HIGH COURT OF JUSTICE (CHANCERY DIVISION)

3RD AND 4TH MARCH, 5TH, 6TH, 7TH AND 8TH MAY, AND 21ST JULY, 1959

COURT OF APPEAL—2ND, 3RD, 4TH, 7TH, 8TH AND 24TH MARCH, 1960

HOUSE OF LORDS—11TH AND 15TH MAY, AND 6TH JULY, 1961

Mitchell and Edon (H.M. Inspectors of Taxes)

v.

Ross [1]

Mitchell and Haddock (H.M. Inspectors of Taxes)

v.

Hirtenstein

Mitchell and Mellersh (H.M. Inspectors of Taxes)

v.

Marshall

Taylor-Gooby (H.M. Inspector of Taxes)

v.

Tarnesby

Taylor-Gooby and Job (H.M. Inspectors of Taxes)

v.

Drew

Income Tax—Part-time specialists under the National Health Service Act, 1946*—Whether remuneration assessable under Schedule D or under Schedule E—Deduction—Expenses.*

Under the National Health Service Act, 1946, *which,* inter alia, *required the Minister of Health to provide the services of specialists, the Respondents held part-time appointments as consultants with regional hospital boards. In addition to their hospital work, the Respondents under their terms of service paid visits to patients in their homes at the request of general practitioners; separate remuneration was paid for these "domiciliary visits". Certain of the Respondents also received payments for locum tenens work under the National Health Service. All the Respondents also had private practices.*

Assessments to Income Tax were made upon the Respondents under Schedules D and E on the footing that all payments received from regional hospital boards, including fees for domiciliary visits and locum tenens work, should be assessed under Schedule E; that income from private practice should be as-

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(1) Reported (Ch. D.) [1960] Ch. 145; [1959] 3 W.L.R. 550; 103 S.J. 635; [1959] 3 All E.R. 341; 228 L.T. Jo. 73; (C.A.) [1960] Ch. 498; [1960] 2 W.L.R 766; 104 S.J. 367; [1960] 2 All E.R. 218; 229 L.T. Jo. 266; (H.L.) [1961] 3 W.L.R. 411; 105 S.J. 608; [1961] 3 All E.R. 49; 232 L.T. Jo. 52

sessed under Schedule D; and that deductions for expenses should be given in each assessment only so far as the expenses had been incurred in connection with the income assessed under the respective Schedule and were properly allowable under the Rules applicable thereto.

On appeal to the Special Commissioners the Respondents contended that their activities as consultants constituted as a whole the carrying on of professions; that the holding of their part-time appointments was an incident of these professions and the appointments were not offices or employments within the meaning of Schedule E; that if they were such offices or employments, any expenses in respect of them not allowable under the Rules applicable to Schedule E should be allowed in their Schedule D assessments; and that in any case the receipts attributable to domiciliary visits and locum tenens work should be assessed under Schedule D.

The Special Commissioners found that the part-time appointments were offices or "posts" and that the remuneration derived therefrom, together with the fees received in respect of domiciliary visits and locum tenens work, were profits of offices within the meaning of Schedule E. They also found, however, that at all material times the Respondents exercised the profession of consultant and that their part-time hospital appointments were necessary parts of the exercise of their profession. In these circumstances, the Commissioners considered that they were bound by the decisions in Davies *v.* Braithwaite, 18 T.C. 198, *and* Household *v.* Grimshaw, 34 T.C. 366, *and held that the remuneration from the appointments fell to be assessed under Case* II *of Schedule D, as also did the fees for the domiciliary visits and the locum tenens work.*

Held, (1) *in the Court of Appeal, that the part-time appointments were offices and that the remuneration from them, including payments in respect of the domiciliary visits and the locum tenens work, was assessable under Schedule E; and* (2) *in the House of Lords, that expenses attributable thereto could only be allowed so far as they satisfied the Rules applicable to Schedule E.*

CASES

(1) *Mitchell and Edon (H.M. Inspectors of Taxes)* v. *Ross*

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 23rd March, 1956, and thence adjourned to 26th, 27th and 28th March, 23rd, 24th and 25th April, 1956, and 23rd April, 1957, Dr. Harold Leslie Ross (hereinafter called "the Respondent") appealed against the undermentioned assessments, viz.:

1951–52	Income Tax, Schedule E	£3,024
1952–53	Income Tax, Schedule E	£3,276
1952–53	Income Tax, Schedule D	£1,500
1953–54	Income Tax, Schedule E	£3,385
,,	Income Tax, Schedule D	£1,000
1954–55	Income Tax, Schedule D	£1,000

The grounds of the appeal were: firstly, as regards the assessments made under Schedule E, that, in computing the profits or gains of the Respondent for the accounting periods relative to the said assessments under appeal, the Respondent's remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits as hereinafter appeareth had been included contrary to law, and that the said assessments should be reduced accordingly; and, secondly, as regards the assessments made under Schedule D, that the assessments, being estimated, should be adjusted in accordance with the accounts of the profits or gains of the Respondent for the accounting periods relative to the said assessments.

2. Evidence was given at the hearing of the appeal by the Respondent and by Dr. Thomas Rowland Hill, a registered medical practitioner, Doctor of Medicine (London University), Fellow of the Royal College of Physicians, Member of the Association of British Neurologists, Fellow of the Royal Society of Medicine, Member of the North-Eastern Metropolitan Regional Hospital Board, Chairman of the Medical Advisory Council of the North-Eastern Metropolitan Regional Hospital Board, Member of the Advisory Committee of the Ministry of Health on Consultants' Establishments, Chairman of the North-East Metropolitan Regional Consultants' and Specialists' Committee, Vice-Chairman of the Central Consultants' and Specialists' Committee of the British Medical Association, Member of the Central Consultants' and Specialists' Committee of the British Medical Association, Chairman of the Medical Advisory Committee of the North-Eastern Metropolitan Regional Hospital Board and Senior Physician to the West End Hospital for Neurology and Neuro-Surgery.

The following documents were produced and admitted or proved:

(i) A statement in writing, furnished by the Respondent, and supporting documents, as follows:

Ministry of Health Report, 1949 (Cmd. 7910).

Ministry of Health Report, 1950 (Cmd. 8342).

Ministry of Health Report for year to 31st December, 1951 (Cmd. 8655).

Ministry of Health Report, 1953 (Cmd. 9321).

Terms and conditions of service of hospital medical and dental staff (England and Wales).

M.D.B. circulars Nos. 1 to 16 inclusive.

Model forms of contract and explanatory memorandum attached thereto.

A copy of form B.R.H.B./Stat/20 (Revised).

(ii) A copy of a memorandum entitled "National Health Service, Medical Committees in Hospitals and Hospital Groups", issued by the Ministry of Health, dated 15th August, 1953.

(iii) Revenue accounts of the Respondent for the years ended 28th February, 1952, 1953 and 1954.

(iv) A letter and schedule dated 9th November, 1950, from the secretary of the Birmingham Regional Hospital Board to the Respondent, together with a form of acceptance dated 14th November, 1950, signed by the Respondent, and an undertaking regarding domiciliary consultations dated 14th November, 1950, signed by the Respondent.

(v) Copy of a brochure entitled "Specialist Services in the Home (as at 1st September, 1955)", issued by the Birmingham Regional Hospital Board.

(vi) Bundle "D" of correspondence.

Such of the above documents as are not attached to, and do not form part of, this Case are available for the use of the High Court of Justice if required.

3. Certain conclusions of mixed fact and law were agreed between the parties and admitted at the hearing of the appeal. They were as follows:

(1) The National Health Service Act, 1946 (hereinafter referred to as "the Act"), laid upon the Minister of Health (hereinafter referred to as "the Minister") the duty to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness; and for that purpose the Minister is under a duty to provide or secure the effective provision of services in accordance with the Act (Section 1 (1) and (2)). Such services are provided free of charge, except where express provision is made for the making and recovery of charges. Any expenses incurred by the Minister in the exercise of his functions under the Act are defrayed out of moneys provided by Parliament (Sections 1 (2) and 52).

(2) The Minister is advised on matters of general policy relating to the services provided under the Act, and to services provided by local health authorities, by the Central Health Services Council (hereinafter referred to as "the Central Council"), a body composed of 41 members (Section 2). In addition, standing advisory committees (for example, medical, maternity and midwifery, mental health and ophthalmic committees) advise the Minister and the Central Council on matters within their respective fields (Section 2 and First Schedule).

(3) The services provided are the following:

(i) Hospital and specialist services (Part II of the Act);

(ii) Health services provided by local health authorities (Part III);

(iii) General medical and dental services, pharmaceutical services and supplementary ophthalmic services (Part IV);

and, in addition, Part V of the Act contains special provisions as to mental health services.

(4) As shown below, the Minister delegates nearly the whole of the administration of the National Health Service, so far as it relates to hospital and specialist services, to various regional hospital boards as regards hospitals other than teaching hospitals and to boards of governors as regards teaching hospitals (i.e., hospitals or groups of hospitals providing university facilities for undergraduate or postgraduate clinical teaching).

(5) The Act requires the Minister, as from the appointed day (5th July, 1948), to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions:

(*a*) hospital accommodation;

(*b*) medical, nursing and other services required at or for the purposes of a hospital;

(*c*) the services of specialists, whether at a hospital, a health centre provided by a local health authority under Part III of the Act, or a clinic, or, if necessary on medical grounds, at the home of the patient.

Accommodation and services so provided are referred to as "hospital and specialist services" (Section 3).

(6) Section 6 of the Act provided that, with the exception of certain hospitals referred to in Sub-section (3) (not material in this case), all voluntary and local hospitals were to be transferred to, and become vested in, the

Minister on the appointed day. On that day, 2,835 hospitals and 585 clinics were so taken over by the Minister (Ministry of Health Report, 1953 (Cmd. 9321), page 6).

(7) The Act provided that regional hospital boards should be constituted for the purpose of exercising functions with respect to the administration of hospital and specialist services in England and Wales. Each regional hospital board is a body corporate with perpetual succession and a common seal (Section 11 and Third Schedule, Part IV, Paragraph 1). The Minister by order determined the regional hospital areas and constituted the regional hospital boards, of which there are 14 in England and Wales, and provided for the appointment and terms of office of members of such boards and for their meetings and procedure. It is the duty of each such board to make its own standing orders, which it may vary or revoke, for the regulation of its proceedings and business, and to conduct its meetings in accordance with prescribed rules (S.R. & O. 1946 No. 2158; S.R. & O. 1947 Nos. 1297 and 1298).

(8) The Act also provided that hospital management committees should also be constituted in each regional hospital area for the purpose of exercising functions with respect to the management and control of individual hospitals or groups of hospitals (other than teaching hospitals) providing hospital and specialist services in the area. Each hospital management committee is a body corporate with perpetual succession and a common seal (Section 11 (3)).

(9) As to hospitals designated as teaching hospitals, the Minister by order constituted a board of governors for the purpose of exercising functions with respect to the administration of each such teaching hospital. A board of governors is a body corporate with perpetual succession and a common seal (Third Schedule, Part IV, Paragraph 1).

(10) Section 12 of the Act sets out in general terms the functions of regional hospital boards, hospital management committees and boards of governors of teaching hospitals. The functions of these bodies are defined more specifically and in relation to various Sections of the Act, but not in any great detail, in the National Health Service (Functions of Regional Hospital Boards, etc.) Regulations, 1948 (hereinafter called "the Functions Regulations") (S.I. 1948, No. 60).

(11) Subject to the exercise of functions by hospital management committees, it is the duty of a regional hospital board,

> "subject to and in accordance with regulations and such directions as may be given by the Minister, generally to administer on behalf of the Minister the hospital and specialist services provided in their area, and in particular—(*a*) to appoint officers required to be employed at or for the purposes of any hospital providing such services, other than a teaching hospital" (Section 12 (1)).

(12) It is the duty of a hospital management committee of any hospital or group of hospitals,

> "subject to and in accordance with regulations and such directions as may be given by the Minister or the Regional Hospital Board, to control and manage that hospital or group of hospitals on behalf of the Board, and for that purpose to exercise on behalf of the Board such of the functions of the Board relating to that hospital or group of hospitals as may be prescribed" (Section 12 (2)).

(13) The Functions Regulations provide that a regional hospital board shall exercise the functions of the Minister relating to hospitals other than teaching hospitals, and the services provided at or in connection with such hospitals, under, *inter alia*, the following Sections of the Act:

(i) Section 3 (1) with respect to the provision of hospital and specialist services;

(ii) Sections 4 and 5 with respect to the making available of hospital accommodation on part payment, the setting aside of special accommodation for private patients and the recovery of charges, and the making of arrangements with medical practitioners for the treatment of their private patients in hospitals (S.I. 1948, No. 60, Regulation 4, paragraphs (1) and (4)).

To the extent provided by Regulation 5 of the Functions Regulations, however, a regional hospital board exercises such functions through the relative hospital management committee. This Regulation 5 provides that a hospital management committee shall control and manage a hospital or group of hospitals, and the services provided in connection therewith, on behalf of the regional hospital board concerned, subject to and in accordance with any directions which may be given by the board or by the Minister; and for that purpose shall exercise on behalf of that board certain functions of that board as specified in Regulation 5, paragraphs (1) to (9) inclusive, relating to the hospital or group of hospitals concerned. These include the functions of the board, under Section 12 (1) of the Act, with respect to the appointment and dismissal of certain officers (other than specialists) employed for the purposes of the hospital or group of hospitals administered by that board.

(14) It is the duty of the board of governors of every teaching hospital, in accordance with regulations and such directions as may be given by the Minister, generally to manage and control the hospital on behalf of the Minister, and in particular to appoint officers required to be employed at or for the purposes of such hospital (Section 12(3)(*b*)). The Functions Regulations provide that the board of governors of a teaching hospital shall, subject to and in accordance with any directions which may be given by the Minister, manage and control that hospital, and the services provided in connection therewith, on behalf of the Minister; and for that purpose exercise the functions of the Minister, in so far as they relate to that hospital, under, *inter alia*, the following provisions of the Act:

(i) Section 3 (1) with respect to the provision of hospital and specialist services;

(ii) Sections 4 and 5 with respect to the making available of hospital accommodation on part payment, the setting aside of special accommodation for private patients and the recovery of charges, and the making of arrangements with medical practitioners for the treatment of their private patients in hospital.

(15) There are, therefore, three kinds of accommodation available in all hospitals providing hospital and specialist services:

(*a*) accommodation for the members of the community generally, without charge (Section 1 (2));

(*b*) accommodation for patients who desire to secure privacy in single rooms or small wards, on payment by them of a charge for accommodation, but without charge for medical or surgical treatment (Section 4);

(*c*) special accommodation, i.e., accommodation for patients who undertake to pay the whole cost of the accommodation and services provided, subject to this: that in the case of a private patient of any honorary or paid medical practitioner on the staff of any National Health Service hospital, the charge does not include the cost of medical or surgical services rendered by that medical practitioner. For these services the private patient pays the fees of the medical practitioner in the ordinary way (Section 5 and S.I. 1953, No. 420).

It is, however, provided that nothing shall prevent accommodation being made available for any patient who needs it on urgent medical grounds and

for whom suitable accommodation is not otherwise available (Section 5 (1), proviso).

(16) In the Ministry of Health report for the year ended 31st March, 1949 (Cmd. 7910), it is stated, at page 243, with respect to the Functions Regulations, that, in framing them, it was the Minister's object to avoid the prescription in detail of the manner in which the functions were to be performed, and to lay down the division of responsibility between the bodies concerned in broad terms to ensure the greatest possible measure of flexibility and variety in administration. The regulations reserved to the Minister the right to acquire land and premises for the hospital service, and limited the powers of hospital management committees with regard to building work to the maintenance of premises, with the object of ensuring that developments are carried out in accordance with the general policy of the hospital service. Hospital management committees were empowered to appoint and dismiss all the staff employed at their hospitals except the senior medical and dental staff, whose appointment and dismissal were reserved to regional hospital boards (or boards of governors of teaching hospitals). It was also stated that regional hospital boards and boards of governors are the Minister's agents in the administration of the hospital and specialist services, and hospital management committees are the agents of the regional hospital boards. The Act and the Regulations provide that directions may be issued by the Minister to the regional boards, boards of governors and management committees, and by regional boards to management committees. It has, however, been the Minister's aim to encourage a broad measure of local independence in the service and to exercise his ultimate powers as infrequently as possible, securing such uniformity of policy as is necessary by the ordinary processes of administration.

(17) The qualified medical staff of the hospital service is divided into a number of different categories, two of which are:

(*a*) Consultants;

(*b*) Senior hospital medical (or dental) officers.

These two categories constitute the "specialists" of the service. The other categories are mainly of junior grades, generally consisting of whole-time officers, many of whom are required to reside at the hospitals where they work.

(18) The Act provides that all officers employed for the purposes of any hospital providing hospital and specialist services, other than a teaching hospital, shall be officers of the regional hospital board for the area in which the hospital is situated; that all officers employed for the purpose of a teaching hospital shall be officers of the board of governors of that hospital; and that the remuneration of all such officers shall, subject to regulations, be determined by the regional hospital board or the board of governors concerned (Section 14 (1)). By Section 79 (1) of the Act the word "officer" includes servant.

(19) Some of the consultants in the service hold whole-time appointments. The great majority of the consultants, however, hold only part-time appointments. Thus, to take the figures for the year 1953 as shown at pages 32 and 207 of the Ministry of Health report for the year 1953 (Cmd. 9321), the total number of consultants in the service was 6,406. Of these, only 1,728 held whole-time appointments, the remaining 4,678 holding part-time appointments. Under the 1952 memorandum, hospital staff were grouped into certain broad categories for the purpose of controlling increases in total numbers; and the consent required before such increases could be made was that of the regional board in the case of management committee staff, and that of the Ministry in the case of regional board or teaching hospital staff. Thus, in relation to

medical and dental staff, while the regional board exercised control over increases at the junior levels, the Ministry had the final word on increases in the number of consultants and other senior staff.

The Ministry's control was exercised over two totals: firstly, over the total number of consultants (expressed in equivalents of whole-time service); and, secondly, over the total number of medical and dental staff, including consultants (again in whole-time equivalents) employed by each regional hospital board and board of governors. It was decided to deal with consultants on their own because they are a key grade and the rate of increase in the total number employed has a very decided bearing on the future level of running costs of the hospital service as a whole.

While, however, the Ministry kept control over total numbers (of consultants and of all medical and dental staff), the hospital authorities were left with the maximum discretion to make changes within their totals and to deploy their medical staff among the various specialities in the way best suited to local needs. When, for instance, a consultant appointment became vacant, it fell to the hospital board to decide whether to make a new appointment in the same specialty as the old or in another specialty. Only when it was proposed to increase the total number had the board to obtain the Ministry's approval, but, even in such cases, arrangements were worked out to enable small upward adjustments to be made without prior consent.

The total number of consultants employed in the National Health Service in England and Wales at the end of each of the last four years is shown in the following table (1):

"TABLE 13

Number of Consultants

(at 31st December)

Year	*Total number employed*	*Increase in the year*	*Percentage increase in the year*
1950	5,649	460	8.9
1951	5,882	233	4.1
1952	6,250	368	6.2
1953	6,406	156	2.4"

These figures relate to all consultants, whether they are employed whole-time or part-time. Most are employed on a part-time basis and therefore the whole-time equivalent of the time given by them is less than their number. A return made by hospital authorities in December, 1952, showed the consultant complements at that time to be equivalent to 5,141 whole-time consultants. In the course of 1953, the Ministry approved increases in the amount of consultant time employed in the service equivalent to 99 extra whole-time consultants.

(20) As to the appointment of consultants, the first regulations made under Section 14 (2) of the Act were the National Health Service (Appointment of Specialists) Regulations, 1948 (S.I. 1948, No. 1416). Paragraph 3 of these regulations defines specialists, and reads as follows:

> "3. These regulations apply to the appointment by a Regional Hospital Board or by the Board of Governors of a teaching hospital of any medical or dental officer, whether whole-time or part-time, to the staff of any hospital providing hospital and specialist services, being an officer appointed for the purpose of practising a special branch of medicine or dentistry, with full responsibility for the treatment of patients or the carrying out of clinical, pathological or ancillary methods of investigation, and the words 'officer' and 'office' shall be construed accordingly."

(1) Ministry of Health Report, 1953 (Cmd. 9321), at p. 32.

An identical definition of a specialist is contained in the National Health Service (Pay-Bed Accommodation in Hospitals etc.) Regulations, 1948 (S.I. 1948, No. 1490).

(21) Section 66 of the Act provides that regulations may make provision with respect to the qualifications, remuneration and conditions of service of any officers employed by any body constituted under the Act, and that no officer to whom the regulations apply shall be employed otherwise than in accordance with the regulations.

(22) At the outset fears were expressed by the medical profession that this Section 66 gave the Minister power to introduce by regulation a whole-time salaried service applicable to all specialists. Accordingly, and pursuant to undertakings given by the Minister before 5th July, 1948 (the "appointed day"), Section 66 of the Act was subsequently amended by the National Health Service (Amendment) Act, 1949, Section 12, by the addition of the following proviso:

> "Provided that regulations made under this section shall not contain any requirement that all specialists employed for the purpose of hospital and specialist services shall be employed whole-time."

(Ministry of Health Report, 1950 (Cmd. 8342), at page 15.)

(23) Before any formal regulations were made under Section 66 of the Act, there had been negotiations between the Minister and the professional negotiating committee concerned, and between whom terms and conditions of service were worked out for hospital medical and dental staff based on the recommendations contained in what came to be known as the "Spens Specialist Report"; and eventually the Minister published a printed document, dated 7th June, 1949, containing such terms and conditions. This document is described as "Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales)", hereinafter referred to as "the terms of service" (Ministry of Health Report, 1950 (Cmd. 8342), at page 14). From time to time various amendments have been negotiated. An amendment list showing certain of them was published by the Minister on 30th May, 1950. Other amendments have been published in circulars issued by Committee "B" of the Whitley Medical Council.

(24) At the time of publication of these terms of service the Minister also published and circulated:

(*a*) suggested forms of contract with consultants, one for whole-time and the other for part-time consultants, or senior hospital medical (or dental) officers; and

(*b*) a printed memorandum explaining various points in relation to the terms of service.

The terms of service, the amendment list dated 30th May, 1950, M.D.B. circulars Nos. 1 to 28 inclusive, and the forms of contract suggested by the Minister, together with explanatory memorandum and form B.R.H.B./Stat/20 (Revised), are comprised in a bundle which is attached to and forms part of this Case (exhibit "A" (1)).

(25) It was not until 1951 that formal regulations under Section 66 of the Act were made by the Minister. These are called the National Health Service (Remuneration and Conditions of Service) Regulations, 1951 (S.I. 1951, No. 1373), and are in very general form. In fact, the terms and conditions of service of hospital and medical staff, since the publication of the terms of

(1) Not included in the present print.

service in 1949, are from time to time negotiated by what is called Whitley machinery; and various amendments of detail (not material here) are from time to time made, and some of them have appeared in the above-mentioned amendment lists after they have been approved by the Minister (Ministry of Health Report, 1950 (Cmd. 8342), at page 103, and Ministry of Health Report, 1951 (Cmd. 8655), at pages 86–7).

(26) Under the terms of service, special distinction awards can be given to either whole or part-time consultants (paragraphs 1 (*b*), 5 (*a*) and 5 (*d*)). A distinction award is not related to any particular appointment. It is given by reason of the consultant's professional distinction. He must have achieved some particular distinction or made some special contribution to medicine, and this may not be anything to do with the work of an appointment which he holds from a board. Thus, many consultants were granted distinction awards as from the commencement of the National Health Service. The award is a personal one; the consultant concerned carries it with him wherever he goes and whatever appointments he may for the time being hold. It is superannuable.

(27) Paragraph 5 of the terms of service also sets out the method by which the remuneration of the part-time consultant shall be calculated. The average amount of time required to perform the duties attaching to the post is first assessed in terms of hours per week. This aggregate number of estimated hours per week is then divided by $3\frac{1}{2}$, so as to give a figure of "notional half days" (also called "sessions") per week for which the consultant will be employed, the consultant being given the benefit of the marginal overlaps as set out in paragraph 5 (*a*). The remuneration of the part-time consultant is then obtained by applying the formula set out in paragraph 5 (*a*) to the number of notional half days, and then by taking the appropriate fraction of the whole-time consultant's salary scale and adding the same proportion of any special distinction award held by the part-time consultant in question. Paragraph 5 (*d*) sets out the maximum remuneration for part-time appointments. Paragraph 6 of the terms of service provides for the fees payable for exceptional consultations, and paragraph 7 for fees payable for locum tenens work.

(28) Paragraph 8 of the terms of service relates to remuneration in respect of domiciliary consultations, including cases where the officer concerned uses his own electrocardiograph or portable X-ray apparatus; and also for travelling and subsistence expenses in relation to such domiciliary visits. It is provided that (exclusive of travelling and subsistence allowances, additional mileage payments and fees for use of the officer's own apparatus) the maximum remuneration for these domiciliary consultations shall be either 200 guineas per quarter or, at the option of the consultant concerned, 800 guineas in any year, however many excess domiciliary consultations may be carried out in the period concerned. Domiciliary work is quite independent of, and different from, the part-time consultant's work under his ordinary appointment with the regional hospital board. The domiciliary consultation is a visit by the consultant to a patient in his home at the request of the patient's general practitioner. Each executive council (the local body which administers the general medical services in a particular area) publishes a list containing the names and addresses of all part-time consultants in the area who are willing to undertake domiciliary consultations, and this list is sent to every general practitioner on the executive council's medical list. A general practitioner who wishes to have a second opinion for one of his patients, and does not wish or is unable to send him to hospital for this purpose, consults this list and selects the name of a consultant. The general practitioner then communicates

directly with the consultant of his choice, and arranges with him to visit the patient's home. The consultant concerned does so in his own time and outside his hospital hours (see paragraph 5 (*a*) of the terms of service), and advises the general practitioner as to the diagnosis and treatment. There is no prior notification to a regional hospital board or board of governors, or an executive council, either by the consultant or the general practitioner, that such a domiciliary consultation is required or is to take place. None of such bodies exercises any control whatever as to the fixing of such domiciliary visits.

(29) After making such a visit, the consultant is required to complete a prescribed form (attached (1)) which he sends to the general practitioner, who has then to certify that the consultation took place at his request and was necessary on medical grounds. The general practitioner returns the completed form to the consultant, who then sends it to the regional hospital board as a claim for payment for the visit. There is no limit to the number of domiciliary visits that a consultant may make, but it will be noted that, under paragraph 8 of the terms of service, there is a limit to the amount of fees he may be paid for this kind of work.

(30) Paragraph 14 of the terms of service deals with private practice and retention of fees.

(31) Paragraph 15 provides for retirement age. Normally this is age 65, but there are provisions for extending it to 70, and for continuing in an honorary capacity.

(32) Paragraph 16 relates to termination of the appointment, and gives the consultant the right to appeal to the Minister if he thinks the appoinment was unfairly terminated.

(33) Paragraph 18 deals with the question of leave. Part-time consultants are entitled to leave on the basis laid down in that paragraph.

(34) Paragraph 19 gives the right to reimbursement of travelling, subsistence and other expenses to the extent set out in the paragraph.

(35) A part-time consultant (whether honorary or paid) on the staff of a hospital providing hospital and specialist services may make arrangements for the treatment of his private patients at that or any other such hospital, and, as already mentioned above, the hospital makes the special accommodation available for that purpose (Section 5 (2) of the Act). The maximum fees charged by such medical practitioner are in these circumstances governed by regulations, unless the medical practitioner and the patient agree a fee in excess of that provided by such regulations (S.I. 1948, No. 1490, Regulation 8). As far as is reasonably practicable, not more than 15 per cent. of the special accommodation for private patients is made available for patients in respect of whom the limitation on fees imposed by the regulations does not apply.

(36) The administration of services provided under Part IV of the Act, namely, general medical and dental services, pharmaceutical services and supplementary ophthalmic services (Section 31 (1) and (2)), is vested in executive councils. The Act provides that an executive council shall be constituted, in accordance with the provisions of the 5th Schedule to the Act, for the area of every local health authority for the purpose of exercising functions with respect to the provision of such services. Where it appears expedient in the interests of the efficiency of these services, the Minister may by Order provide for the constitution of an executive council for the area of two or more local authorities, or for the establishment of a joint committee for the

(1) Not included in the present print.

areas of two or more executive councils for the purpose of exercising some, but not all, of the functions of an executive council (Section 31 (4)).

(37) An executive council consists of a chairman appointed by the Minister and 24 other members. It is a body corporate with perpetual succession and a common seal (Fifth Schedule).

(38) Part of the duty of every executive council is to make arrangements with medical practitioners for the provision by them of personal medical services for all persons in its area who wish to take advantage of the arrangements. In the Act these services are called "general medical services", and they are popularly known as the "family doctor" service (Section 33 (1)). These services may be provided at a health centre or elsewhere, e.g., at the general practitioner's surgery. The executive council makes the arrangements in accordance with regulations. The remuneration of the general practitioner under the arrangements must not, except in special circumstances, consist wholly or mainly of a fixed salary which has no reference to the number of patients for whom he has undertaken to provide general medical services (National Health Service (Amendment) Act, 1949, Section 10).

(39) The executive council keeps and publishes a list (known as the "medical list") of all medical practitioners who undertake to provide general medical services in the area (Section 33 (2) (*a*)).

(40) On his inclusion in the medical list the practitioner enters into contract with the executive council. The contract incorporates the terms and conditions of service contained in the National Health Service (General Medical and Pharmaceutical Services) Regulations, 1948 (S.I. 1948, No. 506), the provisions of Part II of the National Health Service (Service Committees and Tribunal) Regulations, 1948 (S.I. 1948, No. 507), and the provisions of any allocation or distribution scheme in force in the area. The general practitioner is at liberty to practise his profession otherwise than under his contract with the executive council.

(41) Any patient is free to select his own doctor if the latter consents and has not more than the prescribed maximum number of patients on his list (Section 33 (2) (*b*)). On 5th July, 1948, all patients who were on the particular doctor's "panel" under the National Health Insurance Acts were automatically transferred to his list if the doctor was on the executive council's list. Subject to this, a person becomes a patient of a doctor by completing a special form and presenting it to the doctor, and provided the doctor accepts him as a patient. If a patient wishes to change his doctor he must either obtain the consent of the existing doctor named on the patient's medical card, or give the executive council 14 days' notice of his intention to transfer to the new doctor and then apply to the new doctor for acceptance as a patient (S.I. 1948, No. 506, Part IV).

(42) A doctor may withdraw his name from the medical list of an executive council by giving three months' notice. The regulations also provide for the removal of the doctor's name from the list by the executive council for any of the various reasons there mentioned and after giving the notice there provided for. The doctor has an ultimate right of appeal to the Minister against any such removal (S.I. 1948, No. 506, First Schedule).

(43) In the main, doctors are remunerated for their services on the basis of a sum per patient per annum, but there are certain circumstances in which the doctor can charge extra fees against the executive council in respect of a patient. In the case of doctors in rural areas a mileage allowance may also be payable.

(44) With certain exceptions not material here, all general practitioners must join and contribute to the National Health Service superannuation scheme (National Health Service (Superannuation) Regulations, 1947, S.R. & O. 1947, No. 1755, Part II). Their contributions are deductible expenses for Income Tax purposes.

(45) All general practitioners are assessed to Income Tax under Case II, Schedule D, in respect of their general practice in the Service.

4. Apart from, and in addition to, the foregoing, we found the following facts admitted or proved on the evidence adduced at the hearing of the appeal:

(1) In the medical profession the normal way in which an individual became recognised as a "consultant" was by being appointed to the staff of a hospital as physician or surgeon (or a corresponding post). This was a recognition of his professional ability. The work of a consultant is the practice of his own special branch of medicine on cases sent to him by other doctors. Before the introduction of the National Health Service it was usual for consultants to have a private practice as such apart from their hospital appointments. Except in the case of hospitals run under the Public Health Act of 1936, and *ex gratia* payments from voluntary hospitals, it was not usual for consultants to receive payment for their hospital work. After the introduction of the National Health Service, consultants taking part in this service were paid in the manner hereinbefore referred to; but it remained the usual practice for part-time consultants to have a private practice as such, apart from their hospital appointments, though the volume of private work throughout the country declined. Apart from geographical limitations, consultants were free to take up part-time appointments with different regional hospital boards, payment being received from each in accordance with the amount decided by the central bureau, London, but subject to the maximum remuneration for part-time appointments laid down in the terms and conditions of service of hospital, medical and dental staff (England and Wales).

(2) Both before and after the introduction of the National Health Service, the holder of an appointment on the staff of a hospital obtained definite advantages therefrom, in that it gave him professional prestige and provided him with plenty of opportunity for developing and perfecting his skill. After the introduction of the National Health Service, only those consultants who took part in that scheme were permitted to take a patient into a private bed in any of the hospitals under the Ministry of Health and thus obtain for him the services of the nursing staff and the use of the apparatus in the hospital. The same facilities were available at only a few nursing homes.

(3) At all material times the Respondent was a registered medical practitioner in the United Kingdom, specialising in radiology. He was a Bachelor of Medicine, a Bachelor of Surgery and a Master of Radiology; and he held a diploma in medical radio diagnosis. Between 1946 and 1950 he held various appointments at hospitals in the Liverpool region as a registrar and senior registrar in radiology.

(4) On 1st March, 1950, he commenced a private practice as a consultant radiologist which he carried on at first from an hotel in Rugby, where he lived. Since 1951, he carried on his private practice from his house at 15, Moultrie Road, Rugby.

(5) On 1st March, 1950, the Respondent obtained a part-time appointment as a consultant radiologist under the Birmingham Regional Hospital Board to the hospital of St. Cross, Rugby, the Keresley Hospital and the Gulson Hospital. The terms of the appointment were set out in a letter which

was dated 9th November, 1950, and contained a schedule detailing the hospitals and hours of work required at each. At the end of the said letter a form of acceptance was attached, which the Respondent signed on 14th November, 1950. Also attached to the said letter was a form of undertaking in connection with domiciliary consultations which the Respondent signed on 14th November, 1950. A copy of the said letter of 9th November, 1950, and schedule, form of acceptance and undertaking relating to domiciliary consultations is attached to and forms part of this Case (exhibit "B" (1)).

(6) The Respondent interviewed his private patients either at his consulting rooms, or at any of the hospitals to which he was attached, or in nursing homes, or in their own private homes. At his consulting rooms at his house the Respondent kept for professsional purposes a desk, filing cabinets, portable X-ray apparatus, screens, a typewriter, a telephone and a library of books of reference. He also had a darkroom for developing films. The Respondent also had a car which he used in his professional duties. When the Respondent required the use of hospital apparatus and film for a private patient in hospital he paid of fee of 2 guineas.

(7) The Respondent also had need of, and employed, secretarial assistance in his private practice, and also in connection with his undertaking to carry out domiciliary visits. The services of a secretary were also useful in connection with his hospital work and for receiving telephone calls from the hospitals. The secretary helped with correspondence, bills and receipts; typed out professional reports; received incoming telephone calls from general practitioners and hospitals; kept his appointments book; sometimes fixed appointments, both for private patients and domiciliary visits; and filed the clinical record of patients. In connection with his consultation work at the hospital, the Respondent was also provided with secretarial assistance at the hospital for maintaining the records of hospital National Health Service patients and in connection with domiciliary visits. As a part-time consultant radiologist under the Health Service scheme the Respondent had at the hospital a team of radiographers, darkroom technicians and clerks, who were all part of the permanent staff of the hospital. X-ray films of private patients were developed by the Respondent in the darkroom at his consulting rooms, but in the case of patients in the hospital the Respondent either developed the films himself at the hospital or he supervised them being done.

(8) Upon taking up his appointment under the Birmingham Regional Hospital Board, the Respondent contacted the consultant radiologist at the hospital of St. Cross, Rugby, and arranged with him the best way of covering the radiological work at Rugby. It was agreed between them that the Respondent should do two sessions at Gulson Hospital and seven sessions at St. Cross Hospital, but that the work at Keresley Hospital should be done by the other consultant radiologist in Rugby and by the consultant radiologist in Coventry. No permission was sought from, or given by, any of the administrative officials of the hospital for this arrangement.

(9) The Respondent was solely responsible for the radiological work at St. Cross Hospital, Rugby, which he attended on four mornings a week. During this time he attended to National Health Service patients (either in-patients or out-patients), and also to private patients, either in the paying bed section of the hospital, the private wing, or private out-patients. The Respondent also attended at this hospital on three afternoons a week, when specialised investigations were undertaken. During these sessions, also, he attended to both National Health Service and private patients.

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(1) Not included in the present print.

(10) At Gulson Hospital three consultant radiologists, including the Respondent, were responsible for the radiological work, which they arranged between them to their mutual convenience so as to dovetail in their work at the hospital. The Respondent attended on Tuesday afternoons and Wednesday mornings, and again no permission was sought from, or given by, any of the administrative staff of the hospital for this arrangement. The Respondent was entirely responsible for deciding what radiological work he should do and how he should do it.

(11) A domiciliary visit was usually inaugurated by a telephone message from a general practitioner to the Respondent's house, which was received by his secretary. Upon receipt of such message, the Respondent loaded his portable X-ray apparatus into his car and proceeded to the place of consultation. After taking the necessary pictures, the Respondent returned either to hospital or to his consulting rooms and proceeded at once to develop the film himself (usually in hospital). He usually informed the general practitioner concerned of the result the same day. The film used for domiciliary visits was provided by the Ministry of Health, and that used for private patients by the Respondent himself. Domiciliary visits were usually undertaken between 5.30 and 8.30 p.m., i.e., after the afternoon session at a hospital and at a time when general practitioners could very often be present. For each domiciliary visit carried out, up to a maximum of 200 in any year, the Respondent received a fee of 4 guineas plus 2 guineas for the use of his apparatus, the latter fee being payable only once per patient. During the year ended 31st March, 1952, the Respondent carried out 221 visits; for the year to 31st March, 1953, 243 visits; for the year to 31st March, 1954, 206 visits; and for the year to 31st March, 1955, 241 visits.

(12) A brochure published by the Birmingham Regional Hospital Board under the signature of the secretary and senior administrative medical officer, entitled "Specialist Services in the Home (as at 1st September, 1955)" contained, *inter alia*, the following:

"1. *Scope of the Service.*

The Domiciliary Consultant Service has been set up under the National Health Service Act to provide the services of specialists at the home of the patient when appropriate. Normally, the patient should be referred for specialist advice or treatment to a hospital as an out-patient or an in-patient. If, however, the patient's doctor has satisfied himself that medical considerations make this impossible, he may avail himself of the domiciliary consultant service.

2. *Definition of 'Home'.*

In this context, the 'home' means the place where the patient is for the time being resident, and may include, for example, hotels, residential schools, and aged persons' homes, but does not normally include a private nursing home. However, a private nursing home may be regarded as the 'home' in respect of persons who live there permanently, or for the time being are *bona fide* residents, as are some elderly persons. In regard to maternity patients and to the new-born in private nursing homes, where medical considerations make it impossible for the patient to be removed to hospital the following consultations are permissible:—

(i) an obstetrician may be called in *emergency* to a private nursing home.

(ii) a paediatrician may be called in *emergency* to a baby born to a patient in a private nursing home.

In both (i) and (ii) above, the specialist may, when necessary, be accompanied by an anaesthetist, as part of the service. Except as described above, no other consultations in private nursing homes are admissible under the domiciliary consultant service.

3. *List of Specialists Participating in the Domiciliary Consultant Service.*

Details of specialists under contract with the Birmingham Regional Hospital Board, the Board of Governors of the United Birmingham Hospitals, and adjacent regional hospital boards, who are prepared to visit patients in their homes within

the area of this Board, are listed in alphabetical order by specialty. In each case the private address and telephone number of the specialist is given.

Periodically, it is proposed to issue amendments or additions to this list, but if a practitioner has any doubts as to the availability of a particular specialist or difficulty in obtaining the services of the appropriate specialist, he should enquire at the appropriate address, details of which are given in paragraph 5 below [being the address of the board's Hospital Groups], or at the offices of the Board.

4. *Procedure for Calling a Specialist.*

The practitioner should approach the specialist of his choice, at the address given, making appropriate arrangements for the consultation. If the specialist is aproached by telephone and is at that time in attendance at a hospital, the practitioner may approach the hospital. The staff will accept and pass a message to the specialist in the event of his not being available in person to answer a particular telephone call.

. . . . . .

6. *The Domiciliary Consultation Form.*

Forms for domiciliary consultations have been prepared and issued to specialists, and the co-operation of general practitioners is requested in completing any necessary details."

Under the sub-heading "Radiology" the following entry appears: "Ross, H. L., 15, Moultrie Road, Rugby, (*Rugby* 3083): Rugby and district."

(13) The revenue accounts of the Respondent contained, *inter alia*, the following figures:

(i) For the year ended 29th February, 1952.

	£ s. d.	£ s. d.
Basic Pay		1,576 3 0
Domiciliary visits—		
Fees	840 0 0	
Use of apparatus	394 16 0	
		1,234 16 0
Mileage payments		106 2 8
Private fees		366 17 2
Total receipts		3,283 18 10

After deducting expenses as detailed in the account, a "Balance Subject to Capital Allowances on X-Ray Unit and Motor Car" of £2,723 1*s.* 5*d.* was shown.

(ii) For the year ended 28th February, 1953.

	£ s. d.	£ s. d.
Basic pay		1,684 2 0
Domiciliary visits—		
Fees	840 0 0	
Use of apparatus	424 4 0	
		1,264 4 0
Mileage payments		144 8 3
Private fees		339 10 0
Total receipts		3,432 4 3

After deducting expenses as detailed in the account, a "Balance Subject to Capital Allowances on X-Ray Unit and Motor Car" of £2,808 3*s.* 6*d.* was shown.

(iii) Year to 28th February, 1954.

	£	*s.*	*d.*	£	*s.*	*d.*
Basic pay				1,792	1	0
Domiciliary visits—						
Fees	730	16	0			
Use of apparatus	382	4	0			
				1,113	0	0
Mileage payments				147	15	1
Private fees				314	15	0
Total receipts				3,367	11	1

After deducting expenses as detailed in the account a "Balance Subject to Capital Allowances on X-Ray Unit and Motor Car" of £2,671 11*s.* 10*d.* was shown.

Copies of the said revenue account are attached to and form part of this Case (exhibit "C" (1)). The expenses detailed in the accounts included expenses incurred in connection with the Respondent's hospital appointments, domiciliary visits and private practice.

5. It was contended on behalf of the Respondent:

(i) that the activities of the Respondent as a consulting radiologist constituted the carrying on of a profession, and the entirety of the profits and gains arising from those activities was therefore assessable to Income Tax under Case II of Schedule D and not otherwise;

(ii) that the part-time appointments held by the Respondent were not offices or employments within the meaning of Schedule E;

(iii) that if any such part-time appointment was an office or employment within the meaning of Schedule E, the tenure thereof was an incident in the course of the carrying on by the Respondent of his profession as a consulting radiologist and any remuneration arising therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof for the purposes of assessment to Income Tax under Schedule D; and accordingly

(iv) that the said assessments under Schedule E should be reduced accordingly and the assessments under Schedule D should be adjusted to correspond with the figures shown in the Respondent's accounts; and in the alternative

(v) that if the said assessments under Schedule E were in principle well founded, the outgoings shown in the Respondent's accounts were allowable deductions in computing the profits or gains of the Respondent assessable under Schedule D in so far as they were not allowable as expenses under Schedule E; and in any event

(vi) that any profits or gains arising to the Respondent in respect of domiciliary visits were proper to be regarded as profits or gains of his profession assessable under Schedule D and not as emoluments of offices or employments assessable under Schedule E.

6. It was contended on behalf of the Crown:

(i) that the Respondent's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included in the assessments in question made upon him under Schedule E;

(1) Not included in the present print.

(ii) that the payments made to the Respondent by the said board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by the Respondent in respect of an office or employment of profit within the meaning of Schedule E;

(iii) that the Respondent exercised a profession or vocation in respect of which he was assessable under Case II of Schedule D only in so far as he carried on a private practice as consultant radiologist outside the National Health Service;

(iv) that in computing the profits of the Respondent under Schedule E in respect of his said part-time appointment only such expenses as were allowable under the said Schedule and the Rules applicable thereto were deductible, and in computing the profits or gains of the Respondent under Case II of Schedule D in respect of his said private practice only such expenses as were allowable under the said Schedule and Case and the Rules applicable thereto were deductible; and the outgoings shown in the Respondent's accounts fell to be dealt with accordingly;

(v) that the payments made to the Respondent under the National Health Service scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Schedule E and not as profits or gains assessable under Schedule D;

(vi) that the appeal should be dismissed and the assessments confirmed or adjusted in accordance with the appropriate figures.

7. We, the Commissioners who heard the appeal, gave our decision in principle in writing on 31st July, 1956, in the following terms:

(1) This is an appeal by Harold Leslie Ross (hereinafter called "Dr. Ross") against the following assessments, namely:

1951–52	Income	Tax,	Schedule	E	£3,024
1952–53	,,	,,	,,	D	£1,500
1952–53	,,	,,	,,	E	£3,276
1953–54	,,	,,	,,	D	£1,000
1953–54	,,	,,	,,	E	£3,385
1954–55	,,	,,	,,	D	£1,000

The grounds of appeal are: firstly, as regards the assessments made under Schedule E, that no profits or gains arose to Dr. Ross during the accounting periods relative to the said assessments under appeal which fell to be assessed under Schedule E, and accordingly the said assessments should be discharged; and secondly, as regards the assessments made under Schedule D, that the assessments, being estimated, should be adjusted in accordance with the accounts of the profits or gains of Dr. Ross for the accounting periods relative to the said assessments.

(2) The case for Dr. Ross is that at all times material to the appeal he was a registered medical practitioner and carried on the profession of consultant radiologist. His private practice, which he commenced on 1st March, 1950, was carried on at an address in Rugby which was also his home; and as a necessary part of the exercise of that profession he had accepted, and still held, part-time appointments as consultant radiologist to each of several hospitals under the Birmingham Regional Hospital Board—namely, Hospital of St. Cross, Rugby, Keresley Hospital and Gulson Hospital—in which connection he had also agreed to undertake what are known as "domiciliary

consultations" within the area served by the Birmingham Regional Hospital Board. It is said that at the material times Dr. Ross did not exercise any office or employment of profit, public or otherwise, within the meaning of Schedule E, Income Tax Act, 1918 (as amended by Section 18, Finance Act, 1922), and Section 156, Income Tax Act, 1952, and the whole of the profits or gains arising to Dr. Ross from the exercise of his profession as aforesaid fell to be assessed under the provisions of Schedule D, Income Tax Act, 1918, and Section 122, Income Tax Act, 1952. Alternatively, it is said that, if the appointments as consultant radiologist held by Dr. Ross did constitute the holding of offices or employment of profit assessable under Schedule E, the fees received by Dr. Ross in respect of "domiciliary consultations" carried out by him, which arose under a separate agreement, nevertheless remained assessable under the provisions of Schedule D as part of his professional earnings. It is also said that, in any event, the whole of the expenses incurred by Dr. Ross in the exercise of his profession, whether in connection with his private practice, hospital appointments or domiciliary consultations, were disbursements wholly and exclusively laid out or expended for the purpose of his profession within the meaning of Rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D, Income Tax Act, 1918, and Section 137 (*a*), Income Tax Act, 1952, and therefore fell to be allowed as deductions in computing the profits or gains of his said profession.

(3) It is admitted for the Crown that Dr. Ross carried on the profession of consultant radiologist from his private address in Rugby and that the profits or gains arising therefrom are properly assessed under Case II of Schedule D, Income Tax Act, 1918, and Section 122, Income Tax Act, 1952; but it is argued that the exercise of his profession by Dr. Ross was limited to his private practice carried on as aforesaid and that each of his part-time appointments under the Birmingham Regional Hospital Board as consultant radiologist constituted the exercise of an office or employment of profit within the meaning of Schedule E, Income Tax Act, 1918 (as amended by Section 18, Finance Act, 1922), and Section 156, Income Tax Act, 1952, and accordingly the profits or gains arising therefrom fall to be assessed under the provisions of Schedule E. The Crown also contend that the fees received by Dr. Ross from the Birmingham Regional Hospital Board under his agreement to perform domiciliary consultations were perquisites or profits arising from the holding of an office or employment within the meaning of Schedule E (as amended by Section 18, Finance Act, 1922) and Section 156, Income Tax Act, 1952, and fall to be assessed under the Rules relating thereto. The Crown further contend that, in computing for the purpose of assessment under Schedule D the profits or gains of Dr. Ross, only those expenses which are properly attributable to his private practice fall to be treated as deductions; and any expenses attributable to his hospital appointments and domiciliary consultations fall to be deducted from his assessments under Schedule E in so far as allowed by the Rules of that Schedule.

(4) Upon consideration of the evidence adduced and arguments addressed to us on behalf of the parties, we find that each of Dr. Ross's part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office or "post" and the remuneration derived therefrom, together with the fees received in respect of domiciliary consultations carried out in connection therewith, was the profit of an office within the meaning of Schedule E, Income Tax Act, 1918 (as amended by Section 18, Finance Act, 1922), and Section 156, Income Tax Act, 1952. It is immaterial for the purpose of determining this appeal to find whether or not such office or "post" is a public office within the meaning of the charging Rule of Schedule E, Income Tax Act, 1918, and Section 156, Income Tax Act, 1952,

and we express no opinion. Furthermore, finding as we do that the part-time appointments which Dr. Ross held as aforesaid constituted the holding of offices or "posts", it is unnecessary for the purpose of determining this appeal to find whether or not the said hospital appointments also constituted an employment within the meaning of Schedule E, Income Tax Act, 1918 (as amended by Section 18, Finance Act, 1922), and Section 156, Income Tax Act, 1952, and again we express no opinion. We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up[1].

(5) We next have to decide the correct method of assessing the profits or gains which Dr. Ross derived from his hospital appointments. Having regard to the decision in *Salisbury House Estate, Ltd.* v. *Fry*, 15 T.C. 266, and in particular to the judgment of Lord Atkin (at page 319), it would seem, *prima facie*, that remuneration received by Dr. Ross from his various hospital appointments —being, as we have found, derived from the holding of offices or "posts"— must come under the dominance of Schedule E to the exclusion of other Schedules, neither Dr. Ross nor the Crown having any option in the matter. We have, however, to consider what effect, if any, the decisions in the cases of *Davies* v. *Braithwaite*, 18 T.C. 198, and *Household* v. *Grimshaw*, 34 T.C. 366, have upon this view. In the first place, the *Salisbury House Estate* case can, we think, be distinguished, because it dealt only with the mutual exclusiveness of Schedules A and D, whereas the cases of *Braithwaite* and *Household* were concerned with professional earnings falling within Schedule D and Schedule E. In the second place, the *Braithwaite* and *Household* cases were decided after the decision in the *Salisbury House Estate* case had been given, and we are therefore entitled to assume that they are reconcilable with the latter. We think that the decisions in the cases of *Braithwaite* and *Household* are authority for the principle that an individual may have an engagement or hold a post in the same line as his profession at large, but that the contract governing such engagement or post may nevertheless be nothing but an incident in the conduct of his professional career. In such a case, we think we would be bound by the said authorities to hold that the profits or gains arising therefrom fell to be assessed as part of his professional earnings under Schedule D. Applying this principle to our findings in the present case, we hold that the remuneration received by Dr. Ross from his various part-time hospital appointments falls to be assessed under Case II of Schedule D as part of the profits or gains of his profession, and so also do the fees received by him in respect of his domiciliary consultations.

(6) The appeal therefore succeeds against the Schedule E assessments in so far as they relate to Dr. Ross's personal remuneration, and it is unnecessary for us to consider further what, if any, expenses incurred by Dr. Ross would fall to be set against such assessments. We adjourn the appeal against the remaining assessments for consideration and agreement of the figures by the parties on the basis of this our decision in principle.

On 23rd April, 1957, the figures having been agreed between the parties on the basis of our decision in principle, we determined the appeal as follows:

1951–52 — Schedule E assessment reduced to £324.
1952–53 — Schedule D assessment increased to £2,753.
Schedule E assessment reduced to £384.
1953–54 — Schedule D assessment increased to £2,838.

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[1] *See* Supplemental Case: page 32 *post*.

Schedule E assessment reduced to £455.
1954–55 — Schedule D assessment increased to £2,701.

8. Immediately after our determination of the appeal dissatisfaction therewith as being erroneous in point of law was expressed to us on behalf of the Crown, and in due course we were required to state a Case for the opinion of the High Court of Justice pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

9. The point of law for the opinion of the High Court of Justice is whether, on the facts found by us and hereinbefore set forth, there was evidence upon which we could properly arrive at our decision and whether, on the facts so found, our determination of the appeal was correct in law.

N. F. Rowe
A. W. Baldwin
Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
29th July, 1958.

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(2) *Mitchell and Haddock* (*H.M. Inspectors of Taxes*) v. *Hirtenstein*
(3) *Mitchell and Mellersh* (*H.M. Inspectors of Taxes*) v. *Marshall*
(4) *Taylor-Gooby* (*H.M. Inspector of Taxes*) v. *Tarnesby*
(5) *Taylor-Gooby and Job* (*H.M. Inspectors of Taxes*) v. *Drew*

These cases related to the appeals of Dr. A. Hirtenstein, Dr. A. G. Marshall, Dr. H. P. Tarnesby and Mr. C. E. Drew against similar assessments to Income Tax under Schedules D and E. The facts, the contentions of the parties and the findings of the Special Commissioners were not materially different from those in the foregoing Case. In the fourth and fifth cases fees were also received for part-time locum tenens appointments in hospitals under the National Health Service. These fees were, in the contentions of the parties and the findings of the Special Commissioners, treated in all material respects in the same way as those for domiciliary visits.

The cases came before Roxburgh, J., in the Chancery Division on 3rd and 4th March, 1959, when they were remitted to the Special Commissioners for clarification.

Mr. R. O. Wilberforce, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. John Creese for the taxpayers.

The following Supplemental Case was accordingly stated by the Special Commissioners in *Mitchell and Edon* (*H.M. Inspectors of Taxes*) v. *Ross*. Similar Supplemental Cases were stated in the other four cases.

SUPPLEMENTAL CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 23rd March, 1959, we, the Commissioners who heard the appeal, upon consideration of the Order (No. 35 of 1958) of Roxburgh, J., made 4th March, 1959, and upon hearing learned Counsel for the parties hereto, explain the meaning of the last sentence of paragraph 4 of our findings herein by amending the said sentence [1] to read as follows:

"We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general."

N. F. Rowe
A. W. Baldwin
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
31st March, 1959.

The cases again came before the Chancery Division (Upjohn, J.) on 5th, 6th, 7th and 8th May, 1959, when judgment was reserved. On 21st July, 1959, judgment was given in favour of the Crown, with costs.

Mr. R. O. Wilberforce, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. John Creese for the taxpayers.

Upjohn, J.—I have before me five appeals from the Special Commissioners of Income Tax, and they raise questions of general importance to medical specialists: that is, whether the expenses incurred by them in rendering services to patients under the National Health Service Act, 1946 (which I shall call "the Act"), ought to be taxed under Schedule D or Schedule E of the Income Tax Act. As is well known, owing to the difference in wording of the relevant rules for the assessment of tax, outgoings may be deductible as expenses for the purposes of Schedule D which would not be so deductible for the purposes of Schedule E.

The first and main appeal is in respect of Dr. Ross, who for the material years held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board. The second appeal is in respect of Dr. Hirstenstein, who also held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board. He also undertook certain lecture work to nurses. The third appeal is in respect of Dr. Marshall, who held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth appeal is in respect of Dr. Tarnesby, who held two part-time appointments as a psychiatrist, one with the North-West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of National Health appointments. The fifth and last appeal is in respect of Mr. Drew, who held three appointments as a consultant thoracic surgeon, (1) with the Westminster Hospital, a teaching hospital, (2) with the South-West Metro-

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[1] *See* para. 7 (4) of Stated Case: page 30 *ante*.

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politan Regional Hospital Board, and (3) as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum tenens work in respect of National Health appointments, and also lectured to medical students. All these gentlemen also had private patients.

The main question I have to determine is whether, in accepting such appointments, the profits or gains arising from such appointments are profits or gains arising from an "office or employment". The facts, the relevant statutory provisions, forms of contract and general terms of service are so fully set out in the first and main Case that I shall content myself with the barest outline of facts before turning to the law. As set out in the title, the Act is

> "An Act to provide for the establishment of a comprehensive health service for England and Wales, and for purposes connected therewith."

By Section 3 (1) of the Act, it was provided that:

> "As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(*a*) hospital accommodation; (*b*) medical, nursing and other services required at or for the purposes of hospitals; (*c*) the services of specialists, whether at a hospital, a health centre provided under Part III of this Act or a clinic or, if necessary on medical grounds, at the home of the patient; and any accommodation and services provided under this section are in this Act referred to as 'hospital and specialist services'."

The appointed day was 5th July, 1948. I am concerned with paragraph (*c*), the services of specialists.

The Minister in fact carries out his duties in the main by delegation to regional hospital boards who in turn may delegate certain of them to hospital management committees, but not those relating to the appointment and dismissal of specialists. In the case of teaching hospitals there is a separate board of governors for each such hospital to govern and control its activities. I shall use the word "board" to designate a regional hospital board or a board of governors of a teaching hospital indifferently.

Before the Act came into operation, the specialist, or consultant as he was frequently called, was one who was appointed to the staff of a hospital as a physician or surgeon, or some similar post. He practised in his own specialised field on cases normally sent to him by general practitioners. He would normally have private patients, and his appointment to the staff of the hospital was almost invariably honorary and part-time. When the Act came into operation all that was changed. A specialist may, if he so desires, continue to practise exclusively on private patients; but if he desires to participate in services to the public to be rendered under the Act, he must take an appointment with, and become a member of, the staff of a board. He becomes an officer of the board, but the use of that word in the relevant Statutes and Statutory Instruments has not been relied on in throwing much light on the problem I have to decide. He may take a whole-time or part-time appointment. In either case he is remunerated for his services as may be agreed between the board and the specialist, subject to regulations made by the Minister of Health. The large majority of specialists take part-time appointments. In that event the specialist agrees to work a certain number of sessions or notional half-days per week. All these matters are provided for in the contract which the board and the consultant must enter into. Such a contract, by reference to a document referred to in paragraph 23 of Dr. Ross's Case Stated as the terms of service, provides for retirement of the specialist at the age of 65 (subject to extension), for an appeal to the Minister if the specialist

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considers his appointment is being unfairly terminated by the board, for annual leave, for reimbursement of travelling expenses, for subsistence allowance, and for many other incidental matters.

It naturally follows from the nature of the professional status of a specialist that his work is subject to no control or direction as to how he should carry out his work, in the sense of prescribing particular treatment in relation to a particular patient. That appears to be so even in the case of those who are on the lowest rung of the specialist ladder: see, for example, the case of Dr. Tarnesby, paragraph 4 (4) and (5) of his Case Stated. The general organisation of the work—that is, the particular hospital or hospitals within the jurisdiction of a board to be visited by each specialist, and the particular hours per week to be spent at each—will probably be stated in the contract, but in practice these arrangements may be varied very informally between the consultants concerned without reference to the board: see, for example, Dr. Ross's Case Stated, paragraph 4 (8). Generally speaking, all these matters and actual days and hours of attendance, as one would expect, are normally left to arrangements to be made between the particular specialists themselves to suit their mutual convenience and that of the hospital or hospitals concerned. A specialist may take part-time appointments with more than one board, but his total maximum remuneration must not exceed nine sessions a week. I do not propose to read any of the contracts in these five cases, as they are all annexed to the Cases Stated. Some of them vary slightly in form from the others, but nothing turns on the precise terms of the contracts in question. That is all I propose to say on the main issue, but there are certain subsidiary points with which I shall deal later.

I turn, then, to the law. It is necessary to look at the history of the relevant legislation. By virtue of Section 1 and Schedule E of the Income Tax Act, 1918, re-enacting similar legislation in the Income Tax Act of 1842, tax was chargeable under Schedule E in respect of every "public office or employment of profit". Rule 6 of the Rules applicable to Schedule E sets out a long list of public offices and employments of profit, ending with a comprehensive paragraph (*k*): "all other public offices, or employments of profit which are of a public nature." It was clear that the office or employment, to fall within Schedule E, had to be public; and it was so held by the House of Lords in *Great Western Railway Co.* v. *Bater*[1], [1922] 2 A.C. 1, a decision on the corresponding Rule in the Income Tax Act of 1842. In that case it was decided that a clerk in the employment of the Great Western Railway was not the holder of a public office or employment within Schedule E.

Employment which did not fall within Schedule E was taxed under Paragraph (1) (*a*) (ii) of Schedule D as a profit or gain arising from any trade, profession, employment or vocation. The law was altered after the *Bater* case by Section 18 of the Finance Act, 1922, which provided (omitting immaterial words) that

> "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that schedule shall apply accordingly subject to the provisions of this Act."

So in the result the law now is that all offices and employments for profit, whether public or private, fall within Schedule E. The relevant law is now re-enacted to the same effect by the Income Tax Act, 1952: see the proviso

(1) 8 T.C. 231.

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to Paragraph 1 of Schedule D in Section 122 and Paragraphs 1 and 2 of Schedule E in Section 156.

There is but little authority on the meaning of the word "office". It was considered in the *Bater* case(1), and again in *McMillan* v. *Guest*(2), [1942] A.C. 561. In that case it was decided that a director of a private company incorporated in England holds a public office within the United Kingdom. Lord Atkin said this, at page 564(3):

> "On the first point there was no dispute. There is no statutory definition of 'office'. Without adopting the sentence as a complete definition one may treat the following expression of Rowlatt J. in *Great Western Ry. Co.* v. *Bater*, adopted by Lord Atkinson, as a generally sufficient statement of the meaning of the word (4): 'an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders.' There can be no doubt that the director of a company holds such an office as is described."

Lord Wright said this, at pages 566–7 (5):

> "The word 'office' is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: 'A position or place to which certain duties are attached, especially one of a more or less public character.' This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular, *Great Western Ry. Co.* v. *Bater*, where the legal construction of these words, which had been in sch. E since 1803 (43 Geo. 3, c. 122, s. 175), was discussed. It was there held that the position of a clerk in a railway company was not an office or employment of profit of a public nature within sch. E. Lord Wrenbury was content so to hold without attempting to define what type of office or employment would satisfy the language of the schedule. Lord Sumner said that to hold otherwise would be 'an abuse of language.' To hold that the director of a company such as A. Wander Ld. (though it is what is called a private company), does not have an office within the meaning of the schedule would equally, in my opinion, be an abuse of language. Everyone, I think, would say that as director he held an office in the company. The word 'employment', in my opinion, has to be construed with and takes its colour from the word 'office.' If I may adopt the words of the Master of the Rolls, it is too late to say that the director of a company like this does not hold an office within sch. E. I do not attempt what their Lordships did not attempt in *Bater's* case, that is, an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense with due regard to the requirement that there must be some degree of permanence and publicity in the office."

On the question of employment a large number of authorities were cited to me. Many tests have been laid down to determine whether the relation of master and servant exists, such as the degree of control exercised by the master, and so on. The relationship between a specialist and a board is so very special, however, that many of these cases, dealing either with entirely different types of engagements, to use a neutral word, or with the pre-Act relationship between hospitals and specialists, form no safe guide. The real question to be answered is this. Does a specialist who holds a part-time National Health appointment (*a*) occupy an office, or (*b*) undertake an employment, or (*c*) does he merely render services in the course of the exercise or practice of his profession? In support of the last view it was urged that a specialist may have private patients; he may have one or more National Health Service part-time appointments; he may lecture to students or nurses; he may go as a locum tenens to some medical post—these are all ways in which the specialist practises his profession, and they are only incidents

(1) 8 T.C. 231. (2) 24 T.C. 190. (3) *Ibid.*, at p. 201. (4) 8 T.C., at p. 235.
(5) 24 T.C., at pp. 202–3.

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of it. The case, it is said, is analogous to the case of *Davies* v. *Braithwaite*(1), [1931] 2 K.B. 628. It was there held that Miss Lilian Braithwaite, who accepted many engagements on the stage, films and B.B.C., was only exercising her talents as an actress, and that each of these engagements could not be considered an employment but merely an engagement in exercising a profession.

The true nature of the relationship between a board and a specialist was considered in the Court of Appeal in *Razzel* v. *Snowball*, [1954] 3 All E.R. 429. That case decided that the Minister of Health was responsible for the negligence of a specialist, for it was the duty of the Minister under Section 3 (1) (*c*) of the National Health Service Act, 1946, to provide treatment by means of specialists, and not merely to provide the specialist. I will not read Section 3 (1) of the National Health Service Act again. Denning, L.J., as he then was, said this, at pages 432–3:

> "Counsel for the plaintiff pressed us with some observations in the cases concerning consultants. He said that the defendant was a part-time consultant, and that a consultant was in a different position from the staff of the hospital. I think that counsel for the defendant gave the correct answer when he said that, whatever may have been the position of a consultant in former times, nowadays, since the National Health Service Act, 1946, the term 'consultant' does not denote a particular relationship between a doctor and a hospital. It is simply a title denoting his place in the hierarchy of the hospital staff. He is a senior member of the staff, and is just as much a member of the staff as the house surgeon is. Whether he is called specialist or consultant makes no difference. He, like the rest of the staff, is merely carrying out the duties of the Minister and is entitled to the protection of s. 21 (1) of the Limitation Act, 1939."

A specialist or consultant, in carrying out his duties under a part-time appointment with a board, is therefore not merely rendering services as a private though professionally skilled and qualified individual to a private citizen, but he is the instrument of the Minister to carry out part of the national scheme "to provide for the establishment of a comprehensive health service for England and Wales"—I quote again the title to the Act. It seems to me that he is thus carrying out necessarily a public function (see *McMillan* v. *Guest* (2)), and in my judgment such a specialist is properly described as the holder of a public office. So far I agree with the conclusion of the Special Commissioners, and indeed go further in holding that the office is public. The Commissioners, however, then decided that though the appointment constituted the holding of an office, nevertheless the taxpayer was assessable to tax under Schedule D. Mr. Heyworth Talbot, for the taxpayer, has candidly conceded that he can find no argument to support this conclusion of law. It is, indeed, clear that in reaching that conclusion the Commissioners have misunderstood the effect of the *Braithwaite* case and my own later decision in *Household* v. *Grimshaw*, 34 T.C. 366. Those decisions, while helpful in reaching a conclusion as to whether there is on the one hand an office or employment or on the other an exercise of a profession, have no bearing on the tax position once it is found that the activity in question is an office or employment.

Apart from Mr. Heyworth Talbot's point, which I shall mention in a moment, it is not in dispute that if a person holds an office or employment he must be assessed to tax under Schedule E in respect of his earnings arising therefrom; there is no option about it. Mr. Talbot's point, however, is this. There is a finding in each Case (as amended) to this effect (I take Dr. Ross's Case for convenience):

> "We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, not-

(1) 18 T.C. 198. (2) 24 T.C. 190.

withstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general."

That phraseology is not very happy, but I think the parties are agreed that it means this: that Dr. Ross, to establish himself as a specialist, found it necessary as a practical matter to take a hospital appointment; it was a necessary incident of his profession. No doubt this would be for a number of reasons. First and most important, it was the best way of practising and improving his particular skills; secondly, it would provide a salary to live on; thirdly, it would bring him into contact with general practitioners who would in due course no doubt send him their private patients; fourthly, it is only by taking an appointment that hospital services could be made available to the specialist's private patients. There may well be other reasons. Founding himself upon this, Mr. Talbot submits that all Dr. Ross's expenses, whether incurred in the course of exercising his office under the National Health Service Act or otherwise, are all part of carrying on the profession of a consultant radiologist. Therefore, any expenses incurred in the course of exercising the office which would not be allowable under Schedule E but would be allowable under Schedule D may be brought into account as part of the general exercise of his profession of a consultant radiologist. Mr. Talbot poses the question: Is Dr. Ross carrying on one profession or two? The question is a narrow one and without the slightest importance except for the purpose of Income Tax. In a general sense, of course, Dr. Ross is carrying on the profession of a radiologist whether he is performing his National Health functions or attending to private patients. It is all part of his vocation as a medical adviser. In my judgment, however, the argument ought not to succeed. When carrying out his National Health duties, Dr. Ross is performing the duties of an office and he is taxed under Schedule E. When attending private patients he is exercising his profession and is taxed under Schedule D. Each Schedule and the Rules thereunder contain, in the words of Lord Atkin in *Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432, at page 457(1), "definite codes applying exclusively to their respective defined subject-matters".

Once the conclusion is reached that the National Health appointment is the holding and exercise of an office—and that is the vital decision—the expenses attendant thereon must be taxed under the Rules applicable to Schedule E and, in my judgment, under no other Schedule. The fact that the exercise of that office may truly be described as an incident of the profession of radiologist cannot alter that position. Mr. Talbot relied on *Hughes* v. *Bank of New Zealand*, 21 T.C. 472. The Bank of New Zealand had certain tax-exempt securities, exempt as to some by virtue of Section 46 of the Income Tax Act, 1918, and as to others by virtue of the Rules applicable to Schedule C, which were purchased out of floating capital. It was held that the expenses of making those investments were allowable as a deduction in computing tax liability. That was decided unanimously in all Courts. Lord Wright, M.R., pointed out that there was only one indivisible trade and the expenses in question were properly allowable as deductions in computing Income Tax liability. The exempting provisions exempted certain interest from tax, but there was nothing in those provisions which precluded the bank from claiming the expenses as allowable deductions. That seems to me a very different case and does not lay down any principle which assists me in this case. This point fails.

I turn, then, to the supplementary questions. First, as to domiciliary

(1) 15 T.C. 266, at p. 320.

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visits. In addition to the performance of the ordinary duties the specialist may, if, but only if, he so desires, undertake domiciliary visits; that is, he undertakes, at such times and within such area as he may prescribe in his contract, to visit patients whom a general practitioner does not desire to be treated in hospital at their homes. Such visits are arranged directly between the general practitioner and the specialist concerned. The specialist takes his own apparatus to the patient's house, e.g., X-ray apparatus, examines him, develops the film, usually in hospital, and then reports to the general practitioner concerned. For this service he receives a fee of four guineas for each domiciliary visit (with a maximum of 200 visits in each year) and two guineas for the use of his apparatus, but once only per patient. That a specialist holding a National Health appointment might, as part of his duties, carry out domiciliary visits is clearly contemplated in Section 3 (1) (*c*) of the Act. It seems to me clear that in making those visits the specialist is exercising part of his duties under the Act, that is to say the visits are all part of the exercise of the public office which he holds under the Act. In my judgment it is no point of distinction that the specialist need not contract to make domiciliary visits, nor that the visits are arranged directly between the specialist and the general practitioner, nor that the specialist uses his own apparatus, for which, incidentally, he is paid by the State. Accordingly, the expenses attendant thereon must be taxed under the Rules applicable to Schedule E.

Finally, I turn to the question of expenses attendant on the work of a locum tenens in respect of a National Health appointment. The phrase is so well understood in connection with the medical profession that I need not explain it. The case of Mr. Drew shows how informal are the arrangements made for this type of work. It was said that Dr. Tarnesby and Mr. Drew, in carrying out such work, were merely undertaking engagements in the same way that Miss Lilian Braithwaite did. I disagree. The phrase "locum tenens" is in fact a most apt and appropriate expression to describe the work. The specialist, in doing such work, is in fact holding the post of another. He is for the time being exercising the functions and holding the public office of another. How can his expenses of doing so properly be allowed on some different basis from that of the real holder of the office in whose shoes he temporarily stands? In performing this work he is exercising a public office, and his expenses must be taxed under the Rules applicable to Schedule E.

Both Dr. Hirtenstein and Mr. Drew received fees and no doubt incurred expenses in lecturing, but it seemed to me that the facts relating to these activities were quite insufficiently explored before the Special Commissioners to enable me to decide whether such work was undertaken as part of the specialist's public office under the Act or as part of his general practice. Mr. Wilberforce did not press this point or ask me to send the Cases back for further findings. Therefore I say nothing about this aspect of the matter; it was not argued before me and it must be left to some future case to resolve this problem. The decision of the Commissioners that expenses in connection with lecturing are deductible under Schedule D will therefore stand for the relevant years of assessment.

Both Dr. Tarnesby and Mr. Drew undertook domiciliary work not only in the area of the Regional Board with which they respectively had contracts but in other areas. Here again the facts were insufficiently found, and Mr. Wilberforce asked me to deal only with the straightforward case of Dr. Ross so far as the expenses of domiciliary visits are concerned. Therefore, again I decide nothing about domiciliary visits to outside areas. Accordingly, the decision of the Commissioners that the expenses in connection with domiciliary

visits to outside areas are deductible under Schedule D will stand for the relevant year of assessment.

Subject to that, I allow the appeal in each case. These five cases must be remitted to the Special Commissioners to assess each Respondent under Schedule E in respect of his earnings arising from appointments under the Act, and the Respondent in each case must pay the costs of the Crown.

Mr. R. O. Wilberforce.—Perhaps your Lordship would allow me to mention one point. I wonder whether my learned friend would agree whether it is necessary for the cases to be remitted to the Special Commissioners. We have got the assessments on an alternative basis, and I rather apprehended that, once your Lordship had given a decision on the principle, then the rest probably followed. Of course, if my learned friend's clients want the cases remitted, we should not oppose it.

Mr. F. Heyworth Talbot.—My Lord, I always thought that remission to the Special Commissioners would be really a formality. What will happen will be that the two sides will get together and agree what the figures should be in relation to both the Schedule D and the Schedule E assessments. I should have thought that the formal Order your Lordship suggested was right.

Upjohn, J.—I think it is right, because formally it does have to be remitted to adjust the figures. In fact, of course, if the parties agree, nothing more happens.

Mr. Heyworth Talbot.—I do not think there is anything to fear as a consequence.

Mr. Wilberforce.—Very well. I am entirely content, and I apologise for raising the point.

The taxpayers having appealed against the above decisions, the cases came before the Court of Appeal (Lord Evershed, M.R., and Pearce and Harman, L.JJ.) on 2nd, 3rd, 4th, 7th and 8th March, 1960, when judgment was reserved. On 24th March, 1960, judgment was given unanimously against the Crown. The Crown were ordered to pay two-thirds of the costs.

Mr. F. Heyworth Talbot, Q.C., and Mr. John Creese appeared as Counsel for the taxpayers, and Mr. R. O. Wilberforce, Q.C., and Mr. Alan Orr for the Crown.

Lord Evershed, M.R.—The five appeals in which we are now giving judgment have raised the same questions, in substance two in number. For the purposes of the hearing in this Court, as for the purposes of the hearing before Upjohn, J., as he then was, the facts in the case of Dr. Ross have been taken as typical of all five cases, and I shall therefore, as did the learned Judge, treat the facts relating to Dr. Ross, appearing from the Case Stated by the Special Commissioners upon Dr. Ross's appeal against the assessments made against him, as typical of the facts relevant to all the appeals, and therefore as constituting the necessary basis for this judgment upon all the appeals. As the learned Judge justly observed, the material circumstances are set out most fully in the Case Stated, which contains also an analysis of the relevant provisions of the National Health Service Act, 1946, and of various Statutory Instruments made thereunder. Like him, therefore, I shall confine myself to such brief statement of facts as will suffice to make clear the nature of the questions for our decision and the reasons for my conclusions upon them.

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Dr. Ross is, and has at all material times been, a qualified and registered medical practitioner. He is, and has at all material times been, in common with the other Appellants, of the category of medical practitioners known as "specialists". The word is so commonly understood that it requires no further exposition. It is used in its commonly understood sense (and so as to be applicable to Dr. Ross and the other Appellants) in the Act of 1946 itself, particularly in Sections 3 and 14, to which I shall later make again some reference. Dr. Ross's specialist activity is that of a consultant radiologist. In that capacity he attends private patients, and he also holds a part-time appointment by contract with the Birmingham Regional Hospital Board at certain hospitals in the area of the board. The professional activities of the other Appellants are in all material respects wholly similar. The only difference between them is that whereas, in the case of Dr. Ross and three of the other Appellants, the fees received in the relevant years of assessment from private patients were appreciably less than the emoluments from the hospital appointments, in the case of the remaining Appellant, Dr. Hirtenstein, the fees from private patients exceeded the hospital emoluments. But no point was made before us arising out of the distinction.

I can now state the first of the questions debated before us. It is this: Should Dr. Ross be assessed for Income Tax in respect of the profits or gains or emoluments arising to him from his practice as a consultant radiologist, alike from his private patients as from the hospital appointment, entirely under the relevant Rules of Schedule D? Dr. Ross's contention is that he should. Or, as the Crown contend, should he be assessed under Schedule D in respect of the profits or gains arising from his private patients and under Schedule E in respect of his emoluments under his hospital appointment? I have so far deliberately, and for reasons which will later sufficiently appear, avoided the use of the word "profession"; but it has not been in dispute that Dr. Ross's profits or gains from his services to private patients and his emoluments from his hospital appointment alike arose from his practice, his one "job in life", as a consultant radiologist.

I should assume that nine people out of every ten—indeed, that everyone not versed or experienced in the intricacies and anomalies that the heritage of a century and a half of Income Tax legislation has bequeathed—would, upon hearing the questions that I have posed, enquire, "What can it matter? Why should it matter?" And emphasis is given to the enquiry by the Commissioners' finding that Dr. Ross's part-time hospital appointment, no less than his private practice, was a part, and indeed a "necessary" part, of his profession as a consultant radiologist. The actual language of the finding, supplemented after the case had been sent back to them by Roxburgh, J., for the purpose, was as follows:

> "We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general."

There was some discussion before us of the exact significance of the language I have quoted, which Upjohn, J., described as not entirely happy. But this much was quite clear and not in dispute: that for one in Dr. Ross's position who was earning his living as a consultant radiologist, the undertaking of part-time hospital appointments was part of his "job" (again I deliberately do not use the word "professsion"), and a part of it which, as a matter of practical necessity for professsional success, he had to do. The same is true of the other

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four Appellants, save for the substitution for "consultant radiologist" of their respective specialist activities.

Why, then, should it matter whether Dr. Ross is assessed wholly under Schedule D or partly under that Schedule and partly under Schedule E? The answer is that, notwithstanding the unity of Dr. Ross's calling as a consultant radiologist, the allowances and deductions which he may make under the two Schedules differ. The rules for chargeability under Schedule D are now to be found in Part V of the Income Tax Act, 1952, beginning with Section 122. By Section 137 (*a*) the permissible deductions are, in effect, defined, so far as relevant, as sums wholly and exclusively expended for the purposes of the taxpayer's profession or vocation. Liability under Schedule E is expounded in Part VI of the Act, beginning at Section 156. I shall not here recite the language of the two charging Sections, which in material respects show a certain lack of conformity. But the disconformity is further exhibited by the circumstance that for the appropriate allowances under Schedule E it is necessary to turn to the Ninth Schedule to the Act, Paragraph 7 of which reads as follows:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

To the reader in the present age (which is sometimes described as that of the internal combustion engine), the reference to the horse will be somewhat startling. Its presence is evidence of the long ancestry of the Paragraph, re-enacted in succeeding consolidating Statutes; for it reflects the fact, interesting, if hardly relevant today, that the means and speed of conveyance of an inhabitant of this island from one place to another depended in Napoleon's days, as it had depended in the days of Julius Caesar, upon the performance of the horse. More important, however, for present purposes is that the standard of permissible deductions under Schedule E is that of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the taxpayer's office or employment. Thus the standard is in two respects stricter than that appropriate to the taxpayer assessed under Schedule D; for (1) not only must the expenses be wholly and exclusively, but they must also be necessarily, incurred, and (2) they must be incurred not merely for the purposes of the taxpayer's office or employment but, according to the language, actually in the performance of the duties of it.

When Schedule E was first devised it was limited in its application to the holders of certain public offices tabulated in Paragraph 5 of the Schedule. It may well be that the stricter standard of allowances was appropriate and sensible in the case of the holders of such offices, whether equestrian or otherwise, starting with the holders of offices belonging to either House of Parliament; and it may also be that 150 years ago the class of Schedule D taxpayers was far smaller than it is today. But in 1922 there was transferred from the embrace of Schedule D to that of Schedule E a large class of taxpayers covered by the language of what is now the proviso to Section 122 (1) of the 1952 Act and reflected in Section 156, Paragraph 2. It is, of course, altogether beyond the scope of this judgment to attempt to define the limits of the transferred class. For my present purposes it is sufficient to observe that it covers the large class of taxpayers who receive their remuneration after deduction of tax under what is called the P.A.Y.E. system. I hope, therefore, I am not exceeding my judicial duty if I venture to suggest (probably

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not for the first time) that Parliament might well consider the justification and sense, at the present day, of the considerable distinction between the two Schedules in the matter of deductions and allowances. And added force is lent (as I hope) to my enquiry by the circumstances of the present cases. If the Crown are right (as, for reasons later appearing, I think they are) upon the first question already posed, then it follows that persons in the position of Dr. Ross must for the purposes of taxation have one essential part or function of their single calling severed from the rest, and must likewise, if the Crown are right upon the second question which the answer to the first involves, have each item of their expenses similarly dissected and then apply (as I think, somewhat artificially) a different standard of justification to each dissected part.

An example or two from Dr. Ross's revenue account, exhibited to the Case Stated, will illustrate the point. In this account, the first item on the debit side is the salary (£2 per week) paid to Dr. Ross's secretary. Another item is that of expenses in respect of his motor car. It was not suggested that either of these two items would have been disallowed as not having been wholly and exclusively expended for the purposes of Dr. Ross's profession if he were taxable in respect of all his earnings under Schedule D. But on the basis of his taxability in respect of his hospital appointment under Schedule E, it was said that some proportion of these items must be regarded as attributable to this appointment, and as such would then be likely to be disallowed as either not necessarily incurred or as not incurred in the (actual) performance of his hospital duties.

The difficulty of such analysis is enhanced when it is borne in mind that Dr. Ross might well proceed on occasion from his consulting room to the hospital to attend both upon private patients and upon patients under his charge in pursuance of his duties under his hospital appointment—in both cases according to arrangements made by his secretary. Whether or not it was ever contemplated, when the conditions of the two Schedules were devised, that a taxpayer practising a single calling would be taxable for part of his single activity under one Schedule and for part under another, it is obvious that, if the Crown be right upon both questions, the process of severing expenses wholly and exclusively incurred for the purposes of that activity and applying different tests of justification to the severed parts are not only, as I have thought, artificial, but also highly formidable. There is, I venture to think, an unreality and absence of common sense in the processes which has encouraged me to suggest that consideration should now be given to the incidence and characteristics of the two Schedules; and not the less so since it must be in the public interest that the incidence of taxation should generally be regarded as sensible and just. We were informed that the result of the present cases would similarly affect some 4,700 other medical practitioners, and it has seemed to me likely enough that men of other professions will be similarly affected.

For reasons later appearing, however, I think, with my brethren, that the Appellants succeed upon the second main reason raised; that is, that although they must be taxed in respect of their hospital appointments under Schedule E, nevertheless they may still bring into account by way of deduction in their Schedule D assessments sums shown to have been wholly and exclusively expended for the purposes of their single professions as consultants, even though referable to their hospital work, and even though not allowable in their Schedule E assessments. The result may be logically unsatisfactory, but, as later appears, is one from which the language of Section

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137 (*a*) of the Act (which remained unaltered in spite of the transfer from Schedule D to Schedule E brought about in 1922, and now enshrined in the proviso to Section 122 (1)) leaves no escape in the circumstances of the present cases. Though, therefore, if our conclusion on this matter is right, the complex processes above referred to will, in the present cases at any rate, be futile, the processes will still, so far as I can see, have to be undertaken: nor will they necessarily be futile in other, but similar, cases to which the Commissioners' findings would not be applicable. The futility and illogicality in the present cases provide, therefore, I venture to think, no argument against a review of the Schedules by Parliament.

I return, however, to the first question for our determination, and the answer to it must depend upon whether Dr. Ross's hospital appointment constitutes an office or employment within the terms of Section 156, Paragraph 2, of the 1952 Act already referred to. It was the view of the Special Commissioners that the question should be answered affirmatively, but that nevertheless the doctor was not assessable in respect of the emoluments thereof under Schedule E. This conclusion they based on the premise of their finding (already quoted) that the appointments were mere incidents, and necessary incidents, of his profession as a consultant radiologist; founding themselves upon the authority of the cases of *Davies* v. *Braithwaite*, 18 T.C. 198, and *Household* v. *Grimshaw*, 34 T.C. 366. Mr. Heyworth Talbot, for the Appellants, did not attempt to support the reasoning of the Special Commissioners: nor, with all respect to them, could he do so. It is now well established (for example, by the *Salisbury House* case[1] in the House of Lords, 15 T.C. 266) that the various Schedules must be treated as distinct codes, of which Schedule D is, as it were, residuary in nature, applicable, if at all, to cases not falling within any of the other Schedules. It follows, therefore, that if as regards his hospital appointment Dr. Ross held an office or had an employment within Section 156, then, as regards the emoluments of that office or employment, he must be taxable under Schedule E.

But it was Mr. Heyworth Talbot's submission that, because Dr. Ross's engagement by the Hospital Board was a mere incident of his professional activity, therefore he should not be regarded as holding an office or employment at all; and Mr. Heyworth Talbot cited the case of *Davies* v. *Braithwaite* to support that argument. The cited case related to the professional activities as an actress of Miss Lilian Braithwaite, and it was proved that, in the ordinary course of those activities, Miss Braithwaite entered into contracts of "employment" with theatre managers and other persons. In that case the Crown (be it observed) were contending for the applicability not of Schedule E but of Schedule D; and the Crown's contention succeeded on the ground, putting it briefly but sufficiently, that such contracts which did not involve in any true sense the relation of master and servant were not in truth contracts of employment at all, or at least not "employments" within the purview of Schedule E. In my judgment, the case of *Davies* v. *Braithwaite* is upon its facts far removed from the present case. I agree, as I have already indicated, with Upjohn, J., that the conclusion that Dr. Ross's engagement with the Birmingham Regional Hospital Board constituted an "office" within the Section is inescapable; though I prefer to express no view (and we were not invited to do so by Mr. Wilberforce) whether it was or was not a "public" office.

The contract of engagement forms exhibit "B" to the Case Stated. It is headed "National Health Service Act, 1946", followed by the name and

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(1) Salisbury House Estate, Ltd. *v.* Fry.

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address of the regional board. It is in the form of a letter under the heading "Appointment of Consultant (Part-time)" addressed to Dr. Ross and signed by the secretary to the board, having attached to it a form of acceptance signed by Dr. Ross. "The duties attaching to the appointment" were expressed to be such as might be assigned by the regional board for the purpose of providing hospital and specialist services under Section 3 of the National Health Service Act, 1946, at the hospitals indicated, though, as the learned Judge pointed out, it naturally followed from the nature of Dr. Ross's professional status as a specialist that he was not placed under any direction as to how he would carry out his treatment of patients. The letter stated the number of hours Dr. Ross was expected to work; it contained certain provisions in regard to his place of residence if more than a certain distance from the hospitals where he was required to serve; it required Dr. Ross to notify the board in regard to his taking of "leave"; it provided that the appointment carried the right to a pension. There was no statement of the period of service, but it is not in doubt that there was a fixed retiring age and that the appointment was only terminable by Dr. Ross on reasonable notice to the board. The form of acceptance signed by Dr. Ross was in the following terms: "I hereby accept the appointment and the terms and conditions of service described above." It is convenient here to add that Dr. Ross also signed on the same document an agreement, "In addition to the above named duties", to undertake domiciliary consultations in accordance with the terms and conditions stated in a document issued in 1949 by the Ministry of Health.

In my judgment, the document which I have recited and which constituted the contract between the Birmingham Regional Board and Dr. Ross makes clear upon the face of it that Dr. Ross's appointment thereunder as a part-time consultant was, according to the ordinary understanding of its language and effect, an appointment to an "office", to what the Commissioners referred to as a "post". Nor does the matter end there. The appointment was made by the regional board under the powers delegated to them under the Act by the Minister, whose duty it was, by Section 3 (1) (*c*), to provide the services of specialists at hospitals. By Section 14 (1) of the Act—to which Section I also referred at the beginning of this judgment—it is provided, *inter alia*, that part-time specialists, appointed as Dr. Ross was appointed, should be "officers" of the relevant regional boards; and the regulations made under that Section likewise (and, as I think, naturally) refer to such specialists as "officers" (see S.I. 1948, No. 1416, paragraph 3).

The words "office" and "employment" as used in Sections 122 and 156 of the Income Tax Act, 1952, have been the subject of judicial consideration. Thus, in the case of the *Great Western Railway Co.* v. *Bater*[1] (the decision in which by the House of Lords was the occasion for the transfer from Schedule D to Schedule E in 1922), Rowlatt, J. ([1920] 3 K.B. 266, at page 274) used the language:

> "an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders";

language which was accepted as generally sufficient by Lord Atkin and Lord Wright in *McMillan* v. *Guest*[2], [1942] A.C. 561. Lord Wright, in the latter case, also referred (at page 566)[3] to the New English Dictionary meaning of "office" as: "A position or place to which certain duties are attached, especially one of a more or less public character." In my judgment, Dr. Ross's

(1) 8 T.C. 231, at p. 235. (2) 24 T.C. 190. (3) *Ibid.*, at p. 202.

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appointment clearly satisfied the tests indicated by these citations, and I have therefore, for myself, no doubt upon authority and common sense that it was an "office" within the meaning of the relevant Section of the Income Tax Act.

It will be convenient to deal here with two subsidiary points. First, I have equally no doubt that the domiciliary consultations which Dr. Ross undertook to do formed part of the duties of his "office". Domiciliary consultations (as the words imply) involve calls by the specialist at the homes of National Health patients; and the specialist making them is entitled from public funds to receive a fee of so much per visit, subject to a maximum. Dr. Ross was not bound to undertake this duty as an essential part of the hospital appointment, but in fact he agreed to do so. The obligation to make the visits was therefore a part of the duties of his "office". The question of undertaking the duties of a locum tenens during the temporary absence of a part-time consultant is perhaps more difficult. (The question arises, in fact, in relation to another of the Appellants than Dr. Ross.) I agree, however, with Upjohn, J., that the duties involved are also those of an "office". The arrangements made were no doubt somewhat informal; but, as appears from the document of 1949 issued by the Ministry of Health, to which I referred earlier, the engagement of a locum is made by the regional board. In my judgment, therefore, the duties owed to the board are essentially *in pari materia* with those of an appointment of a consultant: they are the duties of an "office".

I turn now to the second main question involved, which I formulate thus: Are the sums which Dr. Ross may deduct for the purposes of his Schedule D assessment limited to sums wholly and exclusively expended by him for the purpose of his private practice, or may he deduct all expenses so incurred for the purposes of his single calling of a consultant radiologist, even though such expenditure related to his hospital appointment and could not be allowed for the purposes of his Schedule E assessment in respect thereof? I have earlier anticipated my answer to this question, and I have upon it had the advantage of reading in advance the judgments to be delivered by my brethren. With those judgments and with their reasoning I am in entire accord. I confine myself, therefore, to a brief statement of my conclusion, which I only add out of respect for the view of the learned Judge, from which, upon this matter, we are differing.

The relevant terms of Sections 122 and 156 are set out in the judgment of Pearce, L.J., and I do not repeat them, noting only that they do not entirely correspond. The question turns upon the meaning, in its present context, of the language of Section 137 (*a*), which is:

> "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation".

It was, and was necessarily, of the essence of the argument of the Crown that, having regard to the present context of the paragraph, the word "profession" must be limited so as to be confined to that "profession", or part of the profession, the profits or gains arising from which are taxable under Schedule D. In my judgment, the language of the paragraph is too clear and unambiguous to admit of such a limitation in a case such as the present, where, according to the findings of the Commissioners, the taxpayer's calling or "job in life", that is, his "profession", is the single profession of a consultant radiologist. If that is in truth his profession, as has been found and as we must, in my view, clearly hold, then sums in fact wholly and exclusively expended

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for the purposes of that profession are deductible in his Schedule D assessment, and none the less so because they may have been attributable to his hospital appointment and cannot, wholly or partly, be allowed in the assessment of the emoluments of that appointment under Schedule E. If it had been intended to make clear that the terms of Section 137 (*a*) were limited as the Crown suggest, it would have been easy so to express the paragraph. Its terms, however, appear to have remained and been re-enacted without alteration after the passing of Section 18 of the Finance Act, 1922, and notwithstanding the insertion of the proviso to Section 122 (1) in the consolidating Act of 1952. In my judgment, the words mean what they appear to me clearly to say. The Crown's argument requires that some gloss should be added to the statutory language, and I do not see any justification for making the gloss.

The result is that the appeal must be allowed. We will discus the form of Order appropriate to be made when my brethren have delivered their judgments.

Pearce, L.J.—I agree. It is clear that the hospital appointment is an office. But the Appellant contends that, even though it be an office, he is entitled to include its expenses among the other expenses of his profession deductible under Schedule D. The Commissioners have found that at all material times Dr. Ross exercised the profession of a consultant radiologist, his part-time hospital appointment being a necessary part of his exercise of that profession and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. These are findings of fact, and have not been challenged.

One would think, therefore, at first sight, that expenses wholly and exclusively expended for the purposes of his hospital appointment should be regarded as wholly and exclusively expended for the purpose of his profession. The Crown argue that they cannot be so regarded for the following reason. Section 122 of the Income Tax Act, 1952 (which is Schedule D), says that tax under that Schedule shall be charged in respect of the annual gains arising or accruing to any person residing in the United Kingdom from any trade, profession or vocation. Dr. Ross's professional profits therefore fall to be taxed under Schedule D. But the proviso to Schedule D says that profits or gains arising or accruing to any person from an office shall not by virtue of that paragraph be chargeable to tax under Schedule D except in certain circumstances which are inapplicable. Section 156 of the Act (which is Schedule E) says, in Paragraph 2:

> "Tax under this Schedule shall also be charged in respect of any office . . . the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule."

The hospital appointment, therefore, must be taxed as an office under Schedule E, and any expenses of it can, it is said, only be deducted under Schedule E. In respect of an office there can only be deducted under Schedule E (Ninth Schedule, Paragraph 7) money wholly and exclusively and necessarily expended in the performance of the duties, whereas in respect of a profession there can be deducted under Schedule D (Section 137) disbursements or expenses wholly and exclusively laid out or expended for the purposes of the profession. The Crown, therefore, seek to disallow certain expenses of the hospital appointment which are not within the narrower limit imposed by Schedule E, although they are within the broader limit imposed by Schedule D. The Income Tax Act, it is argued, is divided into self-contained Schedules, and one cannot set against the Schedule D profits of a profession any expenses attributable to a part of that profession that has been caught by Schedule E. It would, it is said, be absurd, and disruptive of the present

methods of taxation, to allow the taxpayer to recover, as part of the Schedule D expenses attributable to his profession, expenses which are attributable to the hospital appointment taxed under Schedule E but which are not allowable under Schedule E. I do not see any absurdity in such a situation. In the infrequent cases where an office is found to be a necessary part of the exercise of a profession and to be merely incidental to it, I see nothing absurd in treating the expenses of the office as part of the expenses of the profession. Nor do I think it will cause a general disruption of the present method. It is more reasonable than notionally dividing in half a profession which has been found to be one entity, producing an artificial allocation of expenses between the two halves, and then allowing the expenses of one half and disallowing those of the other. The argument of the Crown, therefore, can derive no aid from any argument based on merits. It must stand or fall on the wording of the Act. Lord Simonds observed in *St. Aubyn* v. *Attorney-General*, [1952] A.C. 15, at page 32:

> "The question is not at what transaction the section is, according to some alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits."

Only two cases are relevant. The *Salisbury House* case(1), [1930] A.C. 432, decided that rents were profits arising to a company from the ownership of land and that the Schedule A assessment was exhaustive in respect of them, so that they could not be included in an assessment under Schedule D as trade receipts of the company. Lord Atkin there said, at page 457(2):

> "Believing as I do that the specific Schedules A, B, C and E, and the Rules thereunder, contain definite codes applying exclusively to these respective defined subject matters, I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject matter of the other specific Schedules. In the present case the income from the offices should be and has been assessed under Schedule A on the annual value as prescribed by Statute. It therefore is not the subject matter of assessment under D."

That case is relied on by the Crown as showing that once the hospital appointments have been excised from the profession and put into Schedule E, that part of the profession which is left in Schedule D cannot have any regard to the hospital appointment or claim any of its expenses.

But in so far as any inferences favourable to the Crown can be drawn from *dicta* in the *Salisbury House* case, they are negatived by what was said in *Hughes* v. *Bank of New Zealand*, 21 T.C. 472, decided seven years later by the House of Lords. In that case the bank made substantial profits in dealing with Government securities which came within Schedule C, and which by their terms of issue were exempted from taxation. It was held that those profits, since they were exempt from taxation and came within Schedule C, were not to be included in the trading profits under Schedule D, but that the expenses attributable to them could be included in the general trading expenses under Schedule D and deducted from the profits under Schedule D. It was there said by Lord Wright, M.R., at page 508:

> "The result seems to be that the Legislature in the Income Tax Acts has expressly provided for certain exemptions and exclusions which will operate when the profits of the trade are being dealt with under Case I of Schedule D, and has, either inadvertently or by design, omitted to make any corresponding provision in respect of any allocation or apportionment of the expenses of the trade."

In the House of Lords, Lord Thankerton said, at page 523:

> "It is perhaps enough to say that the Crown are unable to point to any statutory provision in support of their contention, whereas the Respondents find full

(1) Salisbury House Estate, Ltd. *v.* Fry, 15 T.C. 266. (2) *Ibid.*, at p. 320.

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> justification for their resistance in the provisions of Rule 3 of the Rules applicable to Cases I and II of Schedule D, which is as follows: '3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation'. In order to ascertain the authorised deductions, it is right to turn this into positive form. In this view, it seems to me to be incontrovertible that, in the present case, the investments in question were part of the business of the Respondents' trade, and that the expense connected with them was wholly and exclusively laid out for the purposes of the trade. Expenditure in course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purposes of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense."

It is clear from that case that there is no absolute rule that when part of the profits under Schedule D is transferred to another Schedule (in that case Schedule C), the expenses attributable to the part transferred cannot remain to be dealt with under Schedule D. It is true that Schedule C had no provision for deduction of expenses; but that does not, to my mind, affect the principle. I find no authority for reading into the Act a rule that where part of the profits under Schedule D is transferred to another Schedule, then if (and only if) such other Schedule has a provision for deductions, the expenses attributable to the part transferred cannot be dealt with under Schedule D. In this case, therefore, there is no constraint by authority or reason or manifest general intention to do other than follow the literal wording of the Act.

It is clear that this particular problem was not in the mind of the draftsman of the relevant Sections. No doubt it never occurred to him that a taxpayer carrying on the profession of a consultant radiologist, whose hospital appointment was a necessary part of his profession and was in fact inextricably mixed up with it, would be divided by theoretical binary fission into two halves having unequal rights to expenses laid out in the exercise of that profession. If it did occur to him, he was not very fortunate in his choice of words. Section 137 (*a*) reads as follows:

> "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation".

In neither that nor the following Sub-sections (in six of which the words "trade, profession or vocation" occur) is there any suggestion that the trade, profession or vocation referred to might not be the actual physical trade, profession or vocation, but might be the metaphysical residue of that trade, profession or vocation after it has been notionally denuded of some part that has been taken over by some other Schedule.

It is argued by the Crown that the words

> "in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D no sum shall be deducted",

and so forth, show that the deductions must be only those which are referable to the profits and gains to be charged under Schedule D. But although in general you only expect expenses referable to the gains and profits that they produce, it is not always so. Many things that produce no gross profit are proper expenses of a business, things that have been intended to help the business, and may have done so. As Lord Thankerton said above:

> "It does not require the presence of a receipt on the credit side to justify the deduction of an expense."

The test laid down in Section 137 is whether the expenses have been wholly

or exclusively laid out or expended for the purposes of such trade, profession or vocation. Here, the sums in question have been laid out or expended for the purposes of Dr. Ross's profession, as found by the Commissioners. If it had been desired to exclude the expenses of a part of the profession transferred to Schedule E, it would have been easy to say so. I decline to read that gloss into the plain words of Section 137 (*a*), or to import into this consolidation Act implications which could have been easily and clearly expressed.

The Crown's argument seems to me to be covered by the words of Lawrence, J., in *Hughes* v. *Bank of New Zealand*(1), at page 486:

> "I am of opinion that there is no ground for excluding those expenses merely because some part of the profits which those expenses had been incurred to earn is exempt from Income Tax. The contention of the Crown is based upon reading Rule 3 applicable to Cases I and II as though it read: 'any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purpose of earning profits brought into charge', but that is not what the Rule says, and again the words of the Rule must be strictly adhered to. The expenses may be laid out for the purposes of trade, and undoubtedly were apparently in this case laid out for the purposes of the trade, although they earned profits which, by reason of exemption, are not brought into charge."

There is no hardship or unfairness in such a refusal to read into the Act dubious implications that could easily have been expressed, for the Crown are always in a favourable position to clarify any matter by amendment, and to put their rights against the taxpayer beyond any doubt.

For these reasons I would allow the appeal.

Harman, L.J.—Two questions arise here. First, whether the activities of the doctor under the National Health Service Act, 1946, constituted the holding of an office of profit within the meaning of Schedule E of Section 156 (1) or (2) of the Income Tax Act, 1952, or whether these activities were merely one of the engagements entered into by the doctor in the course of the practice of his profession. This is not a matter patient of much discussion. The Commissioners and the Judge below agreed that this is an office, and I too agree. It cannot, in my judgment, properly be described as merely an engagement, as were the various activities of Miss Lilian Braithwaite in the course of the exercise of her profession as an actress, illustrated in the *Braithwaite* case(2), [1931] 2 K.B. 628. The appointment of a consultant radiologist by the agent of the Minister of Health in pursuance of his duty of maintaining a National Health Service (see National Health Service Act, Section 12 (1)) is plainly, in my judgment, the constitution of an office and the appointment of an officer to hold it. An office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt, J., in *Great Western Railway Co.* v. *Bater*(3), [1920] 3 K.B. 266, at page 274, and approved by Lord Atkin in *McMillan* v. *Guest*, 24 T.C. 190, at page 201. Coming to this conclusion, I need not consider whether this is not also an employment within Schedule E, nor whether the office is a public one. I should incline to answer both questions in the affirmative if necessary.

It seems to me to follow inevitably—and, though the Commissioners thought otherwise, it was accepted by the learned Judge, and not contested here—that the emoluments of the office come into charge to tax under Schedule E. So also, in my judgment, do the doctor's activities in the sphere of domiciliary visits to patients by arrangement with general practitioners in the area covered by the office. These seem to me, on the facts stated, to be perquisites of the office. It is true that they arise out of a separate agreement, and that the doctor

(1) 21 T.C. 472. (2) 18 T.C. 198. (3) 8 T.C. 231, at p. 235.

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need not assume the obligation to make such visits even though he holds the office, but the opportunity to make the contract is offered to him as being the consultant radiologist in the area, and profits from it are, it seems to me, perquisites of the office.

The second point was not, as I understand it, discussed at great length before the learned Judge, who dealt with it in one sentence(1), concluding, in accordance with the decision in the *Salisbury House* case(2), [1930] A.C. 432, at page 457, that the Schedules were exclusive and that therefore the expenses incurred by the doctor must be divided and attributed in part to one set of activities, namely the treatment of private patients, and in part to the other, the performance of the duties of his office. This, in my judgment, brushes aside with too little attention the special feature of this case, namely the finding by the Commissioners, first in these words in paragraph 7 (2) of the Case Stated:

> "His private practice, which he commenced on 1st March, 1950, was carried on at an address in Rugby which was also his home; and as a necessary part of the exercise of that profession he had accepted, and still held, part-time appointments as consultant radiologist to each of several hospitals";

and this conclusion, at the end of paragraph 7 (4):

> "We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up."

I do not think these are conclusions of fact so as to be binding on the Court, but they are in my judgment conclusions of mixed fact and law dependent on the testimony of witnesses whom the Commissioners heard and we have not, nor have we any note of it; and I do not think that these conclusions can possibly be disregarded. It follows that the doctor did not carry on two professions, nor engage in two sets of activities, but one. Whether he was attending his National Health patients or his paying patients, he was following the same vocation, the practice of a radiologist. It is true that in order to succeed in his profession he found himself, professionally speaking, obliged to serve part-time as an officer of the National Health Service. We have concluded that he thus brought himself within Schedule E.

Now this is an historical accident. Until 1922 tax was levied under Schedule D on the annual profits accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation (see Income Tax Act, 1918, Schedule D (1) (*a*) (ii)). Under Schedule E were taxed "every public office or employment of profit" (see Income Tax Act, 1918, Schedule E). Under this latter Schedule the tax was paid by deduction, and it was used, because it was convenient, for many cases which did not fall within the Schedule at all. The House of Lords, in the case of *Great Western Railway Co.* v. *Bater*(3), pointed this out. Bater was a ticket clerk on the Great Western Railway, certainly not holding a public office, nor, indeed, an office at all. One of their Lordships remarked that he did not hold an office but merely sat in one. This decision was an administrative inconvenience, and the law was altered by the Finance Act, 1922, Section 18, whereby profits accruing from an office or employment under the 1918 Act chargeable under Schedule D ceased to be chargeable under that Schedule and were made chargeable under Schedule E; and that Section adds these words: "the Rules applicable to that schedule shall apply accordingly".

Now it is notorious and, indeed, a long-standing injustice, that the scale of the taxpayer's allowances under Schedule E are on an altogether more

(1) *See* page 37 *ante*. (2) 15 T.C. 266, at p. 320. (3) 8 T.C. 231.

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niggardly and restricted scale than under Schedule D. Indeed, it has been said that the pleasure of life depends nowadays upon the Schedule under which a man lives. When you turn to the 1952 Act, you will accordingly find, in Section 122, included under Schedule D profits arising from any profession, employment or vocation, with the proviso that profits accruing from an office or employment shall not be chargeable under the Schedule (with exceptions here immaterial). Section 137, as inverted in accordance with the true interpretation of it, allows the deduction of disbursements or expenses wholly and exclusively laid out for the purposes of the trade, profession or vocation. Under Section 156, Schedule E is to include tax in respect of any office or employment the profit accruing from which would be chargeable to tax under Schedule D but for the proviso to Paragraph 1 of that Schedule. For the expenses which may be deducted under this Schedule one must turn to Paragraph 7 of the Ninth Schedule to the 1952 Act, which limits the deductions to expenses incurred (*a*) in travelling, (*b*) in keeping a horse, or (*c*) any expenses wholly, exclusively and necessarily laid out in the performance of the duties of the office.

It is the object of the Crown, therefore, to split the doctor in two and to treat him as if he was in the enjoyment of two sorts of profit, one arising under Schedule D and one under Schedule E, to oblige him to make two returns, and to attribute to each activity the expenses exclusively incurred in the course of it. The result will be that such of the expenses as fall under a Schedule E activity will be disallowed unless they are necessary, whereas, of the expenses attributed to the Schedule D activity, expenses in fact incurred "for the purposes of the profession" may be deducted. This, as it seems to me, is a conclusion contrary to common sense and to the facts. As I have earlier said, the doctor must be taken to have been carrying on one profession of which the services to the National Health Scheme are part. I do not think he has two sources of profit. All his income is the result of the practice of his profession. There must be many occasions when it cannot be said which activity is being pursued, and when the proposed division of activities cannot be made except on a purely arbitrary basis. Many absurd results follow. For example, a general practitioner is taxed under Schedule D (Case Stated, paragraph 3 (45)) notwithstanding the fact that he has entered into a contract with the agent of the Minister, here the Executive Council (Case Stated, paragraph 3 (40)). When he calls in a consultant, both will attend the patient, but the expenses attendant on each will rank under different Schedules though both are doing the same work.

In my judgment, Dr. Ross's accounts in this case can properly be made up only by setting all the professional remuneration on one side and all the expenses incurred "for the purpose of the profession" on the other. Having done this, the proviso to Section 122 obliges you to take out of the account the profits or gains accruing from the office. In my judgment, you must, when transferring these to Schedule E, make such deductions as that Schedule allows. You will then have the taxable sum under Schedule E. To ascertain the taxable sum under Schedule D, you will deduct from the professional receipts which remain the expenses incurred for the purpose of the whole profession after deducting such (if any there be) as have already been allowed against the Schedule E total as having been necessarily expended on a horse or what-not. This seems to me to be the best that can be done. It is said that this does violence to the policy of the Act because expenses appropriate to the Schedule D activity should be deducted from the Schedule D profits. I agree that this would be what one might expect to find, but I cannot find it stated in the Act.

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The learned Judge considered that the *Salisbury House* case(1) obliged him to treat the two Schedules as mutually exclusive, but it has been pointed out to us that this is not by any means always so, notably in the *Bank of New Zealand* case(2), [1938] A.C. 366, where profits which would have been chargeable under Schedule C were excluded because they were exempt from tax and so taken out of the credit side of the account, but expenses incurred in the making of those profits were nevertheless held properly to remain on the debit side. Lord Thankerton forcibly pointed out that an expense was nevertheless a proper charge although profits did not accrue from it. This seems to me a good analogy for the method of assessing the tax here which I have above proposed. I add that this result will only follow in the special and peculiar situation resulting from what I have called the special findings of the Commissioners, namely, that only one profession is being followed and that the office is held merely as an incident of it and because without it the whole profession cannot in practice be carried on. I would therefore allow the appeal.

Lord Evershed, M.R.—Mr. Heyworth Talbot, what would be the exact form of Order?

Mr. F. Heyworth Talbot.—I was wondering whether your Lordships would find it convenient that we should try and agree a form of Order and present a draft for the consideration of your Lordships. I do not think it will be difficult.

Lord Evershed, M.R.—Then perhaps we might adjourn now until a quarter past two, and if there is any question of a form of Order you can mention it to me. It wants a little thought.

Mr. Heyworth Talbot.—May I take it that the appeal is allowed with costs in each case?

Lord Evershed, M.R.—The appeals are allowed in these cases, but, as indicated, we have allowed them on the second point.

Mr. Heyworth Talbot.—Yes, indeed.

Lord Evershed, M.R.—You might consider what that does involve.

Mr. Heyworth Talbot.—If your Lordship pleases.

(After a short adjournment)

Lord Evershed, M.R.—Yes, Mr. Talbot.

Mr. Heyworth Talbot.—May I read the draft, my Lords, which indeed has been prepared by the learned Associate and which, on the whole, I am inclined to think is better than the draft that we ourselves prepared? May I read it and see whether it commends itself to your Lordships? This would apply particularly to the case of Dr. Ross, and minor modifications would be necessary in some of the other cases, but it would be easily adaptable if this were taken as the prototype.

Lord Evershed, M.R.—Yes.

Mr. Heyworth Talbot.—

> "The Court, being of the opinion that the Respondent was assessable to Income Tax under Schedule E in respect of his part-time hospital appointments and also under the same Schedule in respect of any profits or gains arising to him in regard to domiciliary visits, but that the outgoings shown in his accounts

(1) 15 T.C. 266. (2) 21 T.C. 472.

were allowable deductions in computing his profits or gains assessable under Schedule D in so far as such outgoings were not allowable under Schedule E: "

Lord Evershed, M.R.—Then it is conceded that all those items in the exhibited accounts were allowable under Schedule D?

Mr. Heyworth Talbot.—Yes, my Lord, in the five cases.

Mr. Alan Orr.—That is agreed, my Lord.

Harman, L.J.—Is there a similar one in every case?

Mr. Heyworth Talbot.—Yes, my Lord.

Harman, L.J.—And I suppose the exhibit number should be in the Order?

Mr. Heyworth Talbot.—I quite agree, my Lord; it should be identified.

Lord Evershed, M.R.—Yes, I think that is the best thing to do. On our view, it would not be right to resuscitate the Commissioners' language.

Harman, L.J.—I must say that I have a sneaking preference for declarations.

Lord Evershed, M.R.—I do not dissent from that at all; then simply make it a declaration.

Mr. Heyworth Talbot.—Yes, my Lord. I am much obliged.

Lord Evershed, M.R.—Do that, would you?

Mr. Heyworth Talbot.—Yes, my Lord.

Mr. Orr.—I am entirely content with that, my Lord.

Mr. Heyworth Talbot.—

"It is accordingly ordered that this appeal be allowed and the said Order of Upjohn, J., be set aside and that in lieu thereof it be ordered that the Case Stated be remitted to the Special Commissioners in order to amend the assessments in accordance with the declaration of this Court as hereinbefore recited."

Lord Evershed, M.R.—Yes, I think that is right.

Mr. Heyworth Talbot.—And there will be minor adaptations to the other cases to cover the locum tenens appointments and—

Harman, L.J.—There is no locum tenens in Dr. Ross's case, is there?

Mr. Heyworth Talbot.—There is no locum tenens in Dr. Ross's case, but it would be quite easy to draw up other Orders in regard to this.

My Lords, I have had the advantage of a word with my learned friend on the subject of costs and, with your Lordships' approval, we would venture to say that, as some time has been taken up here with arguments on all points, we have felt it would be fair that the Crown should be ordered to bear two-thirds only of our costs in this Court.

Lord Evershed, M.R.—Here and below?

Mr. Heyworth Talbot.—Here and below, I take it. I understand my learned friend Mr. Orr would assent to that, my Lord. It seemed to us on the whole fair because there had been arguments on all the points. That, then, will be your Lordships' Order?

Lord Evershed, M.R.—Yes.

Mr. Orr.—My Lord, I have an application to make. I ask for leave to appeal to the House of Lords if the Crown, on considering your Lordships' judgment, should wish to take that course.

Lord Evershed, M.R.—You wish to pursue this artificiality?

Harman, L.J.—Five appeals, do you want?

Mr. Orr.—My Lords, these were selected as test cases, and I imagine it would be desired to pursue the five. They were cases selected by agreement between the British Medical Association and the Inland Revenue.

Lord Evershed, M.R.—I suppose, so far as the Appellants in this case are concerned, they are not having to raise this matter entirely on their own individual resources?

Mr. Orr.—I understand not, my Lord. So far as there have been five, it has not added much in time in this Court.

Harman, L.J.—Would it not be sufficient to give leave in Dr. Ross's case only?

Mr. Heyworth Talbot.—We should prefer Mr. Drew's case, my Lord, if it is a matter of being selective.

Lord Evershed, M.R.—The difficulty is that up to now everybody seems to have agreed that it was best to deal with Dr. Ross's case as being typical. It is rather late now to say we have taken the wrong one.

Mr. Heyworth Talbot.—We should have much preferred, my Lord, if leave is given, that it should be given in relation to all five cases.

Lord Evershed, M.R.—What do you say about Mr. Orr's application?

Mr. Heyworth Talbot.—My Lord, I do not feel that I could fairly resist it, because I cannot deny that this is a point of general importance. My clients, of course, would wish the result to remain as your Lordships have left it, but I cannot say that it has not a wide application and implication.

Lord Evershed, M.R.—Do you suggest that in this case we had better give leave in all five cases? I would suggest that the parties might consider some attempt, on the face of it, to save a little cost.

Mr. Heyworth Talbot.—Indeed, my Lord.

Harman, L.J.—Five black books, everything printed in style, and £500 deposited in each case . . .?

Mr. Heyworth Talbot.—That we are most anxious to avoid, my Lord. Of course, every attention would be given to what has fallen from your Lordships, and if you were to give leave in all five cases, then, if it were going to be acted upon, I am sure we should use every endeavour to try to cut down the amount of printing for the House of Lords, and I think that might be achieved. It may well be possible to avoid the printing of five cases with their several exhibits; that might well be possible.

I do not know whether your Lordships would think it proper to indicate any terms on which leave would be given? We are not so rich as our opponents.

Lord Evershed, M.R.—Well, they are legally aided!

Mr. Heyworth Talbot.—I can assure you, my Lord, that we are not. On its merits, I do not feel, however, that I could oppose my learned friend's application, but I do venture to suggest that this might be a case in which some terms would not be inappropriate.

(The Court conferred)

Lord Evershed, M.R.—We should be disposed to say, and it has been suggested, that if you appeal you would not ask for any variation of the Order made as to costs up to now.

Mr. Orr.—I am in your Lordships' hands as regards any terms your Lordships might indicate, but I would submit that this is not a case for terms, in all the circumstances. This is not a case of five individual doctors pursuing the matter at their own cost; it is a case of five selected appeals taken as test cases. I would submit that this is not a case in which I should be put to terms, but I am in your Lordships' hands entirely in regard to that.

Lord Evershed, M.R.—I do not think, on the whole, that we will impose any terms.

Mr. Heyworth Talbot.—If your Lordships please. That leaves me with this application, that although, of course, my clients are very content with things as they are, if the Crown were to exercise their right of appeal to the House of Lords, then no doubt we should wish to cross-appeal, or rather to appeal on the Schedule E aspect of the matter, and possibly advance the contention, which has failed here, to the effect that these appointments were not "offices or employments". So I should ask for leave to appeal on that.

Lord Evershed, M.R.—You are only on the point that you wish to say that it is not an office?

Mr. Heyworth Talbot.—If the Crown go on, my Lord, I should want to be able to advance before their Lordships the argument which I have advanced here.

(The Court conferred)

Lord Evershed, M.R.—With such show of reluctance as I can transmit to you, I think if it is going to the House of Lords you had better have the whole thing.

Mr. Heyworth Talbot.—My Lord, one feels that if it going there at all perhaps that would be the best course.

Lord Evershed, M.R.—So far, only three tribunals have found against you.

Harman, L.J.—You also want the point open about it being assessable under Schedule E?

Mr. Heyworth Talbot.—Yes, my Lord.

Harman, L.J.—The Commissioners' original finding was even more original than that.

Mr. Heyworth Talbot.—My Lord, I have abandoned that.

Lord Evershed, M.R.—You want to say that it is not an office?

Mr. Heyworth Talbot.—Yes, my Lord.

Lord Evershed, M.R.—So far, there has been a certain unanimity of opinion against you.

Mr. Heyworth Talbot.—Indeed, my Lord, but I want to be in a position, *de bene esse,* to take that point if it seems good to take it; that is all.

Lord Evershed, M.R.—Yes, very well. Mr. Orr, have you anything to say about that?

Mr. Orr.—My Lord, so far as saving costs in an appeal is concerned, we will co-operate as far as possible.

Lord Evershed, M.R.—It is in the public interest, and it is not right to waste costs.

Mr. Orr.—We would be agreeable to the case of Dr. Ross alone being taken, my Lord.

Lord Evershed, M.R.—As it has really gone on that case up to date, you will perhaps have to introduce something on the locum tenens point.

Mr. Heyworth Talbot.—It occurs to me, my Lord, that perhaps if we went forward on Dr. Ross's case alone, in the respective cases for the Respondents and Appellants before their Lordships there might be a reference to slight differences in other cases, and it could be dealt with in that way; I think it might be accommodated in that way.

Lord Evershed, M.R.—Very well. I am sure we have every confidence and trust that you will be as economical as you can, if it goes further.

Mr. Heyworth Talbot.—If your Lordship pleases.

Appeals having been entered against the above decisions by the Crown and the taxpayers, the cases came before the House of Lords (Viscount Simonds and Lords Radcliffe, Tucker, Cohen and Guest) on 11th and 15th May, 1961, when judgment was reserved. On 6th July, 1961, judgment was given unanimously in favour of the Crown, with costs.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. F. N. Bucher, Q.C., Mr. E. B. Stamp and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. John Creese for the taxpayers.

Viscount Simonds (read by Lord Radcliffe).—My Lords, these consolidated appeals and cross-appeals raise a question of general importance to medical specialists who hold appointments as part-time consultants under the National Health Service and also have private patients. The appeals relate to assessments to Income Tax of five such specialists who held part-time appointments, respectively as consultant radiologist, ophthalmologist, pathologist, psychiatrist and thoracic surgeon, and also engaged in private practice. I will consider the case of Dr. Harold Leslie Ross, a consultant radiologist to the Birmingham Regional Hospital Board. The other cases stand or fall with his.

Dr. Ross, having been assessed to Income Tax under Schedule E in respect of the profits or gains arising from his part-time appointment and under Schedule D in respect of the profits or gains arising from his private practice, appealed against the assessments to the Special Commissioners on two grounds. He claimed, in the first place, that he should be assessed in respect of the whole of his profits or gains under Schedule D and, in the second place, that if this claim was not upheld he was entitled, in the computation of his liability under Schedule D, to deduct the expenses incurred in the exercise of his appointment to the extent that they were not allowed under Schedule E. The first of these two claims was not maintained before this House, learned Counsel conceding that an appointment under the National Health Service to such a post as that held by Dr. Ross fell within Schedule E and that an assessment to tax must accordingly be made under that Schedule. In my opinion the concession was rightly made and the opposite view was not arguable. I may add here that some subsidiary questions were raised as to the category

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into which the fees earned by so-called domiciliary visits and "locum tenens" services fell. But these matters also are no longer in issue. The single question, therefore, that remains is whether expenses incurred in earning the profits or gains which are assessable under Schedule E are, so far as they are not allowed in that assessment, deductible for the purpose of the assessment under Schedule D. The Special Commissioners held that they are, Upjohn, J., upon Case Stated that they are not and the Court of Appeal, upon appeal from him, that they are.

My Lords, in my opinion Upjohn, J., was right, and I can state my reasons shortly.

I regard it as fundamental and well settled law that the Schedules to the Income Tax Acts are mutually exclusive, and that the specific Schedules A, B, C, D and E and the Rules which respectively regulate them afford a complete code for each class of income, dealing with allowances, deductions and exemptions relating to them respectively. Accordingly, when it is conceded, as it has to be conceded, that Dr. Ross was assessable under Schedule E and also under Schedule D, I cannot look further than the Rules under Schedule E to determine his liability under that Schedule and the Rules under Schedule D to determine his liability under that Schedule. It was found by the Special Commissioners, and much importance was attached to the finding, that

> "at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up."

But this means no more than that it was necessary, if he was to carry on his profession, that he should accept a post in respect of which he would be assessable under Schedule E. He would therefore have two taxable sources of income, but that fact lends no support to the view that he can deduct expenses incurred in respect of income assessed under one Schedule from income assessed under another. It appears to me, if I may say so with the greatest respect to the Court of Appeal, that they have given undue weight to the undoubted fact that Dr. Ross carried on the profession of a radiologist whether he was exercising his appointment or seeing private patients, but ignored the fact that for Income Tax purposes he was, no less undoubtedly, not engaged in a single activity. He may be called a consultant radiologist, and so he is; but his activities (and that is what matters) are, for tax purposes, those of a radiologist holding an employment and a radiologist engaging in private practice. In respect of the former the amount that he can deduct from his emoluments for tax purposes is governed by Paragraph 7 of the Ninth Schedule to the Income Tax Act, 1952: in respect of the latter, Section 137 of the same Act, which is expressed in negative terms, affords no grounds for the claim that expenses incurred in earning profits or gains under another Schedule can be brought into account. In my opinion, the Court of Appeal were in error in thinking that in order to reach this conclusion some gloss must be put on the words of the Act. On the contrary, without writing into the Act words that are not there (and, if they were there, might be difficult to harmonise with the scheme of taxation under the several Schedules), I do not see how the claim of Dr. Ross can be sustained. Support is given to this view by a consideration of Section 18 of the Finance Act, 1922. That Section, by Subsection (1), provided that such profits or gains arising or accruing to any person from an office, employment or pension as were, under the Income Tax Act, 1918, chargeable to Income Tax under Schedule D (other than as therein mentioned) should cease to be chargeable under that Schedule and should be

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chargeable to tax under Schedule E, and that the Rules applicable to that Schedule should apply accordingly, subject to the provisions of that Act; and, by Sub-section (7), that Income Tax in respect of profits or gains which would, but for the provisions of that Section, have been chargeable under Schedule D for the year 1922–23 might be charged for that year either under Schedule D or under Schedule E, but the tax should in all cases be computed in accordance with the provisions and Rules applicable to Schedule E as amended by that Act. I find this provision quite inconsistent with the view that any other Rules than those applicable to Schedule E can be applied to an assessment under that Schedule.

My Lords, I have said that the conclusion to which I have come in the present case accords with well settled law. I need refer only to *Fry* v. *Salisbury House Estate, Ltd.* (1), [1930] A.C. 432. It is a familiar case which I can state very shortly. The respondent company, being the owner of a block of buildings which was let out as unfurnished offices to tenants, was assessed to tax under Schedule A. It provided certain services such as heating and cleaning at an additional charge, and admitted its liability to assessment under Schedule D in respect of its profits from these services. The Crown, however, claimed, in making the assessment under Schedule D, to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Schedule A. It was held that the rents were profits arising from the ownership of land in respect of which the assessment under Schedule A was exhaustive and that they therefore could not be included in the assessment under Schedule D as trade receipts of the company. I will cite a single passage from the speech of Lord Atkin, at page 454 (2):

> "My Lords, I think that this case should be decided in favour of the respondents upon the simple ground that annual income derived from the ownership of lands, tenements and hereditaments can only be assessed under Schedule A and *in accordance with the rules of that Schedule*." [The italics are mine.] "In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Schedule D the income so derived is not to be brought into account. The option of the Revenue authorities to assess under whichever Schedule they prefer in my opinion does not exist, and is inconsistent with the provisions of the Income Tax Acts throughout their history."

Here, my Lords, is conclusive authority for the proposition that the scheme of the Income Tax Acts demands that each source of profit should be assessed under the appropriate Schedule, and in accordance with the Rules applicable to that Schedule alone.

It was, however, urged by the Respondents that the authority of *Fry* v. *Salisbury House Estate, Ltd.*, had been qualified by a later decision of this House in *Hughes* v. *Bank of New Zealand* (3), [1938] A.C. 366. This view, which found favour with the Court of Appeal, cannot, in my opinion, be supported. It may be noted that Lord Atkin himself, and also Lord Macmillan, who took part in the earlier case, heard the latter case also. The leading, indeed the only, speech was delivered by Lord Thankerton, the other noble and learned Lords concurring. But neither in the argument of Counsel as reported nor in the speech of Lord Thankerton was any mention made of the *Salisbury House* case. I can only suppose that this was because it did not occur to anyone that any encroachment was being made on the broad principle laid down in that case. In fact, I do not think that there was; and Upjohn, J., was right when, after stating the decision in *Hughes'* case, he said (4):

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(1) 15 T.C. 266. (2) *Ibid.*, at p. 318. (3) 21 T.C. 472. (4) *See* page 37 *ante*.

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"That seems to me a very different case and does not lay down any principle which assists me in this case."

In that case, the Bank of New Zealand, which was resident and registered in New Zealand, carried on banking business at a branch in London. It was assessed to tax on the profits arising from its trade exercised in London under Case I of Schedule D of the Income Tax Act, 1918, for the financial year 1928–29, in the sum of £94,448. It possessed, as part of the assets of its London branch, certain 5 per cent. War Loan and other stocks and securities, which had been purchased out of the floating capital of the London branch and other moneys obtained in New Zealand, to borrow which it had expended £41,262. The interest on the War Loan and other stocks amounted to £72,556 for the period in question. Two questions arose and were answered. In the first place, it was held that the interest on the stocks in question, being exempt from tax under Section 46 of the Income Tax Act, 1918, or as the case might be, did not become taxable by being included in trading profits assessable under Case I of Schedule D. Secondly, it was held that the bank was entitled, for the purpose of assessment, to deduct from its profits its proper trading expenses, including therein the sum of £41,262 being the expenses particularly attributable to the earning of the sum of £78,556 of interest, notwithstanding that the latter sum was exempt from taxation. It was presumably the second holding on which the Respondent relied. But it appears to me that the analogy—for it is no more—fails in this, that in *Hughes* (1) the disbursements and expenses in question were found to be disbursements and expenses laid out for the purpose of the trade which was the subject-matter of taxation under Schedule D. That was not so in the present case. If it were so, all the disbursements and expenses of Dr. Ross laid out for the purposes of his office could be deducted in computing his Schedule D profits, and not merely the part of those expenses disallowed in computing his Schedule E profits. This conclusion would be at direct variance with the provisions of Section 137 of the Act of 1952, for *ex hypothesi* they were not exclusively laid out or expended for the purpose of the profession, the profits of which were taxable under Schedule D.

I cannot accept the contention that the *Hughes* case in any way qualifies the principle laid down in the *Salisbury House* case (2).

Finally, it was urged that great administrative difficulties arise from a division of expenses incurred in the course of engaging in private practice and carrying out the duties of an appointment. That may be so, though it is a commonplace that the allowance of expenses can seldom be a matter of scientific precision. But, be the difficulties great or small, the language of the Act is, in my opinion, too plain to allow them to prevail.

The appeals must in each case be allowed and the cross-appeals dismissed and the Orders of Upjohn, J., restored. The Respondents must pay the Appellants' costs here and below.

Lord Radcliffe.—My Lords, these appeals, though far-reaching in their consequences, have come down to a very short point. If a professional man holds an appointment that is a public office or employment of profit or is otherwise an office or employment tax in respect of which is chargeable under Schedule E, and the holding of that employment is found to be a necessary part of the exercise of his profession and merely incidental thereto, is he entitled to set against any receipts of his profession taxed under Schedule D such expenses incurred in respect of this Schedule E appointment as are not

(1) 21 T.C. 472. (2) 15 T.C. 266.

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allowable under the Rule of that Schedule that governs the deduction of expenses? It has taken some time for the case to come down to this point. Before the Special Commissioners, the High Court and the Court of Appeal it was much in debate whether the appointments now in question, part-time appointments under the National Health Service, constituted public offices, or offices at all, within the meaning of Schedule E; and, apart from that, whether fees in respect of certain special activities arising out of the appointments, domiciliary visits and locum tenens work, were attributable to those offices. The Special Commissioners, by a process of reasoning that I cannot follow and in reliance upon two judicial decisions which were, I think, irrelevant, decided that the appointments under the National Health Service were offices within the meaning of Schedule E, but nevertheless thought themselves bound to hold that the profits or gains arising therefrom should be assessed as part of the professional earnings under Case II of Schedule D. The Respondents have not sought to argue that this could be an admissible result.

The appeals came before Upjohn, J., in the High Court. In his judgment, with which I may say that I entirely agree, he held that the appointments were public offices; that the taxpayers were accordingly assessable in respect of the profits arising therefrom under Schedule E, not Schedule D; and that the expenses attendant upon the exercise of the office must be deducted under the Rules applicable to Schedule E, but not under any Rule found in any other Schedule. The Court of Appeal agreed with the Special Commissioners and Upjohn, J., that these appointments were offices, and agreed with the learned Judge that the profits of these offices must be charged under Schedule E. They held, however, that outgoings incurred in respect of the offices ought to be treated as allowable deductions in computing professional earnings under Schedule D to the extent that they were not allowed as deductions under Schedule E. I am afraid that I have rather paraphrased their Order in stating it as I have, but I think that I have given the substance of its meaning. One, but not the only one, of my difficulties in looking at the matter in this way is that I do not see why it is only the balance of unallowed deductions that is thus thrown on Schedule D; but perhaps a judgment phrased in such a form does something to obscure the inescapable fact that Schedule D and Schedule E each contains its own independent Rule about the allowance of expenses in the assessment of profits, and that it is insuperably difficult to see how one item of profit can be subject at one and the same time to the inconsistent Rules of both Schedules.

On the appeal before this House the Respondents did not contend that the appointments were not offices, or that a Schedule E assessment in respect of them was not correct, or that there was any material difference between the various kinds of fee or remuneration that were received in respect of the appointments. The argument was, therefore, confined to this question: whether the judgments of the Court of Appeal were correct in holding that Schedule D receipts could have set against them some expenses that were incurred in obtaining Schedule E earnings. I appreciate, of course, that such a way of stating the problem does not do justice to the subtler conception which the Respondents would have us accept. They want to say that, on the basis of the facts found in these cases, all the expenses of the "profession", including what I may call the Schedule E branch, are ultimately Schedule D expenses and it is of no particular importance that some of them have already been taken account of in arriving at the assessable figure of Schedule E profits.

My Lords, in my opinion this conception is untenable. I think that it is

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contrary to what the Income Tax Act itself requires, and I think it inconsistent with those rules about the structure of the taxing system and its necessary implications which we conveniently associate with the speeches made in this House in *Fry* v. *Salisbury House Estate, Ltd.* (1), [1930] A.C. 432. I do not mean, of course, that those rules originated with that decision, but they are there recognised and expressed in what I have always thought to be conclusive form. Generally speaking, the five Schedules of taxable categories are distinguished from each other by distinctions as to the nature of the source from which the chargeable profit arises. The source may be property in the ordinary sense such as land, securities, copyright, office; or it may be an activity sufficiently coherent—trade or profession, for example—to be regarded as itself the stock upon which profits grow. That is not an exhaustive account, but it is, I think, a sufficient general introduction. Before you can assess a profit to tax you must be sure that you have properly identified its source or other description according to the correct Schedule: but, once you have done that, it is obligatory that it should be charged, if at all, under that Schedule and strictly in accordance with the Rules that are there laid down for assessments under it. It is a necessary consequence of this conception that the sources of profit in the different Schedules are mutually exclusive. This is what Viscount Dunedin said in the *Salisbury House* case, at page 442(2), when he accepted the proposition that

> "when income is dealt with in the proper Schedule the same income cannot be dealt with again under another Schedule."

Also it is what Lord Atkin said, at page 455 (3):

> "the dominance of each Schedule A, B, C and E over its own subject-matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income dealing with allowances and exemptions, with the mode of assessment and with the officials whose duty it is to make the assessments."

I do not see how anyone can doubt these propositions today: but if they are accepted they seem to me to rule out the idea that, though the Respondents' appointments were offices and so chargeable under Schedule E, they could also form a part or a branch of the "profession" that is the subject of charge under Schedule D. And yet that is the whole case. The profession, for this purpose, is a coherent series of activities of a particular character giving rise to assessable profits: it is not an abstract description in a dictionary. If the activities relating to the employment in the office are excluded, as they must be because they belong to Schedule E, the profession the profits of which are assessable under Schedule D must consist only of the remaining activities. And, if that is so, the rules of Schedule D (see Section 137 (*a*) of the Income Tax Act, 1952) prohibit the deduction in that assessment of any expenses incurred in relation to the activities of the office, since such expenses are not "wholly and exclusively laid out . . . for the purposes of . . . the profession".

I am bound to say, therefore, that in my opinion the Court of Appeal's judgment is wrong. I do not want, of course, to make any detailed criticisms of individual judgments; but, out of respect for what has been said, I ought to state briefly my view upon the two main considerations that were, I think, responsible for the shape that those judgments took. There is, first, what has been called the Commissioners' special finding that the hospital appointments were a necessary part of the exercise of the taxpayer's profession and merely incidental thereto. The "necessity" here referred to is a practical necessity.

(1) 15 T.C. 266. (2) *Ibid.*, at p. 308. (3) *Ibid.* at p. 319.

(Lord Radcliffe)

Actually, I do not think that there is anything really special about this finding. So far as I can see, the proposition that the Respondents wish to maintain would be just the same if there had been a finding to the effect that Dr. Ross, for example, carried on the profession of a consultant radiologist and that it was a reasonable and proper incident of that profession to hold a part-time appointment under the National Health Service. However that may be, I regard the finding as irrelevant to the decision of the case, once it is accepted that the scheme of the tax code necessitates mutual exclusiveness between "profession" and "office" and the assessment of their profits by different sets of rules.

Then there is the decision of this House in *Hughes* v. *Bank of New Zealand* (1), [1938] A.C. 366, which was evidently thought to amount to some qualification of what I will call the *Salisbury House* principle and to an instance of a case in which the expenses of earning income under one Schedule (Schedule C) were treated as an allowable deduction in assessing the profits of a trade under Schedule D. The *Bank of New Zealand* situation was certainly rather a complicated one, and it did not take Parliament long to introduce a new rule which nullified the effect of the decision. But I do not think that there is any ground for supposing that that decision was intended to introduce an exception from the *Salisbury House* principle, nor was the subject approached in that way. Again, I think that it is a misunderstanding of the case to describe it as one in which the expenses of earning income chargeable under one Schedule were allowed as a deduction in an assessment of income chargeable under another. There are no such things as the expenses of earning income chargeable under Schedule C. The Bank of New Zealand was assessed on the profits of their trade as bankers in London, which means their trade of dealing in money. Part of their trading stock, money, which they employed in London was obtained elsewhere, and the cost of obtaining it—primarily interest charges—was an unavoidable deduction in assessing the London profits. That was the strength of their case. It is true that a very small part of the interest on loans received in London which was tax-free would have been chargeable direct under Schedule C, but no one seems to have attached any importance to that aspect of the matter. Nor was it, I think, important. The deductions that were claimed were not the expenses of obtaining the tax-free income but the expenses of obtaining the stock-in-trade that went into the investments that produced the income; and that is a different matter. The whole question in the *Bank of New Zealand* case was whether anyone could see a way of eliminating from the deduction *ex facie* allowed by the Act a sector of the expenses of obtaining money, because that money, when obtained, was put into investments that did not yield taxable income. No one could, until Parliament altered the law. The decision does not offer any useful analogy with the cases now before us, in which the argument for the Crown does not involve the putting of an unauthorised gloss upon the statutory provisions, as the Court of Appeal seem to have thought, but the asking of the plain question why the words of Section 137 regulating deductions in the making of Schedule D assessments should not be given their full effect.

My Lords, I do not think that I need pursue the question further. I agree that these appeals must be allowed. I dare say that the Respondents will feel that, in being told that the law is against them on this point, they are hardly used; and I am sorry for that. I doubt, however, whether it is possible for us in our present capacity to be sure whether their grievance is more directly

(1) 21 T.C. 472.

(Lord Radcliffe)

with the law than with their employers, the National Health Service. I will only say, with regard to some of the sympathetic observations that fell from Lord Evershed, M.R., in the Court of Appeal, that I think that it might be a mistake to approach questions of this sort with the unqualified assumption that the law is anomalous if the Schedule D Rule as to expenses is not in all cases available to Schedule E assessees. There may be real differences between the situations covered by the respective Schedules which justify a difference in formulas, even if the Schedule E Rule is thought to be unduly restricted, or too restrictively applied.

Lord Tucker.—My Lords, I agree that these appeals should be allowed for the reasons which have been stated by my noble and learned friends.

Lord Cohen.—My Lords, while I agree with Lord Evershed, M.R., that the stricter standard of deductions permitted by the Rules applicable to Schedule E as compared with that permitted by the Rules applicable to Schedule D may operate harshly on the holders of offices the income from which is taxable under Schedule E and that Parliament might well consider whether, and how far, the considerable distinction between the two Schedules in the matter of permitted deductions is justified, I am unable to accept the construction of Income Tax Acts which the Court of Appeal have adopted in order to mitigate the hardship on the Respondents to this appeal. In my opinion, the appeal must be allowed. I agree with the reasons given by your Lordships for this conclusion and have but little to add.

It is not now disputed that each of the Respondents is the holder of an office and that the profits or gains derived from that office are taxable under Schedule E. The Respondents have been allowed such deductions as are permissible under Paragraph 7 of the Ninth Schedule to the Income Tax Act, 1952, or the corresponding Paragraph 9 of the Rules applicable to Schedule E under the 1918 Act, but the deductions thus allowed are less by a substantial amount than the Respondents would have been allowed had the whole of their income from carrying on the profession of consultant been taxed under Schedule D. They therefore sought to deduct the disallowed balance from the income of their private practice, which it was agreed was taxable under Schedule D, relying on the finding of the Commissioners that (to cite the finding in the case of Dr. Ross) he

> "exercised the profession of consultant radiologist, *his part-time hospital appointments being a necessary part of the exercise of that profession and merely incidental thereto,* notwithstanding that a great deal of his time was thereby taken up."

Upjohn, J., rejected this claim, but the Court of Appeal allowed it, relying on the finding of the Commissioners which I have cited, and in particular on that part of it which I have italicised. They relied on the provisions of Section 137 of the 1952 Act and said in effect that, since it was found that the part-time hospital appointment was a necessary part of the profession, it followed that any expenses incurred in connection therewith and not allowed under Schedule E must be deducted from the receipts which must be brought into account in assessing the liability under Schedule D. This conclusion seems to me to ignore the proviso to Section 122 (1), which directs that profits or gains arising from any office or employment shall (with certain exceptions irrelevant to the decision of this appeal) not be chargeable to tax under Schedule D. I agree with Upjohn, J. (see [1959] 3 W.L.R. 550, at page 567 [1]), that

> "Once the conclusion is reached that the National Health appointment is the holding and exercise of an office . . . the expenses attendant thereon must be

[1] *See* page 37 *ante.*

(Lord Cohen)

> deducted under the rules applicable to Schedule E and . . . under no other schedule."

This conclusion seems to me to follow from the decision of this House in *Fry* v. *Salisbury House Estate, Ltd.* (1), [1930] A.C. 432. Like Upjohn, J., I will content myself with one citation from the speech of Lord Atkin, at page 457 (2):

> "Believing, as I do, that the specific Schedules A, B, C and E, and the rules thereunder contain definite codes applying exclusively to their respective defined subject-matters I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject-matter of the other specific Schedules."

It is true that in the present case your Lordships are concerned, not with what property or gains shall be brought into charge to tax, but with what deductions ought to be allowed, but the same principle seems to me to be applicable and to conclude the present case. The Respondent relied on the decision of this House in *Hughes* v. *Bank of New Zealand* (3), [1938] A.C. 366, but I agree with your Lordships and with Upjohn, J., that this decision affords no assistance to the Respondent. In that case there was only one indivisible trade, taxable under Schedule D. In the present case the proviso to Section 122 requires the excision of the part-time appointment from Schedule D and its taxation under Schedule E, with the consequence that the only deductions permissible in respect of the income from the office taxed under Schedule E are those allowed by the Rules applicable to Schedule E.

I would allow the appeals.

Lord Guest.—My Lords, I agree that these appeals should be allowed for the reasons which have been stated by my noble and learned friends.

Questions put:

That the Orders appealed from be reversed.

The Contents have it.

That the Orders of Upjohn, J., be restored, and that the Respondents in the original appeals do pay to the Appellants in the original appeals their costs here and in the Court of Appeal.

The Contents have it.

That the cross-appeals be dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Hempsons.]

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(1) 15 T.C. 266. (2) *Ibid.*, at p. 320. (3) 21 T.C. 472.