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***170 H.T.V. Ltd. v Price Commission**

1975 H. No. 6594

Court of Appeal

M.R. Mocatta J., Lord Denning, Scarman, and Goff

1975 Nov. 3, 4, 5; 19; 1976 Feb. 11, 12, 13; March 9

Sale of Goods—Counter-inflation—Prices—Exchequer levy—Whether levy assessed as costs in calculating permissible price increase— Counter-Inflation (Price Code) Order 1974 (S.I. 1974 No. 2113), Sch., para. 39 (1)

Natural Justice—Statutory board—Duty to be fair—Price Commission—Whether duty to act consistently

The plaintiffs ("H.T.V.") provided television programmes and, under contracts with the broadcasting authority, made additional payments, called the Exchequer levy, which were passed to the Exchequer. From 1968 to 1974 this levy was calculated as a percentage of H.T.V.'s advertising receipts but from June 1974 it was calculated as a percentage of profits under the Independent Broadcasting Authority Act 1974 . In their returns of profit margin to the Price Commission under the Counter-Inflation Act 1973 , H.T.V. had deducted the levy in order to arrive at their relevant profit and by letter of June 26, 1973, the commission had written that they were "of the opinion that the levy … should be treated as a cost for the purpose of determining the net profit margin." In July 1975 H.T.V. notified the commission that they intended to increase their advertising charges in accordance with paragraph 39 of the Counter-Inflation (Price Code) Order 1974[1] so that their prices could afford the permitted margin over total costs per unit of output. H.T.V. included the levy in calculating such total costs as they had done in July and December 1974. The commission informed them that the levy was not a cost for the purpose of paragraph 39 .

H.T.V. claimed declarations that the levy was a cost for the purpose of calculating the amount of permissible price increase under paragraph 39 of the code and that such a price increase could take account of the increased levy payable on the increased profits. Mocatta J. dismissed the claim.

On H.T.V.'s appeal: —

Held, allowing the appeal, (1) that since the Price Commission had previously regularly treated the Exchequer levy as properly to be included in H.T.V.'s total costs the commission had acted inconsistently and unfairly in not treating such additional payments as a cost for the purpose of calculating the "total costs per unit of output" under paragraph 39 of the code (post, pp. 186B–C, 192G–H, 195B).

Dictum of Lord Denning M.R. in General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1, 12, 14 applied .

(2) That the question whether the levy came within the meaning of the words "total costs per unit output" in paragraph 39 of the code was (per Scarman L.J.) a question ***171** of mixed fact and law, (per Goff L.J.) a question of law, and that the commission had erred in law in not recognising that it did come within the meaning of those words (post, pp. 186C–D, 190B, 191C, 193E).

(3) That H.T.V. were entitled to take the amount of the levy as being the sum payable under their contracts on their estimated profits as increased by their permitted increases in prices (post, pp. 186E, 192H – 193B, 195D–E).

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Decision of Mocatta J., post, p. 172reversed.

The following cases are referred to in the judgments in the Court of Appeal:

• Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.) .
• Associated Portland Cement Manufacturers Ltd. v. Price Commission [1975] I. C.R. 27, C.A.
• Congreve v. Home Office [1976] 2 W.L.R. 291; [1976] 1 All E.R. 697, C. A.
• Cozens v. Brutus [1973] A.C. 854; [1972] 3 W.L.R. 521; [1972] 2 All E. R. 1297, H.L.(E.) .
• General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1, C.A.
• H.K. (An Infant), In re [1967] 2 Q.B. 617; [1967] 2 W.L.R. 962; [1967] 1 All E.R. 226, D.C.
• Lever Finance Ltd. v. Westminster (City) London Borough Council [1971] 1 Q. B. 222; [1970] 3 W.L.R. 732; [1970] 3 All E.R. 496, C.A.
• Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook, The Times, February 23, 1976, C.A.
• Robertson v. Minister of Pensions [1949] 1 K.B. 227; [1948] 2 All E.R. 767 .
• Wells v. Minister of Housing and Local Government [1967] 1 W.L.R. 1000; [1967] 2 All E.R. 1041, C.A.

The following additional cases were cited in argument in the Court of Appeal:

• Litherland Urban District Council v. Liverpool Corporation [1958] 1 W.L. R. 913; [1958] 2 All E.R. 489 .
• Maurice (C.) & Co. Ltd. v. Minister of Labour [1969] 2 A.C. 346; [1969] 2 W.L.R. 797; [1969] 2 All E.R. 37, H.L.(E.) .

The following case is referred to in the judgment of Mocatta J.:

• General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1, C.A.

The following additional cases were cited in argument before Mocatta J.:

• Associated Portland Cement Manufacturers Ltd. v. Price Commission [1975] I. C.R. 27, C.A.
• Last v. London Assurance Corporation (1885) 10 App.Cas. 438, H.L.(E.) .

Action

By a writ dated September 22, 1975, the plaintiffs, H.T.V. Ltd. ("H.T.V."), sought a declaration against the Price Commission that sums payable by the plaintiffs, known as the Exchequer levy, fell within the words "total costs per unit of output" in paragraph 39 of the Schedule to the Counter-Inflation (Price Code) Order 1974 . ***172**

The agreed issues for determination are set out in the judgment of Mocatta J., post, p. 175E–H.

The facts are stated in the judgment of Mocatta J. and Lord Denning M.R.

Representation

• Richard Yorke Q.C. and Genevra Caws for the plaintiffs.
• Thomas Bingham Q.C. and Peter Scott for the Price Commission.

Cur. adv. vult.

November 19. Mocatta J. read the following judgment. The plaintiffs are television programme contractors having been so appointed under a six-year agreement dated July 29, 1968, made between them (under their former name of Harlech Television Ltd.) and the Independent Television Authority, now the Independent Broadcasting Authority (hereinafter called "the authority"). The action was tried upon an agreed statement of facts to obtain from the court a decision whether the sums payable by the plaintiffs commonly known as "the Exchequer levy" fell within the words "total costs per unit of output" in paragraph 39 of the Price Code contained in the Schedule to the Counter-Inflation

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(Price Code) Order 1974 . This version of the Price Code , issued under powers conferred by section 2 of the Counter-Inflation Act 1973 , came into effect on December 20, 1974, and paragraph 39 , together with other paragraphs dealing with safeguards, was then introduced for the first time. In cases to which it applies the paragraph allows a restricted increase in the price of a product.

Before and at the time of the plaintiffs' contract of July 29, 1968, the statutory provisions as to payments to be made by programme contractors were contained in section 13 of the Television Act 1964 . This laid down that the contracts between the authority and the various programme contractors should provide for payments to be made under two heads. The first were payments representing what appeared to the authority to be the appropriate contributions of the contractors towards meeting the sums which the authority regarded as necessary in order to discharge its duties and may shortly be described as fees. The second, which were called by the statute "additional payments" but became commonly known as "the Exchequer levy," were amounts determined by reference to advertising receipts. These payments, although made to the authority, were to be paid over by it to the Exchequer. Section 13 (4) provided for a sliding scale of rates starting above an initial "free slice" of £250,000 and increasing with the size of the advertising receipts for the accounting period.

In consequence of the statutory provisions of sections 13 and 14 of the Act the contract between the plaintiffs and the authority contained fairly elaborate provisions dealing with the two kinds of payments. Clause 15 of the contract provided:

"In consideration of the right and duty to provide programmes to be broadcast by the authority under and in accordance with the terms hereof the [plaintiffs] shall make payments to the authority as provided in the fifth schedule hereto."***173** Parts of that schedule dealt with the fees payable to the authority. Part II dealt with the additional payments or Exchequer levy in accordance with the statutory provisions. Clause 6 of the contract gave the authority power by which to end it forthwith if the plaintiffs were in arrears with their additional payments for more than seven days after they became due.

Sections 13 and 14 of the Act of 1964 were repealed and re-enacted in the consolidating Independent Broadcasting Authority Act 1973 as sections 26 and 27 . Apart from minor changes due to the statute dealing with independent sound broadcasting as well as with television there were no material changes in the sections. It will have been noticed that down to this date the amount of the Exchequer levy was in no way dependent upon whether the contractors made a profit or loss. It was simply a percentage levy on advertising receipts. The Independent Broadcasting Authority Act 1974 made a substantial change in this; it would seem at the request of the various programme contractors. As from the coming into force of the Act, which was on June 23, 1974, the levy was payable on a new basis, namely, 66.7 per cent. of the contractors' profits as defined in excess of a "free slice" which for present purposes can be stated as £250,000. Profits were carefully defined in Schedule 1 to the Act of 1974 and by Schedule 2 to the Act there were transitional provisions to tide over any gap there might be between June 23 and the alterations of the contracts with the programme contractors, which the Act of 1974 required to be made.

On June 28, 1974, the plaintiffs' original contract of July 29, 1968, which was for a period of six years, was continued for a further two years, and on the same date a supplemental agreement was entered into adding part III to the fifth schedule of the original contract. This was to operate from June 23, 1974, and gave effect to the new basis of the Exchequer levy and the statutory provisions relating thereto in the Act of 1974 and its first schedule.

It is now necessary to refer to the Counter-Inflation Act 1973 which set up the Price Commission, made provision for the issue by the Treasury of a Price Code and gave the commission power to restrict

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any prices in such ways as appeared to it to be appropriate for the purpose of ensuring that the provisions of the code were implemented. This it could do by order or notice to the person concerned, who was obliged by the Act to give a certain length of notice to raise prices in circumstances in which he claimed the code permitted such increases.

The Price Code had two general principles and methods of price control; one was to limit the extent to which prices might be increased on account of increased costs and the other was to enforce the control of prices by a control on profit margins. Paragraphs 64 and 65 of thepresent code (originally paragraphs 57 and 58) dealt with prices and profit margins. Paragraph 64 provided that prices should be determined so as to ensure that net profit margins did not exceed the average level of the best two of the last five years of account of the unit to which the net profit margin control applied ending not later than April 30, 1973. ***174** This was known as the reference level. Paragraph 65 , which was of some relevance to the arguments before me, provided:

"'Net profit margin' means the margin of net profit expressed as a percentage of sales or turnover. 'Net profit' means the net profit, determined in accordance with generally accepted accounting principles consistently applied by the enterprise concerned, which arises from trading operations within the control after taking into account all expenses of conducting and financing them, including depreciation and interest as defined in paragraphs 32 and 33, but before deducting corporation tax or income tax." For the purpose of establishing their reference level the plaintiffs made returns showing a profit after deduction of the levy and in calculating the relevant profit for each subsequent period the plaintiffs have deducted the levy. Other television programme contractors have similarly deducted the levy in calculating their reference levels and thereafter their quarterly returns of profit margin. The Price Commission has accepted this and in 1973 wrote a letter to another programme company stating that it was of the opinion that the levy should be treated as a cost for the purpose of determining the net profit margin and reference level. It was then and down to June 23, 1974, dealing with the levy on the old basis of a percentage charge on advertising receipts. I was told, however, by Mr. Bingham, that the commission took the view that the levy in its new and present form was still properly treated as an expense within paragraph 65 .

The Price Code in paragraphs 18 and 19 provides that prices within the control may not be increased unless there is an increase in what are called "allowable" cost increases. These are defined in paragraph 32 and incidentally include royalties. In July 1974, and again in December 1974, the plaintiffs gave notice to the Price Commission of their intention to increase their advertising charges. In both cases the plaintiffs' supporting documents showed the levy as a cost, but as a "non-allowable" one. No objection was raised by the Price Commission to these increases. The present version of the Price Code came into effect, as I have said, on December 20, 1974. It included a series of new paragraphs numbered 32 to 40 under the general heading "Safeguards." Paragraph 39 is the crucial one for the present case. It is headed "Safeguard against erosion of profit margins on products," and sub-paragraph (1) reads:

"Subject to paragraph 40, where the price of a product (excluding any increase under paragraph 79) does not afford a margin over total costs per unit of output of seven-tenths of the percentage margin at April 30, 1973 … an enterprise may increase the price of the product concerned to the extent required to give such a margin." On July 9, 1975, the plaintiffs notified the Price Commission that they intended to increase their advertising charges (called their "rate card") in accordance with paragraph 39 so that the increased charges would ***175** afford a margin over total costs per unit of output of seven-tenths of the percentage margin at April 30, 1973. In making the necessary calculations to arrive at the total costs per unit of output,

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which in the plaintiffs' case was one hour of television transmission, the plaintiffs (a) included the levy as a cost, and (b) in calculating the amount of the price increase alleged to be justified under paragraph 39 assessed the amount of the levy at the amount that would be payable if the price increase were implemented; in other words there was a grossing-up. The plaintiffs' full claim involved an increase of 16.26 per cent.; without grossing-up the figure claimed involved an increase of 4.11 per cent.

The Price Commission by letter of September 4 notified the plaintiffs that (a) it took the view that the levy on profits was not a cost for the purpose of paragraph 39 of the Price Code , and (b) in any event grossing-up was not permissible by reason of paragraph 52 of the code, which provides that with certain exceptions prices may not be increased in anticipation of cost increases.

Rather than force the Price Commission to issue an order prohibiting the proposed increase, the plaintiffs issued a writ on September 22, 1975, seeking declaratory relief; and I was able to order that issues be agreed and tried upon an agreed statement of facts and heard the matter argued on November 3, and two subsequent days. There was some slight difference of opinion between the parties on the precise form in which the issue for determination by the court should be stated. Three slightly varying alternatives were placed before me and the choice between them was left to me. The version which I think most appropriate was the one of the three called "Alternative version acceptable to defendant" and was as follows:

"1.Whether upon a true construction of the Price Code , contained in the Schedule to the Counter-Inflation (Price Code) Order 1974 , the plaintiffs must as a matter of law be entitled to include the sum (commonly known as 'Exchequer levy') payable by the plaintiffs under part III of the fifth schedule to the programme contract between the plaintiffs and the Independent Broadcasting Authority dated July 29, 1968 (as varied by supplementary agreements dated June 28, 1974), as a cost for the purpose of calculating the total costs per unit of output under paragraph 39 (1) of the code.

2.If the answer to 1 is Yes, whether the plaintiffs must also be required to include such sum as a cost as aforesaid.

3.Whether for the purpose of calculating the increase permitted by paragraph 39 (1) of the code in the rate chargeable by the plaintiffs for their television advertising time, the plaintiffs must as a matter of law be entitled to take the amount of such Exchequer levy as being that sum payable under the terms of the programme contract on the estimated profits of the plaintiffs as increased by the permitted increase in the rate, and to assess the total costs per unit of output accordingly." In order that the force of the competing arguments about the first issue, namely, whether the levy can be treated as a cost for the purpose of calculating the total costs per unit of output, can be appreciated, it is necessary to say a little more about the new basis of the levy contained ***176** in part III to the fifth schedule to the plaintiffs' contract. Profits were there defined as meaning the profits of the plaintiffs for an accounting period consisting of the excess of relevant income over relevant expenditure. Relevant income meant income accruing to the plaintiffs in connection (directly or indirectly) with the provision of television programmes by them, whilst "relevant expenditure" was defined as meaning "expenditure properly chargeable to revenue account which is incurred by the contractor in connection (directly or indirectly) with the provision of television programmes by the contractor."

Condition 3 of part III contained very elaborate provisions for the ascertainment and payment of the levy. Stated briefly, the essentials were that apart from the plaintiffs being under the obligation to keep true and detailed accounts of all matters relating to profits and to the computation of the levy payable, they were: (a) not later than six weeks before the beginning of each accounting period to deliver to the authority estimates of profits for the

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period, which was a calendar year; (b) not later than two weeks after the end of each calendar month deliver to the authority a statement in writing of their advertising receipts in relation to that month; (c) not later than 35 days after the end of each successive period of three calendar months deliver to the authority a revised estimate of profits for that three months; and (d) not later than two weeks after the audit by their auditors of their profit and loss account for the year deliver to the authority a true copy thereof.

Not later than seven days before the commencement of the accounting period the authority was to notify the plaintiffs of the amount of the levy which the authority estimated would be due for the year and from time to time during or after each year the authority might notify the plaintiffs of revised estimates of levy due.

As regard payments, the plaintiffs had to pay the authority on the 27th day after the end of each calendar month an amount equal to the appropriate instalment of the estimate for that period. There were provisions for dealing with payments in respect of revised estimates and for a final settlement to be determined as to amount by the authority, after the conclusion of the accounting period. If there were sums found to be outstanding from the plaintiffs these had to be paid; and if an excess had been paid, the authority had to apply for the excess to be repaid to the plaintiffs out of the Consolidated Fund. There were stringent enforcement provisions in condition 3 (8) and in any proceedings brought by the authority to recover sums payable in respect of the levy the plaintiffs were not allowed to make a set off or raise a counterclaim, or dispute any estimate or revised estimate on determination by the authority of the amount due.

The proper approach of this court to the issues raised in this action is to be found in the decision of the Court of Appeal in General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1 . There it was decided that under the Counter-Inflation Act 1973 Parliament had entrusted original findings of fact to the Price Commission and not to the courts. It is of some relevance, although not of course determinative, that Lord Denning M.R., at p. 11, in elaborating his reasons for coming to that decision, emphasised that many of the matters to be decided were so technical and so ***177** complex that they could only be well determined by a body of experts such as the Price Commission. He mentioned analysing the accounts of a company so as, for example, to find the "total cost per unit of output." This and other matters, Lord Denning M.R. said, might be child's play for accountants, but hard going for others. He did, however, at p. 12, state that the courts would in relation to the Price Commission act in a supervisory capacity and would, inter alia, interfere if the commission had gone wrong on the interpretation of words in the code, or had come to its decision on no evidence or had made a finding so unreasonable that a reasonable person would not have come to it. Very much the same was said by Roskill L.J., at p. 18. Mr. Yorke relied upon the two instances I have cited from Lord Denning M.R.'s judgment as to when the courts would interfere. Mr. Bingham, on the other hand, said the problem here was a matter of fact and degree for the Price Commission; alternatively, he submitted, if it were necessary to do so, that the decision of the Price Commission was right.

Mr. Yorke correctly emphasised that, although the payments in question were commonly known as the "Exchequer levy," their proper description was "additional payments" and that although they stemmed from the provisions of an Act of Parliament the plaintiff's obligation to make them was purely contractual. They were not a tax, although they might have some aspects of a tax. There was no definition of a "cost" or "costs" in the Price Code , but he relied upon the Shorter Oxford Dictionary definition of "cost" as being "that which must be given in order to acquire, produce or effect something; the price paid for a thing." Applying this definition the levy was part of the cost payable for an hour of television transmission time; payment of the levy was a sine qua non of the right to

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have a television programme transmitted; it was as much a cost as the fees that had to be paid to actors or announcers. He emphasised that the levy had to be deducted before arriving at profits before taxation; otherwise the plaintiffs would have to pay the levy of 66.7 per cent. plus corporation tax of 52 per cent. — an impossible position. For corporation tax purposes, therefore, the levy was clearly a cost. He drew attention to the reference in paragraph 65 of the code to the phrase "determined in accordance with generally accepted accounting principles." This was absent in paragraph 39 when the relevant and unqualified words were "total costs per unit of output." The court was therefore able to adopt a common sense approach without the need of accountancy evidence. Moreover, he stressed the point that it would be very strange if the levy were treated as an expense of conducting and financing trading operations under paragraph 65 of the code, but was not part of the total costs per unit of output under paragraph 39 .

In relation to this contrast Mr. Bingham drew attention to the very considerable difference in wording between the two paragraphs. Not only was there the reference to "generally accepted accountancy principles" in paragraph 65 , but further important differences between the two paragraphs were the width of the phrase "all expenses of conducting and financing them, including depreciation and interest as defined in paragraphs 32 and 33 " and the last words "but before deducting corporation tax or income tax," which gave additional emphasis to the ***178** inclusive character of what went before. On the whole I take the view that in dealing with the problem arising before me on paragraph 39 I cannot derive assistance from the different wording of paragraph 65 or the interpretation that the Price Commission have placed upon those words.

The agreed statement of facts exhibits samples of the annual audited accounts of five television programme companies, and whilst in every case the levy is deducted before arriving at the profit before taxation, there are certain differences in the way in which the levy is treated. Thus in the case of the plaintiffs in the profit and loss account for the year ended July 3, 1973, the levy was shown as a deduction from turnover. Trading profit was then shown before interest payable and taxations. In each of the next two years the profit for the year before taxation was shown after express mention in brackets of the amount of the levy deducted. In the accounts for Westward T.V. for the year ended July 31, 1974, a note against the figure of trading profit showed this to have been stated after charging various items including the Exchequer levy. The accounts of London Weekend Television for the period ended July 29, 1973, showed a deduction for rental, or fees, paid to the authority in arriving at group trading profit and then a separate deduction from the latter for the levy before arriving at the profit before taxation. The accounts of Scottish Television for the year ended December 31, 1974, showed the Exchequer levy on advertising sales down to June 23, 1974, as a deduction from the gross turnover figure, whereas the Exchequer levy for the remainder of this financial year assessed on profit was shown as a separate deduction from the trading profit figure to show a net figure of profit before taxation. In the case of each of their last two financial years the accounts of Associated Television showed a figure for group trading profit and then a special deduction for levy explained in a note as additional payments to be collected by the authority on behalf of the Exchequer.

This summary shows a variety of different approaches by the different firms of auditors and accountants responsible for the companies' accounts. Thus although all the companies must have paid the appropriate rental or fee to the authority, only London Weekend Television specifically mentioned this as a deduction in arriving at its figure for group trading profit, whereas all the companies must have incurred such fees and regarded them as part of their costs. On the other hand, as regards the levy, all made specific mention of this in one form or another suggesting that this differed in kind from the rental or fees. If the levy were regarded as a cost to

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be met before arriving at the trading profit figure, as apparently the rental or fees were, one would not have expected it to be dealt with differently from the latter.

These various differences show that there is no general rule prevailing amongst accountants as to how the levy should be treated, save in relation to corporation tax, and suggest that it may be a matter for individual expert accountancy judgment whether a particular charge should be regarded as a cost or not. I thought it of some significance that in summarising his argument at the end of his opening Mr. Yorke as his ***179** first proposition stated that there was no question but that the levy on the plaintiffs' profits was a cost. To be precise the question is whether the levy is a cost for the purpose of calculating the total costs per unit of output and, in so far as the matter is a question of fact, the decision in General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1 shows that this is for the commission to determine and not the court.

The question is therefore whether the present case, despite the difference of treatment amongst the accountants and the opinion of the commission, is one in which the court should take the view that as a matter of law the levy is part of the total costs per unit of output. No doubt the court could take this view if the words used were sufficiently clear as a matter of construction despite the different practices of accountants, although the latter would naturally cause some hesitation on a subject so intimately bound up with questions of accountancy.

Apart from this I find great difficulty in seeing how the levy can be regarded as a relevant element of cost for the purpose of paragraph 39 . The unit of output, namely, one hour of television transmission, can only be produced as the result of many items of expenditure, but the production of such a unit by itself does not give rise to any liability to levy. This only arises if profits result from all the units of output produced. In other words if the levy is to be regarded as part of the costs of output, there is a singular lack of relationship between it and the output. The latter could be great but give rise to no profits and therefore no levy.

What is perhaps more important is that profits are defined in the supplemental agreement in accordance with the provisions in the Act of 1974, as the excess of relevant income over relevant expenditure. It would be impossible mathematically to treat a sum by way of levy as one of the items of expenditure and then arrive at a profit on which the levy was to be charged. Putting the point in another way since the levy is charged on profits the levy cannot itself be one of the items of expenditure that has to be taken into account in arriving at the profits. Mr. Yorke sought to answer this point by submitting that the phrase “total costs per unit of output” applied generally and not only to television programme companies. He followed this up by saying that the definition of “profits,” “relevant income,” and “relevant expenditure” in the supplemental agreement as in the Act of 1974 were only there for the purpose of arriving at the levy, and did not help in the interpretation of “total costs per unit of output.” But those words in the code have to be applied to any company seeking to take advantage of paragraph 39 in order to raise the price of its product. If such a company is a television programme company and seeks to use the particular levy it has to pay in calculating the total costs of the unit of output of its product, then I think it is clear that the nature and genesis of that levy must be examined and analysed in order to arrive at a conclusion on its relevance to the provisions of paragraph 39 .

I do not therefore consider that this is a case in which the court can say that the commission has gone wrong on the construction of the crucial words in paragraph 39 or has expressed a view as to their meaning that no reasonable person could have reached. Accordingly I answer the first issue in the negative. ***180**

In view of that answer issues 2 and 3 do not arise, but had I answered the first issue in the affirmative I should have found difficulty in not giving a simil-

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ar answer to issue 3. As at present advised I feel unconvinced that paragraph 52 has any application to the fact that despite the very elaborate provisions for the ascertainment and payment of the levy, there may be some adjustment to be made at the end of the accounting period.

Action dismissed with costs .

Solicitors: Church, Adams, Tatham & Co.; Treasury Solicitor .

[Reported by MRS. RACHEL DAVIES, Barrister-at-Law]

Appeal from Mocatta J.

H.T.V. appealed on the grounds that Mocatta J. (1) erred in law in having regard to the practice of accountants for the purpose of construing the phrase "total costs per unit of output" in paragraph 39 of the code and the nature of the Exchequer levy; (2) misdirected himself in holding that there was evidence of a difference between accountants in the treatment of the levy when H.T.V.'s accounts merely showed a difference in presentation but all deducted levy in order to calculate profit for tax purposes; (3) misdirected himself in holding that for an item to be part of the "total costs per unit of output" it should have a direct relationship with the output; (4) was wrong in finding no relationship between the levy and the output since it was only where other costs of output varied that the liability to and amount of levy in respect of each unit of output would itself vary; (5) misdirected himself in treating the definition of "relevant expenditure" in the Independent Broadcasting Authority Act 1974 as relevant to the construction of paragraph 39 of the code.

By a supplementary notice of appeal H.T.V. relied upon the additional grounds of appeal, namely: (1) Mocatta J. erred in law in holding that the definition of "net profit" in paragraph 65 of the code was not relevant to the construction of the phrase "total costs per unit of output" in paragraph 39 and accordingly in dismissing as irrelevant the concession made by counsel for the commission that Exchequer levy was an expense of conducting and financing H.T.V.'s trading operations within paragraph 65 ; (2) in construing the meaning of paragraph 39 of the code Mocatta J. failed to give any or any proper weight to the anomalies which would arise if the levy were to be treated as an expense under paragraph 65 of the code and not as per total cost per unit of output under paragraphs 39 and 38. H.T.V. further relied upon the following ground of appeal in substitution for ground 4 above: (4) Mocatta J. was wrong in finding no relationship between the levy and the output since for any given level of income it was only where other costs of output varied that the liability to and amount of the levy in respect of each unit of output would itself vary.

Representation

• Richard Yorke Q.C. and Genevra Caws for the plaintiffs, H.T.V.***181**
• Thomas Bingham Q.C. and Christopher Bathurst for the defendant Price Commission.

Cur. adv. vult.

March 9. The following judgments were read.

Lord Denning M.R. H.T.V. Ltd. (formerly Harlech Television Ltd.) are programme contractors. They provide television programmes for Wales and the West Country. Many of their programmes are designed specially to appeal to the people in those places. H.T.V. Ltd. ("H.T.V.") get their revenue from advertisers who pay for the display of their advertisements on television.

The actual broadcasting of the programmes is done by the Independent Broadcasting Authority ("the authority"). They are broadcast in pursuance of contracts in writing made in 1968 and 1974 under the authority of the Television Act 1964 and the Independent Broadcasting Authority Act 1974 . Those contracts give the company the right to

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provide programmes for broadcasting provided that they make payments to the authority monthly in advance. In default of payment within seven days of falling due, the authority can terminate the agreements forthwith. These payments by H.T. V. are divided into two parts. One part is for the authority to keep for itself. The other part consists of "additional payments" to the authority, which the authority receives as an intermediary to pass on to the national Exchequer. These "additional payments" are called in the trade the "Exchequer levy."

From 1968 to 1974 the Exchequer levy was calculated as a percentage of the advertising receipts. The first £1½ million receipts was a free slice which did not bear any levy. The next £6 million receipts bore an Exchequer levy of 25 per cent. Above those figures, the levy was 40 per cent.

The business of H.T.V. expanded rapidly. In 1968 the turnover was nearly £3 million and the Exchequer levy £½ million. But by 1973 the turnover was over £10 million and the Exchequer levy over £1 million.

From June 1974 onwards, under the authority of Act of Parliament (Independent Broadcasting Authority Act 1974), the Exchequer levy was calculated on a different basis. Instead of being calculated as a percentage of the advertising receipts, it was calculated as a percentage of profits. The first ¼ million of profits was a free slice. All profits above £¼ million bore an Exchequer levy of 66.7 per cent.; that is, two-thirds of the profits.

Now H.T.V. are subject to the Price Code . They cannot increase their charges to the advertisers except within the limits permitted by the code. In 1975 H.T.V. were affected, like everyone else, with the increase in costs. They sought a corresponding increase in the sums which they could charge to advertisers. They notified the Price Commission of their proposed increases. The Price Commission did not agree to the proposal. There was a difference of view as to the proper way of calculating the permitted increases. This difference has culminated in this action in the courts. H. T.V. claim a declaration in support of their view. Pending a declaration, H.T.V. have not increased their rates to advertisers. But, as ***182** it is important to come to an early decision, the courts have specially expedited the hearing.

The Price Code is very difficult to understand. I tried to explain it in General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1 , 8. I gave an outline of "allowable cost increases" and of "reference level." But my explanation then needs to be supplemented now, because in 1974 it was found that the price limitations operated harshly in some cases. The permitted prices were not enough to enable the manufacturer or trader to pay his way. So, in the revised code of 1974 (which came into operation on December 20, 1974) there were introduced "safeguards" so as to give relief to those whose profit margins were being eroded by higher costs. One of these safeguards is contained in paragraph 39 which is directly in issue in this case. It states (so far as material):

"(1)… where the price of a product … does not afford a margin over total costs per unit of output of seven-tenths of the percentage margin at April 30, 1973 … an enterprise may increase the price of the product concerned to the extent required to give such a margin."

H.T.V. claim the protection of that safeguard. They say that the "total cost per unit of output" includes the Exchequer levy, whereas the Price Commission say that, in calculating the "total cost" the Exchequer levy is to be omitted.

The year ended April 30, 1973

I expect that any accountant can understand paragraph 39 easily. But I cannot understand it except by taking an actual illustration to see how it works. I propose to take the year ended April 30, 1973, because that is the very date mentioned in paragraph 39 , and I have extracted the figures for it. It works in this way:

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(i) " Unit of output"

H.T.V. produced one "single product," namely, advertising time on television: see paragraph 48. The output for the year was 5,073 hours of television time. The "unit of output" was one hour of television time.

(ii) " Income per unit of output"

The income of H.T.V. was its income from advertising. It amounted for the year to £10,055,843. Divided by 5,073, this gives an income of £1,982.23 per unit of output.

(iii) " Total costs per unit of output"

The total costs of the company for the year was the combined total of two groups:

• (a) " Allowable costs" : These were the costs incurred by H.T.V. on certain specified items, such as labour, materials, rent, rates, interest charges, depreciation and royalties (see paragraph 32). These amounted for the year to £7,018,050.
• (b) " Non-allowable costs" : These were the costs incurred by the company on other items, such as Exchequer levy, sales promotion, public ***183** relations. These came for the year to £1,436,000. By far the biggest item in this group was the Exchequer levy which came to over £1,000,000. (At that time in 1973 the Exchequer levy was calculated as a percentage on the receipts, not on the profits).
• (c) The "total costs" for the year amounted to the sum of the "allowable costs" and the "non-allowable costs." These came for the year to £8,577,479. Divided by 5,073, this gives the "total costs per unit of output" as £1,690.81.

• (iv) The "margin" per unit of output is the profit made on each unit. It is calculated by taking the "income per unit," that is, £1,982.23, and deducting the "total costs per unit," that is, £1,690.81. So it comes to £291.42 per unit.
• (v) The "percentage margin" is found by taking that figure of £291.42 and expressing it as a percentage of the total costs of £1,690.81. It is 17.24 per cent.
• (vi) "Seven-tenths of the percentage margin at April 30, 1973," is seven-tenths of that 17.24 per cent. It is 12.07 per cent.

Applying paragraph 39 , therefore, it means that the company is entitled to increase the price of its product (i.e., television time) to the extent required to give a percentage margin of 12.07 per cent. per unit of output.

The year ended September 30, 1975

In contrast to the year 1973, I now propose to take the year 1975: because, by so doing, I will be able to disclose the point at issue. The output for the year ended September 30, 1975, was 5,177 hours. The revenue came to £10,852,583. Dividing by 5,177, that gives £2,096.31 as the "income" for 1975 "per unit of output." The "total costs" for that year came to £10,081,379. Dividing by 5,177 gives the "total costs per unit of output" as £1,947.34. (In calculating that figure H.T.V. took as part of the total costs the Exchequer levy which came to about £1,000,000. In the year 1975, however, the levy was calculated as a percentage of profits, and not as a percentage of receipts, as it had been in 1973). The "margin" in 1975 was, therefore, the difference between the "income per unit" — that is, £2,096.31 — and the "total costs per unit," that is £1,947.34. That gives £148.97. When that £148.97. is expressed as a percentage of £1,947.34, it gives a percentage margin of 7.65 per cent.

Applying paragraph 39 , this means that H.T.V. can increase their prices so as to bring the 1975 margin of 7.65 per cent. up to the 1973 margin of 12.07 per cent.

The point at issue

The Price Commission say, however, that the calculation for 1975 is erroneous. They say that the Exchequer levy (amounting to £1,000,000) ought not to be counted as part of the "total costs" in 1975. They say that, when the Exchequer levy was calcu-

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lated as a percentage of profits, it no longer formed part of the "costs," but part of the profits. They liken the arrangement to a partnership in which the partners share the profits: and they liken the Exchequer levy to a tax which comes out of the profits.***184**

But H.T.V. say that the Exchequer levy retains the same characteristics both before and after the change. They say it formed part of the "costs": and that the "total costs per unit of output" should be calculated on the same footing for the base year 1973 as for the subsequent year 1975.

As between the two rival views, the Price Commission rely upon General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1 . They submit that the application of the code is primarily a matter for the Price Commission: and suggested that this court should not interfere save on the grounds specified in that case. The judge accepted their submission. He felt that he could not interfere with a decision of the Price Commission.

In opening the appeal to us, Mr. Yorke for H.T.V. drew our attention to the conduct of the Price Commission. He said that in several respects they had themselves repeatedly acknowledged that the additional payments (called the Exchequer levy) were a part of the "costs" or "expenses" of H.T.V.: and he submitted that they were right in doing so. Consequently, it was not permissible for them to turn round now and treat them differently. He drew our attention to these particular matters:

• (i)The £1,000,000 anomaly. In all the accounts before 1975 (which H.T.V. submitted to the Price Commission) the Exchequer levy was treated as part of the "total costs." It was included amongst the "non-allowable costs." It came in 1973 to about £1,000,000. On that footing H.T.V. was allowed price increases to make up for increases in the levy: see paragraph 18 of the code. In 1975 the Exchequer levy still came to about £1,000,000. If H.T.V. are not allowed to treat it as part of their "total costs," it means that, in and after 1975, their "total costs per unit of output" will be greatly reduced and they will not qualify for an increase for a long time — that is, until other costs have made up the £1,000,000. Mr. Bingham recognised, as I understood him, that this was an anomaly. He suggested that it could be corrected by the Minister. But any correction by the Minister would be as uncertain as the length of his foot.

• (ii)The period from July to October 1974. The new method of calculating the levy (by a percentage of profits) came into force in July 1974: and from that time onwards the levy was calculated on that basis. In July 1974 and again in December 1974, H.T.V. gave notice to the Price Commission of their intention to increase their advertising charges. In both cases H.T. V. showed the Exchequer levy as part of their "total costs." No objection was taken by the Price Commission: and price increases were allowed on that footing. Mr. Bingham suggested that these were passed by some subordinate and not by the commission itself. But I do not think that this is a legitimate excuse. The commission, like everybody else, must take responsibility for what their subordinates do.

• (iii)The treatment of " expenses" in paragraphs 64 and 65. The Price Commission have themselves treated the Exchequer levy as part of the "expenses." This point arises under paragraphs 64 and 65. These show that in calculating the "reference level" and the "net profit," the net profit is calculated (paragraph 65):

"after taking into account all expenses of conducting and financing [the trading operations], including depreciation and interest as defined ***185** in paragraphs 32 and 33, but before deducting corporation tax or income tax."

The Price Commission acknowledge and assert that the Exchequer levy is part of the "expenses" for this purpose, both before July 1974 (when it was calculated as a percentage of "receipts") and after July 1974 (when it was a percentage of profits). They seek to justify this difference by saying that "expenses" in paragraph 65 is different from

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"costs" in paragraph 18 , and that it is, therefore, legitimate to take the Exchequer levy as part of the "expenses" in paragraph 64 : but not as part of the "costs." in paragraphs 18 and 39 and other paragraphs. Mr. Yorke submits that that is too fine a distinction for anyone to make, even for accountants. He draws attention to the Shorter Oxford Dictionary, which, in defining "cost," includes "expenditure …": and in defining "expense" includes "… cost …" In addition, the Price Commission themselves in this context have used "cost" as interchangeable with "expenses." In a letter of June 26, 1973, they said:

"… we are of the opinion that the levy … should be treated as a cost for the purpose of determining the net profit margin and reference level."

I think those criticisms are all well justified. It is plain to me that the Exchequer levy retained the same character both before July 1974 and after it. Its character remained the same, but it was calculated differently. Instead of being calculated on receipts, it was calculated on profits. But it still retained the same characteristics. It was a payment by H.T.V. to the authority in return for a licence to produce the programmes. I see no warrant whatever for treating it differently after July 1974 from before. Yet that is what the Price Commission seek to do.

Can they be permitted to do it? I do not think so. It is, in my opinion, the duty of the Price Commission to act with fairness and consistency in their dealings with manufactures and traders. Allowing that it is primarily for them to interpret and apply the code, nevertheless if they regularly interpret the words of the code in a particular sense — or regularly apply the code in a particular way — they should continue to interpret it and apply it in the same way thereafter unless there is good cause for departing from it. At any rate they should not depart from it in any case where they have, by their conduct, led the manufacturer or trader to believe that he can safely act on that interpretation of the code or on that method of applying it, and he does so act on it. It is not permissible for them to depart from their previous interpretation and application where it would not be fair or just to do so. It has been often said, I know, that a public body, which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it. So when an Army officer was told that his disability was accepted as attributable to war service, and he acted on it by not getting his own medical opinion, the Minister was not allowed to go back on it: see Robertson v. Minister of Pensions [1949] 1 Q.B. 227 . And where an owner, who was about to build on his land, was told that no planning permission was required, and he acted on it by erecting the building, the Minister was not allowed to go back on it: see Wells v. Minister of Housing and Local Government [1967] 1 W.L.R. 1000 and Lever Finance Ltd. v. Westminster (City) London Borough Council [1971] 1 Q.B. 222 . Very recently where a man was issued with a television licence for a year, then, although the Minister had power to revoke it, it was held that it would be a misuse of that power if he revoked it without giving reasons or for no good reason: see Congreve v. Home Office [1976] 2 W.L.R. 291 .

In these circumstances I do not think it necessary to decide whether or not the "Exchequer levy" is properly included in "total costs." All I need say is that the Price Commission in the past have regularly treated it as proper to be included: and it would not be fair or just for it now to be treated differently. But I go further. I think that their interpretation in the past was correct: and their new interpretation is erroneous. In making this new interpretation I think the Price Commission made an error in point of law such that the court can correct it under the principles stated in General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1 , 12.

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There is one further point. H.T.V. claim that, in calculating their total costs, the Exchequer levy for the coming year should be "grossed up" so as to show the true cost to H.T.V. For example, if they have to pay £100 (being two-thirds of their profit) as Exchequer levy, it will cost them £150 out of their profits to do it. So the total cost to them will be £150: and they will have to budget accordingly. The Price Commission reply that that should not be, because of paragraph 52, which says that prices may not be increased in anticipation of cost increases. But I do not think this comes within paragraph 52. This is a present increase in costs, payable by instalments over a year; and H.T.V. must budget for it and increase their prices to take care of it.

My answers to the three issues are, therefore: (1) Yes. (2) Yes. (3) Yes. I would allow the appeal accordingly.

Scarman L.J.

Paragraph 39 (1) of the latest edition of the Price Code (S. I. 1974 No. 2113), which came into operation on December 20, 1974, provides:

"Subject to paragraph 40, where the price of a product (excluding any increase under paragraph 79) does not afford a margin over total costs per unit of output of seven-tenths of the percentage margin at April 30, 1973, or at September 30, 1972, where the margin has declined by one-quarter or more between September 30, 1972, and April 30, 1973, an enterprise may increase the price of the product concerned to the extent required to give such a margin."

Paragraph 40 (2) sets a limit to price increases under paragraph 39 . It provides that "Any increase shall be limited so far as is necessary to ensure that the reference level is not exceeded."

H.T.V., the plaintiffs in the action and appellants in this court, seek a declaration that certain payments, known as "the Exchequer levy," which they make to the Independent Broadcasting Authority under their contract ***187** with that authority, are, as a matter of law, not to be excluded from the total costs per unit of output when determining whether a price increase is permitted by the paragraph, and, if so, its amount. Very shortly, they say that the levy is a cost, not a sharing of revenue or profit with the national Exchequer, for whose benefit the payments are made.

The Price Commission disagrees. It submits that there is here no question of statutory interpretation for the courts to answer. What are "total costs per unit of output" is — so the argument runs — a question of fact for the commission to determine in accordance with generally accepted accountancy principles. If, however, contrary to their submission, it is for the court to decide whether or not the Exchequer levy is within the range of the term "total costs per unit of output," they submit that, upon the true construction of the paragraph, and upon a proper understanding of the nature of the levy, it is not.

H.T.V. reply that, if the question at issue is for the commission, not the courts, the commission is under a duty to act fairly. Prior to December 1974 (at a time when paragraph 39 was not in the code) the commission did not object to their including Exchequer levy, as then calculated, within "total costs per unit of output" for the purposes of calculating a permitted price increase on account of increased costs. The term was then (and is still) to be found in paragraph 18 of the code, which sets a limit to price increases by reference to such total costs. Moreover, in a letter of that period one of the commission's officials, writing on its behalf, referred to the Exchequer levy as a cost. H.T.V. refer to paragraphs 10 to 13 of the agreed statement of facts in support of their contention. Finally, paragraphs 64 and 65 of the code, which set a reference level of net profit which a business enterprise may not exceed by increasing its prices, even though the increase would otherwise be permissible under paragraph 39 , require net profit to be determined by a

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formula in which account is taken of "all expenses of conducting and financing" trading operations within the control of the code. The Price Commission always has recognised, and still does recognise, the Exchequer levy as such an expense — a recognition which operates to diminish net profit and so to depress the reference level. H.T.V. argue that the duty to act fairly requires that the commission act consistently; and that the commission has conspicuously failed so to act in its treatment of television programme contractors and the Exchequer levy.

Mocatta J. dismissed the plaintiffs' action. In effect, he held that it could not, as a matter of law, be said that the Exchequer levy must be included in total costs per unit of output, that whether it should or should not was for the commission to determine, and accordingly that the commission had acted lawfully in refusing to allow it to be so included.

The following questions arise, I think, for consideration by this court. (1) What are the powers of the court in relation to the Price Commission? (2) If it be for the court, whether the words "total costs per unit of output" in paragraph 39 (1) of the code include the Exchequer levy. (3) If the second question be not for the court but for the commission, whether the commission has acted unfairly so as to justify intervention by the court. ***188**

The courts and the Price Commission

The Counter-Inflation Act 1973 introduced into our law a statutory Price Code . The current edition of the code is set out in the Schedule to the Counter-Inflation (Price Code) Order 1974 (S.I. 1974 No. 2113) and came into operation on December 20, 1974. It took the place of an earlier edition (S.I. 1973 No. 1785) and introduced certain new provisions, including paragraph 39 , which is at the heart of the present dispute. It is relevant to note in passing that paragraphs 18, 64 and 65 of the current edition found place in the earlier edition. This legislation adds a new and significant chapter to administrative law. It has called into existence an agency, the Price Commission, to implement a statutory Price Code . To enable this agency to do its duty faithfully, comprehensively and justly, the legislature has conferred upon its chosen agency very wide powers indeed. Paragraph 1 of the code provides that "the Price Commission are required to exercise their powers so as to ensure that it is implemented." Paragraph 130 of the code provides:

"Where the particular provisions of the code cannot be directly applied to particular cases or sectors without modification, the commission will, in exercising their functions, apply those provisions with such adaptations or modifications as appear to them to be necessary to give effect to the principles and objectives of the code."

These two paragraphs are — in truth as well as literally — the alpha and omega of the code. Their width lends credibility to the assertion of the commission that the interpretation and application of the code are very largely its business, and not the business of the courts. The commission says that the issue in this case is for it, and not the courts, to determine.

I find the assertion acceptable, but only within strict limits. Undoubtedly questions of fact and policy arising in the course of implementing the code are for the commission, not the courts. But the interpretation of statutory language (including the language of delegated legislation) is a matter of law. The meaning of common English words is a matter of fact to be decided by the common sense of the court or tribunal by whom they fall to be considered. Similarly, the meaning of technical words is to be determined by the opinion of those expert in the appropriate technique. But, at the end of the process of fact finding, which, where appropriate, will include the application of common sense and knowledge of ordinary English usage to ascertain the meaning of common words and the application of expertise, including the evidence of experts to ascertain the meaning of technical words, the interpretation of legislative language remains a question of law. It is, therefore, a matter for the courts, un-

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less their jurisdiction has been expressly excluded. And it takes very clear language indeed to exclude the supervisory jurisdiction of the High Court when what is challenged is the determination of a governmental agency exercising statutory functions which contain a significant judicial element. If authority be needed for these simple propositions, it may be found in the following cases, which are themselves only a representative selection from many: Cozens v. Brutus [1973] A.C. 854 , per Lord Reid at p. 861; Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 ; General Electric Co. Ltd. v. Price Commission [1975] I.C.R. 1 and ***189** Associated Portland Cement Manufacturers Ltd. v. Price Commission [1975] I.C.R. 27 .

But the supervision of the courts is not limited to the interpretation of statutes. Agencies, such as the Price Commission, must act fairly. If they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as is sought in this case, by declaring the meaning of the statute and the duty of the agency.

This duty of supervision, as old as the establishment of the King's justices themselves, has developed considerably with the modern growth of administrative agencies whose duties require them to make judicial or semi-judicial decisions. It is a commonplace of modern law that such bodies must act fairly. The late Professor de Smith in his book Judicial Review of Administrative Action, 3rd ed. (1973), p. 208, says that this concept began to be used by the judges in 1967 with In re H.K. (An Infant) [1967] 2 Q. B. 617 . Certainly there are many instances of it in this court: the most recent of them is the case of the market trader and the Barnsley Corporation, Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook, The Times, February 23, 1976, C.A.

I would, therefore, agree with the Price Commission that questions of fact and policy in the implementation of the code are for them to determine: and that their determination is not subject to review by the courts unless it can be shown that they have fallen into an error of law in the construction of statutory language or have acted unfairly. Though they are a policy body fighting inflation, they are also an agency implementing a code. It is a code which directly affects the rights of commercial and industrial enterprises. It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness. And I do not understand the commission to deny the existence of the duty, though they have reservations as to how and by whom it should be enforced.

These reservations arise from the policy implications of their duty and from the technical terms used by the code. I say no more about policy. But technical terms should not deter the courts from exercising their power of supervision. Their meaning will be elucidated, with the help of an expert, by the commission. But when this has been done the legislative language is for the courts to construe. However obscure the jargon, it is the language used or approved by Parliament, itself a representative nontechnical institution. If Parliament uses it, the courts must be prepared to give it meaning: and this in the ultimate is a legal, not a technical, process.

The question of statutory interpretation

Applying these general principles, I have no doubt that it is for the courts to determine the meaning of paragraph 39 , and in particular the meaning of the words “total costs per unit of output.” There is nothing technical or special about the words “total costs.” The courts might need expert help to explain “per unit of output”: but there is no difficulty in the present case. It is conceded that the unit of output is one hour of television time. The sole question becomes whether the Exchequer levy — admittedly an expense for the purpose of determining the reference level ***190** under paragraphs 64 and 65 — is a cost for the purposes of paragraph 39 . If it is, accountants can tackle the accountancy problem of calculating it in terms of unit of output — a problem which arises in respect not only of overheads but of expenses which have to be first estimated

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and later adjusted when their exact amount is known, for instance royalties, which are recognised as a cost under the code: see paragraph 32 .

As a matter of law, total costs mean total costs. Is the Exchequer levy a cost? Again, the commission would say this is a question of fact. But it is not: it is a question of mixed fact and law. To answer it, one must analyse the true nature of the levy and then see whether, as so analysed, it is a cost of producing the television programme or a compulsory sharing with the national Exchequer of the revenue arising from the "sale" of the product, i.e., the receipts from advertising. This analysis depends not on evidence but on a proper understanding of the Television Act 1964 , the Independent Broadcasting Authority Act 1974 and the written contract between H.T.V. and the authority established by those Acts.

The contract — obtained on July 29, 1968, for a period of 6 years and extended for a further 2 years in 1974 — gave H.T.V. a right to have its programmes broadcast by the authority over a certain area (Wales, in particular) in return for certain payments which H.T.V. agreed to make. They fell under two heads. The first head can, as the judge said, be shortly described as fees payable to the authority. It is not in dispute that they are a cost. The issue is as to the nature of the second set of payments. The contract calls them "additional payments." Under the contract before it was varied in June 1974 in the way I shall later mention, these payments were amounts determined by reference to gross advertising receipts. They were a percentage of those receipts payable to the authority, but, as everyone knew, immediately to be passed on to the Exchequer, for whose benefit they were collected. That is why they are known as the Exchequer levy. In June 1974 the basis of calculation was varied: by a supplemental agreement they were, as from June 23, to be calculated as a percentage of annual profits over a specified level — the so-called "free slice" of £250,000 a year.

So far as H.T.V. are concerned, the obligation to pay the levy (stringently imposed by an elaborate set of conditions to ensure punctual monthly payments subject to adjustment by periodic assessments) was contractual. They agreed to pay them so as to obtain their right to produce television programmes. If they did not agree, there would have been no contract: having agreed, they would lose their contract if they failed to make the payments as stipulated. Understandably H.T.V. would view the obligation to pay the levy as a cost. It was, in their eyes, a cost imposed by contract which they had to meet — on the old basis before they could obtain a profit, and on the new basis before they could take their profit (the "free slice" apart).

But the Price Commission see it differently. Though imposed by contract upon H.T.V., the obligation, they say, arises from statute. The Television Act 1964 (see especially section 13) required the payments to be made, laid down the basis for calculating their amount, and laid upon the television authority the duty of passing them at once to the Exchequer. ***191** In June 1974 the Independent Broadcasting Authority Act 1974 changed the basis of calculation from gross receipts to profit as defined in the Act, but maintained the other statutory requirements. Thus the 1968 contract, and its variation in June 1974, did no more than follow an inescapable pattern established by statute. If one regards these payments from the point of view of the ultimate beneficiary, i.e., the state, they do, I think, appear to be a compulsory share taken by the state of the proceeds of a monopoly business which the payer can carry on only if he grants the state its share. So it is that the commission submits that since 1974 the Exchequer levy has been a sharing of profits, not a cost.

Accountants cannot resolve this problem. It is not merely a problem as to the meaning of the Price Code but also one of analysing the nature of the payments made pursuant to contract obtained under the provisions of the television legislation. In my judgment, these "additional payments" are, from the contractor's point of view, part of his total costs.

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Like overheads, royalties and other payments based on estimate but later adjusted, they can be distributed over the units of output so as to achieve a figure per unit of output. The contractor, who makes the payments to the television authority, is not concerned as to why they are exacted or to whom they ultimately go: his concern is that, like other costs, they have to be met if he is to remain in business and take a profit.

And this view of the payments makes sense in the terms of the Price Code . The code has to be applied not to the Exchequer but to the trading operations of the programme contractor. Whether for the purposes of the reference level under paragraphs 64 and 65 , of the ceiling set by paragraph 18 to price increases permitted on account of increased costs, or of the safeguard for the trader contained in paragraph 39 , it makes sense to treat the Exchequer levy as a cost or an expense, words which in a trading context are interchangeable. The commission may be said to have recognised that this is so for the purposes of paragraphs 18, 64 and 65 . I think it has erred in law in not so recognising it for the purposes of paragraph 39 .

Did the 1974 change in calculation, however, from gross receipts to profit alter the nature of the levy? I think not. Whether a percentage of receipts or profits, its character remained the same so far as the contractor was concerned, a payment which had to be made to secure the licence to broadcast programmes.

The duty to act fairly

The term "total costs per unit of output" was in the earlier edition of the code. It set then, and still sets, a limit to permitted price increases upon the ground of increased costs: see paragraph 18 . The commission did not object to Exchequer levy, calculated as it then was upon the basis of gross receipts, being included within such total costs. H.T.V. would reasonably have inferred from their dealings with the commission prior to their present dispute that the commission accepted Exchequer levy as a cost. But now the commission is saying that the levy is to be treated not as a cost but as a compulsory transfer to the state of a share of the proceeds of a monopoly for the purposes of paragraph 39 . Unless it is possible to treat the change in the basis of calculation as transforming the ***192** character of the Exchequer levy, I fail to see how the commission can rebut an accusation of inconsistency. But, in my judgment, for the reasons already given, the character of the levy did not change when its basis of calculation was altered. The purpose of the change was simply to ensure that the levy could not drive the contractor into deficit. If, therefore, the meaning of the term "total costs per unit of output" is for the commission, not the courts, to determine, the commission cannot now say Exchequer levy is not a cost included in the term without laying themselves open to the criticism that they are acting inconsistently in the same subject matter.

But inconsistency is not necessarily unfair. Is this inconsistency unfair? As I understand it, the commission's inconsistency has already resulted in unfairness, and, unless corrected, could cause further injustice. First, it gives rise to a real possibility of an erosion of profit margin which paragraph 39 is ineffectual to prevent. The Exchequer levy having been included in total costs for the purposes of paragraph 18 , it is possible that prices cannot be increased on account of increased costs to the same extent as they could have been if it had been excluded. For prices can only be increased upon the basis of allowable cost increases (see paragraph 32); and a large cost such as Exchequer levy among the non-allowable costs by overwhelming or diminishing the effect of increase of allowable costs could prevent or diminish a price increase. Profit margins, consequently, might well be less than they would have been had the Exchequer levy been excluded from total costs. Thus it is possible that the profit margin in 1973 ought to have been greater than it was. Yet it provides the limit for increasing prices under paragraph 39 . There is thus created the possibility of a profit margin erosion which the paragraph cannot relieve. But more dramatic and

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certain is what Mr. Yorke for H.T.V. called the anomaly. By the decision of the Price Commission to exclude Exchequer levy from the calculation of current profit margins, those margins are enhanced so as to appear closer to the 1973 margin than ought in justice to be the case. In truth, in order to get an increase under the paragraph, the contractor, on this basis, has to make good the amount of the Exchequer levy before he can establish a margin for comparison with that of April 30, 1973. The commission, to avoid being unfair, must either include or exclude Exchequer levy as a cost upon both sides of the comparison. Since it has made clear that, in the absence of a ruling to the contrary, it intends to exclude it when calculating current profit margins, the commission must also exclude it when calculating the profit margin at April 30, 1973. I am not completely sure that it intends so to do if it succeeds in this litigation.

In my opinion, Mr. Yorke, for H.T.V., has established his "anomaly." The commission has acted inconsistently and unfairly; and on this ground, were it necessary, I would think H.T.V. are also entitled to declaratory relief.

Mocatta J., post, p. 179H, took the view that the Exchequer levy was not necessarily as a matter of law to be included in the total costs per unit of output. For the reasons I have endeavoured to explain, I respectfully disagree with his conclusion. Had he held it should be included, he would have held that prices could have been increased so as to take ***193** account of the increased levy payable upon the profits thereby increased, a grossing up process. I think he was right. It was suggested that this would amount to a serious price inflation. If an opinion on this suggestion be relevant, I would draw attention to two curbs set by the code: paragraph 18 and the reference level in paragraph 64 .

For these reasons I would allow the appeal. The wording of the declarations now to be made by the court may need further consideration so that effect can be given to our decision.

Goff L.J.

The first question raised on the agreed issues is whether the additional payments which H.T.V. have to pay under the Television Act 1964 and the Independent Broadcasting Authority Act 1974 form part of the "total costs" under paragraph 39 of the Counter-Inflation (Price Code) Order 1974 or not.

Those payments partake of some, but not all, of the characteristics of a number of different kinds of payments which companies have to make in the course of carrying on their business, and so it is possible to support either view, and the question is which should be accepted as correct.

That at once raises a preliminary problem whether this is a question of law for this court to decide, that is to say of construction of the words "total costs" in paragraph 39 and indeed elsewhere, for they appear in a number of other paragraphs, notably paragraph 18 , or a question of fact for the commission.

On this preliminary aspect I am satisfied that it is a question of law. It does not involve any question of accountancy practice or expertise. It is simply a question whether the words "total costs" are wide enough to include this particular impost.

Then we must proceed to answer the question itself, and in my judgment these additional payments are part of the "total costs" within the meaning of paragraph 39 .

Surely that must be so, because H.T.V. are bound to make them in order to obtain and keep a licence from the Independent Broadcasting Authority without which they cannot carry on the business at all, or produce or acquire their "unit of output," which is one hour of television time. This conclusion is confirmed by the past practice of the commission.

In the first place they have allowed, or perhaps one should say required, these additional payments to be treated as part of the "expenses of conducting and financing them," that is their trading opera-

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tions, within the control for the purpose of fixing the "net profit margin" under paragraph 65 . Mr. Bingham pointed out that paragraph 65 is dealing with the trading operations within the control as a whole, whereas paragraph 39 is dealing only with the total costs per unit of output. That is true, but even so, once it is conceded that these additional payments are part of the expenses of conducting and financing the trading operations, I find it difficult to see how they can fail to be part of the total costs per unit of output. He also sought to distinguish paragraphs 65 and 39 by the express reference in the former to "depreciation and interest" and he pointed out that at the relevant time paragraph 32 did not contain any provision limiting depreciation to historic cost, but I do not think that really affects the point. ***194**

Further, when applying for an increase in their price code as from September 23, 1974, H.T.V. brought in as part of the total costs the old form of levy payable in the year to April 30, 1974, which was calculated on advertising revenue, and no action was taken to intervene (agreed facts, paragraph 13). It is true that the calculation is now made on profits, but in my judgment that does not alter the nature of the payment, but only the method of computation. Moreover, their second application, to take effect from March 3, 1975, was based on figures for the year ended October 31, 1974, which included three months of the new form of levy, and this was not challenged.

Again there is a very important letter written on behalf of the commission on June 26, 1973, which reads:

"We have carefully considered the question you posed and we are of the opinion that the levy does not qualify for special treatment under the code and should be treated as a cost for the purpose of determining the net profit margin and reference level." There it will be observed that the commission assert that the new form of levy must be treated as part of the expenses within paragraph 65 and actually treat the words "costs" and "expenses" as synonymous. It was submitted that the writer was only a subordinate officer of the commission, but it was an official decision on their behalf.

Two further arguments were addressed to us by the commission. First, that this view would result in an anticipatory increase contrary to paragraph 52 . In my judgment that is not so. It is clear that under the contract between H.T.V. and the authority the additional payments have to be made in advance and not in arrears. There may have to be an adjustment at the end of the year one way or the other, but that does not, I think, affect the matter in principle.

The other matter arises in relation to question 3 that asks whether, if the answer to question 1 be in the affirmative, as in my judgment, for the reasons I have given, it must be, the permitted increase must be grossed up to allow for the increased levy which it will itself attract. In the view which Mocatta J. took on the first question, the third did not arise, but he indicated a clear view that if it did then the answer must be that grossing up is correct. I agree with that view.

It was argued, however, that that is so extravagantly inflationary that the premise must be wrong. That is countered to some extent by the seven-tenths ceiling in paragraph 39 itself, and the reference level in paragraph 64 . Even so, the argument has force, but not, as it seems to me, sufficient to require the court to adopt, or to justify it in adopting, what would in my judgment be a misconstruction of the clear words "total costs" in paragraph 39 and elsewhere.

If the order does not have the effect the executive desire, then it is for them to amend it, not for the court to misconstrue it.

If, however, I am wrong in considering this to be a question of law, and it is, or was, a question of fact for the commission, then in my judgment, having regard to their past conduct, which I have described, they cannot now be allowed to say, even if it would otherwise be right, which I do not think it is, that the new levy is not part of the "total costs

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per unit ***195** of output." This is particularly so as those words did not come into the code for the first time on the introduction of paragraph 39 , but were already there in paragraph 18 when the commission made the determination it did.

It is of the utmost importance that statutory tribunals should be consistent, and this is a very clear instance on which the facts call for the exercise of that supervisory jurisdiction which this court was careful to reserve in General Electric Co. Ltd. v. Price Commission [1975] 1 I.C.R. 1 , 12, 14.

If the present levy could be held not part of the "total costs per unit of output" then in my judgment the position under paragraph 18 and paragraph 65 would have to be re-opened, otherwise what has been termed the £m. anomaly would arise under paragraph 18 and the reference level under paragraphs 64 and 65 would be far too low.

The £m. anomaly arises in this way. Under paragraph 18 , even though allowable costs have increased, the operator cannot claim to increase his charges unless he can show that his total costs per unit of output have also increased. As, however, they included the old levy, unless that be re-opened, and if the new levy be excluded, other costs would have to be increased by a comparable amount before the total costs could increase.

A similar anomaly also arises under paragraph 39 unless the new levy be counted as part of the total costs, or the percentage margin at April 30, 1973, be assessed on the basis of exclusion of the old.

In my judgment, therefore, the true position is that the old basis was, or must now be taken to be, right and should be similarly applied to the new levy, and I would answer all the questions before us in the affirmative.Appeal allowed with costs. Leave to appeal on understanding that H.T.V. would be entitled to increase their charges in accordance with the Court of Appeal's decision.

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1. Counter-Inflation (Price Code) Order 1974, Sch., para. 39 (1) : see post, p. 174G–H.

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