No. 597.—COURT OF SESSION, SCOTLAND (FIRST DIVISION).—11TH MARCH, 1926.

HOUSE OF LORDS.—6TH, 7TH AND 14TH DECEMBER, 1926.

KIRKE'S TRUSTEES *v.* THE COMMISSIONERS OF INLAND REVENUE.[1]

Income Tax, Schedule D—Repayment of Excess Profits Duty —Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Cases* I *and* II, *Rule* 4 (1).

On the 13th August, 1921, *the Appellants transferred the business carried on by them to a limited company, and thereafter did not carry on any trade or business.*

They were assessed to and paid Excess Profits Duty for all accounting periods up to the 30th June, 1920, *and the duty so paid was allowed as a deduction in computing their profits for Income Tax purposes for each year down to and including the year ending on the 5th April*, 1921.

For the accounting period ending the 30th June, 1921, *they became entitled to a repayment of Excess Profits Duty. The repayment was actually made to them on or about the 22nd April*, 1922, *and they were assessed to Income Tax under Schedule D for the year* 1922–23 *on the amount of such repayment "as a "profit arising from repayment of Excess Profits Duty."*

Held, *that by virtue of Rule* 4 (1) *of Cases* I *and* II, *Schedule D, the Appellants were assessable to Income Tax under Schedule D for the year* 1922–23 *in respect of the said repayment of Excess Profits Duty, notwithstanding that they had ceased to carry on trade, and that the assessment fell to be made under Case* VI *of that Schedule.*

Eglinton Silica Brick Company, Limited *v.* Marian, 9 T.C. 92, *approved.*

CASE.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on 3rd March, 1924, for the purpose of hearing appeals, the trustees of the late Robert Kirke, hereinafter called the Appellants, appealed against an assessment to Income Tax on the sum of £16,242 for the year ending 5th April, 1923, made upon them by the Additional Commissioners of Income Tax for the Division of Kirkcaldy under the provisions of the Income Tax Acts, in respect of a profit arising from repayment of Excess Profits Duty.

[1] Reported (H.L.) 1927 S.L.T. 53.

I. The following facts were admitted or proved :—

(1) The Appellants formerly carried on at Burntisland a business of managing a sugar plantation out of the United Kingdom, the profits of which were assessed to Income Tax under Case I of Schedule D.

(2) On the 13th August, 1921, the said business was transferred to and taken over by the Nickerie Sugar Estates Co., Ltd., a company incorporated in Scotland, and having its registered office situate in Edinburgh. After that date the Appellants did not carry on any trade or business.

(3) The Appellants were assessed to, and paid, Excess Profits Duty for all accounting periods to which that duty was applicable up to and including the accounting period of twelve months ending 30th June, 1920. In computing the profits or gains of their business for the purposes of assessment to Income Tax a deduction was allowed in respect of the amount paid for Excess Profits Duty.

(4) For the accounting period of twelve months ending 30th June, 1921, the Appellants' profits did not reach the point which involved liability to Excess Profits Duty, and on or about the 22nd April, 1922, the Appellants received repayment of a sum of £16,242 paid by them by way of Excess Profits Duty for previous accounting periods, in accordance with the provisions of Section 38 (3) of the Finance (No. 2) Act, 1915.

(5) The assessment to Income Tax made upon the profits of the Appellants' business under Case I of Schedule D for the year ending 5th April, 1922, was duly apportioned between the Appellants and the Nickerie Sugar Estates Co., Ltd., in accordance with Rule 9 of the Rules applicable to Cases I and II of Schedule D. No portion of the repayment of Excess Profits Duty referred to in the preceding paragraph was taken into account in computing the amount of that assessment or in making the apportionment thereof.

(6) The assessment under appeal was made for the year ending 5th April, 1923, being the year in which the said repayment of Excess Profits Duty was made, by reference to the latter part of Rule 4 (1) of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, which Rule is a re-enactment of Section 35 (1) of the Finance (No. 2) Act, 1915. The computation of the amount of the assessment was made on the basis of Rule 2 of the Rules applicable to Case VI of Schedule D.

(7) Rule 4 (1) of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, enacts as follows :—

> " Where any person has paid excess profits duty, the " amount so paid shall be allowed as a deduction in " computing the profits or gains of the year which included " the end of the accounting period in respect of which the

" excess profits duty has been paid; but where any person " has received repayment of any amount previously paid " by him by way of excess profits duty, the amount repaid " shall be treated as profit for the year in which the " repayment is received."

(8) A copy of the notice of assessment issued to the Appellants is attached hereto and forms part of this Case.(1) In this notice the amount of the assessment was entered in a column having the following printed heading :—" In respect of " Profits of Trade, Profession, or Vocation."

II. It was contended on behalf of the Appellants :—

(1) That they were not assessable to Income Tax in respect of the said sum of £16,242 received by them in repayment of Excess Profits Duty.

(2) That, as they were not carrying on any trade, profession, or vocation at any time within the year of assessment, they were not assessable for that year to Income Tax in respect of the profits of trade, profession, or vocation, and that accordingly the assessment appealed against was bad.

(3) That, in any event, assuming that Rule 4 (1) of the Rules applicable to Cases I and II of Schedule D rendered the Appellants liable to be assessed in respect of the sum received in repayment of Excess Profits Duty, the effect of that Rule was that the sum so received should be treated as profit of the year in which it was received, and thus should be included in the average of profits or gains on which the liability to Income Tax (if any) under Cases I or II of Schedule D would be computed; and that accordingly the said sum of £16,242 received on 22nd April, 1922, would not involve liability to Income Tax for the year (6th April, 1922 to 5th April, 1923) to which the assessment appealed against related.

(4) That the said sum of £16,242 was not in its nature a profit or an annual profit, and that the receipt thereof would not (apart from the express provisions of Rule 4 (1) of Cases I and II of Schedule D) in any circumstances have attracted Income Tax.

(5) That Case VI was inapplicable in that the sum of £16,242 was not profit or an annual profit, and that the receipt of a sum in repayment of Excess Profits Duty had been expressly dealt with in the foregoing Cases of Schedule D, namely, Cases I and II; and

(6) That the assessment should be discharged.

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

(1) That the amount received by the Appellants in repayment of Excess Profits Duty was a profit assessable to Income Tax under Schedule D.

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(1) Omitted from the present print.

(2) That the provision for assessing repayments of Excess Profits Duty was originally contained in Section 35 (1) of the Finance (No. 2) Act, 1915, which was not a Rule of Cases I and II of Schedule D, and that therefore an assessment in respect of such a repayment was not necessarily made under either of those Cases; and

(3) That if the amount repaid was not assessable under Case I of Schedule D, it was assessable under Case VI of Schedule D and that the assessment was made under Schedule D generally, and not under any particular Case.

IV. Following previous decisions of the Special Commissioners in similar cases, we held that the repayment in question was in the circumstances assessable under Case VI of Schedule D, and that as the assessment was made under Schedule D generally we were not precluded by the form of the notice of assessment from holding that it was properly made. We accordingly confirmed the assessment.

V. The Appellants immediately upon the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law, and having duly required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, this Case is stated and signed accordingly.

VI. The question of law for the opinion of the Court is whether the Appellants were properly assessed in respect of the repayment of Excess Profits Duty which they received after they had ceased to carry on their trade or business.

P. WILLIAMSON,
W. J. BRAITHWAITE, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway, London, W.C.2,
22nd February, 1926.

The case came before the First Division of the Court of Session on the 11th March, 1926, when judgment was given unanimously in favour of the Crown with expenses.

Mr. Candlish Henderson, K.C., and Mr. Norman Walker appeared as Counsel for the Appellants, and the Lord Advocate (Rt. Hon. William Watson, K.C.) and Mr. A. N. Skelton for the Crown.

I. INTERLOCUTOR.

Edinburgh, 11th March, 1926. The Lords having considered the Case and heard Counsel for the parties, Answer the Question of Law in the Case in the affirmative and Decern: Find the Appellants liable to the Respondents in expenses and remit the Account to the Auditor to tax and to report.

(Signed) J. A. CLYDE, I.P.D.

II. OPINION.

The Lord President (Clyde).—My Lords, it is agreed by the parties, and appears to be clearly the case, that the decision of this case would have to be ruled, as far as this Court is concerned, by the decision in the case of the *Eglinton Silica Brick Company*(1), 1924 S.C. 946. The Appellants in this case are anxious to carry the question in this case, which is also the question in the case just cited, to the House of Lords, and in the circumstances it would be quite unnecessary to have the case repeated here and repetition of the judgments given in the case cited. I therefore suggest we should answer the question of law under the authority of that case in the affirmative.

Notice of appeal having been given against the decision of the Court of Session, the case came on for hearing in the House of Lords before Viscount Cave, *L.C.*, and Lords Atkinson, Shaw of Dunfermline, Sumner and Carson, on the 6th and 7th December, 1926, when judgment was reserved. On the 14th December, 1926, judgment was given unanimously in favour of the Crown with costs.

Mr. A. M. Latter, K.C., Mr.R. C. Henderson, K.C., and Mr. N. M. L. Walker appeared as Counsel for the Appellants, the Lord Advocate (Rt. Hon. William Watson, K.C.), Mr. R. P. Hills and Mr. A. N. Skelton for the Crown.

JUDGMENT.

Viscount Cave, L.C.—My Lords, this appeal raises a question as to the meaning and effect of the fourth of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918. That Rule provides as follows: "Where any person has paid "excess profits duty, the amount so paid shall be allowed as a "deduction in computing the profits or gains of the year which "included the end of the accounting period in respect of which "the excess profits duty has been paid; but where any person "has received repayment of any amount previously paid by him "by way of excess profits duty, the amount repaid shall be "treated as profit for the year in which the repayment is "received."

The Appellants carried on at Burntisland the business of managing a sugar plantation out of the United Kingdom, and were chargeable in respect of the profits of that business to Income Tax under Case I of Schedule D and to Excess Profits Duty under the Finance Acts, their "accounting period" for the latter purpose running from the 1st July in each year to the following 30th June. In respect of all the accounting periods

(1) Eglinton Silica Brick Co., Ltd. (in liquidation) *v.* Marrian, 9 T.C. 92.

(Viscount Cave, L.G.)

up to the 30th June, 1920, they were assessed to and paid Excess Profits Duty, and the duty so paid was duly allowed as a deduction in computing for the purpose of Income Tax their profits and gains for each tax year down to and including the year ending on the 5th April, 1921. During the accounting period ending on the 30th June, 1921, the Appellants' profits did not reach the standard, and accordingly they became entitled under Section 38 (3) of the Finance (No. 2) Act, 1915, to repayment of a part of the sum previously paid by them for Excess Profits Duty. On the 13th August, 1921, they transferred their business to a company and thenceforth ceased to carry on any trade or business. The assessment to Income Tax of the profits of the business for the tax year ending on the 5th April, 1922, was duly apportioned between the Appellants and the purchasing company, no part of the sum repayable in respect of Excess Profits Duty being then taken into account. On the 22nd April, 1922—that is to say after the commencement of the tax year 1922–1923—the Appellants received repayment of the sum of £16,242 in respect of the amount previously paid by them for Excess Profits Duty. Upon this sum of £16,242 the Appellants were assessed to Income Tax in respect of the tax year 1922–23; and it has been held by the Court of Session, following a previous decision of that Court (*Eglinton Silica Brick Company* v. *Marrian*[1], 1924 S.C. 946), that they were properly so assessed. The question is whether that decision was right.

The first objection to the assessment taken on behalf of the Appellants was founded on the case of *Brown* v. *National Provident Institution*[2], [1921] 2 A.C. 222, where it was held by this House that, in order that a subject may be assessable in any tax year in respect of his profits under Case III of Schedule D, it must be shown that he made some profits of that character in the year of assessment, the principle of retrospective measurement applicable to that Case being limited to cases in which the source of income continues to exist in the year of assessment. It was said that, as the Appellants carried on no business in the year 1922–23, they could not be assessed in that year in respect of a receipt arising out of the business carried on by them in previous years. This objection appears to me to be founded on a misconception. Rule 4 which is in question expressly provides that a repayment of Excess Profits Duty shall be treated as profit for the year in which the repayment is received, no condition being imposed as to the carrying on of any business in that year; and in the face of this enactment, it appears to me to be impossible to contend that the Appellants did not receive in the year of assessment profits which could be the subject of assessment. The principle in *Brown's* case[2] has no application to the present case.

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(1) 9 T.C. 92. (2) 8 T.C. 57.

(Viscount Cave, L.C.)

But, secondly, it was said that the only effect of the latter part of Rule 4 is that the repayment in question must be taken into account in computing the Appellants' trade profits in the year of receipt, so that in assessing the Appellants to tax in the following year, the amount may be brought into the three years' average; and that it makes no difference that the Appellants had ceased to trade so that no assessment of their trade profits would fall to be made in the succeeding year. If this argument were sound, the result might be that the Appellants would have to be assessed in the year 1922–1923 on the basis of their average trade profits for the three next preceding years; but no such contention was put forward by either of the parties. It was no doubt obvious to those who framed the Rule that a repayment of Excess Profits Duty might be made after the business in respect of which the duty had been paid had been transferred or discontinued, and at a time when the person entitled to repayment was not possessed of any business or in receipt of any income from that business; it may be for this reason that, while the earlier part of the Rule provides that a payment of Excess Profits Duty shall be allowed as a deduction in computing the profits of the year in respect of which it is paid, the latter part (which is introduced by the word " but ") enacts that a repayment of Excess Profits Duty shall be treated as profit for the year in which it is repaid. I think that the difference of language is significant, and that the meaning is that, while a payment of Excess Profits Duty is only to come into the computation of profits, a repayment of duty is itself to be treated as assessable profit for the year in which it is received.

If it is asked under which Case of Schedule D the assessment is to be made, I think the answer is that, as the profit does not properly fall under Case I or under any of the other Cases preceding Case VI, the assessment falls to be made under Case VI. It is true that the Rule in question is included among the Rules applicable to Cases I and II, but it is possible to make too much of this circumstance. The Rule is a re-enactment of Section 35 (1) of the Finance (No. 2) Act of 1915, and in its original context it applied to the whole of Schedule D; and it does not appear to me that its transfer to a new heading in the Consolidating Act of 1918 was intended to give it a different meaning. Upon this point I find myself in agreement with the reasoning of the majority of the Court of Session in the *Eglinton Silica Brick Company's* case(1).

It was argued on behalf of the Appellants that it would be unfair that, while under the earlier part of Rule 4 they had only been allowed to bring their payments of Excess Profits Duty into computation as a deduction from the profits of the years of

(1) 9 T.C. 92.

(Viscount Cave, L.C.)

payment, and so (in consequence of the principle of a three-years' average applicable to Case I of the Schedule) had not yet enjoyed the full benefit of that deduction, they should now be called upon to pay tax upon the full amount of the duty repaid. This may be the effect of the Rule in the present case; but if so, the result is due to the circumstance that the Appellants have ceased to carry on their business before having the full benefit of the deduction, and I do not think that an accidental inequality in the working of the Rule can override its plain meaning.

A last point was taken on behalf of the Appellants. It was argued that the receipt in question, being a single receipt without any element of recurrence, did not fall within the description of " annual profits and gains " chargeable under Schedule D of of the Act and under Case VI of that Schedule. For the reasons given by your Lordships in the recent case of *Martin* v. *Lowry*(1) I am of opinion that the word " annual " cannot be so limited, and I think that this point also fails.

For the above reasons I move your Lordships that this appeal be dismissed with costs.

Lord Atkinson.—My Lords, I have had the pleasure and advantage of reading most carefully the judgment which has just been delivered by the Lord Chancellor, and I so thoroughly concur in it that I have nothing to add.

Lord Shaw of Dunfermline.—My Lords, I agree.

On 13th August, 1921, the Appellants sold, and ceased to conduct, their business of managing a sugar plantation. The business was, on that date, taken over by the Nickerie Sugar Estates Company, a company incorporated in Scotland. Excess Profits Duty had been paid up to 30th June, 1920.

What happened with regard to the next period, namely, for the accounting period of twelve months ending 30th June, 1921, is thus stated in the Case :—" The Appellants' profits did not " reach the point which involved liability to Excess Profits " Duty, and on or about the 22nd April, 1922, the Appellants " received repayment of a sum of £16,242 paid by them by way " of Excess Profits Duty for previous accounting periods, in " accordance with the provisions of Section 38 (3) of the Finance " (No. 2) Act, 1915."

The Appellants have been assessed to Income Tax under Schedule D, expressly upon " profit arising from repayment of " Excess Profits Duty," namely, the aforesaid sum of £16,242, and the tax chargeable thereon is £4,060 10*s.* 0*d.* The question is whether this tax was properly imposed, namely a tax upon the repayment of Excess Profits Duty, which repayment was received by the Appellants after they had ceased to carry on their business.

(1) Page 297 *ante*.

(Lord Shaw of Dunfermline.)

The case is dealt with in Rule 4 (1) of Cases I and II of Schedule D. That Rule is in two parts. The first part of it has reference to the payment of Excess Profits Duty and provided for the case of preventing over-lapping in taxation. Such a payment has to be " allowed as a deduction " for Income Tax, under Schedule D, " in computing the profits or gains of the " year ". As stated, over-lapping is thus prevented, and the taxpayer is protected accordingly. The second part of the sub-section deals with the case, not of payment by the taxpayer of Excess Profits Duty, but of repayment to the taxpayer of Excess Profits Duty previously paid by him. The repayment is to be treated as profit for the year in which it is received. This is to prevent not over-lapping but under-lapping.

The scheme of the two parts of the sub-section, put together, means that neither over-lapping nor under-lapping is to take place. When a taxpayer has paid Excess Profits Duty, he is *pro tanto* not also to pay Income Tax. The Excess Profits Duty is to be a deduction from the Income Tax to be paid by him. He thus escapes from the Income Tax in respect of having paid Excess Profits Duty. Then comes in the second part of the sub-section which says that if the Excess Profits Duty is, however, repaid, then it must be treated as income upon which Income Tax is to be paid. In no other way could under-lapping be prevented.

This is the ordinary case, uncomplicated by the question of the taxpayer having, during the currency of the assessable years, gone out of business. There was a case, however, manifestly before the mind of the Legislature, namely, that a taxpayer who had thus been saved paying Income Tax in respect of sums paid, might, on going out of business and a repayment of Excess Profits Duty being received, altogether escape the Income Tax which would undoubtedly have been due on the repayment if he had continued in business.

All this seems to me quite clear, and the scheme was accordingly completed by the latter part of the sub-section.

The question in the case is thus reduced to a construction of that latter part. It is in these terms : " but where any person " has received payment of any amount previously paid by him " by way of excess profits duty, the amount repaid shall be " treated as profit for the year in which the repayment is " received."

What is " profit " under this language? I put the point to the learned Counsel for the Appellants, and he, of course, and properly, admitted that it must mean profit under Schedule D, that is to say, trading profit.

What does " for the year " mean in this section? It means that the profit is to be " treated as profit ingathered or earned " during the year."

(Lord Shaw of Dunfermline.)

The language of the sub-section would, so extended and interpreted, read that " in the case of repayment of excess profits " duty having been made, the amount so repaid shall be treated " as trading profit under Schedule D, ingathered or earned during " the year when repayment is received."

So treated, the question raised in the appeal is answered, and it appears clear to my mind that the judgments, both in this case and in the *Eglinton Silica* case(1), were unquestionably right.

It is no answer for the taxpayer to say that while he received the repayment he was out of business and therefore not earning profit, because the language of the Statute is to the effect that the repayment is to be treated as trading profit for the year of repayment, and therefore assessable as such under Schedule D. In my opinion the charge is one to be made under Case VI.

I think that the judgments of the Court below in the present case and in that which preceded it, namely the *Eglinton Silica* case(1), were correctly decided, and that the appeal fails.

Lord Sumner.—My Lords, I am of the same opinion. The words on which the whole question turns are contained in the latter part of the first paragraph of Rule 4 (1). I think they are clear. The adversative " but " shows that what follows is the onus which is to be borne by the person who enjoys the advantage given by the first part of the clause. The express mandatory terms of the sentence show, in carefully chosen language, that he is to submit to something by reason of his having previously enjoyed this advantage in the shape of repayment of an amount previously paid by way of Excess Profits Duty. Something which is not a profit, but is only a money repayment, something which may not result in a profit, because although trading goes on there is so great a loss on the year that this repayment does not make up the deficit, something which may not be a trading profit, because trading has ceased altogether, nevertheless is to be treated as profit and as profit for the year. " Treated " is a fresh word free from legal technicality. It is the widest word that could be chosen. The Legislature avoided saying " shall be assessed as " or " shall " be brought into the computation of profit and loss," and simply says that something which is not profit but mere payment shall be treated as profit, which it may or may not be, and as profit for the year. I think, therefore, that the word " treated " is an apt word to impose a charge. Thus the purpose of the Section as it originally stood in the Finance (No. 2) Act of 1915 was satisfied. It was to meet the case where the taxpayer, having paid a sum for Excess Profits Duty, which diminished the sum upon which he would afterwards pay Income Tax, gets back some or all of it and would escape the Income Tax, which he would otherwise have been liable to pay, unless a provision is made by this Section.

(1) 9 T.C. 92.

(Lord Sumner.)

The only difficult point in the case, I think, is the effect of transferring the Section, which was one of the paragraphs headed " Income Tax " in the Finance (No. 2) Act, 1915, into the Consolidated Income Tax Act of 1918. The Section then becomes one of the Rules applicable to Schedule D, and it has been argued, not without force, that the true charge in the Income Tax Act is to be found in the first clause and that the Rules are only modes of applying the charge previously expressed. The conclusion is drawn that this paragraph, being only a Rule, does not operate to prevent the principle of construction of that charge laid down in *Brown's* case(1) from applying and accordingly the repayment is taken out of any charging words. My Lords, if it is right to hold that " treated as profit " involves chargeability as profit, then the mere fact that these words are words of charge additional to the charge at the commencement of the Schedule does not prevent them from being effectual as a charge or render that part of their full meaning surplusage All that has happened is that there are two statements as to chargeability and the words " treated as profit for the year " still contain a specific charge.

It is quite true that the principle of all taxation statutes is that the Crown must state with reasonable and even more than reasonable clearness what the burthen is that is imposed upon the subject, but I do not think that in this case there can be said to be any doubt about the words, because the express language, that I rely upon, appears to me sufficient to convey the charge, and the insertion of this more or less transitory provision among the Rules applicable to the standing Income Tax legislation is not enough to introduce any element of doubt. If so, it becomes a minor matter to decide whether the charge is to be made under Case I or Case VI. If the amount repaid is treated as profit for the year it will be taxed somehow, but I quite agree with what has been said about the Case under which it should fall.

Lord Carson.—My Lords, I concur.

Questions Put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

(1) The National Provident Institution *v.* Brown, 8 T.C. 57.