

Wednesday, October 27.

FIRST DIVISION.

[Exchequer Cause.

J. & P. HUTCHISON v. INLAND
REVENUE.

Revenue—Excess Profits Duty—Increase of Capital—Pre-War Standard—Average Amount of Capital Employed during the pre-War Trade Years—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 41 (3).

Where the capital employed in a business had been increased in an accounting period of six months, held that for the purpose of fixing the deduction of profits in the accounting period allowable in respect of the increase of capital, the "average amount of capital employed during the pre-war trade years" must be calculated neither upon the average of the actual capital figures shown in the four six-monthly balances applying to the two pre-war years of trade, nor upon the capital figures shown in the two six-monthly balances struck at the beginning of the two pre-war trade years, but by ascertaining in the case of each introduction of fresh capital into the business during the pre-war period its amount and its date.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 38—“(1) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies, in any accounting period which ended after the fourth day of August Nineteen hundred and fourteen, and before the first day of July Nineteen hundred and fifteen, exceeded by more than two hundred pounds the pre-war standard of profits as defined for the purposes of this part of this Act, a duty (in this Act referred to as ‘excess profits duty’) of an amount equal to 50 per cent. of that excess. (2) For the purposes of this part of this Act the accounting period shall be taken to be the period for which the accounts of the trade or business have been made up. . . .” Section 40—“(2) The pre-war standard of profits for the purposes of this part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer (in this part of this Act referred to as the profits standard). . . . The provisions contained in the second part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year, and the provisions contained in

the third part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of this part of this Act. ‘The last pre-war trade year’ means the year ending at the end of the last accounting period before the fifth day of August Nineteen hundred and fourteen, and ‘the three last pre-war trade years’ means the three years ending at the three corresponding times.” Section 41—“(1) Where capital has been increased during the accounting period, a deduction shall be made from the profits of the accounting period at the statutory percentage per annum on the amount by which the capital has been increased, for the whole accounting period if the increased capital has been employed for the whole accounting period, and if the increased capital has been employed for part only of the accounting period, for that part of the accounting period. . . . (3) For the purposes of this section capital shall be taken to be increased or decreased, as the case may be, where the pre-war standard of profits is a profits standard, if the capital employed in the trade or business exceeds or is less than the average amount of capital employed during the pre-war trade years or year by reference to which the profits standard has been arrived at. . . .”

J. & P. Hutchison, shipowners, Glasgow, appellants, being dissatisfied with a determination of the Commissioners for the General Purposes of the Income Tax Acts at Glasgow, assessing the appellants to excess profits duty for the accounting period of six months ending 31st March 1915, appealed by way of Stated Case, in which S. W. Bensted, Surveyor of Taxes, Glasgow, was respondent.

The Case set forth—“The following facts were admitted or proved:—1. The appellants have been in use to balance their books upon the 31st day of March and the 30th day of September in each year. 2. The profits for the purposes of the excess profits duty are determined on the profits standard, and parties are agreed as to these, the question at issue being whether in computing the deduction for increased capital to be made from the profits under section 41 (1) of the Finance (No. 2) Act 1915 the pre-war capital should be based, as the appellants contend, upon the average of capital at the beginning of each of the two pre-war years selected for the purpose of fixing the pre-war standard by the appellants, or as the Surveyor of Taxes contends, upon the average of the four half-years comprised in the two selected years. 3. If the appellants are right the deduction to be made will be struck upon the calculation following, numbered I, and if the Surveyor of Taxes is right it will be struck upon the calculation following, numbered II:—

I
Appellants' Calculations.

Capital	31/3/12	31/3/13	31/3/14	30/9/14
Written down value of ships	138,521	114,271	115,996	110,925
Other assets	45,620	68,700	81,465	63,484
Depreciation plant . . . . .	...	184	349	427
	<u>184,141</u>	<u>183,155</u>	<u>197,810</u>	<u>174,836</u>
Less investments	4,081	3,203	1,206	1,206
" goodwill	19,027	19,027	19,027	19,027
" bank	43,011	21,921	...	...
" creditors	24,091	18,258	13,403	13,291
" deposit receipts . . . . .	...	17,501	27,662	11,155
" depreciation plant allowed . . . . .	...	107	205	255
	<u>90,210</u>	<u>80,017</u>	<u>61,503</u>	<u>44,934</u>
Capital employed	<u>93,931</u>	103,138	136,307	129,902
Pre-war	<u>93,931</u>	...	98,534	98,534
	103,138	Increase	37,773	31,368
	2/197,069	7%	1,322	1,098
Average	98,534	half-year		

II
Surveyor of Taxes' Calculations.

Capital	31/3/12	30/9/12	31/3/13	30/9/13	31/3/14	30/9/14
Written down value of ships	141,913	129,967	116,930	107,122	116,035	110,404
Other assets	45,620	53,079	68,700	70,982	81,465	63,483
Depreciation plant	203	295	387	469	552	628
	<u>187,736</u>	<u>183,341</u>	<u>186,017</u>	<u>178,573</u>	<u>198,102</u>	<u>174,515</u>
Less investments	4,081	4,081	3,203	1,703	1,206	1,206
" goodwill	19,027	19,027	19,027	19,027	19,027	19,027
" bank	43,011	34,442	21,921	10,461	...	...
" creditors	24,091	18,153	18,258	12,028	13,403	13,291
" deposit receipts . . . . .	...	...	17,501	17,501	27,662	11,155
" depreciation plant allowed	109	162	216	265	314	364
	<u>90,319</u>	<u>75,865</u>	<u>80,162</u>	<u>60,985</u>	<u>61,612</u>	<u>45,043</u>
Capital employed	97,417	107,476	105,891	117,588	136,490	129,472
Pre-war . . . . .	...	<u>4/428,372</u>	...	...	107,093	107,093
Average . . . . .	...	107,093	Increase	7%	29,397	22,379
			half-year		1,092	783

... 4. The Commissioners were of opinion that the mode of computing the capital employed in the appellant's business adopted by the surveyor was correct and in accordance with the provisions of the Finance (No. 2) Act 1915, and they accordingly confirmed the assessment and dismissed the appeal."

The following were referred to:—The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 38 (1) and (2), sec. 40 (2), sec. 41 (1) and (3), the Fourth Schedule, Part II, pars. 1, 2, and 4, and Part III, par. 1; the Finance Act 1916 (6 and 7 Geo. V, cap. 24), sec. 52; and the Finance Act 1917 (7 and 8 Geo. V, cap. 31), sec. 26 (5) (b).

At advising—

LORD PRESIDENT—This is an appeal against an assessment to excess profits duty. The appellants balance their books on 31st March and 30th September in each year. Accordingly—following section 38 (2) of the Finance (No. 2) Act 1915—the assessment deals with an accounting period of six months—viz., the period from 1st October 1914 to 31st March 1915. The pre-war standard of profits—in the case of the appellants—is a profits standard, not a percentage standard; and the pre-war period for the ascertainment of the profits standard consists of two pre-war trade years.

It is provided by section 41 of the Act that if the capital employed in a business has been increased (within the meaning of that section) during the accounting period a deduction is to be made from the profits of that period at the statutory percentage on the amount of such increase. If the increased amount is one which has been employed in the business for the whole of the accounting period, then the deduction is to be allowed for the whole of the accounting period. But if it is one which has been employed for only part of that period, then it is to be allowed for only such part. This involves a comparison between (1) the capital employed in the business in the pre-war period, and (2) the capital employed in the business from time to time in the accounting period. By sub-section (3) the latter capital—as it may stand from time to time—is held to show an increase over the former capital whenever it exceeds "the average amount of capital employed during the pre-war trade years or year by reference to which the profits standard has been arrived at."

It appears that the appellants did put additional capital into their business during the accounting period. In computing the deduction to which the employment of this additional capital entitles the appellants, the surveyor has based their pre-war

capital upon the average of the capital figures shown in the appellants' four six-monthly balances applying to the two pre-war years of trade. The appellants maintain (1) that this is unwarranted by the Act, and (2) that their pre-war capital ought to be based on the average of the capital figures shown in the two six-monthly balances struck at the beginning of the two pre-war years. It may be on either view that the book figures have been the subject of adjustments, but the point is that these adjustments, like the original book figures themselves, relate to the dates of the four balances on the one hand, and to the dates of the two balances on the other, and not to the dates at which the additions to the appellants' capital were actually made.

Neither of these contentions appears to me to be well founded. Just as the capital employed in the business may vary from time to time during the accounting period (whatever its length), so also may it vary from time to time during the pre-war period (whatever its length). But for purposes of comparison and of ascertainment of the amount of the increase (if any) at one or more times (as the case may be) during the accounting period, some fixed datum, representing the amount of the capital employed in the pre-war period (whatever its length) is indispensable. The Act provides for this by defining the datum as the average amount employed during the pre-war period, whether that period consisted of two years or of only one. Such an average can only be struck by ascertaining, in the case of each introduction of fresh capital into the business during the pre-war period, its amount and its date. Once these facts are ascertained the calculation of the average is easy.

It may be noted that there is a similar capital average required in order to arrive at the pre-war standard of profits in cases in which there has not been even one full pre-war year of trade. In such cases the statutory percentage is applied to "the average amount of capital employed during the accounting period"—Fourth Schedule, Part II, paragraph 4. Such average would in like manner be struck by ascertaining the amounts actually employed from time to time, and striking an average by reference to the amounts and dates.

The surveyor is probably right in claiming that his method results in a nearer approximation to the statutory average than that of the appellants. I imagine that these averages are usually fixed by discussion and agreement with the taxpayer, rather than by exact ascertainment; and it is possible that the appellants have little to gain by insisting on the application to their case of the more painful method. In the result the determination of the Commissioners must be reversed, and the case remitted to them to adjust the assessment.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court reversed the determination of the Commissioners and remitted the case to them to adjust the assessment.

Counsel for the Appellants—Watson, K.C.—Normand. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—The Solicitor-General (Murray, K.C.)—R. C. Henderson. Agents—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, October 30.

FIRST DIVISION.

[Lord Sands, Ordinary.]

WEMYSS v. WEMYSS' TRUSTEES.

Succession — Will — Condition — Whether Void from Uncertainty or Contra bonos mores—Forfeiture upon Allowing Divorced Wife to Reside on Heritage Life-rented by her Son.

A testator's first wife divorced and survived him. He was also survived by his second wife and by his son by his first wife. His trust-disposition and settlement gave his second wife during her pleasure the right to occupy his mansion-house, but provided she should have a discretion to relinquish that right of occupancy, and in the event of her relinquishing that right or dying, the mansion-house was to be held in trust for the life-rent use of his son by his first wife so long as the first wife should remain alive. The testator declared that it was his "express wish that [my] son shall never allow [the first wife] or any member of [her family] to reside at [the mansion-house] or any part of [my] said estate, and if at any time he shall contravene this condition [my] trustees shall forthwith cease to allow him the life-rent use of [the mansion-house], policies, and others." It was further provided that, *inter alia*, after the death of the first wife, and if the son had not contravened the condition referred to at any time, the estates were to be conveyed to the son, and failing him by predecease, or contravening the condition, the estates were to be conveyed to his lawful issue, whom failing certain others. *Held*, in an action of declarator raised by the son against his father's trustees, that the condition referred to was not null and void either for uncertainty, or because it was *contra bonos mores*.

Opinion per the Lord President (Clyde) and Lord Skerrington that the principles of the interpretation of such clauses were the same whether these clauses took the form of imposing a suspensive or a resolute condition.

Captain Michael John Wemyss, Wemyss Castle, Fife, *pursuer*, brought an action against Lady Eva Wemyss and others, the testamentary trustees of Randolph Gordon Erskine Wemyss, the pursuer's father, *defenders*, the conclusions of which were as follows:— "Therefore it ought and should be found and declared . . . that the