

No. 635.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—  
9TH AND 10TH JULY, 1925.

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COURT OF APPEAL.—6TH, 7TH AND 23RD JULY, 1926.

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HOUSE OF LORDS.—15TH JULY AND 7TH NOVEMBER, 1927.

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- (1) W. H. MULLER AND COMPANY (LONDON), LIMITED v. LETHEM  
(H.M. INSPECTOR OF TAXES).<sup>(1)</sup>
- (2) LETHEM (H.M. INSPECTOR OF TAXES) v. W. H. MULLER AND  
COMPANY (LONDON), LIMITED.<sup>(1)</sup>

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*Income Tax, Schedule D—Non-resident company—Exercise of trade within the United Kingdom—Income Tax Act, 1853 (16 & 17 Vict., c. 34), Section 2, Schedule D—Finance (No. 2) Act, 1915 (5 & 6 Geo. V, c. 89), Section 31.*

*A British company was appointed to be London agent for the "Batavier Line", trading between London and Rotterdam, by the Dutch firm who were the managers and agents of the two Dutch ship-owning companies whose vessels constituted that Line.*

*The service was advertised from the British company's offices and the vessels sailed from its wharves in London. The British company did everything that was required to be done in connection with the Line in London as regards both passenger and goods traffic. It sold tickets to passengers travelling to Rotterdam, and arranged for the landing of passengers from Rotterdam. It accepted goods for shipment from London to Rotterdam and collected the freight if shipped c.i.f. It delivered all goods arriving in London from Rotterdam, and collected the freight from the consignee where shipped f.o.b. in Rotterdam.*

*The British company had no direct communication with the Dutch companies, but received its instructions and remuneration, including commission on all fares and freights, both inward and outward, from the Dutch firm, to whom it accounted for such fares and freights as it collected.*

*The British company was assessed to Income Tax, Schedule D, Case I, as agent for the two Dutch companies in respect of the profits of those companies as ship-owners carrying on trade in the United Kingdom.*

*The British company contended on appeal to the Special Commissioners that it was not an agent of the Dutch companies, but merely a sub-manager appointed by the Dutch firm as managers of those companies, and that there was no privity of contract between it and the*

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<sup>(1)</sup> Reported (C.A.) [1927] 1 K.B. 780; and (H.L.) [1928] A.C. 34.

*Dutch companies, that the Dutch companies were not assessable to Income Tax in its name, and that, in any event, liability could not extend to profits arising from either goods or passenger traffic from Rotterdam to London, from goods shipped f.o.b. from London, or from non-residents travelling from London to Rotterdam.*

*The Special Commissioners decided that the Dutch companies carried on a trade in the United Kingdom through the British company as their agent, and were chargeable to Income Tax in the name of that company in respect of the profits arising from such trade, including those derived from the carriage of goods shipped f.o.b. from London, but excluding those derived from non-resident passengers returning to the Continent and from the carriage of goods and passengers from Rotterdam to London.*

*Held, that the two Dutch ship-owning companies were carrying on trade in the United Kingdom through the British company as their agent, and that they were assessable to Income Tax in the name of that company in respect of the profits derived from all contracts made in the United Kingdom for the carriage of goods and passengers, whether to or from the Continent, but excluding, in view of Section 31 (7) of the Finance (No. 2) Act, 1915, profits arising from contracts for shipments to this country made with non-residents where such profits were not received by the British company.*

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CASE

Stated under the Taxes Management Act, 1880, Section 59, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 2nd May, 1921, for the purpose of hearing appeals, W. H. Muller & Co. (London), Ltd., (hereinafter called the London Company) appealed against the undermentioned assessments to Income Tax made by the Additional Commissioners of Income Tax for the City of London under the provisions of the Income Tax Acts upon the London Company as agents for the Nederland Steamboat Company in the sum of £5,000 for the year ending 5th April, 1916, and in the sum of £5,000 for the year ending 5th April, 1917, and as agents for the General Shipping Company in the sum of £5,000 for the year ending 5th April, 1916, and £5,000 for the year ending 5th April, 1917, in respect of the profits of their business of ship-owners.

2. The London Company is a company incorporated in England under the Companies Acts, 1862 to 1900, on 19th June, 1902, with the following objects, (*inter alia*):—

- (a) To carry on the business of merchants, shipowners, ship-brokers, insurance brokers, underwriters, managers of shipping property, freight contractors, carriers by land or sea, forwarding agents, commission agents, colonial and produce brokers, corn factors, ore and metal brokers and dealers, and any other business which usually is or conveniently can be carried on in conjunction with any of these businesses.
- (m) To do all or any of the matters aforesaid, alone or in conjunction with, or as agents for, foreign firms, companies or persons, and generally for other companies and persons, and to establish, regulate and discontinue agencies for the purposes of the Company.

3. At all material times a preponderating interest in the share capital of the London Company was held by Mr. Kroller, a Dutchman, who was a partner in a Dutch registered partnership, W. H. Muller & Co., of Rotterdam, having its head office at The Hague, (hereinafter referred to as the Dutch firm). All the ordinary shares in the Dutch firm were held by Mr. Kroller, his wife and his brother, but there were a large number of 6 per cent. preference shares held by outsiders and dealt in upon the Dutch Exchange.

4. The Nederlandsche Stoombootmaatschappij (herein called the Nederland Steamboat Company) is a Dutch company established and incorporated in Rotterdam in 1896. Its business is to run a freight and passenger service between Rotterdam and London with the right to run insurance risks on its own vessels and goods shipped on those vessels. Article 10 of its Statutes provided for the management of the Company by a Director under control of the Board consisting of at least three and not more than nine members. Article 11 gives the Director, under the control of the Board, the management and the control of the Company and in consequence thereof all power which has not been assigned to the general meeting of shareholders or to the Board. The Director represents the Company in law and outside the law. Article 19 provided for the distribution of profits, and Article 41 that the Dutch firm should be nominated the first Director of the Nederland Steamboat Company. By minute of general meeting dated 12th October, 1896, three members of the Board of the Nederland Steamboat Company were authorised to enter into a tenancy agreement already contracted provisionally on behalf of the Company by the Dutch firm with the City of London Electric Lighting Co., Ltd., concerning the Custom

House and Wool Quays Wharf, Lower Thames Street, London, and for the term of the said tenancy agreement the Dutch firm were appointed cargo superintendents of the Nederland Steamboat Company in the Netherlands and the firm of Phillips & Graves of London were appointed agents of the Nederland Steamboat Company in London. Phillips and Graves resigned the agency in London in 1899, and for a time the Nederland Steamboat Company did anything that it was necessary to do here for themselves, but after the formation of the London Company in 1902 the Nederland Steamboat Company ceased to do anything themselves in this country, but appointed the London Company as their agents as appears by correspondence hereinafter appearing and the London Company carried on the agency for the Nederland Steamboat Company. The Dutch firm were the shipping agents and managers of the ships of the Nederland Steamboat Company.

5. W. H. Muller & Co's. Algemeene Scheepvaart-Maatschappij (herein called the General Shipping Company) is a Dutch company established and incorporated in Rotterdam in 1899, with the following purposes, (*inter alia*):—

- (a) The carrying on of a shipowner's business ;
- (b) The ownership of shares in companies carrying on ship-owners' business ;
- (c) The purchasing, building, launching, equipping, managing, chartering, re-chartering, engaging and selling of sea and river craft ;
- (d) Transport of passengers, goods and cattle, the establishment of new, the purchase of existing, and the management of places for the building, docking and repairing of vessels and machinery for the loading and discharging of vessels or for the storage of goods ;
- (e) The insurance of all sorts of risks.

Article 9 of the Statutes of the General Shipping Company provided that the Company is managed by a Director under control of the Board, who are all nominated and dismissed by the general meeting of shareholders, and Article 10 that the Director represents the Company in law and also outside the law, and has full power except that which has been granted to the general meeting or to the Board. Article 19 provided for the distribution of profits, of which the Director was to receive 5 per cent., after the payment of 6 per cent. on the issued share capital and the transfer of 10 per cent. to reserve, and Article 41 that the Dutch firm are nominated as the first Director of the General Shipping Company and four Dutch gentlemen as members of the Board.

6. By a deed of contribution dated 29th June, 1899, it was recorded that the Dutch firm contributed large assets—set out in detail in the deed—to the General Shipping Company on condition (*inter alia*):—

- (1) That the Dutch firm should act as exclusive shipping agents and exclusive cargo superintendents of the Company both in Rotterdam and in those places where the Dutch firm were or might thereafter be established or represented by agents.
- (2) That the Dutch firm should, subject to the approval of the Company, appoint sub-agents wherever they might deem this necessary.
- (3) That the Dutch firm should have the right to charge for their services referred to in Article 1 as shipping agents a commission of four per cent. on the gross amounts of freights and passages for cargo and passengers dealt with by them—none excepted—and might, moreover, in cases where they acted at the same time as cargo superintendents on behalf of the Company, charge for their services as such a further commission of one per cent. besides the usual discharging and unloading charges in accordance with the tariff then in force of the Rotterdam cargo superintendents whether they are paid separately by the consignees and the shippers or included, or to be included, in the freights. By minute of general meeting dated 29th June, 1899, the salary of the Manager was fixed at 3,000 Florins per annum.

The commission payable under this deed was in addition to the commission payable to the Dutch firm as Director.

7. As at 1st January, 1914, the Nederland Steamboat Company owned two vessels called the Batavier II and the Batavier III, and the General Shipping Company owned two vessels called the Batavier IV and the Batavier V. The four vessels before mentioned were all employed in one regular shipping service between London and Rotterdam and together they constituted what is commonly known as the Batavier Line. The Batavier Line was founded in or about 1820 and a regular service between London and Rotterdam has been maintained under this name ever since that date, but there has not for many years past been any company bearing the name of the Batavier Line—existing as a separate entity—and during the years to which the assessments relate the line consisted solely and entirely of the four vessels above-mentioned.

8. On 4th July, 1904, the Dutch firm wrote a letter to the London Company in the following terms :—

Rotterdam,  
4th July, 1904.

Messrs. Wm. H. Muller & Co. (London), Ltd.,  
Bury Street, London, E.C.

Dear Sirs,

In respect to your having taken over the business hitherto carried on by the Nederland Steamboat Co., at Custom House and Wool Quays, we herewith confirm that we appoint you Agents in London for our Batavier Line, and as such you will have to follow our instructions in all matters concerning this line, and especially as to the fixing of any rates of freight, etc., nor will you fix any rates for wharfage, cartage, rent, etc., for goods carried by our Batavier Line without our approval.

Your remuneration for the Agency will be as follows :—

Advertisements 10s.

Reporting Inward and Clearing Outward £1 1s. 0d.

Customs Manifests 10s. 6d.

B/L Postage 2s. 6d.

Telegram & Petties 12s.

Stevedores charges 1s. per ton in and outward.

Quay charges £10 per steamer.

Embarking and disembarking over the wharf passengers  
4d. each.

Bicycles if passengers luggage 6d. each.

Moreover we shall have to refund to you the following paid out charges :—

Tonnage Dues.

River Pilotage.

Mooring and Unmooring.

Shifting.

Waterman's Attendance.

Customs overtime.

Landing Customs Officers at Gravesend.

Pilot Calling.

Noting Protest.

Water Supplied.

Please let us have acknowledgment of the present and believe us

Yours truly,

WM. H. MULLER & CO. (BATAVIER LIJN).

(Signed) N. VAN de ROEMER.

This letter was acknowledged by the London Company on the 6th July, 1904, and on the 7th July, 1904, the Dutch firm wrote a further letter to the London Company as follows :—

Rotterdam,

7th July, 1904.

Messrs. Wm. H. Muller & Co. (London), Ltd.,  
32, Bury Street, London, E.C.

Dear Sirs,

In reply to your favour of yesterday we beg to inform you that we can only allow you as Agents 4*d.* per passenger in and outward when passing over the wharf. This is what we understand from Mr. Kroller what he allowed to the wharf, under this heading.

We agree with 2½ per cent. commission on freight and passengers inwards and 5 per cent. commission on freight and passengers outwards.

*Half Lighterage on Horses outwards from London.*

The undersigned talked this matter over with Mr. Chambers and it was fully agreed that the Lighterage of horses shall be taken as included in the wharfage this lighterage being an extension of the wharf. This is necessary by the Conference under which we are compelled to charge per horse 20*s.* sea freight and 3*s.* 6*d.* wharfage, and if we do anything not included herein we have to charge this separately to the customers. In this case the charge for lighterage would be prohibitive for the knacker trade.

Yours faithfully,

WM. H. MULLER & Co. (BATAVIER LIJN)

(Signed) N. VAN de ROEMER.

9. The London Company acted under the agreement contained in the letters set out in the preceding paragraph until March, 1916, when a supervisor was appointed by the Board of Trade under the Trading with the Enemy Acts to supervise the business of the London Company, and at his request a more formal agreement was entered into between the Dutch firm and the London Company on 16th March, 1916.

10. The London Company are the lessees of the Custom House and Wool Quays Wharf in London to and from which the four above mentioned vessels of the Nederland Steamboat Company and the General Shipping Company regularly sail. The name "Batavier Line" is exhibited outside the office of the London Company, their telegraphic address is "Batavier, Bilgate, London", and the

London Postal Directory contains an entry "Batavier Line, W. H. Muller & Co., Ltd., Office, London Wharf, Wool Quay". Advertisements of the service carried on by the Batavier Line are inserted in the press and paid for by the London Company, the charges being refunded by the Dutch firm.

11. The following were the methods followed in the conduct of business connected with the vessels constituting the Batavier Line :—

- (a) As regards passengers, tickets for the Batavier Line were printed in Holland and sent to the London Company and to the general tourist agencies, and a passenger wishing to travel from London to Rotterdam could obtain a ticket either from the London Company or from one of the general agents. The general agents accounted to the London Company for the price of any tickets sold by them, and the London Company accounted to the Dutch firm for the price of all tickets sold in this country, upon which they received a commission of five per cent. Passengers from Rotterdam to London would obtain and pay for their tickets in Rotterdam, and the London Company would not be in any way concerned with them except that they made the necessary arrangements for their landing and for their services in this connection received a commission of  $2\frac{1}{2}$  per cent on the inward fares.
- (b) As regards goods shipped from London to Rotterdam, a person desiring to ship goods by the Batavier Line would fill up a form of consignment note provided by the London Company, agreeing that the goods were forwarded upon the conditions printed on the back of the note. The London Company would collect the goods if desired and put them on board the ship. When the goods were taken on board a mate's receipt would be given, against which the bill of lading was issued. By arrangement for convenience sake the bills of lading were signed for the master by one of the clerks of the London Company in the name of the London Company instead of the master signing it on behalf of his owners as is the usual practice. If the goods were shipped c.i.f. the freight was collected by the London Company and accounted for by them to the Dutch firm. If the goods were shipped f.o.b. the freight was collected by the Dutch firm on arrival of the goods at Rotterdam. The London Company received a commission of 5 per cent. on all outward freights, whether collected by them or in Rotterdam and a commission of  $2\frac{1}{2}$  per cent. on all inward freights.



- (c) As regards goods shipped from Rotterdam to London, if they were shipped c.i.f. the freight was paid at Rotterdam and the London Company delivered the goods to the consignee on arrival here on production of the bill of lading. If the goods were shipped f.o.b. the London Company collected the freight from the consignee when delivering the goods, and accounted for it to the Dutch firm. The London Company received a commission of  $2\frac{1}{2}$  per cent. on all inward freights.

The London Company did everything that was required to be done in connection with the ships in London, obtaining instructions when necessary from the Dutch firm. The London Company had no direct communication with either the Nederland Steamboat Company or the General Shipping Company except through the Dutch firm.

12. Copies of the undermentioned documents are attached hereto and form part of this Case.<sup>(1)</sup>

- A. Memorandum and Articles of Association of the London Company.
- B. Statutes of the Nederland Steamboat Company.
- C. Minute of General Meeting of the Nederland Steamboat Company, 12th October, 1896.
- D. Statutes of General Shipping Company.
- E. Deed of Contribution of 29th June, 1899.
- F. Minute of General Meeting of General Shipping Company, 29th June, 1899.
- G. Agreement of 16th March, 1916.
- H. Specimen Consignment Note.
- J. Specimen Bill of Lading.
- K. Specimen Voyage Account for Passengers rendered by London Company to Dutch firm.
- L. Specimen Voyage Account for Goods rendered by London Company to Dutch firm.

13. It was contended on behalf of the London Company :—

- (a) That the acts done by the London Company were merely those of shipbrokers, and neither the Nederland Steamboat Company nor the General Shipping Company carried on a trade or business in the United Kingdom ;
- (b) That the London Company were not factors, agents, receivers, a branch, or managers of the Nederland Steamboat Company or the General Shipping Company, but were merely sub-managers appointed by the Dutch firm as managers of those Companies, and no privity of contract existed between those Companies and the London Company ;

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<sup>(1)</sup> All omitted from the present print except the agreement of 16th March, 1916 (G).

- (c) That the Nederland Steamboat Company and the General Shipping Company were not assessable to Income Tax in the name of the London Company or otherwise ;
- (d) Alternatively, that if there was any liability to Income Tax it must be confined to profits arising from goods shipped from London c.i.f. and from British residents travelling from London to Rotterdam, and could not extend to profits arising from either goods or passenger traffic from Rotterdam to London, from goods shipped from London f.o.b., or from non-residents travelling from London to Rotterdam.

14. It was contended on behalf of the Crown (*inter alia*) :—

- (a) That the Nederland Steamboat Company and the General Shipping Company were carrying on a trade or business in the United Kingdom ; and
- (b) that they were assessable to Income Tax in the name of the London Company in respect of profits derived from all goods and passengers so far as the contracts for the carriage of such goods and passengers were made in the United Kingdom irrespective of whether the contract between the vendor and the purchaser of the goods was f.o.b. or c.i.f. or whether the passengers carried were residents or non-residents or whether the goods or passengers were being carried from London to Rotterdam or Rotterdam to London.

15. We, the Commissioners who heard the appeal, after considering the facts and arguments put before us, gave our decision on the points of principle involved in the following terms :—

“ Dealing with the Income Tax assessments in question the General Shipping Company and the Nederland Steamboat Company were the owners of the vessels constituting the line known as the ‘ Batavier Line ’ and trading regularly between London and Rotterdam. The London Company of W. H. Muller and Company were appointed agents for the Batavier Line, and were commonly known and acted as Agents for that Line. We consider that the General Shipping Company and the Nederland Steamboat Company carried on a trade in the United Kingdom with the London Company as their agents or managers and were chargeable to Income Tax in respect of profits arising from such trade in the name of the London Company under Section 41 of the Income Tax Act, 1842, and Section 31 of the Finance (No. 2) Act, 1915. We do not think that their liability to be so charged is affected by the fact that the London Company were in form sub-agents appointed by and accounted to the Dutch firm of W. H. Muller and Company. That firm were the duly appointed managers of the General Shipping Company and the Nederland Steamboat

“ Company ; they were authorised subject to the approval of those  
“ Companies to appoint sub-agents wherever they deemed  
“ necessary ; they or their members had a substantial interest in  
“ one at any rate of the two Steamship Companies ; they were  
“ directors of both Companies, and we regard the appointment of  
“ the sub-agents as carrying with it the knowledge and approval of  
“ those Companies.

“ As regards the extent of the liability it is admitted that, if the  
“ above view is correct, the liability extends to profits arising from  
“ goods shipped from London c.i.f. and from passengers resident in  
“ the United Kingdom travelling from London to Rotterdam. It  
“ is contended that Section 31 (7) of the Finance (No. 2) Act, 1915,  
“ excludes from liability the profits arising from goods shipped from  
“ London f.o.b. and from non-resident passengers returning to the  
“ Continent, on the ground that such profits arose from transactions  
“ carried out between non-resident persons. As regards non-  
“ resident passengers we think there is no liability, but as regards  
“ goods shipped from London we consider that the transactions were  
“ transactions with the consignors in this country and that there  
“ was liability to Income Tax in respect of the profits arising from  
“ such transactions prior to the passing of the Finance (No. 2) Act,  
“ 1915, although the machinery for making an assessment did not  
“ exist. We regard Sub-section (7) as inserted as a precaution to  
“ prevent any possible extension of the charge by Section 31 to  
“ business outside the United Kingdom.

“ The profits derived from the carriage of goods and passengers  
“ from Rotterdam to London do not in our opinion arise from a  
“ trade carried on in the United Kingdom ”.

16. It was agreed that any question of figures should be sub-  
sequently settled by agreement between the parties or submitted  
to us for decision if necessary in accordance with the opinion of the  
Court.

17. The London Company and the representative of the Crown  
immediately upon the determination of the appeal both declared to  
us their dissatisfaction therewith as being erroneous in point of law  
and in due course required us to state a Case for the opinion of the  
High Court pursuant to the Taxes Management Act, 1880, Section  
59, which Case we have stated and do sign accordingly.

P. WILLIAMSON,        } Commissioners for the Special  
W. J. BRAITHWAITE, } Purposes of the Income Tax Acts.

York House,  
23, Kingsway, London, W.C.2.

29th September, 1923.

“G.”

MEMORANDUM OF AGREEMENT

made the sixteenth day of March One thousand nine hundred and sixteen. BETWEEN WM. H. MULLER & Co. of Rotterdam in the Kingdom of Holland, (hereinafter called “the Owners”) of the one part and WM. H. MULLER & Co. (LONDON) LIMITED whose registered office is at Baltic House 27 Leadenhall Street in the City of London (hereinafter called “the London Company”) of the other part.

WHEREAS the Owners are the proprietors of a line of steamers and a shipping business known as “the Batavier Line”.

NOW IT IS HEREBY AGREED as follows:—

1. DURING the continuance of this Agreement the London Company shall be the *sole* agents of the Owners in London in respect of the Batavier Line for the transaction of the shipping business of the said Line carried on at Custom House and Wool Quays Lower Thames Street in the said City and in particular for the fixing of rates of freight the embarkation and disembarkation of passengers and the carriage of passengers and cargo and other business usually carried on by a line of steamships.

2. THE London Company shall during the continuance of this Agreement comply with and conform to all directions and regulations given to it and made by the Owners relating to the business of the agency hereby constituted and in particular shall not fix any rates of freight without the instructions of the Owners in each case previously had and obtained in writing or by cable message nor shall it alter the rates of wharfage rent and cartage for goods carried by the Batavier Line without the approval of the Owners.

3. THE London Company shall employ such clerks and office staff and maintain such offices as may be necessary for the proper conduct of the said agency business and shall bear pay and discharge all its own costs and expenses incurred by it therein but the Owners shall repay to the London Company the following charges which shall from time to time have been paid by the London Company videlicet Tonnage dues, river pilot's and sea pilot's expenses, mooring and unmooring the shifting charges, waterman's attendance, customs overtime, expenses of landing customs officers at Gravesend, pilot calling, noting protest, and for water supplied.

4. As remuneration for their services as such agents as aforesaid the Owners shall pay to the London Company the following sums per steamer arriving on an inward voyage and departing on an outward voyage:

- (a) Ten Shillings towards the cost of advertisements.
- (b) One Pound One Shilling for reporting inward and clearing outward.

- (c) Ten Shillings and Six Pence for the customs manifest.
- (d) Two Shillings and Six Pence for Bill of lading and postage.
- (e) Twelve Shillings for petties and telegrams.
- (f) One Shilling and Seven Pence per ton stevedorage charges on both inward and outward cargo but such rate shall be re-considered at the termination of the present war.
- (g) Ten Pounds for quay charges.
- (h) Four Pence for each passenger embarked and disembarked over the wharf.
- (i) Commissions of two-and-a-half per centum upon the amount of all freight and the fares of all passengers on inward voyages and of five per centum upon the amount of all freight and the fares of all passengers on outward voyages.

PROVIDED that the rates of remuneration above specified may be varied at any time by mutual consent.

5. THIS Agreement shall remain in force until the same be terminated by either party giving to the other six calendar months' previous notice of its intention in that behalf.

6. ANY notice hereunder may be given by sending the same in a registered letter or by cable message addressed in the case of the Owners to them at

Rotterdam and in the case of the London Company to it at its registered office for the time being and the same shall be deemed to be served in ordinary course of post or transmission as the case may be and in proving such service it shall be sufficient to shew that the letter or cable message containing the same was properly addressed and registered or delivered to the cable company for transmission as the case may be.

AS WITNESS the hands of A. G. Kroller a member of and on behalf of the Owners and the Common Seal of the London Company.

WITNESS to the signature of }  
A. G. Kroller for and on behalf } (Signed) WM. H. MULLER & Co.  
of Wm. H. Muller & Co. }

THE COMMON SEAL of Wm. H. }  
Muller & Co. (London) Limited was }  
hereunto affixed in the presence of }  
hereunto affixed in the presence of }



(Signed) H. F. BENNETT. }  
(Signed) EDW. C. WESTON. } Directors.

(Signed) F. A. SCOTT, Assistant Secretary.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 9th and 10th July, 1925. On the latter day judgment was given in favour of the Crown, with costs, in both the appeal of the Company and the cross appeal of the Crown.

Mr. Latter, K.C., and Mr. Beecroft appeared as Counsel for the Company, and the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

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#### JUDGMENT.

**Rowlatt, J.**—By the second Finance Act in 1915 it was made possible to charge residents abroad who carried on business in this country in the name of an agent, although the agent was not in receipt of profits, a limitation which was to be found in the Act of 1842, and which endured to 1915. The removal of that limitation has brought about a field of discussion, and will bring about a field of discussion in future, in an enormous number of cases, as to foreigners carrying on business in this country, which could not come up for decision before, because it would not be of any use to raise the question, as there was no chance of finding an agent who satisfied the requirement that he should be in receipt of profits. Now, as I have said, these cases will be very numerous and very important, not only from the point of view of the Treasury but from the point of view of international commercial relations.

The Appellants here, Messrs. Muller, were the agents (and I shall use the word for brevity without prejudice, of course, to the questions which are in dispute) of a firm in Holland, who in turn were the managers in fact, anyhow they were the agents, of two Dutch shipping companies which are jointly referred to, I think, in the market place as the "Batavier Line". The London agents, the Appellants, were remunerated by the Dutch firm, and the Dutch firm was remunerated by the ship-owning companies. The rates of remuneration were not the same. But it is quite clear that Muller & Co., the Appellants, were in a position in London to enter into contracts and make arrangements which would bind the ship-owning companies. Persons wishing to take tickets from London to Holland, or to send goods, could come to the office of Muller & Co. in London and make their arrangements there with them. By those arrangements the two shipping companies who owned the ships actually would be bound, and as their remuneration for those services they were effectively represented to intending shippers of goods and passengers by the Appellants as shippers. Under those circumstances it is contended that the ship-owning companies were not carrying on business in this country, and that even if they were, Muller & Co. were not their agents for Income Tax assessment purposes, because they were the agents of the Dutch firm, and

(Rowlatt, J.)

that the shipping companies carried on their business as they did carry it on through the Dutch firm who acted by their own agents here in the matter. As regards the question whether they carried on business, it is perfectly clear to my mind that they habitually made contracts of carriage in London. The contract of carriage was not made with the Dutch firm. If the goods were lost or the service of carrying the passengers were not properly rendered, or anything of that sort, the Dutch firm could not be sued; the ship-owning companies would be sued. The ship-owning companies seem to me to make contracts in London, and the profits of those contracts are part of the profits of their business; that is to say, the profits they make on the transaction which they enter into on the other side. From the time of *Erichsen v. Last*<sup>(1)</sup> onwards it has been held that when lucrative contracts, or rather contracts intended to be lucrative, contracts in the course of business which are to earn the profits of the business, are made in this country, the business is carried on here. In the case of *Erichsen v. Last* it was a foreign telegraph company, a company owning telegraphs all over the world. They had an office here; people could go into the office here and they could send their telegrams from here. They carried on business here, and it seems to me that there is an extraordinary parallel between that case and this. Substitute for sending telegrams the despatch of goods or the carrying of passengers, and there is a great similarity. We are not discussing here the question as to whether business would be carried on by the making of contracts here for the carriage of goods in a foreign ship between two places both abroad, which I dare say you could arrange perfectly well in London. This company does not do that business. I do not know that it would make any difference. I merely say it does not arise in this case. I think this business is exactly the same as *Erichsen v. Last*, because either goods are taken from his country or are taken to this country by virtue of a contract made in this country, and so far it seems to me that it would be clear that these companies were carrying on business in the United Kingdom. But now Mr. Lattar has introduced a difficulty into the case by reason of this tripartite arrangement, the arrangement between the shipowners and the alleged agency, and he says that in effect the business being carried on here through the Appellants is the business of a Dutch firm who are the agents of the ship-owning companies and not the business of the ship-owning companies.

Now two cases came before me, the *Yokohama Specie Bank, Ltd. v. Williams*<sup>(2)</sup>, and *Maclaine v. Eccott*<sup>(3)</sup>, and my view was that, where there is a foreign business which is a business of agency, the person who lives abroad and carries on that business does not

(1) 1 T.C. 351 and 4 T.C. 422.

(2) 6 T.C. 634.

(3) 10 T.C. 481.

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carry on business in this country because he does in this country acts it may be of entering into contracts, acts which are the fulfilment of the agency engagements which he accepted abroad. What I thought was that contracts which he made here were not the contracts which swelled his profits, although he was paid for making them, and that they were only the acts which he did here in pursuance of carrying on a business which he ultimately carried on abroad; but that view was wrong. I am not quite certain that Mr. Latter made quite clear from what the Master of the Rolls said in *Maclaine v. Eccott* what I meant to say; but that it was wrong is quite clear from what Lord Justice Scrutton said in *Maclaine v. Eccott*. Therefore it may be that the Dutch firm here are carrying on their business of being agents to the Dutch ship-owning companies in this country. That is going into a different province, and different considerations must be dealt with in this case; but Mr. Latter weaves it into this case, and he cited *Maclaine v. Eccott* in this case because he says it shows that the Dutch companies—I do not know that he said it shows that they did not carry on business—but it shows that the Dutch shipping companies had not an agent here. Now I do not think there can be any question, as I have already said, that the Dutch ship-owning companies do carry on business here apart from this complication about the agency. Then comes the question whether they have agents here. I am bound to say that I think the two questions are more or less the same. If they carry on business here, they carry it on through somebody here. They are not here themselves. But it is said, I understand, that they carry on through the agent of an agent, and not an agent of their own. I think they do make contracts here, and that they carry on their business here. Now, are these Appellants their agents for the purposes of the Income Tax? I have heard a great deal of discussion directed to the question as to whether these agents here are in all respects the agents of the ship-owning companies, that is to say, whether they can be called to account, whether they could sue for their remuneration, whether they could ask for their indemnity, against the ship-owning companies; and the question has been put, and I think put as turning on the inquiry, whether the Dutch firm had authority to create the relation of agency between the shipowners and Muller & Co., or whether they were only employed to do work which they might employ other people to do on their own responsibility only; in other words, whether they were agents to create an agency or agents to do work in their own business. Now I do not think I have to decide that. It seems to me that the Dutch firm, at any rate, had this power. I think it is so clear that I do not think it can be disputed. They had power to appoint people in London who could issue tickets and bills of lading, and make arrangements on behalf of the two companies as the



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“Batavier Line”, by which those two companies would be bound and of which they could take advantage. Therefore, so far as making contracts is concerned, they were people who could bind those companies, and I cannot describe them otherwise than as being agents of those companies to make the contracts. Then comes the question whether that sort of position is enough to bring a man within the term of agency, within the Income Tax Acts, and Mr. Latter says it is not. He says that there is a section which says that the agent may deduct what he has expended in Income Tax against his principals. Well, that was all very well in the days when he had profits to deduct from, and I suppose it still holds good when he has anything to deduct. But does that limit the ground? Am I entitled to say that that limits the word agent to an agent who can be brought into account with the principals? I do not think I have any authority to do that. When Parliament says this business shall be taxed at all events, and shall be taxed in the name of the agent, I think it must be held to mean taxed in the name of an agent who is agent enough to do this business, and do it effectively; and I do not see that I could limit it in the way Mr. Latter suggests. Of course, if it is limited in that way, nothing would be easier than for foreign people who do business here by a partner appointing an agent abroad, whose agency would show a very narrow profit, and then that agent appointing people to do business on behalf of the real principal behind him. Therefore it seems to me that the appeal fails in that respect, and that the cross appeal must succeed.

The cross appeal is this. It relates to transactions made in London for the carriage of goods or passengers from Holland to London and not from London to Holland. On the other hand, the cross appeal involves giving up transactions which are made in Holland, but it involves the carriage of goods or passengers from London to Holland. Now, I think in substance the cross appeal is right, that it is the place of contract, and that it is the profits of this trade for Income Tax purposes so as to bring into charge the results of contracts made in the United Kingdom, and exclude contracts not made in the United Kingdom, whichever way the transit of passengers and goods may pass.

Now that disposes of the case subject to one point which arises on what is now Rule 11 of the General Rules, but which was originally Sub-section (7) of Section 31 of the Finance (No. 2) Act, 1915. That is an extraordinary difficult enactment to which to attribute a meaning upon its wording. But Mr. Latter says that the effect of it is to cut out from assessment all transactions made between non-residents where the company is charged through an agent in this country. That means this, if it is strictly applied, as I have pointed out, and it is right, if strictly applied, that if a person

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came here to the office of Muller & Co. in London and took a ticket for himself as a passenger to Rotterdam, that transaction would come in or not come in according as to how you answered the question whether he was a resident in the United Kingdom or whether he was a resident somewhere else. If he happened to be a resident in the United States passing through England on his way to Holland, then you would cut him out; you would cut out the transaction. If he was a gentleman who was resident in England who wished to go to Holland with an American resident, his ticket would be included. It would be impossible to inquire in every case, because residence is a complicated matter, and, as Mr. Latter said, his company would be sorry to have to embark on that sort of inquiry for the sake of the tax involved. He says it does arise in a manageable form of business importance in the case of f.o.b. contracts, because he says if a resident in Holland buys goods in England f.o.b. and they are shipped by this "Batavier Line" then it is the buyer in Holland, who pays f.o.b., who pays for the transport from this country to Holland, and that the result of the position is that you have a non-resident buyer in Holland making a transaction with a non-resident shipowner who is chargeable in the name of Muller & Co., and therefore he is protected by this Sub-section. Now Mr. Latter is in the same difficulty, because what this Sub-section turns upon is residence. It is not the place where the buyer is at the moment of buying, or anything of that sort, or at the moment of shipping. It is his residence, and you would have to inquire whether the gentleman who bought f.o.b. happened to be resident in this country after all, or resident in Holland. He might be resident here just as much as he might be resident in Holland, although he was buying goods f.o.b. for shipment to Holland. In fact, the question of residence seems to me to have no relation to or connection with the question on which we are engaged, and I cannot think that that can be the effect of it. No one has been able to tell me quite what effect this Sub-section does have, but I think the explanation of the Solicitor-General is the correct one, and that is that this Sub-section was put in *ex majore cautela* with some such view of the position as this, which I am about to state. The removal of the limitation that an agent to be assessed must be an agent in receipt of the profits still left two wholly separate questions to be determined: first of all, was there a trade? and secondly, if there was a trade, was there an agent? The circumstance that many people can now be agents for this purpose who were not agents before does not diminish the necessity in the first instance of showing that there is a trade here. But a great many people, I have no doubt, thought it did, and the scheme of Sub-section (3) of this Section shows that the confusion permeated into important quarters, and this is what the Solicitor-General suggested to me, that people

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thought business wholly carried on abroad might be brought into taxation by reason of the circumstance that there was an agent in England who intervened in some way in the business, and that it was put in to keep out that sort of case, which would not come in really if the matter is understood, because the initial condition has to be fulfilled that the business should be carried on in England. Therefore, I think that the decision is not fortified by any considerations arising out of this special provision, and the appeal must be dismissed and the cross appeal allowed.

**The Solicitor-General.**—That will apply to the case with regard to the Excess Profits Duty<sup>(1)</sup>?

**Rowlatt, J.**—Yes.

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The British company having appealed against the decision of the King's Bench Division as regards profits derived from the carriage of goods shipped f.o.b. from London to Rotterdam, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, Scrutton, *L.J.*, and Romer, *J.*) on the 6th and 7th July, 1926, when judgment was reserved.

Judgment was delivered on the 23rd July, 1926, dismissing the appeal with costs and holding that the two Dutch companies were carrying on trade in the United Kingdom through the British company as their agents, but that in view of Section 31 (7) of the Finance (No. 2) Act, 1915, the profits arising from contracts made with non-residents by the Dutch companies through the agency of the British company, where such profits were not received by the British company, should be excluded from the assessment in the name of the British company as agents.

Mr. Latter, K.C., and Mr. Beecroft appeared as Counsel for the Appellants, and the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

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#### JUDGMENT.

**Lord Hanworth, M.R.**—A person, whether a British subject or not, although not resident in the United Kingdom is chargeable to Income Tax from profits or gains arising or accruing to him from any trade exercised within the United Kingdom, and by Section 41 of the Act of 1842, such a person is made chargeable to this Income Tax in the name of any agent having receipt of any profits or gains arising as therein mentioned. By Section 31 (1) (b) of the Finance (No. 2) Act, 1915, that liability was extended "so

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<sup>(1)</sup> This case was on the question of liability to Excess Profits Duty in respect of similar profits. It is not included in the present print.

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“as to make non-resident persons so chargeable although the  
“ . . . agent . . . may not have the receipt of the profits or gains  
“ of the non-resident ”.

By Sub-section (6) that general extension was confined, and was not to “render a non-resident person chargeable in the name  
“ of a broker or general commission agent, or in the name of an  
“ agent, not being an authorised person carrying on the non-  
“ resident’s regular agency or a person chargeable as if he were an  
“ agent in pursuance of this section, in respect of profits or gains  
“ arising from sales or transactions carried out through such a  
“ broker or agent ”.

The assessment here disputed is an assessment to Income Tax. The Appellants are a company registered in London. There are two Dutch shipping companies, called the Nederland Steamboat Company, and the General Shipping Company, which, together, are known as the Batavier Line.

These two companies have Dutch agents to act as agents for the companies. Through these agents the Appellants were appointed in 1902 and 1904 to act as agents over here in the United Kingdom for the shipping companies respectively, and were expressly appointed to act as agents for the Batavier Line by an agreement dated 16th March, 1916.

It appears to me quite unnecessary to restate the facts which were found in the Case stated by the Commissioners and are recounted by Mr. Justice Rowlatt in his judgment. It is sufficient to say that in my judgment it is clear that the Appellants are authorised persons carrying on the non-residents’—that is the two shipping companies’—regular agency; and I agree with the close relevance of the decision of *Erichsen v. Last*<sup>(1)</sup> ((1881) 8 Q.B.D. 414) to this case, as showing that the shipping companies carried on business in this country through the Appellants as their regular agent. No successful argument therefore can be maintained, as was attempted, upon the restrictive effect of Sub-section (6) of Section 31, for the Appellants were “regular” agents.

There remains, however, the important and difficult question as to what is the measure of the non-resident’s liability in respect of business carried on in this country. The difficulty is enhanced by the terms of Sub-section (2) and Sub-section (7) of Section 31, which are as follows: “(2) A non-resident person shall be  
“ chargeable in respect of any profits or gains arising, whether  
“ directly or indirectly, through or from any branch, factorship,  
“ agency, receivership, or management, and shall be so chargeable

(1) 4 T.C. 422.

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“ under section forty-one of the Income Tax Act, 1842, as amended  
“ by this section, in the name of the branch, factor, agent, receiver,  
“ or manager ”. “ (7) The fact that a non-resident person executes  
“ sales or carries out transactions with other non-residents in  
“ circumstances which would make him chargeable in pursuance  
“ of this section in the name of a resident person, shall not of  
“ itself make him chargeable in respect of profits arising from those  
“ sales or transactions ”.

It was held in *Smidth v. Greenwood*<sup>(1)</sup> ([1922] 1 A.C. 417) that Sub-section (2) is not a charging section, and only declared and comprised the effect of Section 41 of the Act of 1842 as extended by Sub-section (1) of Section 31 of the Finance (No. 2) Act, 1915, as to the non-resident's liability in the name of the factor or agent. In that case, the profits of business concluded in Copenhagen, although with purchasers in the United Kingdom, were held not assessable under Schedule D, the effect of which was not held to be extended by Section 31 so as to include them.

It would thus appear that the profits now liable to assessment must be such as would have been assessable under Section 41 through an agent in the United Kingdom, subject to this, that Section 31(1)(b) has removed the limitation that such profits must actually be received into the hands of the agent resident here. *Weiss, Biheller and Brooks, Ltd. v. Farmer* (8 T.C. 381) is an illustration of what may be profits arising from a trade exercised within the United Kingdom: while *Sulley v. Attorney-General*<sup>(2)</sup> 5 H. & N. 711, and *Grainger v. Gough*<sup>(3)</sup> ([1896] A.C. 325) which were applied in *Smidth v. Greenwood*<sup>(1)</sup> ([1921] 3 K.B. 583) affirmed in the House of Lords ([1922] 1 A.C. 417) offer illustrations of the reverse.

It is not so easy to determine the meaning of “ sales and transactions ” in Sub-section (7) from a consideration of these cases. In *Maclaine & Co. v. Eccott*<sup>(4)</sup> ([1926] A.C. 424) the House of Lords has expounded the principles which Sub-section (7) embodies. The Lord Chancellor determined the effect of the Section at page 435<sup>(5)</sup>, as providing that “ when one non-resident sells goods “ to another non-resident through the regular agent of the former “ in the United Kingdom and the proceeds of sales do not pass “ through the agent's hands, the agent shall not (in the absence of “ other circumstances which make him chargeable) be chargeable “ with the tax ”. This is reinforced by Lord Shaw at page 442<sup>(6)</sup> who says that where there is neither one of the parties of the transaction in this country, and when the goods never reach this

<sup>(1)</sup> 8 T.C. 193.

<sup>(2)</sup> 2 T.C. 149.

<sup>(3)</sup> 3 T.C. 462.

<sup>(4)</sup> 10 T.C. 481.

<sup>(5)</sup> 10 T.C. at p. 577.

<sup>(6)</sup> 10 T.C. at pp. 582 and 583.

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country but are sent direct from one foreign country to another, the agent conducting the business in London has no vicarious responsibility for the taxation.

Putting it the other way, those passages appear to me to mean affirmatively, that when a contract is made here through the agent between non-residents, the old position under Section 41 is reverted to, and liability can only be imposed if the agent here receives the profits or gains.

There is still room for question as to what is the precise meaning of "executes sales or carries out transactions". The Lord Chancellor says at page 436, that they must be given a wide meaning, so as to include the actual contracts of sale. Lord Shaw's words appear to indicate that that part of the transaction that may found liability, in what he succinctly terms double foreigner business, may be either the handling of the goods or the payment of the price in this country. In *Wilcock v. Pinto & Co.*<sup>(1)</sup> ([1925] 1 K.B. 30) the Court of Appeal held that a firm was exercising a trade in England, where the contracts were made and the price was payable for them in England.

Applying the above considerations to the trade in the present case, where there is now no question raised as to the passenger traffic, profits on contracts made here for the shipment of goods from this country, whether the vendor has sold f.o.b. or c.i.f., by residents here, or by non-residents—if the proceeds are received here by the agents—are taxable. Profits on contracts made here for the shipment of goods from Rotterdam to residents in the United Kingdom are liable. Profits on contracts for shipment of goods from Rotterdam to this country made between non-residents are not within the charge, unless the profits thereof are received in this country.

The Commissioners must reconsider the facts before them in the light of the decision of this Court, and the case must be remitted to them for this purpose. The substance of the appeal, however, fails, and it must be dismissed with costs.

**Scrutton, L.J.**—Since Section 31 of the Finance (No. 2) Act, 1915, allowed non-resident traders to be assessed under Schedule D as trading in the United Kingdom, in the names of certain agents, though the agents were not in receipt of the profits and gains of the trade, the Courts have had considerable difficulty in deciding the exact circumstances under which such foreign traders can or cannot be effectively taxed. In *Pinto's*<sup>(1)</sup> case ([1925] 1 K.B. 30) and *Maclaine v. Eccott*<sup>(2)</sup> ([1926] A.C. 424) the Courts have considered the case of the foreign trader who sells goods

<sup>(1)</sup> 9 T.C. 111.

<sup>(2)</sup> 10 T.C. 481.

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in England, and I do not repeat my judgments in those cases on the subject of exercising a trade. The present cases, and two cases<sup>(1)</sup> in which we have recently given judgment concerning the liability of a Danish shipping company, Det Forenede, assessed in the name of its regular agents in Hull and Newcastle respectively, raise the question of the position of foreign ship-owners regularly running lines of ships to England.

Firstly, do they exercise a trade in England or merely trade with England? In my view, on the facts in this case coupled with the decision in *Erichsen v. Last*<sup>(2)</sup> ((1881) 8 Q.B.D. 414) they clearly exercise a trade in England. The steamers of the two Dutch companies concerned carry goods from London to Rotterdam and *vice-versa*. A very considerable portion of the carrying voyage is executed in English territorial waters, as are the shipment and delivery of goods, and contracts for carriage binding the shipping companies are made in the United Kingdom and freight received therein. This, in my view, is exercising a trade in the United Kingdom, and so Sir George Jessel clearly thought in his judgment in *Erichsen v. Last*.<sup>(2)</sup>

But, secondly, it is said that the Dutch shipping companies have no agents here to be assessed. It is contended that Messrs. Muller & Company (London), Limited, are really agents of a Dutch partnership firm of W. H. Muller & Company, and not of the Dutch shipping companies. There is, in my view, no foundation for this. The Dutch firm are the sole directors of one shipping company and the managing directors of the other. The shipping companies carry goods between England and Holland under bills of lading signed by a clerk of the London firm for the master. As regards the Nederland Company, the London firm took over the business in this country formerly carried on by the Nederland Company themselves. As regards the General Shipping Company, the Dutch firm are both directors and shipping agents. The boats of the two companies run together in the Batavier Line, which the Dutch firm manage, but the Dutch firm have no independent agreements chartering the steamers of the shipping companies, and in my view the line is the line of the shipping companies, and the Dutch firm are merely an agent of the shipping companies and their combination in the Batavier Line. The London Company describes itself on the shipping documents as "W. H. Muller & Co. (London), Ltd. Batavier Line", and in my opinion it is right, and is an agent of the shipping companies, who, subject to the third point, are rightly assessed in its name.

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(1) *Nielsen, Andersen & Company v. Collins.* } See p. 91 *ante*.  
*Tarn v. Scanlan.*

(2) 4 T.C. 422.

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The third point relates to the position of the London Company under the provisions of Section 31(7) of the Finance (No. 2) Act, 1915, now reproduced as Rule 11 of the General Rules in the Act of 1918. As the case relates to assessments for the years 1916 and 1917, it falls to be determined under the provisions of the earlier Act. It is regrettable, however, that an assessment for 1916 should only reach the Court of Appeal in 1926; and equally regrettable that though the appeal to the Commissioners came on in May, 1921, the Special Case was not stated until September, 1923, and the appeal has taken nearly two years from signing the Case to reach Mr. Justice Rowlatt, and nearly three years to reach the Court of Appeal. It cannot be to the advantage of the State or the subject that proceedings in revenue cases should be so dilatory. I do not know where the blame lies, but I blame the whole system; and in particular I think that if the Commissioners would, as commercial arbitrators do, state the Case themselves, instead of leaving the parties to wrangle about it, much time would be saved. The Commissioners can, if necessary, require the contentions of the parties to be delivered in writing at the time of the hearing, to secure greater accuracy.

At the time when the case was before the Commissioners no decision had been given as to the meaning of Section 31, Sub-section (7) of the Finance (No. 2) Act of 1915. The Courts below were not sure what it meant, or whether it had any meaning. The Commissioners regarded it as merely a precaution to prevent any extension of the liability enforced by assessment under Section 31 to business outside the United Kingdom. The parties desired to raise the question of what they called profits arising from shipment f.o.b. and profits arising from shipment c.i.f. This use of language seems to me merely misleading. The shipowner's contract has nothing to do with f.o.b. or c.i.f., these are terms relating to contracts for the sale of goods between vendor and purchaser. They have this indirect relation to the contract of carriage, that in the sale of goods f.o.b. it is the purchaser's duty to find the ship or shipping room, though as a matter of business the vendor frequently does it on behalf of the purchaser, a transaction which may result in both vendor-shipper and purchaser-consignee being liable to the shipowner for freight. See as to this the statement of Mr. Justice Park in *Domett v. Beckford* (1833, 5 B. & Ad. 521) and the decision in *Shepherd v. De Bernales* (1811, 13 East, Page 565) that on a bill of lading containing a clause "to be delivered to consignee he or they paying freight for the same", the shipper was liable for freight if the master delivered to the consignee without insisting on his lien for freight. On the other hand, when the vendor sells goods c.i.f. the consignee usually pays the freight on delivery, deducting it from the price he has to pay to the vendor. When



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the Commissioners say: "If the goods were shipped c.i.f. the "freight was collected by the London Company; if the goods "were shipped f.o.b. the freight was collected by the Dutch firm "on arrival of the goods at Rotterdam", they are not making any statement depending on the nature of the transaction expressed as f.o.b. or c.i.f., which terms I do not imagine are ever mentioned to the shipowner, but may be making an inaccurate statement of a relation which probably depends on the filling in by the shipper of the question in the consignment note: "Who "pays freight?", a question to which the answer "The consignee", would not, under *Shepherd v. De Bernales*, necessarily free the shipper from liability. However this may be, the Commissioners decided that for profits arising from goods shipped from London c.i.f. and passengers resident in the United Kingdom travelling from London to Rotterdam, there was liability to be assessed in the name of the English agent, as also for profits arising from goods shipped from London f.o.b. on the ground that these were transactions with the shipper in this country, but no liability to be assessed for profits arising from non-resident passengers returning to the Continent. They also held that there was no liability to assessment for profits derived from the carriage of goods or passengers from Rotterdam to London.

Mr. Justice Rowlatt, when both sides appealed, said that while Sub-section (7) was difficult to understand he thought it was inserted *ex majore cautela* to prevent an agent being assessed because he took some small share in carrying out a contract made abroad between two non-residents, and he held that the material question was, "Where were the contracts made?", that the profits from contracts made in England were assessable, wherever the freight was payable, and the profits from contracts made in Holland were not assessable. So far no one had treated Sub-section (7) as more than a negligible precaution. But on appeal to the House of Lords we learnt that we were all wrong. I am not sure that Lord Shaw's view is the same as that of the Lord Chancellor on a point I will mention, but I take the Lord Chancellor's view, concurred in by three other members of the House, as the decision of the House of Lords. He expresses it thus at page 435<sup>(1)</sup>: "I have come to the conclusion that its intention and effect is to "exempt from taxation in the name of a resident agent or other "person in the position of an agent all sales and transactions "between non-residents, even though effected through the medium "of that agent or other person, except in cases where the agent or "other person receives the profits". Then lower down the page<sup>(2)</sup>:

(1) *Maclaine & Co. v. Eccott*, 10 T.C. 481, at p. 576.

(2) *Ibid.* at p. 577.

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“Sub-section (7), as I read it, provides that when one non-resident “sells goods to another non-resident through the regular agent “of the former in the United Kingdom and the proceeds of sales “do not pass through the agent’s hands, the agent shall not “(in the absence of other circumstances which make him charge- “able) be chargeable with the tax”. I understand the effect of this to be that the phrase in Sub-section (7) of Section 31 “ex- “cutes sales or carries out transactions” includes “making “contracts”, but that an agent making contracts here for non-residents is only assessable if he receives the profits of such trading. I am not sure that Lord Shaw concurs in the latter limitation.

Now obviously the Commissioners have not approached the matter from this point of view at all, and I have considered whether the proper course is not simply to send the Case back to them to find facts and state their conclusions, having regard to the new situation created by the House of Lords’ decision. But as the case may go higher and there seems to have been some misunderstanding as to the shipping transactions involved, I think it better to state my own views for the approval or disapproval of the House of Lords or the guidance of the Commissioners. The shipowners are indifferent about the passenger question, as I gather the trouble of inquiring into residence is much more than the tax involved; but they attach importance to the question about the carriage of goods.

Sub-section (7) of Section 31 of the Finance (No. 2) Act, 1915, reproduced in Rule 11 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, according to the decision of the House of Lords, protects a non-resident trading in England from being assessed, so far as that trade consists of contracts between two non-residents, in the name of his agent here, unless that agent is in receipt of the profits of such transactions. But this Section does not apply if one party to the contracts constituting the trade is a resident, and where the shipowner’s resident agent is himself liable on the contract, or where the resident shipper though making the contract on behalf of a non-resident consignee is himself liable on the contract, the Sub-section does not seem to give any protection. To judge in this case whether these considerations affect the matter one would want to see the completed documents, and not merely the blank forms with which we were supplied.

Further, it does not seem to me that Mr. Justice Rowlatt’s division of profits according to where the contract is made is conclusive of the matter. For instance, a foreign firm of ferro-concrete constructors may make in Paris with an Englishman a contract to erect an hotel in England, for payment to be made in England, and habitually have similar transactions. In such a

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case, in my view, the foreign firm would be exercising a trade in England though the contracts were made abroad. The fact that the contract is made in England is, however, almost conclusive that a trade is carried on here, but if neither party to the contract is a resident here assessment can only be made in the name of an agent who receives in England the profits of the transaction. In particular a contract for carriage made abroad between non-residents, of which a substantial part is to be performed in this country, including receipt of freight by an English agent, does not seem to get any protection from Sub-section (7) as explained by the House of Lords. A contract for shipment made in this country, the only parties to which are non-residents and the freight on which is payable abroad, does receive protection from the House of Lords' decision. It is otherwise if any party to such a contract is a resident; in that case it is immaterial where freight is payable. Contracts for shipment are neither f.o.b. nor c.i.f. and these terms should be confined to contracts of sale. In cases which are otherwise protected by Sub-section (7) the English agent must receive the profits of the transaction to render his foreign principal liable to assessment in the agent's name. It appears to me that these principles and the consideration of the completed documents should enable a just conclusion as to the amount in which the agent is assessable to be arrived at.

The matter must be remitted to the Commissioners to complete the assessment on the principles laid down by the House of Lords and in this judgment. As the Appellants fail on their substantial contentions, they should bear the costs of this appeal.

**Romer, J.**—The first question that has to be determined upon this appeal is whether two Dutch companies, referred to in these proceedings as the *Nederland Steamboat Company* and the *General Shipping Company* respectively, were for the years 1916 and 1917 exercising a trade within the United Kingdom. If that question be answered in the affirmative, the next question is whether the Appellants, *W. H. Muller & Co. (London), Limited*, were liable to be assessed to Income Tax in respect of the profits arising from the said trade for the years ending 5th April, 1916, and 5th April, 1917, as the agents of the two Dutch companies under the provisions of Section 41 of the Income Tax Act, 1842, and Section 31 of the Finance (No. 2) Act, 1915. Finally, if both these questions are answered in the affirmative, it has to be determined whether in respect of any and what part of such profits the Appellants are entitled to escape assessment by virtue of the provisions of Sub-section (7) of the last mentioned Section. The first of these questions can, I think, be dealt with quite shortly. Each of the two companies possesses two vessels with which it

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conducts a regular freight and passenger service between London and Rotterdam, the four vessels together constituting what is known as the Batavier Line. Contracts for the carriage of goods and passengers were at all material times being made in London; goods carried by the vessels were being constantly shipped or discharged as the case may be in London; payments for the carriage of both goods and passengers were constantly made in London and the very carriage itself took place for a considerable distance in the territorial waters of this country. In these circumstances I am satisfied that a trade was being exercised within the United Kingdom by both the Dutch companies to the extent at any rate of the carriage of goods and passengers in fulfilment of contracts made in this country, whether such goods and passengers were carried from London to Rotterdam or from Rotterdam to London. Whether the carriage of goods and passengers in fulfilment of contracts made outside the United Kingdom should also be regarded as constituting a trading within this country is a question that we are not at present asked to decide. The contention of the Crown as stated in the Special Case was that the two companies were chargeable in respect of profits derived from goods and passengers so far as the contracts for the carriage of such goods and passengers were made in the United Kingdom, and on the hearing of this appeal Counsel for the Crown were content to rest upon this contention, reserving, however, the right on some future occasion to contend that the two companies can properly be made chargeable in respect of the profits derived from the carriage of goods and passengers between Rotterdam and London even when made in pursuance of contracts made outside the United Kingdom. As to this I express no opinion.

I now turn to the consideration of the question whether the Appellants, referred to in these proceedings as the English firm, were or were not the agents of the two Dutch companies. Now there is no doubt that the two companies were entering into contracts in this country for the conveyance in their vessels of passengers and goods, and that payment for such conveyance was being received in this country on their behalf. As the two companies were resident in Holland it seems obvious that those contracts must have been made and those payments received on their behalf by some agent of theirs in this country. In point of fact it was the English firm that made the contracts and received the payments on behalf of the two companies. This firm nevertheless strictly contends that they were not the agents of either company. They put their case in this way. They say that the general agents of the two companies were a registered partnership firm resident in Rotterdam called

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W. H. Muller and Company, and referred to in these proceedings as the Dutch firm, that the English firm were merely the agents in this country of the Dutch firm, and that the relationship of principal and agent did not accordingly exist between them and the two companies, the Dutch firm and the Dutch firm alone being their principals. They say that in truth they were merely sub-agents of the two companies and are not assessable as agents of the two companies under either of the Sections to which I have referred. But I am satisfied that the English firm were the direct agents of the two companies. On the 4th July, 1904, a letter was addressed to the English firm appointing them agents "for our Batavier Line" and this letter is signed by the Dutch firm as follows: "Wm. H. Muller & Co. (Batavier Line)". Now the Dutch firm were the directors of the Nederland Steamboat Company, having the management and control of this company. They were also the directors of the General Shipping Company, having the general management of that company and representing the company "in law and also outside the law". It is said that inasmuch as the Dutch firm were in addition the shipping agents and managers of the ships of the Nederland Company, and by a deed of the 29th June, 1899, they had been appointed "exclusive agents and exclusive cargo superintendents" of the General Shipping Company with power to charge commission for their services and to appoint sub-agents, the letter was written by them in these capacities. It seems to me however that the letter was written by the Dutch firm in their capacity of directors of each company. For in their capacity of shipping agents and managers they could not properly refer to the Batavier Line as "our Batavier Line", nor should I have expected them in that capacity to sign as Wm. H. Muller & Co. (Batavier Line). But if they were writing as directors of and therefore on behalf of the two companies both the description and the signature would be intelligible. There is not, moreover, any statement in the Case to the effect that as shipping agents and managers of the ships of the Nederland Steamboat Company the Dutch firm had any power to appoint sub-agents or sub-managers. But, however this may be, the matter is in my opinion concluded by the admission made by the English firm at the Bar that the two Dutch shipping companies were carrying goods from London to Holland under contracts binding on them signed by the English firm on their behalf. When once it is admitted that the English firm could sign contracts on behalf of the shipping companies and so as to bind these companies, it seems to me necessarily to follow that the relation of principal and agent existed between each company and the English firm, and it is not material to inquire how or by whom or in what terms the agency was constituted.

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I am accordingly of opinion that the second question arising on this appeal ought to be answered in the affirmative. In these circumstances the English firm are, in my opinion, and as held by Mr. Justice Rowlatt, liable to be assessed to Income Tax in respect of the profits accruing to the two Dutch companies from the carriage of goods or passengers effected in pursuance of contracts made in this country, except in so far as they are freed from chargeability by virtue of the provisions of Sub-section (7) of Section 31 of the Act of 1915. It was contended by the London firm when before the Special Commissioners that having regard to this Sub-section they could not be assessed in respect of the profits accruing to the two Dutch companies from the carriage of goods shipped from London, where the goods had been sold f.o.b., or from non-residents travelling from London to Rotterdam, the contract for carriage being according to their contention made in the first case between the non-resident shipping company and the non-resident consignee who, they say, would normally pay the freight, and in the second case between the non-resident shipping company and the non-resident passenger. When the matter came before Mr. Justice Rowlatt, however, the English firm did not press their claim to exemption in respect of the carriage of non-resident passengers, inasmuch as they preferred to be assessed in respect of the profits arising from such carriage sooner than engage in the impossible task of ascertaining in the case of each passenger whether he is or is not resident in this country. We are not therefore concerned with this class of traffic. But both before Mr. Justice Rowlatt and before this Court they maintained their contention in relation to goods carried from this country to a consignee in Holland who had bought on f.o.b. terms. Mr. Justice Rowlatt in rejecting that contention said that he thought the explanation of the Sub-section given by the Solicitor-General was the correct one. That explanation in effect was that the Sub-section had merely been introduced *ex majore cautela* for the purpose of making it clear that Section 31 did not make an agent assessable in respect of profits derived from a trade exercised outside the United Kingdom.

Since Mr. Justice Rowlatt's judgment, however, the Sub-section has been considered and explained by the House of Lords in the case of *Maclaine and Company v. Eccott*<sup>(1)</sup>. Lord Cave in that case, after referring to the explanation of the Sub-section given by the Solicitor-General in the present case, said<sup>(2)</sup>: "I do not think that this explanation gives proper effect to the words of the Sub-section. The Sub-section applies only to sales or transactions by a non-resident 'in circumstances which would

(1) 10 T. C. 481.

(2) *Ibid.* at p. 576.

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“ ‘ make him chargeable in pursuance of this Section in the name of  
“ ‘ a resident person ’ ; and in the case of sales and transactions  
“ wholly made or entered into abroad, those circumstances do not  
“ exist. The Sub-section must, therefore, apply to sales made  
“ here through an agent or other person resident here ; and no  
“ construction can, I think, be accepted which makes it applicable  
“ only to sales made abroad ”. The Lord Chancellor then proceeded to state that the intention and effect of the Sub-section was to exempt from tax in the name of a resident agent, or other person in the position of an agent, all sales and transactions between non-residents even though effected through the medium of that agent or other person except in cases where the agent or other person receives the profits, and a little later on he says<sup>(1)</sup> :  
“ Sub-section (7), as I read it, provides that when one non-resident  
“ sells goods to another non-resident through the regular agent  
“ of the former in the United Kingdom and the proceeds of sales  
“ do not pass through the agent’s hands, the agent shall not  
“ (in the absence of other circumstances which make him charge-  
“ able) be chargeable with the tax ”. The qualification that the agent does not receive the profits is not of course to be found stated in the Sub-section in express terms. But the Lord Chancellor regarded the Sub-section as in no way qualifying or abridging the liability imposed by Section 41 of the Act of 1842 upon agents having the receipt of profits or gains.

He said<sup>(2)</sup> : “ It was held in *Smidth’s*<sup>(3)</sup> case that Section 31 deals  
“ with machinery only and that Sub-section (2) of the Section was  
“ not to be construed as imposing a charge which did not previously  
“ exist ; and, similarly, I do not think that Sub-section (7) was  
“ intended to remove any existing charge. The words ‘ make him  
“ ‘ chargeable ’ appear to mean ‘ make him so chargeable ’, that is  
“ to say, chargeable in pursuance of the Section in the name of a  
“ resident person ”. The Sub-section is therefore addressed to the case of an agent who, but for it, would be assessable by reason only of Section 31 and it does not apply to an agent who was assessable under the law existing prior to the passing of the Act of 1915. So far therefore as the English firm had the receipt of the profits arising from goods or passengers carried in pursuance of contracts made in this country, they would appear to be properly assessable to Income Tax in respect thereof by virtue of Section 41 of the Act of 1842, whether the contracts for carriage be made on behalf of the carrying company with residents or non-residents. The contention of the English company in relation to the carriage of non-residents from London to Rotterdam must accordingly have

(1) 10 T.C. at p. 577.

(2) *Ibid.* at pp. 577 and 578.

(3) *Smidth v. Greenwood*, 8 T.C. 193.

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failed even if it had not been abandoned, because the English firm would have received the fares, which necessarily included any profit derived from those fares. But in those cases of the carriage of goods where the freight was not received by the English firm they are entitled to resist assessment whenever the carriage was effected in pursuance of a contract made exclusively with a non-resident. It is true that having regard to one of the passages in the Lord Chancellor's judgment that I have cited above I ought to add to this statement the words "in the absence of other circumstances which made them chargeable". But I know of no circumstances that would make the English firm chargeable in such cases beyond the fact that a transaction consisting of the contract for carriage and of the carriage itself has been carried out by a non-resident shipping company, whose agents the British firm are, with another non-resident, and the Sub-section, as construed by the House of Lords, says that this of itself shall not make the shipping company chargeable. I think therefore that to this extent, but to this extent only, the Appellants are entitled to succeed. We are not, however, in possession of materials sufficient to enable us to judge whether there are any cases in which, the freight not being received by the London firm, the contract for the carriage of the goods by the shipping company was made exclusively with non-residents. This is a matter which can only be satisfactorily determined by the Commissioners, and for this purpose the assessment must be remitted to them.

As, however, the Appellants fail in all other respects, the costs of the appeal should be borne by them.

**Lord Hanworth, M.R.**—Mr. Hills, that means that both appeals are dismissed with costs.

**Mr. Reginald Hills.**—Yes, my Lord.

**Lord Hanworth, M.R.**—And in both cases the Case is remitted to the Commissioners.

**Mr. Reginald Hills.**—Yes. As a matter of fact the profits never had been ascertained.

**Lord Hanworth, M.R.**—The second case related to Excess Profits Duty.

**Mr. Reginald Hills.**—Yes.

**Lord Hanworth, M.R.**—So the same order will be made in both cases.

**Mr. Reginald Hills.**—If your Lordship pleases.