the B.B.C. or its servants licensed or permitted by the agreement.

It is against this background that the first two submissions put forward on behalf of the B.B.C. have to be considered. It remains to say, however, that in practice, as found in the Case Stated, complete editorial control is left to the B.B.C. in relation to its broadcasts both in the Home and External services.

I turn now to consider the first submission put forward on behalf of the B.B.C. As the argument was originally presented, it was said that the B.B.C. is an "emanation" of the Crown. This expression has more than once been criticised in the decided cases — see for instance, Tamlin v. Hannaford, (1950) 1 K.B. 18, per Lord Justice Denning at page 22. I confess that for my part I have had some difficulty in entertaining the concept of a body set up as an independent legal persona (as the B.B.C. was), in contractual relations with the Crown through the Postmaster General, yet at the same time being an "emanation" of the Crown so as to be entitled to enjoy Crown status. As the argument developed, however, it was made clear that the B.B.C. does not claim that its officers are servants or agents of the government so as to entitle it to immunity from taxation on that ground. What has been claimed is that the B.B.C. is a body exercising, within the province of government, functions required and created for the purposes of government. Its officers are, therefore, said to be in consimili casu with servants or agents of the government, to use the phrase coined by Mr. Justice Blackburn in Mersey Docks and Harbour Board v. Cameron, (1864) 11 H.L. Cases 443, at page 465.

Mr. Bucher, in opening the appeal on behalf of the B.B.C., formulated his argument under six propositions, as follows: (1) the Sovereign personally is immune from the operation of any Statute unless named in the Statute. (2) Servants or agents of the Crown are equally immune unless named in the Statute. (3) Persons who are not Crown servants or agents are immune if they are in consimili casu with Crown servants or agents. (4) Persons are to be regarded as being in consimili casu with servants or agents of the Crown if they are appointed to carry out government purposes. (5) Government purposes include the traditional provinces of government (for instance, the making of war or peace, the administration of justice, or the maintenance of law and order). (6) Government purposes also include non-traditional provinces of government if the Crown has constitutionally asserted that they are to be within the province of government.

Nobody, I think, could quarrel with propositions (1) to (4), which seem to me to be in accordance with the principle laid down in Mersey Docks and Harbour Board v. Cameron, and applied in such cases as Greig v. University of Edinburgh, (1868) 1 Scotch and Divorce Appeals, 348, the Queen v. McCann, L.R. 3 Q.B. 141, and Coomber v. Berkshire Justices, 9 A.C., 61. Similarly, proposition (5) seems to me to be perfectly acceptable, and it was no doubt on this basis that in Bank Voor Handel en Scheepvaart N.V. v. The Administrator of Hungarian Property, 35 Tax Cases, 311, the custodian was held to enjoy Crown immunity — see per Lord Tucker, at page 358, and per Lord Asquith, at page 360.

In my judgment, however, the argument for the B.B.C. breaks down in relation to proposition (6), because I find it impossible to accept the contention that the Crown ever has asserted that broadcasting should be within the province of government. I do not find it necessary to express any view as to whether it would be within the prerogative of the Crown to assert any such claim. It was, however, contended by Mr. Bucher, and the contention appears to have been accepted by Mr. Justice Wilberforce, that from the early days of wireless telegraphy the Crown asserted a monopoly in respect thereof. I do not think this is so. What happened was that Parliament passed the Wireless Telegraphy Act, 1904, since replaced by the Wireless Telegraphy Act, 1949, which in no sense created a Crown monopoly in respect of wireless telegraphy. All that the Act purported to do was to provide for the regulation of wireless telegraphy by a system of licences.

In other words, wireless telegraphy was treated in much the same way in which road traffic was treated on the invention of the internal combustion engine, and in which more recently aviation has been treated. It may be that at some date in the future it will similarly be necessary to legislate for the regulation of space travel.

It seems to me that when broadcasting became a practical possibility it was for Parliament to decide how it should be dealt with. It might have been left to be developed entirely by private enterprise, as I understand is the position in the United States of America. It might, on the other hand, have been specifically made a function of government, as was no doubt the case in Nazi Germany; for instance, by imposing a statutory duty on the Postmaster General, or some other Minister, to organise a government broadcasting service. This was what was done in relation to certain aspects of the National Health Service, as was held by this Court in Pfizer Corporation v. Ministry of Health, (1963), 3 W.L.R. 999- Had Parliament seen fit to deal with broadcasting in the same sort of way it would no doubt have been correct to say that broadcasting had been made a function of government. Another possible alternative would have been to set up a public corporation like the British Transport Commission, with power to carry on broadcasting as a commercial enterprise; that is, by entering into direct contractual relationship with those receiving the broadcasts, who would thereby have become the customers of the corporation - see Tamlin v. Hannaford. In fact, none of these courses was taken. Instead, the B.B.C. was created by charter as an independent legal persona, and was licensed to carry on a broadcasting service (on the application of the B.B.C. itself), presumably in pursuance of the powers conferred by the Wireless Telegraphy Acts. Moreover, the B.B.C. was specifically required to carry on its broadcasting service without entering into contractual relationship with those who would otherwise have been its customers. I do not find that the B.B.C. is strictly comparable with any other institution. I do not think it is possible to apply the decision in Tamlin v. Hannaford, which related to the activities of the British Transport Commission. Equally, I do not think that the B.B.C. is governed by the ratio of The Queen v. McCann, since in that case the Commissioners who were in occupation of the bridge were themselves the servants of the Crown.

Two further points occur to me which seem to me to be fatal to the contention put forward on behalf of the B.B.C. (1) If the B.B.C. is to be properly regarded as a body exercising functions required and created for the purposes of government it is difficult to see why any licence was ever required to be issued to it. (2) It is equally difficult to understand why, in the event of an emergency, power should be given to the Postmaster General to direct that the B.B.C's broadcasting stations should be taken possession of in the name and on behalf of Her Majesty, if it be the fact that such stations are already used for the purpose of exercising functions required and created for the purposes of government.

The learned Judge, after referring to the argument that the B.B.C's activity is "required and created" by the Crown, proceeded as follows:

> "One cannot decide this case upon a phrase without considering what precisely is the manner in which the service has been created and the manner in which the B.B.C. is required to maintain it. The service has been created not by the Crown but by the B.B.C. As to the require ment to maintain it, that has been imposed not in the Charter of incorporation, which merely confers powers, but in the licence agreement. There the B.B.C. undertakes a contractual obligation and nothing more, a breach of which could lead to revocation of the licence or a claim for damages. Imposed as it is in this way, the requirement suggests independence rather than emanation. So I come to the conclusion that however widely one may be inclined to extend the conception of an act or function of government the Crown has not taken the path of engaging itself in a broadcasting service or of entrusting it to any agent. It has deliberately chosen the alternative of an independent instrument."

I find myself fully in agreement with the view there expressed by the learned Judge, and I would only venture to add that in my view the B.B.C. was doubtless created an independent body precisely for the reason that it was desired to avoid any suggestion that broadcasting in this country is an

instrument of government. In my judgment it is impossible to hold that the B.B.C. enjoys Crown immunity, and accordingly I hold that the first point taken in support of the appeal fails.

I turn now to consider the second submission advanced on behalf of the B.B.C. Assuming that the B.B.C. is not wholly exempted from liability to income tax, it is none the less contended that, in so far as it does not spend in any given year the whole of the grant made by the Postmaster General, the surplus does not represent a "profit" which is taxable under either Case 1 or Case 6 of Schedule D. In this connection I would agree with the view put forward by the Special Commissioners in the Case Stated that the question whether the B.B.C. carries on a trade or not is of no great importance, and that it makes no practical difference whether its profits (if any) are taxable under Case 1 or Case 6. It is conceded on behalf of the B.B.C., for the purposes of this part of the argument, that in so far as it uses the funds in its hands for investment purposes it is liable to income tax like any other taxpayer on its investment income. It is also conceded, for the purposes of this part of the argument, that in so far as it carries on a trade with the public, as it does, for instance, by selling its publications, it is liable to income tax on any resulting profit of such trade. It has been contended, however, that such taxable income is severable from the rest of the surplus funds in the hands of the B.B.C., although this may involve a calculation of some difficulty and complexity. Such a severance was ordered in the case of Carlisle and Silloth Golf Club v. Smith, 6 T.C. 48, where part of the surplus funds resulted from green fees paid by non-members of the club and was accordingly held to constitute a taxable profit.

The B.B.C. is not in practice required to pay back to the Postmaster General the surplus funds in its hands from year to year. This surplus is carried forward, and may be used for investment, or it may be applied for the purpose of capital projects under the powers conferred by the charter itself. Clearly, however, the amount of any surplus in the hands of the B.B.C. must be taken into consideration by the Treasury when it is called upon to authorise the percentage of net licence revenue to be paid to the B.B.C. during the ensuing periods, in accordance with the provisions of clause 17 of the charter. Moreover, it is specifically provided by clause 25 of the charter that upon the dissolution of the B.B.C. its property and assets are to be at the disposal of the Postmaster General. In such circumstances, if the B.B.C. is left with surplus funds in its hands at the end of any given year because it has not spent the whole of the grant made to it by the Postmaster General, it seems to me that it has no more made a profit than has the housewife who manages to get through the week without spending the whole of her husband's weekly housekeeping allowance. The grant made to the B.B.C. is not to my mind to be regarded as being in the same category as a subsidy paid to a trading company to assist it in carrying on its trading activities, as was the case in Smart v Lincolnshire Sugar Co. Ltd., 20 TC 643.

It seems to me that in principle where the person ultimately entitled to the surplus is the same as the person who contributed the fund out of which the surplus is created there can be no question of profit. This, as I understand it, is the principle underlying the mutual insurance cases, such as Jones v. South West Lancashire Coalowners Association, 11 T.C., 790, and Municipal Mutual Insurance v. Hills, 16 TC 430. In the former case the principle was forcefully and concisely stated by Lord Dunedin, at pages 839-840, as follows:

> "The whole case for the Crown rests on the idea that because in a single year the premiums received exceed the sums paid in respect of the losses in that year the balance represents a profit. It represents no such thing. It is simply a sum of money which is carried forward in order that it may be available to meet excessive losses in a future year, or, if it is found in the end to be redundant, be returned to the shareholders either in the form of reduced premiums or cash. In the same case Lord Cave said, at page 838: Sooner or later, in meal or in malt, the whole of the Association's receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them; and the Association does not in any true sense make a profit out of their contribution."

The case of the Municipal Mutual Insurance v. Hills is especially illuminating because in that case it was necessary to draw a distinction between the surplus resulting from contributions made by members of the association and that resulting from transactions with non-members. Again it is useful to cite a short statement by Lord Dunedin, at page 441 of the Report, as to the principle involved. He said:

> "If that surplus is a profit it must bear income tax, secus if it is not; and whether it is a profit or not depends, as was found in the two cases, upon the question: to whom does it go? If it goes to the insurer or insurers it is a profit. If it simply goes back to the insured either in reduction of his premium or in enhancing the sum insured, it is in essence merely a return of his own money which he has overpaid and is not a profit."

The same principle is exemplified in the rating oases; that is, cases in which it has been sought to make a rating authority liable for income tax on the surplus remaining in its hands — see, for instance, In re Glasgow Corporation Waterworks, I T.C., 28, the decision in which was expressly approved by the House of Lords in Ostime v. Pontypridd and Rhondda Joint Water Board, 28 T.C., 261, where, however, the result was different because in that case the rate levied was held to be in effect a subsidy towards financing much larger trading activities carried on by the water undertakers, so that there was in fact no identity between the contributors and the recipients. In Forth Conservancy Board v. Commissioners of Inland Revenue, 16 T.C., 103, the principle of the Glasgow Waterworks case was defined by Lord Buckmaster, at page 117, as follows:

> "The principle of exemption for the surplus of rates is, I think, to be found in this, that the rating authority collects money from the inhabitants of the district for the purpose of application to the expenses incurred on behalf of the inhabitants, and that any surplus rightly belongs to the inhabitants themselves, who receive its benefits in case of any surplus, because it is carried forward towards the expenses of the ensuing year."

In my judgment the principle underlying these cases applies in the circumstances of the present case, and leads to the inevitable conclusion that in so far as the B.B.C's surplus in any year results from failure on its part to spend the whole of its grant it has not made a taxable profit. The learned Judge arrived at the opposite conclusion because he did not regard the profit made by the B.B.C. on its publications as severable from the rest of the surplus in its hands. He said:

> "I think that the B.B.C. is conducting a composite trading activity, the proportions of which it is free to vary as it thinks fit, and that the Postmaster General provides it with a sum of money each year which the B.B.C. takes into its accounts and makes its own. It is a subsidy to assist the business carried on by the Corporation."

I find myself unable to agree with this view. I recognise that the task of severing the profits which the B.B.C. makes on its publications may well call for difficult and complex accounting. But it seems to me that in principle there is all the difference in the world between profits made by carrying on a trade in publications and a surplus resulting from the mere fact of not spending the full amount of the grant in performing the duty laid upon the B.B.C., namely that of providing broadcasting services. For these reasons I am of the opinion that the B.B.C. is entitled to succeed on its second submission.

In view of this decision the point raised by the B.B.C's third submission does not strictly arise. But we have been specifically requested to express our opinion on the assumption that, contrary to the view which I have expressed, the surplus in the hands of the B.B.C. at the end. of the year does represent a taxable profit. The point arises in this way. By an agreement executed on the 31st October, 1957, and made between the B.B.C., the Rank Organisation Ltd., the Canadian Broadcasting Corporation, and the Australian Broadcasting Commission, it was agreed that these respective organisations should join

in forming a private company, to be called British Commonwealth International News Film Agency Limited (hereinafter referred to as BCINA), for the purpose of providing a service of world news recorded on film.

Clause 8 of the agreement provided as follows:

> "If in any year the monies paid or payable to the company by way of subscription by the subscribers to the service are insufficient to cover the cost of operating the service B.B.C. and Rank agree each to pay to the company an additional subscription which shall be equal to one half of the amount of such deficit."

Up to that date the B.B.C. had obtained its news film by subscribing to the service provided by the United Press Movietone Organisation in the United States of America. This proved to be an unsatisfactory arrangement, because (a) the subscription was considered to be somewhat excessive and (b) the news film obtained was prepared with an American slant, which was not thought to be always suitable for British viewers.

In due course the new company B.C.I.N.A. was duly formed, and thereafter it supplied the B.B.C. with such news film as was required. It has been found in the Case Stated that this news film service was for the B.B.C. "a vital part in the development of its news programmes." In the year in question, however, the B.B.C. had to pay the sum of £62,590 by way of additional subscription. This is the sum which is sought to be deducted in computing the profits (if any) of the B.B.C. It was contended on behalf of the B.B.C. that the sum so expended was "wholly "and exclusively laid out or expended for the purpose of the trade" of the B.B.C. The Special Commissioners, however, decided against the B.B.C., on the ground that the sum in question was expended partly for the purpose of affording financial support to B.C.I.N.A. This in their view rendered the expenditure in question indistinguishable in principle from that in Odhams Press Limited v. Cook, 23 TC 233, and Marshall Richards Machine Co., Ltd. v. Jewitt, 36 T.C. 511.

Both of these were cases in which the tax paying company sought to deduct a payment or allowance made to a subsidiary company in respect of goods or services supplied by the one to the other. But, as pointed out by the learned Judge, in both cases the payment or allowance was made not because it was necessary in order to obtain the goods or services, but because it was thought desirable to bolster up the finances of the subsidiary company. The same is also true of Commissioners of Inland Revenue v. Huntley & Palmer Ltd., 12 T.C. 1209, where again the payment was made not for the purpose of securing the goods but in order to save an associated company from financial disaster. I find myself in agreement with the view expressed by the learned Judge that these cases are distinguishable from the present case, having regard to the finding in the present case that the provision of news film was for the B.B.C. a vital part in the development of its news programmes. I think it is clear that, but for the payment of the additional subscription in question, it would not have been possible for the B.B.C. to obtain the further supplies of news film which they required for their services.

I also agree with the learned Judge in thinking that no help is to be derived from the cases of Charles Marsden & Sons Ltd. v. Commissioners of Inland Revenue, 12 T.C. 217, and English Crown Spelter Co. Ltd. v. Baker, 5 T.C. 327, where the payments made were held to he of a capital nature. In this connection I think it is material to bear in mind the finding in the Case Stated that B.C.I.N.A's fixed capital assets would of themselves have probably been sufficient to cover its subscribed capital.

I do not think that there is any substance in the further point which has been made that the payment in question here was made in pursuance of the B.B.C's contractual liability, which they had undertaken under the agreement of the 31st October, 1957. I am prepared to assume that this is so; but it remains the fact that that liability was undertaken, and the payment in question was made, for the purpose of obtaining the supplies of news film which the B.B.C. required.

For these reasons, had it been necessary to decide the point, and on the assumption that the B.B.C. is engaged in carrying on a trade the profits of which are taxable, I would agree with the learned Judge's conclusion and would hold that on the facts found the additional subscription paid to B.C.I.N.A. would constitute a sum wholly and exclusively laid out for the purposes of such trade. For the reasons already stated, however, I am of opinion that the B.B.C. is entitled to succeed on its second submission; I would accordingly allow the appeal and dismiss the cross appeal.

LORD JUSTICE DANCKJERTS: There are three distinct questions to be decided on this appeal from Mr. Justice Wilberforce: (1) whether the appellants (to whom I shall refer as "the B.B.C.") are, by reason of the privileges of the Crown, exempt from taxation; (2), whether, if question (1) be answered in the negative, the B.B.C. are liable to income tax on surplus moneys left after expenditure of the moneys which are paid to them by the Postmaster General, and (3) whether, if the B.B.C. are taxable in respect of such surplus (as being profits of a trade) they are entitled to deduct, as expenses, the sums paid by them as an "additional subscription" to the British Commonwealth International Newsfilm Agency Limited, the name of which has for convenience been rendered as "BCINA".

Question (1) involves, of course, immunity from other things besides income tax, such as rates. The submissions on behalf of the appellants on this point were summarised as follows:

> "The B.B.C. is entitled to Crown immunity from income tax because (a) the Crown's deliberate act of creating the B.B.C. by charter in 1926 as the national instrument of broadcasting (b) with a special relationship with the Crown, (c) viewed in the historical setting (d) of the Crown's monopoly over wireless telegraphy, stamped the B.B.C. as a body exercising, within the province of government, (e) functions required and created for the purpose of government."

The letters (a), (b), (c), (d), and (e) were inserted by counsel to distinguish the different factors in the contention put forward.

I will say at once, as regards (d) (monopoly of the Crown), that the situation, starting with the Wireless Telegraphy Act, 1904, partakes of the nature of control, rather than monopoly, but I do not think that this really affects the basis of the contention.

The B.B.C. was originally incorporated by Royal Charter dated the 20th December, 1926, and there have been supplemental charters since then. The material charter for the present purpose is the charter of the 1st July, 1952. Under the incorporation in paragraph 1 the governors of the Corporation are the members. The objects of the B.B.C. are expressed, in paragraph 3, to be (amongst others):

> "(a) To provide, as public services, broadcasting services of wireless telegraphy by the method of telephony for general reception in sound, and by the methods of television and telephony in combination for general reception in visual images with sound...(b) To hold the existing and to construct or acquire and establish and install additional wireless telegraph stations and apparatus for wireless telegraphy... (d) For all the purposes aforesaid to acquire from time to time from our Postmaster General a non-exclusive licence or licences for such period and subject to such terms, conditions, provisions, restrictions and limitations as he may prescribe, and to exercise the powers herein granted to the Corporation in conformity in all respects therewith and with any agreement or agreements which may from time to time be made "by our Postmaster General with the Corporation, and not in any other manner whatsoever."

The powers of the Corporation are therefore restricted by the terms imposed in any such licence. The financial provisions are in paragraph 18:

> "(1) The Corporation is hereby authorised, empowered and required: (a) To receive all funds which may be paid by Our Postmaster General out of such aids or supplies as may from time to time be appropriated by Parliament therefor in furtherance of the purposes of this Our Charter and to apply and administer such funds in accordance with the terms and conditions which may be attached to the grant thereof; (b) To receive all other moneys which may be obtained by or given to the Corporation or derived from any source not hereinbefore mentioned and to apply and administer such moneys exclusively in furtherance of the purposes of this Our Charter and in accordance with any terms and conditions upon which such moneys may have been obtained, given or derived: Provided that moneys borrowed in exercise of the power hereinbefore conferred for the purpose of defraying capital expenditure (including moneys so borrowed for repayment of moneys borrowed for that purpose) shall be applied to that purpose alone. (2) Subject to any such terms and conditions as aforesaid and to the proviso to subparagraph (b) of paragraph (1) of this article, the Corporation may treat such funds and moneys either as capital or as income at its discretion. (3) Except as in this Our Charter expressly provided, no funds or moneys of the Corporation derived from any source shall in any event be divided by way of profit or otherwise amongst the Governors of the Corporation."

Further provisions which are relevant are:

> "22. (1) The grant of this Our Charter is made upon the express condition that the Corporation shall strictly and faithfully observe and perform and cause to be observed and performed the provisions prescribed therein or thereunder, and also the provisions prescribed in or under any Licence which Our Postmaster General may from time to time grant to the Corporation or contained in or prescribed under any agreement which our Postmaster General may from time to time make with the Corporation. (2) If it is made to appear or appears to Our Postmaster General, either on the representation of any person or body politic or corporate appearing to be interested or in any other manner howsoever, that there is reasonable cause to suppose that any of the provisions prescribed in or under this Our Charter or in or under any such Licence or in or under any such agreement (including any stipulations, directions or instructions of our Postmaster General) have not been observed, performed, given effect to or complied with by the Corporation, Our Postmaster General may require the Corporation to satisfy him that such provisions have been observed, performed, given effect to or complied with, and if within a time specified by him the Corporation shall fail so to do Our Postmaster General may if he thinks fit certify the same under his hand to Us, Our Heirs or Successors, and upon such certificate being given it shall be lawful for Us, Our Heirs or Successors, if We or They shall be so minded, by Letters made Patent under the Great Seal of the Realm, absolutely to revoke and make void this Our Charter, and everything therein contained: Provided that the power of revocation so hereby reserved shall not have or be construed to have the effect of preventing or barring any proceedings which may be lawfully taken to annul or repeal this Our Charter."

> "24. It shall be lawful for the Corporation to surrender this Our Charter subject to the sanction of Us, Our Heirs or Successors, and upon such terms as We or They may consider fit, and to wind up or otherwise deal with the affairs of the Corporation in such manner as may be approved by Our Postmaster General. 25. Upon the voluntary or compulsory dissolution of the Corporation the property and assets of the Corporation shall be applied in satisfaction of the debts and liabilities of the Corporation and subject thereto shall be disposed of in accordance with the directions of Our Postmaster General."

A licence and agreement in accordance with the scheme of the charter was entered into in the form of a deed dated the 12th June 1952. The matters included in the licence are set out in paragraph 2 thereof. Paragraph 14 is of great importance:

> "14. The Corporation shall not without the consent in writing of the Postmaster General receive money or any valuable consideration from any person in respect of the sending or emitting, or the refraining from sending or emitting, of any matter whatsoever by means of the stations or any of them, and shall not send or emit by means thereof any commercial advertisement or sponsored programme: Provided that nothing in this clause shall be construed as precluding the Corporation (so far only as the licence of the Postmaster General is required) from using for broadcasting purposes without payment or for a reduced payment any concert or theatrical entertainment or any other performance of whatsoever kind given in public, or as precluding the Corporation from announcing the place of performance thereof or the name and description of the performers, or from announcing the number and description of any record broadcast, or from acknowledging any permission granted for so using any such matter."

Paragraph 15 contains various provisions conferring on the Postmaster General certain powers of control over the activities of the B.B.C. Under paragraph 16 the B.B.C. has to pay to the Postmaster General a royalty or charge of £500 in respect of wireless telegraph stations. Paragraph 20 has been suggested to be inconsistent with the claim of the B.B.C. to be a government agency or the like. It is in these terms:

> "20. (1) If and whenever in the opinion of the Postmaster General an emergency shall have arisen in which it is expedient in the public interest that Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland shall have control over the transmission of messages or any other matter whatsoever by means of the stations or any of them, it shall be lawful for the Postmaster General to direct and cause the stations or any of them or any part thereof to be taken possession of in the name and on behalf of Her Majesty and to prevent the Corporation from using them, and also to cause the stations or any of them or any part thereof to be used for Her Majesty's service, or to take such other steps as he may think fit to secure control over the stations or any of them, and in that event any person authorised by the Postmaster General may enter upon the stations or any of them and the offices and works of the Corporation or any of them and take possession thereof and use the same as aforesaid."

I do not think that it is necessarily so, for the Crown may be entitled to take property out of the control of a servant or agent and resume possession of it, and there is no particular technical meaning, in my opinion, to be attached to the word "possession." Paragraph 25 should be noticed:

> "25. The Corporation shall at all times indemnify the Crown against all actions, claims and demands which may be brought or made against the Crown or any servant or agent of the Crown by any person in respect of any injury arising from any act of the Corporation or its servants or agents licensed or permitted by these presents."

To sum up, the B.B.C. undoubtedly was formed to carry out public services and there is a certain measure of control through the Postmaster General, and its operations are financed through the Postmaster General out of public funds. The fact that the B.B.C. was incorporated by Royal Charter is not a conclusive factor. The point at issue really is whether it is a body exercising functions of the Government in such a manner and form that it is entitled to the prerogative immunity of the Crown from taxation.

We have been very properly referred to a large number of cases, but I propose only to refer to a few of them. In the Mersey Docks case (1864) 11 H.L.C., 443, at page 465, Mr. Justice Blackburn, after referring to property occupied by local police, county buildings occupied for the assizes, and for the Judges' lodgings or occupied for a county court or for a jail, said:

> "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu. And the decisions are uniform, and were not disputed at the Bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes farther."

There certainly still is such conflict, and it has not been rendered less by the great extension of the operations of government since Victorian days, to which this Court referred in Pfizer Corporation v. Ministry of Health, 1963, 3 W.L.R., 999, at page 1,006. The conflict is well illustrated by the case of Tamlin v Hannaford, 1950, 1 K.B., 18, in which it was held that the British Transport Commission was not within Crown privilege. Lord Justice Denning, at page 22, said:

> "In considering whether any subordinate body is entitled to this Crown privilege, the question is not so much whether it is an 'emanation of the Crown', a phrase which was first used in Gilbert v. Corporation of Trinity House, but whether it is properly to be regarded as the servant or agent of the Crown."

Like Mr. Justice Devlin (as he then was) (see Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property, (l954) 35 T.C. 311, at page 315) I find "emanation" and other vague phrases of no assistance whatever in deciding the question which is before this Court.

It was argued on behalf of the B.B.C. that the Bank voor Handel case had carried the matter beyond the test formulated by Lord Justice Denning in the passage which I have quoted. In 35 Tax Cases, at page 360, Lord Asquith of Bishopstone expressed the position in the following words:

> "3. Persons may enjoy immunity who are not servants of the Crown but occupy premises, such as assize courts, judges' lodgings, policemen's lodgings, and the like, and do so exclusively for the performance of the functions of the executive Government. These persons are in some of the cases described as 'in consimili casu' with servants of the Crown. Persons will tend to be placed in this category if the public functions which they discharge are closely connected with the exercise of the Royal prerogative: e.g., inter alia, the administration of justice, the preservation of public order, the making of war and the conclusion of peace. And the Courts appear on some of the authorities to have "taken these last factors into account as relevant in deciding who is a servant of the Crown within the second class."

Assuming, however, that the limits are not as strict as they appear to be from Lord Justice Denning's test, I find it impossible to bring the B.B.C. within the class that is entitled to Crown immunity. The Crown is no doubt entitled to operate through servants or agents who are incorporated. (See The Queen v. McCann (1868) L.R. 3 Q.B., 141 and 677* The B.B.C. no doubt operates public services, and is substantially financed out of public funds, and is subjected to some measure of control by the Postmaster General. In providing for these public services it was open to the Crown (or the Government) to achieve the object by means of a government department, for instance, the Postmaster General, but, if more convenient, the same object could be achieved by setting up a corporation which was an independent body, as in the case of the nationalised railways, or in the more pertinent case of the Independent Television Authority (under the Television Act, 1954). It appears to me that the B.B.C. was deliberately incorporated in the form in which it was created, because it was thought to be in the public interest that broadcasting should not be conducted by a government agency or as a government function.

In the Television Act, 1954, it is expressly declared that "the Authority are not to be treated for the purposes of the enactments and rules of law relating to the privileges of the Crown as a body exercising functions on behalf of the Crown." The matter is thus made perfectly clear. It is a pity that the position of

the B.B.C. also was not made clear on whichever side of the line it was intended to fall.

I turn now to the second question. For the purpose of this question, it seems to me that the relevant services provided by the B.B.C. must be confined to the broadcasting services of the B.B.C., which, of course, is the primary purpose of the Corporation. It is accepted on behalf of the B.B.C. that there are some other activities in which the B.B.C. engages, in some of which a profit is made, and it is admitted that in respect of these a taxable profit is made. But these activities stand on a different footing, and, in my opinion, these must be separated from the broadcasting services of the B.B.C. It was said that it was difficult for the purposes of accounts to distinguish these services, but as the authorities show, this is not an answer: see Carlisle and Silloth Golf Club v. Smith (1912) 6 T.C., 48 and 198.

Dealing, therefore, with the broadcasting services only of the B.B.C., it is to be observed that though the B.B.C. provides the public services, it does not deal with the public at all. The Postmaster General collects the fees for licences to receive the programmes so broadcast from the public, and he hands over in each year (or for a period of years) a sum equivalent to a certain percentage of these receipts, which in some years has been 85 per cent, and in some years has been more, even up to 100 per cent. But the money comes from the Postmaster General "out of such "aid or supplies as may from time to time be appropriated by Parliament "therefor." By paragraph 14 of the licence the B.B.C. is forbidden to receive money or valuable considerations from any person in respect of the broadcasting services, and is not allowed the profits which are available to the independent television services from commercial advertisements or sponsored programmes.

In paragraph 7 of the Stated Case, the Commissioners aver in paragraph 3 of their conclusions that they have come to the conclusion that the B.B.C. in exercising their function (summarised in paragraph 1 of their conclusions and obviously referring to the broadcasting services) does carry on a trade. But this conclusion or deduction seems to me to be in defiance of the facts and I am quite unable to see how it can be supported. How can it be possible to trade if the body concerned is forbidden to take any money from anybody in respect of the operations concerned? And how then can it be possible to make a profit? In my opinion, the conclusion of the Commissioners must be rejected, and this really, in my opinion, is decisive on the second question on this appeal.

It is no good falling back on Case VI under Schedule D of the Income Tax Act. As was said by Lord Dunedin in The Commissioners of Inland Revenue v. The Forth Conservancy Board (1931) 16 T.C. 103, at page 119,

> "It is trite law that all gains are not gains in the sense of the Income Tax Acts...".

There must be profits from a trade or an adventure in the nature of trade, and there must be profits. I venture to doubt whether there is any practical distinction for tax purposes between the words profits and gains". Reference to the cases which have been cited to us indicate that the judicial pronouncements in those cases have treated them as synonymous.

So I ask the question: have there been any profits in this case from the broadcasting services of the B.B.C.? We have been referred to two series of authorities, in each of which the courts have negatived the idea of profits: (1), the so-called "mutuality" cases, which have been concerned with insurance associations where the insured manage their own insurance arrangements, and (2) the rating cases, in which rating authorities have merely utilised a surplus on receipts over expenditure to benefit the ratepayers. These illustrate the principle that where moneys which represent a surplus on the operations carried out are returned to the contributors who provide them, these are not profits. The present case is not really an example of the same thing but indeed is an a fortiori case because only the Postmaster General or the Consolidated Fund provides the moneys and only he or that Fund receives any surplus.

Lord Dunedin (speaking on one of the "mutuality" cases) puts the point in the plainest terms in Jones v. South West Lancashire Coal Owners' Association, Ltd. (1927) 11 T.C. 790, at pages 839-840, when he says:

> "The whole case for the Crown rests on the idea that because in a single year the premiums received exceed the sums paid in respect of the losses in that year the balance represents a profit. It represents no such thing. It is simply a sum of money which is carried forward in order that it may be available to meet excessive losses in a future year, or, if it is found in the end to be redundant, be returned to the shareholders, either in the form of reduced premiums or of cash."

To put the matter another way, if a man provides a sum of money for the carrying out of a certain purpose which proves more than is required, and receives back the surplus, it is not a profit but a return of his money.

In the present case, the surplus of the Postmaster General's payment to the B.B.C., which may be used to reduce the amount of the financial provision in a subsequent year or may eventually be returned to the Postmaster General, is not a taxable profit. On this point, in my view, the appeal of the B.B.C. is entitled to succeed.

There remains the third question on the appeal, which may not be material in view of the answer made to the second question, but upon which we have been invited to express an opinion. This is a question of deductible expenses, which depends upon the application of the words of Section 137 of the Income Tax Act, 1952, which prohibits deductions unless they are "money wholly and exclusively laid out or expended for "the purposes of the trade profession or vocation." In the present case unless there is a trade, this provision cannot be relevant. The payment which it is claimed to be deductible is a sum of £62,590, which is payable to a company called British Commonwealth International Newsfilm Agency Ltd. (or BCINA) under the name of an "additional subscription" pursuant to the terms of an agreement dated the 31st October, 1957; and made between the B.B.C., the Rank Organisation Ltd., the Canadian Broadaasting Corporation and the Australian Broadcasting Commission. The reasons which led to the formation of this company are set out in the Stated Case (paragraphs (u) and (v) of paragraph 4).

The formation of this company was considered by the B.B.C. the cheapest method of ensuring a supply of new films which was essential to the production of the news programmes of the B.B.C. As a result, the company was formed in conjunction with the Rank Organisation, Ltd., the Canadian Broadcasting Corporation and the Australian Broadcasting Commission, who were interested in problems of the same kind. The B.B.C. and the Rank Organisation, Ltd. agreed to subscribe for 58,000 shares in B.C.I.N.A.,and under clause 8 of the agreement the B.B.C. and the Rank Organisation Ltd. each agreed to make up half the deficit which might arise by reason of the fact that the operating costs of B.C.I.N.A. exceeded the subscriptions paid to it for its news service. This "additional subscription" was considered necessary initially to ensure that B.C.I.N.A. produced an adequate service.

The cases relied on to show that the "additional subscription" paid by the B.B.C. was not a deductible expense were The Commissioners of Inland Revenue v. Huntley & Palmers Ltd., (1928) 12 T.C., 1,209; Odhams Press, Ltd. v. Cook (1940, 23 T.C. 235; and Marshall Richards Machine Co. Ltd. v. Jewitt, (1956) 36 T.C. 511. But the common feature of these cases is that they were payments made by the company that claimed the right to deduct to subsidiary or associated companies which were in need of funds, because it was considered in the interests of the paying company to keep them alive. They were purely voluntary payments made without consideration (as was pointed out by Mr. Justice Upjohn in Marshall Richards Machine Co. Ltd. v. Jewitt at page 526).

In the present case, the payment of the "additional subscription" by the B.B.C. was made because the B.B.C. was compelled to do so by the terms of clause 8 of the agreement, and it was not a voluntary payment. This, in my opinion, completely distinguishes the present case from those above

mentioned. There was, of course, consideration for the B.B.C's undertaking to make such a payment in the mutual arrangements entered into between the contracting parties in the agreement. The purpose of the B.B.C. in entering into the agreement was to secure a supply of news films for its own programmes and not to benefit the other bodies who were parties to the contract, though, of course, self interest made the several bodies combine for the formation of B.C.I.N.A. as arranged by the contract.

I am unable to see why money paid in this way by the B.B.C., therefore, is not "money wholly and exclusively laid out or expended for the purposes of the trade", and, accordingly, a deductible expense. I think that the learned Judge reached the correct decision on this question and I agree with his remark that the Commissioners misapprehended the effect of the authorities in relation to the facts which they found.

LORD JUSTICE DIPLOCK: Three questions arise on this appeal: (1) is the B.B.C. liable to pay income tax at all? - which I shall call "the Crown immunity question"; (2) if it is, does it make any taxable profit or gain out of its broadcasting activities? - which I shall call "the surplus question"; and (3), in computing its taxable profit (if any) from its broadcasting activities is it entitled to deduct its annual contribution to the operating deficit of B.C.I.N.A? - which I shall call "the deductible expense question."

The Crown immunity question. The B.B.C. is liable to pay income tax under Schedule D upon any annual profits or gains accruing to it from its activities if it is included in the expression "any person" in Section 122 l (a)(i) and (ii) of the Income Tax Act, 1952. The question is thus one of construction of a statute. Since laws are made by rulers for subjects a general expression in a law such as "any person" descriptive of those upon whom the law imposes obligations or restraints is not to be read as including the ruler himself. Under our more sophisticated constitution the concept of sovereignty has in the course of history come to be treated as comprising three distinct functions of a ruler: executive, legislative and judicial, though the distinction between these functions in the cases, for instance, of prerogative powers and administrative tribunals are sometimes blurred. The modem rule of construction of statutes is that the Crown, which to-day personifies the executive government of the country and is also a party to all the legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property, unless the statute says so expressly or by necessary implication. But to use the expression "the Crown" as personifying the executive government of the country tends to conceal the fact that the executive functions of sovereignty are of necessity performed through the agency of persons other than the Queen herself. Such persons may be natural persons or, as has been increasingly the tendency over the last hundred years, fictitious persons - corporations. The question here is whether the B.B.C. carries on all or any of its activities as agent for the executive government. Are they carried out in the performance of a duty or the exercise of a power which is imposed upon or vested in the executive government of the United Kingdom by statute or by the prerogative? (cf. Pfizer Corporation v. Minister of Health (1963) 3 W.L.R. 999, at page 1,018).

Mr. Bucher has submitted that because wireless telegraphy and telephony were new inventions the Crown had' a prerogative right to a monopoly of their use and has chosen to exercise this monopoly as respects broadcasting wholly before 1954 and partially thereafter through the instrumentality of the B.B.C. This contention involves adopting what he describes as a modem, and I as a seventeenth century, view, of the scope of the prerogative. But it is 350 years and a civil war too late for the Queen's Courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon citizens of the United Kingdom without any statutory authority are now well settle d and incapable of extension. In particular, as respects monopolies the Crown's claim to a general prerogative right to the monopoly of any activity was denied and circumscribed by the Statute of Monopolies of 1623. To-day, save in so far as the power is preserved by the Statute of Monopolies, or created by other statutes, the executive government has no constitutional right either itself to exercise through its agents or to confer upon other persons a monopoly of any form of activity.

In the case of telegraphy, which was invented in 1837, Parliament, by the Telegraph Act, 1869, Section 4, did confer upon the Postmaster General the exclusive privilege, with certain exceptions, of transmitting inland telegrams, a privilege which was held to extend to telephonic communications when

telephony was invented (see Attorney-General v. Edison Telephone Company); but this statutory method of dealing with a new activity by creating a monopoly in the executive government with exceptions which included, inter alia, other persons licensed by the Postmaster General, is in marked contrast to the way in which Parliament dealt with the new activity of wireless telecommunication in the Wireless Telegraphy Act, 1904. By that Act, which in the income tax year with which this appeal is concerned had been replaced by the Wireless Telegraphy Act, 1949, Parliament contented itself with empowering the executive government, acting through the agency of the Postmaster General, to control wireless transmission and reception by a system of licensing. It was under Section 1 of the Act of 1949 that a licence was granted by the Postmaster General to the B.B.C. to use wireless telegraph stations for broadcasting. If the B.B.C. had been entitled to Crown immunity, it would have required no licence, any more than the Admiralty, the War Office or the Royal Air Force. The B.B.C. is not mentioned in the Act, nor with great respect to the learned Judge does Section 17 contain any provision for the financing of the broadcasting services of the B.B.C.

The B.B.C., like many other bodies, is incorporated by Royal Charter. The creation of a corporate person by charter is done in the exercise of the prerogative power of the Crown but does not make the corporation so created an agent of the Crown. I see nothing in the terms of the charter itself to constitute it such an agent. Its principal objects, videlicet, to provide broadcasting services for general reception in conformity with a licence to be acquired from the Postmaster General, and the agreement which was made with him, which has been cited by Lord Justice Danckwerts are to be contrasted with the power in subparagraph 4(h) of the objects clause to provide, work and manage broadcasting stations "for and on behalf of any department of the Government of the United Kingdom", for which no licence is required. Paragraph 16 of the Charter "requires" the B.B.C. to provide all such broadcasting services as may be required under any licence granted by the Postmaster General or any agreement made with him, but the only effect of this provision is to impose an additional sanction, that of compulsory dissolution under paragraph 22, if the B.B.C. fails to comply with the licence or breaks the terms of the charter.

The Charter thus empowers the B.B.C. to provide broadcasting services either under contract with the Postmaster General and pursuant to a licence granted under Section 1 of the Wireless Telegraphy Act, 1949, or, without licence, as agent for the executive government. The services with which this appeal is concerned are provided by the B.B.C. in the exercise of the former power, pursuant to the licence and agreement of 12th June, 1952. That the services are provided under licence and pursuant to a contract with the Postmaster General is not conclusive that they are not provided by the B.B.C. as agents of the executive government for the contract might be one of service or agency; but I agree with my Lords that the licence and agreement is drafted so as to make clear and give effect to the intention of the parties that the broadcasting services are to be provided by the B.B.C. as an independent contractor and not as agent for the executive government. It is true that it contains numerous provisions under which the Postmaster General is entitled to exercise control over the stations and transmissions of the B.B.C. in their technical aspects, but so far as concerns the general conduct and operation of their stations (see clause 5(l)) and the content of their broadcasts, the freedom of the B.B.C. from the control of the executive government is scrupulously maintained. Clause 15 is in this respect to be contrasted with clause 20, which Lord Justice Danckwerts has cited. I must confess that I find in the provision in this clause for the B.B.C's stations in time of emergency "to be taken possession of "in the name and on behalf of Her Majesty", a powerful argument for the contention that the B.B.C's own occupation and operation of its stations are not "on behalf of Her Majesty", which they would be if the B.B.C. were an agent of the executive government and thus entitled to Crown immunity.

After the judgments which have already been delivered it would be a work of supererogation for me to embark upon an analysis of the cases on Crown immunity which they have so fully discussed. I will content myself by saying that "Crown immunity" is restricted to persons who are servants or agents of the executive government and is enjoyed only in relation to acts which they do or property which they own or occupy exclusively in that capacity; (2) that reference in the cases to persons in consimili casu to servants of the Crown — Mr. Justice Blackburn, incidentally, did not speak of persons in consimili casu to agents — is to-day best translated as agents of the executive government; and (3) that I hope that no one will ever again in a court of law use so imprecise a metaphor as "emanation of the Crown."

I agree with my Lords that the B.B.C. is not entitled to "Crown immunity" and is included in the expression "any person" in Section 122, 1(a) (i) and (ii) of the Income Tax Act, 1952.

The surplus question. This question is also one of construction of a statute and turns on the meaning of the expression "annual profits "or gains arising or accruing" to any person, in Section 122 of the Income Tax Act, 1952. The fact that a person who engages in a continuing activity which involves the disbursement of money and receives funds from other persons from which such disbursements are to be met, finds himself with a surplus of funds in hand at a particular moment, which happens to be the end of a year of account does not of itself render that surplus "annual profits or gains arising or accruing to him." One must look to see how the surplus arises. We are concerned here exclusively with the broadcasting activities of the B.B.C. for which it is ultra vires for the B.B.C. to receive any payment from any person. This is prohibited by clause 14 of the licence and agreement and the B.B.C., by paragraph 3, sub-paragraph 3, of its charter is only empowered to act in conformity with that licence and agreement.

How does its surplus at the end of any year in respect of its broadcasting activities arise? It receives for the purposes of its broadcasting services from the Postmaster General, under clause 17 of the licence and agreement, out of aids or supplies appropriated by Parliament, an annual sum of money calculated by reference to the income which the Postmaster General receives from the public as licence fees for wireless and television. By paragraph 18 of its charter it is ultra vires for the B.B.C. to apply or administer such money except for the purposes of its broadcasting services; and subject to any terms or conditions attached by Parliament, it may treat such money as capital or income at its discretion. It has no power to divide any monies among its members. Any surplus at the end of a year of account must be applied in the future for the purposes of its broadcasting activities and any ultimate surplus upon its dissolution reverts to the Postmaster General. It seems to me' to be a misuse of language to call this surplus "annual profits or gains." To adapt the words of Lord Dunedin in Jones v. South West Lancashire Coal Owners Association Ltd.:

> "It is no such thing. It is simply a sum of money which is carried forward in order that it may be available to be used for the purposes for which it was provided by the payor or, if it is found in the end to be redundant, to be returned to the payor."

I think that this question turns on the ordinary meaning of the words "annual profits or gains." I do not think that it is illumined by elaboration or that the so-called "mutuality" cases and "rating" cases which were cited, have any relevance except as examples of other circumstances in which the court has applied the ordinary meaning of "annual profits and gains" to a surplus which happens to be in the hands of a taxpayer to be carried forward into a new accounting year. My conclusion in this case would be the same if the source of the B.B.C's funds was not aids or supplies appropriated by Parliament for that purpose; that is, the national exchequer. But the funds do come from the national exchequer and it does not seem probable that Parliament really intended to appropriate to the B.B.C. monies from the national exchequer so that the B.B.C. might return part of them to the national exchequer as income tax. I, too, agree that the B.B.C. is not liable to pay income tax on any surplus of monies paid to it by the Postmaster General for the purposes of its broadcasting services which happen to be left in its hands at the end of an accounting year.

The Deductible Expense Question. This question only arises if we are wrong in holding that the B.B.C. does not make any profits or gains out of its broadcasting activities, but we have been asked to express our view upon it. The question is whether the so-called "additional subscription" paid by the B.B.C. to B.C.I.N.A., which is in reality a payment of one half of the annual operating deficit of that company is "money wholly and exclusively paid out or expended for the purposes of" the B.B.C's broadcasting activities.

I do not think, with great respect to Mr. Justice Upjohn that the payments sought to be deducted in Marshall Richards Machine Co. v. Jewitt were without consideration but in any event I do not think that the answer to this question turns upon whether the payment was voluntary or whether there was any

consideration for the payment as between the payor and the payee, which in this case there was not, or as between the payor and a third party, which in this case there was. It is the purpose of the B.B.C. in making the payment which is decisive.

The "primary object" of establishing B.C.I.N.A. was described by the Director General of the B.B.C. as being "to establish a British "agency so as not to leave the whole field to the Americans." In clause 2 of the agreement between the B.B.C., Rank, C.B.C. and A.B.C. of 31st October, 1957, "the main purpose" of B.C.I.N.A. is stated to be "the provision of a service of world news recorded on film for "subscribers throughout the world who are operators of television services "providers of television programmes or producers of cinematograph news "reels and for such other persons as may wish to subscribe in order to "obtain the benefit of such service." The so-called deed of trust contains a similar description of its objects. The contribution which the B.B.C. by clause 8 of the agreement undertakes to make to the operating deficit of B.C.I.N.A., although called in that agreement to which B.C.I.N.A. is not a party, an "additional subscription", is not a payment for the service provided to the B.B.C. by B.C.I.N.A. at all. It is paid to enable B.C.I.N.A. to continue in operation to provide the service not only to the B.B.C. but to all other subscribers to the service. No doubt the B.B.C. would not have promoted B.C.I.N.A. or agreed with its fellow promoters to contribute to its operating deficit if it had not regarded the service which it was itself to obtain from B.C.I.N.A. as being "a vital part of the development of "its news programmes", as the Special Commissioners found that it was.

But although that may have been the dominant purpose of the B.B.C. in agreeing to make the contribution to B.C.I.N.A's operating deficit it appears on the face of the agreement itself that it was not the only purpose and there was in my view ample evidence to justify the Special Commissioners' conclusion that these sums "were expended, as we find, partly to support B.C.I.N.A." This is a finding of fact and since B.C.I.N.A's object was to provide a service for other subscribers as well as for the B.B.C. and it did in fact provide such service for other subscribers I agree with the Special Commissioners that it follows that the so-called "additional subscription" paid to B.C.I.N.A. by the B.B.C. was not money wholly and exclusively paid out or expended for the purposes of the B.B.C's broadcasting activities- On this question I differ obiter and with regret from the conclusion of the learned Judge and the dicta of my brother Lords Justices.

MR. BUCHER: My Lords, may I say one word with regard to costs? I have, of course, lost on the Crown immunity point and some time was taken up on that point, but I had to come before your Lordships in order to succeed on the second point, which is a very substantial point and I would submit that the time taken on the first point was necessarily taken to introduce the way towards the second point, and therefore I would respectfully ask your Lordships to allow the B.B.C's appeal with costs and to dismiss the Crown's cross appeal with costs.

LORD JUSTICE DIPLOCK: Increase its surplus!

MR. BUCHER: Yes, my Lord.

MR. PHILLIPS: I do not know, my Lord, whether you want me to add anything on the question of costs?

LORD JUSTICE WILLMER: I should like to know whether you resist the application.

MR. PHILLIPS: I would only seek, if I might, to add one remark to what my learned friend has said and that is this, that although he says rightly that there are two points, the two points are not of a kind which sometimes happens in which he could have wholly succeeded on either of them. I submit that that is a relevant consideration in your Lordships' findings.

LORD JUSTICE WILLMER: Mr. Bucher, we think you are entitled to your costs.

MR. BUCHER: If your Lordship pleases. My Lord, might I have your Lordships' indulgence to make a statement in open Court correcting a fact which I erroneously stated to your Lordships in the course of the argument, a fact which does not appear in the judgment of any of your Lordships and is of no relevance to the decision of your Lordships on any point but which has been given a certain amount of publicity as I am instructed; and therefore it would be desirable, with your Lordships' leave, to correct the misapprehension.

I stated in the course of the argument that if the B.B.C. were to be successful in this income tax appeal, it would be able to carry on its work with a grant of 5s. less than the £4 for the sound and television licence which it was already receiving. That is not the whole truth. It is true to say that if the licence fee is increased above the present figure of £4 the Corporation could make do with 5s. less if it did not have to pay income tax. The Postmaster General has, however, recently stated that he has no intention of increasing the licence fee, although the Corporation has made it quite clear that the present £4 licence is too small to finance the Corporation's expanded activities in the future. It follows that the Corporation could not make do with £3 15s. in the event of the appeal being successful. My Lords, I am very grateful to you for allowing me to make this correction of a misapprehension for which I am responsible.

MR. PHILLIPS: I am instructed in this case to ask your Lordships for leave to appeal to the House of Lords if, after an opportunity of considering your Lordships' judgments, our clients should wish to do so.

LORD JUSTICE WILLMER: Why?

MR. PHILLIPS: Partly for two reasons, my Lord. One, the intrinsic importance of the case itself. The B.B.C., as you know from the argument, has paid tax for a very large number of years; and secondly because the point on which your Lordships have decided adversely to the Crown is, as I submit, a point of general importance on which, as I say, after considering your Lordships' judgments ---

LORD JUSTICE WILLMER: There was no stage in the argument, it seems to me, when the parties were battling about nothing. It is only a question of in what form the money shall pass from the B.B.C. or vice versa. That was not material for the purposes of the argument and we, I hope, patiently listened to the whole of the argument, but when you ask for permission to repeat the whole thing again in the House of Lords, it seems to me a different situation would arise.

MR. PHILLIPS: Of course, as I say, my Lord, there are really two points. First of all, however important or unimportant the case may be I do not know, but so far as the B.B.C. are concerned it is this fact that they have been paying tax for twenty or more years, which is material, I would have submitted

LORD JUSTICE WILLMER: Why is it important to anybody? You have lost as things are at the moment. It means you will not get so much tax from the B.B.C. You will not have to pay them so much. Why does it matter?

MR. PHILLIPS: It is important. It matters, I suppose in the end, if one is going down to fundamentals, as a matter of public accountancy.

LORD JUSTICE DIPLOCK: They will just have to alter the figures in their published accounts, that is all.

MR. PHILLIPS It is desirable, of course, that the more complicated public accounts become the more accurate the accounts should be. One gets the same problem in rating where there is an argument between a rating authority and a constituent authority about the rateable value of premises. It all goes into one pocket in the end, but in order to get the account correctly representing the truth, it is desirable to have a correct answer arrived at. Passing from the particular importance of the case, I submit that the point on which your Lordships have decided this, is in itself a matter of general importance.

LORD JUSTICE DIPLOCK: No other body is in the same position as the B.B.C.

MR. PHILLIPS: Well, that is not, with respect, the point I am seeking to make. I am now on the more general point. Your Lordships have decided the case on one point and one point alone, the B.B.C. having failed on five points, and your Lordships' decision is upon the meaning of the words "annual profits or gains", and that is a matter which can arise in all sorts of connections.

LORD JUSTICE DANCKWERTS: It is only a very subsidiary point, is it not? As regards the question of the technical position of the B.B.C., I should hope that Parliament would make it clear when they come to deal with an institution of this kind, what they really want.

MR. PHILLIPS: One does not really know what will or will not happen, but with respect when your Lordship says it is a subsidiary point, I respectfully submit that that is not the case. That is the ground of your Lordships' decision.

LORD JUSTICE DIPLOCK: Put it the other way round. The question on which we have decided it is whether the surplus which arises in the unique situation of the B.B.C. does come within the expression "annual profits or gains". I do not think any of us has laid down any general pronunciamento about what the profits or gains are.

MR. PHILLIPS: In arriving at the answer, my Lord, having listened to your Lordships' judgments, each of your Lordships has naturally considered what those words do mean. There are various lines of cases to which your Lordships have been referred and those are matters in my submission which are likely to arise, in my submission, in other conditions quite different from those.

LORD JUSTICE WILLMER: Can you find some other body which carries on its business in the same sort of way as the B.B.C.? That is the point made by my brother. . The B.B.C. is a peculiar creature. It carries on its business in a peculiar way.

MR. PHILLIPS: That I accept, my Lord, but I respectfully do not accept — I cannot really go beyond this — that the ground of the decision is relevant, or likely to be relevant only to cases of peculiar bodies like the B.B.C.

LORD JUSTICE DIPLOCK: It may be correct in a case where a sum of money is involved.

MR. PHILLIPS: One never knows quite what is said in one case. It may crop up in most unexpected combinations in other cases and when your Lordships have given a decision turning entirely on what is a surplus, which after all is the whole basis of any assessment to tax, in my submission the matter is of really general importance and possibly deserving of final determination. I cannot add to that, my Lord, and it is upon those grounds that I do ask your Lordships for leave to appeal.

LORD JUSTICE WILLMER: No, we will not grant leave.

MR. BUCHER: My Lord, I should have said — I apologise for not doing so — a word as to the form of your Lordships' order. I would submit that the case should be remitted back to the Special Commissioners, with the direction that the surplus arising to the B.B.C. from its broadcasting activities is not taxable but that the profits arising from the activity of publication should be quantified and taxed under Schedule D.

LORD JUSTICE DIPLOCK: Is it agreed that that is the only effect?

MR. BUCHER: I think I have my learned friend's agreement, but I have not discussed it formally.

LORD JUSTICE DANCKWERTS: You want the cross appeal dismissed?

MR. BUCHER: Yes, I have asked for that, my Lord.

LORD JUSTICE WILLMER: There was some talk about doing a trade in news film, about sales to other people.

MR. BUCHER: Yes.

LORD JUSTICE WILLMER: I think I had better be rather careful about using too restrictive words.

LORD JUSTICE DIPLOCK: Any other activities in the nature of trade.

MR. BUCHER: That would do, with respect. I would accept that if it is agreeable to my learned friend.

MR. PHILLIPS: I wonder if, my Lord, with respect, it might be put in a negative form. The Notice of Appeal asks that in the alternative to the declaration "the appellant is not liable to income tax under Schedule D in respect of the surplus arising from its broadcasting operations" and if one added to that that it is assessable in respect of any other operations resulting in a profit, or something like that.

MR. BUCHER: I think- my Lord Justice Diplock's thought was a more happy expression of it — "profit arising from any other activities in the nature of a trade."

MR. PHILLIPS: That would be acceptable, my Lord, with respect.

LORD JUSTICE WILLMER: I wonder if counsel could assist the associate in drawing up the appropriate order. If you find yourselves in difficulty or unable to agree, the matter can always be mentioned again.

MR. BUCHER: Certainly, my Lord.

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