VOL. XXII—PART IV

No. 1089—High Court of Justice (King's Bench Division)—18th, 24th, 25th and 31st July, 1935

Court of Appeal—25th, 26th, 27th and 28th January, 11th February and 4th March, 1937

House of Lords—7th, 8th, 10th and 11th February and 17th March, 1938

(1) National Mortgage & Agency Company of New Zealand, Ltd. *v.* Commissioners of Inland Revenue[1]

et e contra

(2) Commissioners of Inland Revenue *v.* National Mortgage & Agency Company of New Zealand, Ltd.

et e contra

Income Tax—Relief in respect of Dominion Income Tax—Finance Act, 1920 (10 & 11 *Geo.* V, *c.* 18), *Section* 27.

Claims to relief from United Kingdom Income Tax in respect of the payment of Dominion Income Tax were made by a finance company, incorporated and controlled in the United Kingdom. The Company's business mainly consisted of lending money in New Zealand on mortgages and short loans, but it also owned its business premises in New Zealand, some New Zealand War Loan, preference shares in a New Zealand company and investments in the United Kingdom the income from which was taxed by deduction at the source. The Company had from time to time issued debentures secured upon the uncalled portion of its capital. In computing the amount of the Company's liability to United Kingdom Income Tax under Case I *of Schedule D, the New Zealand War Loan interest and the dividends from the New Zealand company were included in its trade profits, and no deduction was allowed for the debenture interest paid.*

In computing the Company's assessable income for the purposes of New Zealand Income Tax for the corresponding years, deductions had been allowed in respect of (a) *the interest on so much of the debenture capital as had been employed in the production of the*

[1] Reported (C.A.) [1937] 1 K.B. 685; (H.L.) [1938] A.C. 524.

assessable income, and (b) *five per cent. of the capital value of the land owned by the Company and used for the purpose of its business. The interest on the New Zealand War Loan, the dividends from the New Zealand company and the income arising in the United Kingdom were also excluded from the assessable income. The New Zealand company, X, from which the claimant received preference dividends, had been assessed to New Zealand Income Tax on its profits, but did not deduct New Zealand tax from the dividends. The Company was assessed as agent in New Zealand for its debenture-holders for the years in question in respect of the debenture interest applicable to New Zealand, and charged to tax thereon at the rates appropriate to the incomes of the respective debenture-holders. As, however, the debenture interest was paid under a contract made in the United Kingdom, the Company had no power to deduct, and did not in fact deduct, any New Zealand tax on payment of the interest.*

The Company claimed (a) *that the relief in respect of Dominion Income Tax to which it was entitled under Section 27 of the Finance Act, 1920, should be based on the amount of the income as computed for the purpose of United Kingdom Income Tax, and that the method by which the New Zealand assessment was computed and the deductions allowed in arriving at that assessment (including* (i) *the debenture interest applicable to New Zealand,* (ii) *the five per cent. allowance in respect of the land used for its business there, and* (iii) *the New Zealand War Loan interest) were immaterial;* (b) *that, as X had paid New Zealand tax on the profits out of which its preference dividends were paid, the Company should be allowed relief on those dividends, and* (c) *alternatively (as regards the debenture interest) that as it had paid tax in New Zealand as agent for its debenture-holders and had been obliged to bear this tax it was entitled to relief in respect of the amount of tax so paid.*

[*The Company's claim in so far as it related to the New Zealand War Loan interest and the preference dividends from the New Zealand company was abandoned in the course of the proceedings.*]

Held, *that, for the purpose of ascertaining the amount on which the Company was entitled to relief from United Kingdom Income Tax under Section 27, Finance Act, 1920, the amount of the income from the Company's business as computed for the purpose of United Kingdom Income Tax should be compared with the amount of such income as computed for the purposes of New Zealand Income Tax, excluding only items of income not common to both assessments: that relief was due upon the smaller of these two amounts, without further adjustment by reference to particular allowances or deductions made in ascertaining the statutory incomes for the purpose of*

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the respective taxes; and that in ascertaining the amount on which relief was due to the Company under Section 27, Finance Act, 1920, the amount of the assessment made upon the Company in New Zealand as agent for the debenture-holders in respect of debenture interest should be taken into account.

CASE

Stated under the Finance Act, 1921, Section 28, 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 8th December, 1931, the National Mortgage & Agency Company of New Zealand, Limited, hereinafter called " the Company ", claimed relief in respect of New Zealand Income Tax under the provisions of Section 27 of the Finance Act, 1920, for the years ended the 5th April, 1925, to the 5th April, 1931. The claims for the two years to 5th April, 1929, were alone dealt with by us, it being agreed that the decision upon the claims for these years should be applied to the other years.

2. The Company is a company incorporated in England under the Companies' Acts, with an authorised capital of £1,500,000 in 125,000 ordinary shares of £10 each and 250,000 preference shares of £1 each. At the material times the issued capital consisted of 125,000 ordinary shares on each of which £2 had been paid up.

The Company has from time to time issued debentures at varying rates of interest, secured upon the uncalled capital of the Company. The amount of debentures outstanding at the 30th September, 1927, was £782,275 9*s*. 9*d*.

A copy, marked " A ", of the Memorandum and Articles of Association of the Company, a copy, marked " B ", of the debenture trust deed, and a specimen copy, marked " C ", of the debentures are annexed hereto and form part of this Case(1).

3. The Company, which is controlled in the United Kingdom, is a finance company, and its business mainly consists in lending money in New Zealand on mortgages and short loans, generally secured on farm chattels and on land. By far the greater part of the Company's income arises in New Zealand, chiefly from the interest on these loans.

The Company owns some real property in New Zealand, being premises occupied by it for the purposes of its business. It also has an investment in New Zealand War Loan, investments in ordinary

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(1) Not included in the present print.

and preference shares in New Zealand companies, and investments in the United Kingdom the income from which is subject to deduction of United Kingdom Income Tax at the source.

Copies, marked " D.1 " and " D.2 ", of the accounts of the Company for the two years ended the 30th September, 1926, and 30th September, 1927, are annexed hereto and form part of this Case(1).

4. The Company is assessed to Income Tax in the United Kingdom under Schedule D and in computing the amount of the liability under Case I of that Schedule the debenture interest paid by the Company is not allowed as a deduction from the profits, and is consequently included in the assessment to the United Kingdom tax.

5. Income Tax is imposed in New Zealand by the Land and Income Tax Act, 1923, of which a copy is annexed, marked " J ", and may be referred to for the purposes of this Case(1).

The following are the material sections of the Act :—

Section 2.—" ' Assessable income ' means income of any " kind which is not exempted from income-tax otherwise than " by way of a ' special exemption ' expressly authorized as " such by this Act.

" ' Taxable income ' means the residue of assessable income " after deducting the amount of all special exemptions to " which the taxpayer is entitled ".

Section 72.—" (1.) Subject to the provisions of this Act, " there shall be levied and paid for the use of His Majesty in " and for the year commencing on the first day of April, " nineteen hundred and twenty-four, and in and for each year " thereafter, a tax herein referred to as income-tax.

" (2.) Subject to the provisions of this Act, such tax shall " be payable by every person on all income derived by him " during the year preceding the year in and for which the tax " is payable.

" (3.) The year in which income is so derived is in this " Act referred to as ' the income year ', and the year in and " for which income-tax is payable is in this Act referred to as " ' the year of assessment '."

Section 73.—" (1.) Income-tax shall be assessed and levied " on the taxable income of every taxpayer at such rate or rates " as may be fixed from time to time by Acts to be passed for " that purpose.

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(1) Not included in the present print.

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" (2.) The Act by which the rate of income-tax is so fixed " for any year is in this Act referred to as ' the annual taxing " ' Act '."

Section 74.—" (1.) From the yearly assessable income of " every person, other than a company or an absentee, there " shall, for the purpose of assessing income-tax on that income, " be deducted by way of special exemption the sum of three " hundred pounds, diminished at the rate of one pound for " every pound of the excess of that income over six hundred " pounds, so as to leave no deduction under this section when " the yearly assessable income amounts to or exceeds nine " hundred pounds.

" (2.) ' Absentee ' means, in this Part of this Act, a person " whose home has not been in New Zealand during any part of " the income year . . . "

Section 78.—" The following incomes shall be exempt from " taxation :— . . . .

" (*g*.) Dividends and other profits derived from shares or " other rights of membership in companies, other than com- " panies which are exempt from income-tax :

" (*h*.) Income derived by a person who is not (within the " meaning of this Part of this Act) resident in New Zealand, " from stock or debentures which have been issued by the " Government of New Zealand, or by any local or public " authority, or by the Public Trustee acting as the agent of a " land-settlement association under the Land Settlement " Finance Act, 1909, and the interest on which is payable out " of New Zealand :

" (*i*.) Income derived by the trustees of a superannuation " fund . . . . .

" (*m*.) Income expressly exempted from income-tax by any " other Act to the extent of the exemption so provided."

Section 79.—(1.) " Without in any way limiting the mean- " ing of the term, the assessable income of any person shall " for the purposes of this Act be deemed to include, save so " far as express provision is made in this Act to the " contrary, ...

" (*g*.) All interest, dividends, annuities, and pensions ".

Section 80.—(1.) " In calculating the assessable income " derived by any person from any source no deduction shall be " made in respect of any of the following sums or " matters :— . . . .

" (*h.*) Interest, except so far as the Commissioner is " satisfied that it is payable on capital employed in the " production of the assessable income."

Section 83.—(1.) " When any land in which a taxpayer " owns an interest, or any portion of such land, has throughout " the income year or any portion thereof been actually used " by the taxpayer exclusively for the purposes of his business " or for the purpose of deriving rent, royalties, or other profits " therefrom, he shall be entitled, by way of special exemption, " to deduct from the assessable income derived by him during " the income year, so far as derived from such use of the land, " a sum computed in respect of the period of such use at the " rate of five per centum per annum on the capital value for " the time being of his interest in the land or in the portion " thereof so actually used by him, as the case may be, and " income-tax shall be assessed and payable accordingly."

Section 84.—(3.) " Subject to the provisions of this Act, " no income which is neither derived from New Zealand nor " derived by a person then resident in New Zealand shall be " assessable for income-tax."

Section 99.—(2.) " If the Commissioner is satisfied with " respect to the holder of any debenture or debentures issued " by any local or public authority or by any company that the " aggregate amount of income-tax paid or payable by or on " behalf of the debenture-holder (including the tax paid in " respect of interest on debentures) exceeds the amount of tax " that would have been payable by him if the interest received " by him on those debentures had formed part of his taxable " income, the Commissioner shall, on application by the tax- " payer, pay to him the amount of the excess."

Section 116.—" (1.) Save as otherwise provided in the next " succeeding section, every company which has issued deben- " tures, whether charged on the property of the company or " not, shall for the purposes of this Act be the agent of all " debenture-holders, whether absentees or not, in respect of " all income derived by them from those debentures, and shall " make returns and be assessable and liable for income-tax on " that income accordingly.

" (2.) No deduction by way of special exemption or other- " wise shall be allowed to the company as such agent, or to " any debenture-holders, in respect of the income so derived " from debentures.

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" (3.) Income so derived by debenture-holders in companies " shall be assessable and chargeable with income-tax separately " from income derived by the debenture-holders from other " sources, and at the rate prescribed by the annual taxing Act " as appropriate to income so derived.

" (4.) Income derived from debentures held by a banking " company shall not be liable to income-tax under this " section."

Section 130.—" When an agent pays any tax he may " recover the amount so paid from his principal, or may deduct " the amount from any moneys in his hands belonging or " payable to his principal."

Section 170.—" Every contract, agreement, or arrangement " made or entered into, whether before or after the coming " into operation of this Act, shall be absolutely void in so far " as, directly or indirectly, it has or purports to have the " purpose or effect of in any way altering the incidence of " land-tax or income-tax, or relieving any person from his " liability to pay such tax."

Section 171.—" (1.) Nothing in the last preceding section " shall be so construed as to render void any contract, agree- " ment, or arrangement made or entered into by any company " (whether before or after the coming into operation of this " Act) to the effect that the interest on any debentures issued " by that company shall be free of income-tax; and all such " contracts, agreements, and arrangements are hereby declared " to be valid and effective in accordance with this section " unless the company is expressly or impliedly prohibited, by " its memorandum or articles of association, from making or " entering into any such contract, agreement, or arrangement.

" (2.) Where any debentures issued by a company purport " to be issued free of income-tax the company shall be liable " for the payment of the income-tax payable in respect thereof, " and the debenture-holders shall be entitled to receive the full " amount of interest payable pursuant to the debentures."

6. In computing the assessable income of the Company for the New Zealand tax a deduction had been allowed under Section 80 (1.) (*h.*) for the interest on so much of the debenture capital as had been employed in the production of the assessable income. The amount of interest so deducted was £37,861 for the year to 30th September, 1926, and £34,779 for the year to 30th September, 1927, out of the total debenture interest paid by the Company of £40,261 and £39,322 for those years. There were also deducted

under Section 83 (1.) the sums of £9,999 and £9,998 by way of special exemption as representing 5% of the value of the land owned by the Company and used by it for the purpose of the business.

The dividends from New Zealand companies, the interest on New Zealand War Loan and certain income earned in London were excluded from the assessable income.

Copies, marked " E.1 " and " E.2 ", of the computations of assessable income in New Zealand are annexed hereto and form part of this Case(1).

The computation for the year 1927–28 resulted in a loss, and no New Zealand Income Tax was payable direct by the Company for that year in respect of its assessable income.

The computation for the year 1928–29 showed an assessable income of £26,592 on which the New Zealand Income Tax payable was £5,983 4*s*. 0*d*.

A copy, marked " E.3 ", of the notice issued to the Company by the Land and Income Tax Department in respect of the year 1928–29 is annexed hereto and forms part of this Case(1).

The computation of the Company's profits for assessment to United Kingdom Income Tax differs in several other material respects, *e.g.*, in the allowance for bad debts, from the computation for the purposes of New Zealand Income Tax, as will be seen on comparison of the annexed documents, " F.1 " and " F.2 "(1), with the computations shown in documents " E.1 " and " E.2 ".

7. The Company's investments in New Zealand companies consisted almost entirely of ordinary and preference shares in a company which may be referred to as X. X was assessed to New Zealand Income Tax on its profits, and the dividends paid to the Company were not again assessed to New Zealand Income Tax in the Company's hands. No New Zealand tax was deducted by X from the preference dividends and the Crown contended that the Company had not paid New Zealand tax in respect of these preference dividends. It was admitted that the Company had paid New Zealand tax on the dividends on the ordinary shares which it held in X.

Copies, marked " E.4 " and " E.5 ", of certificates of the tax paid by X, are annexed hereto and form part of this Case(1).

8. The Company was also assessed as agent in New Zealand for its debenture-holders for each of the two years in respect of the debenture interest applicable to New Zealand.

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(1) Not included in the present print.

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Copies, marked " G.1 " and " G.4 ", of the computations of the Company's liability in respect of this debenture interest and of the tax chargeable thereon are annexed hereto and form part of this Case(1).

The tax was in the first place charged on the Company at the full rates, as shown by the annexed copies, marked " G.2 " and " G.5 " of the notices of assessment(1), but was subsequently reduced to the rates appropriate to the respective debenture-holders as shown by the revised notices of assessment, dated the 20th August, 1929, copies, marked " G.3 " and " G.6", of which are also annexed(1).

9. The interest on the debentures being payable under a contract made in the United Kingdom, the Company had no power to deduct and did not in fact deduct any New Zealand Income Tax therefrom, notwithstanding that it had been assessed to and had paid that tax as agent for the debenture-holders.

10. Copies, marked " H.1 " and " H.2 ", of the computations made on behalf of the Company of the relief which it claimed to be due in respect of New Zealand Income Tax and a copy, marked " K ", of the computations made on behalf of the Commissioners of Inland Revenue showing no relief to be due are annexed hereto and form part of this Case(1).

From these computations it will be seen that the items in dispute were :—

(1) The debenture interest applicable to New Zealand.

(2) The allowance of 5% on the value of the land owned by the Company and used by it for the purposes of its business.

(3) The dividends on preference shares of X from which no New Zealand tax had been deducted.

(4) The New Zealand War Loan interest.

The Crown admitted the claim to relief in respect of the dividends on the ordinary shares of X.

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

(1) That the relief must be based on the amount of the income as computed for the purpose of the United Kingdom tax, and that the method by which the New Zealand assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

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(1) Not included in the present print.

(2) That accordingly the fact that the debenture interest applicable to New Zealand and the allowance of 5% on the land owned by the Company and used in its business were allowed as deductions in computing the New Zealand assessment should not be taken into account, and the relief should be allowed on the United Kingdom figures without any deduction for these two items.

(3) That X having paid New Zealand Income Tax on the profits out of which its preference dividends were paid, the Company should be allowed relief on those dividends.

(4) Alternatively (as regards the debenture interest), the Company having paid New Zealand tax thereon as agent for the debenture-holders and having been obliged to bear this tax was entitled to relief in respect of the tax so paid.

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

(1) That the Company had not paid any New Zealand tax direct for 1927–28 in respect of its assessable income.

(2) That the New Zealand War Loan interest, the debenture interest and the allowance of 5% on the value of the land had been specifically excluded and exempted from the subjects of taxation in New Zealand and had not borne tax in New Zealand as part of the Company's profits and that consequently no relief was due thereon.

(3) That no New Zealand tax had been paid by the Company on the preference dividends from X, and therefore no relief was due thereon.

(4) That, on the alternative contention, the Company was only assessed to tax on the debenture interest as agents for the debenture-holders, and this tax was not paid by the Company on its income.

13. The cases of :—

Rolls Royce, Ltd. v. *Short*, 10 T.C. 59,

Commissioners of Inland Revenue v. *Dalgety & Co., Ltd.*, 15 T.C. 216, and

Ward & Co., Ltd. v. *Commissioner of Taxes*, [1923] A.C. 145,

were referred to.

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14. Having considered the facts and arguments we gave the following interim decision :—

" The main question in this case is on what part or parts of " the income of the Appellant Company has New Zealand " Income Tax been paid.

" The Appellant Company contends that it has paid New " Zealand Income Tax on the whole of its profits arising from " its business in New Zealand, while the Crown contends that " it has only paid New Zealand Income Tax on its profits from " its business in New Zealand less the profits applied in pay- " ment of its debenture interest for which allowance has " been made in calculating its business profits under " Section 80 (1.) (*h.*) of the Land and Income Tax Act, 1923.

" It was argued on behalf of the Appellant Company that " the whole of the New Zealand income was income from one " source, and that in determining the part of the income on " which relief is allowable regard must be had to the source " from which it is derived and not to its amount. In support " of this argument reliance was placed on a dictum of " Warrington, L.J. in the case of *Rolls Royce, Ltd.* v. " *Short*(1). It must, however, be observed that in that case " the Court was only concerned with the English income as a " whole and Indian income as a whole, and no question arose " as to whether Indian Income Tax had been paid on different " parts of the Indian income.

" It seems clear to us that where under Dominion Income " Tax law different parts of the Dominion income are separately " treated as regards the liability to Dominion Income Tax, we " are bound to discriminate between those different parts and " see whether Dominion Income Tax has been paid in respect " of each of those parts or not.

" In this case the income applied in payment of the deben- " ture interest for which allowance has been made has been " specifically excluded from the profits on which the Appellant " Company has been assessed to New Zealand Income Tax, and " consequently no New Zealand Income Tax has been in fact " paid in respect of the profits so applied under the assessments " made on the Appellant Company in respect of its business " profits.

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(1) 10 T.C. 59, at pp. 70/72.

" On the other hand the Appellant Company has been " separately assessed as agent for its debenture-holders in " respect of the debenture interest paid by it, and has paid the " tax so charged at the rates appropriate to the respective " debenture-holders' incomes. The Appellant Company has " not been able to re-imburse itself by deduction of this tax " from its debenture-holders.

" In view of the specific separation of the income applied in " payment of the debenture interest for which allowance has " been made from the rest of the income, we are of opinion that " the income so applied must be regarded as a separate part of " the Appellant Company's income.

" We hold, therefore, that the Appellant Company is entitled " to relief in respect of the New Zealand Income Tax on the " profits of its business less the profits applied in payment of " debenture interest for which allowance has been made, but " that it is also entitled to relief in respect of the Income Tax " which it has paid on the debenture interest at the rates appro- " priate to the respective incomes of the debenture-holders, " such interest being treated as its income under the decision " in the case of the *Commissioners of Inland Revenue* v. " *Dalgety & Co., Ltd.*(1).

" There are three subsidiary questions to be dealt with :—

" (*a*) The income from New Zealand War Loan is " specifically exempted from New Zealand Income Tax " under Section 78 (*h*) of the Land and Income Tax Act, " 1923. This is clearly a separate part of the Appellant " Company's income and as no New Zealand Income Tax " has been paid in respect of it, the Appellant Company is " not entitled to any relief.

" (*b*) 5% of the capital value of the land used " by the Appellant Company for the purposes of its business " or deriving profits therefrom has been allowed as a deduc- " tion by way of special exemption in computing the " assessable income of the Appellant Company for the " purposes of the New Zealand Income Tax. A part of " the profits equal to 5% of the capital value of the " land has thus been excluded from the profits in respect of " which New Zealand Income Tax has been charged, and no " New Zealand Income Tax has been paid in respect of this " part of its profits. We hold, therefore, that no relief is " due in respect of this part of its profits.

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(1) 15 T.C. 216.

" (*c*) As regards the dividends on the preference " shares which the Appellant Company holds in X, " although New Zealand Income Tax has been paid by X on " its profits out of which those dividends have been paid, no " New Zealand Income Tax has been paid or suffered by the " Appellant Company on those dividends. We hold, there- " fore, that no relief is due to the Appellant Company on " those dividends.

" On the figures being agreed we will give our final " decision ".

15. The parties having been unable to come to an agreement as to the method of computation of the relief to be allowed in respect of the New Zealand Income Tax which the Company had paid on the debenture interest, we held a further meeting on the 8th November, 1932, to determine this point.

16. Two questions emerged :—

(1) As stated in paragraph 8 of this Case the Company had paid New Zealand Income Tax on the debenture interest at varying rates appropriate to the incomes of the respective debenture-holders. Further, certain interest paid to the Trustees of the Superannuation and Provident Fund had been altogether exempted from New Zealand Income Tax under Section 78 (*i*) of the Land and Income Tax Act, 1923. It was claimed on behalf of the Company that the whole of the debenture interest on which New Zealand Income Tax had been paid formed one part of the Company's income, and that relief should be allowed at the rate arrived at by dividing the total amount of the Income Tax paid by the total amount of such debenture interest. It was claimed on behalf of the Crown that each item of debenture interest should be taken separately, and that relief should be allowed on each item at the rate of Income Tax paid on it, subject to the restriction imposed by Section 27 (1) (*b*) of the Finance Act, 1920, to one-half of the appropriate rate of United Kingdom Income Tax.

(2) For the year 1927–28, the Company had not made enough profit in New Zealand to pay its debenture interest. Accordingly the debenture interest was paid to the extent of £10,556 out of dividends on United Kingdom investments of the Company, which were not subjected to New Zealand Income Tax as income of the Company, but New Zealand Income Tax had been paid by the

Company on the whole of the debenture interest, whether such interest was paid out of New Zealand profits or the United Kingdom dividends.

It was claimed on behalf of the Company that the sum of £10,556 had borne Income Tax both in the United Kingdom and in New Zealand and relief was allowable thereon.

It was claimed on behalf of the Crown that the sum of £10,556 was not taxed in New Zealand as income, but was only taxed by reason of its application in payment of debenture interest, and no relief was due thereon.

17. We held that the debenture interest as a whole formed one part of the Company's income, and the rate of relief to be allowed in respect of the tax paid on the debenture interest was to be computed by dividing the total tax paid in respect of the interest by the total amount of the debenture interest, including that part which had been exempted from the New Zealand Income Tax.

We further held that the United Kingdom income which had been applied in payment of the debenture interest had suffered both United Kingdom Income Tax and New Zealand Income Tax, and that relief should be allowed thereon accordingly. The amount of relief due was ultimately agreed in accordance with our decisions, and we finally determined the appeal accordingly.

18. Immediately after the determination of the appeal both parties 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, 1921, Section 28, 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.

19th March, 1934.

The cases came before Finlay, J., in the King's Bench Division on the 18th, 24th, 25th and 31st July, 1935, and on the last named date judgment was given in favour of the Crown on all points, dismissing the Company's appeal, with costs, and allowing the Crown's cross-appeal, with costs.

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Mr. A. M. Latter, K.C., and Mr. Cyril L. King appeared as Counsel for the Company, and the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Finlay, J.—In this case, there is an appeal and a cross-appeal, and the matter has reference to the very well-known and very difficult Section, Section 27 of the Finance Act, 1920: " If any " person who has paid, by deduction or otherwise, or is liable to " pay, United Kingdom income tax for any year of assessment on " any part of his income proves to the satisfaction of the Special " Commissioners that he has paid Dominion income tax for that " year in respect of the same part of his income, he shall be entitled " to relief from United Kingdom income tax paid or payable by " him on that part of his income at a rate thereon to be determined " in a particular way. Now that Section, with an appearance of simplicity, as a matter of fact presents immense difficulties of construction, and those difficulties have been indicated by Lord Blanesburgh in a speech in the case of *Assam Railways & Trading Co., Ltd.* v. *Commissioners of Inland Revenue*, 18 T.C. 509, at pages 531 and 532.

The case with which I have now to deal was heard by the Special Commissioners shortly before the judgments of the House of Lords in the *Assam* case, and their decision in this case was the same as their decision in the *Assam* case. The Appellants are a company, the National Mortgage and Agency Company of New Zealand, Limited. They are a company controlled in England whose main business is to lend money in New Zealand. The Company has issued debentures. The Company is liable to pay Income Tax both in this country and in New Zealand. In the Case the material sections of the New Zealand Act are set out; I shall have to refer later to one or two of those. Certain documents are attached to the Case, and documents " E1 " and " E2 " show the computation of the New Zealand tax. The result was to show a loss for the year 1927–28, but an assessable profit of £26,592 for 1928–29. Later documents " F1 " and " F2 " show the computation for the United Kingdom tax and, taking the second year, a profit is there disclosed of £73,056. The only other document necessary to be referred to is document " K ", which shows the working out of the tax liability. There is, taking that document, no dispute as to the United Kingdom profits. There is a slight question as to whether the proper amount was exactly the amount shown, but nothing turns upon that. There is, further, no dispute as to item no. 6 in the deductions, the ordinary dividends, nor is

(Finlay, J.)

there any dispute as to item no. 1 in the deductions, the United Kingdom profits, but items 2, 3, 4 and 5 in that document are in dispute, and, indeed, the matter turns upon the view to be taken with reference to those matters. The result is that for 1927–28 on these figures no tax was paid in New Zealand and, therefore, there could be no return. For 1928–29 tax was paid in New Zealand, but, after the elimination of items not charged to tax in New Zealand and the ordinary dividends, as to which there is no dispute, there is no United Kingdom income left in charge to New Zealand tax.

The Commissioners, having the appeal of the Company before them, arrived at a conclusion, and it is proper that I should read it: " ' The main question in this case is on what part or parts of " ' the income of the Appellant Company has New Zealand Income " ' Tax been paid. The Appellant Company contends that it has " ' paid New Zealand Income Tax on the whole of its profits " ' arising from its business in New Zealand, while the Crown " ' contends that it has only paid New Zealand Income Tax on its " ' profits from its business in New Zealand less the profits applied " ' in payment of its debenture interest for which allowance has " ' been made in calculating its business profits under Section 80 " ' (1.) (*h.*) of the Land and Income Tax Act, 1923. It was argued " ' on behalf of the Appellant Company that the whole of the " ' New Zealand income was income from one source, and that in " ' determining the part of the income on which relief is allowable " ' regard must be had to the source from which it is derived and " ' not to its amount. In support of this argument reliance was " ' placed on a dictum of Warrington, L.J. in the case of *Rolls* " ' *Royce, Ltd.* v. *Short*(1). It must, however, be observed that in " ' that case the Court was only concerned with English income as " ' a whole and Indian income as a whole, and no question arose as " ' to whether Indian Income Tax had been paid on different parts " ' of the Indian income. It seems clear to us that where under " ' Dominion Income Tax law different parts of the Dominion " ' income are separately treated as regards the liability to Dominion " ' Income Tax, we are bound to discriminate between those " ' different parts and see whether Dominion Income Tax has been " ' paid in respect of each of those parts or not. In this case the " ' income applied in payment of the debenture interest for which " ' allowance has been made has been specifically excluded from the " ' profits on which the Appellant Company has been assessed to " ' New Zealand Income Tax, and consequently no New Zealand " ' Income Tax has been in fact paid in respect of the profits so

(1) 10 T.C. 59, at pp. 70/72.

" ' applied under the assessments made on the Appellant Company " ' in respect of its business profits.' " Then they deal with a matter which is really the substance of the cross-appeal, but I had better read it. " ' On the other hand the Appellant Company has " ' been separately assessed as agent for its debenture-holders in " ' respect of the debenture interest paid by it, and has paid the tax " ' so charged at the rates appropriate to the respective debenture- " ' holders. In view of the specific separation of the income " ' to re-imburse itself by deduction of this tax from its debenture- " ' holders. In view of the specific separation of the income " ' applied in payment of the debenture interest for which allowance " ' has been made from the rest of the income, we are of opinion " ' that the income so applied must be regarded as a separate part " ' of the Appellant Company's income. We hold, therefore, that " ' the Appellant Company is entitled to relief in respect of the " ' New Zealand Income Tax on the profits of its business less the " ' profits applied in payment of debenture interest for which " ' allowance has been made, but that it is also entitled to relief in " ' respect of the Income Tax which it has paid on the debenture " ' interest at the rates appropriate to the respective incomes of the " ' debenture-holders, such interest being treated as its income " ' under the decision in the case of the *Commissioners of Inland* " ' *Revenue* v. *Dalgety & Co., Ltd.*(1). There are three subsidiary " ' questions to be dealt with :—(*a*) The income from New Zealand " ' War Loan is specifically exempted from New Zealand Income " ' Tax under Section 78 (*h*) of the Land and Income Tax Act, " ' 1923. This is clearly a separate part of the Appellant Com- " ' pany's income and as no New Zealand Income Tax has been " ' paid in respect of it, the Appellant Company is not entitled to " ' any relief. (*b*) 5% of the capital value of the land used by " ' the Appellant Company for the purposes of its business or " ' deriving profits therefrom has been allowed as a deduction by " ' way of special exemption in computing the assessable income " ' of the Appellant Company for the purposes of the New Zealand " ' Income Tax. A part of the profits equal to 5% of the capital " ' value of the land has thus been excluded from the profits in " ' respect of which New Zealand Income Tax has been charged, " ' and no New Zealand Income Tax has been paid in respect of this " ' part of its profits. We hold, therefore, that no relief is due in " ' respect of this part of its profits. (*c*) As regards the dividends " ' on the preference shares which the Appellant Company holds " ' in X, although New Zealand Income Tax has been paid " ' by X ' "—X, I should mention, was a company—" ' on its " ' profits out of which those dividends have been paid, no New

(1) 15 T.C. 216.

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" ' Zealand Income Tax has been paid or suffered by the Appellant " ' Company on those dividends. We hold, therefore, that no relief " ' is due to the Appellant Company on those dividends ' ". I have thought it desirable to read the decision of the Commissioners because it expresses their view with very great clearness. That view was in accord with the view which they had expressed in the *Assam* case(1).

As to the appeal of the Company, the matter arises in this way. It is conceded that if the *Assam* case, as it was decided by the Commissioners, and, affirming the Commissioners, by me, stands, the present case was correctly decided by the Commissioners, but Mr. Latter argued that in the Court of Appeal and in the House of Lords there was a different basis of decision altogether, the result being that, though the appeal was dismissed in the Court of Appeal and again dismissed in the House of Lords, none the less it was dismissed on quite different grounds, and it was said that what was decided in the Court of Appeal and in the House of Lords was that if one finds income taxed in the United Kingdom and further finds income taxed in the Dominion, then one makes the allowance on the lesser sum; one simply ignores, so it was argued, differences as to what income or parts of income are brought in, differences as to the methods of computation, and one looks simply at a figure, compares two figures, takes the lesser of them, and that is the measure of the relief. That argument has certainly the merit of simplicity. It was also urged that it led to a more logical result. Of that I confess I am by no means convinced, and, anyhow, the observations made by Lord Hanworth (then Baron Pollock) in the case of *Rolls Royce, Ltd.* v. *Short*, 10 T.C. 59, are worth remembering, where he explains the general operation of the Section and utters a caution as to the likelihood of its not operating precisely in the way which was perhaps anticipated. What he said at page 70 was this: " The fact of paying a tax in a Dominion does not induce " relief. The basic condition is that a person has paid tax on his " income over here—then, if some part of that income so charged " and assessed to tax in the United Kingdom can be identified and " proved to have paid Dominion tax, that same part which has " suffered dual taxation can be relieved of the tax paid here, up to " the measure of relief given by the Section. It is never possible " to forecast the result of such a relieving Section generally. " Experience may prove that in effect it does not give relief in as " many cases as it was hoped and anticipated, and indeed intended " that it should do. That experience must be built up from actual " cases in which relief is claimed and allowed or disallowed."

(1) 18 T.C. 509.

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The main question which is now before me is the meaning of the decision, the real effect of the decision, in the *Assam* case(1), particularly, of course, the decision of the House of Lords. The basis of the decision of the Special Commissioners was expressed in that case with the utmost clearness, and it is common ground that I, for reasons which I endeavoured to express in that case and will not repeat now, affirmed the decision of the Commissioners. It is undoubtedly the fact that the Court of Appeal decided that the proper sum was not £135,000 but £129,000. That is the sum arrived at by deducting not only debenture interest and the Bogapani Tea Garden profits, but also certain other small items which will be found set out in the computations in the bound book in the House of Lords Case in the *Assam* case. I fully feel the weight of certain passages to which my attention was called, particularly, perhaps, in the judgment of the Master of the Rolls. Passages in his judgment were pressed, and very properly pressed, upon me by Mr. Latter, but it is, I think, curious that if they were a departure from the very clearly expressed decision of the Special Commissioners, he did not definitely say so. What I attach even more weight to is an observation made by Lord Wright in the course of his speech, a speech to which I shall have to refer in some detail later, in the House of Lords. Lord Wright says this, at page 536: " The Court of Appeal in confirming, in sub-" stance, the ruling of the Special Commissioners, took the view, " rightly, as I think, that the true amount on which relief should " be given was £129,365, and I shall proceed on the basis of that " figure, though no claim is made by the Respondents to have " the figure of £135,907 altered ". It is, I think, extraordinarily difficult to suppose that Lord Wright would have said that the Court of Appeal confirmed in substance the ruling of the Special Commissioners if he had thought that the Court of Appeal, while affirming in a sense the decision of the Special Commissioners, had substituted for it a decision on an entirely new basis. In the House of Lords the position was as follows: Lord Blanesburgh greatly doubted, and expressed his doubts in his speech, but he finally agreed with the view which was to be expressed by Lord Warrington and Lord Wright, and, doubtless, in accordance with the ordinary practice, he had had an opportunity of reading the speeches to be delivered by them before he delivered his own speech. After expounding the argument which had been urged on the House of Lords by Mr. Latter and expressing his sympathy with that argument and how it had impressed him, he goes on in this way, at

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page 532 : " I have been moved by these considerations which seem " to me to have weight. But they are not to my mind final, nor do " they, I think, outweigh the reasoning which leads to the con- " clusion that the Section, in every case where it has to be applied, " is really directed against a charge *pro tanto* of double Income Tax " upon any portion of any ' compartment ' of the assessee's total " income, and that there is no sufficient indication in the language " employed necessitating the conclusion that any further relief is " contemplated or provided for. Accordingly, while conscious of " difficulty, I am ready to accept the construction in that sense " placed upon the Section by my noble and learned friends, Lord " Warrington of Clyffe and Lord Wright, in their judgments, which " I have had the advantage of reading and which I accept ". That passage which I have read is, I think, of importance from two points of view. In the first place, the sentence in which Lord Blanesburgh refers to " a charge *pro tanto* of double Income Tax upon " any portion of any 'compartment' of the assessee's total income ", seems to me to be inconsistent with the view that all that had to be looked at was the two figures. I think that Lord Blanesburgh undoubtedly there shows that he considers some further analysis necessary, that one has got, so to speak, to split up what he calls the " compartments " into portions and see which of those portions have in fact borne double tax. The other point with reference to which this passage in Lord Blanesburgh's speech is important is this, that he expresses his acceptance of the speeches both of Lord Warrington of Clyffe and Lord Wright, and I think it is very unlikely that he would have expressed himself in that way if he had thought that there was any divergence of view between Lord Warrington and Lord Wright. I think it was really almost decisive as to the fact that Lord Warrington and Lord Wright were in agreement that not only Lord Blanesburgh but also Lord Atkin express agreement with both of them.

I am conscious, however, that in the speech of Lord Warrington, as in the judgment of the Master of the Rolls, there are passages which support the view which Mr. Latter presented. I may refer particularly to a sentence at page 534 : " I can see no reason why, " for the purpose of identification, any other meaning should be " given to the word ' part ' than the numerical meaning ".

I turn now to look at the judgment of Lord Wright, which was approved not only by Lord Blanesburgh and Lord Atkin, but also by Lord Thankerton. I have read it more than once, and my view is that it confirms the view of the Special Commissioners in that case. It is perfectly true that Lord Wright took the figure of £129,000, but why did he take it? In order to see that, it is

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necessary to look at page 536, where Lord Wright says this : " In " effect the position is that the Appellants have paid or become " liable to pay United Kingdom Income Tax for the year 1928–29 " on an assessment on part of their income of £186,750, but, in " respect of the same income for the same year, have paid in India " on an assessment of £129,365. The difference between the two " assessments is, in the main, due to the fact that in India the " sum of £42,500 for debenture interest was allowed as a deduction " from the tax, whereas in the United Kingdom no such deduction " was allowed. In addition, in India profits from a tea garden " owned by the Appellants were for some reason not taken into " account, whereas these profits were included in the profits under " the United Kingdom assessment. As already indicated, there " were other similar "—I think importance attaches to that word " similar "—" but minor differences in the assessments, which it " is not necessary here to consider. The rival contentions may be " thus summarised. The Appellants claim that, though the Indian " assessment is only at the figure of £129,365, it is an assessment " on the whole amount of the profits of £186,750 : in other words, " it exhausts the taxable capacity in India of the whole of those " profits, so that the Appellants have paid Indian Income Tax on " the whole of that sum and hence are on that footing entitled to " Income Tax relief under Section 27 of the Act of 1920 on the " whole of that sum. The Respondents, on the other hand, con- " tend that double Income Tax has only been paid on £129,365, " and no more, within the meaning of the Section, and hence that " it is only on that sum that relief is claimable ". Another passage which is important in Lord Wright's speech is to be found on page 538, where he says this : " On the facts of the present case, " I am of opinion that the Appellants fail in their contention. " The Section requires that the taxpayer should prove (1) that he " has paid tax in the United Kingdom for any year on a certain " sum which is part of his income; in this connection, I do not " think that the word ' part ' is used to exclude the whole but " merely to point to an ascertainable sum of income which is " brought into question; (2) that he has paid tax in the Dominion " ' in respect of ' the same part of his income for that year : here " the words ' in respect of ' as contrasted with ' on ' do not, I " think, involve any latent distinction, since the word ' on ' would " be inapplicable to the ' same income ' which becomes a separate " taxable subject in the Dominion. The taxpayer then becomes " entitled to relief. It seems clear that there must be a definite " part of income brought into question, and that can only be " expressed in a sum of money. As income *ex vi termini* must be " expressed in a sum of money, the words ' the same part of his

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" ' income ' must involve a comparison between two sums of money " which prove to be the same. The contention of the Appellants " is to the contrary : it is said on their behalf that the words " ' the same part of his income ' refer solely to what is " called the source, and that identity of amount is immaterial " and does not come into question except for the purpose " of ascertaining the rate of tax to be allowed for. I cannot " agree with this argument. No doubt questions of source, " as it has been called, that is, such questions as where " the income comes from, are essential to identify, so far " as that aspect goes, what is taxed in the United Kingdom " with what is taxed in the Dominion, but, in addition, the income " itself, that is, the amount of money, must also be identified. " I think the words ' the same part of his income ' are apt to " include both elements of comparison and identification ". Finally, there is a passage on page 539 : " The Appellants, having " paid tax in the United Kingdom on £186,750, have not paid tax " at all in India on two definite and separable amounts, parts of that " sum of £186,750, namely, £42,500, the debenture interest, and " the sum representing the profits of the tea garden. On the words " of the Section, it seems that the Appellants can only show double " taxation in regard to £129,365, which is a part of the £186,750. " In other words, I think that, in such a case as this, where " definite amounts are in question, ' paid ' means paid in fact and " cannot be applied in truth to these definite amounts, which are " simply in India deducted from the profits assessable, as not being " liable to tax at all. Accordingly, on the facts of this case, I do " not think it is correct to say that the Appellants have paid in " India tax on the whole sum of £186,750 so as to be able to claim " relief on the whole. I reject the contention made on behalf of " the Appellants and based by them on the ground that the whole " sum has been taxed to its full taxable capacity according to Indian " law; the admissible deductions, it is said, amount simply to a " method of assessment or computation of the entire profits and not " a mere immunity of certain items. No doubt there may be cases " in which a reduction in the amount of the assessment in the " Dominion may be consistent merely with a difference in computa- " tion, so that it may be said that the larger sum taxed in the " United Kingdom ought to be regarded as taxed *in toto* in the " Dominion by the smaller assessment, and that the taxpayer in " that event has paid tax on the same part of his income taken at " the larger figure both in the United Kingdom and in the " Dominion. But I think that, on the true view of the facts of the " present case, certain definite parts of income which are taxed in

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" the United Kingdom are excluded from taxation altogether in " India, so that the element of double taxation does not exist at all " in regard to those parts of the Appellants' income ". Now I cannot read that speech of Lord Wright's—large extracts from which I thought it right to read—as differing from the view of the Special Commissioners. On the contrary, I think that Lord Wright was affirming the view which was taken by the Special Commissioners. I have had, of course, having this case before me, to reconsider the view which I endeavoured to express in the *Assam* case(1). I still adhere to it, but I know it is not necessary that I should say that, if I thought that a different view had been taken by the House of Lords, I should, without any hesitation at all—as indeed I should be bound to do—follow and apply that, but when the speeches in the House of Lords, and particularly the speech of Lord Wright, are looked at, I am of opinion that they really affirm the view which was taken by the Special Commissioners and which, following the Special Commissioners, I took, and, accordingly, it is, in my opinion, not open to Mr. Latter to argue, as he so forcibly did argue, that all that was necessary was to look at the two figures. I have to apply and to follow the authority of the House of Lords, and on that ground I am of opinion that the appeal fails.

As to the cross-appeal, that has reference to a rather curious point with reference to debenture interest, and I have already read the decision of the Commissioners and I need not read it again. The matter arises on two or three Sections of the New Zealand Act, in the first place by Section 80 (1) (*h*), under which interest, if the Commissioner is satisfied that it is payable on capital employed in the production of the assessable income, is exempted. Then it is necessary to look at Section 116 and Section 130 and the substance of those Sections can be quite concisely stated. The debenture interest is excluded from the assessment of the profits of the Company, but the Company is liable to be assessed in respect of it as agent for the debenture-holders. The charge is to be made at a rate appropriate to the income of the particular debenture-holder and power is given to the agent—in this case the Company—paying the tax to recover the amount so paid from his principal. The point is perfectly familiar. In New Zealand, as I pointed out, the debenture interest forms a deduction in arriving at the profits. As we all know, in the United Kingdom, that debenture interest does not form a deduction. If one has a Company making £10,000 of

(1) 18 T.C. 509.

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profits and having to pay £1,000 in debenture interest in the United Kingdom, the tax is levied on the full £10,000, and there is a right to deduct in paying the debenture-holder, but in my opinion no question of agency at all arises in the United Kingdom. In New Zealand, in the illustration I have just put, the profits would be taxed at £9,000, but the Company, having paid tax on those £9,000 profits would be liable to assessment on the debenture interest, but only as agent. The point is strikingly illustrated by the fact to which I alluded a moment ago, that the tax is levied at the rate appropriate, not to the Company, but to the debenture-holders who are the principals, the Company being the agent. A good deal of reference was made to a leading case on this subject, *Dalgety & Company, Ltd.* v. *Commissioners of Inland Revenue*, 15 T.C. 216, but it seems to me that that case has little to do with the present one. The point is whether the income in respect of which the Company pays tax indeed but pays it only as agent can be regarded as its income within the meaning of Section 27—" part of his " income ". I cannot think that that can be so. I have not failed to notice the fact, which is a fact, that the Company has not been able to recoup itself in the special facts of this case. That is due, as is found in paragraph 9, to the circumstance that the contract is an English contract. There are a series of cases—*Spiller* v. *Turner*, [1897] 1 Ch. 911; *Borax Consolidated, Ltd.* v. *Indian and General Investment Trust, Ltd.*, [1920] 1 K.B. 539; and the *London and South American Investment Trust, Ltd.* v. *British Tobacco Company (Australia), Ltd.*, [1927] 1 Ch. 107—which establish the general principle. Upon this last case an argument was raised that the New Zealand legislation was nugatory. I confess that I do not follow that argument. It seems to me that the New Zealand legislation is not nugatory, only in particular circumstances the New Zealand legislation may be unable to affect persons and things outside New Zealand. It is, however, clear that in this particular case the Company is unable to recoup itself, but does that matter? If recoupment were possible it would seem to be clear that the Company could not possibly say that it was its income. It cannot, I think, make any difference that in particular circumstances recoupment is impossible. The Company pays the tax only as agent; the Legislature says so. It pays it at rates appropriate not to itself but to its various principals. It cannot, I think, be said that it is paying tax on its own income. I cannot really develop the point much. It seems to me, when one examines it, it is reasonably clear. It is paying tax not on its own income but on the income of its debenture-holders, and on behalf of those debenture-holders. The result is that in my view the cross-appeal succeeds.

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Two subordinate points were argued which arose only if the cross-appeal failed. With regard to them, they do not in the view which I have taken arise, and I do not myself think it necessary to deal with them. I ought only to mention that these two points would, of course, be open to the Crown if in any higher Court a view differing from mine were taken on the main point in the cross-appeal.

The result is that the appeal of the Company is dismissed and the cross-appeal of the Crown is allowed.

Mr. Hills.—With costs in each case, my Lord?

Finlay, J.—In each case with costs. Of course, I had better mention, now you and Mr. King are here, that in the event of this judgment standing, the case very possibly might have to go back for adjustment in the absence of agreement. I do not know about that, but it is quite clear we had better wait and see what happens. As far as I am concerned, I will simply say that the one appeal is dismissed and the other allowed, and leave it there.

The Company having appealed against the decision in the King's Bench Division, the cases came before the Court of Appeal (Lord Wright, M.R., and Romer and Greene, L.JJ.) on the 25th, 26th, 27th and 28th January, 1937, when judgment was reserved. On the 11th February, 1937, judgment was given unanimously against the Crown reversing the decision of the Court below. Two subsidiary points arising were reserved for hearing at a later date.

Mr. A. M. Latter, K.C., and Mr. Cyril L. King appeared as Counsel for the Company, and the Solicitor-General (Sir Terence O'Connor, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Wright, M.R. (read by Romer, L.J.).—I have read the judgments prepared and about to be delivered by my brethren Romer, L.J., and Greene, L.J. I am so fully in agreement with these judgments in every respect, both as regards reasoning and conclusions, that it is a work of supererogation to add any observations of my own. But I may perhaps say that as I read the Subsection(1), the protean and ambiguous word " income ", as there used, means the figure of income or part of income as assessed for tax purposes in either jurisdiction. The income or part of income,

(1) Section 27 (1), Finance Act, 1920.

(Lord Wright, M.R.)

that is the figure so assessed, is that on which the person has paid or become liable to pay tax within the words of the Section in the United Kingdom and in the Dominion respectively. Once it is established, on the principles expounded by my brethren, that the same part of income is assessed in the Dominion as that assessed in the United Kingdom, " double taxation " is *pro tanto* established, on the basis of and to the extent of the smaller assessment; the figures of assessment respectively are the material figures of income for this purpose.

Romer, L.J.—On this appeal the Court is once more invited to consider and apply the provisions of Section 27, Sub-section (1), of the Finance Act, 1920. As the Section has been recently discussed and explained by the House of Lords in the case of *Assam Railways & Trading Co., Ltd. v. Commissioners of Inland Revenue*, [1935] A.C. 445(1), it becomes necessary to examine the facts and the judgments given in that case in some detail.

The facts, so far as material for the present purpose, were as follows : the company concerned was an English company carrying on a business in India, from which business the whole of its income was (with a small exception) derived. It was controlled by its board in England and was accordingly taxed under Case I of Schedule D of the Income Tax Act, 1918, on the whole of the profits arising from its business in India. Under the Rules applicable to that Case the tax on its income for the year ending 5th April, 1929, fell to be computed on the company's profits for its financial year ending on the 31st March, 1928. The profits so computed amounted to the sum of £186,750. Under the Indian Income Tax Act the tax for the year 1928-29 had to be computed on the profits for the same financial year, but those profits, when ascertained in accordance with that law, amounted only to £129,365. This was due to the following facts : (1) according to the Indian Act the sum paid by the company as interest on its debentures and amounting to £42,500 was a permissible deduction, whereas it was not so in the United Kingdom ; (2) the profits derived by the company from a certain tea garden amounting to £8,343 were excluded from the Indian computation but were included in that of the United Kingdom ; (3) other divergencies between the two systems of taxation resulted in a net excess of £6,542 in the profits as ascertained in the United Kingdom over the profits as ascertained in India.

The company in due course paid United Kingdom Income Tax calculated at the appropriate rate on £186,750 and paid Indian Income Tax at the appropriate rate on £129,365. In these circumstances it was plain that the company was entitled to relief under

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Section 27 (1). The question to be determined was as to the basis upon which such relief was to be calculated. The contention of the company was this: " The subject of taxation both in India and in " the United Kingdom is the income derived from the business " carried on in India during the year of assessment ending on the " 5th April, 1929. According to the law of each country the tax on " that income is ascertained by taking a notional sum that bears no " relation to the actual income in fact and applying the appropriate " rate to that notional sum. The fact that the notional sums are " different in the two countries is immaterial. The notional sums " are only brought into notional existence for the purpose of ascer- " taining what Income Tax should be charged in the respective " countries on the profits of the business earned in the year of " assessment. Having served that purpose they need not be con- " sidered further. We have paid Income Tax for the year of " assessment both in the United Kingdom and in India on precisely " the same income and are entitled to relief under the Section " upon that footing ". It is an attractive argument and none the less so because it involves the proposition that throughout the Sub-section the word " income " means " income " and nothing else. Had it been accepted, the company would have been entitled to be relieved to the extent of but not exceeding half the United Kingdom rate on the sum of £186,750. For the purpose of ascertaining the rate the actual income from the Indian business would no doubt have to be ascertained. But this should present no difficulties to a competent accountant. If any such difficulty should occur it would have to be settled by the appropriate tribunal. The actual profit having been ascertained, the Indian rate and the United Kingdom rate for the purposes of the Section would be ascertained by dividing the amount paid in tax in the two countries respectively by the amount of the actual profit.

This contention on the part of the company failed, however, to find acceptance at the hands of the Commissioners for the Special Purposes of the Income Tax Acts, Finlay, J., the Court of Appeal or the House of Lords, and must now be regarded as unsound.

The Special Commissioners held that the company was entitled to relief in respect of the sum of £135,907. This sum was arrived at by deducting from the sum of £186,750 the two sums of £42,500 and £8,343. They treated the sum of £186,750 as being the taxable income in the United Kingdom, and £129,365 as being the taxable income in India. They then analysed these two sums and found that, inasmuch as debenture interest had not been deducted in the United Kingdom computation and had been deducted in the Indian computation, £42,500, part of the United Kingdom taxed income,

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had not been taxed in India. They further found that £8,343 had been included in the United Kingdom taxed income but had not been taxed in India. The reason why they did not also find that £6,542, further part of the £186,750, had not been taxed in India would seem to have been that they had not been asked to do so by the Inspector of Taxes. Attention was called to this omission in paragraph 8 of the Respondents' Case when the matter eventually came before the House of Lords(1). On an appeal by the company to Finlay, J., that learned Judge affirmed the decision of the Commissioners and, as I read his judgment, upon the same grounds as those on which the Commissioners had proceeded.

Pausing there, it is to be observed that the question whether and to what extent Income Tax in this country or in India would ultimately fall on the debenture holders in respect of the interest paid to them was immaterial. Income Tax on the £42,500 had been paid by the company here and had not been paid by the company in India, and that is all that mattered. For it had been decided by the House of Lords in the *Dalgety* case, [1930] A.C. 527(2), that the word " paid " in the Section means " paid " and not " ultimately paid ".

The decision of Finlay, J., was affirmed by the Court of Appeal, but on somewhat different grounds. They agreed with the learned Judge in treating the sum of £186,750 as the income from the Indian business that had been taxed in the United Kingdom and not merely as a notional sum arrived at for the purpose of calculating the tax to be paid on the real income for the year of assessment. They also treated the £129,365 as representing the part of the £186,750 that had been taxed in India and as representing, therefore, the only part of the company's income from the Indian business that had borne tax in both countries. They made no analysis of the two figures. They rejected, indeed, the idea that any such analysis ought to be made. " When we come to consider ", said Lord Hanworth, M.R.(3), " what is to be the relief, it has to be " shewn by the taxpayer that, on a part of the income which is his " statutory income in the United Kingdom, he has paid Dominion " Income Tax for that year. Are we to re-open and to readjust the " figures in each country? Are we to set side by side the items " which compose the total assessable income for which the man is " to be charged first in the Dominion and afterwards in the United " Kingdom? To my mind, not so. You have to deal with the " results which have been attained by following the legislative

(1) 18 T.C. 509, at pp. 534 and 536. (2) Commissioners of Inland Revenue v. Dalgety and Co., Ltd., 15 T.C. 216. (3) 18 T.C. 509, at p. 528.

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" directions in each country, and you have to deal with the total " result when those exemptions or deductions or abatements have " been allowed, and you cannot scrutinise those abatements or " deductions by a comparison with a different system in the other " part of the Commonwealth; and it falls upon the taxpayer to " prove that he has paid Income Tax for that year in respect of the " same part of his income." The Court of Appeal accordingly held that the Company was entitled to relief in respect only of £129,365. But as the Crown was content with the figure of £135,907 arrived at by the Commissioners, the appeal was merely dismissed.

The matter was then taken to the House of Lords, who unanimously affirmed the decision of the Court of Appeal. Lord Warrington of Clyffe, in his speech, summed up the conclusions as follows(1): " In the present case the part of his income on which " the taxpayer has paid tax in England is £186,750. In India he " has paid tax on a smaller part numerically of the same income ". This was precisely the view of the case that had commended itself to the Court of Appeal. Lord Wright also agreed with that view. " The Court of Appeal ", he said(2), " in confirming, in substance, " the ruling of the Special Commissioners, took the view, rightly, " as I think, that the true amount on which relief should be given " was £129,365." I would call attention to the words " in " substance ". Later on he said(3): " On the words of the Section, " it seems that the Appellants can only show double taxation in " regard to £129,365, which is a part of the £186,750 ". Lord Blanesburgh, Lord Atkin and Lord Thankerton agreed with the judgments of Lord Warrington of Clyffe and Lord Wright.

The case seems to establish the following conclusions: (1) that the word " income " in the Section does not mean the real income but the " statutory " or " notional " income by means of which the tax is calculated; (2) that if this statutory income in the Dominion is £a and in the United Kingdom the statutory income from the same source is £$(a+b)$ relief will be given in respect of £a; (3) that an analysis of the two statutory incomes for the purpose of comparing, for example, the respective allowances for repairs or depreciation is inadmissible. It is in regard to the two latter conclusions that the view taken by the Special Commissioners and Finlay, J., differed from that taken by the higher tribunals. The difference is one of vital importance. If the two statutory incomes are to be dissected, as was done by the Special Commissioners, every item appearing on the debit side in the Dominion account that does not appear on the debit side of the United Kingdom account must

(1) 18 T.C., at p. 534. (2) *Ibid.*, at p. 536. (3) *Ibid.*, at p. 539.

be regarded as having borne Income Tax in the United Kingdom and not in the Dominion, and *vice versa*. If, for instance, in the Dominion £1,000 be allowed for depreciation and nothing for bad debts, and in the United Kingdom £1,000 be allowed for bad debts and nothing for depreciation, then although the statutory incomes in the two countries might be equal (say £10,000) relief could only be given in respect of £9,000. The same result would occur in the case of a difference in relation to receipts of the business. The receipts of the business might in the Dominion be treated as being worth £50 less than the value at which the same receipts are brought into account in the United Kingdom. The total statutory incomes might be the same and yet relief would only be given in respect of the statutory income less the £50. In cases where the statutory incomes of the two countries are the incomes or average of incomes over different periods of time hopeless confusion would result. In the United Kingdom the statutory income is that of or for the year preceding the year of assessment. In the Dominion it might be that of the year of assessment. In such a case no relief could be granted at all, even though the statutory income in the Dominion were equal to that in the United Kingdom. For no item on either side of the two accounts would be the same. The view taken by the Court of Appeal and the House of Lords in the *Assam* case(1) would, however, lead to no such difficulty. Nothing need be regarded except the two statutory incomes of the business, taking care of course to see that neither includes income from any other source. Relief will then be given to the extent of the smaller of the two sums without enquiry into the reasons for the difference between them. The statutory income is in such case to be treated as the taxable income for the year of assessment. Both sums must be treated as representing income derived from the same source and for the same period, namely, the year of assessment. It necessarily follows that the smaller sum is a part of the larger sum, as was pointed out both by Lord Warrington of Clyffe and Lord Wright in the *Assam* case(2).

But just as it is necessary to see that the statutory incomes do not include any receipts from sources other than the business, so also is it necessary to see in each case that no profits of the business are being taxed otherwise than through the medium of the statutory income. For what has to be ascertained for the purpose of the Section is how much tax has been paid by the company on its profits in this country and in the Dominion respectively.

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(1) 18 T.C. 509. (2) *Ibid.*, at pp. 534 and 538/9.

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It only remains to apply these considerations to the present case, taking for that purpose the year of assessment 1928–29. The United Kingdom statutory income from the whole of the Company's business for that year was £70,017. This figure, however, included certain receipts from sources other than the business of the Company in New Zealand amounting together to £25,549, leaving the statutory income for the last mentioned business £44,468. The New Zealand statutory income was £26,592. The Appellants are therefore entitled to relief in respect of that sum. That would be the only relief to which they are entitled if under the New Zealand law the profits from the New Zealand business are only taxed by reference to the New Zealand statutory income. It appears, however, that the effect of the Land and Income Tax Act, 1923, of New Zealand is to exclude from the statutory income a sum equal to the interest on debentures the money secured whereby has been employed in the production of the assessable income, and to tax such sum in the hands of the Company. The profits of the New Zealand business are not, therefore, taxed merely by reference to the statutory income, but partly by reference to that income and partly by reference to the amount of interest payable in respect of its debentures. The amount taxed under this latter head is the sum of £34,779 and on this sum the Company is also entitled to relief. It is true that as regards such last mentioned part of the Company's profits the Company has only been assessed as agent for the debenture holders; but this is immaterial. In order to get relief under the Section it is sufficient for the Company to show that it has paid the New Zealand tax on that part of its profits. The question in what capacity it has paid it and the question whether the tax falls ultimately on the Company or the debenture holders are beside the point. The Company has paid United Kingdom Income Tax on a part of its income, namely, £34,779, and has proved that it has paid Dominion tax in respect of the very same thing. In accordance with the plain words of Section 27, Sub-section (1), of the Finance Act, 1920, it is entitled to relief on that sum.

For these reasons I am of opinion that both appeals should be allowed.

Greene, L.J.—Section 27, Sub-section (1), of the Finance Act, 1920, provides as follows:—"If any person who has paid, by "deduction or otherwise, or is liable to pay, United Kingdom "income tax for any year of assessment on any part of his income "proves to the satisfaction of the Special Commissioners that he "has paid Dominion income tax for that year in respect of the "same part of his income, he shall be entitled to relief from

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" United Kingdom income tax paid or payable by him on that part " of his income " at a rate to be determined as therein mentioned. The language of this provision appears at first sight to be reasonably clear. The first thing to consider is whether the person claiming relief is liable to United Kingdom Income Tax " on any part of his " income ". His income for the purposes of United Kingdom Income Tax may comprise a number of elements derived from different sources and taxable under different Schedules. Any one of these elements may be a " part of his income " for the purposes of this limb of the Sub-section. The next question for consideration is whether he has paid Dominion Income Tax for the year in question " in respect of the same part of his income ". It is said that in strictness the word " same " is necessarily inappropriate to convey the meaning intended, since income as assessed for United Kingdom Income Tax is a notional sum and the income on which Dominion Income Tax is paid cannot be the " same ". This, to my mind, presents no practical difficulty in construing the Sub-section, nor am I prepared to find in its language such abstruse metaphysical difficulties as were suggested in the arguments for the Crown. The Sub-section says that identity exists, and as a practical matter I find no difficulty in treating the assessed income which is taxed in a Dominion as being the " same " as that taxed in the United Kingdom.

Now even if the matter had been devoid of authority, I should have thought that the character of the identity postulated by the words " the same part of his income " was not difficult of ascertainment. If the income is derived from dividends on shares or interest on debentures, and it is taxed in both countries, the identity is apparent. If the income is derived from a business, the question is more complicated but not, in my opinion, any more difficult to answer. In such a case, in order to ensure the identity which the Sub-section requires, the first thing to do is to see that the income taxed in the Dominion is the same as that taxed in the United Kingdom in the sense that each includes, and includes only, income (that is to say, incoming profits or gains) which is common to both, and any necessary adjustments of the accounts to ensure this result must be made. To take a single example : if an English company carries on from England business both in England and in a Dominion, its assessment here will be on the amount of the profits of the entire business. But in the Dominion it will be assessed only on the profits of the business so far as carried on in the Dominion. It is accordingly necessary, in order to achieve the primary identity of the two incomes, to dissect the United Kingdom assessment and eliminate from it that portion which represents the

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profits of the English business. This is a perfectly simple and intelligible operation, and presents no difficulty in principle. But it will be noticed that the only matters to be eliminated from the United Kingdom or the Dominion assessment (as the case may be) are incoming profits or gains which are not common to both assessments. It is, in my judgment, essential to the proper understanding of this case to appreciate the fundamental distinction between sums which truly represent incoming profits and gains, and sums which represent allowances or permissible deductions in arriving at the assessable income. For reasons which will appear later, it is only the former which must be eliminated, not the latter. But the process of arriving at the identity of the two incomes does not stop at the point where incoming profits or gains not common to both assessments have been eliminated. When this has been done, the resultant figures for the United Kingdom income and the Dominion income will in all probability be different by reason of differences in the two methods of arriving at assessable income. It must have been present to the mind of the Legislature that uniformity in the method of assessing business profits is not to be found throughout the Empire. The rules for the deduction or non-deduction of expenses or the allowance for wear and tear (to take some examples) which operate in the United Kingdom may differ widely from those in force in a Dominion. And here it is necessary to see that what I may call a secondary identity is attained. If after the elimination of incoming profits or gains which are not common to both assessments the income from the Dominion business is for the purpose of the United Kingdom assessment (let me say), £10,000, and for the purpose of the Dominion assessment, £8,000, it is only in respect of £8,000 that the identity exists. £8,000 is not " the same part " of the Company's income as £10,000, even though each figure represents an assessment in respect of the same incoming profits or gains. The relief given by the Sub-section is therefore to be ascertained on the footing that the only part of the business income in respect of which tax is exigible in both countries is £8,000. In the converse case if the figures are reversed the only part of the Company's income on which tax is exigible in the United Kingdom will be £8,000 and the additional £2,000 in the Dominion assessment will not entitle the Company to any relief.

In support of the views expressed above, I may quote some words from the speech of Lord Wright in the *Assam* case, [1935] A.C. 445, at page 459(1). His Lordship said : " It seems clear that " there must be a definite part of income brought into question, " and that can only be expressed in a sum of money. As income

(1) 18 T.C. 509, at p. 538.

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" *ex vi termini* must be expressed in a sum of money, the words ' the " ' same part of his income ' must involve a comparison between " two sums of money, which prove to be the same. The contention " of the appellants is to the contrary : it is said on their behalf that " the words ' the same part of his income ' refer solely to what is " called the source, and that identity of amount is immaterial and " does not come into question except for the purpose of ascertaining " the rate of tax to be allowed for. I cannot agree with this argu- " ment. No doubt, questions of source, as it has been called, that " is, such questions as where the income comes from, are essential " to identify, so far as that aspect goes, what is taxed in the United " Kingdom with what is taxed in the Dominion ; but in addition the " income itself, that is, the amount of money, must also be " identified. I think the words ' the same part of his income ' " are apt to include both elements of comparison and identifica- " tion ". Lord Blanesburgh in a passage on page 452 of the report(1) expresses the same view in a different way.

In order to apply these principles to the present case, it is necessary to examine shortly the facts relating to the two assessments. There are some variations in the figures in the various documents due to certain adjustments which have been made, but I will take the round sums which will readily be recognisable. The figure of the United Kingdom assessment for the year 1928–29 is £70,000. This includes, in addition to the profits of the business in New Zealand, the following items of incoming profits or gains :—(1) United Kingdom profits; (2) New Zealand War Loan interest; (3) New Zealand preference dividends; (4) Ordinary dividends on shares in " X ", amounting in round figures to £25,000.

Now none of these items is brought into the New Zealand assessment, and the first step necessary to secure identity between the two incomes is to deduct them from the United Kingdom assessment, which will then give the figure of £45,000 as representing that part of the United Kingdom assessment which is exclusively referable to the part of the income which is taxed in both countries. This is what Lord Wright in the *Assam* case describes as identification of " what is taxed in the United Kingdom with what is taxed " in the Dominion "(2). Now the New Zealand assessment in respect of that part of the income is £26,000 only, and it is in respect of this figure that what Lord Wright describes as identification of " the income itself, that is, the amount of money "(2) exists. The result, in my opinion, is that the Appellants are entitled to relief upon the basis that to the extent of the assessment of £26,000

(1) 18 T.C. 509, at p. 532. (2) *Ibid.*, at p. 538.

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they have paid Dominion tax upon the profits of the New Zealand business which are the same subject matter of taxation as those covered by the United Kingdom assessment as adjusted in the way which I have described. This result appears to me to accord with the language of the Sub-section, the construction placed upon it by the House of Lords in the *Assam* case(1), and with good sense.

Upon the view of the meaning of the Sub-section which I have expressed, differences between the rules prevailing in the two countries as to such matters as allowances and deductions of expenses are entirely disregarded. To take a simple example: let me assume that the method of arriving at the assessable profits of a Dominion business is identical both in principle and in the matter of amount in both countries with the exception of wear and tear allowance, and gives for each country a figure of £10,000 before deducting that allowance. Let me assume then that the allowance in the United Kingdom is £750 (giving a United Kingdom assessment of £9,250) and in the Dominion £1,000 (giving a Dominion assessment of £9,000). The business income on which Dominion tax has been paid will be £9,000, that on which United Kingdom tax has been paid will be £9,250, and relief will be given accordingly. It is quite illegitimate, in my opinion, to treat the difference between the two allowances, namely, £250, as in some sense a part of the business income which has not suffered tax in the Dominion and has therefore, for the purposes of the Sub-section, to be deducted from the United Kingdom assessment under the guise of eliminating from that assessment a piece of income which has not borne tax in the Dominion. In truth, what has borne tax in the Dominion in such a case is the business profits as assessed, not merely a part of those profits ascertained after deducting the excess of the Dominion allowance over the United Kingdom allowance. Nor is the position, in my opinion, any different if one of the countries makes an allowance or permits a deduction of a kind not recognised in the other country. Again, let me take a simple example. I will assume that all figures are identical in the two countries except that in the United Kingdom an allowance is given which is not given in the Dominion—for example, an allowance of £500 in respect of bad debts—giving an assessment of £9,500, and a deduction is permitted in the Dominion which is not permitted in the United Kingdom—for example, a deduction of £500 in respect of certain expenses of the business—giving an assessment of £9,500. The two figures which are comparable for the purposes of relief under the Sub-section will be £9,500 and £9,500—not £9,000 and £9,000 as they would have to be if the £500 in each case were to be treated as an untaxed part of the business profits.

(1) 18 T.C. 509.

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It is at this point that what, in my opinion, is the fallacy underlying the Crown's argument on this part of the case emerges. It is due to a failure to distinguish between two things fundamentally different, namely, an incoming profit and an allowance or deduction. I have already referred to the items of incoming profit which are included in the United Kingdom assessment but not in the New Zealand assessment and shown how these must be deducted from the United Kingdom assessment for the reason that that assessment is *pro tanto* referable to these items. But the Crown seeks to treat on the same basis as these items certain sums representing allowances or deductions made in New Zealand, namely, (1) debenture interest, (2) 5 per cent. unimproved value of land allowance, amounting in round figures to £45,000. These sums, it is said, must be deducted from the United Kingdom assessment on the basis that they are pieces of income, not taxed in New Zealand, to which *pro tanto* the United Kingdom assessment is referable. The result is to reduce the United Kingdom assessment to nothing or a minus quantity for the purpose of the Sub-section and to destroy the claim to relief. But it is to be noticed that the effect of these allowances and deductions is in itself to reduce the amount of the New Zealand assessment and so to reduce the area of double taxation in respect of which relief may be claimed. To use them again for the purpose of still further reducing that area is in my opinion wholly illegitimate.

The Crown's argument here is in my judgment based on a misconception of the effect of the *Assam* decision(1). I have had the advantage of reading the analysis of that decision contained in the judgment which my brother Romer has just read and I entirely agree with it. I only wish to add one observation of my own. In the *Assam* case the appellants were endeavouring to write back into the Indian assessment two sums which had not entered into that assessment at all, one of which was an item of incoming profit not taxed in India, namely, the Bogapani Tea Garden account, and the other of which was a deduction in respect of debenture interest. For the purpose of the decision in that case the difference in character of these two items was irrelevant; it was equally inadmissible to add back the one or the other in order to *write up the Indian assessment above its true figure*. But this is an entirely different thing from saying that the fact that a particular deduction is allowed in a Dominion which is not allowed in the United Kingdom can be used in order to *write down the United Kingdom assessment below its true figure*, which is what the Crown claims to be able to do in this case.

(1) 18 T.C. 509.

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I have so far dealt only with the New Zealand assessment in respect of business profits and for that purpose I have treated the deduction of a sum equal to the debenture interest as what for the purpose of that assessment it in fact is, namely, a true deduction of a business expense. But the Company was assessable and was in fact assessed in respect of what it paid for this interest under a different provision of the New Zealand Statute, namely, Section 116. Under that Section a company is to be the agent of the debenture holders for the purposes of the Act and is assessable in respect of interest paid to them accordingly. The Appellants contend that as no deduction was permissible in respect of the debenture interest for the purposes of the United Kingdom assessment they have paid United Kingdom Income Tax upon it; that they have also paid New Zealand Income Tax upon it; that the fact that under the New Zealand Act this tax is chargeable under a different section is irrelevant since all that Section 27 (1) of the Finance Act, 1920, requires is that Dominion tax shall have been paid; and that the fact that under the New Zealand Statute they are to be deemed to have paid as agents and have in New Zealand a statutory right of recovery against the debenture holders —a right which is not enforceable in this country—is also irrelevant. In my opinion the argument of the Appellants upon this point is right. Whether or not the part of the Company's income in respect of which it has paid tax in the Dominion is the same as the part of its income on which it is chargeable to United Kingdom Income Tax is in my judgment to be decided by reference to English law alone; and the fact that for purposes of its own the New Zealand Legislature has chosen to treat the sum paid away in interest as in a different tax category from that in which it is treated here cannot, in my opinion, affect the matter.

I agree that the appeals should be allowed.

Mr. Latter.—My Lords, the appeals will be allowed with costs here and below and the whole matter will be remitted to the Commissioners. There are two questions, Mr. Hills reminds me, on which the Crown has an argument, in view of your Lordships' decision in my favour, on the debenture interest.

Romer, L.J.—We heard nothing about it.

The Solicitor-General.—Your Lordships heard nothing about it They were excluded specifically from argument here. It is a matter of computation.

Mr. Latter.—I do not know whether this course would be convenient to the Solicitor-General. The Commissioners will have to alter the figures in every year, I am told by my accountant, in

(Mr. Latter.)

view of this, and I wondered whether the points which my friend wishes to argue could be quantified by the Commissioners and then it could come up before the learned Judge below.

Romer, L.J.—The Commissioners decided both those points in your favour, Mr. Latter?

Mr. Latter.—They did.

Romer, L.J.—Then Finlay, J., expressed no opinion about them, but was against you on the main point?

Mr. Latter.—Yes, my Lord.

Romer, L.J.—I did not understand that they were relied upon here. At any rate, they were not mentioned in argument, Mr. Solicitor.

The Solicitor-General.—No, my Lord, not at all.

Romer, L.J.—You still want to raise them?

The Solicitor-General.—We should like to leave them open.

Romer, L.J.—Perhaps that would be the best way, to let the whole matter go back to the Commissioners, and those two points will be open to the Crown before them.

The Solicitor-General.—I am very much obliged. Your Lordships will appreciate that we should like the advantage of the learned Judge's judgment on those matters. It was really impossible to argue those points before your Lordships without the advantage of the judgment of Finlay, J., which was not necessary upon the view he took of the other points.

Romer, L.J.—It means another appeal to the Special Commissioners.

The Solicitor-General.—I am afraid it does.

Romer, L.J.—And then to Finlay, J.

Greene, L.J.—Is that necessarily so? The Commissioners decided against you.

The Solicitor-General.—They decided against me, yes. Then when Finlay, J., decided upon the main point in my favour, it was not necessary for him to consider these two subsidiary points, and so there is no judgment of Finlay, J.

Romer, L.J.—I suppose it would have been open to you, would it not, here to have argued those points as being so to speak *pro tanto* a ground for keeping part of your judgment; you could have argued those points here notwithstanding the fact that Finlay, J., had not dealt with them?

The Solicitor-General.—Technically I could, my Lord. I am sure my learned friend will agree that during the opening of his argument here—

Mr. Latter.—Yes, my learned friend asked me to reserve that and pass it over. I certainly understood that my learned friend reserved it.

Greene, L.J.—I did not mean that there was any default about it but simply whether or not it is competent to this Court to hear that argument without the matter going through the machinery of the Commissioners and Finlay, J., again.

Romer, L.J.—First of all, I should like to ask whether you are going to ask for leave to appeal?

The Solicitor-General.—I wish to follow the practice that, I hope, is convenient to your Lordships, that has been established by my learned friend, of asking your Lordships for time for the consideration of the judgment. We both think that in these cases it is much more courteous to the Court and much more in accordance with the best interests of the Revenue that some time should be given for the consideration of the matter—if I might have an opportunity to ask for leave to appeal, to be exercised only after a reasonable period for consideration.

Romer, L.J.—If it goes to the House of Lords, the House of Lords will decide what can be done, in the circumstances, as regards the other two points. The House of Lords may take the view that, as you did not argue them before us, it is too late to argue them at that stage.

The Solicitor-General.—That would be a possible view in the House of Lords but I hope that they would not be asked to consider these two subsidiary matters. If I might, I should like to take advantage of what your Lordship suggested a moment ago, and if it suits my learned friend I should be quite prepared to come to this Court in a fresh argument without the intervening stages of the Commissioners and the learned Judge on these subsidiary points.

Mr. Latter.—I have no objection.

The Solicitor-General.—If my learned friend has no objection, I cannot conceive that there is objection to cutting out the stage of the learned Judge. I do not think any unfairness would be involved. Perhaps your Lordships would indicate that you would hear the appeal upon those subsidiary points if we desire to come here?

Romer, L.J.—I think we must, in the circumstances. If you wish, before this Order is drawn up, to argue those two points, it means we must allow you, I think, to do so, but it means the standing over of the rest of this appeal for some time because I do not know when the Court will again be constituted as it was when we heard this appeal.

The Solicitor-General.—That is undoubtedly a troublesome matter.

Romer, L.J.—The Master of the Rolls will be, as always, only too willing to assist a law officer of the Crown in disposing of a case in which he is interested.

The Solicitor-General.—Would your Lordships allow me a moment to confer with Mr. Latter?

Romer, L.J.—Yes, certainly.

(*Learned Counsel conferred.*)

The Solicitor-General.—My Lord, my learned friend suggests a course which, I think, might avoid some inconvenience to the Court, that the whole matter as regards the figures should be remitted to the Commissioners but that this particular matter, which is a matter of construction, which is raised in paragraph 16 of the Case, should be remitted to the King's Bench Division for a decision and then it would come up here in the ordinary way. It does raise some rather bigger matters than I had anticipated.

Romer, L.J.—Can we do that?

The Solicitor-General.—I feel a considerable sense of responsibility because it was at my invitation that my learned friend did not address any observations on those points.

Romer, L.J.—I do not remember anything he said about it. The recollection of Greene, L.J., is that Mr. Latter did mention the points and said that he was not going to deal with them for the moment.

Mr. Latter.—I did not, because my learned friend asked me not to.

The Solicitor-General.—I agree.

Romer, L.J.—Then when the turn of the Solicitor-General came nothing was said about the points at all.

The Solicitor-General.—I at once assented and agreed, and as the matter had not been dealt with by the learned Judge and it only arose in certain circumstances, the appeal proceeded without either of us making any further reference to it.

Romer, L.J.—I am afraid you will have to argue the point, if it is to be argued at all in this Court, before the same Court as heard the appeal, constituted in the same way as the Court which heard the appeal.

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The Solicitor-General.—If you please. My learned friend will try to arrange for it to be dealt with as early as possible.

Romer, L.J.—How long do you think it will take—half a day?

The Solicitor-General.—Those instructing me think it will take not more than half a day.

Romer, L.J.—I will speak to the Master of the Rolls about it, and if he can manage to give you a day, I am sure he will, but as you realise, it does mean reconstituting the Court because the Court, as now constituted since Monday, is different.

The Solicitor-General.—I very much regret that it has occurred. I had not foreseen that.

Romer, L.J.—It cannot be helped. It was a misunderstanding.

The Solicitor-General.—It might be convenient if I say that I defer any request for leave to appeal until after your Lordships have heard those two points argued and in the meantime I suggest the Order should not be made. Your Lordships have allowed the appeal with costs.

Romer, L.J.—We will leave the costs until we have gone into the appeal.

The Solicitor-General.—If your Lordship pleases.

The cases came again before the Court of Appeal (Lord Wright, M.R., and Romer and Greene, L.JJ.) on the 4th March, 1937, when, in view of the judgment of the Court on the 11th February, 1937, it was agreed by Counsel that a decision on the first of the two subsidiary points reserved from the hearing before the Court was unnecessary, the Company did not pursue its attitude on the second point, and the whole matter was remitted to the Special Commissioners to determine the figures in accordance with the judgment of the Court on the main issues. Costs were awarded to the Company.

Mr. A. M. Latter, K.C., and Mr. Cyril L. King appeared as Counsel for the Company, and the Solicitor-General (Sir Terence O'Connor, K.C.), and Mr. Reginald P. Hills for the Crown.

PROCEEDINGS

The Solicitor-General.—May it please your Lordships, when you gave judgment on the main point in this matter on the 11th February, there remained upon the record two subsidiary matters which arose in this way. The Commissioners, when they decided this issue, treated the profits as separate from the question

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of the profits applicable to the payment of debenture interest. Upon their doing that, a separate question arose as to the rate of tax that should be applicable in respect of the debenture interest, whether you should take the rate applicable to the different persons who had received that interest, and aggregate it, or whether there should be another method. My Lords, that was of course all on the basis that the income applicable to the payment of debenture interest was different, or to be treated differently, from the rest of the income of the Company. As my learned friend Mr. Latter and myself both understand your Lordships' judgment, your Lordships, on the main point, make no distinction between the two parts of the profits and gains; they are all parts of the profits of the Company. Therefore we both agree that the present case does not raise a point which is of practical value upon your Lordships' judgment to either of us. It does not raise the point that my learned friend raised at an earlier stage before the Commissioners, when they decided to treat the two matters separately, and it does not raise the point that he would now desire to raise upon the basis of the judgment of the Court. In those circumstances the discussion upon the Case Stated, paragraph 16 (1), and therefore upon the cross-appeal by me, would be academic, and I do not ask your Lordships for a decision upon it.

My having taken that attitude, there is a second ground of appeal under paragraph 16 (2) of the Case Stated. Under that, my learned friend, in view of the attitude that we adopt here, abandons (for purposes here, and without prejudice to any argument that he might address at any time) the advantage that he would obtain under paragraph 16 (2) of the Case Stated; that is on page 12 of the Case. That deals only with one year, where debenture interest was paid entirely out of profits that arose in the United Kingdom. In those circumstances, we think, with respect, that the proper course would be to ask your Lordships upon the whole matter to remit it to the Special Commissioners for them to determine the figures both of profits and of rate, in accordance with the judgments that this Court has delivered upon the main issue.

Lord Wright, M.R.—Yes; it will have to go back.

The Solicitor-General.—That will be so, both as to profits and to rate. The appeal will, in those circumstances, be allowed with costs here and below. The only remaining matter is that I have to ask your Lordships for leave to appeal to the House of Lords.

Lord Wright, M.R.—Yes, I think it is a very proper case, Mr. Solicitor, for leave to appeal to be given.

The Solicitor-General.—If your Lordship pleases.

Romer, L.J.—What income has to be ascertained now?

The Solicitor-General.—Your Lordships will appreciate that it was a period of years that has to be dealt with?

Romer, L.J.—Yes—we only dealt with one year.

The Solicitor-General.—We only dealt with one year, and your Lordships laid down the principles. The whole matter would have to go back.

Lord Wright, M.R.—To be applied to the different figures of those years?

The Solicitor-General.—Yes, my Lord.

Lord Wright, M.R.—Very well. On the question of principle, there will be the appeal to the House of Lords, which will go on independently, perhaps,—I do not know—may go on independently of the proceedings before the Commissioners.

The Solicitor-General.—I think we both intend that there should not be proceedings before the Commissioners until after the views of the House of Lords have been ascertained.

Lord Wright, M.R.—I expected that. Very well.

The Solicitor-General.—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the cases came before the House of Lords (Lord Maugham, L.C., and Lords Atkin, Thankerton, Russell of Killowen and Macmillan) on the 7th, 8th, 10th and 11th February, 1938, when judgment was reserved. On the 17th March, 1938, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. Cyril L. King, K.C., for the Company.

JUDGMENT

Lord Maugham, L.C. (read by Lord Atkin).—My Lords, these appeals raise questions upon the true construction and effect of Section 27 of the Finance Act, 1920, a difficult Section which has already led to arguments and differences of opinion in the Courts and has more than once come before your Lordships. There are now, in fact, two appeals from Orders of the Court of Appeal dated the 4th March, 1937, allowing appeals by the Respondent Company (to be called here " the Company ") from two Orders of Finlay, J., dated the 31st July, 1935. The matters came before the learned Judge as to one case by way of Case Stated from a decision of

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the Commissioners for the Special Purposes of the Income Tax Acts and as to the other from another decision of the said Commissioners. In the first case the learned Judge reversed their decision; in the second he affirmed it. The facts have some complexity and are related to the claims of the Company to relief under Section 27 in respect of the seven Income Tax years 1924–25 to 1930–31 inclusive. Fortunately it has been agreed that the facts with regard to the year 1928–29 can be treated as sufficiently illustrating the principles to be observed in applying the provisions of Section 27, and that agreement was observed in the King's Bench Division and in the Court of Appeal and was continued in the hearing before your Lordships.

The Company is a company incorporated in England under the Companies Acts with an authorised share capital of £1,500,000, of which at the material times £250,000 had been issued and paid up. It has also issued in the United Kingdom debentures at varying rates of interest secured on its uncalled capital. The amount of the debentures outstanding at the 30th September, 1927, was £782,275 9*s*. 9*d*., and the amount of the interest paid in the year ending on that date was £39,321 11*s*. 10*d*.

The business of the Company in the main consists in lending money in New Zealand on mortgages and short loans. By far the greater part of the Company's income arises in New Zealand, chiefly from the interest on these loans. The Company owns real property in New Zealand, being premises occupied by it for the purposes of its business. It also had during the relevant years an investment in New Zealand War Loan (specifically exempted from New Zealand Income Tax), investments in ordinary and preference shares in New Zealand companies, and investments in the United Kingdom, the income from which was taxed at source in the United Kingdom. No question arises on this appeal as to the income from the Company's investments.

The Company, being controlled in England, was taxed to United Kingdom Income Tax on the whole of its profits, whether arising from its trade in New Zealand or otherwise, under the Income Tax Act, 1918. It was also taxed to New Zealand Income Tax in New Zealand in respect of its profits arising in New Zealand. Both in the United Kingdom and in New Zealand the tax is computed by reference to the profits of the year preceding the year of assessment, for example, for the assessment year 1928–29 by reference to the Company's year ending 30th September, 1927.

The Section of the Finance Act, 1920, so far as material and as amended by Section 46 of the Finance Act, 1927, and the Fifth Schedule, Part II—2 (i), runs as follows: " 27.—(1) If any

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" person who has paid, by deduction or otherwise, or is liable to " pay, United Kingdom income tax for any year of assessment on " any part of his income proves to the satisfaction of the Special " Commissioners that he has paid Dominion income tax for that " year in respect of the same part of his income, he shall be entitled " to relief from United Kingdom income tax paid or payable by " him on that part of his income at a rate thereon to be determined " as follows :—

" (*a*) If the Dominion rate of tax does not exceed one-half of the " appropriate rate of United Kingdom income tax, the rate at " which relief is to be given shall be the Dominion rate of tax :

" (*b*) In any other case the rate at which relief is to be given " shall be one-half of the appropriate rate of United Kingdom " income tax ".

It is clear that the Section relates to the statutory incomes in the United Kingdom and in the Dominion, that is, incomes ascertained for a particular year of assessment according to the systems and rules in force in the two countries. The relief afforded is in respect of double taxation, and is then given as a relief from United Kingdom Income Tax. It is necessary to prove (1) payment or liability to payment of United Kingdom Income Tax for a year of assessment on a part of the payer's income, and (2) payment of Dominion Income Tax for that year in respect of the same part of his income. This involves the ascertaining of those " parts " in the two countries, by excluding from the statutory incomes in the two countries items which do not satisfy the conditions according to the true construction of the Section. For brevity I shall call the part in the United Kingdom in regard to which the taxpayer can prove that he has paid Dominion tax in respect of the same part " the United Kingdom comparative income ", and I shall call the similar part in respect of which he has paid New Zealand tax " the New Zealand comparative income ". The problems to be solved are the amounts of these two comparative incomes. As will appear later, it is the smaller of the two in respect of which relief is afforded by the Section. For the year 1928–29 the profits of the trade of the Company computed for assessment to United Kingdom tax under Case I of Schedule D were (as adjusted) £70,017. This sum included certain items of income which did not enter into the profits of the trade carried on in New Zealand. It was admitted before your Lordships on behalf of the Company that these items, which amounted altogether to £25,549, must be deducted from the £70,017, leaving (if nothing more ought to be deducted) the sum of £44,468 as the United Kingdom comparative income.

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In considering the figure of £70,017 for the purposes of the questions that arise on this appeal it must be remembered that according to the provisions of the Income Tax Act, 1918, the debenture interest paid by the Company in Great Britain, amounting to the sum of £39,322 for the year in question, was not deducted in arriving at the amount of the assessment, though the Company of course has a right to deduct the tax on payment of the interest to the debenture holders.

Income Tax is imposed in New Zealand by the Land and Income Tax Act, 1923. Your Lordships have thought it necessary to consider all the provisions of this Act, but for the purposes of making this opinion intelligible it will be sufficient to set out the relevant parts of the following Sections :—

" 73. (1.) Income-tax shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose."

" 74. (2.) ' Absentee ' means, in this Part " (Sections 72 to 110) " of this Act, a person whose home has not been in New Zealand during any part of the income year ".

" 78. The following incomes shall be exempt from taxation :— . . . . (*g*.) Dividends and other profits derived from shares or other rights of membership in companies, other than companies which are exempt from income-tax ".

" 79. (1.) Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary,— . . . . (*g*.) All interest, dividends, annuities, and pensions ".

" 80. (1.) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters :— . . . . (*h*.) Interest, except so far as the Commissioner is satisfied that it is payable on capital employed in the production of the assessable income."

" 83. (1.) When any land in which a taxpayer owns an interest, or any portion of such land, has throughout the income year or any portion thereof been actually used by the taxpayer exclusively for the purposes of his business or for the purpose of deriving rent, royalties, or other profits therefrom, he shall be entitled, by way of special exemption, to deduct from the assessable income derived by him during the income year, so far as derived from such use of the land, a sum computed in respect of the period of such use at the rate of five per centum per

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" annum on the capital value for the time being of his interest in " the land or in the portion thereof so actually used by him, as " the case may be, and income-tax shall be assessed and payable " accordingly."

" 84. (2.) Subject to the provisions of this Act, all income " derived from New Zealand shall be assessable for income-tax, " whether the person deriving that income is resident in New " Zealand or elsewhere. (3.) Subject to the provisions of this Act, " no income which is neither derived from New Zealand nor " derived by a person then resident in New Zealand shall be " assessable for income-tax."

" 99. (2.) If the Commissioner is satisfied with respect to the " holder of any debenture or debentures issued by any local or " public authority or by any company that the aggregate amount " of income-tax paid or payable by or on behalf of the debenture- " holder (including the tax paid in respect of interest on debentures) " exceeds the amount of tax that would have been payable by him " if the interest received by him on those debentures had formed " part of his taxable income, the Commissioner shall, on application " by the taxpayer, pay to him the amount of the excess."

" 111. In this Part of this Act " (Sections 111 to 132) " the " term ' absentee ' means—(*a.*) Any person (other than a com- " pany) who is for the time being out of New Zealand ".

" 116. (1.) Save as otherwise provided in the next succeeding " section, every company which has issued debentures, whether " charged on the property of the company or not, shall for the " purposes of this Act be the agent of all debenture-holders, whether " absentees or not, in respect of all income derived by them from " those debentures, and shall make returns and be assessable and " liable for income-tax on that income accordingly. (2.) No " deduction by way of special exemption or otherwise shall be " allowed to the company as such agent, or to any debenture- " holders, in respect of the income so derived from debentures. " (3.) Income so derived by debenture-holders in companies shall " be assessable and chargeable with income-tax separately from " income derived by the debenture-holders from other sources, and " at the rate prescribed by the annual taxing Act as appropriate to " income so derived. (4.) Income derived from debentures held by " a banking company shall not be liable to income-tax under this " section."

" 126. (1.) Every agent shall be personally liable for the tax " on the land or income in respect of which he is an agent."

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" 127. Every agent shall make returns of the land and income " in respect of which he is an agent, and shall be assessed thereon " in the same manner as if he was the principal, save that he shall " be entitled to no special exemption other than such exemption " (if any) as his principal may be entitled to."

" 130. When an agent pays any tax he may recover the amount " so paid from his principal, or may deduct the amount from any " moneys in his hands belonging or payable to his principal ".

In computing the assessable income of the Company in New Zealand a deduction had been allowed (Section 80 (1) (*h.*)) for the interest on so much of the debenture capital as had been employed in the production of the assessable income, namely, the sum of £34,779. A special exemption was allowed under Section 83 (1) amounting to £9,998. The dividends from New Zealand companies, the interest on New Zealand War Loan and certain income earned in the United Kingdom were also excluded.

The Company was accordingly assessed to tax in New Zealand in respect of its business and assets there in the sum of £26,592, after receiving all the various deductions and exemptions above referred to. It was, however, also bound under Section 116 to make returns and it was liable to pay and has paid Income Tax " in respect of all income derived by " the debenture holders from all the debentures it had issued. This is expressly stated in Section 116 (*supra*) to be done as " agent of all debenture-holders, " whether absentees or not ". These persons, however, hold debentures registered in Great Britain, which in fact do not confer a charge on any property in New Zealand. It is not in dispute that the holders, or most of them, reside in Great Britain, and they could not therefore be directly liable to pay Income Tax under a New Zealand statute, which is necessarily subject to well-known territorial limitations. Moreover, for another reason the Company is unable to rely on Section 130 of the New Zealand Act. The interest on the debentures is payable under a contract made in the United Kingdom and to be performed here, and the Company, as is indeed admitted, will be unable to recover from its debenture holders the tax which it has paid in respect of the income due on the debentures (*see* paragraph 9 of the Case Stated, and *Indian and General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.*, [1920] 1 K.B. 539). The question then arises : is the New Zealand comparative income £26,592, or ought it to include the debenture interest, tax on which is assessed on and paid by the Company under Section 116, which appears to be (as adjusted) the sum of £33,609, making the total sum of £60,201?

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The United Kingdom statutory income, as already stated, was £70,017. The items which it is now admitted must be deducted were in respect of: (1) dividends on preference shares in a New Zealand company (called in the Case for convenience " X ") which the Respondent Company received and from which no New Zealand tax was deducted and which, under the New Zealand Act, were excluded from assessable income of the Company (£1,500); (2) interest on New Zealand War Loan which is specifically exempted from tax under the New Zealand Act (£860); (3) dividends on ordinary shares in the company " X " (£19,758); (4) profits earned in the United Kingdom (£3,431). These items, which amount to £25,549, were deductible as not having been taxed in New Zealand, so that the taxpayer has not " paid Dominion " income tax for that year in respect of " those items. This would leave the sum of £44,468 as the United Kingdom comparative income. The Crown, however, contends on the grounds to be next stated that the sum of £9,998, the 5 per cent. unimproved value of the land specially exempt under Section 83 of the New Zealand Act, should also be deducted from the £44,468, thus reducing the United Kingdom comparative income to £34,470. The question here is whether that contention is correct.

My Lords, two points of principle have been argued in this House on behalf of the Crown. First, it is contended that it is necessary for the purposes of Section 27 to investigate the component elements of the income as computed and assessed under the taxing Act of each country and to eliminate elements not common to each system of taxation, *i.e.*, elements which, not being included in the income as computed for the tax of each country, had not been the subject matter of taxation by the law of each country. By this contention it is sought to deduct the sum of £9,998 from the United Kingdom comparative income. Secondly, it is contended that the interest paid to the debenture holders was their income for which the Company has been taxed as agent for those debenture holders and that the income in question does not fall within the expression " his income " in Section 27 (1). If this contention were to prevail the (adjusted) sum of £33,609 paid in respect of debenture interest could not be treated as part of the income of the Company in New Zealand in respect of which it has paid Income Tax, and therefore could not be added for the purposes of Section 27 to the Company's statutory income in New Zealand (£26,592).

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The Court of Appeal (Lord Wright, M.R., and Romer and Greene, L.JJ.) has decided both contentions against the Commissioners, that is, in favour of the Company, and your Lordships have had the advantage of some interesting arguments on both points.

Section 27 has been under consideration in this House on two occasions, first, in *Dalgety's* case (*Commissioners of Inland Revenue* v. *Dalgety & Co., Ltd.*, [1930] A.C. 527(1)) and, secondly, in the *Assam* case (*Assam Railways & Trading Co., Ltd.* v. *Commissioners of Inland Revenue*, [1935] A.C. 445(2)). In the *Dalgety* case, the company, which was incorporated in England, carried on a trade mainly in Australia and New Zealand. It had issued debentures charging its total assets with payment of principal and interest and in paying the interest on them in this country had deducted (under Rule 19 of the All Schedules Rules) the full amount of the United Kingdom Income Tax in respect of the interest. The question in dispute was whether, for the purposes of relief under Section 27, the amount of relief was to be calculated on (*a*) the whole of the profits earned by the company in the Dominions or only on (*b*) the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom. It was agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as that would suffice to meet it. It was stated that the company paid Dominion Income Tax on the profits arising in Australia and New Zealand, including that part which was applied in payment of debenture interest, and had not recovered any part of that tax by deduction or otherwise from the debenture holders. (No evidence appears to have been given as to Section 112 of the New Zealand Act, 1916, No. 5, which was in similar terms to Section 116 of the Act of 1923.) It was recognised that, if the claim of the company were allowed in full, it would receive back a sum which would cause the amount of profits distributed by way of dividend to escape the full burden of tax measured in terms of the rate imposed in the United Kingdom. Nevertheless it was held that upon the true construction of the Section the company was entitled to succeed. There is a passage in the opinion of Lord Buckmaster which may be cited as throwing some light on the present case. "Taking the words" (of the Section) "in

(1) 15 T.C. 216. (2) 18 T.C. 509.

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" order ", he said (at page 531(1)), " there can be no doubt the " company did pay ' United Kingdom Income Tax ' on the full " amount. ' The Income Tax charged in accordance with the " ' provisions of the Income Tax Acts ' was charged on the whole " of its profits and gains. Nothing less would have been accepted " and no other person was liable to make the payment. But it " is urged that even if this be accepted, to the extent of the " debenture interest, the payment was made on behalf of the " debenture holders. To this extent that is true—namely, that, " having paid, the company was entitled to deduct the tax from " the debenture interest, and, to the extent of that deduction, it " was the debenture holders' tax that was thus discharged. But " it was not the debenture holders who made the payment but " the company ". Lord Warrington (at page 536(2)) put the same conclusion in other words, when he said that the contention of the Crown required the words of the Section to " be read in a sense " other than their ordinary and natural meaning, as, for example, " ' paid ' must be read ' paid and ultimately borne ' ". Lord Thankerton used substantially the same phrase (page 539(3)). Lord Macmillan observed (page 542(4)) : " Actual payment, not " ultimate incidence, is the criterion both of the right of relief " and of the right to deduct ".

It should be explained that nothing turns as a matter of principle on the fact that it had been agreed (*see* the report in the Court of Appeal, [1930] 1 K.B., at page 4(5)) that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as there was such income available for the purpose. As appears from the figures on pages 4 and 5 of the same report, that was apparently done in the Case Stated only for the purpose of preventing a claim for relief in respect of items of income arising solely in the United Kingdom.

My Lords, I do not think it necessary to explain in detail the facts proved and the contentions dealt with in the *Assam* case(6), for that has already been done in the judgment of Romer, L.J., in the Court of Appeal. I agree in all respects with his view(7) as to the conclusions established in that case in this House : " (1) that " the word ' income ' in the Section does not mean the real income " but the ' statutory ' or ' notional ' income by means of which the " tax is calculated; (2) that if this statutory income in the " Dominion is £a and in the United Kingdom the statutory income " from the same source is £$(a + b)$ relief will be given in respect

(1) 15 T.C. 216, at p. 245. (2) *Ibid.*, at p. 249. (3) *Ibid.*, at p. 251.
(4) *Ibid.*, at p. 253. (5) *Ibid.*, at p. 217. (6) 18 T.C. 509.
(7) *See* page 251 *ante*.

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" of £*a*; (3) that an analysis of the two statutory incomes for " the purpose of comparing, for example, the respective allowances " for repairs or depreciation is inadmissible ". And he adds later on(1) : " Nothing need be regarded except the two statutory incomes " of the business, taking care of course to see that neither includes " income from any other source. Relief will then be given to the " extent of the smaller of the two sums without enquiry into the " reasons for the difference between them ".

In the light of these two authoritative decisions the contentions in this case on behalf of the Crown, as above stated, can now be considered.

Taking first the dispute as to the abatement of partial exemption in respect of land in New Zealand used for the purposes of the Company's business (£9,998), it is difficult to see how this item is in a different position from that of allowances for repairs or for wear and tear or for bad debts. As was pointed out by Greene, L.J.(2) : " It must have been present to the mind of the " Legislature that uniformity in the method of assessing business " profits is not to be found throughout the Empire ". It is only necessary to read through the 13 clauses of Rule 3 of the Rules applicable to Schedule D, Cases I and II, of the Income Tax Act, 1918, to see how arbitrary are some of the provisions as regards deduction from profits and gains to be charged, and how improbable an event it would be to find the same clauses in force in the Dominions. The reasons given in the *Assam* case(3), as well as the reasons given by Romer and Greene, L.JJ., are sufficient to show that the rules which determine in the United Kingdom or in a Dominion the allowances or deductions which are permissible for the purposes of assessing a taxpayer to Income Tax in either country must be disregarded in determining the comparable incomes in those countries, provided that the incomes are derived from the same source (*see* the opinion of my noble and learned friend Lord Wright in the *Assam* case, [1935] A.C. 445, at page 459(4)).

To avoid misunderstanding, it should be added that there might be an exemption granted by a Dominion Act relating to Income Tax which justified the inference that certain specific property used for the business was not being taxed at all in the Dominion. Such an exemption might require special consideration, and I need not express an opinion in regard to it. Nor am I dealing here with income from a separate source in the Dominion which is not taxed in the Dominion. In the present case the allowance we

(1) *See* page 252 *ante*. (2) *See* page 255 *ante*. (3) 18 T.C. 509. (4) *Ibid.*, at p. 538.

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are called upon to consider is, I think, clearly within the principle laid down in the *Assam* case(1). The allowance is one granted as an allowance or deduction for the purpose of ascertaining the statutory amount of the assessable income of the business in New Zealand. The source of the income is the business. No analysis of the component elements of the income, so far as permissible allowances or deductions are concerned, is therefore called for. The land in question is taxed in New Zealand in so far as it is an important factor in producing the profits and gains of the business, and we are not concerned, for the purposes of the Section, with the special exemption given by Section 83. In my opinion, therefore, the claim of the Crown to deduct the sum of £9,998 in respect of this item so as to reduce the United Kingdom comparative income fails, and that income must be taken, assuming that the figures above mentioned are correct, to be the sum of £44,468.

There remains the question of the debenture interest. The contention of the Crown here is largely rested on the argument that the income in question is not that of the Company and that tax upon it has been assessed upon the Company (under Section 116 of the New Zealand Act) only as agent of the debenture holders. This argument was, I think, rather lightly brushed aside in the Court of Appeal; but your Lordships have thought it right carefully to consider the provisions of the Land and Income Tax Act of 1923 in order to see whether there was substance in the argument based on agency. They have noted that there are in each annual taxing Act in New Zealand special rates prescribed for taxing income derived by debenture holders in companies, and that these rates vary in accordance with the incomes received by the debenture holders from the debentures held by them. This circumstance tends to support the argument that the Company is only being taxed as agent. As I understand the judgments in the Court of Appeal on this point, their conclusion on it would be the same as it was even if the debentures had been issued in New Zealand and, the interest being payable there, the Company had deducted the whole of the tax in respect of the debenture interest. This may be the right view; but it does not seem to me to be necessary at the present time to decide the case on that ground. In the circumstances I have suggested it might perhaps be a true conclusion to draw from the New Zealand Act that the tax paid there in respect of the interest on the debentures was not tax in respect of the Company's income and so not within the words of the Section " has paid Dominion income tax . . . . in respect of the same part " of his income ", giving due emphasis to the possessive pronoun.

(1) 18 T.C. 509.

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In the present case the circumstances are different from those I have suggested. There cannot be a real agency without a principal, and I am unable to see how the Company can be in any true sense an agent to pay tax for debenture holders who are not liable to pay it. The Company has been allowed under Section 80 (1) (*h.*) to deduct the amount of the interest on debenture capital employed in the production of assessable income from such income, but it is liable under Section 116 of the same Act to pay Income Tax on the amount of the interest payable on all the debentures, and that in a case where the Company cannot recover according to our law, which must apply here, any part of the tax so paid.

My Lords, I am of opinion that the argument based on agency fails and that in such a case the interest paid in respect of the debentures under Section 116 must be added to the Company's statutory income in New Zealand (£26,592), as forming part of the profits assessable in New Zealand. I come to this conclusion on substantially the same grounds as those which actuated this House in the *Dalgety* case(1). The tax paid on the interest in question was paid in New Zealand and also ultimately borne by the Company and it was so paid in respect of the Company's income. There is no other person receiving income on whose behalf it could have been paid. Accordingly, the New Zealand comparative income must be taken to be £26,592 plus £33,609, making a total of £60,201.

If these figures are correct and if there were not, as we are told there are, certain further subsidiary matters to be considered, the result would be that the United Kingdom comparative income would be £44,468 and the New Zealand comparative income would be £60,201, with the consequence that the smaller sum would be that in respect of which (as explained in the *Assam* case(2)) relief could be afforded under the Section. We are, however, not concerned with figures, but with the principles stated in the judgments of the Court of Appeal. With these principles, subject to a slight difference of opinion as to the ground on which the question of the debenture interest should preferably be decided, I entirely agree. The appeals should, I think, be dismissed with costs; but it will probably be right to modify the language of the Orders of the Court of Appeal by adding to the words " in accordance with the " judgments of the Court " (after the Orders remitting the matter to the Commissioners) the words " and of this House ".

Lord Atkin.—My Lords, I concur in the opinion which I have just read.

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(1) 15 T.C. 216. (2) 18 T.C. 509.

Lord Thankerton.—My Lords, I also concur in the opinion of my noble and learned friend the Lord Chancellor; and with regard to his opinion on the debenture interest question, I also desire to reserve my opinion on the wider ground to which he has referred, and to confine myself to the facts of this present case.

Lord Russell of Killowen.—My Lords, I agree.

Lord Macmillan.—My Lords, in the fiscal year 1928–29 the Respondent Company paid Income Tax both in the United Kingdom and in the Dominion of New Zealand. The question is to what extent this fact entitles them to relief from United Kingdom Income Tax under Section 27 of the Finance Act, 1920.

It is a condition of relief under that Section that the taxpayer shall have paid tax both in the United Kingdom and in the Dominion in respect of the same part of his income and for the same year. In the present case no question arises as to the identity of the year of charge. Both here and in the Dominion the Respondents were taxed in the same fiscal year 1928–29 on the basis of their accounts for their own financial year to 30th September, 1927. The computation of their statutory income for tax purposes in both countries was thus based on the same set of figures. But the methods of computation of income for tax purposes and, in particular, the permissible deductions differ materially in the United Kingdom and in New Zealand. Consequently, starting from the same figures, the assessing authorities in this country and in the Dominion arrived at different sums as representing the statutory assessable income of the Respondents in their respective jurisdictions. Hence arises the problem of ascertaining the common fund which is to be taken as having been taxed in both countries.

As regards the United Kingdom, the profits of the Respondents' business were assessed here for 1928–29 at £70,017. But the Respondents did not maintain at your Lordships' bar that they could claim relief in respect of the whole of this sum as having also borne tax in New Zealand. They conceded that it must be reduced to £44,468 by deducting certain profits made in the United Kingdom and not included in the New Zealand assessment and also certain items not taxed in New Zealand.

Then, as regards New Zealand, the result of applying the methods of computation prescribed by the Land and Income Tax Act of that Dominion was to bring out an assessable income of only £26,592. The difference between the results of the two methods of computation was chiefly accounted for by the fact that in the United Kingdom interest paid on debentures is not a permissible deduction, while in New Zealand such interest is deductible if payable on capital employed in the production of the assessable

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income. This item, deducted in the New Zealand computation, amounted to £33,609, and the main controversy in the present appeal was concerned with the question of its true position in law.

I have said that this debenture interest was under the New Zealand Act deductible in computing the Respondents' assessable income in the Dominion. But that is not the whole story. The Act, after permitting the deduction of debenture interest, goes on to provide that every company which has issued debentures shall be the agent of all the debenture holders in respect of all income derived by them from those debentures and shall make returns and be assessable and liable for Income Tax on that income accordingly. Subsequent Sections render every agent personally liable for the tax on income in respect of which he is an agent, and entitle him to recover the amount of the tax paid from his principal either directly or by deduction from any moneys in his hands belonging to or payable to his principal. The tax which the company has to pay as agent is calculated on the basis of the tax payable by the recipients of the debenture interest. While, therefore, the Respondents' assessable income was reduced to £26,592 by the deduction, *inter alia*, of £33,609 of debenture interest, they were nevertheless served with a separate notice assessing them for Income Tax on this latter sum, in precisely the same terms as the notice of assessment in respect of the £26,592, except that the words " as agent for debenture holders " were written below the amount brought out as due.

The Respondents duly paid, as they were in law bound to pay, the amounts of tax brought out in both notices of assessment. The question is whether they can be said to have paid Dominion Income Tax on the £33,609 of debenture interest within the meaning of Section 27 of the Finance Act, 1920. In my opinion they can. It is true that the theory of the New Zealand Act seems to be that the debenture interest is to be regarded as income of the recipients and that the Company are to be regarded as their agent in paying the tax. But this artificial method of treating the debenture interest, no doubt devised for administrative reasons, does not alter the substance of the matter. It remains true that the money applied in payment of the debenture interest is part of the revenue of the Company and that they are assessable and liable for tax on it. They have to pay the tax in any event, and so far as the financial effect is concerned the only difference between the tax which they pay as principal and the tax which they pay as agent is that they are given a right of recovery from the debenture holders of the tax paid on the debenture interest. But in the United Kingdom a company on paying its debenture interest is also

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entitled to deduct tax and so recoup itself. Nevertheless the company, notwithstanding this right of recoupment, is held to have paid United Kingdom Income Tax on the amount of its debenture interest within the meaning of Section 27 of the Finance Act, 1920(1). The right of recoupment conferred by the New Zealand Act on the company which pays tax " as agent " on the debenture interest which it pays to its debenture holders is similarly, in my opinion, irrelevant for the present purpose. If I may quote my own words in the case of *Commissioners of Inland Revenue* v. *Dalgety & Co., Ltd.*, [1930] A.C. 527, at page 542(2): " Actual " payment, not ultimate incidence, is the criterion both of the right " of relief and of the right to deduct ".

Between the United Kingdom system and the New Zealand system there is really only a difference of method. In the United Kingdom the debenture interest is not deductible and is assessed along with the rest of the company's income, but the company is entitled to recover the tax from the recipients; in New Zealand the debenture interest is deductible but is nevertheless assessed to tax separately in the company's hands, the company being entitled to recoup itself from the debenture holders for the tax paid. In substance the result is the same, with this difference only, that the rate of tax on the debenture interest is calculated in New Zealand on the basis of the recipients' liability. The principle of Section 27 is that the same fund of income shall not bear the full burden of both United Kingdom and Dominion Income Tax, and in the present instance it is clear that the £33,609 of debenture interest has both here and in New Zealand been subjected, though under different schemes, to the full burden of Income Tax. I may remind your Lordships that the view was at one time taken in this country by high authorities that a company paying Income Tax on its profits did so as agent for its shareholders (*cf. Attorney-General* v. *Ashton Gas Co.*, [1904] 2 Ch. 621; [1906] A.C. 10, and *contra*, *Commissioners of Inland Revenue v. Blott*, [1921] 2 A.C. 171, *per* Lord Cave at page 201(3)).

I have not hitherto adverted to the circumstance that in this particular case the Respondents are unable, in fact, to exercise the right of recoupment conferred on them by the New Zealand statute and consequently cannot reimburse themselves for the tax which they have paid " as agents ", inasmuch as the contracts under which the interest was payable were made in the United Kingdom. Thus ultimately as well as primarily the burden of the New Zealand tax rests upon them. I understand that your

(1) Commissioners of Inland Revenue *v.* Dalgety & Co., Ltd., 15 T.C. 216.
(2) *Ibid.*, at p. 253. (3) 8 T.C. 101, at p. 136.

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Lordships regard this special circumstance as affording the most satisfactory ground for holding that the Respondents' claim to relief has been justified, without finding it necessary to adopt in this case the more general ground which has commended itself to me. The result, whether the broader or the narrower ground is taken, is fortunately the same so far as the present appeals are concerned.

Accordingly, I think that for the purposes of Section 27 the Respondents should be taken to have paid United Kingdom Income Tax on £44,468 and Dominion Income Tax on £26,592 + £33,609 = £60,201. Applying the principle of the decision in the case of *Assam Railways & Trading Co., Ltd.* v. *Commissioners of Inland Revenue*, [1935] A.C. 445(1), I should find that the Respondents are entitled to relief in respect of £44,468, being the part of their income which has borne both taxes.

I have dealt only with the single year 1928-29, although the appeals relate to a series of years, for the considerations applying to the other years are the same. And I have confined my observations to the question of the debenture interest, for the reason that on the other topics which have been raised I have not felt that I could usefully add anything to the full and adequate treatment which they have received in the judgment of the Lord Chancellor, which I have had the advantage of reading in print.

I agree that the appeals should be dismissed with costs.

Questions put:

That the Orders appealed from be reversed.

The Not Contents have it.

That the Orders appealed from be affirmed, and that these appeals be dismissed with costs.

The Contents have it.

[Solicitors :—Freshfields, Leese & Munns; Solicitor of Inland Revenue.]

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(1) 18 T.C. 509.