No. 462.—COURT OF SESSION (SCOTLAND), FIRST DIVISION.—13TH JUNE, 1922.

HOUSE OF LORDS.—30TH APRIL, 1923.

M'DONALD (H.M. INSPECTOR OF TAXES) *v.* SHAND.[1]

Income Tax, Schedule E—Commission based on profits—Perquisites—Income Tax Act, 1842 (5 & 6 *Vict., c.* 35), *Section* 146, *Schedule E, Rules* 1 *and* 4.

The Appellant, whose remuneration as general manager of a limited company consisted partly of a fixed annual salary and partly of a commission or bonus

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(1) Reported Ct. of Sess., 1922, S.C. 555, and H.L., [1923] A.C. 337.

on the company's net profits, had been assessed to Income Tax under Rule 1 *of Schedule E for the years* 1914–15 *to* 1917–18 *on the basis of the total amount of salary and commission or bonus received or receivable by him from the company in respect of each of those years.*

Held, *that the commission or bonus on net profits fell within the definition of the expression "perquisites" in Rule* 4 *of Schedule E and was properly assessable under that Rule and not under Rule* 1.

CASE.

At meetings of the Commissioners for the General Purposes of the Income Tax Acts and for executing the Acts relating to the Inhabited House Duties for the Lower Ward of Lanarkshire, held at Glasgow upon the 14th of June, 1920, and 20th of January, 1921, Francis James Shand, formerly general manager of Nobel's Explosives Company, Limited (hereinafter called the "respondent"), appealed against the additional first assessments made upon him under Schedule E of the Income Tax Act, 1842 (5 & 6 Vict. c. 35).

Year.	First Assessment.	Additional Assessment appealed against.	Duty charged in additional Assessment.
	£	£	£ s.
1914–15	6,475	2,112	176 0
1915–16	7,196	16,262	2,439 6
1916–17	12,851	39,357	9,839 5
1917–18	24,751	4,583	1,145 15

I. The following facts were admitted or proved :—

The respondent, as general manager of Nobel's Explosives Company, Limited, and in virtue of his agreements with that company, received during the years 1914 to 1917 (both inclusive) a fixed salary and a commission or bonus on the company's net profits.

During these years, and for a series of years prior thereto, he was assessed under Schedule E upon the amount of the salary received by him during the year of assessment, plus an amount equal to the average of the bonuses received by him during the three years immediately preceding the year of assessment. By the additional assessments appealed against it is proposed to assess both salary and bonus upon the amounts received or receivable by the respondent in respect of each year of assessment.

The sole point at issue between the respondent and the Crown is whether the bonuses in question fall to be assessed under rule 1 or under rule 4 of section 146, Income Tax Act, 1842, Schedule E. There is no dispute about the figures involved and if effect is given to the view of the Crown, both parties were agreed and submitted to the Commissioners that the additional assessments appealed against should be amended as follows :—namely, to £5,829, £24,194, £35,126 and nil for the years 1914–15, 1915–16, 1916–17 and 1917–18 respectively.

II. Mr. Alexander Moncrieff, K.C., appeared for the respondent and contended :—

(*a*) That the respondent had correctly interpreted the law in returning for assessment his commission on an average of the three years preceding the year of assessment. This basis had for about thirty years been accepted by the Inland Revenue Authorities, who had expert knowledge of the Income Tax Acts. Counsel, however, did not maintain that the Revenue Authorities were thereby barred from now assessing on a different basis ;

(*b*) That the assessment came under section 146 of the Income Tax Act of 1842, as the charging section, which was re-enacted by section 2 of the Income Tax Act of 1853. The rule contained in Schedule E of the Act accordingly applied. It was to be noted that by section 82 of the Taxes Management Act of 1880, the duties imposed were made payable annually on or before the 1st day of January. Thus payment was due before the expiry of the year of assessment, and as commissions might not be ascertainable before the expiry of the year of assessment, it must be inferred that the basis of assessment was to be looked for in a year or period of years prior to the year of assessment ;

(*c*) That under rule 1 of Schedule E, while both salaries and wages which might be termed stable income, and perquisites and profits which were unstable and fell to be estimated, were made chargeable, it was neither provided nor implied that the manner of assessment should be uniform. On the contrary, it was necessary in order to give effect to the statutory rules that stable income should be assessed on the actual receipts of the year while unstable income was assessed upon an estimate based on the receipts of former years ;

(*d*) That under rule 4 perquisites were defined as such profits of offices and employments as arise from fees or other emoluments. In view of this definition the term " perquisites " was appropriate, and was the only term in the schedule which was appropriate to include the bonuses paid to the respondent. Such bonuses fell to be estimated at the option of the receiver either on the profits of the preceding year or on the fair and just average of one year of the amount of the profits thereof in the three years preceding. Thus perquisites were withdrawn from the scope of rule 1, and the receiver of such bonuses was thus given an option to be assessed either on the preceding year or on the average of the three preceding years.

III. Mr. D. M'Donald, Inspector of Taxes, contended :—

(*a*) That section 82 (3) of the Taxes Management Act, 1880, provided for assessments being made after 1st January, that section 53 of the Income Tax Act, 1853, provided for assessment of additional salary, fees, or emoluments, and that section 52 of the Taxes Management Act provided machinery for additional assessments ;

(*b*) That the respondent had right to commission in virtue of a series of agreements enforceable in law ;

(*c*) That his commission was not a perquisite, which term connoted something casual and irregular, and not an annual sum, payment of which could be enforced in law.

IV. The Commissioners, after due consideration of the facts and arguments submitted to them, granted the Appeal and discharged the additional assessments.

Whereupon the Inspector of Taxes expressed his dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and having duly required the Commissioners 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.

JOHN ADAM,
WALTER RITCHIE,
Commissioners.

Glasgow, 19th January, 1922.

The case came on for hearing in the First Division of the Court of Session on the 13th June, 1922, before the Lord President and Lords Skerrington and Cullen, when the Solicitor-General (Mr. Constable, K.C.) and Mr. Skelton appeared as Counsel for the Appellant, and Mr. Moncrieff, K.C., and Mr. Normand as Counsel for the Respondent.

Judgment was delivered on that day unanimously in favour of the Respondent, with expenses.

I. INTERLOCUTOR.

Edinburgh, 13th June, 1922. The Lords having considered the Case and heard Counsel for the parties, affirm the determination of the Commissioners and Decern: Find the Appellant liable to the Respondent in expenses and Remit the Account thereof to the Auditor to tax and to report.

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

II. OPINIONS.

The Lord President.—This appeal relates to Income Tax assessed upon the Respondent under Schedule E for four years prior to the date when the Income Tax Act of 1918 came into operation. The decision must, therefore, turn on Section 2 of the Act of 1853 which contains the Schedule, and on Section 146 of the Act of 1842 which contains the Rules. The Respondent was manager of an incorporated company. This office came within the third Rule of Schedule E and subjected him to taxation under it. By the terms of his appointment his remuneration consisted, in part, of an annual salary of fixed amount, and, in part, of a commission or percentage upon the profits of the company in each year during which his appointment lasted. The question raised in the case is whether that part of his remuneration which consists in a commission on the company's annual profits falls to be assessed under Rule 1 of Schedule E, or under one or other of the methods prescribed by Rule 4. If it falls to be assessed under Rule 1, the tax payable in each year will have to be assessed with reference to the commission on the profits of that year—involving recourse to the cumbrous method of supplementary assessment—instead of to the commission on the profits of the preceding year or on those of the three preceding years, as provided in Rule 4.

The first Rule of Schedule E contains a comprehensive description of the taxable emoluments of offices or employments of profit :—" Salaries, fees, wages " perquisites or profits whatsoever accruing by reason of such offices." As is usual in a clause defining the extent of the charge, the net is spread as widely as possible and words of broad import are employed. It is obvious that, where an office or employment of profit is concerned, the amount of the remuneration attached to it may either be fixed by the terms of the officer's appointment or it may be variable according to circumstances arising in the course of executing the office or employment. Thus it may take the form of a fixed termly payment ; or, again, it may take the form of casual payments or dues receivable by the officer at times and in amounts dependent on the occurrence of certain contingencies, or on the performance of certain services. So far as the Rules go—other than Rule 4—every one of the different denominations of remuneration enumerated in them (except perhaps the first)—salaries, fees, wages, perquisites, profits whatsoever—may be fixed and definite, or variable and uncertain in amount. It will be observed that Rules 5 and 6 (dealing with employees of the Crown and of a subject respectively) apply the method of deduction at source to all of them indifferently. Yet it seems plain that this method could not be practically carried out at all in the case of many of the variable and uncertain forms of remuneration, and would be at least very difficult of application to most of them. Now, when I come to Rule 4, I find that certain classes of remuneration, therein described or defined as " per- " quisites ", are withdrawn from the mode of assessment which would have to be followed under Rule 1, and are made assessable by reference to their amount in the preceding year, or to their average amount during the three preceding years.

I do not think anybody can read Rule 4 without seeing that it has suffered some misfortune during the process of birth in Parliament, for the first half-dozen lines cannot be read grammatically. At first sight, the Rule seems designed to make another cast of the fiscal net by providing a wide definition of " perquisites ", thus enlarging the sweep of Rule 1, which includes " per- " quisites " by name, among the various forms of remuneration brought into charge. But when you come to look at the substance of the Rule, it is clear that that is not the object of the definition of " perquisites " in it, because the definition adds nothing to Rule 1. The definition is :—" Profits arising " from fees or other emoluments payable in the course of executing such " offices " ; all such profits are already comprehended under Rule 1. It seems to me to follow that the definition of " perquisites " in Rule 4 is a definition for the special purposes of that Rule. So reading it, I arrive at this result, that certain classes of profit from offices or employments—conveniently enough grouped under the term " perquisites "—may be estimated either on the basis of the preceding year or on the fair and just average of the three preceding years—which could not be done under Rule 1. It is not legitimate to construe the Act of 1842 by the consolidating Act of 1918 ; but I cannot help observing that that is the result more clearly expressed in the Consolidation Act. In short, the word " perquisites " is defined as a shorthand way of describing certain classes of remuneration (already covered under Rule 1) which may be assessed in a special way—those, namely, which " arise from fees or other " emoluments in the course of executing such offices or employments ". I think Mr. Skelton was right in treating the words " either by the Crown or the " subject " as parenthetical. It remains to discover what profits are meant by this description. I think they are those which are dependent for existence and amount on circumstances arising during the execution of the office or employment, as distinct from those whose amount is fixed and ascertained

by the terms of the officer's appointment. That seems to me the only reading of the Rule that can be given to it consistently with the rest of the Schedule. It is supported by the circumstance that assessment by reference to past years is specially appropriate and convenient to the case of variable and casual elements of remuneration, as opposed to fixed and permanent ones.

Rule 4, therefore, has the effect—as I read it—of withdrawing from the mode of assessment which would have to be applied under Rule 1 all remuneration of the holders of public offices or employments which consists of profits the amount of which is not fixed by the terms of the appointment, but depends upon the events and experience of the actual execution of the office. If that is right, there is no doubt as to the category to which the case of the present Respondent belongs. The amount of his commission on the annual profits is not fixed by his appointment. On the contrary, it is only ascertainable as his service proceeds, and according as it happens that the company makes a profit or not, and how big that profit is. The appeal does not raise any question as to whether the assessment should be made with reference to the immediately preceding year or to the average of the three preceding years.

My opinion, therefore, is that the decision arrived at by the Commissioners was perfectly right, and that no sufficient ground has been advanced for disturbing it.

Lord Skerrington.—I concur.

Lord Cullen.—My Lord, the ratio of Rule 4 appears to me to be profits called perquisites which fall under that Rule and profits which vary from year to year and the amount of which cannot be ascertained in any particular year until the close of it. None other has been suggested. That ratio seems to me to apply just as much to the case of a commission such as is paid to the Respondent as to any other class of payment which on the view for the Crown would admittedly fall within the meaning of the word "perquisites". I accordingly concur with your Lordship.

An appeal having been entered against the decision in the First Division of the Court of Session, the case came on for hearing in the House of Lords before the Earl of Birkenhead, Viscount Finlay, and Lords Dunedin, Atkinson and Shaw of Dunfermline, on the 30th April, 1923, when judgment was delivered unanimously in favour of the Respondent, with costs, affirming the decision of the Court below.

The Attorney-General (Sir Douglas Hogg, K.C., M.P.), the Lord Advocate (the Hon. William Watson, K.C.), Mr. R. P. Hills and Mr. Skelton appeared as Counsel for the Appellant, and Mr. Moncrieff, K.C., and Mr. Normand as Counsel for the Respondent.

JUDGMENT.

Earl of Birkenhead.—My Lords, this is an appeal against an interlocutor pronounced by the First Division of the Court of Session, as the Court of Exchequer in Scotland, on an appeal by Duncan M'Donald, His Majesty's Inspector of Taxes at Glasgow, under the Taxes Management Act, 1880, from the determination of the Commissioners for the General Purposes of the Income Tax Acts relative to assessments made upon the Respondent under the provisions of those Acts.

At or before the hearing certain facts were admitted or were proved. The Respondent, as General Manager of Nobel's Explosives Company, Limited, under an agreement to which in a moment I will more particularly refer, received during the years 1914 to 1917 a fixed salary and commission or bonus on the Company's revenue. During those years, and for a series of years prior thereto, he was assessed under Schedule E upon the amount of the salary received by him during the year of assessment, together with an amount equal to the average of the bonuses received by him during the three years preceding the year of assessment. Then additional assessments were made, which are the subject of the present appeal, under which it was proposed to assess both salary and bonus upon the amounts received or receivable by the Respondent in respect of each year of assessment. Only one point, and that within the briefest possible compass, requires determination by your Lordships, and that is whether the bonuses under discussion are to be assessed under Rule 1, or under Rule 4, of Section 146 of the Income Tax Act, 1842, Schedule E. No dispute arises in relation to the figures.

It is convenient that I should call attention to the terms of the Agreement between Nobel's Explosives Company, Limited, and Francis James Shand dated 18th and 19th August, 1914. The material clause is the eighth: "The "Company shall pay the said Francis James Shand in remuneration for his "services under this Agreement a fixed salary at the rate of fifteen hundred "pounds per annum, and in addition a bonus for each twelve months equal "to one and a quarter per cent. of the total revenue of the Nobel Dynamite "Trust Company, Limited, of London, as shown by the addition on the credit "side of the published profit and loss account of that Company, provided that "the total remuneration payable to the said Francis James Shand under this "clause shall not be less than at the rate of four thousand pounds for each "period of twelve calendar months." The result of this eighth clause of the Agreement is that a guaranteed minimum sum of £4,000 a year shall in any event be paid to Francis James Shand, but there is a possibility, depending upon the revenue of the Company, that by the operation of the bonus the total moneys payable to him will exceed the sum of £4,000 a year.

It is next convenient to examine shortly the terms of the Rules under Schedule E. I will first read the material words in the First Rule, the contention of the Crown, of course, being that this case is governed by the words of that Rule: "The said duties shall be annually charged on the persons respectively having, "using, or exercising the offices or employments of profit mentioned in the said "Schedule (E.), or to whom the annuities, pensions, or stipends mentioned in "the same Schedule shall be payable, for all salaries, fees, wages, perquisites, or "profits whatsoever accruing by reason of such offices, employments, or "pensions, after deducting the amount of duties or other sums payable or "chargeable on the same by virtue of any Act of Parliament, where the same "have been really and bonâ fide paid and borne by the party to be charged; "and each assessment in respect of such offices or employments shall be in "force for one whole year, and shall be levied for such year without any new "assessment", and then follow words with which we are not so closely concerned. The Fourth Rule is the following: "The perquisites to be assessed "under this Act shall be deemed to be such profits of offices and employments "as arise from fees or other emoluments, and payable either by the Crown or "the subject, in the course of executing such offices or employments, and may "be estimated either on the profits of the preceding year, or of the fair and "just average of one year of the amount of the profits thereof in the three "years preceding; such years in each case respectively ending on the fifth "day of April in each year, or such other day of each year on which the accounts "of such profits have been usually made up."

The first observation which I think falls to be made is that in construing Rule 4 one must bear in mind that the Legislature had already placed on record Rule 1; in other words, when they deal with "perquisites" in Rule 4 it is to be assumed that they had in their minds the provisions of Rule 1, and intended in the language which they employed in Rule 4 to provide for a distinguishable and, indeed, for an already distinguished case. Bearing that observation in mind, what conclusion is to be drawn? It is, I think, evident that the scheme of the First and Fourth Rules of Section 146 is that fixed emoluments, such as salary, shall be assessed on the basis of the sum receivable during the year of assessment, but that profits which vary from year to year shall be assessed by way of estimate, at the recipient's option, either on the profits of the preceding year or on the fair average of one year of the amount of the profits in the three years preceding. The First Rule is intended, as I read it, to define the extent of the charge, and it accordingly uses wide words in order to bring within the charge all profits whatsoever accruing by reason of the office. The object of the Fourth Rule, on the contrary, is to deal in a more specific manner with profits which vary, and here the important words from the point of view of the subject matter of the present appeal are the definition of "perquisites". It is at first sight not altogether easy to see what in the definition of "perquisites" in the Fourth Rule is added to the definition of "perquisites" in the First Rule; but the words about which an observation falls to be made in the definition of "perquisites" in the later Rule are "such "profits of offices and employments as arise from fees or other emoluments, "and payable . . . . . in the course of executing such offices or employ- "ments". My Lords, what is the purpose of the definition? It surely must be to ascertain what are the profits which are to be assessed either by reference to the receipts of the year preceding the year of assessment, or by reference to the average of the three preceding years. The words that are used are "such profits of offices and employments as arise from fees or other "emoluments".

Is it possible to contend with success that a bonus payable under the circumstances provided for by the clause of the Agreement which I have read is not a "perquisite" in the sense in which "perquisite" is explained by the words that follow it in Rule 4? Infinite disputation is possible as to what, in different contexts, may be the proper connotation of a term such as "perquisite". In one context it may have a bad or an irregular connotation; in another it may be normally ranged under payments which are both frequent and regular in commercial transactions. I am to put a meaning upon "perquisites" in the context of the Rule, and I derive no small degree of guidance from the words which follow, to which I have directed attention: "such profits of offices and "employments as arise from fees or other emoluments." The Lord Advocate in his clear argument says that I am to read "emoluments" as being *ejusdem generis* with "fees". Be it so. With what am I to read "fees" as being *ejusdem generis*? What definition of the term "fee" am I to adopt which would exclude a payment by way of bonus such as that which is stipulated for under clause 8 of this Agreement?

My Lords, for these reasons, in a case which seems to me to be very clear, I reach the conclusion that the decision of the Commissioners was right and ought to be affirmed and that this appeal should be dismissed, and I move your Lordships accordingly.

Viscount Finlay.—My Lords, I am of the same opinion. Under the First Rule certain duties are imposed "for all salaries, fees, wages, perquisites or "profits whatsoever" arising from certain offices, employments, and pensions mentioned in the Schedule. Then the Rule goes on to say that each assessment

shall be in force for a whole year. In the enumeration in that Rule 1 you have "perquisites", and it seems to be considered desirable to define the word "perquisites". "Perquisites" is a word which may, according to the connection in which it is used, have a variety of different meanings, and a definition is given accordingly by Rule 4 which in some respects may be taken as extending the meaning of the term "perquisites": "The perquisites to be assessed under "this Act shall be deemed to be such profits of offices and employments as "arise from fees or other emoluments, and payable either by the Crown or the "subject, in the course of executing such offices or employments, and may be "estimated either on the profits of the preceding year, or of the fair and just "average of one year of the amount of the profits thereof in the three years "preceding." The first observation to be made, I think, on this Rule is that the words "to be such profits as arise from fees" are clearly to be read with the words "in the course of executing such offices or employments". You have got words intervening referring to the question by whom the fees are to be paid, and saying it does not matter whether they are payable by the Crown or the subject. The profits are to be such profits as arise from fees or other emoluments in the course of executing such offices or employments. There is nothing that I can find there to denote that the fee or perquisite is to be payable on the doing of a particular act. In most cases I dare say it will be so, but it is quite enough if it is a payment which arises in the course of the employment.

The object of Rule 4 was to deal with a case where, owing to the manner in which the charge was made, you could not say till the period had elapsed what the amount was, because, if a fee is to be charged either on doing a certain act or on the happening of a certain event, you cannot say until the period has run out how often that act has been done or how often that event has happened. For that reason Rule 4 gives the definition, according to my reading of the Rule, really with a view to the special provision which immediately follows as to the mode of assessment. It deals with the case of profits which could not in the nature of things be ascertained till the year runs out, and then, it says, they may be ascertained either on the profits of the preceding year or on the fair and just average of one year of the amount of the profits thereof in the three years preceding.

My Lords, that seems to me to be the fair meaning of the Rule, and I can entertain no doubt whatever that the decision of the Court below was right and this appeal should be dismissed.

Lord Dunedin.—My Lords, I think this was a hopeless appeal, and I concur in the judgment proposed.

Lord Atkinson.—My Lords, I concur.

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

Questions put:

That the Interlocutor appealed from be reversed.

The Not Contents have it.

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

The Contents have it.