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No. 953—High Court of Justice (King's Bench Division)—15th and 19th December, 1933

Court of Appeal—2nd and 3rd May, 1934

House of Lords—25th and 26th February and 15th March, 1935

Simpson (H.M. Inspector of Taxes) *v.* The Grange Trust, Ltd.[1]

Income Tax—Investment trust company not assessable under Case I *of Schedule D—Claim for relief in respect of expenses of management—Income Tax Act*, 1918 (8 *&* 9 *Geo.* V, *c.* 40), *Section* 33 (1).

The Respondent Company, an investment trust company which was admittedly not carrying on a trade the profits of which were assessable to Income Tax under Case I *of Schedule D, preferred a claim under Section* 33 *of the Income Tax Act*, 1918, *to repayment of Income Tax in respect of its expenses of management. H.M. Inspector of Taxes objected to the claim on the ground*, inter alia, *that the proviso* (*a*) *to Section* 33 (1) *applied to all companies and banks claiming relief under the Section and not* (*as the Company contended*) *only to companies and banks whose profits the Crown were entitled to charge under Case* I *of Schedule D, and that, as the amount of tax paid by the Company for the year of claim was less than the tax which would have been paid if the profits had been charged in accordance with the Rules of Case* I, *no relief was due to the Company. The Special Commissioners allowed the claim.*

Held, *that proviso* (*a*) *to Section* 33 (1) *applied only in the case of companies and banks whose profits could, at the option of the Crown, be assessed under Case* I *of Schedule D, and that the Respondent Company was entitled to the relief claimed.*

Case

Stated under the Income Tax Act, 1918, Sections 33 (2) and 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. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 15th December, 1932, we heard the claim of The Grange Trust, Ltd., hereinafter called " the Company ", for relief under Section 33 of the Income Tax Act, 1918, for the year 1931–32, in respect of its expenses of management.

[1] Reported (C.A.) [1934] 2 K.B. 317 ; (H.L.) 51 T.L.R. 320.

2. The Company's claim for relief under Section 33 had been objected to by the Inspector of Taxes on the ground that proviso (*a*) of Section 33 (1) applied to this claim and that as a result no relief was due.

The relevant provisions of Section 33 (1) are as follows :—

"33 (1) Where an assurance company carrying on life "assurance business, or any company whose business consists "mainly in the making of investments, and the principal part of "whose income is derived therefrom, or any savings bank or "other bank for savings, claims and proves to the satisfaction "of the special commissioners that, for any year of assessment, "it has been charged to tax by deduction or otherwise, and has "not been charged in respect of its profits in accordance with "the rules applicable to Case I of Schedule D, the company or "bank shall be entitled to repayment of so much of the tax "paid by it as is equal to the amount of the tax on any sums "disbursed as expenses of management (including commissions) "for that year :

"Provided that—(*a*) relief shall not be given under this "section so as to make the tax paid by the company or bank "less than the tax which would have been paid if the profits "had been charged in accordance with the said rules."

3. The Company, which was incorporated in 1926, carried on the business of an investment trust company. It was admitted by the Inspector of Taxes that the Company was not carrying on a trade, the profits of which were assessable under Case I of Schedule D.

A copy, marked "A", of the Memorandum and Articles of Association of the Company is annexed hereto and forms part of this Case(1).

4. The Company's year of account ends on the 31st May. The management expenses of the Company for the year ended the 5th April, 1932, arrived at by aggregating one-sixth of the expenses for the year ended the 31st May, 1931, and five-sixths of the expenses for the year ended the 31st May, 1932, amounted to £2,294, and the Company's claim was for repayment of the sum of £573 10*s*. 0*d*. being the tax at 5*s*. in the £ on £2,294.

A statement, marked "B", showing particulars of the claim is annexed hereto and forms part of this Case(1).

5. The receipts of the Company were derived from Shares and Bonds of English and Foreign Companies, and from interest on State and Municipal Loans. Nearly the whole of the receipts were taxed by deduction. The greater part of such receipts fell within the charge under Schedule D, but about 15 per cent. fell under Schedule C.

(1) Not included in the present print.

A statement, marked " C ", showing an approximate analysis of the Company's receipts is annexed hereto and forms part of this Case(1).

6. If the Company's profits had been charged in accordance with the Rules applicable to Case I of Schedule D, on the basis of no tax having been deducted at the source, the amount of the tax which would have been paid for the year 1931–32, based on the profits for the Company's year ended on the 31st May, 1930, would have been tax on a sum of £48,048. The amount of tax actually paid by the Company (by deduction and by direct assessment) for the year ended the 5th April, 1932, computed by taking one-sixth of the tax so paid for the year ended the 31st May, 1931, and five-sixths of the tax so paid for the year ended the 31st May, 1932, amounted to tax on a sum of £42,159.

A copy, marked " D ", of a statement showing how these amounts were arrived at, is annexed hereto and forms part of this Case(1).

7. The Inspector of Taxes had objected to the claim on the ground that the amount of tax paid by the Company was less than the tax which would have been paid if the profits had been charged in accordance with the Rules applicable to Case I of Schedule D.

Copies, marked E1, E2, E3, of the Reports and Accounts of the Company for the three years ended the 31st May, 1930, 31st May, 1931, and 31st May, 1932, are annexed hereto and form part of this Case(1).

8. It was contended on behalf of the Company :—

(1) That under the decision in the case of *The Rosyth Building & Estates Co., Ltd.* v. *Rogers*, 8 T.C. 11, proviso (*a*) of Section 33 (1) could only be applied to the claim of a company, the profits of which the Crown was entitled to charge under Case I of Schedule D ;

(2) That this Company was admittedly not chargeable under Case I of Schedule D ;

(3) That proviso (*a*) did not apply to the claim of the Company ;

(4) That even if proviso (*a*) applied the hypothetical assessment ought to be based on the Company's profits for the year to the 31st May, 1931, corresponding to the Income Tax year 1931–32, and not on its profits for the year to the 31st May, 1930, corresponding to the Income Tax year 1930–31 ;

(5) That in the alternative, if proviso (*a*) did apply, the only profits of the Company which would be chargeable in accordance with the Rules of Case I of Schedule D, were the profits which were not chargeable under any other Schedule and had not been already charged by deduction ; and

(6) That the claim should be allowed.

(1) Not included in the present print.

9. It was contended on behalf of the Inspector of Taxes :—

(1) (*a*) That on a true construction of Section 33 (1), proviso (*a*) applied to all companies and banks which claimed repayment under its provisions, whether the profits of such companies or banks were assessable to tax under Case I or otherwise ;

(*b*) That, accordingly, the said proviso applied to the present claim ;

(2) That the tax which would have been paid if the profits had been charged in accordance with the said Rules (*i.e.*, the Rules applicable to Case I of Schedule D) was tax on the profits of the Company for the year ended 31st May, 1930, in accordance with the Income Tax Act, 1918, Schedule D, Rules applicable to Case I, and the Finance Act, 1926, Sections 29 and 34 ;

(3) (*a*) That such last mentioned amount of tax was tax on a sum of £48,048, arrived at as set out in paragraph 6 above ;

(*b*) That, accordingly, as the tax which has been paid by the Company (*i.e.*, tax on £42,159—see paragraph 6 above) was less than the tax on £48,048, no relief was due to the Company ;

(4) Alternatively to (3) above that if in calculating the amount of " tax which would have been paid if the profits had been " charged in accordance with the said rules "—for whatever year such tax had to be calculated—the profits of the Company were to be arrived at by excluding from the computation receipts taxed by deduction, " the tax which " would have been paid " by the Company would be the tax on the profits as so computed together with the tax deducted from its interest and dividends, and that the aggregate of these amounts would be greater than the tax actually paid by the Company for the year 1931–32 ; and

(5) That the claim should be refused.

10. Having considered the arguments we gave the following decision :—

" (1) The view held by the Court of Session in the case of " *Rosyth Building and Estates Co., Ltd.* v. *Rogers*, that, in " order that proviso (*a*) of Section 33 (1) of the Income Tax " Act, 1918, may operate, the Company must be capable " of assessment under Case I of Schedule D, was left " untouched by the observations made on that case in the " case of *Salisbury House Estate, Limited*, v. *Fry*, 15 T.C. " 266.

" The Appellant Company is admittedly not assessable " under Case I of Schedule D, and consequently following

" the view of the Court in the *Rosyth* case, we hold that " the proviso cannot be applied in this case.

" We accordingly allow the claim in principle.

" (2) If we are wrong in this opinion and what is required by " the proviso is a notional assessment under Case I of " Schedule D, whether the Company is capable of assess- " ment under that Case or not, we hold that that notional " assessment must include the whole profits of the Company " irrespective of the Schedule under which they are actually " taxed, and must be computed on the previous year's " profits in the manner laid down in the Rules of Case I.

" Even if this is not so the ' tax which would have been " ' paid ' by the Company includes in our opinion not only " the tax which would have been paid under the notional " Case I assessment but also that paid by the Company by " deduction or under the other Cases or Schedules."

11. If we are wrong on both (1) and (2) above it is requested that the Case be remitted to us for consideration of the figures in accordance with the judgment of the Court.

12. The Appellant 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 Income Tax Act, 1918, Sections 33 (2) and 149, which Case we have stated and do sign accordingly.

J. JACOB,
H. M. SANDERS, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
22nd June, 1933.

The case came before Finlay, *J.*, in the King's Bench Division on the 15th and 19th December, 1933, and on the latter date judgment was given against the Crown, with costs.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. J. H. Stamp for the Company.

JUDGMENT

Finlay, J.—This is a case which I hope may go further, because I think it is in a rather unsatisfactory position. I have heard very able arguments from Mr. Latter on the one side and Mr. Hills in his reply on the other, and I am satisfied that, if the matter is open,

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there is a great deal which requires attentive consideration, and, certainly, if I had felt that the matter was at large to me, I should have desired to consider the points of real force on the one side and on the other which were brought to my attention. But I am prepared to decide the case upon a narrow point and with regard to the arguments to which I have listened I only say this : that it is clear that, if the case goes further, as I have already said I hope it will, all points on the one side and on the other, all the points which were urged upon me by Mr. Latter and all the points which were urged upon me by Mr. Hills—points arising upon the Case—will be open.

The view which I have formed is that there is in the *Rosyth* case, in 8 T.C. 11, reasoning leading up to, and lying at the root of, the decision which has not been overruled. In my view, there were several things decided in that case. The final thing which was decided in that case was that one could, in computing income for Schedule D, bring in Schedule A rents. That is wrong. It is wrong because the House of Lords in a very well-known case, the *Salisbury House* case(1), has said that it is wrong; and I entertain no doubt, therefore, that on that point the decision was overruled and cannot stand with the *Salisbury House* case. But when one looks, as one must look, at the reasoning of the Judges in the *Rosyth* case(2), it does seem to me that the Special Commissioners here were right in the view which they took.

It is probably right that I should, only in a sentence or two, just state how the matter arises on the Case. It is this. A company, called The Grange Trust, Limited, applied for relief under Section 33 of the Income Tax Act, 1918. That is a Section giving relief in respect of expenses of management, and it is a Section consolidating two or three Sections in the Finance Act of 1915. The Inspector resisted that and he said that proviso (*a*) applied to the claim and in the result there was no relief due. Proviso (*a*) is this : " Relief shall not be given under this section so as to make " the tax paid by the company or bank less than the tax which " would have been paid if the profits had been charged in accordance " with the said rules." Here the Company was one which, as it is found, was incorporated in 1926 and it carried on the business of an investment trust company. It is stated in the Case that there was an admission by the Inspector of Taxes that the Company was not carrying on a trade the profits of which were assessable under Case I of Schedule D.

The first contention of the Company was this : " That, under " the decision in the case of *The Rosyth Building & Estates Co. Ltd.* " v. *Rogers*(2), proviso (*a*) of Section 33 (1) could only be applied " to the claim of a company, the profits of which the Crown was

(1) 15 T.C. 266. (2) 8 T.C. 11.

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" entitled to charge under Case I of Schedule D." The first contention of the Inspector of Taxes was: " That, on a true con- " struction of Section 33 (1), proviso (*a*) applied to all companies " and banks which claimed repayment under its provisions, whether " the profits of such companies or banks were assessable to " tax under Case I or otherwise." In these circumstances the Special Commissioners gave their decision, and what, in effect, they said was that the view held by the Court of Session in the *Rosyth* case, that in order that proviso (*a*) of Section 33 may operate, the company must be capable of assessment under Case I, was left untouched by the observations made on that case in the *Salisbury House* case(1).

One has to look at the *Rosyth* case to see what it did decide. The judgments have been very carefully read and analysed to me by Mr. Latter from the one point of view and by Mr. Hills from the other; and the curious position, as I mentioned in the argument, arose, that Mr. Latter said that the decision was wrong, but this part of the reasoning stood, and Mr. Hills said that the decision was right, and right because it could be supported on the view of a notional assessment, but that part of the reasoning was wrong and ought not to be allowed.

Looking at the *Rosyth* case—I am not going through the judgments again, having had them so fully read to me—it does seem to me that there were two distinct things there decided. The first thing, and it is material for the present case, is that the companies must be capable of assessment under Case I. It then went on to decide, and wrongly to decide, that, in computing its income under Case I, rents could be brought in. I am unable to resist the view that not only Lord Skerrington, who puts it perhaps most clearly, but also the Lord President in 8 T.C. at page 16, and also Lord Mackenzie, do quite clearly decide that there must be a company susceptible of assessment under Case I, not merely notionally, but actually, that the company must be, so to speak, a Case I company. That that is said in the judgments, and is said with the utmost clearness in the judgment of Lord Skerrington, is beyond question.

I listened with attention, as I always do listen with attention, to Mr. Hills' argument and I do appreciate the serious difficulties which arise on it, but I have looked, and looked twice, at the speeches in the House of Lords and I cannot say that that part of the reasoning in the *Rosyth* case is overruled. Reliance was placed upon some observations of Lord Atkin. Reliance was placed upon some observations of Mr. Justice Rowlatt. I do not think that those observations are sufficient to enable me to say that that part of the reasoning is in any way overruled. Both Lord Atkin and

(1) 15 T.C. 266.

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Mr. Justice Rowlatt appear to have been attracted by what one may call the notional assessment. I am deliberately refraining from expressing any opinion upon these matters, though one is tempted, by the extremely interesting and ingenious argument which I heard, to express an opinion on more than one point, but I refrain, and refrain deliberately, for this reason. Where there is a decision, particularly a decision of the Inner House, in Scotland, I conceive that here I ought to follow. Here I think there is a decision, or anyhow reasons, of three Judges sitting in the First Division in Scotland, and I am not satisfied that anything that has since happened has qualified that reasoning, or that there is authority for saying that the House of Lords, who could have done it, of course, have overruled that reasoning. Therefore, I follow what I conceive to be the correct rule in a case of this sort, repeating my hope that the matter may go further; I say that I feel myself bound by the reasoning of the Court of Session in the *Rosyth* case and, not presuming to express any opinion either that that reasoning is right or is wrong, I adopt the same course as the Special Commissioners adopted and apply that reasoning, and, accordingly, I dismiss this appeal.

Mr. Latter.—The appeal will be dismissed with costs?

Finlay, J.—Yes.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 2nd and 3rd May, 1934, and on the latter date judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. J. H. Stamp for the Company.

JUDGMENT

Lord Hanworth, M.R.—This appeal fails. It involves the construction of a very difficult Section, Section 33 of the Income Tax Act of 1918, and I confess that my mind has from time to time fluctuated a good deal as to what is the right interpretation of that Section. It is designed to give relief to insurance companies and some other companies in respect of management expenses. The history of the Section is this. Section 14 of the Finance Act, 1915, first introduced the relief which is contained in the body of Section 33 (1) of the Income Tax Act, 1918, to insurance companies, and by Section 21 (2) of the Act of 1915, that relief was extended to savings banks. It was demanded by certain other companies that they should also have the relief which had been accorded by virtue of

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Sections 14 and 21 of the Finance Act, 1915—that is, one ought to say, the first Finance Act of 1915, because, as most of us remember, there was a second Finance Act of that year—and Section 33 (1) gave effect to this wish. That this is the history of the matter does not, however, help us, because we have simply to construe the Section as it stands.

The facts in the present case are these. The Company was incorporated in 1926 and carried on the business of an investment trust company. It was admitted by the Inspector of Taxes that the Company was not carrying on a trade the profits of which were assessable under Case I of Schedule D. The Company being one which did not carry on a trade, but carried on the business of an investment trust company, it has claimed that it comes within Sub-section (1) of Section 33, as being a company whose business consists mainly in the making of investments, and one whose income, as it was able to prove to the satisfaction of the Special Commissioners, was derived from investments. In the present case we are told that the receipts of the Company were derived from shares and bonds in English and foreign companies and interest on state and municipal loans, and nearly the whole of the receipts were taxed by deduction. They therefore said : " We have now, on those " facts, qualified for relief which is tendered, or available, under " Sub-section (1) of Section 33." The Inspector of Taxes countered that by saying : " Your relief is limited, and it is limited by virtue " of the terms of proviso (*a*), which says that ' relief shall not be " ' given under this section so as to make the tax paid by the com- " ' pany or bank less than the tax which would have been paid if " ' the profits had been charged in accordance with the said rules.' " Those are the Rules under Case I. We have got, in paragraph 6 of the stated Case, a statement whereby, under certain circumstances, a calculation has been made that, if the profits of the Company had been treated under Case I, the amount which would then have been chargeable to tax would have been a sum of £48,048, whereas, in truth and in fact, according to the measure which is appropriate to this Company, which receives its whole income, or practically its whole income, from the fruit of shares and bonds and from interest on state and municipal loans, properly taxed in accordance with the Income Tax Act, the sum which is chargeable to tax is £42,159, and no more. The Inspector of Taxes contended that on a true construction of Section 33 (1), proviso (*a*) applies to all companies which claim repayment under its provisions, whether the profits of such companies or banks are assessable to tax under Case I or otherwise, and, accordingly, that the proviso applied to the present case, although the Company had not been taxed under Case I of Schedule D.

We are, therefore, face to face with the problem of interpreting the Sub-section and saying whether it is of such wide application that it applies to a company which has not been assessed in accordance

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with Case I of Schedule D, but which has been assessed in accordance with the provisions generally applicable to such a company as this one. The Section is distinctly obscure. I will read Sub-section (1) of Section 33, leaving out the immaterial words. It says this: "Where . . . . any company whose business consists mainly in the "making of investments, and the principal part of whose income is "derived therefrom . . . . claims and proves to the satisfaction of "the special commissioners that, for any year of assessment, it has "been charged to tax by deduction or otherwise, and has not been "charged in respect of its profits in accordance with the rules "applicable to Case I of Schedule D, the company . . . . shall be "entitled to repayment of so much of the tax paid by it as is equal "to the amount of the tax on any sums disbursed as expenses of "management . . . . for that year: Provided that—(*a*) relief shall "not be given under this section so as to make the tax paid by the "company . . . . less than the tax which would have been paid if "the profits had been charged in accordance with the said rules." I do not hide from myself that, if that proviso, especially the last hypothetical part of it, is to apply to all companies, so that to the figures provided by the company there is to be applied the formula or system provided by Case I and the Rules thereunder, then it may be well said that this proviso would apply in the present case to cut down the relief which is given to this particular Company under the operative part of Sub-section (1). But one has, first of all, to appreciate the general system which is in operation under the Income Tax Acts. First of all, it must be remembered that certain companies, certain businesses, are to be charged under different Schedules according to their characteristics. It is not every trading company or every person that is to be charged in respect of the trade under Schedule D. Case I indicates that there may be trades which are to be charged in a different way from Schedule D. Case I of Schedule D is as follows—and, again, I read the operative part of the Section: "Tax under this Schedule shall be charged under the "following Cases respectively; that is to say,—Case I.—Tax in "respect of any trade not contained in any other Schedule"; and you will find under Case VI: "Tax in respect of any annual profits or "gains not falling under any of the foregoing Cases, and not charged "by virtue of any other Schedule." In its terms, therefore, the Cases which are within Schedule D are not to include every possible case of a trade, but only the trades which are not contained in any other Schedule.

It has been pointed out in the *Salisbury House* case, 15 T.C. 266, that Lord Dunedin says, at page 312, that, while the Crown cannot select under which Schedule they shall charge a particular subject, they can choose between the Cases and select the Case of Schedule D under which tax shall be charged. His words are these: "From this "the Lord President has without authority deduced the view that

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"as there is an option between Cases so there must be an option "between Schedules, and he bases this in argument on the possibility "of an insurance company having securities which would fall under "Schedule C and others falling under Schedule D. My Lords, "I confess this has been the difficult part of the case to me. It "is very obvious to suggest that if the Crown can opt as between "Cases why should it not opt as between Schedules. And that the "Company is carrying on a business I do not doubt. The "Memorandum of Association shows that it is. But I think "the answer is that an option between Cases does not in any way "disturb the general scheme of the Act: an option between Schedules "would. I think on a general survey of the history and policy "of the Income Tax Acts one finds the great distinction that there "is between Schedules A and B on the one hand and the other "three Schedules on the other." One, therefore, has to bear in mind that the Schedules cover certain cases which are appropriate respectively to them, but there is still left an option to tax and to charge under one Case or another Case of the particular Schedule which is appropriate to the case upon the facts. In the case of insurance companies, if a case is wanted to show that a choice may be made, it is to be found in the case of *Liverpool & London & Globe Insurance Company* v. *Bennett*, 6 T.C. 327. The Master of the Rolls, at page 368, said this: "The question is whether the "Appellant Company can be charged under Case I, in Schedule D, "in respect of the income of certain American and Canadian "investments, or whether they can only be charged under Case "IV, in respect of such moneys as are actually received in Great "Britain. The general principle has been laid down in the Court "of Session by Lord Dunedin"—and then he cites the passage from the case of *Revell* v. *Edinburgh Life Insurance Company*[1] —and goes on: "I feel no doubt that the Crown has an option "to tax under Case I, or under Case IV, in any state of circumstances "falling within that case." It is important then to bear in mind when considering the operative part of Sub-section (1) of Section 33 and the proviso attached to it, which, as Lord Justice Slesser pointed out in the course of the argument, *prima facie* is intended to be appropriate to the operative Sub-section to which it is a proviso, that there are some cases in respect of which an option can be exercised as to whether the subject shall be charged under Case I or another of the Cases in Schedule D, and it then becomes easy, or comparatively easy, to construe the proviso (*a*), because then you are able to consider the hypothesis in the last portion of the proviso: "if the profits had been charged in accordance with the said rules", namely, the Rules of Case I.

But it is argued for the Crown that there could be what is called a notional assessment under Case I. Although that Case is

(1) 5 T.C. 221, at p. 226.

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not appropriate, and although the subject would fall within a different Schedule and a different mode of assessment would be appropriate, yet it is said that you can have a notional assessment made upon the Company, taking the figures as you find them and treating them as if they fell to be charged under Case I. Following out that principle, we are given, in paragraph 6 of the Case, a figure of £48,048, which, it is said, would have been the sum on which tax would have fallen if the Rules applicable to Case I of Schedule D had been applied. But that is really an arbitrary course. We have here a company which was not carrying on a trade, the income of which was, as to nearly the whole of it, taxed by deduction. There are many difficulties in applying Case I to such a company. Take, for instance, the provisions in Rule 3 of the Rules applicable to Cases I and II of Schedule D as to the allowances which are to be made in computing the amounts of the profits or gains to be charged. There are a number of matters in regard to which one would have to make some sort of modification or adjustment in order appropriately to fit or apply the Rules under Case I to a company which was not appropriately charged under that Case. To my mind, that is exactly what the House of Lords have said in *Ormond Investment Company, Ltd.* v. *Betts*, 13 T.C. 400, ought not to be done. Mr. Justice Rowlatt had pointed out the difficulty of applying that case to a company which had started a business too late to make it possible to find a standard for charge, and when the case was before the Court of Appeal I ventured to say this, at page 413 : " For my part, I cannot but " accept the view that those words are intended referentially to bring " in Case I with its concomitants " ; because Case V had said that the amount of the tax is to be computed on the full amount of the three preceding years as directed in Case I, and I had accepted, as I thought rightly, that direction bringing in the concomitants, the Rules and the concomitants applicable to Case I. Lord Sumner definitely said that that was not right. He says this at page 431 : " I cannot accept this. The analogy between the date of starting " a trade, which is an aggregate of many operations, and the date " when an investor buys a stock to hold, is too remote to be " applicable, and in any case the Crown does not tax by analogy " but by Statute, and there is nothing in the Act which says what " is here contended for." Well, I agree, respectfully, and I say that in endeavouring to apply my analogy, in order to make the subject chargeable, I was wrong in suggesting that you could bring in referentially some other Rules which might be appropriately used to find a basis for the tax. Shortly put, the Crown does not tax by analogy but by statute. Applying that rule to the present case, this appears to me : it may be that the Section is imperfect ; it may be that it works too much in favour of the subject or too much in favour of the Crown. I do not know. But whatever it is, it does mean that the Court must take the words of the statute as

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they are, and cannot bring in, however appropriate they may seem to be, some other Rules, or adopt some system so as to try and cover the present case.

I therefore look at the words of the proviso. Do they necessarily apply to all companies coming within Sub-section (1) or do they cover only the case which could properly be taxed under Case I? It says this: "Provided that—(*a*) relief shall not be given under "this section so as to make the tax paid by the company . . . . less "than the tax which would have been paid if the profits had been "charged in accordance with the said rules;" I add: "As they "might have been if, instead of choosing a different Case, the charge-"ability to tax had been worked out under Case I—as, in some cases, "it could be, at the option of the Crown." Once you bear in mind that there is such an option and that there may be cases in which a different mode of assessment is applied, although Case I might have been applied then, I think, you can give a full meaning to the hypothesis contained in the proviso, and I think the words then are to be limited in the proviso to the cases in which the profits could have been and might have been charged under the said Rules. That, to my mind, really answers the case. The Crown contend that: "On a true construction of Section 33 (1), proviso (*a*) applied "to all companies and banks which claimed repayment under its "provisions, whether the profits of such companies or banks, were "assessable to tax under Case I or otherwise," and "that, accordingly, "the said proviso applied to the present claim." I think that so to interpret the Section and proviso would be to run counter to the *Ormond* v. *Betts* case[1]; it would be to mould the Section and proviso in a manner which is not necessary when you regard the whole policy and system of the Income Tax Acts.

Under those circumstances, it appears to me that the contention of the Crown is wrong. I will only add this. I quite agree that proviso (*b*) and proviso (*c*) must also be taken into account when you are reading the Sub-section and its proviso (*a*), but proviso (*b*) seems to me quite appropriate when proviso (*a*) is construed in the manner I have suggested, because it provides that the amount of income or profits derived from sources not charged to tax shall be deducted from the expenses of management. As in the case of proviso (*b*), there are particular cases in which what may be called the detailed provisions in proviso (*c*) will be appropriate and must be brought into play. Those parts of the provisos (*b*) and (*c*) do not, however, militate against the interpretation which I have given to proviso (*a*), and I have come further to the conclusion that it is not right to say that this proviso applies to all companies which claim repayment and I hold that the proviso does not apply to the present claim. It is a case in which the liability to tax need not be, and would not be, notionally brought within Case I, and, if that be so, I think the claim of the Crown cannot succeed. I think that the idea of a

(1) 13 T.C. 400.

(Lord Hanworth, M.R.)

notional assessment is no longer tenable. I agree with Mr. Latter's argument that the observation which was made by Mr. Justice Rowlatt in *Collyer* v. *Hoare*(1) has been disposed of by the observations by Lord Dunedin which appear in the *Salisbury House* case in 15 T.C., at page 312. The idea of a notional taxation is one which it is no longer possible to adopt.

For these reasons, the appeal fails and must be dismissed with costs.

Slesser, L.J.—I agree. The relief given to the appropriate companies under Section 33 (1) of the Act of 1918 may arise in two different ways. It is made essential by the language of that Subsection that it be proved to the satisfaction of the Special Commissioners that, for any year of assessment, a company "has been "charged to tax by deduction or otherwise, and has not been charged "in respect of its profits in accordance with the Rules applicable to "Case I of Schedule D" but the finding that the company has not been charged in respect of its profits may arise either because the Crown has elected, in a case where the company is assessable under Case I, Schedule D, to charge it under some other Case, or it may be that the company has not been charged because the company is not chargeable under Case I in any event.

There is no doubt in my mind that proviso (*a*), which limits the amount of relief which may be attributed to expenses of management, including commissions, applies in the case where the Crown had the option to charge either under Case I or otherwise and elected not to charge under Case I. In that case there is no difficulty in applying the language of the proviso, because it says: "Relief shall not be given under this section so as to make the "tax paid by the company .... less than the tax which would "have been paid if the profits had been charged in accordance with "the said rules." In such a case, in the case of a trading company or other company appropriately coming under Case I, it is a mere matter of arithmetic to calculate what would have been the charge under Case I; and being a company which in its nature and in its incidence is appropriately covered by Case I, then, although the Crown has elected, in the particular case in question, not to proceed under Case I, there is no difficulty at all in ascertaining what would have been the tax paid if the profits had been charged in accordance with Case I of Schedule D.

The difficulties to which my Lord referred, the difficulties of ascertaining the exemptions, the difficulty of assuming a trade where there is no trade—none of these difficulties arises where the Crown could have charged a company under Case I if they had wished to do so, and in such a case the proviso fully satisfies all the conditions. But the difficulty which arises in this case and in cases similar to this

(1) 17 T.C. 169, at p. 181.

(Slesser, L.J.)

where the Company is not carrying on a trade at all, is that the Crown are seeking to apply paragraph 2 of Schedule D, which speaks of tax under Case I being " in respect of any trade not contained in any " other Schedule " to a case where there in no trade, and that raises the first problem, that is, to ascertain what are the incidents of the trade. The matter does not end there. There are all the difficulties which would arise under Rule 3 of the Rules applicable to Cases I and II of Schedule D with regard to the deductions permitted in computing the profits or gains to be charged, including the deduction of money wholly and exclusively laid out or expended for the purposes of the trade. That is a very great difficulty, but it is said by the Crown in answer to that : " Oh, the moneys which are to be assumed to " have been laid out in respect of the trade must mean the same " thing as expenses of management, including commissions, which " appear in the principal part of the Section." It may be so or it may not be so. I had occasion to point out to Mr. Hills, in the course of the argument, that whether a commission is or is not a deductible expense has been held in the case of *Stott and Ingham* v. *Trehearne*, reported at 9 T.C. 69, to be a question of fact ; some commissions are so deductible and some are not. One would have thought that if the Legislature had intended that the deductions which fall in Case I to be deducted were to be regarded as of the same order as the deductions of expenses of management which are referred to under Section 33 (1), then the Legislature would have used the same language ; instead of which it uses different language. The matters are, therefore, not necessarily the same. Nor am I satisfied that provision for computing Income Tax on the profits or gains of the year preceding the year of assessment in Section 29 of the Finance Act, 1926, is necessarily to be imported, by analogy, by the words on which the Crown rely in applying it to a case like this where there is no trade. All these matters seem to me to be an invitation to put a construction, by analogy, upon these words and apply it to a case, where admittedly there is no trade, the very manner in which, as my Lord has pointed out, we have been warned not to proceed.

As Lord Cairns said in *Pryce* v. *Monmouthshire Canal and Railway Companies*, (1879) 4 A.C. 197, at page 203 ; " The taxpayer " had a right to stand upon a literal construction of the words " used, whatever might be the consequence." I think the construction of those words of the proviso limits the right of the Crown to put a maximum upon the relief given under Section 33 in the proviso to cases where they had the option to proceed to tax on the basis of trade either under Case I or under some other Case, and it is not applicable to a case where a company was not carrying on a trade. In other words, I have come to the conclusion that the language used in the *Rosyth* case[1] in this matter by Lord Skerrington is

[1] Rosyth Building & Estates Co., Ltd. v. Rogers, 8 T.C. 11, at pp. 18/19.

(Slesser, L.J.)

right, and that we should follow the view that has been taken by the Court below in following those words. I do not think there is anything which has been said in the *Salisbury House* case(1) which deals with this particular matter. For these reasons, because I agree with the views expressed there by Lord Skerrington, and because of the reasons which I have given myself where I am considering the matter anew—because, of course, what Lord Skerrington said is not binding upon us—I am of opinion that this appeal fails.

Romer, L.J.—I have come to the same conclusion, though not without difficulty and in spite of the fact that some of the difficulties I have felt are not entirely removed. On the whole, I think the proper construction of Section 33, Sub-section (1), is that for which Mr. Latter has contended. The object, or the general object, of the Section cannot be in doubt. There are many companies the principal part of whose income is derived from investments, and in respect of those investments the companies have been taxed by deduction at the source or by direct assessment, but they never had an opportunity of bringing in against their profits—that is to say, deducting from their profits for the purposes of taxation—their management expenses, either because they were not trading companies at all, or because, being trading companies, the Crown had elected to tax them on the income of their investments rather than under Schedule D. It was that injustice—anything can be called an " injustice " under the Income Tax Acts—that the Section was intended to remove.

The first question which arises on the construction of the Section is as to the meaning of the words " its profits in accordance " with the rules applicable to Case I of Schedule D " in the Sub-section itself. Is that merely a profit that could be taxed under Case I of Schedule D, or does it include all profits chargeable under any Schedule to the Income Tax Acts ? In my opinion, it means merely the profits which could be taxed under Case I. In the first place, it is to be observed that the Sub-section is only concerned with companies whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank, or other bank for savings. In the case of such a company, the greater part of its income will be taxed by deduction at the source or by direct assessment, and there is hardly a company of that description whose profits would be actually charged under Case I of Schedule D. It is difficult to think of such a company. The company would be receiving, perhaps, income from real estate, income from investments being from sources chargeable under Schedule C, or income from investments being

(1) 15 T.C. 266.

(Romer, L.J.)

from sources chargeable under Cases other than Case I of Schedule D, and it is difficult, as I say, to conceive a company of that description all of whose income or profits would be charged under Case I of Schedule D. In the next place, the Sub-section seems to contemplate two cases; one where the profits have been charged under Case I and, secondly, where the profits have not been charged under Case I. It is difficult, in construing those two cases, to assign different meanings to the word "profits". Supposing in the case of a trading company, such as is described in the Sub-section, it earned a small profit which could be properly charged under Case I and it had been so charged, could that company possibly come before the Court and say: "I come within the words of the Section "because my profits have not been charged in accordance with "the Rules applicable to it?" If it could, this strange result would follow—in the present case the income from investments has been going down lately. Take a case where the income from investments had been going up: could a trading company go to the Commissioners and say: "My income this year from investments "was £10,000, and I have been taxed by deduction on that £10,000, "and also I was charged on my £500 profit, which I made from other "sources under Case I, but my profits as a whole have not been "charged under Case I. I want you to deduct from my £10,000, "for the purposes of taxation, the whole of my management "expenses." The Commissioners would say: "What about proviso "(*a*)?" The answer would be: "If you take proviso (*a*) and attach "to that the meaning for which the Crown are contending in this "case, you will find, if you take last year, that my income was very "small from investments, and, therefore, although my trading "profits have in fact been taxed under Case I, yet I come within this "Sub-section and I am entitled to have my management expenses "deducted from my £10,000, because, in the circumstances, proviso "(*a*) does not apply." I cannot help thinking that the case contemplated in Sub-section (1) is a case in which certain profits might have been taxed under Case I, but, in point of fact, have not been so taxed. If that is so, and the word "profits" in the Sub-section means only profits which could dealt with under Case I, I cannot attach a different meaning to the word "profits" in proviso (*a*). It appears to me that the body of the Sub-section is dealing with a case where certain profits have not been taxed; proviso (*a*) is dealing hypothetically with the converse case; that is to say, what would happen if those profits had been taxed, I think one must be contrasted with the other, and both are dealing with the same subject matter.

I come to the difficulties with which Mr. Latter is confronted by the adoption of that construction and I think the difficulties are serious. He says, of course, and rightly: "Putting that construction "on the proviso, the proviso does not apply at all to a non-trading "company, because a non-trading company never has any profits

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" which can be dealt with under Case I." That being so, it is said against him : " Oh, but then the Sub-section does not apply to you " at all, because the Sub-section is only contemplating a company, " on your own shewing, which has got profits which are capable " of being dealt with under Case I." The only way out of that difficulty, which, I think, is a legitimate way, is to treat the words " and has not been charged in respect of its profits in accordance " with the rules applicable to Case I of Schedule D," as being prefaced by these words, " and, in the case of a trading company, has " not been so charged." I think there is authority for adopting such a construction ; in other words, for saying that those words do not, in the least, cut down the generality of the preceding ones, but only deal with such companies comprised in the preceding words as those words are applicable to, and, therefore, to treat these words as only applying to a trading company. The other difficulty I have felt is also a serious one, and apparently is more difficult to get over. Let me take the case of a non-trading company which has income from investments, £10,000, to be taxed by deduction or by direct assessment, but has also derived a profit of £500. It cannot be taxed under Case I, because it is a non-trading company. Mr. Latter says that, if, in that case, the company's management expenses were £2,000, he is entitled to deduct the £2,000, for the purposes of taxation, from the £10,000, and only be taxed on the £8,000. The result of that, of course, is that proviso (*a*) will not apply to it, and that he is paying tax on £8,000 net when his net income is £8,500, which does not seem particularly just, or an end which the Legislature probably had in view. Similarly, in the case of a trading company : take a trading company which has got an income of £10,000 from investments and a gross profit of £500 from its trading, with management expenses, £2,000. It has made no profit which can be assessed under Case I ; it has made a loss. Then Mr. Latter says : " Proviso (*a*) does not affect me because " there is no profit ; I am still entitled to have £2,000 deducted " from my £10,000 for the purposes of taxation and disregard " altogether that £500 which I earned, because I made a loss as a " whole on my trading." There, again, he would be paying Income Tax on a net income of £8,000 when his net income is £8,500. As I say, it is more difficult to escape from that dilemma than from the earlier one. The only possibility I can see of escape from it is by saying that proviso (*b*), which, I agree, from its language does not appear to be directly intended to apply to such a case, is nevertheless, in view of the language, capable of applying to such a case, so that, in both those cases, the management expenses can be reduced for the purposes of the Sub-section by deduction of the £500 as a profit from a source which has not been charged in fact. As I say, I feel those difficulties, but yet it appears to me that the difficulties involved in accepting the contention of the Crown on

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the true construction of the word "profits" in the Sub-section and in the proviso are much more difficult—in fact, impossible really to get over.

It is for these reasons that I agree that this appeal fails. I will only add that I agree with the observations made by the other members of the Court as to the *Rosyth* case(1).

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lords Atkin, Tomlin, Russell of Killowen, Macmillan and Wright) on the 25th and 26th February, 1935, when judgment was reserved. On the 15th March, 1935, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. J. H. Stamp for the Company.

JUDGMENT

Lord Atkin.—My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Wright, and I entirely agree with it and have nothing to add. I am asked to say that my noble and learned friend **Lord Tomlin** also agrees with it.

Lord Russell of Killowen.—My Lords, I find myself in the same position, and have nothing to add to the opinion about to be read by my noble and learned friend Lord Wright.

Lord Macmillan.—My Lords, I also agree.

Lord Wright.—My Lords, the question in this appeal is whether the Respondents, who for purposes of this case are admitted (whether rightly or not need not be here considered) to be a non-trading company, are excluded by proviso (*a*) to Section 33 (1) of the Income Tax Act, 1918, from the relief in respect of management expenses to which under Section 33 (1) they are *prima facie* entitled; or, to state the question in another form, whether proviso (*a*) applies to non-trading companies.

It may be convenient to set out the material parts of Section 33 (1) which are as follows: "Where an assurance company carrying "on life assurance business, or any company whose business "consists mainly in the making of investments, and the principal "part of whose income is derived therefrom, or any savings bank "or other bank for savings, claims and proves to the satisfaction

(1) 8 T.C. 11.

(Lord Wright.)

" of the special commissioners that, for any year of assessment, " it has been charged to tax by deduction or otherwise, and has " not been charged in respect of its profits in accordance with the " rules applicable to Case I of Schedule D, the company or bank " shall be entitled to repayment of so much of the tax paid by it " as is equal to the amount of the tax on any sums disbursed as " expenses of management (including commissions) for that year : " Provided that—(*a*) relief shall not be given under this section " so as to make the tax paid by the company or bank less than " the tax which would have been paid if the profits had been " charged in accordance with the said rules ; and (*b*) the amount " of any fines, fees, or profits arising from reversions in the case " of an assurance company, and, in the case of any other company " or any such bank, the amount of any income or profits derived " from sources not charged to tax, shall be deducted from the amount " treated as expenses of management for the year."

The Section reproduced Section 14 (1) of the Finance Act, 1915, which first gave relief in such cases. An ordinary trading company assessed on the balance of its profits and gains for the year under Schedule D, Case I, is entitled, in order to arrive at the balance, to an allowance for outlays incurred for the purpose of earning its profits : the companies or concerns enumerated in Section 33 (1), whose income is in the main taxed by deduction, would be placed at a disadvantage if no allowance was made to them for management expenses.

The Respondents are a limited company incorporated in 1926 ; it is conceded for purposes of this case that they have been at all material times a company within the description in Section 33 (1), as being a company " whose business consists mainly in the making " of investments, and the principal part of whose income is derived " therefrom." Their income has been almost entirely derived from shares and bonds of English and foreign companies and from interest on State and municipal loans and nearly the whole of these receipts has been taxed by deduction. The greater part of these receipts from investments has been chargeable under Schedule D, but about fifteen per cent. has been chargeable under Schedule C. During the material period the Respondents have not been charged under Case I of Schedule D ; and it is conceded for purposes of this case that they are not chargeable under that Case.

The fiscal year in respect of which relief is claimed is 1931–32 ; the Respondents' net income during that fiscal year amounted to £42,159 ; the actual receipts were almost entirely derived from the sources enumerated above but there were in addition some other small items, viz., bank interest amounting to £20 in all, separately assessed under Case III of Schedule D, and certain underwriting commissions amounting to £200, which sum was assessed under Case VI of Schedule D. The actual receipts from investments

(Lord Wright.)

for the fiscal year, all of which were taxed at the source, came to £45,356, but from the sum of these and the other receipts there was deducted interest paid to the bank amounting to £3,417, giving £42,159 as the net figure of income. The Respondents' expenses of management for the same period came to £2,294. The Respondents accordingly claimed under the Section repayment of £573 10*s.* 0*d.* as being the tax on £2,294 at 5*s.* in the £ of these expenses.

The Appellant resisted this claim on the ground that it was barred by proviso (*a*). The Respondents' taxed income for the previous fiscal year 1930–31 had amounted to £48,048 ; it has been found by the Commissioners that if the Respondents' profits for 1931–32 had been assessed as profits of a trade under Schedule D, Case I, on the basis of no tax having been deducted at the source, the amount of tax which would have been paid for that year (which would have been, so it is said, assessed under the Rules of Case I, as amended by Section 29 of the Finance Act, 1926, on the profits of the preceding year) would have been tax on £48,048, whereas the actual tax paid was tax on £42,159 only. Hence, it was said, proviso (*a*) came into force so that no relief could be granted, because the tax that was paid was less than the tax which would have been paid under the Rules of Case I. Such was the argument.

In the case of a trading company which comes within the terms of Section 33 (1), the Crown has an option, where more than one Case of Schedule D is applicable, to elect to tax under the Case which is most advantageous to it, though the Crown cannot elect as between different Schedules (*Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432(1)). An illustration of the Crown's right to elect between Cases of Schedule D is furnished by *Liverpool and London and Globe Insurance Co.* v. *Bennett*, [1913] A.C. 610(2), where it was held by this House that in regard to an assurance company the Crown could elect to tax under Schedule D, Case I, interest collected abroad even though not received in this country ; the company was a trader and the interest on its invested funds was a part of the profits of its business, because these investments were made in the ordinary course of its business as an insurance company and for the purpose of that business. In such a case the company might come within Section 33 (1) provided that it had not in fact been taxed in respect of any of its profits in that year under the Rules of Case I, and hence in proper cases proviso (*a*) would apply to it. Even in a case where the profits of the company had been in fact charged under some other Case of Schedule D, yet as the particular profits might have been assessed under Case I, it would in these conditions be easy to calculate what tax it would have paid if it had been charged under the Rules of Case I. Such an assessment may be described as a " notional assessment ".

(1) 15 T.C. 266. (2) 6 T.C. 327.

(Lord Wright.)

But a different state of things arises where, as in the present case, the Company, though answering one of the descriptions contained in Section 33 (1), is not a trading company. Since it is a non-trading company, the Crown has no option to assess it under Case I or the Rules of that Case; it can only be taxed normally by deduction in respect of its invested funds under whatever other Cases of Schedule D are appropriate, that is, of Cases III, IV or V, or under Schedule C; if it has also some other receipts, these will generally be taxed under the relevant Cases or Schedules. Case I is limited to profits of a trade and the Respondents *ex hypothesi* carry on no trade. Hence it follows that what is called the "notional assessment", if it can be made at all, must be something which not only had not in fact been made but could not ever, according to Income Tax law, have been made at all; the Respondents could not legally be charged in accordance with the Rules of Case I of Schedule D nor could they ever pay any tax under these Rules. Not only has the actual tax paid been outside the Rules of Case I, but the Crown has never been entitled to elect to assess under these Rules. It would seem, therefore, that while the Respondents have a right *prima facie* to the benefit of Section 33 (1), that right is not affected by proviso (*a*), which by its very terms can only be applied to a case in which, if the Crown had so elected, tax could have been paid and charged under the Rules of Case I. In my opinion, proviso (*a*) in its true construction is restricted to cases where tax would have been paid in fact under a legal assessment. The postulated assessment is one which is not only notional as regards the fact, but as to the legal possibility.

The Appellant contends for a different construction; he contends that proviso (*a*) on its true construction requires a "notional assessment" even though the income is not taxable under Case I, an assessment in which all the receipts are deemed to be profits of a trade and the balance is to be arrived at by some computation of allowances corresponding as far as possible to the allowances under the Rules applicable to Case I of Schedule D. But I do not think the words of proviso (*a*) are susceptible of such a construction. The word "profits" in Section 33 (1) clearly means trade "profits" chargeable under Case I and I think in proviso (*a*) "profits" must have the same meaning. But, furthermore, clear words would in my opinion be necessary to justify a fictitious assessment so arbitrary and so far removed from the provisions of the Income Tax law. This construction would mean rewriting Case I so that Case I, which is limited expressly to trades, should be notionally applied to what is not a trade at all; but even if that were done, it would be impossible to apply in the notional assessment the Rules which are applicable to Cases I and II. Thus Rule 1 of these Rules prescribes that tax shall be charged "without any other deduction "than is by this Act allowed." Rule 3 (*a*) says that no sums shall be deducted unless for "money wholly and exclusively laid out or

(Lord Wright.)

" expended for the purposes of the trade " ; this express limitation to " the trade " is repeated in respect of all the allowances permitted under that Rule. I need not give further instances to show that the Rules applicable to Case I cannot be applied as they stand to the receipts of non-traders, such as the Respondents. But there is nothing in proviso (*a*) to provide that the Rules are to be applied with necessary modifications, or that they are to be applied to income to which not only is Case I of Schedule D inapplicable, but as to some parts of which, for instance, that falling within Schedule C, even Schedule D is inapplicable. In the absence of clear and express words to justify the course for which the Appellant contends, I think he must fail. It is a recognised rule in the construction of the Income Tax Acts that taxation cannot be imposed by analogy or by implication or by any sort of *cy près* doctrine ; the same rule equally applies to the construction of a provision like proviso (*a*), which is directed to excluding the enjoyment of a relief from taxation given by the Section unless the proviso applies.

In my opinion the construction put forward by the Appellant cannot be accepted. It is retorted on his behalf that the Respondents' construction involves reading in words which are not there. Thus, it is said, on that construction, proviso (*a*) must be read as if its words were " paid if the profits had been (chargeable and) charged." I do not agree with this argument because I think, as I have already said, that the actual language of the proviso on its true construction can only refer to the case of profits capable of being brought within Case I, but I may observe that the sense which the Appellant seeks to impose on the proviso involves a substantial rewriting of its language, somewhat to this effect : " less than the tax which would " have been payable if the receipts had been deemed to be profits " chargeable under the Rules modified so as to apply as far as " possible to such receipts, and had been charged accordingly." I certainly cannot extract any such meaning from the words as they stand. And I cannot help protesting against the idea of a " notional assessment " which not only would confuse Case I with the other Cases of Schedule D but would also overleap the bounds between the different Schedules and, as in this case, confuse Schedule D with Schedule C. Proviso (*a*) on its true construction is, in my opinion, limited to cases where an assessment under Case I of Schedule D, though not made in fact, could properly have been made under the Income Tax law. If words have to be read in to the proviso (*a*) it is much simpler to read in the word " chargeable ", as Lord Justice Romer suggests, than to rewrite the proviso, as the Appellant's construction requires. But, for myself, I find the words sufficient as they are.

This conclusion is sufficient to dispose of the appeal, which, after all, depends simply on the construction of proviso (*a*). I think it unnecessary to discuss some further matters which were mooted in argument but do not help a decision on the real point.

(Lord Wright.)

I should, however, add that the difficulties felt by Lord Justice Romer would, I think, disappear if it were remembered that a company like the Respondents, whose business is mainly in the making of investments, may have some sources of income taxable by direct assessment, for instance under Schedule A or Schedule B or under Case VI of Schedule D; these pieces of income would be subject to appropriate taxation, like the bank interest and underwriting profits received by the Respondents. If they had trading profits in respect of which they were actually taxed under Case I of Schedule D, Section 33 (1) would by its very terms not apply at all. It is clear that a concern may be taxed in respect of different parts of its income under different Schedules or Cases, see, for instance, *Fry* v. *Salisbury House Estate, Ltd.*(1)

It is not necessary to refer to *Rosyth Building and Estate Co., Ltd.*, v. *Rogers*, 1921 S.C. 372(2), which cannot be regarded as law in view of what was said in *Fry* v. *Salisbury House Estate, Ltd.*, even though the observation of Lord Skerrington in reference to proviso (*a*) is, abstracted from its application in that case, correct.

In my opinion, the conclusions of the Commissioners, of Mr. Justice Finlay, and of the Court of Appeal were right.

I think the appeal should be dismissed with costs.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That this appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Clifford-Turner & Co.]

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(1) 15 T.C. 266. (2) 8 T.C. 11.