

CHAPTER XVIII

ADMINISTRATIVE RULE-MAKING PROGRAMS

Section A. *Character of the Underlying Statute*

2.1 *The precision of the statute itself*

Controversies arising from time to time about the precise amount of the tax liability in particular cases, certainly are not due to any paucity of legislative provisions indicating the rules by which Parliament intended to govern the matter. There is, indeed, a massive volume of guidance available.

The whole statutory code of income tax provisions was consolidated last in 1952. The result was the longest single Act of Parliament ever put on the statute book. This act contained 532 separate sections, together with 25 schedules. In the legislative practice of the United Kingdom the term schedule normally is used to denote an appendix to an Act of Parliament, supplementing the sections in the main body of the act by setting out subordinate and ancillary provisions. The standard edition of the statutes issued by the Queen's Printer has 511 octavo pages with upwards of 400 words to a page.

Since the consolidating Act of 1952 embodied virtually the whole of the code of income tax legislation then in force, it necessarily contained some materials other than the statutory provisions directly defining the amount of a taxpayer's liability. Nearly 30 percent of its sections related to administration in the broadest sense, covering a wide range of matters such as the obligation to make returns of income, penalties for non-compliance or fraud, appeal procedures, and the enforcement of collection. Only the remaining 70 percent related to substantive questions of liability, specifying how taxable income should be measured or what relief from tax should be available and in what circumstances. The basic code of general application, after the 1952 consolidation, numbered about 250 different sections, comprising roughly about two-thirds of this part of the statute. The remaining one-third of this portion of substantive provisions dealt with departures from the normal tax pattern. These departures do not—with two exceptions—cut across wide groups of taxpayers. Instead they apply only to special classes of taxpayers, such as estates in the course of

administration, banks, insurance companies, charitable bodies, or nonresidents. The two exceptions to the general principle of the English statute—that deviations of the type used in the United States requiring itemization of deductions shall be avoided in favor of round-sum allowances—are the deductions for interest, available to all taxpayers whether businesses or individuals, and for life insurance premiums, available to individuals under certain specific restrictions.

Since that consolidating act was passed, Parliament has continued to occupy itself with income tax matters. In all, by 1964, fifteen subsequent statutes had been enacted, containing over three hundred additional sections and schedules. In part, this activity represents a process of reform in which new legislation entirely displaces the corresponding provisions of the old, thus enabling the superseded provisions to be repealed. On balance, however, the result has been a considerable net increase in the size of the income tax code.

The corpus of legislation just described covers the surtax as well as the income tax. Moreover, many of the basic principles which it sets out are applicable also to the computation of a company's income for the purpose of determining its profits tax. There is, however, a considerable number of supplementary substantive and procedural enactments not included in the foregoing enumeration that do bear upon the ascertainment of liability for the profits tax.

Information reflecting the volume of the applicable statutory material does not, of course, afford any complete index of the degree to which interpretative difficulties may be expected to arise when the statute is applied to practical situations. This will be affected, as well, by the character of the language used by the legislature, and, in particular, by the extent to which it sought to draw fine distinctions between one case and another in a search for greater equity. On this aspect of the legislative process, it is worth quoting from the Final Report in 1955 of the Radcliffe Commission on the Taxation of Profits and Income:

1085. The social and industrial structure of the United Kingdom is intricate. It comprehends a great variety of forms. A master tax, such as income tax has come to be, which has to be applied with fairness to all the variety of forms, must reflect to a large extent the intricacy and complication of the underlying structure. Even if the social pattern is itself becoming less complicated—an assumption which we do not make—the general extension of the range of the tax to new circles of

taxpayers involves a complementary increase of detailed provisions.

1086. Secondly, the high rate of tax brings certain consequences. On the one hand, there is pressure for allowances, alleviations and qualifications wherever a special case can be asserted or a distinction claimed. Indeed, with a high rate of tax, a distinction acquires a potential value which it would not possess in other circumstances. Moreover, the methods and process of Parliamentary legislation, particularly, perhaps, as applied to the annual Finance Act, themselves assist in the multiplication of special provisions. On the other hand, a tax which has so heavy a bearing on the lives and prospects of its citizens is sure to meet with avoidance on a large scale: and the statute book becomes encumbered with elaborate provisions against avoidance, some of which rank among the least intelligible portions of English prose. . . .

1088. In considering whether we can make any useful recommendation for the improvement of the present situation we must distinguish between the two other major criticisms of the tax code. First, as to the complications of its conceptions and structure. These can never be simple, as we have said. Can they be simpler than they are today? Such answers as we can give to this are to be found in the other Chapters of our Reports. We were at one in starting our inquiry with an ardent desire to leave the structure and the conceptions of the tax simpler than we found them. If we have had only small success in the result, we have at least explained in most instances why we have failed, and what were the reasons that have led us on occasions to reject a seemingly attractive simplification. Perhaps the most formidable single obstacle is the fact that hitherto the tendency both of Parliament and of the Inland Revenue Department has been in the opposite direction. Scrupulous regard has been paid to even small differences in individual situation: and, while it is comparatively easy to advance from a simple system to a more refined one by introducing qualifications and differentials, it is very much more difficult to retire from a refined system to a simpler one and, by so doing, to ignore distinctions which hitherto have been recognized and allowed for.

Here, then, is expert testimony to a significant tendency in the country's tax legislation: for some time it has been customary to accord differential treatment on the basis of rather small distinctions between one case and another. This process seems likely to continue. It certainly must be conceded that the broad and sweeping language of the earliest acts relating to income tax gradually has become overlaid by refinements involving elaborate definitions quite foreign to the original conception of the code.

It is almost inevitable that this modern elaboration should prove a fruitful source of interpretative controversy. In practice, while no statistics are available, the accounts submitted by almost every business enterprise give rise to one or more interpretative controversies. On the other hand, it is unlikely that such controversies will arise frequently in the returns of wage or salary earners.

At the same time, it must be acknowledged that evidence is lacking by which to judge whether the old style of drafting tax legislation would have been any more successful in avoiding such controversies had Parliament been constrained to continue its use. Here it is possible to quote contrasting examples of the old style and the new, leaving the reader to draw his own conclusion on the matter. But first it may be helpful to quote another comment from the Final Report of the Radcliffe Commission bearing on what, after all, is one of the central problems any legislature encounters on adopting an income tax law, namely, the problem of indicating the distinctions separating taxable from nontaxable receipts. The report calls attention to the strains that may well arise when a form of definition that served well enough in former times must be applied to more modern conditions:

28. The tax code contains no general definition of income. It is often said that it is impracticable or undesirable that it should. We do not feel it necessary to subscribe to either of those epithets. The codes of other countries have achieved the work of definition without any known ill-effects. What seems to us more important is that no real advantage could possibly result from the introduction of a general definition that had to cover so multifarious a subject as taxable income. If it were expressed in very general terms the work of deciding how to apply to particular instances would have to be done by deductions drawn from other parts of the code's framework or with the help of general principles imported from without. To a large extent the United Kingdom system itself has proceeded by this method of interpretation. On the other hand, the more particular the definition the more it tends to become a mere list of different classes of receipt, and the anxiety not to exclude some class by inadvertence or omission leads to the addition of a comprehensive "sweeping up" clause at the end which, in effect, raises over again the problem of interpreting the general phrase in the light of a particular instance. The United Kingdom code has in fact established the limits of what it will regard as taxable income by formulating a list of different classes of income, grouped under five Schedules: and the interpretation of the wording and significance of these lists has been the subject of copious decisions of the Courts

of law during the course of some three generations. Their interpretation has been governed by the principle, in itself unexceptionable, that income tax is a tax on income. . . .

30. Since the tax code identifies income by a process of classification, a receipt, to constitute taxable income, must be capable of being referred to one of those classes. The classification itself takes two forms: either it specifies a kind of receipt which is regarded as being inherently of an income nature, e.g., interest, annuity, public revenue dividends, or, more often, it specifies a kind of source which is regarded as being inherently productive of income, e.g., land, trade, profession, securities, employment, and charges the income from that source. The identification of a receipt of the first kind presents little difficulty, once the material facts are ascertained. But very great difficulty arises from time to time in deciding whether a particular receipt is or is not to be regarded as income of the second kind. For it has to be determined, first, whether the recipient owns one of the specific sources to which the receipt can be related, and, secondly, whether the relation of the receipt to that source is such that it can be said to grow out of it by way of annual increment. The difficulties are added to by the fact that in most cases the income to be taxed is not receipts themselves but profits representing the balance between receipts and deductible expenses.

31. We have here one of the basic conceptions of the tax code, that referability to a defined source is essential to permit of a receipt being categorized as income, unless it falls within the limited class of receipts that are identified as income by their own nature. The source provides the capital substance from which income can emerge. Since the division of classifiable income into five Schedules dates back to the Income Tax Act of 1803, the adaptation of increasingly complex forms of income to the general structure of the tax code has not proceeded without strain. For instance, though offices and employments appeared in the original list of 1803 as a categorized source of income, it is not always easy to recognize that it is the office or employment itself that constitutes the source of income, not the services rendered or the contract that secures the payment. While the fundamental structure remains signally unaltered, additions and alterations have, of course, been made from time to time either by changing or enlarging the list of sources or by ad hoc provisions to the effect that a particular kind of receipt is to rank as taxable income.

The need asserted above, to discern a classifiable source, such as a trade, for the purpose of identifying particular receipts as taxable, emphasizes the importance of the statutory definition of trade. The manner in which the statute approaches that term serves as our first illustration of the older style

of definition (dating back to the Income Tax Act of 1805) which in this instance survives almost intact today. The present definition reads: "'trade' includes every trade, manufacture, adventure or concern in the nature of trade."¹

While this is a sweeping description, the language still leaves room for differences of opinion over the question whether the purchase and profitable resale of property in any given case does or does not amount to the carrying on of a trade. Is the answer to be influenced, for example, by the precise character of the property involved? What is the significance of the period that elapses between purchase and resale, whether long or short? Can a single transaction of this sort amount to an "adventure . . . in the nature of trade" or is it a requisite that there be recurring transactions? Does it tend to negative the existence of a trade if the property is in no way altered before it is sold? Is there an opposite tendency if the property is improved only to make it more marketable? Does the definition postulate that the surrounding circumstances show that the person originally acquired the property for the purpose of making a profit, and would a case be excluded where some different motive led to the acquisition? All of these questions have had to be considered in litigation over many years, to fix the proper interpretation of the definition itself.

The meaning of residence provides another illustration of the older style of drafting. From the very earliest period, Parliament has acted on the principle that income from sources within the country should be taxed irrespective of the nationality or place of abode of the recipient and that, in addition, persons residing in the country should be taxed also in respect of income which they received from foreign sources. Thus the concept of a person's residence long has been of crucial importance in determining the basis of liability. Nevertheless, Parliament did not specify any general definition of residence. Instead, the word residing apparently was to be viewed according to its everyday popular meaning, with such additional assistance as might be derived from two particular rules (originally enacted in 1799 and 1803 respectively) directed to specific situations. In their current form those rules read:

368. *British subjects, etc., temporarily abroad.* Every British subject or citizen of the Republic of Ireland shall, if his ordinary residence has been in the United Kingdom, be assessed and charged to tax notwithstanding that at the time the

¹ Income Tax Act of 1952, § 526.

assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad, and shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains, whether they arise from property in the United Kingdom or elsewhere, or from any allowance, annuity or stipend (save as herein is excepted), or from any trade, profession, employment or vocation in the United Kingdom or elsewhere.

375. *Position under Schedule D of temporary residents.* A person shall not be charged to tax under Schedule D as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, who is in the United Kingdom for some temporary purpose only and not with any view or intent of establishing his residence therein, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year.

It will be observed that these two rules have one thing in common; each deals with a situation constituting something of an exception to a person's normal way of life. Since the general concept of residence is fairly well understood where an individual is concerned, it could be said that Parliament has given fairly clear guidance as to its intention to use the term residing in that ordinary sense for normal cases, while taking care to spell out a definite rule for the exceptional cases where doubt might otherwise arise. But the income tax must be applied to corporations as well as individuals. Since the relevant statutory provisions say nothing about a corporation's residence, the courts had to decide whether analogies could be developed which would give some coherent meaning to the concept in the case of a legal entity so materially different from a natural person.

The contrast between the older statutory approach to definitional problems as illustrated above, and the more modern approach can be observed in one example taken from the considerable volume of modern legislation directed against the avoidance of tax by the ostensible transfer of income from one person to another. In 1936, Parliament provided that a settlement by a parent who transferred income to a minor child would not be effective for tax purposes (subject to certain conditions) unless the settlement had been made before the new statutory amendment was first proposed and was then irrevocable. Parliament in the same act set forth an elaborate definition

of the term "irrevocable," the current form of which as amended in 1952 follows:

399. For the purposes of this Chapter, a settlement shall not be deemed to be irrevocable if the terms thereof provide—

- (a) for the payment to the settlor or, during the life of the settlor, to the wife or husband of the settlor for his or her benefit, or for the application for the benefit of the settlor or, during the life of the settlor, of the wife or husband of the settlor, of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement; or
- (b) for the determination of the settlement by the act or on the default of any person; or
- (c) for the payment of any penalty by the settlor in the event of his failing to comply with the provisions of the settlement:

Provided that a settlement shall not be deemed to be revocable by reason only—

- (i) that it contains a provision under which any income or assets will or may become payable to or applicable for the benefit of the settlor, or the wife or husband of the settlor, on the bankruptcy of any such child as is mentioned in paragraph (a) of this section or in the event of any assignment of or charge on that income or those assets being executed by such a child; or
- (ii) that it provides for the determination of the settlement as aforesaid in such a manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child, or the wife, husband, or issue of such a child;
- (iii) in the case of a settlement to which section thirty-three of the Trustee Act, 1925, applies, that it directs income to be held for the benefit of such a child as aforesaid on protective trusts, unless the trust period is a period less than the life of the child or the settlement specifies some event on the happening of which the child would, if the income were payable during the trust period to him absolutely during that period, be deprived of the right to receive the income or part thereof.

At first glance, it might be supposed that a definition so comprehensive would leave no room for argument about its application. A determined inquirer, however, would find room for arguments as to whether particular cases are covered. In connection with paragraph (a), for example, can a settlement be

justly said to "provide for" a payment to the settlor if a trust does permit such a payment to be made but only at the discretion of the trustees, there being no certainty that any such payment will be made? Again, does a settlement provide for payments to the settlor "during the life of" his child if the enabling words are such that the payments, if made would not necessarily continue during the *whole* life of the child? Or, turning to paragraph (b), is there provision for the "determination" of a settlement if it permits or requires the trust fund to be invested in shares of a company which the settlor so dominates (e.g., through his holding of shares with special voting and liquidation rights) that he could neutralize the settlement by winding up the company and thereby legally take possession for himself of the entire assets?

2.2 *Legislative pre-enactment aids to interpretation*

When an Inland Revenue official or a private tax practitioner encounters a problem of interpretation arising out of a statutory provision, he may well seek to enlarge his knowledge of its background by studying the relevant passages in the published reports of the different Royal Commissions and committees of enquiry which have from time to time reviewed the country's tax system. He knows that, as a matter of history, many amendments of the tax law owe their origin to the recommendations of such bodies. In addition, he may decide to check his tentative conclusions against statements made on behalf of the Government when the proposal to enact the amending section was debated in the House of Commons (though, as noted under 2.3 *infra*, arguments based on such a statement could never be decisive). To this end, he can turn to the bulky volumes of the Official Report of Parliamentary Debates for the year concerned. This is a substantially verbatim report, published since 1909 under the authority of the House itself. Not every provision of a finance bill attracts notice in the debates on the second and third readings of the bill; the tendency at that point is to concentrate on major issues of policy. But the bill is also considered clause by clause in Committee of the whole House; and at this stage, it is usually for the Chancellor of the Exchequer or another member of the government to explain the object of each provision of the bill as it comes up for discussion. There are further opportunities for debate on points of detail when the bill as amended in committee is reported back to the House.

It will thus be to those two different stages of debate in the House of Commons that the inquirer will turn, for there is no debate on points of detail in the House of Lords (which is constitutionally precluded from amending a bill relating to taxation). Nor are there any committee hearings, such as occur under the legislative procedures of some countries, at which evidence bearing on the provisions of the bill would be given by officials or representatives of interested taxpayers.

Any interpretative guidance derived from a study of these legislative pre-enactment aids is a complete byproduct. An attorney examines them to facilitate his own understanding of the meaning of the statute; they have no *de jure* weight in court. The status of such aids is not peculiar to tax legislation; it is common to all United Kingdom legislation.

2.3 Standards of construction followed by the judiciary in interpreting the statute

While the reports of Parliamentary debates may afford a valuable indication of the government's intentions at the time the statute was enacted, the courts have regularly refused to turn to Ministers' statements in either House of Parliament in order to explain its meaning. The courts proceed from a common premise, that the language of a statute must be regarded as the language of the whole legislature and, in consequence, that the meaning attached to it by an individual member of either House cannot govern the interpretation. Indeed, it has been stated that if there is a difference between the language of a statute and the declared intention of its framers, the proper inference is that this difference was not accidental but intentional.

In interpreting tax statutes, courts are accustomed to apply the recognized rules of construction applied to statute law generally. If, for example, a statute uses plain and unambiguous language, the court will give effect to it; the court's duty in such case is not to make the law reasonable but to apply it by reference to the usual sense of the words. Words will not be read into a statute by implication unless it is necessary to do so to give the language sense and meaning in its context. If, on the other hand, some apparent contradiction arises between two passages in the same statute or in two related statutes dealing with the same subject matter, the court will interpret the actual words of the section under review in a manner which best harmonizes with the subject and with the scheme of the statute or statutes taken as a whole.

In addition, courts tend to hold that tax statutes should be construed strictly. This approach rests on the view that when the legislature imposes a monetary obligation which, in some sense, encroaches on the property of a citizen, it is reasonable to expect it to manifest its intention in clear words, rather than leave the matter to mere inference. This approach was reflected in one judgment as follows:

In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.²

Section B. *The Regulations Program*

2.4 *Types and force of regulations*

The United Kingdom tax code contains no general enabling provision authorizing issuance of so-called interpretative regulations. Hence, a regulations program of the type administered by the United States Treasury Department under the general authority of section 7805 of the 1954 Internal Revenue Code, could not be and is not, carried out by the Board of Inland Revenue.

However, in the tax code, as in many other United Kingdom statutes, Parliament sometimes does delegate legislative power. That is, it does provide that some specified authority shall have power to prescribe rules, having the force of law, which amplify and otherwise carry into effect some particular provision or group of provisions in the parent statute. These rules take on different forms and go under various names (for example, the instrument by which, after Parliamentary approval, effect is given to a double taxation convention with another country is an Order-in-Council), but it is convenient to refer to them comprehensively as statutory regulations.

Some statutory regulations may be primarily or indeed wholly concerned with matters of machinery. For example, they might specify the form of notification to be given to the Inland Revenue Department by a taxpayer who wishes to claim the benefit of a relief provision in the parent statute, and they

²Cape Brandy Syndicate v. Inland Revenue Commissioners, 37 Times L.R. 33 (1920), [1921] 1 K.R. 64, 71, *per* Rowlatt, J., *aff'd on different grounds*, 37 Times L.R. 402, [1921] 2 K.B. 403 (Aff'd Cas.).

might also go on to outline the procedure to be followed in resolving a dispute between the taxpayer and the Department concerning the applicability of such relief in a particular case. But regulations also may deal with questions of substantive liability. Such regulations sometimes define more specifically than the parent statute the qualifying conditions giving rise to a claim for relief, or prescribe the actual method of calculating a result intended by the parent statute.

In 1945, for example, Parliament enacted a new code providing a system of capital allowances for amortization of expenditures incurred after a given date on various types of depreciable assets. The application of this new code to some types of assets in existence at the initial date was fully worked out in the statute. In the case of construction works connected with mining operations, however, the statute merely set forth certain general principles for determining the extent to which any relevant expenditure incurred before the initial date would qualify for amortization after that date, and then authorized the Board of Inland Revenue to make regulations indicating how those general principles would be applied in actual cases.³

Again, in 1956 the system of investment allowances (an incentive device to encourage capital investment in certain business assets) temporarily was withdrawn. Parliament decided, however, to make an exception in favor of investments undertaken in connection with the conservation of fuel. Since a very wide range of industrial equipment was involved, the statute did not attempt to catalogue the fuel-saving devices which would continue to be eligible for an allowance. Instead the Treasury was authorized to make regulations prescribing the types of equipment which would qualify. After obtaining technical advice, the Treasury promulgated a list of qualifying equipment.

These two examples are typical of the degree to which statutory regulations are used to complement a substantive statutory tax provision. The general objective was stated clearly by Parliament; but, the subject matter being one of some complexity, it was deemed advisable to delegate authority to develop the subsidiary specifications regarding application of the basic principles. Another typical feature is that the power to make statutory regulations is granted on each occasion for some more or less specific purpose; in the tax area,

³The regulations made by the Board of Inland Revenue are printed and issued by H.M. Stationery Office. They are available to the public.

Parliament would be most unlikely to grant a regulation-making power which extended to a wide range of different matters.

Where a question of substantive liability turns on a provision contained in statutory regulations, a court before which that question arises will determine whether the body which promulgated the regulation exceeded the limits of the authority delegated to it by Parliament in the parent statute. If, upon review of the scheme of the parent statute and the actual language by which the power to issue regulations was granted, the court should conclude that some part of the regulation goes beyond the presumed intention of Parliament, a decision would no doubt follow that, to this extent, the regulation was *ultra vires* and therefore invalid. This is not, of course, a feature peculiar to statutory regulations on tax matters; it reflects the control which the courts exercise over all forms of delegated legislation. For example, the "Pay as you Earn" system, under which employers withhold income tax when paying employees' wages and salaries, was put into force by virtue of regulations authorized by legislation reading in part as follows:

The Commissioners [i.e., Board] of Inland Revenue shall make regulations with respect to the assessment, charge, collection and recovery of income tax in respect of emoluments to which this Act applies . . . and those regulations may, in particular, include provision—

- (a) for requiring any person making any payment of, or account of, any such emoluments, when he makes the payment, to make a deduction or a repayment of tax calculated by reference to tax tables prepared by the Commissioners of Inland Revenue and for rendering persons who are required to make any such deduction or repayment accountable to, or, as the case may be, entitled to repayment from, those Commissioners;

* * *

and any such regulations shall have effect notwithstanding anything in the Income Tax Acts. . . .⁴

For many years, the Bankruptcy Acts had provided that, in the administration of a bankrupt's property, there should be paid in priority to his other debts certain preferential claims, including one year's taxes and outstanding wages due to his servants and workmen. An analogous provision appeared in legislation relating to insolvent companies. Accordingly, the statutory regulations for "Pay as you Earn" were drafted so as to apply the same rules to the tax which an insolvent employer

⁴Income Tax Act of 1952, § 157.

had deducted but not yet paid over. In relation to bankruptcy for example, the relevant regulation read:

There shall be included among the debts which under section 33 of the Bankruptcy Act, 1914, are to be paid in priority to all other debts in the distribution of the property of a bankrupt or person dying insolvent, so much as is unpaid of the employer's liability for the period of twelve months next before the date of the receiving order or of the death, as the case may be.

Later, in the course of a dispute, the Law Officers of the Crown indicated their opinion that this part of the regulation was *ultra vires*. While the language of the parent statute clearly indicated that the authorized statutory regulations would be deemed to override any inconsistent provision in the Income Tax Acts themselves, it did not indicate that the regulatory power could alter the separate bankruptcy legislation dealing with preferential claims in bankruptcy. After the Law Officers' opinion was handed down, the Board of Inland Revenue rescinded this part of the regulation.⁵

2.5 *Precise purpose of statutory regulations*

The Parliamentary practice of delegating legislative authority may indirectly contribute to greater clarity in the affected area. When the subject matter is especially technical and complex, statutory regulations issued under the specific authority of a parent statute are likely to deal with the application of a new measure in a more detailed fashion than Parliament would have been willing to undertake if the entire matter had to be compressed within the narrower bounds of the statute itself. This consideration apart, however, statutory regulations do not afford a means of resolving the interpretative problems which emerge from all tax legislation. For, as has just been seen, the *ultra vires* test means that, in the United Kingdom, these regulations are subordinate to, and controlled by, the parent statute. Since the power to make regulations is granted only for a specific and limited purpose, study of their language will not throw much light on wider questions arising even out of the parent statute itself.

⁵In 1952, however, Parliament itself enacted amending legislation which directed that the priority rules in the Bankruptcy Act and other analogous legislation should extend thenceforward to "Pay as you Earn" tax not accounted for by an employer at the date of the receiving order or other relevant date.

As these regulations are not designed to interpret doubts generated by the statutory language—recall that their purpose is to complete the gaps left deliberately by Parliament—there is no part in them designed to interpret the parent statute. However, as the Inland Revenue fills in the gaps, the statutory regulations indirectly come to serve an interpretative function for they are more detailed than Parliament itself would have provided in a statute. Although the process is a legislative one, the completion of details, it must be emphasized again that the regulations must not go beyond or vary the clear meaning of the statute.

From time to time, even without a new Parliamentary enactment, statutory regulations will be amended by whatever agency to which Parliament originally delegated the legislative authority.⁶ Illustratively, an incentive allowance encourages the installation of fuel economy devices. There is no general language which permits such an allowance for any and all devices insuring an economical use of fuel. Instead, the regulation lists specific devices with very precise engineering details. If a new device were to be invented, it would be added to the list, with great preciseness as to its engineering features.

2.6 *Manner of processing regulations*

In other countries where the primary tax legislation is supplemented by a comprehensive system of interpretative regulations, a regular procedure doubtless will be developed for drafting original regulations, as well as amendments should the primary legislation itself undergo amendment. But, as has been seen, statutory regulations, as used in the United Kingdom, have a much more limited scope. Each such regulation has something approaching an *ad hoc* character; in consequence, the process of bringing them into existence has not been formalized.

Generally speaking, however, the Board's secretariat takes the initiative in preparing any given set of regulations. To provide continuity, members of that office who are familiar with the underlying problem, having looked after the Department's interests when the enabling statute was originally proposed to Parliament, normally continue to handle the matter at the later point when the related regulations are to be prepared. The staff of the secretariat are administrators, not trained

⁶See 2.4 *supra*.

lawyers. However, they may seek the advice and assistance of the legally qualified staff of the Solicitor's Office. They also usually keep in touch with the relevant technical branch of the Department (e.g., with the specialist Inspectors in the Chief Inspector's Office) as the draft of the regulations takes shape.

Whether interests outside the Department will be consulted while the regulations are still in draft form and, if so, the arrangements to that end, will depend largely on the particular subject matter. The secretariat's timetable, within which regulations must be processed, is also variable and depends on the circumstances.

Section C. *The Rulings Program*

2.7 *Formal advance written rulings to taxpayers*

It is only in a few very special cases that the tax code gives the taxpayer the right to obtain a formal written ruling regarding the probable tax consequences of a transaction which he proposes to carry out in the future. Parliament has been extremely sparing in creating such a right. In each case where it has done so, it was enacting unusually sweeping provisions designed to counter avoidance of tax liability by artificial transactions; and there was some risk that its broad language would become a deterrent to normal business transactions unless the affected persons could obtain a clearance beforehand.

The first example dates from 1951. In that year there was a steep rise in profits tax rates, and antiavoidance legislation was deemed necessary. It was designed to cover any transaction where the main purpose, or one of the main purposes, was avoidance of or reduction of liability to profits tax. In such cases, the Board of Inland Revenue was authorized to adjust the liability in a manner which counteracted the avoidance or reduction. Further, the legislation provided that avoidance or reduction would be presumed to have been the main or one of the main purposes in certain types of transactions (e.g., on the transfer or acquisition of shares in a company) if the main *benefit* which might have been expected to accrue in the immediately succeeding years was avoidance or reduction of liability for the tax. It was provided, however, that a company could send to the Board full particulars of a projected transaction; and the Board, if satisfied that the transaction was being entered into "for bona fide commercial reasons" and ought not to be brought under the section, then must notify the company

of its finding. In such event, the Board could not thereafter invoke the statutory provision in respect of the transaction described to them (though such a clearance does not prevent further action under the section if the particulars supplied did not amount to a full and accurate disclosure of the material facts).

Since this device of an advance clearance under these particular circumstances is considered as an exceptional departure, one to give swift comfort to a business man, an oral conference is not available. However, a refusal of advance clearance does not preclude recourse to the courts should the transaction be held by the Inland Revenue to fall within the thrust of the statute.

In 1960, provision for advance clearances was again inserted in antiavoidance legislation—this time in the income tax and surtax fields. For present purposes, it is enough to summarize the two groups of avoidance devices to which this legislation was directed:

- (1) The first group is illustrated by cases where the disposal of a company's stock-in-trade (inventory) was effected indirectly by arranging for the intended purchaser to buy, not the stock-in-trade itself, but the whole share capital of the company holding it (so that the result was a capital gain for the former shareholders instead of a taxable profit for the company itself).
- (2) The second group involved the manipulation of holdings of securities, so as to bring about a tax advantage analogous to that sought to be gained by the operations known as "bond-washing" and "dividend-stripping."

For the first group, the legislative remedy was, broadly, to make the vendors of the shares liable for income tax (and, if applicable, surtax) on an appropriate proportion of the taxable profit which would have been realized by the company had the disposition been carried out in a straightforward fashion. But it was also provided that prospective vendors and purchasers otherwise within the scope of the section might apply jointly to the Board of Inland Revenue for an advance clearance. To obtain such, they are required in effect to show that the company itself will eventually dispose of its stock-in-trade in a manner which produces a realized profit to the company. If the projected sale is carried out within six months of the clearance date, such a clearance again prevents the Inland Revenue from invoking the statutory provision.

For the second group of avoidance devices, the remedy (as in the 1951 precedent) was to authorize the Board of Inland Revenue to require adjustments of liability sufficient to counteract the tax advantage sought to be obtained. The section did not apply, however, to transactions carried out "for bona fide commercial reasons," obtaining of tax advantages not being a main object. Here too, persons who intended to undertake one or more such transactions were authorized to seek binding advance clearances, by sending full particulars to the Board which then had the duty to respond one way or the other.

No formal procedure has been prescribed with respect to applications for a clearance under the three sections just described. A letter giving all relevant information is sufficient. Before the Board will rule, the application is examined by the secretariat in consultation, where appropriate, with the Office of the Chief Inspector or the Surtax Office. The Board's ruling takes the form of a simple notification, that a clearance is granted or, as the case may be, withheld. The sole purpose of the clearance system, as previously stated, is to prevent the legislation from acting as a deterrent to normal business transactions. Thus, if a clearance is withheld, there is no reason why the applicant should be permitted to make elaborate legal arguments regarding the precise technical application of the legislation. Such argument would be more appropriately held over to a later stage should the applicant, notwithstanding denial of advance clearance, carry out his proposal and should the Inland Revenue then take countervailing action under the statutory provision.

While statistics regarding the number who apply for clearances are not available, in the case of mergers or reorganizations involving issuance of shares to the public, it is not uncommon for the published prospectus to state that clearances have been obtained.

2.8 Informal technical advice to taxpayers on proposed transactions

The relatively restricted compass of the area within which the United Kingdom tax code has given taxpayers the right to obtain a formal advance ruling on the tax consequences of a proposed transaction is matched by the absence of any general custom of providing informal or oral technical advice on such transactions. However, as to one or two areas of tax law, the practice of the Inland Revenue Department does permit such advice to be given, and this practice might be looked upon as a partial rulings program.

An outstanding example of this is afforded by the advice which the Department is willing to give when a business concern decides to establish a superannuation fund—or to institute some comparable scheme—for the payment of retirement pensions to its employees. The purpose is to give advice as to whether a given plan will qualify for tax purposes if carried out in accordance with the proposal submitted. The specialist unit at headquarters is able at a preliminary stage to call the employer's attention to any features of the proposal which make it difficult for the plan to achieve recognition for tax purposes and advises on the changes which would eliminate points of difficulty. The matter can be handled by correspondence, or by a combination of correspondence and oral discussion.

Since the advance informal advice is given by the echelon of the Department which renders technical advice to the Board's secretariat on recognition of pension arrangements when formally constituted, as a practical matter employers can place great confidence in the rulings they receive. It would be very unusual for an employer's representatives to omit the precaution of informal consultation before the proposed pension arrangements become legally binding on the employer.

It should be observed that this exception to the normal no-rulings practice of the department involves a circumstance in which the official who is consulted can obtain a complete picture of the proposed transaction. He can be supplied with complete copies of the proposed trust deeds and other legal documents which establish the funds and regulate the rights and obligations of employer and employees. The same is true in the other principal area in which informal technical advice is regularly given, namely, to charitable organizations. The tax code exempts from income tax, subject to conditions, "a body of persons or trust established for charitable purposes only." The Chief Inspector's specialists who give technical advice to the Board's secretariat on the recognition of charitable organizations customarily give informal advance rulings on the tax effect of a proposed constitution (corporate charter and bylaws), or change of constitution, in much the same way as the staff of the unit which handles questions about pension arrangements.

2.9 Technical advice to field offices

It is evident that the arrangements just described for giving formal advance rulings or informal technical advice on the tax aspects of proposed transactions cover only a small proportion

of interpretative tax questions which arise. It follows that, in general, the key role in resolving such questions falls to the local Tax Offices which must apply the abstract language of the tax code to completed transactions in the course of making yearly assessments. Consequently, the very greatest importance attaches to the system adopted within the Inland Revenue Department for giving them technical guidance in the interests of uniformity and certainty.

The primary source of guidance upon which the local Tax Office relies in performing its task is that afforded by the departmental instruction manuals and by the circulars (mimeographed or printed) sent out from headquarters. These can be considered as a single medium because the instruction manuals represent a consolidated version of those previous circulars having permanent value, and also because the circulars use the instruction manuals as the point of departure in explaining new problems. Indeed, a circular may well take the form of a textual amendment of the pertinent passage in one of the manuals. It is convenient, therefore, to refer comprehensively to the circulars and manuals under the single name of instructions.

As a result of long experience, the conclusion has been reached that the local Tax Offices will be best served if editorial responsibility for instructions is placed on a single unit in the Office of the Chief Inspector. *Inter alia*, such consolidation helps to ensure use of uniform terminology and adequate cross-references to other instructions dealing with cognate problems. Because instructions often prescribe procedures as well as give substantive technical advice, the Instruction Section was made a part of the Organization Group in the Office of the Chief Inspector.⁷

Though editorial responsibility for a new instruction rests with the Instructions Section, that section necessarily consults with the specialist or specialists interested in its subject matter when preparing the text. To the extent the instruction attempts to resolve interpretative questions, the specialist provides necessary guidance regarding the departmentally accepted view of the law. In its final form, the instruction is sent out under the authority of the Chief Inspector; but where the instruction deals with a matter of substance (as distinct from a purely procedural matter), the text first will be submitted to the Board's secretariat to insure that the stated interpretation carried their approval.

⁷ See Chap. XVII, 1.2 *supra*.

The circumstances which trigger new instructions vary from one occasion to another. In one case, for instance, Parliament may have amended the law, and the practice of the Department must be altered to conform to the amended legislation. Or a particular statutory provision may have been interpreted by a court decision. While local Tax Offices regularly receive the reports of tax litigation, a new instruction may be needed to point out the extent to which the new court decision appears to govern application of the code to situations analogous to, but not identical with, the actual situation subjected to litigation. Again, examination of some problem at headquarters (for whatever reason) may have clarified views hitherto held on a debatable question of interpretation, and it may be thought desirable to communicate the result to local Tax Offices. As a last example, headquarters may find that a question previously deemed to have only academic interest has begun to assume practical significance in a number of actual cases, and thus merits specific guidance in an instruction.

Instructions, however, are only part of the story. It previously has been stressed that (subject to compliance with departmental instructions) the District Inspector in charge of a local Tax Office has an independent command in a very real sense. Indeed, he has discretion to arrive at a reasonable settlement of controversies arising with taxpayers in his area. Nevertheless, from time to time he may want technical guidance on some specific point not adequately covered by the instructions. He is entitled to submit his problem to the relevant specialist at headquarters, though he will not do so lightly. In making such a submission, which normally is in writing, he is expected to provide, not only an adequate summary of the facts of the actual case giving rise to his request, but also citations to the statutory provisions and to any court decisions that appear relevant, together with an indication of his own view as to the correct solution. The object at this stage does not go beyond providing the District Inspector with an expert opinion on the interpretative question. In consequence it is not customary for the headquarter's specialist to meet with the taxpayer whose affairs are covered by the submission. Should the specialist think it desirable, before reaching a decision, to have a more complete understanding regarding the taxpayer's view of his own affairs, he probably will leave it to the District Inspector to make the necessary contact.

Although the Surtax Office is not a field office in the ordinary sense of the term, since it assesses surtax centrally for

the whole of the United Kingdom, it nevertheless resembles the local Tax Offices in that it has direct contact (if only by correspondence) with the taxpayers whose liabilities it handles. When the amount of a taxpayer's income from a *given* source has been finally determined for *ordinary income tax* purposes, that amount is conclusive in calculating that particular source's contribution to the taxpayer's *total* income for the purpose of determining his surtax for that same year. This often means that interpretative questions affecting the assessable amount of an item of income, if not resolved between the taxpayer and his local Tax Office prior to the point the Surtax Office considers the surtax matter, continue to be the primary responsibility of the local Tax Office. Nevertheless, interpretative questions can arise for the first time in the context of the surtax computation for a case where no ordinary income tax assessment was required. A simple example might relate to the precise amount of an income item which was subject to deduction of tax at source and for which, accordingly, no income tax assessment was required. In this circumstance, the Surtax Office bears the responsibility of upholding the departmental construction of the tax code's provisions. Since the Surtax Office is a centralized branch of the headquarters organization, it is not as dependent on instruction manuals and circulars as the local offices, in trying to achieve uniform administration. Nevertheless, even at this higher level, the use of branch instructions has been found advantageous. The details of this separate system of branch instructions need not be discussed here, however; the procedures followed correspond generally to those associated with the Chief Inspector's instructions to local Tax Offices. For example, the Board's secretariat will be informed in advance regarding important newly proposed interpretations.

2.10 *Publication of technical advice given taxpayers and local offices*

The question of whether the Department should or should not publish what are sometimes termed Practice Notes in order to alert the public to interpretations officially placed on tax statutes was the subject of earlier debate. Some of the relevant arguments were indicated in the Final Report of the Radcliffe Commission:

982. The preparation of Notes of this sort is not free from pitfalls. In the first place the style and content of the Notes must be adapted to the needs and understanding of the prospective reader; and these must be supposed to differ from one case to

another according to the branch of the tax code to which the Notes relate. Again, an official publication may well prove embarrassing if it does not state the whole law in complete detail. If minor qualifications of the main principles of the code are omitted in the interests of simplicity, there is a risk of misleading those taxpayers to whose affairs some such qualification is in fact relevant: on the other hand, if detailed treatment is resorted to, the Notes may be of little value except to the skilled lawyer and accountant—whose training already fits them to derive the same information at first hand from the code itself and the reports of decided cases. A further problem arises when the legal provisions to be dealt with have not been the subject of any Court decision. Unless the Notes are to give some account of the supposed construction of those provisions they may be seriously incomplete; but if they do enter upon the matter it can be objected that they lack authority. When in the past the Board have volunteered a public statement as to the basis of liability which they themselves suppose to be applicable in a given set of circumstances their action has sometimes been criticised as a usurpation of the proper functions of the appeal Commissioners and the Courts and they have on occasion been accused of an attempt to over-awe taxpayers. We think that criticism of this sort is misconceived. The Inland Revenue Department must do what it can to secure that the law is uniformly administered; there must be therefore some view, officially received, as to the right interpretation of each enactment that bears upon the computation of liabilities. This view may have to be a provisional one in cases where the language of the statute has not been judicially construed, but that is no good reason for not letting interested taxpayers know what it is if it is regularly acted upon by the Department in its executive work of computing tax liability.

983. We ascertained from the Board that they were in favor of adding to the existing series of pamphlets and that a certain amount of preparatory work had already been undertaken for that purpose. In spite of the difficulties to which we have referred in the previous paragraph we think that the project ought to be encouraged, and we recommend that it should be persevered with. The kind of publication we have in mind is one which would describe, preferably with illustrative examples, the effect that a particular branch of the tax code is understood to have; the presentation in summary form of the facts of individual cases considered at headquarters and of the decisions arrived at was also suggested by some witnesses, but we do not think that a disconnected series of "rulings" of this sort would have any real value.

The pamphlets in existence at the time of that report consisted chiefly of a series explaining the postwar system of capital allowances for expenditures on different types of depreciable

assets. Following the above recommendation, the Board have repeatedly added to their number. The subjects bear on such matters as the arrangements for double taxation relief, maintenance claims for relief in respect of expenses connected with the ownership of real property, and the tax consequences when company directors and executives receive benefits in kind or expense allowances from their companies.

In particular, the program has made a sustained effort to issue pamphlets which provide technical guidance on major legislative changes. For example, pamphlets have been issued explaining respectively (1) the 1957 tax reliefs for Overseas Trade Corporations, (2) the 1962 extension of the income tax to certain short-term gains, and (3) the 1963 comprehensive reform of provisions governing tax liability in respect of rents, etc., from real property.

A typical pamphlet conforms to the general specification suggested by the Radcliffe Commission, that is, as to some distinct branch of the tax code, it seeks to cover, in outline at least, the effect of the legal provisions on the whole range of normal situations to which those provisions are directed. When possible, definitions in general terms are illustrated by citing concrete instances which would (or would not) be covered; and simple numerical examples are added where this would help to illustrate the mathematical aspects of particular provisions. The emphasis throughout is upon final results deemed to follow from the terms of the statute, rather than upon the legal reasoning which could be advanced in support of the interpretation adopted.

It is through this publication program, and not through any system of published rulings on specific cases submitted for that sole purpose, that the Inland Revenue Department seeks to provide taxpayers with a starting point from which they may begin the study of interpretative questions arising in connection with their own tax affairs.