

NO. 1434—COURT OF SESSION (FIRST DIVISION)—
10TH AND 25TH JUNE, 1948

HOUSE OF LORDS—18TH AND 19TH OCTOBER, 1949, AND
14TH DECEMBER, 1949

Commissioners of Inland Revenue v. John Dow Stuart, Ltd.⁽¹⁾

Income Tax—Deduction—Excess Profits Tax payable for chargeable accounting period—Effect of deficiency in subsequent chargeable accounting period—Finance (No. 2) Act, 1939 (2 & 3 Geo. VI, c. 109), Sections 15 (2) and 18 (1).

The Respondent Company was assessed to Excess Profits Tax for the three chargeable accounting periods ended 31st July, 1940, 1941 and 1942, in the sum of £9,568 in all. In September, 1943, the Company paid £1,000 to account of Excess Profits Tax; this payment was credited by the Commissioners of Inland Revenue against the assessment for the chargeable accounting period ended 31st July, 1940. Relief due in respect of deficiencies of profits for the two subsequent chargeable accounting periods ended 31st July, 1943 and 1944 exceeded the tax assessed but unpaid for the earlier accounting periods by £483 and this sum was accordingly repaid to the Company in the year 1946.

The Company was assessed to Income Tax for the years 1941-42 to 1945-46 on the footing that, under Section 15 (2), Finance (No. 2) Act, 1939, the effect of a deficiency of profits in a chargeable accounting period was to reduce the amount of Excess Profits Tax payable for previous chargeable accounting periods, and that the deduction allowable for Income Tax purposes under Section 18 (1), Finance (No. 2) Act, 1939, was the amount of the Excess Profits Tax payable as so reduced, except where a payment of Excess Profits Tax had in fact been made; and, accordingly, that the sum of £1,000 actually paid in respect of the chargeable accounting period ended 31st July, 1940, was to be deducted in computing the profits chargeable to Income Tax for the year 1941-42, and the sum of £483 repaid in respect of the deficiency of profits in the chargeable accounting period ended 31st July, 1944, was to be taken into account, under the proviso to Section 18 (1), as a profit accruing in that period for the purpose of computing the profits chargeable to Income Tax for the year 1945-46.

The Company appealed to the General Commissioners, who accepted the Company's contention that the deduction allowable for Income Tax purposes under Section 18 (1), Finance (No. 2) Act, 1939, was the full amount of Excess Profits Tax payable for each chargeable accounting period, regardless of any relief in respect of subsequent deficiencies.

Held, that the decision of the General Commissioners was correct.

CASE

At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of the Lower Ward of the County of Lanark, held for the purpose of hearing appeals at 181 West Regent Street, Glas-

⁽¹⁾ Reported (C.S.) 1948 S.L.T. 521; (H.L.) [1950] A.C. 149.

gow, C.2, on 3rd February, 1947, John Dow Stuart, Ltd. (hereinafter called "the Company") appealed against assessments to Income Tax under Schedule D of the Income Tax Act, 1918, namely,

1941-42 on the sum of £2,338 less wear and tear £80.

1942-43 on the sum of £5,000.

1943-44 on the sum of £5,000.

1944-45 on the sum of £500.

1945-46 on the sum of £500.

The General Commissioners were informed by both parties that the amount of the liability to Income Tax for each of the years concerned had been agreed subject to one point, namely, the proper treatment for Income Tax purposes of amounts payable for Excess Profits Tax and of amounts repayable in respect of deficiencies for Excess Profits Tax for the several chargeable accounting periods. This was the sole point on which the General Commissioners were asked to adjudicate.

1. The following facts were admitted or proved:—

(1) The Company carries on business as building contractors.

(2) Estimated assessments to Excess Profits Tax were made on the Company and notices of assessment were issued as under:—

<u>Chargeable Accounting Period</u>	<u>Excess Profits Tax</u>	<u>Notice of Assessment Issued</u>
	£ s. d.	
4 months to 31st July, 1939	118 4 0	21st May, 1943
12 months to 31st July, 1940	3288 8 0	21st May, 1943
12 months to 31st July, 1941	5000 0 0	17th August, 1943
12 months to 31st July, 1942	5000 0 0	17th August, 1943

Notice of appeal was given by the Company against each of these estimated assessments and no attempt was made by the Commissioners of Inland Revenue, under the provisions of paragraph 5 of Part II of the Fifth Schedule to the Finance Act, 1937, made applicable to Excess Profits Tax by the Finance (No. 2) Act, 1939, Section 21, to collect tax on any undisputed liability. £1000 was paid in September, 1943, as a payment to account of Excess Profits Tax. This payment was credited against the assessment for the chargeable accounting period 31st July, 1940. No further payments on account of Excess Profits Tax were made by the Company.

(3) On 22nd October, 1945, the final accounts for the three years to 31st July, 1941, 31st July, 1942 and 31st July, 1943, were sent to the Inspector of Taxes together with computations of the liability by the chartered accountants who dealt with the matter on behalf of the Company. The accounts for the year to 31st July, 1944, were sent to the Inspector of Taxes by the aforesaid chartered accountants on 16th April, 1946.

(4) Final agreement of the figures of profits and of Excess Profits Tax for all chargeable accounting periods up to that ending on 31st July, 1944, was reached on 13th September, 1946, when the net balance of Excess Profits Tax payable on an accounting in respect of all the chargeable accounting periods up to and including the twelve months ending 31st July, 1944, was agreed to be £517.

The details of the finally agreed computations were as under:—

Chargeable Accounting Period.	Excess Profits Tax Payable.	Amounts repayable or to be set off in respect of Excess Profits Tax Deficiencies.
4 months to 31st July, 1939		£97 16s. 0d. (Set off against excess for twelve months to 31st July, 1940)
12 months to 31st July, 1940	£3,548 (after allowance of deficiency of £97 16s. for the period of four months to 31st July, 1939)	
12 months to 31st July, 1941	£1,384	
12 months to 31st July, 1942	£4,636	
12 months to 31st July, 1943		£8,465
12 months to 31st July, 1944		£586
	<u>£9,568</u>	<u>£9,051</u>
Deduct deficiencies	<u>£9,051</u>	
Net balance of Excess Profits Tax payable	<u>£517</u>	

(5) As the Company had, as aforesaid, paid £1,000 the Commissioners of Inland Revenue after satisfying the net balance of Excess Profits Tax payable of £517 repaid in the year 1946 the balance of £483 to the Company.

(6) The amounts of the profits chargeable to Income Tax before making adjustments in respect of Excess Profits Tax payable and repayable were also agreed by both parties in the following amounts:—

Year to 31st July, 1940	Profit £4,838
Year to 31st July, 1941	Profit £2,456
	Interest £21
Year to 31st July, 1942	Profit £5,783
Year to 31st July, 1943	Loss £7,645
Year to 31st July, 1944	Profit £550

(7) The parties, however, did not agree the adjustments to be made for Income Tax purposes in respect of the Excess Profits Tax liabilities payable and the amounts of Excess Profits Tax repayable for deficiencies.

The Company took the view that in computing the Income Tax liability for a particular fiscal year the Excess Profits Tax payable for the accounting year which formed the basis of charge for that fiscal year should be deducted as an expense under Section 18 (1) of the Finance (No. 2) Act, 1939, and that where a deficiency of Excess Profits Tax occurred in any chargeable accounting period the amount repayable should be added as if it had been a profit accruing in the chargeable accounting period in which the deficiency occurred.

The Inspector of Taxes, on the other hand, took the view that the Excess Profits Tax "payable" which formed the deduction for Income Tax purposes in terms of the said Section 18 (1) was not the Excess Profits Tax computed on the accounts for a particular chargeable accounting period alone but was by reason of Section 15 (2) of the said Act (except where an actual payment of Excess Profits Tax had been made) the reduced Excess Profits Tax payable consequent on subsequent deficiencies.

The following table sets out the alternative computations of profits for Income Tax purposes which were put before us.

<u>A. THE COMPANY'S COMPUTATION</u>			Net Profit for Income Tax.
Year to 31st July, 1940	Agreed profit Less Excess Profits Tax payable as finally agreed	£4,838 £3,548 <hr/>	£1,290
Year to 31st July, 1941	Agreed profit Interest Less Excess Profits Tax payable as finally agreed	£2,456 21 £1,384 <hr/>	£1,093
Year to 31st July, 1942	Agreed profit Less Excess Profits Tax payable as finally agreed	£5,783 £4,636 <hr/>	£1,147
Year to 31st July, 1943	Agreed loss Credit for Excess Profits Tax repayable as finally agreed	£7,645 £8,465 <hr/>	£820
Year to 31st July, 1944	Agreed profit Credit for Excess Profits Tax repayable as finally agreed	£550 £586	£1,136

B. THE INSPECTOR'S COMPUTATION.

			Net Profit for Income Tax.
Year to 31st July, 1940	Agreed profit	£4,838	
	Less Excess Profits Tax actually paid	£1,000	
		£3,838	£3,838
Year to 31st July, 1941	Agreed profit	£2,456	
	Interest	21	
	Excess Profits Tax actually paid	Nil.	
		£2,477	£2,477
Year to 31st July, 1942	Agreed profit	£5,783	
	Excess Profits Tax actually paid	Nil.	
		£5,783	£5,783
Year to 31st July, 1943	Agreed loss	£7,645	
	Excess Profits Tax actually paid	Nil.	
		Loss £7,645	Loss £7,645
Year to 31st July, 1944	Agreed profit	£550	
	Add Excess Profits Tax repaid	£483	
		£1,033	£1,033

2. Mr. Dickel, chartered accountant, contended on behalf of the Company, *inter alia*:—

(1) that under Section 18 (1) of the Finance (No. 2) Act, 1939, the amount of Excess Profits Tax payable for any chargeable accounting period should in computing the profits for Income Tax purposes be allowed to be deducted as an expense incurred in that period;

(2) that the proviso to Section 18 (1) of the Finance (No. 2) Act, 1939, provided that, where relief was given by way of repayment of Excess Profits Tax chargeable for any accounting period previous to that in which the deficiency occurred, the deduction allowed under Section 18 (1) should not be altered, but the amount repayable should be included in the profits for Income Tax purposes as if it had been a profit of the business accruing in the chargeable period in which the deficiency occurred;

(3) that, relief in this case having been given by way of repayment, the amounts of the deductions for Income Tax purposes were not to be altered and accordingly the Excess Profits Tax deductible in the Income Tax computations was not the sum which the Company happened to have paid to account of Excess Profits Tax, namely £1,000, but the amounts of Excess Profits Tax payable in respect of each accounting period as finally agreed;

(4) that, although the method adopted by the Commissioners of Inland Revenue was to set off deficiencies against excesses and thus in a general accounting to arrive at the ultimate liability of £517 giving a resulting net repayment of £483, nevertheless this operated as a repayment to the Company of these credits for deficiencies in the sense of the proviso to Section 18 (1) of the Finance (No. 2) Act, 1939;

(5) that the payment of £1000 by the Company in respect of Excess Profits Tax was a general payment to account, and had no relation to the "amount of Excess Profits Tax payable" which was allowed as a deduction under the aforesaid Section 18 (1); that there was no statutory warrant for bringing in as a deduction against Income Tax such payments to account as the £1000 referred to; and that the allowable deductions were the amounts of Excess Profits Tax payable in respect of each chargeable accounting period;

(6) that the result of the contentions of the Commissioners of Inland Revenue was to make the words "Excess Profits Tax payable" in Section 18 of the Finance (No. 2) Act, 1939, equivalent to Excess Profits Tax *paid*—in this case the £1000—a construction for which it was submitted there was no warrant in the wording of that Section;

(7) that the computation contended for by the Company was correct.

3. Mr. J. S. Fletcher, H.M. Inspector of Taxes, contended on behalf of the Appellants, *inter alia*:—

(1) that under Section 15 (2) of the Finance (No. 2) Act, 1939, the effect of a deficiency of profits in a chargeable accounting period was to reduce the amount of profits chargeable for previous chargeable accounting periods;

(2) that under Section 18 (1) of the said Act the deduction allowable was the amount of Excess Profits Tax payable as so reduced except in the case where a payment of Excess Profits Tax had in fact been made;

(3) that where payment of Excess Profits Tax had been made such payment formed a deduction for the period in respect of which it was paid, and a repayment of Excess Profits Tax fell to be taken into account in computing the profits as if it were a profit in the chargeable accounting period in which the deficiency occurred;

(4) that the payment of £1000 having been made to account of Excess Profits Tax in respect of the chargeable accounting period to 31st July, 1940, that sum was a deduction in computing the profit chargeable to Income Tax for the year 1941-42;

(5) that not until the deficiency for the chargeable accounting period to 31st July, 1944, was ascertained was the Company entitled to relief by way of repayment in respect of part of the £1000 previously paid; that the deficiency in respect of which the repayment of £483 was made occurred in that chargeable accounting period, and, consequently, that repayment fell to be taken into account in terms of the proviso to Section 18 (1) of the Finance (No. 2) Act, 1939, in computing the profits chargeable to Income Tax for the year 1945-46 as a profit accruing in the chargeable accounting period to 31st July, 1944;

(6) that the computation contended for by the Inspector of Taxes was correct.

4. We, the Commissioners who heard the appeal, after due consideration of the facts and the arguments submitted to us decided that the method of computation adopted by the Company was the correct one.

5. Immediately upon our so determining the appeal dissatisfaction with our decision as being erroneous in point of law was expressed to us on behalf of the Commissioners of Inland Revenue, and we were duly

required, pursuant to the Income Tax Act, 1918, Section 149, to state and sign a Case for the opinion of the Court of Session, as the Court of Exchequer in Scotland, which Case we have here stated and signed accordingly.

6. The question of law for the opinion of the Court is whether we adopted the correct method of dealing with Excess Profits Tax in arriving at the profits of the Company for the purpose of Income Tax.

THOMAS WATT,	}	General Commissioners of Income Tax for the Division of the Lower Ward of Lanarkshire.
JOHN URIE,		
JAMES M. RITCHIE,		

Dated this twenty-second day of January, 1948.

R. WALKER,

Clerk to the said Commissioners.

The case came before the First Division of the Court of Session (the Lord President and Lords Carmont and Russell) on 10th June, 1948, when judgment was reserved. On 25th June, 1948, judgment was given unanimously against the Crown, with expenses.

The Solicitor-General for Scotland (Mr. Douglas Johnston, K.C.) and Mr. H. A. Shewan appeared as Counsel for the Crown, and Mr. R. P. Morison, K.C., and Mr. A. A. Matheson for the Respondent Company.

I.—INTERLOCUTOR

Edinburgh, 25th June, 1948. The Lords having considered the Case, answer the Question of Law in the affirmative, refuse the Appeal and Decern: Find the Respondents entitled to expenses and remit the Account thereof when lodged, to the Auditor to tax and to report.

(Signed) T. M. COOPER, I.P.D.

II.—OPINIONS

The Lord President (Cooper).—In this case we are invited to choose between two rival computations of profits for Income Tax, which differ only in respect of their treatment of the taxpayer's liability for Excess Profits Tax. Nothing turns on the detailed facts and figures, the single issue being the correct interpretation of the Finance (No. 2) Act, 1939, as regards the inter-relation of Income Tax and Excess Profits Tax.

When it is recalled that not long ago Income Tax stood at 10s. in the pound while Excess Profits Tax stood at 100 per cent., the need for adjustment as regards the incidence of two such taxes requires no comment. A similar problem arose in connection with the Excess Profits Duty thirty years ago, and it received a similar solution by what became Rule 4 applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, a provision which was authoritatively expounded in *Kirke's Trustees v. Commissioners of Inland Revenue* ⁽¹⁾, 1927 S.C. (H.L.) 56. In the case of both Excess Profits Duty and of Excess Profits Tax the scheme of the solution was to treat the emergency tax as an allowable deduction when computing liability for the normal tax. The old provision was that: "Where any person has paid excess profits duty, the amount so paid shall be allowed as a deduction . . ." for Income Tax purposes; and that "where any person has received repayment of any amount previously paid by him by

(1) 11 T.C. 323.

(The Lord President (Cooper).)

“way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received”. In the words of Lord Shaw (1927 S.C. (H.L.) 63 ⁽¹⁾) both “overlapping” and “underlapping” were thus avoided, and this result was achieved by language of a clarity now only too rare in Finance Acts.

But in 1939 the draftsman departed from the language of the earlier legislation while obviously aiming at the same overriding purpose. By Section 18 (1) of the Finance (No. 2) Act, 1939, it is provided that: “The amount of the excess profits tax payable”—(not *paid*)—“. . . for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period”. The substitution of “payable” for “paid” must be significant. The words manifestly do not mean the same thing, and the chief obstacle to be overcome by the Inland Revenue is that they wish to treat them as if they did.

By Section 21 (1) of the Act of 1939 we are told that Excess Profits Tax shall be “due and payable at the expiration of one month from the date of assessment”. To take for purposes of illustration one of the assessments here in question, we are informed by the Case that, for the chargeable accounting period of the year to 31st July, 1942, an assessment to Excess Profits Tax was issued on 17th August, 1943, for the sum of £5,000, later adjusted at £4,636. In my view that sum was “payable” on 17th September, 1943, and was therefore an allowable expense to be deducted from the relative profits for Income Tax purposes in terms of Section 18 of the Act. The Company in their computation so deduct it. The Inspector of Taxes refuses any deduction, because the Excess Profits Tax of £4,636 was not “actually paid”—an argument which would have been unanswerable under the old Act dealing with Excess Profits Duty, but which appears *prima facie* irrelevant when applied to the new Act dealing with Excess Profits Tax.

The case for the Inland Revenue was developed by seeking to impart a very special meaning to Section 18 by implication from its proviso and from the provisions of Section 15 (2); and the argument requires examination. I take Section 15 first. As its side-note indicates, Section 15 is concerned with relief to the taxpayer who has incurred liability to Excess Profits Tax in one chargeable accounting period and has subsequently suffered a “deficiency of profits”, the general principle being that of retrospective adjustments to reflect a supervening loss, either by reducing outstanding or future Excess Profits Tax liability, or by repayment of tax overpaid. The language of the main operative provision (Section 15 (2) (a)) does not use the language of Section 18; for it provides that, when a deficiency of profits occurs in any chargeable accounting period, the aggregate amount of the profits chargeable for previous chargeable accounting periods shall be *deemed* to be reduced by the amount of the deficiency, and the amount of Excess Profits Tax payable in respect thereof shall be *deemed* to be reduced accordingly, the necessary relief being given by repayment *or otherwise*. I understand the idea, but I do not clearly understand the precise significance of the underlying conception of *deeming* to reduce *aggregates*. The argument of the Inland Revenue had to be that,

(1) *Ibid.*, at p. 331.

(The Lord President (Cooper).)

so long as Excess Profits Tax existed (i.e., until December, 1946), assessments to that tax were merely provisional, and that there was no finality for either Excess Profits Tax liability or Income Tax liability until the whole six years of the emergency tax had run their course, so that it could be known whether, and to what extent, relief under Section 15 might be claimable.

This impresses me as quite unacceptable. For one thing Parliament could not know in 1939 whether Excess Profits Tax would survive for six years or for sixty, and it is not legitimate to read the Act of 1939 with the retrospective wisdom of 1948. Moreover I cannot read Part III of the Act of 1939 without being impressed by the reiteration in every Section (and sometimes repeatedly in the same Section) of the words in, or for, "any chargeable accounting period"—a term defined as meaning (in the normal case) any period of twelve months for which the taxpayers' accounts are made up and which commences on or after 1st April, 1939. The plain implication is that each such chargeable accounting period is to be considered by itself for purpose of Excess Profits Tax, and therefore for purposes of the interaction of Excess Profits Tax and Income Tax. Section 15 certainly authorises the reopening of any tax liability ascertained for any chargeable accounting period in the event of subsequent deficiencies warranting relief; but that is a very different thing from treating the whole tax situation as completely fluid and indeterminate until Excess Profits Tax is repealed, or the taxpayer dies or goes out of business. Such methods of taxation would produce confusion in the finances of most taxpayers, and even in the national accounts.

For these reasons I find it impossible to spell out of Section 15 anything to warrant the inference that when Section 18 refers to Excess Profits Tax "payable . . . for any chargeable accounting period" it does not mean what it says. Even if I am wrong as to this, I should regard it as inadmissible to impose a tax liability (in this instance running into thousands of pounds) on the basis of an obscure and very dubious implication contradictory of language which is by contrast clear and distinct. If the Legislature desired to achieve the results contended for by the Inland Revenue, these results could have been expressed, and they could only properly be expressed, by language very different from that employed.

Similar considerations apply to the proviso to Section 18 and the implications sought to be extracted from it. In my opinion far more was read into this proviso than was ever intended; for it is no more than a re-enactment in less happy form of what was distinctly enacted in the latter part of Rule 4 of Cases I and II of Schedule D and clearly explained by the House of Lords in *Kirke's Trustees*, its purpose being "to meet the case where the taxpayer, having paid a sum for excess profits duty" (or tax) "which diminished the sum upon which he would afterwards pay income tax, gets back some or all of it, and would escape the income tax which he would otherwise have been liable to pay unless a provision was made by this section (1)" (per Lord Sumner, 1927 S.C. (H.L.) 56, at page 64).

So far I have ignored the fact that this Company in September, 1943, voluntarily paid to account of Excess Profits Tax a sum of £1,000, which the Inland Revenue at their own hand credited to the then outstanding

(1) 11 T.C. 323, at p. 332.

(Lord Russell.)

assessment of £3,288 for the chargeable accounting period to 31st July, 1940; and that in 1946, after subsequent deficiencies had led to readjustment of the position and disclosed an ultimate liability of only £517, the Company received repayment of £483 out of this £1,000. I am disposed to regard this as a speciality which leaves the matter of principle unaffected. But if the proviso to Section 18 is literally read and applied to this situation, it produces results destructive of the contention of the Inland Revenue. The proviso is applicable only to the case where deficiencies have arisen and given rise to a right to relief, and where that relief has been given by repayment—and not “otherwise”. That is this case; and in every such case direction is that the deduction allowed under Section 18 “shall not be altered”. But I need not rest my opinion upon this point.

I consider that this appeal fails because the Inland Revenue have failed to satisfy me that any implication to be derived from other provisions of the Act is sufficiently unambiguous to override the specific provisions of Section 18.

Lord Carmont.—I concur.

Lord Russell.—I am of the same opinion. In computing a trader's profits and gains for the purposes of Income Tax, an adjustment of the assessable amount by way of deduction of sums allowed as “an expense” is not an unfamiliar feature. It is by resort to that method of deduction that the trader liable to pay Income Tax in any year of assessment is authorised, in computing his profits for that purpose, to deduct as an expense the amount of Excess Profits Tax payable in respect of the profits of the corresponding period. The scheme of computation as outlined in the relevant Sections of Part III of the Finance (No. 2) Act, 1939, does not appear *prima facie* to be unduly complicated. One month after assessment by the Commissioners of the amount of Excess Profits Tax due by a trader in respect of a chargeable accounting period, the amount so assessed becomes payable (Section 21 (1)); and *ipso facto* takes effect on the computation of the trader's profits for the purposes of Income Tax by becoming an allowable deduction therefrom as “an expense incurred in that period” (Section 18 (1)).

Provision is made in Section 15 for the case of a “deficiency of profits” occurring in a chargeable accounting period. The situation envisaged is where one or more chargeable accounting periods in which a trader's profits have been chargeable with Excess Profits Tax are followed by a chargeable accounting period in which a deficiency of profits occurs. The relief to be granted to the trader in respect of Excess Profits Tax is thus described (Section 15 (2)) :—(i) the aggregate amount of profits chargeable with Excess Profits Tax for the previous chargeable accounting periods is to be “deemed to be reduced” by the amount of the deficiency; (ii) the amount of Excess Profits Tax payable in respect thereof is to be “deemed to be reduced accordingly”; (iii) the relief necessary to give effect to those notional reductions is to be given “by repayment or otherwise”. I may observe that although no further explanation as to the meaning of the words “or otherwise” appears in the Section, it may be that they are intended to meet a case in which the amount to be repaid is capable of being set off *pro tanto* against sums then due to be paid by the trader as a taxpayer, and to authorise that method of settlement as being the equivalent of repayment. The method of dealing with a deficiency of profits which exceeds the aggregate profits chargeable with Excess Profits Tax

(Lord Russell.)

for the previous chargeable accounting periods (Section 15 (2) (b)) by applying the balance of the deficiency in reducing the chargeable profits in the next subsequent chargeable accounting period, does not call for comment. The effect of the granting of relief as aforesaid in relation to the computation of profits for Income Tax, as set out in the proviso to Section 18 (1), is as follows:—(first) where the relief is given by way of repayment, the amount of the deduction allowed in respect of Excess Profits Tax *chargeable* in any prior accounting period is not to be altered, but (second) the amount repayable is to be taken into account in computing the profits for the purposes of Income Tax as if it were a profit of the trade accruing in the chargeable accounting period in which the deficiency occurs.

It appears to me that the intention expressed in the statutory scheme as above summarised is that in each chargeable accounting period a trader's profits for Income Tax purposes fall to be adjusted, downwards or upwards, according as there is payable by him in the particular period Excess Profits Tax or there is disclosed a deficiency of profits for which relief is available. The outlook of the scheme is expressly directed to the chargeable accounting period and to the relationship between profits for Income Tax and liability for Excess Profits Tax (or relief therefrom) in that period. On the agreed facts and figures set out in the present Case, I am of opinion that the Company's computation (paragraph I (7)) is in conformity with the relevant statutory provisions. Counsel for the Revenue sought to support the competing computation of the Inspector (paragraph I (7)) by arguing, *inter alia*, that the word "payable" in Section 18 (1) falls to be read as "paid"; and that inasmuch as the Company had not actually paid Excess Profits Tax in any of the first three chargeable accounting periods, no deduction was permissible from Income Tax profits in any of these years because the fourth year's "deficiency" relief had the effect of notionally reducing the Company's outstanding liability for payment of the Excess Profits Tax. Indeed, it appeared to be maintained that, save in the case of actual prompt payment of Excess Profits Tax (deduction as an expense being then permissible), a trader's liability for such tax, if not actually paid, has to await the final balancing of figures as between tax payable and deficiency relief—so that his right to deduct anything for Income Tax purposes as an expense may subsequently or ultimately come to be "notionally" defeated. I cannot find anything in the relevant statutory provisions to support such a contention or to justify the somewhat arbitrary computation of Income Tax profits appearing in the Inspector's statement.

While I have sought briefly to formulate the reasoning on which I have come to the conclusion just indicated, I wish to express my entire concurrence with the opinion delivered by your Lordship in the Chair.

The Crown having appealed against the decision in the Court of Session, the case came before the House of Lords (Lords Porter, Normand, Morton of Henryton, MacDermott and Reid) on 18th and 19th October, 1949, when judgment was reserved. On 14th December, 1949, judgment was given against the Crown (Lord Morton of Henryton dissenting and Lord MacDermott dissenting in part) confirming the decision of the Court below.

The Solicitor-General (Sir Frank Soskice, K.C.), the Solicitor-General for Scotland (Mr. Douglas Johnston, K.C.), Mr. H. A. Shewan, K.C., and

Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. R. P. Morison, K.C., Mr. J. G. Wilson and Mr. J. W. P. Clements for the Respondent Company.

Lord Porter.—My Lords, this is an appeal from a decision of the First Division of the Court of Session upon a Case stated under Section 149 of the Income Tax Act, 1918. It is concerned with the proper method of ascertaining what the liability to Income Tax is where there has been a reduction and repayment of Excess Profits Tax.

The facts are succinctly stated in the special Case, have been set out by Lord Morton of Henryton, and need not be repeated.

As appears from the Case, two opposing methods have been suggested for computing the profit of the Respondents for Income Tax purposes where repayment or deduction of Excess Profits Tax comes into question: one is that adopted by the subject and the other by the Crown. The Commissioners have accepted that put forward by the subject and ask whether they are right in so doing. The Court of Session upheld their view and the Crown now appeal from that decision.

In substance the solution of this controversy depends upon the true construction of the terms of Sections 15 and 18 of the Finance (No. 2) Act of 1939. Excess Profits Tax is imposed by Section 12 of that Act; under Section 14 the profits of the standard period or of any chargeable accounting period are to be separately computed, and Section 21 makes Excess Profits Tax payable one month after assessment, but these provisions have at best only an indirect bearing upon the point at issue. Your Lordships are concerned not with profits themselves but with the method by which relief is given to the taxpayer where profits and excess profits have been earned in one or more years and a deficiency of profit has occurred in a later year or years.

Section 15 (1) merely provides the method by which the amount of a deficiency is to be ascertained. Sub-section (2) is concerned with the manner in which that deficiency is to be treated. It begins by asserting that in case of deficiency in any chargeable accounting period the profits chargeable with Excess Profits Tax shall be deemed to be reduced. Read without any further explanatory words I should myself understand that statement to mean that the totality of that portion of the profits which is so chargeable and has been earned before a deficiency occurs is to be diminished by the amount of the deficiency occurring in any subsequent chargeable accounting period, not that any particular accounting period was to suffer such reduction.

This view is supported by the statement in (a) of that Sub-section which provides that the *aggregate* of profits so chargeable for the previous accounting periods is to be deemed to be reduced and as a consequence the amount of Excess Profits Tax payable is to be reduced accordingly. It is the aggregate of the excess profits of previous accounting periods which is to be reduced, not those of each separate period; and this expression must, I think, mean that whereas each deficiency is to be written off against previous excess profits as it occurs, the excess profits are not to be divided into their constituent parts but treated as a lump sum regardless of when they have been obtained.

Therefore no provision is made in the Sub-section for attributing the deficiency to any particular past year—the whole deficiency is to be written off against the totality of excess profits previously made. It may wipe them

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completely out, it may only reduce them in part. It may however happen that the deficiency exceeds the excess profits earned in former years, and this last case is dealt with in Section 15 (2) (b) which enacts that if the deficiency exceeds the aggregate amount of the profits chargeable to Excess Profits Tax, the balance is to be applied in reduction of such profits in future years, the profits of each year in turn being reduced by the amount of the deficiency remaining unrelieved until the whole of the deficiency has been made up.

It is not unnatural that where there has first been the incidence of excess profits and then a deficiency, those profits should be added together and the deficiency treated as a reduction of the aggregated sum. But this method of procedure gives no ground for implying that the deficiency is to be written off each year's excess profits as a separate entity, starting with the first and continuing year after year until the whole has been wiped out. Where the law adopts the last-mentioned method it can say so in plain terms and does so in Section 15 (2) (b) where future years are being dealt with.

I find nothing in these provisions to say that the whole accounts are to be re-opened for the purpose of calculating to what sum profits, whether subject to Excess Profits Tax or not, amount or what sum is deductible from the excess profits of any particular period, nor do I see any reason why the true figures should not continue to prevail. The actual profits and the actual sums chargeable with Excess Profits Tax for each period remain constant and can be accurately set out, and those figures are unaffected by the circumstance that the aggregate sum due for Excess Profits Tax may have to be reduced. Section 15 is not concerned with individual chargeable accounting periods where the past is concerned. It aggregates past gains until there is a deficiency and then deducts this deficiency from the aggregate sum. When this has been done the Sub-section provides that relief shall be given by repayment or otherwise, and this must, I think, mean that it can be given either by a cash payment or in any other way in which a debt can be discharged, for example, by set-off against a debt due to the Crown.

Section 18 deals with a different question. By reason of its terms and by them alone, excess profits due in respect of any chargeable accounting period are deductible from the total profits earned for the purpose of ascertaining the profits chargeable to Income Tax for the period. The first portion of that Section is not, to my mind, confined to cases where a deduction is claimable. It is applicable to all cases and primarily to a case where there has been no deficiency. Moreover it treats each chargeable accounting period as a separate entity and *primâ facie* at any rate has under consideration the actual figures, not those deemed to exist for the purpose of deficiency deductions.

In my opinion the proviso which follows supports this view. As I read it, though the amount of a subsequent deficiency may reduce the previous excess profits in whole or in part the reduction is to, or is to be deemed to, affect the total sum of those profits and is not to be regarded as altering the actual periodic profits of any previous chargeable accounting period which have already been or may thereafter be ascertained. The amount of the deduction allowed to be subtracted from profits, because they were subject to payment of Excess Profits Tax, is not to be altered, but the sum deducted is to be attributed as a profit to the chargeable accounting period in which the deficiency occurs.

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For myself I find it difficult to understand what "the deduction allowed under this section shall not be altered" means or what deduction is referred to unless it refers to the deduction given after ascertaining what the actual profits were for the relevant period and what the consequent sum originally subjected to Excess Profits Tax amounts to.

I do not know why it should be contemplated that the reduced sum upon which Excess Profits Tax is imposed should be subsequently altered or what state of facts would make it desirable to alter it. The Section is concerned with the question of Excess Profits Tax payable over the whole period during which the Act is in force and is not meant to alter the Income Tax already assessed or assessed in respect of each separate accounting period. The aggregate amount of Excess Profits Tax alone is to be diminished. Indeed, that is all with which the opening words of Section 15 (a) deal. In my opinion this construction provides a coherent and comprehensive scheme requiring as little alteration as possible in figures already ascertained, and is in accordance with the provision in Section 21 which contemplates an ascertainment of the Excess Profits Tax due in respect of each period and its payment one month after assessment.

The Crown however say that such a construction gives the go-by to two vital considerations and neglects the express wording of the Sections. In the first place they contend that Sections 15 and 18 appear in the same fasciculus of the Act and each must be read in the light of the other.

Section 15 (2), they say, provides that profits shall be deemed to be reduced by the amount of the deficiency and that result cannot be attained without also reducing to that extent the sums chargeable with Excess Profits Tax in each chargeable accounting period and it is this latter sum so reduced which is ultimately to be deducted from the total profits attributable to each accounting period. If then the sum chargeable with Excess Profits Tax be reduced by the amount of the deficiencies and the result is to reduce it to nothing, there is no Excess Profits Tax payable and therefore none deductible under Section 18 (1). It is, they maintain, the ultimate sum upon which Excess Profits Tax is payable which is deductible from the profits liable to pay Income Tax, not the provisional sum which is arrived at by taking account of an individual year's working. I doubt if this interpretation gives enough weight to the use of the word "deemed" or to the fact that the relief granted is confined to a reduction in the aggregate amount of profits over all the years. Both seem to me to point to an inference that the deduction is to give relief in respect of overpaid or over-payable Excess Profits Tax and nothing more. But any doubt which might exist is, in my opinion, set at rest by the enactment in the proviso to Section 18 (1) that the amount of the deduction allowed under the Section shall not be altered.

The Revenue representatives meet this argument by contending that the words "the amount of Excess Profits Tax payable" in Sections 15 (2) and 18 (1) must be read as meaning "ultimately payable", that is, the sum payable after the appropriate deduction for deficiency has been made. Even however in Section 15 (2) "payable" appears to me to refer to the actual and not the reduced figure. The sum payable remains what it previously was but it is to be deemed to be reduced for the purpose of giving relief and for that purpose only.

Nor do I see any reason for construing the wording of Section 18 (1) as meaning "ultimately payable". The phraseology might indeed be capable of meaning either the Excess Profits Tax payable upon the actual

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figures appertaining to the particular period or the reduced amount after deducting the permissible deficiencies. The provision that the deduction allowed is of the Excess Profits Tax payable in respect of any chargeable accounting period might of itself tend to cause a preference for the earlier version, but as I have already indicated the provision against alteration of the amount of the deduction allowed is in my view decisive.

In the second place the Appellants contend that even if the conclusion indicated is to be preferred, nevertheless the proviso to Section 18 (1) is only applicable to a case where and to the extent to which actual payment and repayment have been made. Had the Respondents paid the Excess Profits Tax in full upon the figures agreed before any deduction for later deficiencies then in their submission relief would have been claimable, the proviso would apply and the amount of the deduction already allowed could not be altered. In the present instance however only £1,000 has been paid and for that sum credit has been given. Apart from the payment of the £1,000 and repayment of £483 found to have been overpaid when the final liability was ascertained, no sum was paid or repaid in respect of Excess Profits Tax. Repayment, it is said, is used in that Section in its strict sense of a cash payment; where anything other than cash payment is intended the Act is explicit in its term. "Relief" says Section 15 (2) (a) . . . shall be given by "repayment or otherwise."

The Appellants therefore maintain that in such a case as this the amount of the deduction originally allowed under the Section is to be altered and the ultimate amount of Excess Profits Tax due after the relevant deductions for deficiencies have been made is alone to be taken from the profits of the year. As in fact no Excess Profits Tax is payable for the relevant accounting period, no sum is to be allowed to be deducted in arriving at the profits.

My Lords, whatever force the last observation may have it is not open to this House to consider what might be an appropriate solution of such events as are now being dealt with. The question is not what might have been done, but what the Act provides. The argument, as I see it, depends upon the distinction to be drawn between the words "repayment or otherwise" in Section 15 and "repayment" in Section 18.

Repayment is not, nor indeed is payment, a term of art. It can be effected in any way which puts an end to the indebtedness between one person and another. Set-off is payment as much as the tender of cash.

Where the Crown is engaged in settling accounts with the subject it is natural and desirable that a repayment in cash should be authorised if the return of money paid is contemplated and if this authority is given it is again natural that the method of relief shall not be confined to a cash payment and that the words "or otherwise" should be inserted to make this clear. But where no question of the authority of the Crown to make a cash payment is involved, the generic term "repayment" may well be used to cover any kind of repayment such as a set-off of indebtedness on the part of the subject.

The omission of the words "or otherwise" in Section 18 seems to me altogether inadequate as a foundation for the argument presented and it would be an odd result if, as was conceded by the Crown's advisers, the Respondents' calculations should be right if they had paid or tendered each

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sum due for Excess Profits Tax or indeed paid the whole sum due and then received back the overplus, whereas if they waited until accounts could be conveniently settled their indebtedness should be calculated on a totally different basis.

It is, as the Lord President points out, the amount of any excess profits payable which is to be deducted—not, as the Act of 1916 provided, those paid: and, as he says, the change may well be significant. The general scheme of the Act in my opinion deals with the matter on the basis that past accurate computations should not be interfered with, but the matter should be adjusted by adding the sum deducted to profits in the year of deficiency.

No doubt the Respondents gained by not having to pay the Excess Profits Tax originally charged, but on the other hand they are deprived of the right to set off their loss against future profits.

In these circumstances I cannot say that the Court of Session was wrong—indeed I think its conclusion was right and should dismiss the appeal.

Lord Normand.—My Lords, I agree with the opinion of my noble and learned friend on the Woolsack.

The question in the appeal turns on the construction of Sections 15 and 18 of the Finance (No. 2) Act, 1939. Section 15 (1) provides for the ascertainment of a deficiency of profits in any chargeable accounting period. Section 15 (2) enacts that when a deficiency occurs in any chargeable accounting period the profits chargeable with Excess Profits Tax shall be deemed to be reduced, and it then goes on to deal with the consequential relief. Under paragraph (a) the aggregate of the profits chargeable for the previous chargeable accounting periods is to be deemed to be reduced by the amount of the deficiency and the amount of Excess Profits Tax payable in respect of the aggregate is to be deemed to be reduced accordingly. The relief necessary to give effect to the reductions is to be given by repayment or otherwise. Paragraph (b) deals with the case where the amount of the deficiency exceeds the aggregate amount of the profits chargeable for the previous chargeable accounting periods. In that event the balance is to be applied in reducing any profits chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of these profits, any profits chargeable for the next subsequent chargeable accounting period and so on. Pausing there I think that there is not much doubt about what is intended. Section 15 (2) is designed to secure that if excess profits have been earned in one or more chargeable accounting periods, but if a deficiency has occurred in a subsequent chargeable accounting period, the taxpayer shall pay Excess Profits Tax only on the net aggregate. In the first part of the Section I think “the profits chargeable with Excess Profits Tax” means the total chargeable profits whenever earned and irrespective of the particular chargeable accounting period in which they were earned. There are two significant differences between paragraph (a) and paragraph (b). Under (a) the deficiency is set against the *aggregate* of past profits, which is to be deemed to be reduced by the amount of the deficiency. Under (b) the excess profits chargeable for the subsequent chargeable accounting period are to be actually reduced. I agree with my noble and learned friend on the Woolsack that there is no indication that the computation of excess profits for any chargeable accounting period before the

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chargeable accounting period in which the deficiency occurred is to be re-opened. The words "shall be deemed to be reduced" occur three times in Section 15 (2) and I think that they cannot be ignored or treated as negligible. One must ask for what purposes the total profits chargeable with Excess Profits Tax, or the aggregate amount of the profits so chargeable for the chargeable accounting periods previous to the chargeable accounting period in which the deficiency occurred, or the amount of Excess Profits Tax payable in respect of this aggregate, are to be deemed to be reduced. The answer supplied by the context is that it is for the purposes of giving the relief from Excess Profits Tax made necessary by the occurrence of a deficiency of profits.

The words "shall be deemed" appear also in Section 15 (1), and there they are qualified by the words "For the purposes of this Part of this Act," because it is intended that the event which has been deemed to occur should affect not only the computation of Excess Profits Tax but also the computation of Income Tax. The omission of the words "For the purposes of this Part of this Act" in Section 15 (2) seems to me to be significant.

If that is the meaning of Section 15 (2), its provisions seem to have no bearing upon the problem dealt with in Section 18. Section 18 deals with the computation of profits for the purposes of Income Tax, and the first part of Section 18 (1) provides that the amount of the Excess Profits Tax payable for any chargeable accounting period shall be deductible as an expense in computing profits for Income Tax purposes for the period. "The amount of the Excess Profits Tax payable . . . for any chargeable accounting period" must, it seems to me, mean the amount of Excess Profits Tax arrived at for each several accounting period. When no deficiency has occurred, or when payment of Excess Profits Tax has been made in each year before a deficiency occurred that is admittedly the meaning of the words. I think it must also be their meaning where a deficiency has occurred after a year or a succession of years in which excess profits have been earned and where the provisions for aggregating the past excess profits and deeming them to be reduced by the amount of the deficiency fall to be applied before any payment of Excess Profits Tax has been made.

The Crown, however, relied on the proviso to Section 18 (1) as well as upon Section 15 (2). The proviso deals with the case where relief is given by way of repayment from Excess Profits Tax chargeable for any chargeable accounting period previous to that in which a deficiency occurs. I think that it is intended to cover all those cases to which the method of aggregation and deduction is applied by Section 15 (2) (a). In those cases the proviso says that "the amount of the deduction allowed under this section shall not be altered". Unless these words mean that the deduction of the amount of the Excess Profits Tax payable in respect of each particular chargeable accounting period is to stand, I do not know what they can mean. And if that is their meaning the method of aggregation and deduction and its results provided for by Section 15 (2) (a), in which the particular chargeable accounting periods are disregarded, are expressly excluded from having any place in the calculation of profits for the purposes of Income Tax.

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My Lords, I am aware that the meaning which I have put upon the relevant Sections does not avoid all the difficulties of construction. I appreciate that the words "relief is given by way of repayment", which in themselves are appropriate to cover both those cases in which relief is given by a cash repayment and those cases in which relief is given by set-off, nevertheless throw the mind back to the words "relief . . . shall be given by repayment "or otherwise" in Section 15 (2) (a) and may reasonably lead to the inference that the proviso to Section 18 (1) is limited to the case where relief is given by a cash payment. I will add that on the Crown's construction it might result that the liability of the taxpayer for Income Tax would be heavier if, instead of paying Excess Profits Tax year by year, he postponed payment till the deficiency had occurred and the provisions of Section 15 (2) had come into operation. But I do not rely on the comparative equity of the rival contentions of parties. I prefer the construction submitted by the Respondents, and it is enough to say with my noble and learned friend on the Woolsack that it has not been shown that the Interlocutor under appeal is erroneous.

Lord Morton of Henryton.—My Lords, this is an appeal against an Interlocutor pronounced by the First Division of the Court of Session, as the Court of Exchequer in Scotland, upon a Case stated under Section 149 of the Income Tax Act, 1918. The facts giving rise to the appeal are fully set out in the Case Stated, but I must repeat some of them in order to state the contentions of the parties and my views upon these contentions.

The question raised in the Case is whether the General Commissioners of Income Tax for the Lower Ward of Lanarkshire adopted the correct method of dealing with Excess Profits Tax in arriving at the profits of the Respondents for the purpose of Income Tax. The matter depends upon the deductions allowable, in arriving at such profits, on account of liability in respect of Excess Profits Tax.

The Respondents, a limited company carrying on business in Scotland as building contractors, were assessed to Income Tax under Schedule D of the Income Tax Act, 1918, for the years 1941-42 to 1945-46 inclusive, as follows:—

1941-42 on the sum of £2,338 less wear and tear £80.

1942-43 on the sum of £5,000.

1943-44 on the sum of £5,000.

1944-45 on the sum of £500.

1945-46 on the sum of £500.

The Respondents appealed against these assessments, and their appeal was heard by the General Commissioners of Income Tax for the Lower Ward of Lanarkshire, on 3rd February, 1947. It was then stated to the Commissioners that on 13th September, 1946, the parties had finally agreed to the figures of profits and of Excess Profits Tax for all chargeable accounting periods up to that ending on 31st July, 1944. The net balance of Excess Profits Tax payable on an accounting in respect of all the chargeable accounting periods up to and including the twelve months ending 31st July, 1944, had been agreed to be £517.

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The details of the finally agreed computations were as follows:—

Chargeable Accounting Period.	Excess Profits Tax Payable	Amounts repayable or to be set off in respect of Excess Profits Tax Deficiencies.
4 months to 31st July, 1939		£97 16s. 0d. (Set off against excess for twelve months to 31st July, 1940)
12 months to 31st July, 1940	£3,548 (after allowance of deficiency of £97 16s. for the period of four months to 31st July, 1939)	
12 months to 31st July, 1941	£1,384	
12 months to 31st July, 1942	£4,636	
12 months to 31st July, 1943		£8,465
12 months to 31st July, 1944		£586
	<hr/>	<hr/>
	£9,568	£9,051
Deduct deficiencies	£9,051	<hr/> <hr/>
Net balance of Excess Profits Tax payable	<hr/> <hr/>	
	£517	

The Respondents had paid £1,000 in September, 1943, as a payment on account of Excess Profits Tax and the Appellants had credited this sum against the assessment for the year to 31st July, 1940. In the year 1946 the Appellants, after satisfying the net balance of Excess Profits Tax payable of £517, repaid the balance of £483 to the Company.

The amounts of the profits chargeable to Income Tax before making adjustments in respect of Excess Profits Tax payable and repayable were also agreed by both parties in the following amounts:—

Year to 31st July, 1940	Profit £4,838
Year to 31st July, 1941	Profit £2,456
	Interest £21
Year to 31st July, 1942	Profit £5,783
Year to 31st July, 1943	Loss £7,645
Year to 31st July, 1944	Profit £550

The parties, however, did not agree the adjustments to be made for Income Tax purposes in respect of the Excess Profits Tax liabilities payable and the amounts of Excess Profits Tax repayable for deficiencies.

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It is convenient at this point to set out Sections 12 (1), 15, 18 and 21 (1) of the Finance (No. 2) Act, 1939, to which I shall refer hereafter as "the 1939 Act." These four Sections are part of a fasciculus of Sections headed "EXCESS PROFITS TAX".

"12.—(1) Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this Part of this Act, be charged on the excess a tax (to be called the excess profits tax) equal to three-fifths of the excess."

"15.—(1) For the purposes of this Part of this Act a deficiency of profits shall be deemed to have occurred in a trade or business in any chargeable accounting period if the profits arising from the trade or business in that period are less than the standard profits, or if a loss is sustained in the trade or business in that period; and the amount of the deficiency occurring in any such period shall be taken to be:—

"(a) where profits have been made in the period, the amount by which those profits fall short of the standard profits;

"(b) where a loss has been sustained in the period, the amount of the loss added to the amount of the standard profits.

"(2) Where a deficiency of profits occurs in any chargeable accounting period in any trade or business, the profits chargeable with excess profits tax arising from the trade or business shall be deemed to be reduced, and relief shall be granted in accordance with the following provisions:—

"(a) The aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency, and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly, and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

"(b) where the amount of the deficiency exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, the balance of the deficiency shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and, if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period, and so on."

"18.—(1) The amount of the excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period:

"Provided that where, under the provisions of this Act relating to deficiencies of profits, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under this section shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the trade or business for the purposes of income tax as if it were a profit of the trade

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“or business accruing in the chargeable accounting period in which the deficiency occurs.

“(2) The provisions of this section do not apply to the computation of the profits of a trade or business for the purposes of the national defence contribution.”

“21.—(1) Excess profits tax shall be assessed and collected by the Commissioners, and shall be due and payable at the expiration of one month from the date of assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed.”

The contest between the parties as to the construction and effect of these Sections is conveniently illustrated by certain tables which have been put before the Commissioners and relied upon before your Lordships' House.

Table A shows the Respondents' computation, and is as follows:—

A. THE COMPANY'S COMPUTATION

			Net Profit for Income Tax.
Year to 31st July, 1940	Agreed profit	£4,838	
	Less Excess Profits		
	Tax payable as finally agreed	£3,548	
		<hr/>	£1,290
Year to 31st July, 1941	Agreed profit	£2,456	
	Interest	21	
	Less Excess Profits		
	Tax payable as finally agreed	£1,384	
		<hr/>	£1,093
Year to 31st July, 1942	Agreed profit	£5,783	
	Less Excess Profits		
	Tax payable as finally agreed	£4,636	
		<hr/>	£1,147
Year to 31st July, 1943	Agreed loss	£7,645	
	Credit for Excess Profits Tax repayable as finally agreed	£8,465	
		<hr/>	£820
Year to 31st July, 1944	Agreed profit	£550	
	Credit for Excess Profits Tax repayable as finally agreed	£586	
		<hr/>	£1,136

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Table B was put in on behalf of the Appellants, by the Inspector of Taxes who appeared before the General Commissioners, and is as follows:—

B. THE INSPECTOR'S COMPUTATION

			Net Profit for Income Tax.
Year to 31st July, 1940	Agreed profit	£4,838	
	Less Excess Profits Tax actually paid	£1,000	
		<hr/>	£3,838
Year to 31st July, 1941	Agreed profit	£2,456	
	Interest	21	
	Excess Profits Tax actually paid	Nil.	
		<hr/>	£2,477
Year to 31st July, 1942	Agreed profit	£5,783	
	Excess Profits Tax actually paid	Nil.	
		<hr/>	£5,783
Year to 31st July, 1943	Agreed loss	£7,645	
	Excess Profits Tax actually paid	Nil.	
		<hr/>	Loss £7,645
Year to 31st July, 1944	Agreed profit	£550	
	Add Excess Profits Tax repaid	£483	
		<hr/>	£1,033

The General Commissioners accepted the Respondents' computation as shown in Table A and their decision was affirmed on appeal by the First Division of the Court of Session.

In the concluding paragraph of the Case Stated, the General Commissioners set out the question of law as follows: "The question of law for the opinion of the Court is whether we adopted the correct method of dealing with Excess Profits Tax in arriving at the profits of the Company for the purpose of Income Tax." Now the method adopted by the General Commissioners was the method adopted by the Respondents in their Table A, and consequently the only question before your Lordship's House is whether the method adopted in Table A is right or wrong.

Counsel for the Respondents explains and seeks to justify this method as follows. In the first place, he says, you must look at Section 18 of the 1939 Act. That is the Section under which payments of Excess Profits Tax can be deducted as an expense. Following the words of that Section, and taking the first of the five relevant chargeable accounting periods, you find that £3,548 is "The amount of the excess profits tax payable in respect of" the Respondents' business for that chargeable accounting period. That sum is therefore deductible, under Section 18, "as an expense incurred in that period." The scheme of the 1939 Act is to treat each chargeable accounting period separately, and once you have found out what are the excess profits in respect of a particular chargeable accounting period, and what is the Excess Profits Tax payable in respect thereof, you have arrived at an allowable deduction which cannot subsequently be disturbed. If there is a subsequent "deficiency of profits", as defined in Section 15, the proviso to

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Section 18 comes into operation and the words "where . . . relief is given "by way of repayment" are not limited to the case of a repayment in cash. Consequently, in Table A the Respondents rightly deducted the "Excess Profits Tax payable as finally agreed" in each of the first three chargeable accounting periods, and as it was found that there was a "deficiency of "profits" amounting to £8,465 in the fourth period, they rightly did not disturb the deductions already made in each of the first three periods; the deficiency of £8,465 was correctly taken into account "as if it were a profit "of the trade or business accruing in the chargeable accounting period in "which the deficiency occurs", in accordance with the concluding words of the proviso to Section 18, and the same observation applies to the subsequent "deficiency" of £586. Thus Table A is correct throughout.

My Lords, it may at once be observed that the argument just summarised, if correct, leads to remarkable results. Taking the year to 31st July, 1941, as an example, the Respondents' method of calculation would allow them to deduct, "as an expense incurred in that period," within the meaning of Section 18, a sum of £1,384 in respect of Excess Profits Tax, which never was paid and never will be paid by them.

Before considering the Respondents' argument in more detail, it is desirable that I should state my views upon the meaning of the word "payable" in the first line of Section 18. The learned Judges of the First Division appear to have thought that the Crown's argument involved reading this word as meaning "actually paid" and the wording of Table B would seem to indicate that the Crown might desire so to contend. No such argument was advanced before this House. I would add that, although the wording of Table B is ill-chosen, it may well be that the ill-chosen wording conceals a perfectly correct line of reasoning which arrives at a perfectly correct result. However, the correctness of Table B is not at the moment under consideration, and I turn to the construction of the word "payable" in Section 18.

My Lords, in my view the word "payable" in Section 18 has no strained or artificial meaning. It is used in the same sense as it is used in Section 21 and in Section 15. The amount of the Excess Profits Tax payable in respect of each chargeable accounting period is ascertained in the manner laid down in the Act and the tax becomes "payable" at the expiration of one month from the date of assessment. That amount the taxpayer is allowed to deduct as an expense incurred in respect of that period. If, however, there is a deficiency of profits in a subsequent chargeable accounting period, Section 15 (2) comes into operation. The aggregate amount of the profits chargeable with Excess Profits Tax for the previous chargeable accounting periods is to be "deemed to be reduced" by the amount of the deficiency and the amount of Excess Profits Tax "payable" in respect thereof is to be "deemed to be reduced" accordingly. The relief necessary to give effect to this "deemed" reduction is to be given "by repayment or otherwise". It seems to me that the method of giving relief by repayment can only be adopted when there has been a previous payment, or previous payments, by the taxpayer, and it turns out that, having regard to the "deemed" reduction, he has paid too much. The obvious, and possibly the only way of giving relief, if the taxpayer has paid no Excess Profits Tax, is by way of set-off against the debt originally due to the Crown under Section 21. It may be convenient if at this stage I apply the provisions of Section 15 (2) as I understand them, to the figures in Table A, disregarding, as Table

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A disregards, the payment of £1,000 in 1943 and the repayment of £483 in 1946.

1. A "deficiency of profits" occurred in a chargeable accounting period, namely a deficiency of £8,465 in the year ending 31st July, 1943.

2. The aggregate amount of the profits chargeable with Excess Profits Tax for the previous chargeable accounting periods must therefore be "deemed to be reduced" by the sum of £8,465, in accordance with the opening words of Section 15 (2) (a), and the amount of Excess Profits Tax payable in respect thereof must be "deemed to be reduced accordingly". The amount of the profits chargeable with Excess Profits Tax for each of the first three periods is not mentioned in Table A. For the present purpose I shall assume that it was the same as the sum there stated to be "Excess Profits Tax payable as finally agreed", as Excess Profits Tax was at the rate of 100 per cent. for the whole of the second and third periods and for part of the first period. On this footing, the aggregate amount which must be "deemed to be reduced" was £3,548 plus £1,384 plus £4,636, or a total of £9,568.

3. Section 15 (2) (a) does not define exactly how this "deemed" reduction is to be applied to the aggregate amount of £9,568, but the most natural way of applying it would seem to be first to reduce the £3,548 to nil, then to reduce the £1,384 to nil and then to reduce the £4,636 to £1,103. In this way effect will have been given to the total "deemed" reduction of £8,465, and the Respondents do not seek to contest this method of carrying out the "deemed" reduction if they fail in their contention that the figures of £3,548, £1,384 and £4,636 ought to be left unaffected by the deficiencies of profits in subsequent chargeable accounting periods.

4. In the year to 31st July, 1944, there was again a "deficiency of profits" amounting this time to £586. This will be applied in reducing the £1,103 to £517; thus there remains a balance of £517 of Excess Profits Tax payable in respect of the year to 31st July, 1942, and no further Excess Profits Tax became payable prior to the repeal of that tax in December, 1946.

My Lords, with all respect to those who have thought otherwise, I cannot see that this method of applying the provisions of Section 15 (2) involves giving an artificial meaning to the word "payable" in Section 18, or that it involves giving to that word a twofold or threefold meaning, depending upon the events which actually happen. To my mind "payable" always has the same simple meaning as it has in Section 21, but in certain events the amount payable is *deemed* to be reduced.

Taking again, as an example, the year to 31st July, 1941, the Respondents claim to deduct £1,384 as an "expense" under Section 18 (1). They say "This sum was 'payable' under Section 21 (1) and therefore we can deduct it." To this the Appellants reply "True, it was 'payable' under Section 21 (1) and we do not seek to give any other meaning to the word 'payable' in Section 18 (1). But we do say that it is 'deemed to be reduced' to nil under Section 15 (2) and therefore you can deduct nothing as an expense. If you had paid the £1,384, relief would be given 'by way of repayment' and the proviso to Section 18 (1) would have applied; the £1,384 would have been brought into a later year 'as if it were a profit of the business accruing' in that year, and the figures given in Table A

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would have been correct. As it is, relief is given 'otherwise', namely by way of a set-off, and the figures in Table A are wrong."

To my mind this contention of the Crown is unanswerable, and shows that Table A cannot be correct. It is true that I have so far disregarded the payment of £1,000 and the repayment £483, but I cannot see that any introduction of these figures into Table A can possibly make that Table correct, if I am right in my construction of Section 15 (2) and if, as I think, "repayment" in the proviso to Section 18 (1) can only mean repayment in cash. I shall return to consider this proviso, but meanwhile I must consider the payment of £1,000 and the repayment of £483. As to the £483 no difficulty arises. I have already shown that the total Excess Profits Tax payable in respect of the whole period, after Section 15 (2) has been put into operation, is £517. The Respondents have paid £1,000. Therefore £483 is due to them and this sum must be paid in cash, since there is no sum against which it can be set off. Here the proviso to Section 18 (1) comes into play, and the £483 must be "taken into account in computing the profits and gains of the trade or business for the purposes of income tax as if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs."

I am relieved of the task of considering at this point exactly how the £1,000 should be taken into account, by reason of a concession and statement by Counsel for the Respondents. He conceded that if Section 15 (2) were construed as I construe it, Table A must be incorrect, and he stated that in this event his clients were willing to accept a suggestion of the Appellants, which appears in Table B, that the £1,000 should be allowed as a deduction, for the purposes of Income Tax, as an expense incurred in the year ending 31st July, 1940, and that the £483 should be brought in as if it were a profit of the business accruing in the year ending 31st July, 1944.

I now turn to consider the argument of Counsel for the Respondents, as already summarised. It will be observed that throughout his argument Counsel disregarded, as Table A disregards, the payment of £1,000 in 1943 and the repayment of £483 in 1946.

In my view there are at least two fatal flaws in the argument of Counsel for the Respondents. In the first place, the method adopted in Table A, and sought to be upheld by Counsel, gives no effect at all to the provisions of Section 15 (2). No heed is paid to the "deemed" reduction of Excess Profits Tax for which provision is made in that Sub-section. The First Division found it possible to accept the Respondents' argument, and the Lord President said, in the course of his Opinion, "The argument of the Inland Revenue had to be that, so long as Excess Profits Tax existed (i.e., until December, 1946), assessments to that tax were merely provisional, and that there was no finality for either Excess Profits Tax liability or Income Tax liability until the whole six years of the emergency tax had run their course, so that it could be known whether, and to what extent, relief under Section 15 might be claimable".⁽¹⁾ This argument he found unacceptable. I respectfully agree with the Lord President that this argument gives rise to difficulties, but I think that the wording of Section 15 (2) renders its acceptance inevitable. That Sub-section makes it impossible to ascertain the amount of Excess Profits Tax for which a

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taxpayer may ultimately be liable, in respect of any chargeable accounting period, until Excess Profits Tax ceases to be in force. I would add two observations. First, that Excess Profits Tax was essentially a temporary measure, although, of course, the Legislature could not know exactly how long it would last; secondly, that the Respondents' argument also gives rise to anomalies. As I have already pointed out, if it were correct it would enable them to deduct, as an expense, large sums on account of Excess Profits Tax which was never paid and was ultimately found not to be payable.

In the second place, the latter part of the argument of Counsel for the Respondents, dealing with the event of a subsequent deficiency of profits, rests upon his contention that the word "repayment" in Section 18 is not limited in its meaning to a repayment in cash but covers every case in which relief is given, including a case in which relief is given by set-off. In my judgment this word can only refer to a repayment in cash. I think that this is its more natural meaning, in the context in which it appears, but if there were any doubt on the point it is removed by the words "the relief necessary to give effect to the reduction shall be given by repayment or otherwise" at the end of Section 15 (2) (a). In my view the word "repayment" must bear the same meaning in Section 18 (1) as it bears in Section 15 (2) (a). In the latter Sub-section relief given "by repayment" is contrasted with relief given "otherwise", and I think that "repayment" in this context plainly means repayment in cash, as contrasted with relief given in any other manner. The Respondents' argument gives no meaning at all to the words "or otherwise" in Section 15 (2) (a). The words in the proviso to Section 18 (1) "where . . . relief is given by way of repayment" show that the proviso applies only where one particular method of giving relief is adopted and the method referred to can only be, in my view, the method of repayment in cash. In the present case only £483 was repaid in cash; yet in Table A the Respondents treat two sums of £8,465 and £586 as coming within the proviso to Section 18 (1).

My Lords, as I have said, the only question before this House is whether the method adopted in Table A is right or wrong. I have endeavoured to show that it is wrong in two vital respects, viz. (a) it gives no effect at all to the provisions of Section 15 (2) and (b) it treats two sums of £8,465 and £586 as coming within the proviso to Section 18 (1), although neither of these sums was the subject of a cash repayment. If Table A does not show the correct method of dealing with Excess Profits Tax in arriving at the profits of the Respondents for the purpose of Income Tax, the question of law must be answered in the negative.

It would not be right for me to express a concluded view as to how the Respondents' payment of £1,000 should be treated, assuming that my view as to the construction of the Act is correct. This point has not been argued, for the reasons which I have already stated. Nevertheless I think it is right that I should state one way in which I think it might be treated, because by so doing I shall show, as I hope, that my construction need not lead to any strange result in a case where part, but not all, of the Excess Profits Tax "payable" under Section 21 (1) has been paid before a "deficiency of profits" occurs. I think it is reasonable to treat the £1,000 as a payment on account of the Excess Profits Tax payable for the year to 31st July, 1940, and the Appellants have so treated it with the assent of the Respondents. It follows that when relief has to be given to give effect

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to a "deemed" reduction of £9,051 (£8,465 plus £586) relief can be given by way of repayment in respect of part of the "aggregate amount" of £9,568 (£3,548 plus £1,384 plus £4,636) and relief can be given by way of set-off against the remainder. By setting off the £9,051 against the £9,568 the Excess Profits Tax payable is reduced to £517. But as the Respondents have paid £1,000, £483 is due to them as a repayment. As I have already pointed out, the proviso to Section 18 (1) comes into play as respects this repayment in cash. The Respondents have already paid £1,000. That sum was part of the Excess Profits Tax "payable" within Section 18 (1), although the sum "payable" was ultimately "deemed to be reduced". Accordingly, if there had been no subsequent "deficiency of profits" the Respondents would have been able to deduct it, as an expense, for the purposes of Income Tax. Following the words of the proviso to Section 18 (1) the amount of the deduction allowed under Section 18 (1) (namely, a deduction of £1,000 in respect of the year ending 31st July, 1940) is not altered, but the £483 repayable is taken into account "as if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs." I see no difficulty in dealing with the payment and repayment in this way. It may be that in Table B the £483 is brought in as a profit a year too late, but to this the Respondents do not object.

I think I should add that if my reasoning is incorrect and the argument for the Respondents is to be accepted, it would appear to be necessary to explain how Table A can be correct in disregarding the payment of £1,000 and the repayment of £483, and how these sums shall be treated. I find no light upon this point in the Respondents' case. Nor does it appear to be dealt with in the opinions delivered in the First Division of the Court of Session.

I would allow the appeal and answer the question of law in the negative.

Lord MacDermott.—My Lords, if the submission of the Crown is to prevail the words "the amount . . . payable" in the first part of Section 18 (1) of the Finance (No. 2) Act, 1939, must bear a complex and unnatural meaning. They must, as I follow the argument, mean the greater of (a) the amount ultimately payable, that is the amount of Excess Profits Tax payable in respect of a particular year as subsequently reduced by way of relief under Section 15, and (b) the amount actually paid as Excess Profits Tax in respect of the same year.

It is material to observe that the first part of Section 18 (1) is an enactment of general applicability. It makes Excess Profits Tax deductible as an expense for Income Tax purposes irrespective of whether or not a right to relief under Section 15 arises; and if it could be read apart from its proviso and Section 15 the submission of the Crown would clearly be untenable. So read I think there can be no doubt that the words "the amount . . . payable" would connote nothing more or less than the Excess Profits Tax liability as computed for the year in question. They would hold no warrant for looking beyond what could be assessed and levied at the end of such year, and payment would be an irrelevant consideration.

The first question, then, is whether the effect of Section 15 and the proviso to Section 18 (1) is to expand and modify this *prima facie* meaning so as to accord with the contentions of the Crown.

(Lord MacDermott.)

Regarded alone Section 15 would not justify the view that "the amount . . . payable" may mean, on occasion, not the liability but a different amount measured by the sum actually paid. But it would go some way to justify the view that "payable" means "ultimately payable" if, in Sub-section (2) (a) thereof, the word "deemed" in the direction "and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly" could be construed as meaning "deemed for the purposes of this Part of this Act". Coming, however, to the best conclusion I can on the language of the statute, I do not think that would be the right interpretation. It seems to me that Sub-section (2) is concerned primarily with the granting of relief from liability in respect of a period, which may span several years, rather than with the re-opening and adjustment of each of the previous assessments. The machinery of paragraph (a) starts its work on actual profits and actual liabilities. The first are to be "deemed to be reduced" in the aggregate, but that can only be notional and for the purpose of Sub-section (2). The second are to be "deemed to be reduced accordingly" and I do not think this reduction can fairly be regarded as intended to fulfil a wider purpose.

If that is right I can find no good reason for reading "payable" in Section 18 (1) as "ultimately payable" for there is nothing in the proviso to that Sub-section, taken either alone or in conjunction with Section 15, to support that interpretation. The proviso does not purport to modify what has gone before. On the contrary, it directs, in regard to the only kind of event with which it is concerned, that "the amount of the deduction allowed under this section shall not be altered".

But even if the view of Section 15 which I favour is wrong it does not follow that the Crown case is right. It is not enough for the Crown to say that "payable" means "ultimately payable" and to stop there. To do so would, where relief under Section 15 has been given by way of repayment, lead to an impossible result, for the proviso would then operate to charge the subject, who because he had paid had got a repayment, a second time in respect of the same parcel of profits. It is to avoid the entanglements thus created by the difficult terms of this proviso that the Crown definition of "payable" assumes the form of "ultimately payable or actually paid, whichever amount is the greater". This is not a severable proposition and the first part of it cannot survive alone.

My Lords, I have had the advantage of reading in print the opinions of my noble and learned friends Lord Porter and Lord Reid and I desire to express my concurrence with the reasons which have led them to reject the construction placed upon the word "payable" in Section 18 (1) by the Crown. I need not repeat those reasons; but I would, if I may, add a further ground for the same conclusion which seems to flow from the considerations to which I have just referred. A proviso in a statute must, no doubt, be read and have effect according to its tenor; but its nature is not to be overlooked in the task of interpretation, and in the absence of some compelling context (of which I see no sign in the present case) it is not a legitimate process, in order to resolve some doubt or difficulty arising from a proviso, to use it, so to speak, as a lever to force plain words in the enactment to which it is appended away from their natural meaning. Here, I think, that is what the Crown has endeavoured to do and that is one of the reasons why its contentions should not succeed. See *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647.

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As Lord Herschell there observed, at page 655: "Of course a proviso may "be used to guide you in the selection of one or other of two possible "constructions of the words to be found in the enactment, and show when "there is doubt about its scope, when it may reasonably admit of doubt "as to its having this scope or that, which is the proper view to take of "it; but to find in it an enacting provision which enables something to be "done which is not to be found in the enactment itself on any reasonable "construction of it, simply because otherwise the proviso would be "meaningless and senseless, would, as I have said, be in the highest degree "dangerous."

The next question is whether the Respondents' method of computation complied with the terms of the statute. It is based on a construction of Section 18 (1) which cannot be accepted merely because that of the Crown is rejected, though the case appears to have been presented throughout as a matter of choice between the rival interpretations and on the basis that if one fell the other stood.

The Respondents' submission as to the meaning of the words "the "amount . . . payable" accords with what I think is the right view. The trouble is with their construction of the proviso. Though it applies only where "relief is given by way of repayment from excess profits tax "chargeable . . ." they say that this extends to any relief which may be given under Section 15 (2) (a) and, consequently, that in the instant case "the amount repayable", which under the proviso is to be brought into account as a profit in the deficiency year, includes all the Excess Profits Tax liability in respect of which relief has been granted and is not limited to the actual repayment of £483.

This meaning has the virtue of giving the proviso a rational design by making its compensatory provisions adequate to maintain a constant balance against the operation of the words "the amount . . . payable" according to their true construction. But it rides so uneasily upon the language which the Legislature has used that I find myself unable to adopt it. I would not feel the same difficulty if relief under Section 15 had to take the shape either of an actual repayment or of a set-off in the sense of applying one obligation to reduce or extinguish another, for "repayment" like "payment" need not always connote the passing of money. It is, however, plain that relief may commonly come to be given under Section 15 merely by virtue of the process of reduction which is deemed to be effected thereunder. That, indeed, has happened in the present case, for in it the relief was of that nature save to the extent of the £483. I do not think that kind of relief can reasonably be described as "relief . . . by "way of repayment". Nor am I able to find in the statute any context to justify such a description of it. No doubt the proviso to Section 18 (1) must be read closely with Section 15 (2), but that, as it seems to me, only adds another difficulty. The kind of relief under discussion either falls within the expression at the end of Section 15 (2) (a)—"repayment or "otherwise"—or it does not. If the former, its appropriate place is in the category covered by the words "or otherwise" and not in that covered by "repayment"; and if the latter it is no whit nearer being given "by way "of repayment".

This view, if well founded, means that there has been an unfortunate *casus omissus* in the drafting of the proviso. It may well be that this

(Lord MacDermott.)

reflects the stress of events in 1939 when the statute was enacted; but whatever the reason the defect is, to my mind, beyond repair by any process of adjudication, however anomalous its results.

For these reasons I think the Respondents' computation (Table A) is correct in law for the first three, but not for the last two, of the years under review and I would answer the question of law accordingly.

Lord Reid.—My Lords, in the present case a number of profitable years for the Respondents, in respect of which they would have had to pay large sums of Excess Profits Tax if these years had stood alone, were succeeded by a year in which a heavy loss was sustained and a year in which the profits fell short of the standard profits. The general scheme of the Act for dealing with such a situation is simple enough. Relief is given so that at the end of the period for which the tax is in operation Excess Profits Tax is only due on the amount by which the aggregate of chargeable profits in the good years exceeds the deficiencies in the other years. This result must be reached by way of relief because as regards each of the earlier chargeable accounting periods, where the profits exceeded the standard profits, tax was immediately chargeable on the excess: assessments could be and were made and tax was collected before it was known that there would later be a loss. What the Act does in Section 15 (2) is to direct that the profits chargeable with tax in the earlier good years and the tax payable in respect thereof shall be deemed to be reduced by the amount of the subsequent deficiency and to provide that the relief necessary to give effect to the reduction shall be given by repayment or otherwise. The nature of the relief must depend on whether tax in respect of the earlier years has actually been paid or not. If the sum paid by the taxpayer in respect of the earlier years is larger than his total liability for the whole period as ascertained when the later deficiency of profits is taken into account then plainly the taxpayer must get something back and relief will operate by way of repayment. But if the taxpayer though due to pay large sums in respect of the earlier years has in fact paid nothing or has only paid a sum smaller than the total amount of his ultimate liability, there is no room for any repayment and relief can operate by discharging the taxpayer's outstanding liability in respect of the earlier years to such extent as is necessary. I do not think that it is necessary to consider whether relief could operate in any other way.

So far there is no difficulty. The difficulty arises out of the interrelation of Excess Profits Tax and Income Tax. Where there is no question of a deficiency of profits in any year, again the scheme is simple enough. For Income Tax purposes the amount of Excess Profits Tax payable for any chargeable accounting period (normally a period of one year) is allowed by Section 18 to be deducted as an expense incurred in that period. So long as there is no subsequent deficiency each period can be and is treated as standing by itself: and in effect that part of the profits which exceeds the standard profits is subject to Excess Profits Tax but not to Income Tax, while the remainder of the profits is subject to Income Tax. But the simplicity of the scheme breaks down when a subsequent deficiency of profits makes it necessary to re-open the position of the earlier years in order to operate the relief from Excess Profits Tax to which the taxpayer is entitled. The question which arises in this case is what does the statute direct to be done as regards Income Tax in that event?

(Lord Reid.)

I start with one direction about which there is no controversy in this case and which appears to me not to be ambiguous. Where the taxpayer has paid more than is ultimately found to be due he gets a repayment and the latter part of the proviso to Section 18 (1) directs that this repayment shall be treated for Income Tax purposes as if it were a profit accruing in the period in which the deficiency of profits occurs. The repayment is not in fact a profit and if it is treated as a profit in one year it must be offset by a corresponding allowance of a deduction in another period. This was not disputed by the Solicitor-General. I think that the position can best be made plain by a simple example. Let me suppose that in one year there is an excess profit of £5,000 and in the next a deficiency of £5,000. The result is that in the end no Excess Profits Tax is due. It may be that the £5,000 of tax due in respect of the first year taken by itself has been paid in full: in that case the whole of that £5,000 is repayable and the statute directs that for Income Tax purposes it must be taken into account as a profit in the second year when there was a deficiency of £5,000. Let me further suppose that the standard profits were £2,000 in each year so that there was a total profit of £7,000 in the first year and a loss of £3,000 in the second year. The statutory direction to take into account as a profit in the second year the £5,000 of Excess Profits Tax which was repayable converts the actual loss of £3,000 in that year into a profit of £2,000 for Income Tax purposes. If that were the only adjustment the result would be that Income Tax would have to be paid on the actual profit of £7,000 for the first year and on the fictitious profit of £2,000 for the second year, in all £9,000 for the two years. But in fact the total profit for the two years taken together was only £4,000 so one would expect to find a provision for a reduction of the first year's profits for Income Tax purposes from the actual profit of £7,000 to £2,000 so that the total profits for Income Tax purposes for the two years would correspond with the actual total profit for the two years of £4,000. I turn to the provisions of Section 18 (1) which is the only place where any warrant for a deduction from the £7,000 profit in the first year could be found. I have already said that in a case which is not complicated by any question of deficiency of profits Section 18 (1) is a warrant for treating as a deduction for Income Tax purposes the sum payable as Excess Profits Tax. In that case when the tax so payable is paid it is retained by the Exchequer; in the case I am now supposing, the tax has been paid but has then been repaid to the taxpayer. Does this repayment make any difference to the Income Tax position for the first year? The first part of the proviso to Section 18 (1) supplies the answer. It enacts that "the amount of the deduction allowed under this section shall not be altered". That can I think only refer in the case I am supposing to the £5,000 which was originally payable and was in fact paid as tax due in respect of the first year but later repaid. A direction that where relief is given the amount of the deduction shall not be altered assumes that the amount of the deduction could be and was ascertained before the relief was given. The deduction is the amount of Excess Profits Tax "payable" so "payable" cannot mean "ultimately found to be payable" because that can only be ascertained after relief has been given; it must mean "originally payable before any question of relief arose".

The Solicitor-General admitted, and, I have no doubt, rightly admitted, that the first part of the proviso means that where tax has been paid the fact that it has later been repaid makes no difference; it remains deductible

(Lord Reid.)

as an expense for Income Tax purposes notwithstanding its later return to the taxpayer. The matter is then put right not by cancelling the deduction but by treating the repayment as a profit in a later year.

The real difficulty is to determine what has to be done as regards Income Tax where the Excess Profits Tax payable in respect of an earlier year has not in fact been paid and relief has to be given in respect of a later deficiency by total or partial discharge of the assessment in respect of the earlier year. The proviso appears only to apply where "relief is given by way of repayment" and there is no corresponding provision to deal with relief given otherwise than by repayment. But if in this case one applies the first part of Section 18 (1), giving to it the same meaning as the Solicitor-General admitted it to have and as I have tried to show it must have where the proviso applies, it is impossible I think to reach a reasonable result without invoking the proviso. Let me revert to the simple example which I took before, with the single difference that I now suppose that £5,000 was assessed and payable as Excess Profits Tax for the first year but not paid. The deduction allowed by Section 18 (1) for Income Tax purposes is "the amount of excess profits tax payable" for the chargeable accounting period and there is nothing in the Act to indicate that "payable" must be held to have a different meaning or that the deduction must be calculated in a different way according to what has in fact been paid. So the £5,000 would still be a deduction for Income Tax purposes just as it was when that sum had first been paid and then repaid. But there would be no proviso to direct that this is to be compensated by adding in £5,000 as a profit in the subsequent deficiency year.

The Solicitor-General boldly sought to get over this difficulty by arguing that the word "payable" in Section 18 (1) has different meanings depending on what has actually been paid before the deficiency years are taken into account under Section 15 (2). If the original assessment has been paid in full, then "payable" means payable under that assessment; if nothing has been paid, then "payable" means ultimately found to be payable after subsequent deficiencies have been taken into account; but if a part only has been paid of the amount due under the original assessment and part or all of that payment has to be repaid (as happened in this case) then "payable" has no relation either to the amount payable under the original assessment or to the amount ultimately found to be due after taking subsequent deficiencies into account, but it means the amount actually paid.

My Lords, I find it impossible to construe the phrase "the amount of the excess profits tax payable . . . for any chargeable accounting period" in this way. I do not deny that the word "payable" is ambiguous. A word is ambiguous because a reasonable man using it in the context in which it occurs can be supposed to have intended in so using it one of two or more different meanings, and if a word is ambiguous a Court is entitled to select one of those meanings as the true meaning. But the fact that a word is ambiguous does not entitle a Court to select another meaning which it is plain that no reasonable man could have intended. "Payable" is ambiguous because it might mean originally payable before the subsequent deficiency was known or taken into account or it might mean ultimately payable after that deficiency had been taken into account. But could it possibly have the complicated threefold meaning for which the Solicitor-General contends? To my mind the question in this case is

(Lord Reid.)

whether Parliament can possibly be supposed to have intended the phrase which I have quoted to bear the meaning which I have stated. I cannot bring myself to imagine anyone having such an intention, and therefore I cannot accept the argument for the Crown. It might be that an equitable result or even a reasonable result, could only be reached by attributing to a phrase in a statute a meaning which no reasonable man would attach to it. But to attribute such a meaning to a phrase would in effect be legislating and not construing the statute and that is beyond the province of a Court of Law. If by legitimate processes of construction no meaning can be found which is equitable or even reasonable then the matter can only be put right by further legislation.

I think it is fairly clear how Section 18 (1) came to assume its present form. There are many similarities between Excess Profits Tax and the old Excess Profits Duty and under the Finance (No. 2) Act, 1915, Section 38 (3), relief was provided to meet the case of a subsequent deficiency of profits after a year for which Excess Profits Duty was payable. But this Section was so phrased that it was necessary to pay the duty in respect of the earlier year before relief could be claimed in respect of the subsequent deficiency. Accordingly the relief could only take the forms of repayment or set-off against duty payable in respect of a still later profitable year and the main difficulty in the present case could not arise. It is not very surprising that in the circumstances of 1939 it was not observed that the change introduced by which a taxpayer can now get relief without actually paying the tax due for the earlier year necessitated a further provision dealing with deductions for Income Tax purposes if a proper result were to be reached. But however that may be I do not think that it is possible to reach a satisfactory result merely by construing the provisions of the Finance (No. 2) Act, 1939, as they stand, and a Court cannot supplement construction by legislation.

There appear to remain two possibilities. I have said that the proviso appears only to apply when relief is given by way of repayment and not when relief is given otherwise than by way of repayment. If this is taken to be the true meaning of the proviso a reasonable result cannot be reached. In the present case the taxpayer has throughout presented his case on the footing that the proviso applies not only to the tax which he actually paid and must now be repaid, but also to the further sum originally due which he did not pay, and which he is not now bound to pay because liability to pay it has been discharged by the operation of relief. This construction produces something much nearer to a reasonable and equitable result. In short the two possibilities are that the word "repayment" means what it says or that it is wide enough to include the case when no money passes but a liability is discharged. There are serious objections to the adoption of either of these alternatives. But if I have to choose between them because there is no other possible construction—I would choose the alternative which has been adopted by the General Commissioners and approved by the First Division in this case. I think therefore that the appeal should be dismissed.

Lord Porter.—Before I put the questions, the House is anxious to know what arrangement, or if any arrangement, has been made as to costs and how the matter should be dealt with.

Mr. Hills.—My Lord, I am informed that the arrangement was that the Crown would pay the reasonable costs of the other side.

Lord Porter.—Do you want anything put in the Order of the House or is that to be left as it is? Do you want the House to say nothing about costs?

Mr. Hills.—My Lord, I should with respect have thought the matter had better be left as it is, subject to arrangement.

Mr. Clements.—My Lords, I would respectfully agree with that view.

Lord Porter.—Then the House will say nothing about costs.

Questions put:

That the Interlocutor appealed from be reversed.

The Not Contents have it.

That the Interlocutor appealed from be affirmed and the appeal dismissed.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue (England), for Solicitor of Inland Revenue (Scotland); Kingsley Wood, Williams & Murphy, for Downie, Aiton & Co., Glasgow, and D. G. M'Gregor, W.S., Edinburgh.]

