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Date: 31/10/2025

(1939) 7 ITR 245

Calcutta High Court

Case No: None

INLAND REVENUE COMMISSIONERS		APPELLANT
	Vs	
BRITISH SALMSON AERO ENGINES, LTD.		RESPONDENT

Date of Decision: May 12, 1938

Acts Referred:
Finance Act, 1907 â€" Section 25

Citation: (1939) 7 ITR 245

Hon'ble Judges: Scott, J; Greene, J; Finaly, J; Clauson, J

Bench: Full Bench

Judgement

These two appeals arise out of five assessments to income tax made on British Salmson Aero Engines, Ltd, under rule 21 of the General Rules.

The assessments were in respect of certain payments made by the taxpayer, the company - I will call it the English company - under an agreement

of October 25, 1929. It appears that the English company was incorporated shortly before that agreement was executed for the purpose of

entering into it, the object of the agreement and of the incorporation being to acquire the sole licence to manufacture and sell in the United

Kingdom of Great Britain and Ireland and its Dominions, Colonics and Dependencies the aeroplane engines made by a French Company, the

other party to the agreement, called Society des Moteurs Salmson, of France. The agreement provides for certain payment to be made by the

English company to the French company, and it is in respect of those payment that the assessments now under consideration were made. The

agreement, which was in the French language, provided that its object was to grant to the licensees - that is, the English company - the exclusive

right for the period of ten years from October 25, 1929, until October 24, 1939, to construct, use, and sell in the territory which I have mentioned

certain Salmson aero engines. Then there were certain other provisions of the agreement to which I must just refer. Provision is made for the free

use of certain patents in use in the types of engines described, and Article II provides : As consideeation for the licence thus granted to them the

licensees shall pay to the constructors; - that is, the French company - the sum of Pound 25,000 payable as follows : Pound 15,000 on the signing

of this agreement, Pound 5,000 six months after the signing of this agreement, Pound 5,000 twelve months after the signing of this agreement.

There shall be paid in addition to the foregoing payments and as royalty Pound 2,500 twelve months after the signing of this agreement, and a like

sum each twelve months during the following nine years. The payments are to be made at an address in Paris.

Article 3 provides for the FRench company giving to the licensees necessary information and help, and under it they undertake to disclose

improvements. that, of course, is a common form of obligation in agreement of this kind. Article 4 contains a provision by which the French

company agree to maintain the patents in England, and, in the event of infringement, the French company and the licensees agree to take all

necessary proceedings to protect the patents and prevent any infringements.

Article 5 gives the licensess power to grant sub-licences. Article 7 provides : The constructors shall not during the life of this agreement

manufacture or sell directly in the countries granted to the licensees any engine of the above mentioned types, or any of the subsequent

improvements, and there is a corresponding under-taking by the English company not to go outside its own territory.I do not think that there is

anything also to which I need refer, except that there is an arbitration clause providing for arbitration in France. The agreement is expressed to have

been made in Paris on October 25, 1929.

By that agreement Payments, were made by the English company to the French company. The payments were not made out of profits brought

into charge, and, accordingly, if the Crown is right in its contention that these payments are payments in respect of which, as such, tax is

chargeable, the position was, under rule 21 of the General Rules, that the company was bound to deduct a sum representing the amount of tax, and

was bound to account for it to the revenue. On the face of the agreement, the payments to be made under it in terms fall under two heads : one is

what is expressed to be consideration for the licence granted, a lump sum of Pound 25,000 payable in specified instalments, the other what is

described as an additional payment as royalty of Pound 2,500 a year.

The Special Commissioners, on appeal to them, decided in favour of the company with regard to the first of those two classes of sums. Those

sums, they held, were instalments of the capital sum of Pound 25,000, whereas, the sums under the second class, they held, were sums paid in

respect of the user of the patent, and the appellants were assessable in respect thereof under rule 21 of the Rules application to All Schedules.

Both the Crown and the company appealed to the kings Bench Division. Finlay, J., affirmed the decision of the Commissioners, and both sides

appeal to this Court.

Greene, M.R., having stated the facts continued : In my opinion, the Commissioners and Finlay, J., came to a right conclusion. The argument for

the Crown is based on the language of rule 21, which provides : ""Upon payment any interest of money, annuity or other annual payment charged

with tax under Schedule D, or any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or

gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the

tax thereon at the rate of tax in force at the time of the payment."" The words on which the Crown relies are ""royalty or other sum paid in respect of

the user of the patent."" Both classes of sums, they say, were paid in respect of the user of a patent, and they contend that the effect of this language

is that, whether or not a sum paid in respect of the user of a patent is in reality of a capital or of an income nature, the language of the Legislature

had definitely attributed to it the latter characteristic for tax purposes. Another way in which the argument is put is that any sum paid in respect of

the user of a patent, whether it be called a royalty or not, and whether it be a lump sum or not, is of necessity stamped with the character of

income, because it is paid in respect of user.

Before I came to examine the argument a little more closely, and the authorities on which reliance is placed, there are one or two matters with

regard to the agreement itself which must be borne in mind. The first thing to notice about it is that it is not merely an agreement under which the

English company receives the right to use a patent; under this agreement the English company is entitled to restrain the patentees themselves from

exercising the patent in the territory, and they are entitled to call on the patentees to take steps to prevent others exercising the invention within the

territory. Those rights are, to my mind, in essence different from the mere right of user. A licensee under a patent is a person who is put into such a

position that the patentee disentitles himself to complain of what would otherwise have been an infringement. That is all a patent licence is. On the

other hand, where the patentee undertakes himself not to exercise the invention, that is something quite different; he is restraining himself by a

convenant or contract from exercising his monopoly rights, and further, if he undertakes to prevent others from infringing his monopoly rights, he is

giving an undertaking which also in its nature is quite different from what is given by a patent licence, which in effect is an undertaking not to

complain of what would otherwise have been an infringement. I merely mention that fact as one of the circumstances in this case to which it is

necessary to have regard.

The other circumstance to which I wish to call attention is this. There is in the article relating to payment a fundamental difference in the nature of

the two classes of sums, in this sense, that the former class starts off by being a lump sum payment, definite and fixed, which is then to be payable

by instalments. The other class is not of that description; no lump sum payment is referred to; it is, on the face of it, nothing but an undertaking to

pay yearly sums as royalty. Speaking quite apart from any close examination of authority, and simply regarding the distinction between these two

payments, it would appear on the face of it that, with regard to the latter class, the parties are creating an obligation as between themselves which

they choose to describe as a royalty payable each year at a fixed rate. I should have found it very difficult, in the face of so strong an indication as

that, to appreciate an argument which said that those sums were not in the nature of income payments. They do not start from a capital sum which

is afterwards split up into instalments. Their existence from beginning to end is an annual existence, and nothing else, and the parties have indicated

what, to their minds, is the nature of that annual payment.

Here I may get rid of one point which has emerged in the course of the argument. There were before the Commissioners certain letters written

between the parties before the agreement was executed. Those letters suggest, at any rate at the time when they were written, that the proposal

was that there should be a lump sum of Pounds 50,000 payable by instalments, which would have corresponded with the payments to be made

under this agreement. Nothing that I say must be taken to the expressing the view that in ascertaining the answer to the question whether or not a

payment is to be regarded as a capital or an income payment, it is illegitimate to look outside the terms of a contract. I do not wish to lay down any

such proposition. What has to be ascertained in these cases is the true nature of a payment; that is to say, the true nature from an accountancy

point of view; and that is a question of fact. I do not wish to say anything which will have the effect of circumscribing the matter which may

properly be looked into in answering that question of fact. On the facts of this particular case I take the view that the Commissioners were right

when they said that those were documents which they could not look at, but for this reason, that those documents are not documents which

resulted in the creation of a lump sum liability of Pounds 50,000 at all. It may have been the intention of the parties when those letters were written,

and it seems likely that it was, that they should first of all create a lump sum obligation and then provide for it by payment by instalments. If they did

that the agreement shows us on its face that they subsequently changed their minds, because instead of adhering to that scheme they have

deliberately, as we must assume, divided the payments into two categories differently described. I make those observations in order to explain the

reasons why, in my opinion, the cross-appeal of the tax payer must be dismissed. I agree with the view of the Commissioners and of the learned

Judge on that matter. I have said what I have said with regard to it on the assumption that the question whether a sum is a capital or an income

payment is one which may legitimately be enquired into, and, indeed, must be enquired into, in cases of patents.

That brings me to the substantial matter raised by the Crowns appeal. Before I come to it in a little more detail, it is necessary to remember what is

the history of this particular reference in rule 21, and the corresponding reference in rule 19, of the General Rules to royalties or other sums paid in

respect of the user of a patent. They have their complement in rule 3 of the Rules applicable to Case I and II in paragraph (m), under which, in

computing the amount of the profits or gains to be charged, deductions are prohibited in respect of ""any royalty or other sum paid in respect of the

user of a patent"". The scheme, therefore, is that where a business is being carried on with the use of patents in respect of which royalties or other

sums fall to be paid, the person carrying on the business, in computing his profits, cannot deduct the sums in question. On the other, hand, he is

entitled under rule 19, and bound under rule 21, when he comes to make the payment, to deduct the tax. Although it now appears broken up into

two parts of the Act of 1918, it originated in section 25 of the Finance Act, 1907. That section prohibited such a deduction in calculating profits

and gains, but authorised the person paying to deduct tax when he paid. It is not suggested on behalf of the Crown that the position since the Act

of 1918 is in any way different with regard to the matters with which we are concerned from what it was u/s 25 of the Act of 1907. The re-

arrangement under the Act of 1918 has not affected the law.

Section 25 came up for consideration before this Court in Lanston Monotype Corporation Ltd. v. Anderson. The question there arose in rather a

special and indirect manner. I need not go into the details of that case, showing how the question arose. The important matter for the present

purpose is that in deciding that case, and as I read the judgments, as an essential step in the reasoning which led to the decision, the Court of

Appeal, or at any rate two members of it, expressly, and the Master of the Rolls impliedly I think, took a view which I find most conveniently

expressed in the language of Farwell I.L.J. 80 L.J.K.B1353 1911 2 K.B.1022; 5 Tax 683 : ""I think it is plain that this is a section for the

improvement of the machinery for collecting the tax, and not a charging section at all, and that on the true construction of it, the words any royalty

or other sum paid in respect of the user of a patent are necessarily confined to the royalty or sum which is spoken of two lines below, on making

payment of which the person paying is entitled to deduct."" Kennedy, L.J., in a reference to the judgment of Hamilton, J. (who had, as I read his

judgment, negatived that view), took the same view as Farwell, L.J. The Master of the Rolls disagreed with the conclusion to which Hamilton, J.,

had come. That case being in the reports, when the Legislature in 1918 codified the Income Tax Act, it seems to me that we must assume that it

codified them with the law as so declared in its mind and with no intention that the law as expressed in that judgment should in any way be altered.

Accordingly, I start the examination of this question by basing myself on the proposition that Section 25 of the Act of 1907 did not alter the law by

bringing into charge to income tax a subject-matter which, previously to the passing of that section, would not have been charged.

income tax, as has been said over and over again, is a tax on income. It does not tax capital. As the corollary to that, in ascertaining profits,

payments of a capital nature may not be deducted. It is income all the time which has to be considered under the income tax Acts, and when I fine

that in Section 25 the Legislature in terms prohibits deductions on account of any royalty or other sum in computing profits, I can only read that as

meaning that they are prohibiting a class of deduction in the ascertainment of profits, which, but for such prohibition, would have been legitimate;

that is to say, a class of deduction which was of an income, as distinct from a capital nature. Similarly, the direction to the person paying the royalty

or sum to deduct, or giving the authority to deduct, the tax, relates to royalties or sums of the same character, that is to say, sums of an income

nature. Nobody is going to dispute that the general type of payment, there described ""royalty or other sum paid in respect of the user of a patent"",

is of an income nature, and payments of that kind, in the common form, of a royalty per machine, or so much based on turnover, and so forth,

common commercial payments, are unquestionably of an income nature. But I am unable to read this machinery enactment, which was enacted

merely for the purpose of altering the method by which the tax should be collected, as being something which brings into charge something of a

capital nature which otherwise would not have been chargeable.

There were in 1925, and there have been since, many cases where this matter of capital or income, has been debated. There have been many

cases which fall on the borderline; indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as

satisfactorily as an attempt to find reasons. But that class of question is a notorious one, and has been so for many years.

I am unable to read this legislation as deciding that class of problem in the matter of patents once and for all by declaring in some way that every

payment in respect of the user of a patent must of necessity be of income nature; I not only cannot extract any such proposition from the language

of the section, but I entirely fail to find any such proposition asserted in the authorities to which we have been referred. It seems to me that in the

case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment. Is it capital or is it

income ? And that question has to be decided, as it has to be decided in reference to other subject-matters, on the particular facts of each case,

including, of course, in those facts the contractual relationships between the parties. It has been said that the question is one of fact, and it is, when

one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, it does not mean that, in deciding it questions of law

may not have to be discussed and decided. For example, the construction of a contract may be one of the elements which must be taken into

consideration in deciding that question; there may be cases where the construction of the contract is of itself the really decisive matter in answering

the question. In this case the question of the contract and the terms of the contract is of cardinal importance, as I have already endeavoured to

indicate in saying what I have said on the question of the cross-appeal.

In support of the Crowns argument that a payment in respect of the user of a patent must of necessity be of an income nature, and that is in any

case what the Legislature has enacted, the authorities relied on begin with the well-known case of Constantinesco v. R. That was a case where the

patentee had an award made in his favour by the Royal Commission on Awards to Inventors. The only jurisdiction which that Commission had, at

any rate so far as that case was concerned, was to settle the terms of user by the Crown of the patentees patent, which otherwise would have

fallen to be decided u/s 29 of the Patents and Designs Act, 1907. That section provided that any Government department might use..... the

invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the

Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the treasury after hearing all parties

interested.

One of the functions of the Royal Commission was to settle the amount payment, in lieu of having it settled by the machinery laid down by that

section. But the only matter with which they had to concern themselves was the terms of user. In Constantinesco v. R., the user had taken place

before the terms were settled. The claimant, Mr. Constantinesco, had put forward a claim for a royalty, based on Pounds 10 per gear

manufactured on behalf of the Government. In point of fact, he received a lump sum award which began with the expression : ""The Commission

have settled the terms of user of this invention as follows;"" and they awarded him Pounds 50,000 and Pounds 20,000, making Pounds 70,000. It

was as clear as anything ever could be, that the Government had in fact used the patent. They had manufactured a number of gears. The

consideration to be paid or the award to be made in respect to the user had to be settled after the event. It could have been settled on the basis of

so much a gear; it could have been settled on the basis of a lump sum. To say that some difference for tax purposes would result, according to

whether the Commission awarded a lump sum or awarded so much per gear, or took the aggregate sum which the inventor was claiming on the

basis of so much per gear and reduced it by half, leaving it as a lump sum, appears to me, if I may humbly say so, as preposterous as it appeared in

that case to Lord Dunedin. Differences of technique of that kind could not alter the substantial nature of the payment. But be it observed that the

decision in that case was not based on any such broad proposition, as that for which the Crown now contends. It would have been sufficient, if the

Crown was right, to say : ""This is in respect of the user of a patent"". That was the ground for making payment u/s 29 of the Patents and Designs

Act, that was the matter in respect of which the Royal Commission had jurisdiction to make an award. Therefore, it would have been sufficient to

say that that concludes the whole matter, because the Legislature, as the Crown now says here, has asserted that every sum paid in respect of the

user of a patent is of necessity of an income nature. But there was no such approach to that case, either in the Court of Appeal or in the House of

Lords. It is sufficient just to look at the passage in Lord Caves speech, which is particularly relied on by the Crown. He said 43 T.L.R.728; 11

Tax.745 : ""My Lords, three points are raised on behalf of the appellant. First, it is said, that the sum of Pounds 70,000 was not annual profits or

gains within the meaning of the income tax Act, 1918, but was the payment of a capital sum."" There the point emerged as neatly as any point could.

If the Crown is right, it would have been sufficient for Lord Cave to say : ""The short answer to that argument is that it was in its nature and of

necessity an income payment, being a sum paid in respect of the user of a patent. ""But what did he do ? He proceeded to examine the

circumstances of the case in order to disprove the appellants contention. First of all, he noted the period over which invention was to be used, for

which this payment was made. Then he said : ""The claim put in was a claim as for royalty in respect of the successive uses of the invention."" There

he was referring to the claim, which was a claim for successive uses, that is to say, for each gear manufactured. That is what Lord Cave is quite

obviously referring to as ""successive uses"". He then referred to the practice of the Commission ""to take as a basis of their award a fair royalty as

between a willing licensor and a willing licensee""; and he said he had no doubt that that basis was accepted. Then he stated, not as a necessarily

determining factor, but as one of the facts in the case, that the corpus of the patent was not taken away from the appellant. And then he said : ""In

view of all the facts"" - that is to say, the facts which he had very summarily stated - ""I am satisfied that the sum awarded is to be treated as profits

or gains, and annual profits or gains, within the meaning of the income tax Act, 1918"". I find great difficulty in understanding how it can be said, in

the light of that passage and that reasoning, directed as it was to the specific argument that the sum was a capital sum and resulting in the

conclusion, based on an examination of the facts, that it was not a capital sum, but was annual profits or gains, that that the case is an authority for

the proposition that the matter is concluded once and for all, once you assert of a payment that it is a payment in respect of the user of a patent. I

cannot appreciate myself how any such argument as that can really stand.

The next case of importance relied on is the Mills Bomb Case, reported under the name of Mills v. Jones. There an award had been made to an

inventor. The only point of difference between that case and Constantinesco v. R. was that the actual award itself awarded a lump sum ""in respect

of the user, past, present and future, by or for the purposes of H. M. Government (including user by way of selling for use, licencing or otherwise

dealing)"" with the Mills bomb. The inclusion of the future, whether it was within the jurisdiction of the Royal Commission or nor, was agreed on by

the parties. The General Commissioners of income tax found as a fact that the amount included in respect of future user was negligible. An attempt

was made to distinguish that case from Constantinesco v. R. The way in which the argument was put is most conveniently stated in the speech of

Lord Buckmaster who said 142 L.T 339; 14 Tax 786 : ""The real ground upon which the appellant complains of those judgments"" - those are the

judgments of Rowlatt, J., and of the Court of Appeal -""is this : He says that the award itself shows that part of the sum was in effect payment for

the right to use the invention for the future, which means that there were capital moneys involved in the Pounds 37,000 which are in no way

distinguished from the income, and that, as they have not been distinguished, and cannot at present be distinguished, a surcharge cannot properly

be made for the total sum and, consequently, the surcharge was wrong and ought to be discharged."" The tax-payer, therefore, was saying there :

This is a sum which contains in it a capital element, in that part of it is attributable to future user. You cannot disintegrate it and say how much is

referable to each kind of user, and, therefore, you cannot tax any of it"". I suppose it might also have been said that there must be some sort of

apportionment claim on some basis. That was the case which was being put there. That was the distinction which was attempted to be drawn

between that case and Constantinesco v. R.

It is said that the Court of Appeal, in its judgment in Mills v. Jones, decided against the claimant on the ground now asserted by the Crown, that

any payment in respect of the user of a patent, be it past user or be it future user, be it a lump sum or be it a lump sum payable by instalments, or

whatever from it takes, is of necessity an income payment. Expressions in the judgment of Greer, L.J., are relied on in support of that argument, I

am quite unable to extract from the judgments in the Court of Appeal any such sweeping proposition. The language used must be construed in

reference to the particular facts of that case and the particular arguments which were being there put forward. I cannot agree that the paragraph on

which so much reliance is placed is one which bears anything like the construction which is sought to be placed on it. Greer, L.J., himself, in a later

passage, was quite clearly keeping open, to put it at the lowest, the case of exclusive licence, because he said so in terms. He drew a distinction

between the ordinary licence to use and an exclusive licence. I venture to think that there is a very good ground for that distinction, because, as I

have already pointed out, directly an exclusive licence is granted, it comes into a category or right different altogether from that of a mere right of

user. However that may be, the fact that Greer, L.J., guarded himself in that way makes it impossible for me to treat what he said as laying down

some general proposition as sweeping as the Crown would suggest that it is, and in particular as laying down a proposition which would govern a

case where one of the relevant facts is that the licence is an exclusive one.

I am fortified in that attitude towards that case because I find that when the matter went to the House of Lords, they did not deal with it in the way

in which they could have dealt with it, and ought to have dealt with it, if the Crowns contention here be right. Lord Buckmaster, who delivered the

leading opinion, instead of answering the question which he formulated, as I have already said, in the short way in which it could have been

answered, proceeded to base his decision on the findings of fact if the Commissioners, that the amount of future user included in the payment was

negligible. He, therefore, treated it as being a sum which can be disregarded; that is to say, there was nothing left in the point that, wrapped up in

that award, there is an element of a capital nature, because that capital element was a negligible element, and, therefore, could be disregarded. That

speech of Lord Buckmaster was far from asserting the proposition that every payment in respect of the use of a patent must necessarily be an

income payment.

I may also refer to this circumstance. Lord Dunedin agreed with Lord Buckmasters opinion and added this, which I venture to think is significant

142 L.T 340; 14 Tax717) : ""I think the finding of fact is conclusive."" What Lord Dunedin ought to have said, according to the Crowns present

argument, was that as a matter of law the Commissioners were bound to find against the claimants. But instead of that both of those noble and

learned Lords (and the other noble and learned Lords, Viscount Sumner, Lord Blanesburgh and Lord Atkin agreed without delivering any opinions

of their own) treated the decisive matter not as matter of law, as to which the Commissioners were bound to decide in a particular way, but as a

matter fact, with a regard to which their finding of fact was final and binding on the House. That being so, it seems to me that there is nothing to

prevent the Commissioners in the first place, or the Court, from examining the facts in the case of a payment made in respect of a royalty, and

saying what its true nature is. If the answer is that its true nature is that it is a capital payment, then that is equivalent to saying that it is not

chargeable with tax.

I do not propose to add anything by way of expression of my own views on the principles on which that question ought to be determined. It is a

question which has been investigated very carefully in a number of different connections, and different matters of fact have been regarded in

different cases as of importance and of weight. It seems to me, on all the facts of this case, including the terms of the contract itself, which is the

important and, indeed, the essential fact in the case, that the Commissioners were perfectly entitled to come to the conclusion to which they did,

namely, that this class of payment was not of an income nature, but of a capital nature. I can find nothing in the facts of the case or in the

construction of the documents, which would justify me in saying that the Commissioners conclusion is wrong in law. In my judgment their

conclusion is the right one.

There is one further matter which I should mention. In Constantinesco v. R., Rowlatt, J., had said, as in the similar case of annuities, and so forth,

so in the case of a patent, that there may be a lump sum payment which would not be an income payment, but would be a capital payment. He

summarised very succinctly the familiar class of principle which applies to the determination of those matters. It is said that Rowlatt, J., in that

respect had wrongly appreciated the Income Tax Acts so far as they relate to patents. I do not propose to examine what he said. One may find

perhaps, somewhat loose language in a very concise statement, which might be thought possibly to go a little too far, or be too comprehensively

expressed. It would not serve any useful purpose to examine those statements. In my opinion, subject to any closer examination of their language,

they refer to a principle which is just as much applicable to a payment in respect of a patent as it is in respect to other subject-matters, namely, that

if the payment, when its true nature is looked at, is not an income payment, but a capital payment, it is not chargeable to tax. But that question is to

be answered on the facts of each particular case. Rowlatt, J., did not intend to go further than that. But, quite apart from that matter, for the

reasons which I have given, I have come to the clear conclusion which I have stated and, therefore, both the appeals must be dismissed with costs.

SCOTT, L.J. - I agree with the conclusion arrived at by the Master of the Rolls, and with the whole of the reasoning of his judgment and I do not

propose to add anything on the general principles which he has discussed.

But there is one particular aspect of the case upon which I think it may be useful to add a word; and that is the value to be attached in this Court to

the impressions of the Commissioners when they heard the appeal in the first instance. They have decided that the first three payments in question

were capital payments. How far ought we, one the facts of this case, to be guided by that finding, or give it weight, or even feel bound by it ? The

rule as to the position of a Court of Appeal, on a case stated with regard to the point whether the decision of the Commissioners was on a question

of fact into which the Court cannot enquire, or was an issue involving a question of law into which the Court can enquire, was dealt with very fully

by Hamilton, J., in American Thread Co. v. Joyce, in a passage which was subsequently approved both in the Court of Appeal and in the House

of Lords. The gist of what he said was, I think, that where the Commissioners have put before the Court in the special case the whole of the

materials from which they drew their final inference, then it is a question of law whether, from that material, their inference was correct or not. But

that foundation of the rule seems to me subject to a qualification which I do not think that Hamilton, J., or the other Courts who agreed with him,

intended in any way to exclude. Where the Special Commissioners are skilled persons in matters of business, if on an analysis of the business

arrangements out of which the case has arisen, they come to the conclusion as business men that a particular payment has what my Lord has called

the accountancy quality of a capital payment or an income payment, that is a view to which, in my opinion, the Court is entitled and ought to give

great weight. The position is analogous to the case of a trial in the Commercial Court before a City of London special jury, on a question of

business and keeping of accounts, where the special jury have expressed a view on the issue whether a particular payment is a capital payment or

an income payment. In such circumstances the Court ought to be very slow to disagree with such a skilled opinion.

In my view that kind of weight ought to be attached to the findings of the Commissioners in the present case. It is quite true that they put before us

the whole of their material; and that that material in substance consists of an agreement made between the licensees and the patentees, and nothing

more. But they have taken the view, without hesitation, evidently, that these lump sum payments were in the nature of capital payments. If there

were any doubt from the purely legal point of view, which I do not think there is, that opinion of the Commissioners ought to weigh in the balance;

and in my opinion is an additional reason for upholding their findings.

CLAUSON, L.J. - For the reasons stated by the Master of the Rolls, and supplemented by SCOTT, L.J., with which I agree, I concur in the

order which is proposed.

Appeal dismissed.