

HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—25TH OCTOBER, 1949

COURT OF APPEAL—20TH MARCH AND 4TH APRIL, 1950

HOUSE OF LORDS—14TH, 15TH AND 16TH NOVEMBER, 1951 AND
25TH FEBRUARY, 1952

Commissioners of Inland Revenue

v.

Dowdall O'Mahoney & Co., Ltd.⁽¹⁾

Excess Profits Tax—Branch business in United Kingdom carried on by company resident in Eire—Eire taxes paid on profits of main business and of United Kingdom branches—Whether deduction from profits of United Kingdom branches permissible in respect of proportion of such taxes attributable to those profits.

The Respondent Company was managed, controlled and resident in Eire, where it carried on the business of margarine manufacturers and butter merchants; it had two branches in England where it conducted a general grocery business. The Company paid Irish income tax, corporation profits tax, and excess profits tax on the whole of its profits, including the English branch profits.

On appeal to the Special Commissioners against assessments to Excess Profits Tax for the seven chargeable accounting periods ended 31st March, 1946, the Company contended that in computing the profits of the English branches it was entitled to deduct that proportion of the Irish taxes which was attributable to those profits. The Commissioners held that it was a necessary expense for the Company, in carrying on part of its trade at branches in England, to incur Irish taxes, and they allowed the appeal. The Crown demanded a Case.

Held, (i) that the Irish taxes were not wholly and exclusively laid out for the purposes of the Company's trade in the United Kingdom and (ii) that no part of such taxes was an admissible deduction in computing its trading profits for the purposes of Excess Profits Tax.

CASE

Stated under the Finance (No. 2) Act, 1939, Section 21 (2), the Finance Act, 1937, Fifth Schedule, Part II and the Income Tax Act, 1918, Section 149, 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⁾ Reported 93 S.J. 774; 94 S.J. 335; [1950] 1 All E.R. 969; 96 S.J. 148; [1952] 1 All E.R. 531; [1952] A.C. 401.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st January, 1948, Dowdall O'Mahoney & Company, Ltd. (hereinafter called "the Respondent Company") appealed against seven assessments to Excess Profits Tax, in the sums of £5,400, £9,000, £9,000, £9,000, £9,000, £8,000 and £6,300 for the chargeable accounting periods ended 31st March, 1940 to 31st March, 1946 inclusive, made upon it by the Commissioners of Inland Revenue.

1. The sole question raised by this appeal is whether the Respondent Company, in computing the profits arising from its trade or business carried on in the United Kingdom for the purposes of the said assessments to Excess Profits Tax, is entitled to deduct from the profits of each chargeable accounting period a proportion of certain taxes paid by it in Eire by reason of the matters hereinafter set out.

2. The facts in this case are not in dispute and are as follows.

The Respondent Company was incorporated in Eire in 1915; its directors live in Eire. Its head office is in Cork. Its business in Eire is that of margarine manufacturers and butter merchants and it is managed, controlled and is resident in that country. It has two branches in England, one at Manchester and one at Cardiff. At these branches a general grocery business is carried on. It is assessable to Excess Profits Tax in Britain in respect of the profits arising from the business carried on at these two branches. In Eire it has been assessed to and has paid income tax, corporation profits tax and excess profits tax on the whole of its profits including the profits made by the said two branches at all material times.

3. On 14th April, 1926 an agreement was made between the British Government and the Government of the Irish Free State in respect of double Income Tax. This agreement is confirmed by Section 23 of, and is set out in Part I, Second Schedule to, the Finance Act, 1926. As a result of this agreement the Respondent Company is not liable to British Income Tax. Our attention at the hearing was directed in particular to clauses 1, 2 and 4 of this agreement. Our attention was also called to Section 27 of the Finance Act, 1920 and Sections 12 and 14 and paragraph 5 of Part I of the Seventh Schedule of the Finance (No. 2) Act, 1939.

Our attention at the hearing was also directed to Section 30 of the Finance Act, 1940, which relates to relief in respect of excess profits tax in Dominions; to Section 51 of the Finance (No. 2) Act, 1945, which relates to agreements for relief from double taxation of income; and to the fact that no arrangements have been made with Eire under or by reference to these Sections.

4. It was contended on behalf of the Respondent Company that the proportion of the said taxes paid by it in Eire in respect of the two branches in England was a business expense and deductible in arriving at its profits assessable to Excess Profits Tax in Britain in respect of those branches.

5. On behalf of the Crown it was contended;

- (a) that the Respondent Company incurred liability to income tax, corporation profits tax and excess profits tax in Eire because it was resident and carried on business there;
- (b) that no part of the said taxes was an admissible deduction in computing the profits of the trade of grocers carried on by it at Manchester and Cardiff for the purposes of Excess Profits Tax in the United Kingdom;

- (c) that no part of the said taxes was money wholly and exclusively laid out or expended for the purposes of the trade of grocers carried on by it at Manchester and Cardiff ;
- (d) that the deduction of any part of the said taxes was prohibited by Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D, Income Tax Act, 1918, which was applied to Excess Profits Tax by Section 14 (1) Finance (No. 2) Act, 1939 ;
- (e) that the case of *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402, was distinguishable.

6. We, the Commissioners, gave our decision as follows:—

The Respondent Company is resident in Eire. The assessments under appeal are made upon it in respect of the trading carried on by the two English branches. For the purposes of taxation in Eire, the results of the whole of its trading, including those of the two English branches, have to be brought into the computation. In our opinion it was a necessary expense for the Respondent Company, in carrying on part of its trade at branches in England, to incur Irish taxes. We hold that the appropriate part of the taxes paid in Eire by the Respondent Company applicable to the English branches constitutes money wholly and exclusively laid out and expended for the purposes of its trade as a whole and is deductible in computing its profits or gains for Excess Profits Tax. We consider that the case of *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402, supports this view.

We allow the appeal. The figures of the assessments having been agreed we adjusted the figures accordingly.

The representative of the Appellants immediately after the determination of the appeal declared to us his 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 Finance (No. 2) Act, 1939, Section 21 (2), the Finance Act, 1937, Fifth Schedule, Part II and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

R. Coke,	}	Commissioners for the Special Purposes of the Income Tax Acts.
N. Anderson,		

Turnstile House,
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15th November, 1948.

The case came before Croom-Johnson, J., in the King's Bench Division on 25th October, 1949, when he ordered the case to be remitted to the Special Commissioners.

Mr. Cyril King, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. Frederick Grant, K.C., and Mr. John Senter for the Company.

Croom-Johnson, J.—This is a Case stated by the Special Commissioners for the purposes of the Income Tax Acts in connection with Excess Profits Tax, and it raises a question of whether a company established in

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Southern Ireland or Eire, which is managed, controlled and is resident in that country, is entitled in making its computation for the purposes of Excess Profits Tax in England to deduct from those profits sums of money which it has paid for income tax, corporation profits tax and excess profits tax on the whole of its profits, including the profits made by the English branches.

The Respondents were incorporated in Eire in 1915, and their business in that country is that of margarine manufacturers and butter merchants. It has two branches in England, one in Manchester and one in Cardiff, and at those branches a general grocery business is carried on. It is not disputed that under Section 12, the charging section of the Finance (No. 2) Act of 1939, the Respondents are liable to pay Excess Profits Tax in respect of the profits arising from the business carried on at those two branches. What they have claimed to do is to do some sort of proportion sum or some sort of allocation of the three Eire taxes to which I have referred and attribute that apportioned or allocated part against those branch profits in computing their liability to English Excess Profits Tax.

The question which has been argued before me is whether it is right, the Special Commissioners having come to the conclusion that the Respondents were entitled for the purpose of taxation in England to bring into the computation those three taxes which they paid in Eire, or as I have said, some allocated or proportionate part unspecified.

As is well known, the principles which have to be applied in computing the profits arising from a trade or business falling within Section 12, which this business is to the extent which I have mentioned, are Income Tax principles as adapted in accordance with the provisions of Part I of the Seventh Schedule of the statute. One of those principles of course is that "In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation". That is Rule 3 (a) of the Rules applicable to Cases I and II in Schedule D of the Income Tax Act, 1918.

Mr. Grant on behalf of the Company has argued before me that there is now, rightly understood, no prohibition against the allowance of taxes paid either in a Dominion or in a foreign country for the purposes of making this particular computation under this English statute. He has presented me, if he will allow me to say so, with quite an impressive argument on the point. I will assume that he is right about it, but without deciding it; and upon that assumption what follows? Does it follow that because a company such as this Company has paid what I will call other taxes, so as not to hurt any susceptibilities by using the word "foreign", in full, some proportion sum must be done, or must some method be adopted? One of the methods which manifestly must be adopted is to look and see whether the company has paid this, that or the other tax and what that tax has to do with the branches which it is admitted are the subject of a proper assessment to Excess Profits Tax in this particular case. That I think is what the Special Commissioners have done in this case. I do not think that they have laid down any general rule that if a company which has branches in England and which is carrying on business in some other country happens to pay corporation tax and excess profits tax and income tax, which one assumes are based on much the same principles as ours, therefore those payments are to be simply taken into account and

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deducted from the profits. They have not done anything like that at all. They have said: "No. We apply the methods of the English Income Tax which are applicable to Excess Profits Tax. We give effect to those principles", and they have come to their conclusion, as I say, in accordance with those principles so applied by them, and the result is what they have set out in paragraph 6 of the Case. They have said that the result of the trading in the two English branches has to be brought into the computation and then, applying the Rule to which I have already referred, they say that it was a necessary expense for the Respondent Company, in carrying on part of its trade from branches in England, to incur Irish taxes. I searched through the Case to find out why. Why is it necessary to incur Irish taxes simply because you happen to be an Irish company carrying on business in Eire and want to carry on business at two branches in England? I think the only light I get about it is the next statement: "We hold that the appropriate part of the taxes paid in Eire by the Respondent Company, applicable to the English branches, constitutes money wholly and exclusively laid out and expended for the purposes of its trade as a whole and is deductible in computing its profits or gains for "Excess Profits Tax." That is manifestly the application of Rule 3, to which I have already referred. The trouble about it is that the Case has stated what is practically an agreed statement of facts in paragraph 2. I know nothing at all from the Case (and I am not entitled to look elsewhere) about this business. I do not know whether any amount of stock-in-trade used in the grocery business in Manchester and Cardiff comes from Ireland or only a part of it, margarine and butter. I do not know the conditions upon which the goods are charged against the two English branches. There is no evidence to indicate at all in the Case on what the Commissioners have based these findings. It is not quite clear whether it is two findings or one finding, or whether the second finding is merely explanatory of their mental process in arriving at the first. It may very well be that a company carrying on business in Ireland and supplying its branches in England with its stock-in-trade may be entitled to incur expenses, and indeed may be compelled to incur expenses and disbursements for Irish taxes as a condition of carrying on its trade and being permitted to ship the stock-in-trade from Eire to England. I do not know. I conceive it would be a possibility—but I can say no more about it because I am not deciding it—and if so, the amount of the expenses which it is so put to might be a proper charge against the English branches for the cost of the stock-in-trade which was being shipped to them from Ireland. It occurred to me that if for example there was an export duty in Ireland which the Irish company had to pay in order to get permission to send the stock-in-trade to England, it might be proper, in a proper case, if the Commissioners were satisfied about it, to hold that the true cost of the stock-in-trade, one of the disbursements in acquiring it, would be not merely the market price or the cost price or the contract price of the goods, but the duty which had to be paid as a condition of lawful shipment.

Accordingly, thinking as I do that the Commissioners have dealt with this matter on that basis, I have come to the conclusion that there must have been some other information before them other than the extremely slight information which is contained in paragraph 2 of this Case. I am supported in the view which I have formed, because apparently the decision in *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402, was cited and canvassed before the Commissioners. That was a case in which

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a company carrying on a gold mining business in the Transvaal had to pay tax in the Transvaal of 10 per cent. on the net produce earned from working the mine. It was conceded apparently that that was a proper deduction in the circumstances of the case to be made in computing the liability of the company to English Income Tax under Schedule D. Both sides agreed, and the point of the case was: at what stage in the accounts and to what extent that 10 per cent. was deductible, the case arising during the time when the old three years' average applied. I do not think it is any authority for the proposition that the tax paid could be deducted and certainly it is not an authority for that proposition generally. It seems, from my own study of the case at page 403 of the report, that the reason why each side agreed that this 10 per cent. tax was a proper deduction is because evidence was adduced before the General Commissioners for the City of London, who were the Commissioners dealing with the case, that without the payment of the tax the company would not be allowed to carry on business. Now there is nothing of that sort here. As Mr. King on behalf of the Crown has rightly pointed out in this case, I know nothing at all so far as I am allowed to know from this Case as to the basis on which any one of the trade taxes was assessed on the Company in this particular case. Inasmuch as the Commissioners have come to the conclusion (which I think is expressed in such a form as to be intended to be a conclusion of fact) that it was a necessary expense of the Company in carrying on part of its trade at branches in England to incur Irish taxes, the only thing I can do is to send the case back to them, so that they may state the evidence upon which they came to that conclusion.

Mr. Grant says that he is entitled to say that, although that is the finding in the form in which it is in this Case, I am entitled to deal with the case on the basis that the Commissioners have held as a matter of law that this tax is a deductible amount, apparently irrespective and independently of the nature of the business and the way in which it was conducted. I do not think that I can do anything of the sort. I think that to do so would be to apply my mind to a point which I do not think is raised in the Case.

I am not intending by the Order which I make to limit the Commissioners to this particular finding. I do not think they meant to find (otherwise I am sure that experienced Commissioners would have found it) that the mere fact that the Company had paid these Irish taxes entitled them without more to debit a part of those taxes in the computation for Excess Profits Tax in respect of the English profits arising under the English statute.

Accordingly the appeal will be allowed and the matter will be remitted to the Commissioners for the purpose which I have indicated in this judgment.

Mr. Grant.—Does your Lordship intend that the parties should be at liberty to call further evidence or not?

Croom-Johnson, J.—No, I do not think so. What do you say about that, Mr. Hills?

Mr. Hills.—I should have thought not. The only suggestion I was going to make—of course, neither of us is asking that this case should be remitted, but it is your Lordships' view that it should be—was that, without prejudice, the Commissioners will (I think your Lordship's judgment implies it) give particulars of the Irish taxes which are only set out in terms; as to what they are, the methods of assessment and so forth. I think that is what your Lordship meant.

Croom-Johnson, J.—No, I did not quite mean that. I want them to express their view about this argument which Mr. Grant has addressed to me as to the right to debit the taxes at all. I think it is probably implicit in their finding, because they clearly must have arrived at the conclusion that it is deductible but only deductible if they bring themselves within Rule 3. Then I want them to tell me what it was they acted upon in finding as a fact that this is necessary. If it is some sort of inference drawn from the facts that were stated, well and good, but it may be that there were further facts, and I want them to amplify that. I do not want to shut them out.

Mr. Hills.—In case this case goes further, having heard the argument, and without prejudice to the matter, I suggest that it might be convenient to have further particulars of these taxes. They are merely stated as Irish excess profits tax and so forth.

Mr. Grant.—There were no particulars of these Irish taxes before them. You may take that from both of us. The case was not argued in that way.

Croom-Johnson, J.—I am much obliged to you. I think the Court ought to be informed about it. I think we ought to know about it. It may be that you can agree about it. I dare say you can?

Mr. Grant.—Probably we can.

Mr. Hills.—It would be probably agreed.

Croom-Johnson, J.—You can probably agree about it. If not, let the Commissioners state the nature of the taxes and where they come from, and then a proper argument can be addressed to the Court about them.

Mr. Grant.—I think it really does involve technically fresh evidence.

Croom-Johnson, J.—I should have assumed that, in view of the form of the Case, they are taxes on profits; but I do not know how they were arrived at or the figures.

Mr. Grant.—Neither do the Commissioners.

Croom-Johnson, J.—I think the Court ought to know.

Mr. Hills.—To that extent there may be fresh evidence, but otherwise not?

Croom-Johnson, J.—Yes.

Mr. Hills.—If your Lordship pleases.

Mr. Grant.—Evidence as to the incidence and effect of these taxes.

Mr. Hills.—Yes.

Croom-Johnson, J.—Very well.

Appeals were entered against the above decision by both the Company and the Crown and the case came before the Court of Appeal (Somervell and Singleton, L.JJ., and Roxburgh, J.) on 20th March, 1950, when judgment was reserved. On 4th April, 1950, judgment was given against the Crown with costs.

Mr. Cyril King, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. Frederick Grant, K.C., and Mr. John Senter for the Company.

Somervell, L.J.—The judgment I am about to read is the judgment of the Court.

The Appellant taxpayer is a company incorporated in Eire with its head office in Cork. It has two branches in England. It is assessable to Excess Profits Tax here in respect of the profits of its trade here and the case is concerned with assessments for that tax. In Eire, during the years covered by the assessments, 1940 to 1946, the whole of the profits of the Appellant, including those made here, were subject to income tax, corporation profits tax and excess profits tax, which have been paid. It is agreed that these taxes are similar to Income Tax, National Defence Contribution and Excess Profits Tax as imposed under our statutes.

The question is whether the proportion of the taxes paid by it in Eire in respect of the two branches in England was deductible in arriving at its profits assessable to Excess Profits Tax here. The Special Commissioners held that it was. The Crown appealed. Croom-Johnson, J., remitted the case for them to state the evidence upon which their finding was based, and to state in summary form the nature, effect and incidence of the three Irish taxes referred to. The learned Judge proceeded on the basis that there must have been evidence before the Commissioners which had not been set out in the Case. The Appellant appealed and the Crown cross-appealed. Before us Mr. Grant for the Appellant and Mr. Cyril King for the Crown agreed that the Case set out all the evidence called. They had agreed in summary form a statement as to the Irish taxes, and both sides desired this Court to dispose finally of the case.

The appeal had been placed in the Interlocutory List, and we were at first doubtful whether we could dispose finally of the substantive issue. Our attention was drawn to *Commissioners of Inland Revenue v. Sansom* ⁽¹⁾, [1921] 2 K.B. 492, in which an appeal was brought to this Court in a case in which Rowlatt, J., had made an order similar to that made by Croom-Johnson, J., here. This Court decided that the case ought not to be remitted, and upheld the decision of the Commissioners. This is clear authority for the jurisdiction of this Court to decide an appeal finally when the learned Judge has ordered that the case be remitted. In our opinion, the appeal should have been entered in the Final and not in the Interlocutory List. We transferred it to that list and proceeded to hear argument on the substantive issue. We have come to the conclusion, in the first place, in the light of what has been set out above as stated and agreed by Counsel, that the Order for remission should be set aside.

It is unnecessary to set out the general scheme of the Excess Profits Tax. The tax applies to profits arising from a trade or business. The profits so arising are under Section 14 (1) of the Finance (No. 2) Act, 1939, to be computed on the Income Tax principles on which profits of a trade or business are computed, i.e., under Case I of Schedule D, as adapted in accordance with the provisions of Part I of the Seventh Schedule.

The Commissioners' finding is as follows: "The Respondent Company "is resident in Eire. The assessments under appeal are made upon it in "respect of the trading carried on by the two English branches. For the "purpose of taxation in Eire, the results of the whole of its trading, "including those of the two English branches, have to be brought into the "computation. In our opinion it was a necessary expense for the Respondent Company in carrying on part of its trade at branches in England, "to incur Irish taxes. We hold that the appropriate part of the taxes paid

⁽¹⁾ 8 T.C. 20.

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"in Eire by the Respondent Company, applicable to the English branches, constitutes money wholly and exclusively laid out and expended for the purpose of its trade as a whole and is deductible in computing its profits or gains for Excess Profits Tax. We consider that the case of *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402, supports this view."

Two points were argued before us. First, that the finding of the Commissioners was correct, applying the Case I rules irrespective of any special provisions in the Excess Profits Tax code. Second, that assuming the result on that basis led to the prohibition of the deductions, there were provisions in the Excess Profits Tax code which, though not expressly modifying the relevant Case I rules, showed plainly the intention of Parliament that such deductions were to be allowed for Excess Profits tax, and that the Court should on recognised principles that have been laid down for the construction of statutes give effect to that intention.

Before considering the authorities we will refer briefly to the nature of the argument. It is said that a tax on profits cannot be a disbursement for the purposes of the trade within Rule 3 (a) of the Rules applicable to Cases I and II. The trader trades, makes his profit, and then in a different capacity, that of taxpayer, has to hand over a share of those profits to the Crown. Does however this broad principle apply when, as here, one is dealing with a claim to deduct taxes imposed by a different, in this case a Dominion, Government in respect of profits which are assessable here because made here? One may consider a Dominion trader contemplating opening a branch here, the Dominion law imposing a tax on all his profits wherever made. He realises he is taxed here on the profits referable to his branch here. There is, we think, a good deal to be said for the view that the Dominion tax which he will have to pay is a sum laid out for the purposes of his trade here. We are fortified in this provisional view by the fact that it was, so far as we can see, the view taken by the Crown's advisers in *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402. The taxpayer was an English company which carried on a gold mining business in the Transvaal. In the Transvaal it was subject to a profits tax. The tax according to the case was imposed on the net produce of the individual year. The Ordinance is not set out in the report, but the Attorney-General in his reply said (1): "It is true that both the Profits Tax and the Income Tax are taxes 'on profits'. It was therefore regarded as a tax on profits. The Crown did not contest the right of the taxpayer to deduct the amount of the Transvaal tax on profits for the purpose of assessing the taxpayer's liability here. The dispute was as to whether the amount of the Transvaal tax payable in the year in which it was first imposed should be spread over that and the two preceding years for the purpose of arriving at the three years' average or should be charged against the profits of the year in which it was imposed. The Attorney-General in opening stated that it was rightly dealt with as a deduction from the profits of the year in which it falls. In reply he emphasised the point we have indicated. Following on the phrase we have already quoted as to the two taxes being taxes on profits, he says 'but they are different taxes, applying to different areas, assessed on different principles, collected by different machinery, appropriated to different purposes. In one sense the Company suffers double assessment, because it lives in England and is subject to English taxes, and it works in the Transvaal and

(1) 5 T.C., at p. 406.

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"is subject to Transvaal taxes . . . The amount paid in Profits Tax is not "taxed twice. It is not taxed to Income Tax at all, for it is taken out of "the profits before the sum assessable to Income Tax is arrived at."

We have quoted this because it analyses the position in very clear language. The Crown regarded the taxpayer's claim to deduct the Transvaal tax as a disbursement laid out for the purposes of the trade here as plainly right. In that case the Court were dealing with the assessment on the head office, and here we are having to consider an assessment in respect of a branch, but the view taken by the Crown's advisers establishes at any rate that the proposition that a tax on profits paid in a country outside the United Kingdom may be a disbursement deductible within the Rules is not plainly wrong.

Mr. King on behalf of the Crown referred us to *Commissioners of Inland Revenue v. Alexander von Glehn & Co., Ltd.*, 12 T.C. 232. That was an Excess Profits Duty case. The company, who were general merchants, had committed breaches of certain regulations, no "moral obliquity" being suggested. Proceedings were taken and a compromise penalty accepted. The company sought to deduct the penalty and their legal expenses. We do not think that case assists for the reason stated by Lord Sterndale, M.R., at page 238. He says: "This business could perfectly well be carried on without any infraction of the law at all." No one here suggests that the trade in the English branches could have been carried on without paying the Irish taxes. The argument for the Appellant, as summarised by Lord Sterndale⁽¹⁾, was that all you had to look at was the "actual sum that the Appellants "put in their pocket". That, of course, is plainly wrong.

We were also referred to *Smith's Potato Estates, Ltd. v. Bolland*, 30 T.C. 267. In that case the companies sought to deduct under Rules 3 (a) and (e) of Cases I and II a sum incurred as legal costs in successfully appealing against a decision of the Commissioners of Inland Revenue that only £3,500 out of a salary of £6,486 14s. 0d. paid to a manager should be allowed in the computation for Excess Profits Tax. The appellants contended that there were business reasons which it is unnecessary to specify as well as purely financial ones for their action. The House of Lords held by a majority that the sum could not be deducted. The fact that two of their Lordships, Viscount Simon and Lord Oaksey, dissented shows that the borderland is debatable, which has some relevance to the second point if it arises. We think the difficulty of the present case is exemplified by quoting the issue as formulated by Lord Porter⁽²⁾: "... what your Lordships "have to determine is whether the expense is incurred in order to earn "gain, or is the application or distribution of that gain when earned." Going back to the Dominion trader contemplating opening a branch here, and considering the gain to be earned by that branch which will be the subject-matter of his United Kingdom assessment, he will take into account that he will have to hand over part of what he gains to the Dominion Government. Having regard to our code under which all profits made are taxed here, it is in one sense a precedent liability from his point of view. In the present case we are told the Irish profits tax was 50 per cent. Ours started at 60 per cent. and rose to 100 per cent. There is a certain artificiality in saying that the payment of 10 per cent. or 50 per cent. over and above his total gains by trading here is an application or distribution of that gain when earned. This again brings out the relevance so clearly emphasised by the

(1) 12 T.C., at p. 236.

(2) 30 T.C., at p. 290.

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Attorney-General in the gold mining case ⁽¹⁾ of the tax on profits sought to be deducted being a different tax payable to a different government. If one is considering one tax system only, the tax could plainly not exceed 100 per cent.

We do not think the case is covered by authority. In one sense of course the Irish taxes are taxes on profits when earned. But it is on the profits made by an Irish company trading through a branch in this country. Before that company opened a branch in England it had made itself chargeable to tax in Ireland, and when it opened a branch in England the profits of that branch were chargeable in Ireland. Looking at the matter as it has to be done under our code as profits of a "trade exercised within the United Kingdom" by a person "not resident in the United Kingdom", we should have come to the conclusion that the Irish taxes could and should be regarded as a disbursement laid out for the purposes of his trade here within the Rule.

As however we think the point is one of difficulty we will assume we may be wrong and consider the second argument. It is submitted by the taxpayer that the Excess Profits Tax statutes show a clear intention that the taxes such as those in question should be deducted. The statutes were drafted, it is said, on the assumption that such taxes were deductible for Income Tax purposes under the Rules applicable to Case I. The correctness of the assumption is now challenged by the Crown. The taxpayer submits that effect ought to be given in dealing with Excess Profits Tax to the intention of Parliament if, as they submit, it is sufficiently plain. The principle invoked by the taxpayer is stated by Baron Alderson in *Attorney-General v. Lockwood*, 9 M. & W., at page 398: "The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act or to some palpable and evident absurdity." (See also *Salmon v. Duncombe*, 11 App. Cas. 627.) The words it is said here in their literal application provide that the issue is to be decided in accordance with the Rules applicable to Case I. Ought they, however, to be given this construction if it would lead to a plain and clear contradiction of the apparent purpose of the Act?

The actual provisions relied on in the Excess Profits Tax code will be more intelligible if we trace first the history of the legislation relating to the deduction of foreign or dominion taxes. Cases IV and V of Schedule D deal with tax in respect of income arising from securities or possessions abroad. Rule 1 of Case IV which is made applicable in certain circumstances to Case V reads as follows: "The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom, to the same deductions and allowances as if it had been so received, and to the deduction, where such a deduction cannot be made under any other provision of this Act, of any sum which has been paid in respect of income tax in the place where the income has arisen, and to a deduction on account of any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom,

⁽¹⁾ *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402, at p. 406.

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"and the provisions of this Act (including those relating to the delivery of "statements) shall apply accordingly." If one assumes £100 of income arising abroad subject to foreign income tax of £10, the United Kingdom Income Tax is levied on £90. It is suggested, we think probably rightly, that the words "where such a deduction cannot be made under any other provision "of this Act" suggest or assume that such deductions could be made under the general provisions of the Rules applicable to Cases I and II. It would seem illogical to allow the deduction under Case IV if it was not to be allowed under Cases I and II. In 1920, by the Finance Act, Section 27, a more generous form of relief was granted in respect of income liable to tax here in respect of which Dominion income tax had been paid. The form of relief was to reduce the rate of the United Kingdom tax as applied to the full amount of the income before deduction of the Dominion tax, to the following extent: "(a) If the Dominion rate of tax does not exceed one-half "of the appropriate rate of United Kingdom income tax, the rate at which "relief is to be given shall be the Dominion rate of tax: (b) In any other "case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom income tax." This scheme obviously could not stand with Rule 1 of Case IV. This is dealt with in the opening words of Section 27 (4) in the Finance Act of 1920: "Notwithstanding anything "in the Rules applicable to Case IV or Case V of Schedule D or in any "other provision of the Income Tax Acts, no deduction shall be made on "account of the payment of Dominion income tax in estimating income for "the purposes of United Kingdom income tax". The later words of the Section do not concern us. Their complexity is, we were told, due to the fact that in certain Dominions a shareholder is affected by two taxes, one a general tax on the profits of the company, and a further tax on any dividend declared.

We now turn to the provisions dealing with Excess Profits Tax which are relied on. Paragraph 5 of Part I of the Seventh Schedule to the Finance (No. 2) Act, 1939 (which contains, as we have said, the adaptations of Income Tax principles) reads as follows: "The provisions of subsection (4) "of section twenty-seven of the Finance Act, 1920 (which disallows deductions on account of the payment of Dominion income tax) shall not apply." Now if the Rules of Case I disallow the deduction of Dominion income tax *in all cases*, this was meaningless, misleading and not an "adaptation" of any principle. The words italicised are of course of crucial importance. Counsel for the Crown, as we understood him, agreed that if the deduction was inadmissible under the Rules of Case I, it must be inadmissible in all cases. It was argued for the Crown that full effect could be given to the intention of the Paragraph by construing it in this way: if but for Section 27 (4) the taxpayer would be entitled to deduct under Case I, the deductions may be made leaving open the argument whether such deductions were or were not admissible. There are in our opinion two conclusive arguments against this as the "intention". In the first place, it would have been worded differently on the following lines: "Nothing in Section 27 (4) shall "prohibit deduction on account of payment of Dominion tax which but for "that Section would be admissible." That form would have at once raised the second point. The Excess Profits Tax was 60 per cent. at its inception and, as we know, rose later to 100 per cent. The question whether Income Tax and other similar taxes were deductible was a vital factor in considering the whole scheme. Taking the rate as 80 per cent. if a trader had in respect of the same income to pay Dominion Income Tax at, say, 30 per cent. he was in effect being fined for activities which were presumably regarded as

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useful as they were permitted to continue during the war. If on the other hand one assumes that Income Tax and other taxes of a similar kind are deductible under the Rules of Case I, the Paragraph is logical and self-explanatory. It removes the one statutory bar to the deduction of any such taxes, namely, Dominion Income Tax, the reason for the existence of which we have given.

Mr. Grant for the taxpayer also relied on Section 30 of the Finance Act, 1940. Section 30 (1), which we need not set out in detail, gave power to His Majesty by Order in Council to put into force arrangements if made with the Government of a Dominion which levied an excess profits tax for relief against double taxation on the basis of a formula set out in Section 30 (1) (b). Sub-section (2) reads as follows: "Where any such Order in Council is made, then, if the Commissioners are satisfied that any case is one which falls within the arrangements to which the Order relates, they shall, in lieu of allowing, in computing profits for the purpose of excess profits tax or the national defence contribution, any deduction in respect of excess profits tax charged in the part of His Majesty's dominions outside the United Kingdom to which the Order relates, make such adjustment of the excess profits tax payable in the United Kingdom or the national defence contribution as may be necessary to give effect to the arrangements, and allow any necessary relief accordingly by repayment or otherwise, so, however, that the effect of the adjustment shall be not less favourable to the taxpayer than the effect of allowing the deduction." Again this makes it, we think, clear beyond argument that Parliament has passed this legislation on the basis that the taxpayer is entitled to make deduction for his tax here of excess profits tax charged in the Dominions in respect of the same income. The relief under any arrangements to be made is in lieu of this right. The effect of the adjustment is not to be less favourable than the effect of allowing the deduction. Those negotiating any arrangements are in effect instructed to proceed on this basis. If the arrangements for any reason do not put the taxpayer here in a better position than he is in on the basis of deducting, they will plainly not be worth pursuing.

The argument can be put in two ways. First, Rule 3 (a) falls to be construed for Excess Profits Tax in the context of the provisions to which we have referred. If a provision is capable of two meanings, other provisions dealing with the subject matter may be looked at to decide the question as to the meaning or application of the ambiguous words. If Rule 3 (a) had appeared for the first time in the Excess Profits Tax code, we would have had no difficulty in construing or applying it in the way contended for by the taxpayer.

It may be said that the position here is different. Income Tax principles are to be applied except in so far as they are adapted or modified. Parliament has not sought to adapt or modify them *quoad* this issue because it assumed a construction or application which has turned out to be erroneous. If there were no such principle of construction as that laid down by Baron Alderson and applied in many cases (see Maxwell on The Interpretation of Statutes, Chapter IX), that would be an end of the matter. That principle being a principle that in proper cases has to be applied, the present case is, we think, well within it. In the first place, we hold that the intention of Parliament that the taxes in question here should be deducted for Excess Profits Tax is plainly established. In the second place, having regard to the high level of Excess Profits Tax, the construction contended for by the Crown

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would in this and no doubt in many other cases lead to the manifest injustice that traders affected would be called on to pay in respect of their trade here more than the total profits they earned. Put in another way, the form of this legislation would lead any trader to believe that he could deduct such sums. On this basis he continues to trade, and, as he was allowed to do so during the war, presumably his activities were useful to us. It is said, now that it is all over, the basis is much more onerous.

We therefore come to the conclusion that, if we are wrong in our conclusion on the first point, the Court ought to give effect to the plain intention of Parliament and hold that these taxes are deductible for the computations in question.

The appeal is allowed, I presume?

Mr. Senter.—The appeal will be allowed with costs here and below, and the decision of the Special Commissioners restored.

Somervell, L.J.—Yes, I think that is right, is it not, Mr. Hills?

Mr. Reginald P. Hills.—Yes, my Lord.

Mr. Senter.—And the cross-appeal of the Crown will be dismissed with costs.

Somervell, L.J.—That must be right, Mr. Hills.

Mr. Hills.—If your Lordship pleases. I am instructed to ask for leave to appeal if my clients, after considering your Lordship's judgment, think it desirable to do so.

Somervell, L.J.—One moment. The taxpayer's appeal will be allowed with costs here and below, and the decision of the Special Commissioners affirmed.

Mr. Senter.—It is restored.

Somervell, L.J.—It was not actually set aside. It was remitted. What is the proper form of Order?

Mr. Hills.—I think it is enough to say that it is affirmed.

Somervell, L.J.—Very well—it is affirmed, and the cross-appeal of the Crown is dismissed with costs. We did anticipate, Mr. Hills, that such an application might be made by you. If you do decide to appeal naturally it is an issue which affects a great many cases.

Mr. Hills.—Yes, my Lord, a good many.

Somervell, L.J.—I do not quite know what sum of money is involved here, but it may be a case where it would be proper to impose terms, or reasonable for the Crown to agree to terms. It is much more important to them than it is to the individual taxpayer.

Mr. Hills.—That is so. Would your Lordships allow me a moment?
(Counsel conferred with his clients.)

My clients would not object to any conditions which your Lordships would wish to impose.

Somervell, L.J.—The usual form is—the Crown are very reasonable in these matters—that the Crown will not seek to disturb the Order for costs made here if they succeed, nor will they ask for costs in the House of Lords.

Mr. Hills.—I think that is the ordinary form.

Mr. Senter.—In the House of Lords they will agree to the costs being the taxpayer's costs in any event.

Somervell, L.J.—No, we must not do that. The House of Lords have said "No"—they have complete jurisdiction over their own costs. I do not think there is any difficulty. The proper form of Order is that the Crown will not ask for costs in the House of Lords.

Mr. Senter.—If your Lordship pleases.

The Crown having appealed against the above decision the case came before the House of Lords (Lords Oaksey, Reid, Radcliffe and Tucker) on 14th, 15th and 16th November, 1951, when judgment was reserved. On 25th February, 1952, judgment was given unanimously in favour of the Crown.

Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown and Mr. Frederick Grant, Q.C., and Mr. John Senter for the Company.

Lord Oaksey.—My Lords, this is an appeal from an Order of the Court of Appeal (Somervell and Singleton, L.JJ., and Roxburgh, J.) dated 4th April, 1950, allowing the appeal of the Respondent (hereinafter referred to as "the Company") from an Order of the King's Bench Division (Croom-Johnson, J.), dated 25th October, 1949, whereby he ordered that the Case stated by the Commissioners for the Special Purposes of the Income Tax Acts should be remitted to such Commissioners and that they should restate the Case. The Order of the Court of Appeal against which the Commissioners of Inland Revenue now appeal allowed the appeal of the Company and affirmed the determination in its favour of the Commissioners for the Special Purposes of the Income Tax Acts, and dismissed the cross-appeal of the Commissioners of Inland Revenue.

The question arising in the present appeal is whether the proportion of certain taxes paid by the Company in Eire in respect of profits of its trade arising in England are deductible in arriving at its profits assessable to Excess Profits Tax of the United Kingdom.

An agreed Memorandum as to the nature of these Irish taxes was put in and is as follows:—

"That the Irish income tax, corporation profits tax and excess profits tax referred to in the Case Stated were imposed under Irish Statutes, the provisions of which are similar to the provisions of the United Kingdom Finance Acts imposing Income Tax, National Defence Contribution and Excess Profits Tax, and in particular that the Irish income tax was imposed on the profits of a trade, which profits were computed on income tax principles similar to United Kingdom Income Tax principles and that the profits of a trade for assessment to Irish corporation profits tax and excess profits tax were computed on Irish income tax principles with adaptations similar to the adaptations for the purposes of United Kingdom National Defence Contribution and Excess Profits Tax."

The Company was incorporated in Eire and it is managed, controlled and resident there. Its business there is that of margarine manufacturers and butter merchants. It has two branches in England, one at Manchester and the other at Cardiff, where a general grocery business is carried on.

(Lord Oaksey.)

In the Court of Appeal and in your Lordships' House the question raised was treated as involving two points: first, whether the Irish taxes in question were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the trade of the Company in England within the meaning of Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D; and second, whether even if they were not, the Company was entitled to deduct them by reason of the provisions of Paragraph 5 of Part I of the 7th Schedule to the Finance Act (No. 2) of 1939 and Section 30 of the Finance Act, 1940.

On the first question it was contended on behalf of the Appellants that the authorities establish that the payment of such taxes by a trader is not a disbursement wholly and exclusively laid out for the purposes of his trade and that this is so whether such taxes are United Kingdom taxes or foreign or dominion taxes, and reliance was placed upon the cases of *Strong v. Woodfield*, [1906] A.C. 448; 5 T.C. 215; *Commissioners of Inland Revenue v. von Glehn*, [1920] 2 K.B. 553; 12 T.C. 232; *Commissioners of Inland Revenue v. Warnes*, [1929] 2 K.B. 444; 12 T.C. 227; *L.C., Ltd. v. Ollivant*, [1944] 1 All E.R. 510; 60 T.L.R. 336; and *Smith's Potato Crisps v. Commissioners of Inland Revenue*, [1948] A.C. 508; 30 T.C. 267.

On behalf of the Company it was contended that the principle of these cases ought not to be extended and that dominion and foreign taxes stand on a different footing from United Kingdom taxes and ought to be considered as disbursements which the trader has as a matter of fact and not of law to pay for the purposes of his trade in the United Kingdom. Reliance was also much placed by the Respondents upon the case of *Stevens v. Durban-Roodepoort Co.*, 5 T.C. 402, in which Channell, J., held that a tax paid in the Transvaal of 10 per cent. on the net produce obtained from working gold mines should be deducted from the profits of the year to which it related before striking the average for the three years. I may say at once that, in my opinion, this is not a decision which affords much help since it was agreed between the Crown and the taxpayer in that case that the tax upon the profits was to be brought into the computation and the only question was whether it was to be deducted from the profits of the year to which it related or from the average profits of three years.

On the first question I am of opinion that taxes such as those now in question, namely, income tax, corporation profits tax and excess profits tax, are not, according to the authorities, wholly and exclusively laid out for the purposes of the Company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade: they are the application of those profits when made and not the less so that they are exacted by a dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by dominion or foreign governments.

The second question is one of more difficulty but I have come to the conclusion that neither Paragraph 5 of Part I of the 7th Schedule to the Finance Act (No. 2) of 1939 nor Section 30 of the Finance Act, 1940, confers upon the taxpayer the right to deduct such taxes.

The provision in Paragraph 5 of the First Part of the 7th Schedule was, I think, necessary in order to make clear that in cases which would otherwise have come under Cases IV and V, deduction of Dominion income tax was still to be allowed although the computation was now by Section

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14 (1) to be made under Case I. But this provision confers no new right of deduction: it merely leaves the right to deduct income tax on investments and possessions in the Dominions as before.

As to Section 30 of the Finance Act, 1940, I am of opinion that the Section confers no new power upon the Commissioners to allow a deduction in respect of excess profits tax unless an Order in Council has been made; and none had been made at the time the present assessments were made.

Sub-section (2) was, I think, intended to allow the Commissioners either to make such adjustment of the Excess Profits Tax as might be necessary to give effect to the arrangements with the government of the Dominion or to allow the deduction of the Dominion excess profits tax. It was provided by Sub-section (2), no doubt, that the adjustment should not be less favourable to the taxpayer than the effect of allowing the deduction, but I do not think these words can be read as conferring a right to the deduction unless the Order in Council was made.

For these reasons, though not without some doubt, I am of opinion that the appeal must be allowed and I so move your Lordships. In accordance with the Order of the Court of Appeal each party will pay their own costs of this appeal.

Lord Reid.—My Lords, the Respondents are a company incorporated, managed and controlled in Eire: they are margarine manufacturers and butter merchants and they had two branches in Manchester and Cardiff where they carried on business as grocers. They were assessed to Excess Profits Tax in the United Kingdom in respect of the profits of those branches for seven consecutive chargeable accounting periods ending on 31st March, 1946, for amounts varying between £5,400 and £9,000. They have paid taxes in Eire in respect of the profits of these two branches for these periods and in this case they maintain that they are entitled to deduct taxes which they have paid in Eire in computing the profits of their two branches for the purposes of United Kingdom Excess Profits Tax. No question as to United Kingdom Income Tax arises because, as a result of an agreement between the British Government and the Government of the Irish Free State, confirmed by Section 23 of the Finance Act, 1926, the Respondents are not liable to pay United Kingdom Income Tax; but there is nothing in that agreement or elsewhere to modify the ordinary provisions of the law of the United Kingdom with regard to their liability to pay Excess Profits Tax for the periods in question.

Before the Special Commissioners the Respondents contended that the proportion of income tax, corporation profits tax and excess profits tax paid by them in Eire in respect of these two branches was a business expense and deductible in arriving at their profits assessable to Excess Profits Tax in the United Kingdom. The Special Commissioners upheld this contention: in their decision they said: "In our opinion it was a necessary expense for the Respondent Company, in carrying on part of its trade at branches in England, to incur Irish taxes. We hold that the appropriate part of the taxes paid in Eire by the Respondent Company applicable to the English branches constitutes money wholly and exclusively laid out and expended for the purposes of its trade as a whole and is deductible in computing its profits or gains for Excess Profits Tax."

A Case stated by the Commissioners came before Croom-Johnson, J., who ordered that the said Case be remitted to the said Commissioners for

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them to state the evidence upon which the finding is based, that it was a necessary expense of the Respondent Company in carrying on part of its trade at branches in the United Kingdom to incur Irish taxes and also for the said Commissioners to state in summary form the nature, effect and incidence of the three Irish taxes referred to in the said Case and for this latter purpose, but not otherwise, to hear further evidence. The parties agreed a Memorandum regarding these matters which is as follows:

"That the Irish income tax, corporation profits tax and excess profits tax referred to in the Case stated were imposed under Irish statutes, the provisions of which are similar to the provisions of the United Kingdom Finance Acts imposing Income Tax, National Defence Contribution and Excess Profits Tax, and in particular that the Irish income tax was imposed on the profits of a trade, which profits were computed on income tax principles similar to United Kingdom Income Tax principles and that the profits of a trade for assessment to Irish corporation profits tax and excess profits tax were computed on Irish income tax principles with adaptations similar to the adaptations for the purposes of United Kingdom National Defence Contribution and Excess Profits Tax."

The case then came before the Court of Appeal and on 4th April, 1950, the Respondents' appeal was allowed and the determination of the Commissioners affirmed. Against that judgment the present appeal is taken.

Excess Profits Tax was imposed by the Finance (No. 2) Act, 1939. Section 14 (1) directs that profits shall be computed on Income Tax principles as adapted in accordance with the provisions of Part I of the Seventh Schedule to the Act, and "income tax principles" are defined as meaning "the principles on which the profits arising from the trade . . . are computed for the purposes of income tax under Case I of Schedule D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising". So those "income tax principles" must be applied to the facts of this case.

It is enacted in Schedule D—"1. Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; and (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom". The Respondents are assessed to United Kingdom Excess Profits Tax by virtue of Sub-paragraph (iii) which I have just quoted and no doubt they were assessed in Eire in respect of profits arising in the United Kingdom by virtue of the provision in the Irish legislation corresponding to Sub-paragraph (ii). The same Rules apply whichever be the Sub-paragraph applicable. The relevant Rules in this case are the Rules applicable to Cases I and II: "1.—(1) The tax shall be charged without any other deduction than is by this Act allowed", and "3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation". So it is necessary to determine whether any part of the Irish taxes paid by the Respondents can in law be regarded as money wholly and exclusively laid out or expended for the purposes of the Respondents' trade.

(Lord Reid.)

It was argued for the Respondents that this is a question of fact and that therefore the decision of the Commissioners on this matter is final in their favour. I cannot accept this argument. If certain payments made by a taxpayer are of such a kind that they are capable in law of being regarded as coming within the exception in Rule 3 (a) then no doubt it is for the Commissioners to determine whether the circumstances of the case are such that in fact they do come within that exception. But it is in my judgment a question of law whether particular payments are of a nature capable of coming within the exception, and that is the issue here.

The Respondents argue that foreign taxes on income have in the past been regarded by the Revenue as proper deductions and that in several enactments Parliament has shown by the language it has used that it regarded such taxes as proper deductions. The question does not appear to have come up in any case before 1909. In that year the case of *Stevens v. Durban-Roodepoort Gold Mining Co.*, 5 T.C. 402, was decided. In that case the taxpayer had paid tax under the Profits Tax (Gold Mines) Proclamation, 1902, of the Transvaal. It was not disputed that this taxpayer was entitled to some deduction in respect of that tax: the only issue in the case was how the deduction should be computed. United Kingdom Income Tax was payable by the company on the average of the profits of the preceding three years and the Transvaal tax had only been paid in the last of these years. The company contended that in computing its income for United Kingdom Income Tax the Transvaal tax should be deducted from its average profits so that it would get the advantage in that particular year of assessment of the deduction of the whole of that tax. But it was contended, successfully, for the Crown that that tax should be deducted from the profits of the year when it was paid before those profits were averaged with those of the two preceding years. This meant that for that particular year of assessment the company only got a deduction equal to one-third of the tax it had paid, though in the following two years the amount of Transvaal tax paid would also come into the account. It was argued for the Appellants in this case that that case is distinguishable because the Transvaal tax was not really a tax on income. Even if this were so I do not think that it is material. The arguments of the parties are reported in the report in Tax Cases and neither in the arguments nor in the judgment of Channell, J., is there any reference to this distinction. The admission made on behalf of the Crown appears to have been of a general character. The reported argument of the Attorney-General contains this passage with regard to the Transvaal tax⁽¹⁾: "If it is a sum which, 'in fairness to the shareholders, must be treated as withdrawn from the 'amount available for division, it is rightly dealt with as a deduction from 'the profits of the year in which it falls". It does not appear whether the admission for the Crown was based on an interpretation of the rule which is now Rule 3 (a) or on some other ground: but it is difficult to see what else could have been regarded as a warrant for this deduction. It was argued for the Respondents that this case is an authority in their favour because the decision is exactly what they are now contending for: but the decision proceeded on an admission which is now withheld. I think that all that the Respondents can take from this case is that the Crown's former advisers had a different view of the law from that now maintained. It must now be determined which view is right.

⁽¹⁾ 5 T.C. 402, at p. 405.

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The Respondents then drew attention to certain statutory provisions with a view to showing that Parliament has long recognised a wider basis for deductions than that for which the Appellants now contend. The first of these provisions in point of time is Rule 1 of Case IV of Schedule D. That Rule in its present form first appeared in Section 5 of the Finance Act, 1914. Before that date a taxpayer was only liable to pay Income Tax in respect of income arising from securities in any place out of the United Kingdom in so far as that income was remitted to the United Kingdom, and the question of deducting foreign income tax could hardly arise. But in 1914 a British taxpayer became liable in respect of all such income whether it had been or would be received in the United Kingdom or not, and therefore the question of the right to deduct foreign income tax became material. There was then enacted a right to "the deduction" (where such a deduction cannot be made under any other provision of "the Income Tax Acts) of any sum which shall have been paid in respect "of income tax in the place where the income shall have arisen". Of course the enactment of a deduction under Case IV and of a similar deduction under Case V cannot help the Respondents: what they rely on is the phrase "where such a deduction cannot be made under any other "provision of the Income Tax Acts". This certainly indicates that Parliament when enacting this legislation must have been of opinion that foreign income tax was in some cases at least a good deduction under some other provision of Income Tax legislation, and it is difficult to see what that other provision could be if not Rule 3 (a). One curious feature of this enactment is that it seems to indicate an opinion that, apart from this enactment, foreign income tax would sometimes be deductible and sometimes not. No explanation has been suggested of how that could be and none occurs to me. The arguments of both parties in this case are inconsistent with this view. If the Appellants are right, foreign income tax is never a good deduction under Case I; but if the Respondents are right, it would seem that foreign income tax must always be a good deduction.

The Respondents next found on the terms of Section 27 (4) of the Finance Act, 1920. The purpose of that enactment is to mitigate the hardship of double payment of income tax, and it begins: "Notwithstanding "anything in the Rules applicable to Case IV or Case V of Schedule D "or in any other provision of the Income Tax Acts, no deduction shall "be made on account of the payment of Dominion income tax . . ." The importance of this Section to the Respondents' argument is in the phrase "or in any other provision of the Income Tax Acts". Again it indicates, though perhaps not so clearly as Case IV, Rule 1, that Parliament was of opinion that there was some right to deduct Dominion income tax other than that given in respect of Case IV and Case V. I think that the indication here is not so clear because a draftsman sometimes inserts general words of this kind without any very clear idea of what they are intended to cover, and I would not attach great importance to these words if this Section stood alone.

But the next provision founded on by the Respondents is more significant. I have said that for the purposes of Excess Profits Tax profits are computed on the principles of Case I of Schedule D as adapted by Part I of the Seventh Schedule to the 1939 (No. 2) Act. The Respondents found on two of the Paragraphs of this Schedule. Paragraph 5 enacts: "The provisions of subsection (4) of section twenty-seven of the Finance "Act, 1920 (which disallows deductions on account of the payment of

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"Dominion income tax) shall not apply", and Paragraph 8 enacts; "No deduction shall be made on account of liability to pay, or payment of, "United Kingdom income tax, the national defence contribution, or excess "profits tax." Paragraph 5 must, it is said, have been intended to have some effect. It can have no effect unless Section 27 (4) has something to do with Case I; because Excess Profits Tax is only concerned with Case I and Paragraph 5 is only concerned with Excess Profits Tax. But Section 27 (4) only refers expressly to Cases IV and V. So the draftsman of Paragraph 5 must have thought that the general words in Section 27 (4) to which I have already referred—"Notwithstanding anything . . . in any "other provision of the Income Tax Acts, no deduction shall be made"—were a sufficiently clear indication that some deduction otherwise permissible under Case I was being disallowed by Section 27 (4) to make it necessary for him to exclude Section 27 (4) and thereby restore that deduction under Case I. If the draftsman had thought that the general words in Section 27 (4) were of doubtful effect he would not have used the positive words which are in Paragraph 5. Parliament must therefore be taken to have legislated in the belief that there would be this deduction available to the taxpayer. I think that there is some substance in this argument and I shall return to it.

The argument on Paragraph 8 is twofold. In the first place the whole Paragraph is unnecessary unless there would have been some right to a deduction in respect of payment of these taxes if the Paragraph had been omitted: and secondly it is significant that the Paragraph only applies to United Kingdom Income Tax, *etc.* This limitation is said to show that income tax, *etc.*, payable to foreign governments must have been intended to be deductible. I do not find the first branch of the argument very convincing. It is true that one ought not lightly to assume that any statutory enactment has no effect or is superfluous, but it is not very uncommon to find the Legislature inserting superfluous provisions under the influence of what may be excessive caution. Paragraph 8 has the effect of providing, *inter alia*, that in computing profits for assessment to United Kingdom Excess Profits Tax no deduction shall be made on account of liability to pay United Kingdom Excess Profits Tax. I can hardly think that anything but superlative caution can have given rise to this provision. Moreover, it is somewhat difficult to reconcile Paragraph 8 with Section 18 of the same Act. This Section makes payments of Excess Profits Tax a good deduction in computing profits for Income Tax purposes, so in drafting this Section the draftsman must have thought that without it such payments out of profits would not have been allowable deductions. But profits for Excess Profits Tax purposes are also computed on Income Tax principles; so one would think that when the draftsman came to the Schedule he would still have thought that payments out of profits would not be allowable deductions in computing profits for Excess Profits Tax and would therefore have seen that Paragraph 8 was strictly speaking unnecessary. Nevertheless, he put it in. Putting in a provision of this kind is not misleading and its insertion may well be explained by a cautious desire to make sure. But the limitation to United Kingdom taxes is not so easy to explain, particularly when taken into conjunction with Paragraph 5, and I think that this limitation adds some weight to the argument founded on the insertion of Paragraph 5.

The Respondents also founded on Section 30 of the Finance Act, 1940. That Section empowers His Majesty to declare by Order in Council that

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excess profits tax is payable in another part of His Majesty's Dominions in respect of profits in respect of which Excess Profits Tax is also payable in the United Kingdom and that arrangements have been made with the Government concerned for giving relief from double taxation in accordance with principles which are then set out. The first principle set out is: "(i) "that there shall be computed the amount of excess profits tax which "would be payable in each territory if excess profits tax in the other "territory, and national defence contribution in the United Kingdom, were "disregarded except in computing capital". Then the method of calculating relief in each territory is set out. Sub-section (2) then provides:—

"Where any such Order in Council is made, then, if the Commissioners are satisfied that any case is one which falls within the arrangements to which the Order relates, they shall, in lieu of allowing, in computing profits for the purpose of excess profits tax or the national defence contribution, any deduction in respect of excess profits tax charged in the part of His Majesty's dominions outside the United Kingdom to which the Order relates, make such adjustment of the excess profits tax payable in the United Kingdom or the national defence contribution as may be necessary to give effect to the arrangements, and allow any necessary relief accordingly by repayment or otherwise, so, however, that the effect of the adjustment shall be not less favourable to the tax-payer than the effect of allowing the deduction."

The Respondents contend that this Section also clearly shows that Parliament was of opinion that before this Act was passed a taxpayer had a right to deduct excess profits tax paid elsewhere in the computation of his profits for United Kingdom Excess Profits Tax. I agree. Sub-section (2) directs the Commissioners, in a case where an Order in Council applies, "in lieu of allowing . . . any deduction in respect of excess profits tax "charged" in the other territory to make the adjustment for which Section 30 provides, but it adds, "so, however, that the effect of the adjustment "shall be not less favourable to the taxpayer than the effect of allowing "the deduction." Parliament does not purport in this Section to enact that the taxpayer shall be entitled to deduct the other excess profits tax in his computation of profits for United Kingdom tax. It would have been easier and simpler so to enact if it had been thought that the taxpayer had no pre-existing right to make the deduction. Instead, Parliament enacted that in lieu of allowing the deduction (which is not expressly authorised by the Section) the arrangement shall be followed: but only if the arrangement is not less favourable than the deduction. Moreover, principle (i) which I have quoted directs that there shall be computed the amount of Excess Profits Tax which "would be payable" if excess profits tax in the other territory were disregarded. This phraseology is quite inappropriate if the law then was that excess profits tax in the other territory must always be disregarded in computing profit for United Kingdom tax.

The Appellants' reply must be that, even if Parliament did think in 1939 and 1940 that there was a pre-existing right to make such a deduction under Income Tax principles, Parliament was wrong in so thinking. There is a difference between Parliament exhibiting an erroneous opinion as to the existing law and enacting that that law shall be changed. Before considering this matter I think it necessary to determine what was the existing law, and whether, in light of decisions of this House, it is possible to read the Rules which are applicable to Case I in a way which would

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permit the deductions claimed. Counsel for the Respondents admitted, rightly in my opinion, that Rule 3 (a) of the Rules applicable to Cases I and II is the only Rule on which he could rely.

The rule in the Income Tax Act, 1842, which corresponded with what is now Rule 3 (a) was considered in *Strong & Co., Ltd. v. Woodfield* ⁽¹⁾, [1906] A.C. 448. I need not set out the facts of that case. I shall only quote the passage in the speech of Lord Davey dealing with this rule: he said ⁽²⁾ of the words in the rule, "for the purpose of the trade", that these words "appear to me to mean for the purpose of enabling a person "to carry on and earn profits in the trade, etc. I think the disbursements "permitted are such as are made for that purpose. It is not enough that "the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must "be made for the purpose of earning the profits". This explanation has always been regarded as authoritative and is difficult to reconcile with the Respondents' contention. But I think that the matter is put beyond doubt by the reasons given by the majority in this House in *Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Commissioners* ⁽³⁾, [1948] A.C. 508. In that case an increase of salary to a servant of a subsidiary company had been disallowed for the purpose of Excess Profits Tax. There was a successful appeal against this disallowance and the companies contended that the costs incurred in prosecuting this successful appeal were an admissible deduction for Income Tax and Excess Profits Tax purposes. Section 18 of the Finance (No. 2) Act makes the amount of Excess Profits Tax a good deduction for Income Tax purposes but did not cover the sum expended in this case, so the case turned on the proper interpretation of Rule 3 (a). Viscount Simon and Lord Oaksey dissented. If their opinion had prevailed I think that there would have been much to be said for the Respondents in this case. Viscount Simon said ⁽⁴⁾: "Since excess profits "tax is deductible as an expense when calculating the proper assessment "of the trader to income tax, the fixing of a correct figure for the former "is essential to the correct calculation of the latter. And it is only when "the latter is ascertained that the trader knows how much of his commercial profit he can carry forward, or, if a company, how much of the "year's profit is available for dividend or for reserve . . . Here, the expenditure was, in my view, incurred for the purpose of carrying on and "earning profits in the trade, for a reduction in the amount of tax does "increase the fund in the trader's hands after tax is paid and so promotes "the carrying on of the trade and the earning of trading profits". Lord Oaksey said ⁽⁵⁾: "It is an incident which he may think reasonably necessary for the purposes of his trade to engage in litigation as to the amount "of his taxes. If he succeeds in either case he increases the profits arising "from his trade and it appears to me to be no straining of language to "say that a trader who increases his profits by incurring a certain expense "incurs that expense for the purposes of his trade." These expressions of opinion do not appear to me to be very far removed from the admission made for the Crown in *Stevens'* case ⁽⁶⁾ to which I have already referred and they would, I think, at least open the door for the Respondents' argument that payment of taxes in Eire was a necessary incident of their earning profits in the United Kingdom and therefore a proper deduction. But I cannot reconcile the Respondents' contention with the opinions

⁽¹⁾ 5 T.C. 215.

⁽²⁾ *Ibid.*, at p. 220.

⁽³⁾ 30 T.C. 267.

⁽⁴⁾ 30 T.C. 267 at pp. 284-5.

⁽⁵⁾ *Ibid.*, at p. 297.

⁽⁶⁾ 5 T.C. 402.

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expressed by the majority in *Smith's Potato Crisps*. Lord Porter said ⁽¹⁾ with reference to the expense of an appeal for the purpose of discovering the true measure of profits for tax purposes: "Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve."; and later he said ⁽²⁾ with regard to Excess Profits Tax: "It is true that a trader only is liable to pay it, but it is not payable by him as a trader. He pays as an individual, like any other individual, tax on the sum which he has earned as a trader. 'To my mind', said Lord Selborne L.C. in *Mersey Docks & Harbour Board v. Lucas* ⁽³⁾, 8 A.C. 901, 'it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used' and therefore what your Lordships have to determine is whether the expense is incurred in order to earn gain or is the application or distribution of that gain when earned". Lord Simonds ⁽⁴⁾: "Neither the cost of ascertaining taxable profit nor the cost of putting it with the Revenue authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the tax gatherer is heard. He would have earned no more and no less if there was no such thing as income tax. . . . Let me suppose that a trader, having been assessed to income tax in the sum of £X in a certain year, disputes the assessment, claiming that his taxable profit is not £X but a lesser sum, say £Y. Suppose further that he succeeded in his claim. I fail to see how he has by the expenditure that he incurred earned profit in his trade. His taxable profit has been reduced: that was the object of his expenditure. But what has this to do with his trading profit?" Lord Normand, dealing with the reason why Income Tax is not deductible in computing profits for Income Tax purposes, said ⁽⁵⁾: "There is the more substantial reason, that income tax is an impost made upon profits after they have been earned, and that unless the observations of Lord Davey in *Strong & Co., of Romsey, Ltd. v. Woodfield* ⁽⁶⁾ which have often been referred to and applied in later cases, are to be disregarded a payment out of profits after they have been earned is not within the purposes of the trade carried on by the taxpayer. But excess profits tax also is levied on profits after they are earned and, apart from the statutory provision, is *in pari casu* with income tax"

My Lords, I trust that I have not misrepresented the speeches of noble Lords by giving these short extracts from them. I have read and re-read those speeches and they appear to me to establish conclusively (first) the distinction between money spent to earn profits and money spent out of profits which have been earned, and (secondly) the fact that Income Tax and Excess Profits Tax payments come within the latter category. I have not dealt separately with National Defence Contribution or its equivalent in Eire, but there was no argument that this can be distinguished from the other two taxes for the purpose of this case. It is true that the payments which the Respondents seek to have allowed as deductions were payments of Eire taxes and not of United Kingdom taxes, but the parties have admitted that the relevant legislation in Eire corresponds to that in the United Kingdom, and I cannot see that there is any distinction in principle between them for present purposes. Certainly no authority for any such distinction was cited. It therefore appears to me to be established that there is not

⁽¹⁾ 30 T.C., at p. 288.

⁽²⁾ *Ibid.*, at p. 290.

⁽³⁾ 2 T.C. 25, at p. 29.

⁽⁴⁾ 30 T.C. at p. 293.

⁽⁵⁾ 30 T.C. 267 at pp. 294-5.

⁽⁶⁾ 5 T.C. 215.

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and never was any right under the principles applicable to Case I to deduct Income Tax or Excess Profits Tax, British or foreign, in computing trading profits.

There remains the question whether the provisions of the Seventh Schedule to the Finance (No. 2) Act, 1939, adapting Income Tax principles for the purposes of Excess Profits Tax, have enacted any such right for the first time. I have said that I think that the terms of Paragraphs 5 and 8 indicate a belief that some such right already existed under Case I; but for the reasons I have given I am bound to hold that that belief was erroneous. So the question is whether the terms of those Paragraphs are such as merely to indicate a belief or whether they can be interpreted as enacting by implication that which Parliament, having its erroneous belief, did not find it necessary to enact expressly. In such circumstances I would not be averse from holding that there was an enactment by implication, but first I must be able to discover precisely what Parliament's belief was. Section 30 of the Finance Act, 1940, may well contain such an enactment: it is there made clear that Parliament believed that there was already a right to a certain deduction and the scheme of the Section will not work unless there is such a right, so it is not difficult to imply the enactment of that right. But the whole Section is limited to cases which are covered by an Order in Council and it is not possible to imply any enactment which goes beyond the scope of the Section. There has been no Order in Council which could apply to the present case: and therefore in my judgment, even if Section 30 were held to contain by implication an enactment authorising deductions such as those claimed by the Respondents, that would not help them as they are outside the scope of the Section.

Then it was said that an enactment allowing the deduction ought to be implied because without it there will be great injustice. If taxpayers have to pay excess profits tax in two countries without being entitled to such a deduction they may have to pay in taxation much more than their total profits. That is true, and I think that it has long been recognised by Parliament that applying the rigour of Income Tax principles to such cases is unjust. There is a whole series of statutory provisions designed to remove or at least mitigate this injustice in particular cases of double taxation. But it is the Respondents' misfortune that there is no such provision applicable to them for the years in question. They can only obtain relief if there is some general provision in their favour, and instead of enacting any such provision Parliament had, at least until 1939, preferred to deal with the matter otherwise.

The question is therefore narrowed down to this: Does Paragraph 5 of the Schedule to the 1939 Act, reinforced by Paragraph 8, contain or require the implication of an enactment that certain Dominion taxes are to be deductible in computing profits for United Kingdom Excess Profits Tax? I think that the question is a difficult one but I have come to be of opinion that it does not. Paragraph 5 is very misleading but to mislead a taxpayer is not the same thing as to entitle him to relief. It may well be that these Paragraphs show that Parliament was under a misapprehension as to the existing law at the time, but it does not necessarily follow that if Parliament had been correctly informed it would have altered the law. It is one thing to leave an old deduction untouched and quite another thing to enact for the first time a new deduction of a new kind. If Paragraph 5 were held to have enacted a new deduction several difficult questions would

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arise. That paragraph only refers expressly to Dominion income tax. Would the implied enactment be limited to Dominion income tax or would it also extend to excess profits tax—at least where that is assessed on income tax principles? And would it extend also to foreign income tax as does Case IV, Rule 1? Moreover the present case is an example of a puzzling situation which would arise if the Respondents were right. It is admitted that tax in Eire is assessable on the same principles as in the United Kingdom. So, if the Respondents are right here, they would have been entitled in Eire to a deduction of United Kingdom Excess Profits Tax payable by them. The amount of tax payable in the one country could not be determined until the amount of the deductions allowable there had been determined; but one deduction would be the amount of tax payable in the other country. The amount of tax payable in the other country could not be determined until the deductions allowable there had been determined: but one of those deductions would be the amount of tax payable in the first country. I see no way in which this circle could be broken. Parliament provided for this difficulty in Section 30 (1) of the 1940 Act which I have quoted; but, as I have said, that Section cannot apply to this case, and I cannot see how any appropriate provisions to deal with this matter could be read into the 1939 Act. For all these reasons I am unable to hold either that there was any provision before 1939 which could entitle the Respondents to the relief which they claim or that there is anything in the 1939 Act which so entitles them. I therefore agree that this appeal should be allowed.

Lord Radcliffe.—My Lords, I agree that this appeal should be allowed. I would be content to say no more than this: but I will add a few words out of the respect that I feel for any judgment of Somervell, L.J., on this subject.

Two main questions are involved in the Respondents' claim to deduct a proportion of the income and profits taxes that they have paid in Eire when computing their trade profits for the purpose of assessment to Excess Profits Tax in this country. The first question is whether such a deduction would be admissible in a computation of profits under Case I of Schedule D, apart from any special statutory rules about Excess Profits Tax. The second question is whether there is to be found in the legislation imposing Excess Profits Tax some rule that makes this a permissible deduction, even if it would not be so in an ordinary Case I assessment to Income Tax.

The first question was answered by the Special Commissioners in the affirmative. They expressed the opinion that the payment of these Eire taxes was a "necessary expense for the Respondent Company, in carrying "on part of its trade at branches in England". I think that, on the information available to them and to us, they made an error of law in expressing that opinion. I do not think that such a view was open to them having regard to the established law as to the principles that govern the ascertainment of what is a necessary expense for this purpose. Their view is in conflict with what was said by Lord Davey in *Strong v. Woodfield*, 5 T.C. 215, at page 220: "It is not enough that the disbursement is "made in the course of, or arises out of, or is connected with, the trade "or is made out of the profits of the trade. It must be made for the "purpose of earning the profits".

In this case there is no material that makes it possible to say that these taxes (let alone any particular proportion of them) were paid for the purpose of earning such profits as were earned in the United Kingdom.

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There is much to be said for the criticism that Lord Davey's speech in *Strong v. Woodifield* (*supra*) imposes too limiting a criterion as to what is a permissible deduction by way of trade expenditure: but I do not know a wider one that is not vulnerable in other ways, and the fact is that his criterion has stood for so long and been so often applied that it has become, as it were, part of our Income Tax language. It led directly to the decision of the Court of Appeal in *Rushden Heel Co., Ltd. v. Inland Revenue Commissioners*, 30 T.C. 298, and to the decision of this House in *Smith's Potato Crisps v. Inland Revenue Commissioners*, 30 T.C. 267.

It is true that both those decisions bore upon the question of deducting Excess Profits Tax paid in this country in a computation of profits, and the question before us relates to a deduction of income and profit taxes paid in another country. But once it is accepted that the criterion is the purpose for which the expenditure is made in relation to the trade of which the profits are being computed, I have been unable to find any material distinction between a payment made to meet such taxes abroad and a payment made to meet a similar tax at home. Certainly the case of *Stevens v. The Durban and Roodepoort Gold Mining Co., Ltd.*, 5 T.C. 402, suggests none. I think that it is no authority at all on the point that we are now considering. That point was not even argued.

Now the Court of Appeal in this case have based their decision mainly on the ground that Parliament has shown a clear intention in its enactments relating to Excess Profits Tax that there should be a deduction in respect of income and profits taxes paid abroad. This intention is said to be shown in one case by Paragraph 5 of Part I of the 7th Schedule of the Finance (No. 2) Act, 1939, which Paragraph repealed Sub-section (4) of Section 27 of the Finance Act, 1920, for the purposes of Excess Profits Tax computations, and in the other case by Section 30 of the Finance Act, 1940. I do not think that either of these provisions, on any view, shows an intention to make law or to declare law in any way that bears upon the subject of the present appeal, but I will deal with that aspect of the matter later. The first thing that strikes me about this argument as a whole is that if Parliament did really intend that for the purposes of Excess Profits Tax there should be a different rule as to deduction of foreign taxes from that prevailing under Case I of Schedule D for the purposes of Income Tax, they concealed their intention with a more than Baconian obscurity. For, whereas it is explicitly provided by Section 18 of the Finance (No. 2) Act, 1939, that Excess Profits Tax is an allowable expense for the purposes of Income Tax and it is explicitly provided by Paragraph 8 of Part I of the 7th Schedule that United Kingdom Income Tax, National Defence Contribution and Excess Profits Tax are not to be allowable expenses for the purposes of Excess Profits Tax—provisions which, necessary or unnecessary, are at least precise—the allowability of foreign taxes if they are to be allowed is only to be deduced from a devious chain of reasoning based on this Paragraph 5. This consideration alone would lead me to think that the Legislature did not intend to enact a new rule for Excess Profits Tax as opposed to Income Tax on this point, although it may well be that those who framed the Excess Profits Tax legislation supposed that foreign taxes were as much deductible for the purpose of one computation as for the purpose of the other. If they did, they were, as I have said mistaken.

But I do not think that the repeal of Sub-section (4) of Section 27 of the Finance Act, 1920, has any bearing on the present problem. That

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sub-section did away with the deduction of any sum paid by way of Dominion income tax, "Notwithstanding anything in the Rules applicable to Case IV or Case V of Schedule D, or in any other provision of the "Income Tax Acts": it gave in exchange the relief provided by the rest of Section 27. There can be no doubt what Rules of Case IV and Case V were being referred to: they were in each case Rule 1 of the Rules applicable to those respective Cases (the Case V Rule being a mere echo of the Case IV Rule) and they did provide for the deduction of income tax paid abroad in respect of income assessable under those Cases and they also said that such tax could be deducted by the authority of those Rules "where such a deduction cannot be made under any other provision of this Act". But they had been saying that and, in effect, in just those words ever since the Finance Act, 1914, Section 5, had enlarged the area of income assessable under Case IV from a remittance basis to the larger basis of income arising in the place of source. That enlargement had been accompanied by the grant of this right to deduct the foreign tax on that income, if the deduction could not be made under any other provision of the Income Tax code. The 1918 Income Tax Act merely consolidated those enactments. But the "other provision" could only be some provision that authorised a taxpayer in receipt of income "arising from securities out of the United Kingdom, except such income as is charged under Schedule C" (I quote the words of Case IV) to deduct tax in computing that income. I do not see how it could possibly authorise the inference that there was some statutory provision which allowed foreign taxes to be treated as allowable expenditure for the purposes of the trade when income has to be computed under Case I of Schedule D. In truth, as is well known, allowable expenses under Case I are not so much the product of express provision as inferences from the words "the balance of the profits and gains" or inferences from the prohibited deductions which are listed in Rule 3 of the Rules applicable to Cases I and II.

It remains extremely difficult to say what was actually achieved by Paragraph 5 of Part I of the Finance (No. 2) Act, 1939, having regard to the requirement of Section 14 (1) that the principles of computation that are to be applied are those of Case I of Schedule D, subject to the specific modifications laid down by the Act. I think, though I do not come to any final conclusion about this, that Paragraph 5 was put in because of the transfer to Case I for Excess Profits Tax purposes of certain kinds of income, such as those provided for by Paragraph 6, which would normally have been assessed under Cases IV or V. However that may be, I am satisfied that there is no permissible inference to be drawn either from Section 27 (4) of the Finance Act, 1920, or from Paragraph 5 of Part I of the 7th Schedule of the Finance (No. 2) Act, 1939, as to foreign taxes being an allowable expenditure when the profits of a trade are being computed for the purposes of Case I of Schedule D. If that is so, I do not think that your Lordships need trouble further with the obscure significance of that Paragraph.

The case is different when one turns to Section 30 of the Finance Act, 1940. It seems to me very probable indeed that this Section was framed on the basis that excess profits tax paid in any part of His Majesty's Dominions outside the United Kingdom would be an allowable expenditure in computing profits for the purposes of Excess Profits Tax in the United Kingdom. Even that is not a certain inference, for all that the Section does is to authorise an adjustment which is regulated by a calculation of what the situation would be if overseas excess profits tax were allowed. But

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suppose that it was in fact the assumption that this allowance could be claimed in the ordinary course, so far as overseas excess profits tax payments are concerned; still the Section affords no authority for giving the allowance if it is not otherwise permissible. The only authority that it gives is one that comes into existence if an Order in Council has been made, and none has been made that governs this case. If the Order in Council has been made then the only adjustment which Parliament allows under this Section is one that gives effect to "the arrangements" covered by the Order, even though in any particular case the adjustment may have to be larger than the "arrangements" above would justify because of the requirement that it is not to be less favourable to the taxpayer than it would be if the overseas excess profits tax were itself deducted.

What it comes to is this. Parliament has not made any enactment that requires or authorises the making of the allowances now claimed. It has not declared the law to be that such allowances are proper deductions. The most that can be said is that it is fairly certain that those who framed Section 30 of the Finance Act, 1940, believed that such allowances ought to be given or were in fact being given (which is not always quite the same thing in this field). But if that is all that can be said it is, with all respect to the Court of Appeal, a misuse of words to say that the Law Courts ought to give effect to the "intention" of Parliament that overseas excess profits tax should be allowed. The beliefs or assumptions of those who frame Acts of Parliament cannot make the law. Section 30 will be just as much effective in those cases when it does operate as it would be if overseas excess profits tax were not, in general, an allowable deduction, for wherever it operates it operates under the authority given by Parliament in that Act and not otherwise. This is not the first occasion upon which a somewhat similar problem has been presented to your Lordships' House, and in face of the abiding complexity of Income Tax legislation I do not suppose that it will be the last. But if the House felt no difficulty in the *Ayrshire Employers Mutual Insurance Association* case, 27 T.C. 331, in disregarding the plain, though mistaken, assumption of the Legislature as to the prevailing law, I do not think that your Lordships need feel even as much embarrassment in the present case.

Lord Tucker.—My Lords, I concur.

Questions Put:

That the Order appealed from be reversed, except as to costs.

The Contents have it.

That the Order of the Queen's Bench Division be discharged.

The Contents have it.

That it be declared that the taxes incurred by the Respondent Company in Eire were not wholly and exclusively laid out for the purposes of the Company's trade in the United Kingdom.

The Contents have it.

That it be further declared that no part of the said taxes are an admissible deduction in computing the profits of trade for the purposes of Excess Profits Tax in the United Kingdom.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Last, Sons & Fitton for Crofton, Craven & Co.]