No. 749.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—30TH JANUARY, 1929.

COURT OF APPEAL.—29TH AND 30TH APRIL, AND 1ST MAY, 1929.

HOUSE OF LORDS.—9TH, 10TH AND 12TH DECEMBER, 1929, AND 27TH FEBRUARY, 1930.

THE CORPORATION OF BIRMINGHAM v. THE COMMISSIONERS OF INLAND REVENUE.(1)

Income Tax—Local Authority—Housing Scheme—Liability to account for tax deducted from interest—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Rules* 19 *and* 21, *General Rules applicable to Schedules A, B, C, D and E, and Finance Act*, 1927 (17 & 18 *Geo.* V, *c.* 10), *Section* 26.

The Appellant Corporation for the purposes of a Housing Scheme under the provisions of the Housing, Town Planning, etc., Act, 1919, *had issued Stock and Local Bonds and had borrowed money on mortgage. These issues were secured on all the rates, revenues and property of the Corporation.*

The Corporation had one Fund only, the Borough Fund, into which the balance of profits of its trading operations (markets, gas, etc.) was payable and out of this Fund expenses incurred in connection with the operation of the Housing, Town Planning, etc., Act, 1919, *were payable.*

In accordance with Statutory Rules and Orders under that Act, a special Housing Scheme Revenue Account was prepared each year. For each of the years material in the present connection this account showed a deficit which, in accordance with the Act, was made good by an Exchequer subsidy. The expenditure debited to this account included the interest on the Stock, Bonds, etc., at its gross amount, without deduction of Income Tax. The interest was paid under deduction of Income Tax. It was, in part, paid before the relevant subsidies were received.

The total taxed income of the Corporation, including that from sources outside the scope of the Housing Scheme Revenue Account, exceeded the interest payable by the Corporation.

It was contended on behalf of the Corporation that the Exchequer subsidy was intended to make good generally the loss to the Borough Fund occasioned by the Housing Scheme; that their position was distinguishable from that of the Council in the case of Dickson *v.* The Hampstead Borough Council, 11 T.C. 691, *by reason of the difference between the borrowing powers of Local Authorities in*

(1) Reported (C.A.) [1929] 2 K.B. 187: and (H.L.) [1930] A.C. 307.

London and those elsewhere; and that the Housing Scheme interest was a charge on and payable, and in fact paid, out of the taxed income of the Borough Fund and so wholly paid out of taxed profits.

The Crown contended that the Housing Scheme interest in so far as it exceeded the taxed income of the Scheme was not payable out of taxed profits. Assessments made upon the Corporation on this footing under Section 26, Finance Act, 1927, were confirmed by the Special Commissioners.

Held, *that the Corporation were rightly so assessed.*

CASE.

Stated under the Finance Act, 1927, Section 26, and the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 11th July, 1928, the Corporation of Birmingham, hereinafter called the Corporation, appealed against assessments to Income Tax made upon them in the sums of £83,433, £125,731 and £110,434 for the years ended the 5th April, 1922, the 5th April, 1923 and the 5th April, 1924 respectively. These assessments were made under the provisions of Rule 21 of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act, 1918, as amended by Section 26 of the Finance Act, 1927, in respect of certain sums of interest paid on money borrowed by the Corporation for the purpose of its Assisted Housing Scheme undertaken in pursuance of the provisions contained in the Housing, Town Planning etc. Act, 1919.

On making payments of such interest the Corporation had deducted tax, and the question for the opinion of the Court is whether, upon the facts of the Case (as hereinafter set out) and the law applicable thereto, the Corporation is liable to account to the Commissioners of Inland Revenue for the tax so deducted. No dispute as to figures arises in this Case, and it is agreed that if the Corporation is so liable to account the assessments will stand, and if the Corporation is not so liable, that the assessments will require to be discharged.

2. A Charter of Incorporation was granted to Birmingham in the year 1838. Since that date the funds and rating powers of the Corporation have been regulated by a series of Public and Local Acts. Since the passing of the Local Government Act, 1913, the Corporation has had one fund only, the Borough Fund, and any deficiency in that fund is met by raising a Borough Rate. The general expenses of its execution of the Public Health Acts are paid from that fund.

The balance of profits of the Corporation's markets, gas, water, electric supply and tramway undertakings are under the provisions of the relevant Acts paid into the Borough Fund.

The following Acts and Sections of Acts relating to the Corporation's finances may be referred to for the purposes of this Case :—

The Municipal Corporations Act, 1835.

The Birmingham Improvement Act, 1851, Sections 126 and 127.

The Birmingham Improvement Act, 1861, Sections 78 and 79.

The Public Health Act, 1872.

The Public Health Act, 1875.

The Birmingham Stock Order, 1880, confirmed by the Local Government Board's Provisional Orders Confirmation (Bethesda &c.) Act, 1880, Articles II (2) (4) III and IV (3) (4) (5) (6).

The Municipal Corporations Act, 1882.

The Birmingham Corporation (Consolidation) Act, 1883, Sections 100, 163, 194, 219, 234.

The Birmingham Electric Lighting and Powers Order, 1894. Confirmed by the Electric Lighting Orders Confirmation (No. 4) Act, 1894, Articles 2 and 59.

The Birmingham Corporation Stock Act, 1900, Section 4.

The Birmingham Corporation Act, 1903, Sections 4, 52, 124, 125, 126, 127, 133, 134.

The Birmingham Rating Order, 1913, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1913, Article III (1).

Copies marked "A" of the relevant provisions of the Local Acts and Orders are annexed hereto and form part of this Case.(1)

3. In the year ending 5th April, 1920, the Corporation prepared and undertook a Housing Scheme under the provisions of The Housing, Town Planning etc. Act, 1919. The relevant Sections of that Act are as follows :—

Section 1 (1).—"It shall be the duty of every local authority within the meaning of Part III of the Housing of the Working Classes Act, 1890 (hereinafter referred to as the principal Act), to consider the needs of their area with respect to the provision of houses for the working classes, and within three months after the passing of this Act, and thereafter as often as occasion arises, or within three months after notice has been given to them by the Local Government Board, to prepare and submit to the Local

(1) Not included in the present print.

Government Board a scheme for the exercise of their powers under the said Part III."

Section 7 (1) and (2).—" (1) If it appears to the Local Government Board that the carrying out by a local authority, or by a county council to whom the powers of a local authority have been transferred under this Act, of any scheme approved under section one of this Act, or the carrying out of a re-housing scheme, in connection with a scheme made under Part I, or Part II of the principal Act, including the acquisition, clearance, and development of land included in the last-mentioned scheme, and whether the re-housing will be effected on the area included in that scheme or elsewhere, or the carrying out of any scheme approved by the Board for the provision of houses for persons in the employment of or paid by a county council or a statutory committee thereof, has resulted or is likely to result in a loss, the Board shall, if the scheme is carried out within such period after the passing of this Act as may be specified by the Board with the consent of the Treasury pay or undertake to pay to the local authority or county council out of moneys provided by Parliament such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury, subject to such conditions as may be prescribed by those regulations.

" (2) Such regulations shall provide that the amount of any annual payment to be made under this section shall—

" (A) in the case of a scheme carried out by a local authority, be determined on the basis of the estimated annual loss resulting from the carrying out of any scheme or schemes to which this section applies, subject to the deduction therefrom of a sum not exceeding the estimated annual produce of a rate of one penny in the pound levied in the area chargeable with the expenses of such scheme or schemes; and

" (B) in the case of a scheme for the provision of houses for persons in the employment of or paid by a county council, or a statutory committee thereof, be an amount equivalent to thirty per centum of the annual loan charges as calculated in accordance with the regulations on the total capital expenditure incurred by the county council for the purposes of the scheme:

" Provided that the regulations shall include provisions—

" (i) for the reduction of the amount of the annual payment in the event of a failure on the part of the local

authority or county council to secure due economy in the carrying out and administration of a scheme to charge sufficient rents or otherwise to comply with the conditions prescribed by the regulations;

"(ii) for the determination of the manner in which the produce of a rate of one penny in the pound shall be estimated; and

"(iii) for any adjustment which may be necessary in consequence of any difference between the estimated annual produce and the actual produce of the said rate of one penny in the pound."

Section 40.—"This part of this Act shall be construed as one with the principal Act (i.e. The Housing of the Working Classes Act 1890) and any provisions of this part of this Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained and references in this part of this Act to the principal Act or to any provisions of the principal Act shall be construed as references to that Act or provision as amended by any subsequent enactment, including this part of this Act . . ."

The relevant provisions of the Housing of the Working Classes Act, 1890, as to the defraying of expenses and the powers of borrowing in connection with schemes for the housing of the working classes are as follows:—

Section 65.—"All expenses incurred by a local authority in the execution of this part of this Act shall be defrayed—

"(i) in the case of an authority in the administrative county of London, out of the Dwelling House Improvement Fund under Part I of this Act;

"(ii) in the case of an urban sanitary authority, as part of the general expenses of their execution of the Public Health Acts."

Section 66.—"The London County Council and the Commissioners of Sewers may borrow for the purpose of the execution of this part of this Act, in like manner and subject to the like conditions as they may borrow for the purposes of Part I of this Act, and a sanitary authority may borrow for the purpose of the execution of this part of this Act in like manner and subject to the like conditions as for the purpose of defraying the above-mentioned general or special expenses."

The Corporation is an urban sanitary authority and accordingly the following provisions of the Public Health Act, 1875, relating to expenses and borrowing powers are material :—

Section 207.—" All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act.

" Subject to the following Exceptions, (namely) . . . .

* * * * *

" That where at the time of the passing of this Act the expense incurred by an urban authority in the execution of certain purposes of the Sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving sewering or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this Act shall respectively be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid."

Section 233.—" Any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs charges and expenses incurred or to be incurred by them in the execution of the Sanitary Acts or of this Act, or for the purpose of discharging any loans contracted under the Sanitary Acts or this Act, borrow or re-borrow, and take up at interest, any sums of money necessary for defraying any such costs charges and expenses, or for discharging any such loans as aforesaid.

" An urban authority may borrow or re-borrow any such sums on the credit of any fund or all or any rates or rate out of which they are authorised to defray expenses incurred by them in the execution of this Act, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate.

" A rural authority may borrow or re-borrow any such sums, if applied or intended to be applied to general expenses of such authority, on the credit of the common fund, out of which such expenses are payable, and if applied or intended to be applied to special expenses of such authority

on the credit of any rate or rates out of which such expenses are payable, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund rate or rates."

4. In order to raise money for the purpose of their Housing Scheme the Corporation issued stock and local bonds and also borrowed on mortgage. In each case the loan was secured on all the rates, revenues and property of the Corporation and in the case of the local bonds, the rates, revenues and property of the Corporation were expressed to include " the grant to be paid by the Government in aid of the Housing Scheme."

Copies, marked " B1," " B2," " B3 " and " B4 " of the forms of stock certificate, mortgage and bond are annexed hereto and form part of this Case.(1)

The houses built by the Corporation under its Assisted Housing Scheme were completed by the year 1924.

5. In accordance with the powers contained in Section 7 of the Housing, Town Planning etc. Act, 1919, regulations were made by the Minister of Health and became Statutory Rules and Orders 1919 No. 2047. A copy thereof marked " C " is annexed hereto and forms part of this Case.(1) In 1925 certain further regulations amending (in certain respects) those above referred to were made by the Minister of Health and became Statutory Rules and Orders 1925 No. 778. A copy thereof marked " C1 " is also annexed to and forms part of this Case.(1)

The following are among the material Regulations :—

Statutory Rules and Orders 1919 No. 2047.

Article IV.—(1) The local authority shall for the purposes of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, keep separate accounts, to be called " The Housing (Assisted Scheme) Accounts," including a separate revenue account, to be called " The Housing (Assisted Scheme) Revenue Account."

(2) They shall cause to be credited to the Housing (Assisted Scheme) Revenue Account in each financial year :—

(A) the produce of a rate of one penny in the pound levied in the area chargeable with the expenses of the

(1) Not included in the present print.

assisted scheme, or such less amount as may be necessary to meet the deficit for the financial year;

(B) the rents (inclusive of rates where rates are payable by the owner) in respect of any houses provided or acquired by them under the assisted scheme; and

(C) any other income which in the opinion of the Minister may properly be credited to the said account.

(3) They shall cause to be debited to the Housing (Assisted Scheme) Revenue Account in each financial year :—

(A) the sums required for interest and repayment of principal in respect of all moneys borrowed by them for the purposes of the assisted scheme (including moneys borrowed for the purchase of land which is approved by the Minister as part of the assisted scheme) which in the opinion of the Minister may properly be debited to the said account;

(B) the rates, taxes, rents or other charges payable by them in respect of any land or houses acquired, leased or provided by them under the assisted scheme, including any sums payable by way of rent, with the approval of the Minister, to any other account of the Local Authority, in respect of land acquired by them for some other purpose and appropriated for the purposes of the assisted scheme;

(C) the annual premium payable by them in respect of the insurance against fire of any houses acquired or provided by them for the purposes of the assisted scheme;

(D) the expenditure incurred in respect of supervision and management of the houses acquired or provided by them under the assisted scheme;

(E) the expenditure incurred by them in and about the repair or maintenance of any property acquired or provided by them for the purposes of the assisted scheme, whether such expenditure is incurred by way of a fixed annual contribution to a repairs fund or otherwise; and

(F) any other expenses which in the opinion of the Minister may properly be debited to the said account.

(4) (A) In the case of the council of a borough whose accounts under the Housing Acts are not otherwise subject to audit by the District Auditor, the Housing (Assisted Scheme) Accounts shall be made up and shall be audited by the District Auditor in like manner, and subject to the same provisions, as the accounts of an urban district council,

and for this purpose enactments relating to the audit by District Auditors of those accounts, and to all matters incidental thereto and consequential thereon, shall apply, so far as necessary, in lieu of the provisions of the Municipal Corporations Act, 1892, relating to accounts and audit.

(B) In every case as soon as practicable after the conclusion of each financial year the local authority shall forward to the Minister a copy of the Housing (Assisted Scheme) Revenue Account, certified by the District Auditor.

Article V.—Except with the approval of the Minister, the local authority shall not borrow moneys for the purpose of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, at a higher rate of interest than that fixed for the time being in the case of loans by the Public Works Loan Commissioners to local authorities for the purpose of assisted schemes.

Article VI.—Subject to the provisions of these regulations and provided that these regulations are complied with the annual payment to be made by the Minister to the local authority out of moneys provided by Parliament (hereinafter referred to as "the Exchequer subsidy") shall be determined by the Minister as follows:—

(A) During the period before any part of the assisted scheme has been carried into effect the Exchequer subsidy shall be an amount equivalent to the deficit in the Housing (Assisted Scheme) Revenue Account made up at the conclusion of each financial year, in accordance with the provisions of Article IV of these Regulations.

By the Amendment Regulations, 1925, this provision applies during the period up to and including the 31st March, 1927.

Article VII.—(1) In any determination of the amount of the Exchequer subsidy, whether based on an estimate or otherwise, such deductions may be made from the amount of the deficit upon which the Exchequer subsidy is calculated as will in the opinion of the Minister represent:—

(A) an item of expenditure or estimated expenditure which is excessive or not properly chargeable to the debit of the assisted scheme; or

(B) the omission from the account or estimate of any item of income which should be included therein; or

(C) any deficiency of income or estimated income which is due to the insufficiency of the rents charged or proposed to be charged by the local authority; or

(D) any deficiency of income or estimated income which is due to the failure of the local authority to secure due economy in the carrying out or administration of the scheme.

Article IX.—The Exchequer subsidy shall be payable in such instalments as the Minister may think fit (including payments on account, during the periods mentioned in paragraphs (A) and (B) of Article VI of these Regulations, based on the probable deficit for the year as certified by the Local Authority), but the Minister may, if he thinks fit, withhold payment of the final instalment of the Exchequer subsidy until the provisions of sub-division (4) (B) of Article IV of these Regulations have been complied with.

6. During each of the three years to which the appeal related the Corporation had a deficit on its Housing Scheme Revenue Account, and under the Housing Town Planning etc. Act, 1919, and the Regulations made thereunder, as above mentioned was entitled to an Exchequer subsidy equal to the amount of the deficit for each of the three years, subject however to the terms of the Regulations and, in particular to disallowances and discontinuance at the instance of the Minister of Health.

For the year 1921-22 the deficit was £115,808 18s. 3d. of which amount £1,002 was disallowed by the Minister. The following statement shows the dates of payment of interest for that year on money borrowed for the Housing Scheme and the dates when the subsidy was received from the Ministry of Health.

Payment to Stockholders, etc.			Subsidy Received.	
	Date.	Amount.	Date.	Amount.
Interest on Mortgages...	1 July 1921	£751		
Dividend on 6% Stock	1 July 1921	22,518		
			28 Sept. 1921	£35,000
Interest on Housing Bonds	30 Sept. 1921	18,642		
Interest on Mortgages...	1 Jany. 1922	1,596		
Dividend on 6% Stock	1 Jany. 1922	48,856		
			20 March 1922	60,000
Interest on Housing Bonds	31 March 1922	19,455		
Dividend on 5½% Stock	1 April 1922	7,310		
			29 Sept. 1924	18,000

Note.—Balance of Subsidy outstanding £3,766.

For the year 1922-23 the deficit was £178,374 9s. 7d. of which amount £2,708 was disallowed by the Minister and the dates of payment of interest and receipt of subsidy were as follows :—

Payment to Stockholders, etc.			Subsidy Received.	
	Date.	Amount.	Date.	Amount.
Interest on Mortgages...	1 July 1922	£1,591		
Dividend on 6% Stock	1 July 1922	54,530		
Interest on Housing Bonds	30 Sept. 1922	19,438	29 Sept. 1922	£57,000
Dividend on 5½% Stock	1 Oct. 1922	20,296		
Dividend on 6% Stock	1 Jany. 1923	54,530		
Interest on Mortgages...	1 Jany. 1923	1,590		
			3 Feby. 1923	90,000
			23 March 1923	5,000
Interest on Housing Bonds	31 March 1923	19,421		
Dividend on 5½% Stock	1 April 1923	38,999		
			8 Sept. 1923	12,000
			30 March 1925	10,000
			5 April 1927	659

Note.—Balance of Subsidy outstanding £1,326.

For the year 1923-24 the deficit was £156,480 8s. 4d. of which amount £2,639 was disallowed by the Minister and the dates of payment of interest and receipt of subsidy were as follows :—

Payment to Stockholders, etc.			Subsidy Received.	
	Date.	Amount.	Date.	Amount.
Interest on Mortgages...	30 June 1923	£1,547		
Dividend on 6% Stock	30 June 1923	54,094		
			8 Sept. 1923	£45,000
Interest on Housing Bonds	30 Sept. 1923	19,406		
Dividend on 5½% Stock	1 Oct. 1923	38,974		
Interest on Mortgages...	1 Jany. 1924	1,509		
Dividend on 6% Stock	1 Jany. 1924	54,093		
			18 March 1924	102,000
			27 March 1924	5,000
Interest on Housing Bonds	31 March 1924	19,347		
Dividend on 5½% Stock	1 April 1924	38,760		

Note.—Balance of Subsidy outstanding £2,368.

The amounts of the Exchequer subsidy payable to the Corporation for the three years were based on the deficits in the Revenue Account of the Housing Scheme, and the interest on the loans was only a factor in determining the amounts of the deficits.

In arriving at the amount of the Exchequer subsidy no sums of interest paid by the Corporation on loans raised for the purpose of the scheme were disallowed by the Minister as inadmissible items of expenditure. The sums disallowed were for the most part in respect of general management expenses.

The dates of payment of the instalments of the subsidy did not correspond with the dates of payment of interest on the loans. Some instalments of the subsidy were paid long subsequent to the payment of interest, and certain small amounts of the subsidy were still outstanding for each year.

During each of those years the total taxed profits of the Corporation's property and undertaking paid into the Borough Fund exceeded the amount of the aggregate interest on loans payable by the Corporation including the interest on loans under the Housing Scheme. Copies marked "D1," "D2,"[1] and "D3"[1] showing the interest on the Corporation's loans and the taxed income of the Borough Fund are annexed hereto and form part of this Case. Copies marked "E1," "E2"[1] and "E3"[1] showing the revenue account of the Housing Scheme and the computation of the assessments appealed against are also annexed and form part of this Case.

7. It was contended on behalf of the Corporation :—

(1) That the Exchequer subsidy was paid to the Corporation to make good generally the loss to the Borough Fund occasioned by the Housing Scheme.

(2) That by reason of the difference between the borrowing powers conferred on the Local Authorities in London and those outside, the facts of this case differed from those in the case of *Dickson* v. *Hampstead Borough Council*, 11 T.C. 691 and 43 T.L.R. 595.

(3) That the interest on the loans for the Housing Scheme was a charge on and lawfully payable and in fact paid out of the taxed income of the Borough Fund and that such interest was wholly payable and paid out of profits and gains brought into charge to Income Tax, and

(4) That the assessments appealed against should be discharged.

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

(1) That for the reasons advanced by the Crown in the case of *Dickson* v. *Hampstead Borough Council* (supra), and for other reasons, the interest payable by the

[1] Not included in the present print.

Corporation upon loans raised for the purpose of its assisted Housing Scheme, in so far as such interest exceeded the taxed income from the said scheme, was not payable out of profits and gains brought into charge.

(2) That the present case was indistinguishable from the case of *Dickson* v. *Hampstead Borough Council* above referred to, and

(3) That the assessments should be confirmed.

9. We held that this case was indistinguishable from that of the *Hampstead Borough Council* and we accordingly confirmed the assessments under appeal.

10. The Appellants immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1927, Section 26, and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

J. JACOB,
MARK STURGIS,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
21st November, 1928.

D.1.

BIRMINGHAM COPORATION.

INCOME TAX 1921–1922.

BOROUGH FUND.

	£	£
Interest on Loans—		
Asylums	9,402	
Baths	4,340	
Cemeteries	1,861	
Education	42,881	
Highways, Sewerage, etc.	47,023	
Hospitals and Sanatoria	3,263	
Housing (Assisted Scheme) 1919	149,091	
Markets	3,595	
Parks and Recreation Grounds	9,603	
Police	2,126	
Refuse Disposal	4,086	
Other Borough Fund Accounts (including loans to other Local Authorities)	305,120	
Water—balance of Interest not covered by Profits...	87,759	
		670,150

Set-off—

Trading Departments.

	£	£	£
Electric—			
Profit for the year		345,931	
Less : Interest on Loans ...	123,797		
Sinking Fund Contribution	153,702		
		277,499	
			68,432
Gas—			
Profit for the year		403,641	
Less : Interest on Loans ...	74,435		
Sinking Fund Contributions	66,648		
		141,083	
			262,558
Tramways—			
Profit for the year		333,400	
Less : Interest on Loans ...	84,116		
Wear and Tear Allowance	96,280		
		180,396	
			153,004
Water—			
Profit for the year (*less* prior charge)		222,501	
Less : Interest on Loans ...		310,260	
Markets—			
Profit for the year			34,934
Cemeteries—			
Loss for the year (tax repaid)			8,290

Non-Trading Departments.

Schedule A. Assessments (a)	39,990	
Bank Interest assessed under Schedule D. (b)	120,478	
Interest on Investments	47,070	
Interest on Loans to other Local Authorities—taxed on receipt	32,273	
		750,449
Amounts by which Set-off exceeds Interest ...		£80,299

(a) Includes Housing (Assisted Scheme) £22,874.
(b) „ „ „ £12,983.

E.1.

BIRMINGHAM CORPORATION.

HOUSING (ASSISTED SCHEME) 1919.

INCOME TAX 1921-1922.

		Expenditure on Revenue Account as certified by District Auditor.			*Items affecting Income Tax.*
		£	s.	d.	£
1.	To Loan Repayments	198	0	8	
2.	Contributions to Sinking Fund ...	16,203	13	5	
3.	Dividends and Interest	147,093	19	7	147,001 (*a*)
4.	Management of Stock and Mortgages	1,762	15	6	
5.	Management of Housing Bonds ...	1,297	12	6	
6.	Repairs and Maintenance	6,061	7	7	
7.	Supervision and Management ...	4,107	8	8	
	Rates and Taxes—				
8.	Rates recharged	17,687	12	4	
9.	Other Rates	536	18	11	
10.	Income Tax	1,437	14	5	
11.	Land Tax, Tithes, etc.	149	4	5	140
	Other Expenditure—				
	Contribution to Expenses of Issue—				
12.	Housing Bonds	623	18	5	
13.	Bank Interest	4,369	8	0	— (*b*)
14.	Rent Losses	542	6	6	
15.	Interest on Purchase Money ...	2,165	5	2	2,090 (*c*)
16.	Rent Charges—Appropriated Sites	546	19	0	1,161 (*d*)
17.	Law and Professional Charges ...	52	6	4	
18.	Miscellaneous	849	10	5	
		£205,686	1	10	

		Income on Revenue Account as certified by District Auditor.			*Items affecting Income Tax.*
		£	s.	d.	£
19.	By Rent Income—Houses	27,261	5	6	24,175
20.	Rent Income—Land and Various Properties	5,250	5	7	
21.	Rent Income—Collected in respect of Rates	16,822	5	4	
22.	Rate Contribution	20,933	7	10	
23.	Tax Charges recoverable	1,437	14	5	
24.	Bank Interest	17,448	15	1	12,983 (*b*)
25.	Miscellaneous Income	723	9	10	
26.	Exchequer Subsidy	115,808	18	3	
		£205,686	1	10	

	£	£		£		£
(*a*) Interest (including Interest paid) gross	£8,868	147,094	(*b*) Bank Interest—		(*c*) Interest on Purchase Money	2,165
Less—			Received	17,449	*Less*—	
Management of Housing Bonds ...	85		Charged	4,370	Included in Set-off statement for previous year ...	75
Contribution towards Interest made by Borough Rate A/c. and credited to Miscellaneous Income ...	8		Net	13,079		£2,090
		93	*Deduct*—			
		£147,001	Adjustment with Borough Rate ...	96		
				£12,983		

	£	£
(*d*) Rent Charges—		
Appropriated Sites ...		547
Add—		
Included in Accounts for following year		1,475
		2,022
Less—		
Included in Set-off statement for previous year ...		861
		£1,161

INSPECTOR'S FIGURES.

						£		
Dividends and Interest	(Item 3)					147,001		
Interest on Purchase Money	(„ 15)					2,090		
Total Interest						149,091		
Deduct—								
Rate Contribution	(Item 22)			20,933				
Bank Interest	(„ 24)			12,983				
Schedule "A" Assessments	(„ 19 & 20)		24,175					
Less Ground Rents	(„ 11)	140						
„ „	(„ 16)	1,161	1,301	22,874		56,790		
						92,301		
Less Interest paid in full (Footnote (*a*))						8,868		
						£83,433	@ 6/- in the £	£25,029 18 0

The case came before Rowlatt, *J.*, in the King's Bench Division on the 30th January, 1929, when judgment was given in favour of the Crown, with costs.

Mr. A. M. Latter, K.C., and Mr. G. R. Blanco White appeared as Counsel for the Corporation, and the Attorney-General (Sir T. Inskip, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—Mr. Attorney, I really need not trouble you further. I think I am bound by the *Hampstead Borough* case[1].

In my judgment, if my decision in the *Hampstead Borough* case was right, which perhaps remains to be seen, I must decide this case in favour of the Crown. Because there I certainly did hold that the subvention—in that case the County Council rates, in this case the Government grant—must be held to be applied to the particular deficit which it was given to supply and held to be applied in fact to that, and as the deficit was not in what I call the mixed fund—you all know what I mean—but was in a particular fund, the interest must be taken to be paid out of the money granted for that purpose.

Now Mr. Latter did raise another point, as to which I did not call upon the learned Attorney-General. He said: In fact here a different course has been pursued, because by reason of the delay on the part of the Government in paying this subvention, the payment of interest was in fact financed and therefore made out of the other taxed income. I cannot think that that makes any difference. If the Corporation had defaulted or delayed until the Government paid, the question would not arise. I think the mere fact that they borrowed the money from themselves out of another account at the moment does not make any difference in substance at all.

Therefore on the strength of the *Hampstead Borough* case I dismiss this appeal with costs.

The Corporation having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Sankey, *L.JJ.*) on the 29th and 30th April and the 1st May, 1929, when judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. G. R. Blanco White appeared as Counsel for the Corporation, and the Attorney-General (Sir T. Inskip, K.C.) and Mr. R. P. Hills for the Crown.

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[1] Dickson *v.* Hampstead Borough Council, 11 T.C. 691.

JUDGMENT.

Lord Hanworth, M.R.—This case is, at first sight, a somewhat puzzling case, but when it is carefully examined I think the conclusion that we ought to reach is clear.

It is an appeal by the Corporation of Birmingham in respect of assessments made upon them for three years ending the 5th April, 1922, 5th April, 1923, and the 5th April, 1924. The point that arises in all three of those years is the same. It is sufficient, therefore, to take the first of these years, for the other two years fall into line with the decision upon the first year, namely, the year ending the 5th April, 1922. The Corporation appeal against an assessment made upon them in that year in respect of a sum of £83,433.

Now the facts must be stated. The Corporation of Birmingham were incorporated under a Statute as far back as 1838, and in 1913, since the passing of the Birmingham Act of that year the Corporation have had one fund only for the purpose of paying the charges which fall to be paid by them. It is called the Borough Fund, and out of that Fund all the expenses that arise in carrying out their duties under the Public Health Acts are to be paid and are, in fact, paid. There are certain sums which fall to be paid into that Fund and if the amount which is paid into the Fund is deficient in amount, then it has to be replenished by raising a Borough rate. The sources of revenue besides a Borough rate which are paid into the Borough Fund arise from certain activities which the Corporation carry on in respect of the markets, gas, water, electric supply, and tramway undertakings, and, as will be seen by the table which refers to this year and which is attached to the Case, marked D.1., it will be found that in those years from those sources—what are called the trading departments—there was a sum received by the Corporation amounting to £750,449. In order to carry out those activities it has been necessary for the Corporation to borrow moneys and they have to pay interest on those loans. The interest in this year of which I am speaking amounted to £670,150. It will be seen, therefore, that, taking those two figures, it was possible for the Corporation to meet the charges in respect of loans, namely, £670,150, by finding that sum out of the profits derived from their trading funds which left them, after paying those charges, a sum of £80,299 in hand. In respect of those loans and dividends and interest paid upon them, the Corporation would have the duty charged upon them of collecting the Income Tax which falls ultimately upon the persons to whom the dividends and interest are paid. It is provided by Rule 19 of the General Rules applicable to Schedules A, B, C, D, and E, in accordance with the system of deduction of Income Tax at source, that "Where any yearly interest of money . . . is payable wholly out of "profits or gains brought into charge to tax, no assessment shall be "made upon the person entitled to such interest, annuity, or annual "payment, but the whole of those profits or gains shall be assessed

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" and charged with tax on the person liable to the interest, annuity, " or annual payment, without distinguishing the same, and the " person liable to make such payment, whether out of the profits " or gains charged with tax or out of any annual payment liable to " deduction, or from which a deduction has been made, shall be " entitled, on making such payment, to deduct and retain thereout " a sum representing the amount of the tax thereon at the rate or " rates of tax in force during the period through which the said " payment was accruing due," and further, " The person to whom " such payment is made shall allow such deduction upon the receipt " of the residue of the same, and the person making such deduction " shall be acquitted and discharged of so much money as is repre- " sented by the deduction, as if that sum had been actually paid." Taking, therefore, the simple case of the profits which are made by the trading departments and which would be subject to tax, it is right for the Birmingham Corporation to deduct from the sums which they are paying over to the persons who are entitled to the receipt of those dividends and interest, the Income Tax which has been borne by the profits or gains which have been made, and to pass on that tax to the persons who are in receipt of dividends or interest, and those persons are bound to allow in respect of the payment to them of the dividend and interest such deduction upon the receipt of the residue of the dividend and interest, and the person making the deduction, that is, the Birmingham Corporation, is acquitted and discharged of so much money as is represented by the deduction. That is the simple method of deducting the Income Tax at the source and passing it on to the person who is ultimately liable to pay it.

Now we come to consider the special facts which raise the question in controversy. It is stated in Paragraph 3 of the Case that in the year ending the 5th April, 1920, the Corporation prepared and undertook a housing scheme under the provisions of the Town Planning Act of 1919. By that Act it was provided in Section 1, that it should be the duty of every local authority to consider the needs of their area, with respect to the provision of houses for the working classes, and within three months after the passing of the Act to prepare and submit to the Local Government Board a scheme for the exercise of their powers under the Housing of the Working Classes Act. The Corporation of Birmingham were a local authority within the meaning of that Section 1. Therefore, the duty fell upon them to prepare and submit to the Local Government Board a scheme for the exercise of their powers as to making provision of houses for the working classes, or a housing scheme. That scheme, the duty for the carrying out of which was laid upon the Corporation, is a special scheme. Section 7 of the Act provided: " If it appears to the Local Government " Board that the carrying out . . . of any scheme approved under " section one of this Act . . . has resulted or is likely to result in " a loss, the Board shall, if the scheme is carried out within such

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" period after the passing of this Act as may be specified by the " Board with the consent of the Treasury pay or undertake to pay to " the local authority or county council out of moneys provided by " Parliament such part of the loss as may be determined to be so " payable under regulations made by the Board with the approval " of the Treasury. . ." Pausing there for a moment, the duty of carrying out the housing scheme attached to the Birmingham Corporation. On the other hand, they had a right, within the limits allowed and provided they carried out and fulfilled their duties in accordance with regulations, to ask that the Local Government Board, out of moneys provided by Parliament, should make good such part of the loss as was to be determined as payable. Now the way in which that money was to be ascertained is set out. The regulations to which I have referred provided that the local authority should secure due economy in the carrying out and administration of a scheme, and they were to deduct from any apparent loss a sum which should represent and be estimated at a value of one penny in the pound, levied in the area chargeable with the expenses of suc scheme. By Section 207 of the Public Health Act, 1875 (set out in paragraph 3 of the Case) it is provided that the expenses incurred in the execution of any of the purposes of the Sanitary Acts should be charged on and defrayed out of the Borough Fund, and that is the single fund which is now the source of payment of all matters under the Public Health Acts in the case of the Birmingham Corporation.

Now the houses which were built under this housing scheme were completed in 1924. But, as will be seen, in consequence of the Corporation having to borrow money for the purposes of this scheme there was a " loss " within the meaning of Section 7, which I have read. The part of the regulations under which one has to ascertain the loss are the regulations which are set out in paragraph 5 of the Case. Article IV provides that, for the purposes of an Assisted Scheme—and this housing scheme is an Assisted Scheme—the local authority was to keep separate accounts to be called " The Housing " (Assisted Scheme) Accounts," and they were to include a separate revenue account, and there was to be credited to that Housing (Assisted Scheme) Revenue Account the produce of a rate of one penny in the pound because of the loss which is to be estimated, or such less amount as may be necessary to meet the deficit, and they are to bring into the accounts rents, inclusive of rates, in respect of the houses provided, and any other income which, in the opinion of the Minister, may be properly credited to the account. Then they are to debit to the revenue account all sums required for interest and repayment of principal, the rents, rates, taxes and other charges payable by them, the annual premium in respect of fire insurance, the expenditure incurred in respect of supervision and management, and the expenditure incurred by them in respect of maintenance and

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repair, and any other expenses which, in the opinion of the Minister, may be properly debited to the account; and in every case, as soon as practicable, after the conclusion of every financial year, the local authority are to forward to the Minister a copy of the Housing (Assisted Scheme) Revenue Account certified by the District Auditor. Article VII (paragraph 5) deals with the determination of the amount which is to be paid in accordance with Section 7, and it is called the Exchequer Subsidy, and in determining the amount of the Exchequer Subsidy Article VII has to be followed. Such deductions may be made from the amount of the deficit as will, in the opinion of the Minister, represent an item of expenditure which is excessive or not properly chargeable to the debit of the Assisted Scheme, the omission from the account or estimate of any item of income which should be included therein, any deficiency of income or estimated income which is due to the insufficiency of the rents charged or proposed to be charged by the local authority, or any deficiency of income or estimated income which is due to the failure of the local authority to secure due economy. Then by Article IX, when all those conditions precedent have been fulfilled, the Exchequer Subsidy is to be paid, and paid in such instalments as the Minister may think fit during the periods which are specified.

Now it is found by the Case that the amounts of the Exchequer Subsidy payable to the Corporation for the three years which are in question in the case were based on the deficits in the revenue on the housing scheme, and the interest on the loans was only a factor in determining the amounts of the deficits. I am bearing that finding of fact in mind. No doubt the interest on the loans was a large factor but not the only factor in determining the amount of the deficits. If there had not been any interest payable on loans, as a matter of fact it is quite plain that the accounts of the housing scheme would not have shown a deficit at all.

Now it is contended on behalf of the Corporation that the Exchequer Subsidy was paid to the Corporation to make good generally the loss to the Borough Fund occasioned by the housing scheme. After the facts which I have recounted, is it true to say, as contended by the Corporation, that that was the nature and the purpose of the subsidy paid? The Exchequer Subsidy was not paid in regard to or in reference to the totality of the Borough Fund at all. From the point of view of the Local Government Board authorities or the Exchequer it mattered not to them whether there was a Borough Fund or whether there were any other funds. The purpose of the subsidy was to make good the deficit on what is called the Housing Assisted Scheme, and at the outset it is right to make quite plain that this contention that the payment of the Exchequer Subsidy was to make good generally a loss to the Borough Fund, is to mistake the true nature and purpose of the Exchequer Subsidy. It

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was not a subvention to the Borough Fund as a whole or relief of rates; but it was a sum paid in respect of the loss incurred out of this Assisted Housing Scheme.

The next contention was that the case of *Dickson* v. *The Hampstead Borough Council*(1) did not apply, and, thirdly, that the interest on the loans on the housing scheme was a charge on, and lawfully paid, and in fact paid out of, the taxed income of the Borough Fund, and that such interest was wholly paid and payable out of the profits or gains brought into charge by the Income Tax Act. If that contention could have been made good it would have meant that Rule 19 applied. As a matter of fact, what the Exchequer Subsidy does is to make good the loss on the housing scheme, and if the sum of the loss is paid out of the Borough Fund, the Borough Fund is at once refilled *pro tanto* by the subsidy which is paid. The reason why the Exchequer Subsidy is paid is because the scheme is not intrinsically self-supporting. If there had been no loss on the housing scheme, there would have been no Exchequer Subsidy at all, and, as is plain from the examination of the figures which are set out in the Appendix to the Case, if there had not been a sum of £147,093 19s. 7d. payable in respect of dividends and interest on the loans required for carrying out the housing scheme, the Housing Assisted Scheme as it stands would not have shown a deficit and there would have been no Exchequer Subsidy. The point which is raised in this third contention is this. It is said that the loans which were raised were charged upon the Borough Fund and that the holder had a right to look to the repayment of the sum which he had lent out of the Borough Fund, at any rate in one resort, if not the last resort. So that the Borough Fund was the security upon which the stockholder had lent his money. But it is not the security of the stockholder which governs the point in question. Rule 21, which is the Rule in question, says this: "Upon payment of any interest of money . . . "charged with tax under Schedule D . . . . not payable, or not "wholly payable, out of profits or gains brought into charge, the person "by or through whom any such payment is made shall deduct "thereout a sum representing the amount of the tax thereon at the "rate of tax in force at the time of the payment." Then it says: "Any such person shall forthwith render an account to the Commis-"sioners of Inland Revenue of the amount so deducted . . . . as "is not paid out of profits or gains brought into charge," and so on. Once the sum is not paid or not wholly paid out of profits or gains brought into charge, then a return must be made, and the only way in which the Corporation can escape from making a return in respect of the sum deducted for interest upon the loans is to show that they have paid the interest on those loans out of profits or gains brought into charge. If they have paid the interest on those loans

(1) 11 T.C. 691.

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out of the profits or gains brought into charge, then they are entitled to retain the sum so deducted under Rule 19. But if they have not so paid them out, then under Rule 21 they are bound to make a return of the sums which they have so retained and which were not paid out of the profits or gains brought into charge.

It appears to me, therefore, that the present case is largely a question of fact. When I say it is a question of fact, I do not mean a question of fact such as to exclude an appeal to this Court, or a question upon which this Court cannot exercise its discretion. But it is a mixed question of law and fact, because we have to determine whether or not the Commissioners have rightly advised themselves in coming to their conclusion. But the question undoubtedly arises: From what were these dividends and interest paid? Were they in fact paid out of the profits or gains brought into charge, or were they not? In the case of *Sugden* v. *Leeds Corporation*, [1914] A.C. 483, Lord Haldane, at page 495, (1) referred to the judgment of Mr Justice Hamilton (2) in the Court below as deciding that the Edinburgh Life Assurance Company, in the *Edinburgh Life Assurance* case(3), [1910] A.C. 143, "had a perfect right to treat interest "as payable out of the income in question," and said that Mr. Justice Hamilton summed up the law as being that ". . . the person assessed can retain the Income Tax which he has "deducted from the interest paid to his creditor only if the interest "is operatively charged upon or payable, that is to say, immediately "out of the taxable income." I will say a word or two about the meaning of that word "operatively" later on. But, in whichever way you put it or argue it, it ultimately comes back to the question: What was the source from which these dividends or interest were paid? Were they paid out of the profits or gains subject to charge or were they not? Here the Commissioners have adopted a method which is not quite satisfactory. They say that they hold that this case was indistinguishable from the case of *Dickson* v. *The Hampstead Borough Council*, and that they accordingly confirm the assessments under appeal. That, to my mind, is rather a loose way of coming to their decision. It would have been more helpful if they had given us a definite finding that the sum which was paid in respect of the dividends and interest was in fact paid out of profits or gains which had not been subjected to tax. But I think that is what is meant.

Mr. Justice Rowlatt, in the *Hampstead* case, 11 T.C. 691, says at p. 702: "In other words, what is given here is such a subsidy by "the County Council as shall prevent the charge of this interest on "any other resources than those resources which belong to the

(1) 6 T.C. 211, at p. 256.
(2) *Ibid.* at p. 231.
(3) Edinburgh Life Assurance Company v. Lord Advocate, 5 T.C. 472.

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"Housing Scheme from being effective. That is absolutely the "position. The thing is calculated so that the other sources which "are charged shall never be effectively called upon to provide the "money." Applying that to the present case, I think what is intended to be found and held is this, that the Exchequer Subsidy was given so as to release any other resources of the Birmingham Corporation from being used for the purpose *pro tanto* of discharging the interest and dividends, and so as to leave all other resources and moneys of the Birmingham Corporation free from the incidence of the burden which was caused by the Housing Assisted Scheme. Mr. Justice Rowlatt, at the end of his judgment, said this (1): "What is really paying and must pay this interest as long as this "subsidy is forthcoming is the receipts of the Housing Scheme plus "the subsidy and nothing else, and until the present scheme breaks "down it is not payable effectively, as is said in one case, or opera-"tively, as is said in another case, out of any of the other profits and "gains of this Corporation." The finding of the Commissioners, therefore, appears to me to mean this, that the dividends and interest were in fact paid out of the Exchequer Subsidy and that the other moneys in the hands of the Corporation were released from any burden in respect of the Housing Assisted Scheme. If the Commissioners and Mr. Justice Rowlatt have rightly directed themselves, that finding is sufficient to make this appeal fail.

But it is said that on an examination of the cases, inasmuch as the Borough Fund is ultimately the security, or—to use a phrase of Mr. Justice Hamilton,(2) as he then was, in the case of *Sugden* v. *Leeds Corporation*—if the Borough Fund is one in which there is a theoretic possibility of its being used for the purposes of payment, it is sufficient. Secondly, it is said that inasmuch as the Corporation have a right to appropriate the payments, they have in fact appropriated to the payment of dividends and interest moneys which they have received out of the property of the trading departments which had been in fact subjected to tax. Let me examine those propositions. It appears to me that the question of the ultimate security is not a determining factor in the present case. In the first *London County Council* case (3), [1901] A.C. 26, there was a sum required to pay the dividend on the Metropolitan Stock amounting to £1,140,000. The Council received about £100,000 in rent and about £500,000 for interest on authorised advances to other public bodies. The balance required to make up the dividend was raised by rates, and in their return to the Commissioners of Inland Revenue the Council charged themselves with Income Tax on the proceeds of rates applied towards the payment of the dividend, but they claimed

(1) 11 T.C., at p. 703.

(2) 6 T.C., at p. 241.

(3) Attorney-General *v.* London County Council, 4 T.C. 265.

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exemption in respect of the rest of the money so applied as having been paid out of profits or gains already brought into charge. In other words, one of the three sources from which the dividends and interest were paid being rates which had not been subjected to charge, the Council, following out the terms of Rule 21, accepted the liability of making a return in respect of the sums which they had deducted. It was not suggested that Rule 21 could not be applied in respect of that balance which was raised by the rates. But what was said by Lord Macnaghten when dealing with the argument, on page 33, was this (1): "It was seriously argued that, inasmuch as the "holders of the Metropolitan Stock have a charge on all the property of "the Council—capital and income alike—for their interest as well as "for their principal and might in case of default resort to any and every "item comprised in their security, therefore it would be right and proper "before default, and merely for the purpose of computing Income "Tax, to treat the dividend on Metropolitan Stock as paid rateably "out of the capital of the property belonging to the Council and the "different branches of their income. That is an ingenious, but not, "I think, very businesslike suggestion. It is enough to say that it "is the plain duty of the Council, not being beneficial owners of the "funds which they administer, to keep down annual charges out of "annual income as far as it will extend. . . ." Again, in the case of *Sugden* v. *Leeds Corporation*, [1914] A.C. 483, at page 501, Lord Atkinson says (2): "It must, therefore, I think, be taken that "it was, in fact, though possibly not in form, paid out of gains or "profits brought into charge, *i.e.*, the taxed funds of the Corpora-"tion." The question of whether or not there is ultimate right to recur to the Borough Fund was not dealt with as a determining factor. Lord Atkinson, at the conclusion of his speech, on p. 507, said this (3): "I express no opinion on what property "might, under the Act of 1901, come within the reach of the "remedies of the creditors of the Corporation in hostile litigation." It appears to me that the *Edinburgh* case, [1910] A.C. 143, gives us a rule or guide which is of great importance in the present case. In that case the Company had a very large income from interest, dividends, and rents, from which Income Tax was deducted at the source. The co-partnership of the Company provided that every policy of insurance or other obligation should contain a clause declaring that the capital, stock, and funds of the Company should be the only fund answerable for any demand under such policy or other obligation, that is to say, the annuities were charged on the capital stock and funds of the Company. In fact, they were paid out of the income derived from interest, dividends, and rents, and what was argued in the House of Lords was that the right way of dealing with the payment of the annuities was to treat them as

(1) Attorney-General *v.* London County Council, 4 T.C., at p. 292.
(2) 6 T.C., at p. 260.
(3) 6 T.C., at p. 264.

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having partly been paid out of the general income of the Assurance Company and apportion the sums which had been paid. "There "ought, therefore," says the argument of Counsel, [1910] A.C. at page 151, "to be an apportionment; one-third of the money payable "paid to the annuitants will come out of interest, for interest con- "stitutes one-third of the general fund, and two-thirds of the money "so payable will be taken from the premiums, because the general "fund, to the extent of two-thirds, consists of premiums." In other words, inasmuch as there was a charge in respect of the annuities upon the capital stock and funds of the Company, so one should bear that in mind and treat the payment of the annuities, not as being wholly paid, as in fact they were paid, out of interest, dividends and rents, but rateably, partly out of the fund to which they could in the ultimate resort go and partly out of the interest, because the premiums were not subjected to tax. In dealing with that proposition it will be observed that in the statement of the facts Lord Atkinson, on page 154 (1) calls attention to the fact that "The "income of the Company from all sources is treated as paid into a "common fund, from which all outgoings are discharged. And by "the 18th Article of the Contract of Co-partnership of the Company "it is provided, amongst other things, that every policy of insurance "or other obligation entered into by the directors for the behoof of "the Company shall contain a clause declaring that the capital "stock and funds of the Company for the time being shall be the "only fund answerable for any demand under such policy or other "obligation." Following the contentions in the *Edinburgh* case and applying them here, it is said by parity of reasoning that this money received from the Exchequer Subsidy goes into the Borough Fund, that the Borough Fund is ultimately responsible to the stockholders and, therefore, that there ought to be an appropriation, or at any rate a distribution, of the liability in respect of the dividends and interest in accordance with that system under which the stockholder had a right to come upon the Borough Fund, as the annuity holder in the *Edinburgh* case had a right to come upon the common fund of the Insurance Company.

Lord Atkinson, on page 156, deals with the first *London County Council* case to which I have referred, which is in [1901] A.C. He says(2): "The Council were quite willing to pay the Income Tax "deducted on the interest so paid out of the *rates*, but claimed "the right to retain the Income Tax deducted on the interest "paid out of the tax-bearing portion of their income." He then refers to the statement of Lord Davey in *London County Council* v. *Attorney-General*(3) that "....the general principle of

(1) 5 T.C., at p. 483.

(2) In Edinburgh Life Assurance Company *v.* Lord Advocate, 5 T.C. 472, at p. 484.

(3) 4 T.C. 265, at p. 301: quoted at p. 485 in 5 T.C.

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" payment in due course of administration is to pay annual charges " in the first place out of annual income," and that although there was in that case the contention that inasmuch as the consolidated stock was charged upon the whole funds belonging to the Corporation, in the same way, as pointed out by Lord Atkinson(1): "The question "is whether a manipulation such as that by the Company of its funds, a " setting apart of less than one-third of their taxed income, to pay these " annuities, which they can any day readily accomplish, and which if " done could not have any effect on their balance sheet or financial " position, is a condition precedent which must be performed in " order to entitle them to retain under the provisions of Section 24 of " the Customs and Inland Revenue Act of 1888 the sum deducted " and now sued for." Then he comes to the conclusion that in fact the interest on the annuities must, under such circumstances, be treated as payable out of the income which has been subjected to tax, so far as it will reach. He, therefore, says that you do not look at the ultimate charge which enables the lender to come down upon the assets of the borrower; but you look to the nature of the fund out of which in fact the interest and dividends are provided. The *Edinburgh* case, therefore, says that where you can show that in fact the payments that are being made are dividends and interest out of taxed income, the Corporation would be entitled to deduct and retain the tax, but not otherwise. It is a clear authority, however, that you are not to consider or mix up the question of what is the ultimate source for the repayment of the capital sum lent. Incidentally Lord Gorell, [1910] A.C. at page 162, says (2): " It is not required by the " Income Tax Acts in order to raise the right of deduction and " retention that the interest on annual payments shall be exclusively " charged upon or payable out of profits or gains brought into charge. " It is enough if the interest is charged upon or payable out of the " taxable income, though there may be other subjects of charge. " But the mortgagor cannot, of course, retain against the Crown more " Income Tax than he has paid." Once more, in the second *London County Council* case, [1907] A.C. 131, Lord Macnaghten in his speech says at page 137(3): " So it is, if the incumbered owner pays the " interest out of his own pocket. But the case is different if the " interest is discharged from some other source, and the owner is " free."

A consideration of those cases leads me quite clearly to the conclusion that one would be confusing the question of the payment of

(1) In Edinburgh Life Assurance Company *v.* Lord Advocate, 5 T.C. 472, at p. 485.

(2) Edinburgh Life Assurance Company *v.* Lord Advocate, 5 T.C. 472, at p. 490. The passage is a quotation by Lord Gorell from Lord Davey's speech in Attorney-General *v.* London County Council, 4 T.C. 265, at p. 301.

(3) Attorney-General *v.* London County Council, 5 T.C. 242, at pp. 261 and 262.

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interest with the ultimate repayment of the capital if one brought into consideration the question of what funds form a proper source from which the repayment of the capital can be made. What we have got to consider in this case is: Did the money which was received from the Exchequer Subsidy go to the payment of the interest and dividends, or did it go as a subvention to the Borough Fund as a whole? It appears to me upon the facts found by the Commissioners and upon the true consideration of what that Exchequer Subsidy is that it is not right to hold that this interest has been paid out of the totality of the Borough Fund, but out of the subvention which has been handed over to the Birmingham Corporation for that particular purpose. If otherwise, it would appear to me that the Corporation would be doing violence to the purpose for which the money is paid.

Mr. Justice Hamilton, as he then was, deals with this matter in his judgment in the *Sugden* case, 6 T.C. at page 240, where he says, after consideration of the Statutes under which certain funds reached the Leeds Corporation: " . . . I do not think that can be construed " in face of the other provisions as conferring a power to pay the " interest on such principal moneys so unified at will out of these " different revenues whatever they may be. A power to borrow on " mortgage doubtless involves a power to borrow on mortgage at " interest, and a charge of the loan doubtless involves a charge upon " the subject matter of the security, not only in respect of the princi- " pal but of the interest attaching to it. That is not essentially the " same thing as giving liberty to the borrower to pay the interest " out of any fund that he pleases, even although the lender may, in " case of default, have, under the general power to create such a " security, the right to come for interest as well as principal upon all " and any of the sources of revenue, but in face of the provisions in " question it not only does not of itself follow that there is such a " power for the borrower to apply his revenues at will, but I think he " is in this case expressly tied down and prevented from doing so." In dealing with the question of what has been said to have been " effectively " or " operatively " paid, it seems to me that the decisions which have already been given only use those words for the purpose of finding out what, in fact, was the source of income out of which the dividends and interest were paid. At page 241 Mr. Justice Hamilton says: " . . . . if the sum of the statutory or other " provisions is that in truth and in fact, the taxable income is a " fund out of which the debtor, the borrower, either lawfully does, or " lawfully might, pay before any default has occurred," then different considerations apply. Then he goes on: " The specific provisions " of the Leeds Act, 1901, coupled with the outstanding provisions " of the prior Leeds legislation, seem to me to prevent that. I do " not think that the application of the income to the purpose in " question, the theoretic possibility of which is the foundation of the " argument for the Leeds Corporation, is one which is permissible in

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"view of these various sections." In other words, keeping one's attention closely to the purpose for which the Exchequer Subsidy is paid, it appears to me that it would be wrong on the part of the Corporation to say that they have received that sum in the Borough Fund for the general purposes of the Corporation. They have received it marked with a purpose, namely, to meet the possible deficiency arising out of the Assisted Housing Scheme.

There is left the question of whether or not there is a right of appropriation on the part of the Birmingham Corporation so that they can say: Well, once the money has been received, or whether the money has been received or not, inasmuch as we have an income which is subjected to payment of tax in respect of profits or gains, we are entitled to be deemed to have paid the dividends and interest out of that sum because it is the most favourable to us—and certain passages and observations made by Lord Atkinson are quoted in support of that view. To my mind that is untenable. It appears to me that, rightly considered, when one looks at the substance and not at the mere book entries, this subsidy was paid in respect of a particular loss which had been suffered in the Assisted Housing Scheme, a loss which the subsidy was to make good, and that there was no right of appropriation which would leave that fund in the hands of the Corporation. They were bound to use the subsidy for the particular purpose shown in the accounts of the Assisted Housing Scheme and for no other. They would have been failing in their duty if they had used it otherwise. Such observations as are made about appropriation do not apply to the present case. The sum is a sum which has been placed in the Corporation's hands for a particular purpose, namely, for paying the loss which appears in the accounts of the housing scheme, a loss which would not have occurred at all if this sum for dividends and interest had not been payable, and it is a sum which must be appropriated for that purpose and for no other. It is unfortunate in some of these cases that words are used in a different connection which, when taken from their purpose in relation to the facts of the case, may be construed as having a wider significance than they actually have. They do not, to my mind, apply to this case, and when one has examined them it appears to me that the principles laid down in the *Edinburgh* case, the first and second *London County Council* cases, and the *Leeds Corporation* case by Mr. Justice Hamilton, as he then was, clearly show that there can be no such appropriation, that one must leave out of account the general nature and purpose of the Borough Fund, and treat this sum as a sum which has been placed in the hands of the Birmingham Corporation for the purpose of discharging this heavy toll upon them in respect of borrowed moneys.

For these reasons, although the judgment of Mr. Justice Rowlatt is expressed in terms of a reported case, and not otherwise, I think

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the intention of the Commissioners was to hold that in fact the money had been paid, as it ought to have been paid, out of moneys which had not to be subjected to tax, and therefore that the case fell under Rule 21, and thus that the Birmingham Corporation are bound to make a return in respect of those moneys, and there is a liability upon them in each of these three years. The question of amount is not in dispute, so I need not dwell upon that. The only observation to be made is that as the result of this judgment the appeal must be dismissed with costs.

Lawrence, L.J.—This is in effect an appeal against the decision of Mr. Justice Rowlatt in the case of *Dickson* v. *The Hampstead Borough Council*, 11 T.C. 691, which admittedly governs the present case. The Birmingham Corporation contended before us that the interest on the loans for their housing schemes was a charge upon and lawfully payable, and in fact paid, out of the taxed income of the Borough Fund, and consequently that such interest was wholly payable and paid out of profits or gains brought into charge to Income Tax within the true meaning of Rule 19 of the All Schedule Rules of the Income Tax Act, 1918. This contention was based upon the assumption that the Exchequer Subsidy was in fact paid to make good the loss alleged to have been occasioned to the Borough Fund generally by reason of the Corporation having undertaken a housing scheme under the Act of 1919. The Crown dispute the contention of the Corporation on the ground that the Exchequer Subsidy was paid to the Corporation for the sole purpose of making good the loss resulting from the carrying out of the housing scheme, and contend that it was the duty of the Corporation to apply such subsidy in making good that loss and not in making good any alleged loss to the Borough Fund generally. The Crown relied upon Rule 21 of the All Schedules Rules and contended that, in the circumstances of this case, the interest on the loans for the housing scheme was not wholly payable out of profits or gains brought into charge to Income Tax, but that it was only payable out of such profits or gains to the extent to which such profits or gains consisted of the taxed income arising from the housing scheme, and that as to the balance it was payable out of, and ought to be borne by, the subsidy, and consequently that the Corporation was, to the extent to which the interest was payable out of such subsidy, bound to account to the Crown for the Income Tax deducted in respect of that portion of the interest. The Exchequer Subsidy is payable under the Housing Act of 1919. Under that Act it was the duty of the Corporation to prepare and carry out a housing scheme, and under Section 7 the Local Government Board was bound to pay the Corporation out of moneys provided by Parliament such part of the loss resulting from the carrying out of the scheme as might be determined under regulations made by the Local Government Board. The regulations made by the Local

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Government Board under this Section oblige the Council to keep separate accounts of the housing scheme and to specify what is to be debited and credited to such account. The deficit shown on such separate account determines the amount of the loss which the Board has to pay to the Corporation. It is plain from these regulations that the loss is calculated on the footing that the receipts of the Corporation from their trading departments and their other sources are not to be brought into account, and that the Exchequer Subsidy is not measured by, nor has it any relation to, any alleged loss to the Borough Fund generally. Moreover, in calculating the deficit, the total amount of interest on loans for the housing scheme, without making any allowance for the deduction of Income Tax, is debited to the housing scheme account. The obvious intention of the Legislature in providing the Exchequer Subsidy was to ensure that any loss which might result from the carrying out of the housing scheme upon which the local authority was compelled to embark should not be thrown upon, or become payable out of, the general revenue of the local authority. It would be strange if, in these circumstances, the local authority were entitled to take the subsidy and then to say: "We will not apply it to make good the deficiency in the housing "scheme account in respect of which it is paid, but as we have suffi- "cient taxed income from other sources out of which we can pay "such deficit, we will apply such taxed income in making good the "deficit and apply the subsidy to recoup so much of our taxed "income as we have applied for that purpose." If this method of dealing with the subsidy were justified the result, as pointed out by Mr. Justice Rowlatt in the *Hampstead* case, would be that, to the extent to which the Corporation deduct Income Tax from the interest paid by them on their housing loans out of their taxed income, they are recouping themselves the Income Tax paid on their taxed income, and thus escape from payment of any Income Tax upon the income so applied. In other words, the Corporation are using the machinery of Rule 19 for the purpose of collecting the Income Tax payable by the lenders, and are claiming to retain the Income Tax so collected for their own benefit. Such a proceeding is, in my opinion, contrary to both the letter and the spirit of Rules 19 and 21 of the All Schedules Rules. The Appellants, however, seek to justify their method of procedure by pointing out that since the passing of their local Act of 1913 they have only one fund, namely, the Borough Fund, into which all moneys payable to them, including both the profits from the trading departments and the Exchequer Subsidy, are paid, and out of which the general expenses of the Public Health Acts, including by virtue of Section 65 of the Housing of the Working Classes Act, 1890, the expenses incurred by them in the execution of that Act, are payable. Consequently they say that the interest on the housing loans is payable out of the Borough Fund, which is a mixed fund of taxed income and untaxed income, and so long as the taxed income is

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sufficient to meet the interest on the housing loans they can appropriate the payment of such interest to such taxed income. In support of this proposition the Corporation rely mainly upon the two following passages in the speech of Lord Atkinson in *Sugden* v. *The Leeds Corporation*, [1914] A.C., at pages 499 and 506 respectively. The first is(1): "When the interest and annuities so charged"—that is charged to Income Tax—"may with equal legality be paid "out of either the 'taxed' or 'untaxed' fund of the debtor, and the "taxed fund is adequate in amount to pay them, it will not be "necessary for the debtor, in order to entitle him to retain for his "own benefit the entire sum deducted, that he should have, in his "books or otherwise, specifically appropriated, or set apart, the "taxed fund to discharge this interest or these annuities, or to prove "that he had in fact paid them out of the 'taxed fund'. It will "suffice, should the two funds be blended and formed into a mixed "fund, that the interest and annuities charged should be paid out of "this mixed fund. They will, if so paid, be treated as having been "paid out of the taxed fund, especially where in the ordinary course "of business it should be applied for that purpose." The second is(2): "In my view, therefore, the right of the debtor who "has paid 'interest or annuities' brought into charge to the "Income Tax to retain for his own benefit the amount of the tax he "has deducted from his creditors depends upon whether he can "answer in the affirmative each of the two following questions:—(1) "Have the interest and annuities been, in fact, paid, or must they "in the circumstances of the case be taken to have been, in fact, "paid out of profits or gains brought into charge, *i.e.*, out of the "so-called 'taxed fund'? (2) Was it lawful to pay them out of the "fund? If either of these questions be answered in the negative he "must account to the revenue for the tax he has deducted. This "is, I think, the only workable rule which can in practice be applied." The Corporation also rely upon the case of the *Edinburgh Life Assurance Company* v. *The Lord Advocate*(3), [1910] A.C. 143, and on the case of *The Sterling Trust, Ltd.* v. *The Commissioners of Inland Revenue*, 12 T.C. 868, which affirmed the principle enunciated by Lord Atkinson in the passages which I have read from *Sugden's* case, namely, that where interest is properly payable out of a blended fund, consisting of taxed and untaxed income, the debtor may appropriate the payment of interest to the taxed income, notwithstanding that such taxed income has not been specially set apart for that purpose. In my judgment none of the cases so relied upon applies to the facts in this case. In my opinion the fallacy underlying the whole of the Appellants' argument consists in treating the Exchequer Subsidy as a receipt on general revenue account and not as a sum of money ear-marked to meet the particular loss. The Subsidy

(1) 6 T.C., at p. 259. (2) *Ibid.* at p. 264. (3) 5 T.C. 472.

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is paid solely in order to meet the loss on the housing scheme and for the express purpose of preventing that loss falling upon the general revenue of the Corporation. In the special circumstances of this case, therefore, I am of opinion that the interest on the housing loans is not, to use the expression employed by Lord Haldane in *Sugden's* case, [1914] A.C. at page 497, " operatively or effectively charged " upon the Borough Fund generally, but only upon the profits or gains of the housing scheme, the penny rate and the Exchequer Subsidy. The fact that in the event of the Corporation making default the lenders may have a charge upon the whole of the revenues of the Corporation, does not assist the Appellants' case—see the observations of Lord Macnaghten and Lord Davey in the *London County Council* case(1), [1901] A.C., at pages 33 and 46 respectively—nor have we in the present case to determine what might happen if the Corporation were to fail to carry out the obligation to forward to the Minister a certified copy of the housing account, and by reason of such default the Board were to decline to pay the Subsidy.

For these reasons, which are in substance the reasons given by Mr. Justice Rowlatt for his decision in the *Hampstead* case, I am of opinion that this appeal fails and should be dismissed with costs.

Sankey, L.J.—I agree.

In my view Rules 19 and 21 are not in the nature of substantive law imposing the tax, but rather in the nature of adjective law facilitating its collection. To ensure this object, they provide for the collection of the tax at the source and for preventing a person paying tax upon a sum which is not really his income—see Lord Gorell's remarks in the case of the *Edinburgh Life Assurance Company* v. *Lord Advocate*, [1910] A.C. at page 160. There, referring to Lord Macnaghten's judgment in the first *London County Council* case, he says (2): " . . . . he points out how they authorise a person who " has paid Income Tax on what is really not available income, " because it includes money which he has to pay over to some one " else, to deduct and retain the tax upon that payment." If that was the object of the Rules it would, in my opinion, be a strange result if they enabled a man to escape payment of tax upon profits in respect of which, apart from the Rules, he would have to pay. I quite agree, however, that the decisions show that this result may follow in certain cases, because of the taxpayer's right of appropriation. But in my view those cases are exceptional ones and whenever this question arises, the facts must be carefully and accurately ascertained before the law is applied to them. I doubt whether it is possible to lay down the principle which will be found to cover all the cases as they arise. Lord Atkinson in the case of *Sugden* v. *Leeds Corporation*, [1914] A.C. at page 499, formulated certain rules which sum up the results of the decisions up-to-date. Now I

(1) 4 T.C. 265.

(2) 5 T.C., at p. 489.

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especially refer to rule 3 which says (1) : " When the interest and " annuities so charged may with equal legality be paid out of either " the ' taxed ' or ' untaxed ' fund of the debtor, and the taxed fund " is adequate in amount to pay them, it will not be necessary for the " debtor, in order to entitle him to retain for his own benefit the " entire sum deducted, that he should have, in his books or other- " wise, specifically appropriated, or set apart, the taxed fund to " discharge this interest or these annuities, or to prove that he had " in fact paid them out of the ' taxed fund '. It will suffice, should " the two funds be blended and formed into a mixed fund, that the " interest and annuities charged should be paid out of this mixed " fund. They will, if so paid, be treated as having been paid out of " the taxed fund, especially where in the ordinary course of business " it should be applied for that purpose." I think that perhaps the learned Law Lord pronounced *dicta* in his speech which were not necessary to the decision of the case ; but accepting loyally his rule 3, it still remains to be considered : What is a mixed fund, and is the fund in this case, the Borough Fund, a mixed fund within the meaning of Lord Atkinson's rule ? This leads to the real points in the case which are, in my opinion, two : (1) What is the purpose and nature of the subsidy ? and (2) was the Borough Fund a mixed fund ? Upon those questions many facts have to be considered and weighed. I do not propose to examine all of them, but I wish to refer, before discussing some of them, to the remarks of the Lord Chancellor, Lord Haldane, in the *Leeds* case, at the end of his speech, [1914] A.C. at page 497 (2) : " My Lords, I am unable, after considera- " tion of these sections, to arrive at the conclusion of the Master " of the Rolls, that the interest on the loans is no longer presently " payable out of the net receipts of the particular undertakings to " which they belong, and that the net receipts cannot be earmarked " for that purpose. What may happen if there is default and a " question of ranking has arisen, we are not called on to determine. " In the meantime and pending that event I think that no other " income than the profits of the several undertakings and properties " is operatively and effectively charged with payment of the interest " on the various loans." What was the object of the subsidy ? It was earmarked for a particular purpose, namely, subject to certain regulations to pay the loss incurred by the Corporation in their housing scheme over and above that which could be met by a penny rate. Some of the facts to be taken into consideration are the following ones : (1) That the Borough Fund is one fund—see Paragraph 2 of the Case which says : " Since the passing of the " Local Government Act, 1913, the Corporation has had one Fund " only, the Borough Fund, and any deficiency in that Fund is met " by raising a Borough Rate "—now that is a fact to some extent in favour of the Corporation, and (2) That the Housing Loan was,

(1) 6 T.C., at p. 259. (2) 6 T.C., at p. 258.

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secured upon all the revenues of the Corporation—see Paragraph 4 of the Case which says : " In each case the loan was secured on all " the rates, revenues and property of the Corporation and in the " case of the Local Bonds, the rates, revenues and property of the " Corporation were expressed to include ' the grant to be paid by the " ' Government in aid of the Housing Scheme ' ". That might be an ultimate and not an operative charge. That to some extent may be a fact to be considered in favour of the Corporation. But personally I think not, in view of the words of Lord Haldane, to which I have already referred. Thirdly, it will be noted that in the Regulations of the Subsidy, the accounts are to be kept separate and the scheme is segregated. Upon those considerations I refer to two passages in the remarks of Mr. Justice Rowlatt in the case of *Dickson* v. *The Hampstead Borough Council*, 11 T.C. 691. The first is on page 702, where the learned Judge says : " The whole point here is " that the untaxed money which this Corporation gets should go to " supply the deficiency of the profits and gains which are here in " question, because it is calculated on the very footing that those " other profits and gains are not to be brought in. In other words, " what is given here is such a subsidy by the County Council as shall " prevent the charge of this interest on any other resources than " those resources which belong to the Housing Scheme from being " effective." Then he adds on page 703 : " If what is contended " for can be done here it would simply mean that the Corporation " would be enjoying the profits and gains of the electrical under- " taking to some extent free of Income Tax." Now I do not for the moment say that this is a question of fact upon which the decision of the Commissioners is final ; it is a question of mixed law and fact and of the proper legal inference to be drawn from the facts. No doubt the decided cases lay down valuable rules as to the interpretation of the various Sections. But as above stated, before applying the law, the facts must be accurately ascertained. On a consideration of all the facts of this case as to the purpose and nature of the subsidy and the regulations applicable to it, I have come to the conclusion that the Borough Fund in this case was not such a mixed fund as Lord Atkinson referred to in his third rule. I think that the *Hampstead* case is indistinguishable from the present case, that that case was rightly decided, and that this appeal should be dismissed.

The Corporation having appealed against this decision, the case came before the House of Lords (Lord Buckmaster, Viscounts Dunedin and Sumner and Lords Blanesburgh and Atkin) on the 9th, 10th and 12th December, 1929, when judgment was reserved. On the 27th February, 1930, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. H. P. Macmillan, K.C., Mr. A. M. Latter, K.C., and Mr. G. R. Blanco White appeared as Counsel for the Corporation, and the Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Buckmaster (read by Viscount Dunedin) :—

My Lords, the Attorney-General stated in his argument that this case could be confined in a nutshell. This may be true, but it is certain that when once liberated it assumed the dimensions of an Afrite and was equally difficult to recapture.

The issue arises out of an assessment to Income Tax of the Corporation of Birmingham, and for its explanation it is necessary to refer to a few facts which can be briefly stated.

The Corporation of Birmingham owns and successfully works certain public undertakings such as gas, water, electricity, tramways, etc., the profits from which are considerable; by virtue of some private Acts of Parliament all such profits are carried into one fund, known as the Borough Fund, into which also are paid moneys levied by rates.

The Housing and Town Planning Act, 1919, provided by Section 7 that in the case of a re-housing scheme carried out pursuant to its provisions by a local authority, the Local Government Board should, on certain conditions, all of which are satisfied in the present case, with the consent of the Treasury pay to the local authority, out of moneys provided by Parliament, " such part " of the loss as may be determined to be so payable under regula- " tions made by the Board with the approval of the Treasury, " subject to such conditions as may be prescribed by those " regulations."

The Section continued to define the scope of these regulations as follows : " Such regulations shall provide that the amount of any " annual payment to be made under this Section shall—(*a*) in the " case of a scheme carried out by a local authority, be determined " on the basis of the estimated annual loss resulting from the " carrying out of any scheme or schemes to which this Section " applies, subject to the deduction therefrom of a sum not exceeding " the estimated annual produce of a rate of one penny in the pound " levied in the area chargeable with the expenses of such scheme " or schemes; . . . ."

The regulations made under this Section threw on the local authority (*see* Article IV) the duty of keeping a separate account to be called " The Housing (Assisted Scheme) Accounts " including a separate revenue account to be called " The Housing (Assisted

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" Scheme) Revenue Account," and directed that such accounts should be prepared so that they should cause to be debited in each financial year " (*a*) the sums required for interest and repayment " of principal in respect of all moneys borrowed by them for the " purposes of the assisted scheme (including moneys borrowed for " the purchase of land which is approved by the Minister as part " of the assisted scheme) which in the opinion of the Minister " may properly be debited to the said account, ..."

The Corporation for the three years 1921–22, 1922–23 and 1923–24 prepared accounts on this basis showing serious deficits which were paid by the Exchequer, and it is in respect of the sums so paid that the claim for Income Tax has arisen.

The case of the Inland Revenue depends on the following facts : The Corporation raised loans to assist the scheme and in their accounts each year brought forward, as a debit item, the gross amount of the interest they had paid on such loans, a sum which in each case was larger than the ultimate deficit. In fact, of course, they paid the interest after deducting the tax and the Inland Revenue authorities contend that, measured on the amount of the deficit, the tax so retained must be paid over to them. The Commissioners, the learned judge who heard the appeal from their decision, and the Court of Appeal have all supported this contention.

The Corporation argue that these decisions are wrong because in their Borough Fund, out of which the payments for interest were made, there were large sums representing the profits on their undertakings which had already paid tax and that out of these sums they paid, as they were entitled to do, the interest on the loans. By this means the Income Tax in respect of the interest on the loans was discharged because the moneys used for its payment had already paid tax under Schedule D. They say therefore that they thus properly paid the gross amount of the interest and were entitled to bring in the full sum as a debit in their accounts.

The right of the Corporation to pay interest on loans out of taxed profits and to deduct the tax in so doing is established by authorities that cannot be disputed and need not be discussed; for the curious in such matters the cases of *The London County Council* v. *The Attorney-General*(1), [1901] A.C. 26; *The Attorney-General* v. *The London County Council*(2), [1907] A.C. 131, and *Sugden* v. *Leeds Corporation*(3), [1914] A.C. 483, may be referred to.

But admitting this does not appear to me to solve the difficulty. The persons to whom the interest was payable are the persons whose income is to be taxed. If paid without deduction they could

(1) 4 T.C. 265. (2) 5 T.C. 242. (3) 6 T.C. 211.

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be assessed for the amount. If, however, paid out of profits taxed under Schedule D the debtor can get a full discharge by paying the sum less tax; in such a case it is assumed he has paid the tax on behalf of his creditor and the creditor, where entitled to abatement, can recover on this hypothesis. In the present case, if the accounts had brought in the actual sum paid no question would have arisen, but the accounts were prepared for a department of the Crown to whom, acting through another department, the tax was payable, and, so regarded were prepared upon the footing that the tax was unpaid, with the result that either the creditor was still liable for the tax or that, if it had been deducted, it was retained to satisfy his liability in that respect.

The first hypothesis was not accurate and the other is the only one tenable.

The position may be put in other words. The Corporation by the accounts put forward for the purpose of obtaining and measuring the subsidy, represented that the sum required for interest was the gross sum. If the interest was paid out of moneys already taxed this was not the sum required; they only required the lower figure. The statement therefore was equivalent to saying that the interest had not been paid out of moneys which had already paid tax. They cannot therefore now set up the contrary, but if not so paid the tax is still undischarged and it is in their hands for payment.

It is unnecessary to dwell on the results of the other contention, but it would appear, and was indeed accepted, that if it were correct the effect of the Act, the regulations, and the circumstances was such as might cause part of the sum provided by the subsidy to be used in relief of the general rates.

No doubt such conclusion might be contained in words aptly devised for the purpose, but it can hardly have been the intention of the Act and I can find nothing in this case to point to the conclusion that it was its consequence.

Viscount Sumner (read by Lord Warrington of Clyffe) :—

My Lords, if the interest on the Housing Bonds now in question was not payable or not wholly payable by the Appellants out of profits or gains brought into charge, they were bound to deduct the tax and thereupon they owed the sum so deducted to the Crown. If on the other hand it was so payable, then, by reason of having paid it out of profits already brought into charge, the Appellants would be entitled to keep the sum deducted. They did deduct it as tax-gatherers for the Inland Revenue and they did keep it for themselves. The first question therefore is whether the interest was payable out of their taxed profits; the second whether they did so pay it. If it was not so payable, their present claim does not arise;

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if it was, but they did not so pay it, the obligation to deduct and to account for the sum deducted remains, for otherwise the interest would escape tax altogether. So far Rules 19 and 21 of the All Schedules Rules govern the matter.

The Appellants make their recurring payments out of their statutory General Fund, which is a common account in and out for all their receipts and payments. Enough money, received as taxable profits and so charged, had been previously paid in to enable the interest payments in question to be made out of it, but of course no actual destination of particular incoming sums to the satisfaction of particular payments out was feasible. The Appellants claim to be now entitled to treat their payment of interest as if they had, in fact, earmarked enough of their chargeable profits, when received into the General Fund, to satisfy the payments of interest falling due and to be thereafter paid. A series of decisions in your Lordships' House has laid down, not it is true in any case precisely the same as this, the conditions under which payments, neutrally made in fact, may be deemed to have been so made for Income Tax purposes and the effect of this assumption upon the disposal of the sums deducted from the payments of interest. I will spare your Lordships any citation of them, but they lay down a limitation on the right to do this, depending on its being lawful or legitimate to have made the payments out of such chargeable profits, if this had actually been done. This makes it necessary to consider the Housing Scheme, the Housing and Town Planning Act, 1919, under which the Scheme was prepared, and the regulations duly made thereunder.

The Appellants contend that there is nothing in this Act to defeat their right as generally laid down in the above decisions. It is true that no express words take the particular right away and it is their argument that nothing less than express words will do; but, alternatively, they say also that there is no inconsistency between their enjoyment of this right and the scheme, provisions and purpose of the legislation in question. The scheme seems to contemplate that the houses, when built, may not and probably never will pay their way. There is no provision at any rate for such an event on the face of the Act. On the other hand, careful provision is made as to the extent of the Ministry's liability in terms which are vital on this appeal. The obligation under which a subvention is to be paid out of moneys to be provided by Parliament, is contained in Section 7. If it appears that the carrying out of the scheme " has resulted or is likely to result in a loss," the Board is to pay such part of the loss as may be determined to be so payable under regulations made by the Board and these regulations are required to provide that the amount of any annual payment shall be " determined on the basis of the estimated annual loss

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" resulting from the carrying out " of the scheme, " subject to " the deduction therefrom of a sum not exceeding the estimated " annual produce of a rate of one penny in the pound levied in the " area chargeable " and in the regulations which were made under the Act, Article IV bound the Appellants to keep separate accounts to be called " The Housing (Assisted Scheme) Accounts," including a separate revenue account to be called " The Housing (Assisted Scheme) Revenue Account." The form of this account was prescribed, the credit side containing the proceeds of the penny rate and the rents collected with some smaller matters, and the debit side " the sums required for interest and repayment of " principal in respect of all moneys borrowed " by the Appellants for the purposes of this scheme, the rates, taxes and rents payable by them in respect of any land or houses acquired, and sundry items of expenditure further specified.

My Lords, I think the scheme prescribed is clear. The housing undertaking is to be carried on by the Appellants, though under Ministerial supervision, and such efforts as there may be to make it pay must be made by them. The money required to finance the scheme is to be borrowed on their credit, but when the results of working are gathered in, they are to pay in the proceeds of the penny rate and the subsidy does the rest. As it seems to me, this express contribution out of public moneys by an actual subsidy must be exclusive of any implied right to lay hands on other public moneys by way of further contribution in the form of a notional attribution of a particular part of their own undivided fund to the payment of this particular interest charge. The undertaking is at the risk of two parties, of whom the Ministry which pays the subsidy bears the less limited share, whether or not it eventually bears the greater amount of the loss, and the loss is one ascertained in the prescribed way upon a particular undertaking, which is their joint concern, and is isolated from all other concerns by keeping the prescribed accounts separate from all other undertakings and concerns of the Appellants. It is the amount required for interest and for repayment of principal that is to be debited, that is, the interest in full and not the sum actually paid to the bondholders, when adjusted to discharge what is in substance the bondholders' debt to the Inland Revenue. The regulations are not concerned with the Appellants' functions as tax-gatherers, nor do they make any provision for the possible case of payment of the money in a manner specially beneficial to themselves. Suppose that the small incomings and the penny rate were just to balance the items on the other side. Upon the scheme there would then be no subsidy payable, but on the Appellants' contention if there was an apparent loss, due to and not exceeding the amount of the tax deducted, the subsidy would have to be called on to the extent of that loss, and yet the Crown would not receive the sums so deducted. I can

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find nothing in the Act consistent with this, yet this would be the result if this separate undertaking is to be influenced by rights which arise, partly under fiscal legislation that has nothing to do with the Housing Scheme, and partly under the mode in which, again under wholly independent legislation, the Corporation keeps its accounts.

My Lords, I put aside two matters of detail which, as I think, cannot affect this wide distinction. In practice, the Corporation pays the interest when due and subsequently completes the Housing Account and claims the subsidy over. I think, as Mr. Justice Rowlatt thought, that this is mere financial accommodation which cannot affect the case. Further, the accounts when prepared have to pass certain examinations and audits for which the Act provides, and these accounts did so pass without objection. I can find nothing which either by Statute or Common Law ousts the Crown from its right to the tax, if the right is otherwise complete. I am further of opinion that the comprehensive form in which the Corporation's bonds are expressed is not sufficient to make the interest an effective charge on the Corporation's general incomings within the cases that have been cited.

My Lords, I think that the whole scheme of the Housing Act, under which the Treasury participate with the Corporation in the ultimate outlay on working the scheme upon a method of calculation which involves a debit of the gross interest paid, is inconsistent with the application of the Income Tax Rules which the Appellants assert, and it is therefore unlawful, in the sense of being negatived by the whole tenor of the Act, to retain the tax deducted. It is true that no words in the Housing Act expressly forbid it, for the settlement of other matters and accounts arising between the Corporation and the Inland Revenue was not within the purview of the Housing Act, but I know of no authority for saying that this right of attribution can be defeated only by express words or for excluding from the exceptions out of this privilege something that is contrary to the general intention of a Statute.

My Lords, it is true that under the All Schedules Rules in question the tax must be paid as well as payable, but I hesitate in this case to say that it has not been paid within the meaning of the Rule, if the right of attribution referred to in your Lordships' decisions is applicable to the case. Neither as a matter of handing over identical currency nor of making specific appropriations in the books beforehand has there been any actual payment of the interest out of profits, but the decisions, I think, clearly contemplate that a mere attribution *ex post facto* as part of a contention as to their rights will serve the Corporation's turn without even an ultimate attribution in their books. Nor again do I see why the form of the

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Housing Accounts in any way closes the Corporation's mouth. They have not made a misrepresentation, for they have only made an entry which the regulation required them to make, nor do I suppose that anyone ever was or ever was meant to be hoodwinked as to the facts. The question I think turns upon a claim of right. One Statute directed the Corporation to deduct the interest and in fact they did so; another directed them to bring the interest item into account at the gross amount, and so they did. Then came the present question—a separate one as I venture to think. Can they successfully assert that they must be deemed to have paid the interest out of profits already brought into charge? In view of the Housing Act, I do not think that they must be deemed to have done so, for that neither squares with the statutory relations resulting from this Act, nor is consistent with any tolerable working of it. I think that the Appeal should be dismissed.

Lord Atkin.—My Lords, I agree that this appeal should be dismissed, but I desire to add a few words to define my reasons for coming to this decision. The case turns upon the words of Rule 19 and the amended Rule 21 of the General Rules in the Income Tax Act, 1918. I need not read them; their legal effect on such a claim as this is to give rise to two questions which I will state as formulated by Lord Atkinson in *Sugden* v. *Leeds Corporation*(1), [1914] A.C. at page 506. " (1) Have the interest and the annuities " been, in fact, paid, or must they, in the circumstances of the case, " be taken to have been, in fact, paid out of ' profits or gains " ' brought into charge ', *i.e.*, out of the so-called ' taxed fund '? " (2) Was it lawful to pay them out of that fund? "

Mr. Justice Rowlatt and the members of the Court of Appeal have, as it appears, answered both questions in the negative; but they have rather stressed the second question. They have accepted the contention of the Crown that the effect of the Housing Act and the regulations made thereunder was to create a fund of which the subsidy formed an integral part; and that the payment of interest could only be made out of that fund. Alternatively, it was said that the subsidy was " earmarked " or appropriated by Statute to the payment of interest so that it was unlawful to use it for any other purpose. My Lords, I am not prepared to accept either view. I think that there was no fund created—certainly not actually, for by law there could be no fund except the Borough Fund, nor notionally, for the account to which so much importance is attached is an account and not a fund; a calculation and not a source of payment. In fact, the loss was incurred and in practice had to be incurred before the amount of the subsidy could even be ascertained, much less paid. Nor was there any earmarking. The

(1) 6 T.C. 211.

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statutory power to grant the subsidy is in the Housing, Town Planning, etc., Act, 1919, Section 7 (1), which omitting immaterial words, provides: " If it appears to the Local Government Board " that the carrying out by a local authority . . . . " of any approved scheme " has resulted or is likely to result in a loss, " the Board shall, ... pay . . . . such part of the loss as may " be determined to be payable under regulations ". Such an obligation is common among individuals. A promises B expressly or impliedly that if B will embark upon a particular venture A will repay him the whole or part of his loss. In ordinary circumstances, no legal obligation rests upon B to apply the money so paid to him by A in any particular way. The result and the intended result is that B's own resources, from which he has met or is bound to meet the loss, shall be restored to the extent of the agreed payment. I see no reason for imposing any further obligation upon the parties in the present case; in view of the terms of payment in practice an obligation to pay only out of the subsidy seems impossible to carry out. If the case therefore turned only on the second question I should have come to the conclusion that it was lawful for the Corporation to pay out of their taxed funds. But the first question remains, did they in fact do so? As it was lawful for them to pay out of their taxed funds, so it was lawful for them to pay out of their untaxed funds. In both cases they must deduct the income tax; in the former case they could put it in their pocket, in the latter case they must account to the Crown. In the former case their loss caused by payment of interest would be limited to the net amount paid; in the latter case it would extend to the full amount. But in preparing the account for the subsidy under the regulations they return the amount required for interest as the full amount without deduction; and they give no credit for and make no reference to the deduction. The account is prepared for the purpose of ascertaining the loss on the Housing Scheme, and in these circumstances it must, I think, be taken that the Corporation are representing that they are out of pocket the full amount of the interest, or in other words, that they have no right to keep for themselves the Income Tax deducted. This can only be on the footing that they have in fact paid the interest out of their untaxed funds. I do not think that it is necessary to involve the principles of estoppel even if the necessary conditions for an estoppel exist, as to which I say nothing. The effect of the form of the account, charging the gross amount of interest as an element of loss intended to result in receipt of a subsidy and followed by the actual receipt of the money based upon the representations contained in it, is to afford to my mind conclusive proof that the Corporation in fact paid the interest out of untaxed funds. If so, the assessments in question were correctly made. I think therefore that their appeal should be dismissed.

Viscount Dunedin.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Sumner, which has just been read; it exactly expresses the view I have formed of the case, and I concur in it. My noble and learned friend Lord Blanesburgh desires me to say that he concurs in the judgments just delivered.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and this appeal dismissed with costs.

The Contents have it.

[Solicitors:—Messrs. Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham; the Solicitor of Inland Revenue.]