NO. 1017—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—18TH AND 19TH JULY, 1935

COURT OF APPEAL—3RD, 4TH AND 5TH DECEMBER, 1935

HOUSE OF LORDS—27TH AND 29TH OCTOBER, 1936, AND 21ST JANUARY, 1937

SMART (H.M. INSPECTOR OF TAXES) *v.* LINCOLNSHIRE SUGAR CO., LTD.(1)

Income Tax, Schedule D—Profits of trade—Advances under British Sugar Industry (Assistance) Act, 1931*—Whether revenue receipts or loans—Whether and when assessable.*

The British Sugar (Subsidy) Act, 1925*, provided that a subsidy be paid for ten years on sugar manufactured in Great Britain from beet grown therein. The British Sugar Industry (Assistance) Act,* 1931*, provided for further assistance to be given to companies engaged in such manufacture (of which the Respondent Company was one) by way of weekly advances for one year commencing on* 1*st October,* 1931*. In the event of a rise in sugar prices, the advances were repayable, wholly or in part, by deductions from any subsidies payable under the Act of* 1925 *in respect of sugar manufactured during the period of two years beginning on* 1*st October,* 1932*, while in the event of the winding-up of the Company or the appointment of a receiver within the period of three years beginning on* 1*st October,* 1931*, the total advances, so far as not already repaid, were to become repayable. Apart from these provisions, the advances were not to be repayable.*

The Respondent Company received payments of the subsidy under the Act of 1925*, and brought them into its profit and loss accounts as trading receipts, and they were so dealt with for Income Tax purposes. During the year* 1931–32*, the Company received advances under the Act of* 1931 *which were shown in its balance sheets as a liability. It was admitted that in the events which happened no part of the advances was in fact repayable by the Company.*

In the assessment under Schedule D made upon the Company for the year 1932–33*, the advances received under the Act of* 1931 *were treated as trading receipts of the Company's year ending*

(1) Reported (K.B. & C.A.) 154 L.T. 167; (H.L.) 156 L.T. 215.

31st March, 1932. *On appeal the Special Commissioners held that the advances were in their nature loans and not trading receipts, and that, in any event, they were not trading receipts until the period during which possible repayment might be claimed had expired, and the Company could not be assessed to Income Tax in respect thereof in the year under appeal.*

Held, *in view of the business nature of the sums in question, that they were trading receipts of the Company and proper to be taken into account for Income Tax purposes in the year in which they were received.*

CASE

Stated under 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 meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 6th November, 1934, and 12th February, 1935, the Lincolnshire Sugar Company, Limited (hereinafter called " the Company ") appealed against an assessment in the sum of £45,000, less £15,000 wear and tear, made upon it for the year ending 5th April, 1933, under Case I, Schedule D, of the Income Tax Act, 1918.

2. The Company was incorporated under the Companies Acts, 1908–1917, and is engaged at Bardney in the County of Lincoln in the manufacture in Great Britain of sugar from beet grown in Great Britain.

3. By the British Sugar (Subsidy) Act, 1925 (15 Geo. 5, c. 12), it was provided that there should be paid out of moneys provided by Parliament a subsidy at the rates prescribed by the First Schedule to the said Act in respect of every hundredweight of sugar manufactured in Great Britain during a period of ten years from 1st October, 1924, from beet grown in Great Britain.

The Company has received the said subsidy in respect of the sugar manufactured by it, and the sums so received have been brought into the profit and loss accounts of the Company as trading receipts and dealt with as such in computing the profits for Income Tax purposes.

4. It was admitted that as the price of sugar per hundredweight had fallen from approximately 22*s.* in 1924 to 7*s.* in 1930 and the rates of the subsidy payable under the British Sugar (Subsidy) Act, 1925, after the 30th September, 1931, were only one-third of those paid in respect of the period from 30th September, 1924, to 1st October, 1928, certain companies engaged in the manufacture of sugar from sugar beet grown in Great Britain (of which the Com-

pany was one) would have found themselves in difficulties in 1931 if called upon to pay the prices contracted to be paid to the growers of the sugar beet without receiving further assistance from His Majesty's Government.

5. In 1931 the British Sugar Industry (Assistance) Act, 1931 (21 & 22 Geo. 5, c. 35), was passed.

The said Act is described as " An Act to provide for the making " of advances to certain companies in respect of sugar manufactured " by them in Great Britain during a period of one year beginning " on the first day of October, Nineteen hundred and thirty-one, " from beet grown in Great Britain; to provide for the recovery " in certain events of the advances so made, and for the remission of " any balance thereof not so recovered. . . . ."

6. The said Act, after reciting that His Majesty's Government had offered to grant assistance by way of advances to the extent and subject to the conditions mentioned in the said Act to such persons engaged in the manufacture in Great Britain of sugar from beet grown in Great Britain as might be prepared to accept those conditions and the said conditions had been accepted by the companies specified in the First Schedule to the said Act (of which the Company was one), provided that the Minister of Agriculture and Fisheries should, out of moneys provided by Parliament, make advances to the companies specified in the First Schedule to the said Act in respect of sugar manufactured by them from home-grown beet during the period of one year commencing on 1st October, 1931, in the factories specified in the second column of the said Schedule.

The maximum quantity of sugar in respect of which advances could be made was, in the case of each scheduled factory, 300,000 hundredweights.

An advance was not to be made unless the price paid, or agreed to be paid, to the grower of the beet represented a rate not less than the price specified in the Second Schedule of the said Act.

7. Section 2 of the said Act makes provision with respect to the manner in which and the extent to which advances made to companies under Section 1 of the said Act should be repayable.

8. Between 18th October, 1931, and 3rd January, 1932, the Company received weekly advances under the said Act of 1931 in respect of sugar manufactured by it in its factory at Bardney (the factory specified in the First Schedule to the said Act) amounting in all to £17,494 5*s*. 7*d*. A detailed statement of the said advances is attached hereto (marked " A ") and forms part of this Case[1].

9. In the Company's accounts for the years ending 31st March, 1932, 1933 and 1934, the said sum of £17,494 5*s*. 7*d*. is shown in the balance sheet as a liability.

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[1] Not included in the present print.

Copies of the said accounts are attached hereto (marked " B ", " C " and " D ") and form part of this Case(1).

In the events which happened neither the said £17,494 5*s*. 7*d*. nor any part thereof is repayable under the said Act.

In arriving at the assessment of £45,000 made upon the Company for the year under appeal the said £17,494 5*s*. 7*d*. has been treated as a trading receipt of the Company's year ending 31st March, 1932 (the profits of which year form the basis of the Income Tax assessment for the year under appeal).

10. The Company gave notice of appeal against the assessment in a letter dated 7th October, 1932, but withdrew that ground of the appeal which related to the liability of the Company to be assessed to Income Tax in respect of the sums received, leaving the only question outstanding that of the years in which the sums received should be credited. (See letters dated 10th and 11th October, 1933(1)).

Copies of the correspondence are attached hereto (marked " E ") and form part of this Case(1).

At the hearing on 6th November, 1934, the Inspector objected that it was not now open for the Company to contend that the Company was not assessable in respect of the sums received.

We, the Commissioners, overruled this objection but adjourned the hearing till the 12th February, 1935, so that the Inspector should not be taken by surprise.

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

(*a*) The said advances amounting in all to £17,494 5*s*. 7*d*. received by the Company under the British Sugar Industry (Assistance) Act, 1931, were in their nature loans liable to repayment under certain specified circumstances;

(*b*) The said advances were capital payments or receipts of capital and were not liable to Income Tax;

(*c*) The said advances were not trading receipts and the Company was not assessable to Income Tax in respect thereof;

(*d*) If the said advances were trading receipts in respect of which the Company was assessable to Income Tax, the said advances were not trading receipts before 30th September, 1934, having regard to the provisions of Section 2 (2) of the said Act of 1931, and the Company was not assessable to Income Tax in respect thereof in the year under appeal.

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

(*a*) The said advances were in the nature of revenue and were not capital receipts;

(1) Not included in the present print.

(*b*) The said advances constituted trading receipts of the Company for the year in which they were received, namely, the year ending the 31st March, 1932;

(*c*) The Company was assessable to Income Tax in respect thereof in the year ending 5th April, 1933.

13. Having considered the evidence and arguments adduced before us, we held that the said advances made to the Company under the British Sugar Industry (Assistance) Act, 1931, were in their nature loans and were not trading receipts.

We further held that in any event the said allowances were not trading receipts prior to 30th September, 1934, and that the Company could not be assessed to Income Tax in respect thereof in the year under appeal.

14. After making other adjustments agreed upon between the parties we reduced the assessment for the year ending 5th April, 1933, to £27,117, less wear and tear £16,788.

15. The Appellant immediately after the determination of the appeal declared to us his 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 Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

N. ANDERSON,
G. R. HAMILTON,
} Commissioners for the Special Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.

31st May, 1935.

The case came before Finlay, *J.*, in the King's Bench Division on the 18th and 19th July, 1935, and on the latter date judgment was given against the Crown, with costs.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Roy E. Borneman for the Company.

JUDGMENT

Finlay, J.—This is a case of considerable difficulty in which I have been greatly assisted by the arguments of Counsel. I have upon the whole arrived at the conclusion that the appeal fails, and I desire to explain as clearly as I can why I think it fails, although I agree with a very great deal of the argument of Mr. Hills in the able reply which he made just now.

(Finlay, J.)

It is convenient first to state what the facts are. The Respondents in this Court, the Lincolnshire Sugar Company, Limited, are a company engaged in the manufacture of beet sugar, and they appealed against an assessment under Schedule D. The facts are clearly set out in the Case, and it is probably convenient to follow them as they are there set out. It begins with an Act of 1925 called the British Sugar (Subsidy) Act, which provided for the payment out of moneys provided by Parliament of a subsidy at prescribed rates in respect of every hundredweight of sugar manufactured in Great Britain, during a period of ten years, from beet grown in Great Britain. This Company, among, I have no doubt, many others, duly received that subsidy, and they have brought it into their profit and loss account and dealt with it as a trade receipt in computing their profits for Income Tax purposes. Now by reason apparently of a fall in the price of sugar, the Act of 1925 was thought to be ineffective, or not fully effective for its purpose, and in 1931 there was passed the Act upon which the question in this case mainly turns, that is, the British Sugar Industry (Assistance) Act, 1931. It is not necessary that I should now review the provisions of that Act, but I shall have to look at them a little carefully, for my decision really depends on the view which ought to be taken of it. It is sufficient for the moment to say that it provides for weekly advances to certain companies, and among others to this Company, and this Company received advances amounting in all to £17,000 odd. The Company received these amounts, and in their balance sheet (I do not think it is very important, but it is worth mentioning) the advances are shown as a liability. There are certain provisions, which again I must look at more closely later, for repayment. But it is a fact found by the Commissioners that in the events which happened no part of this sum of £17,494 5*s*. 7*d*. was repayable. In arriving at the assessment upon the Company, this sum of £17,494 5*s*. 7*d*. was treated as a trading receipt. The assessment was based upon that view, and the point in the case is whether that was right or not.

The contentions of the Company and of the Crown are set out. I need not refer to them because the case was elaborately and carefully argued before me, and I have had all the contentions put to me. What the Special Commissioners found was this : " Having " considered the evidence and arguments adduced before us, we held " that the said advances made to the Company under the British " Sugar Industry (Assistance) Act, 1931, were in their nature loans " and were not trading receipts. We further held that in any " event the said allowances were not trading receipts prior to " 30th September, 1934, and that the Company could not be " assessed to Income Tax in respect thereof in the year under " appeal ".

(Finlay, J.)

To my mind the decision in this case depends entirely on the view which one takes of the true meaning of the Act of 1931. It may be convenient to say at this stage that some cases were very properly cited to me. For the Crown there were cited the familiar cases of *Blake* v. *Imperial Brazilian Railway*, 2 T.C. 58, and the *Nizam's Guaranteed State Railway Co.* v. *Wyatt*, 2 T.C. 584, and perhaps the main reliance was placed upon the rather special and peculiar case of the *Pretoria–Pietersburg Railway Company, Limited* v. *Elwood*, 6 T.C. 508. I do not need to say very much about those cases. To my mind they are all of a rather special character, and each depends really upon its facts. I do not need to say very much about them, for the reason that they have been recently reviewed by the present Master of the Rolls in the case of the *Seaham Harbour Dock Company* v. *Crook*, 16 T.C. 333, and at pages 345, 346 and 347 the Master of the Rolls discusses those three cases. I am not satisfied that any great amount of help is really to be got from them. The *Pretoria* case, the one upon which I think most reliance was placed, was a case of a very special character. The point there was this. There was a certain sum which the Government, after the conquest of South Africa, agreed to pay and did pay as interest, and it was really decided by both Courts that that was in the nature of a revenue payment. But the real point in the case was whether it was interest and as such taxable—under Case III, Schedule D, I suppose it would be—in respect of the year in which it was received, or whether it was to be regarded as revenue liable to tax but as being part of the profits and gains of the company, in which case it would be assessable as to only one-third in the particular year under the system which then prevailed. That was the point in that case, and I observe that the Master of the Rolls obviously considered in the *Seaham Harbour Dock* case[1] that these cases, though no doubt useful, depended very much upon their own particular facts, and what he said with regard to those cases there I should venture myself to apply to the *Seaham Harbour Dock* case. That case in the Court of Appeal appeared to go upon the point that this was a sum to be applied to capital expenditure, namely, the building of the dock, not the working of the dock. If that stood alone there would be no difficulty about the case; it would be remote from the present. But it has been pointed out by Mr. Borneman, and Mr. Hills, I think, agreed, that in the House of Lords a somewhat wider scope was given to it. I have looked at the House of Lords' judgment, and I do not think that that can possibly be taken as being authority, or ought to be taken as being authority, for the view that a subsidy granted by a Government Department cannot be the subject of taxation to Income Tax. To take the very case before me, it is found in the Case that the present Respondents have brought into account and

(1) 16 T.C. 333, at p. 347.

(Finlay, J.)

paid tax upon the subsidy which they received under the Act of 1925. Nothing that I say must be supposed to throw any doubt upon the view that they were right in so bringing that in and so accounting for it. I think that these cases must always be taken as referring to their own facts, and that what is said must necessarily be read with reference to those facts. I so read the *Seaham Harbour Dock* case(1), and in so reading it, I do not treat it as an authority for the view that the subsidy cannot be brought into account for the purpose of Income Tax. If the point before me had been, as it is not, whether the subsidy under the Act of 1925 had to be brought into account for Income Tax, then I should, of course, have had to consider the *Seaham Harbour Dock* case, assuming I had first of all decided that it had to be brought into account.

That brings me to what I conceive is the real point in this case, and that depends upon a survey of the provisions of the British Sugar Industry (Assistance) Act, 1931, which have been gone into with great care and great fulness by Counsel on both sides. I need not say a very great deal about it, but I must say enough to make the view which I take intelligible. It was substantially the view which was urged upon me by Mr. Borneman, for I was convinced not by evidence but by his argument on this which I think is the real point in this case. The Act has a rather long title. I think some attention was rightly called to it, and I had better read it. The Act provides " for the making of advances to certain companies in " respect of sugar manufactured by them in Great Britain during " a period of one year beginning on the first day of October, nineteen " hundred and thirty-one, from beet grown in Great Britain; to " provide for the recovery in certain events of the whole or some " part of the advances so made, and for the remission of any balance " thereof not so recovered ". A good deal was said to me by both sides of the Bar about the use of the word " advances " there. I should be disposed to agree with Mr. Hills that an advance is not necessarily a loan, but I do think that the word " advances " contemplates some repayment. I think that, while it is not necessarily a loan, it is a word which certainly rather suggests " loan " more than do the words often used " subsidy " or " grant ".

We now come to the actual provisions of the Act, and it is only necessary to consider the first and second Sections and to some extent the Third Schedule, though it is not necessary for me, for the purposes of my judgment, to go into the somewhat complicated provisions of the Schedule. Section 1 (1) provides for the making of advances to certain companies, and the Company here in question was one of the companies. What it says is this : " Subject to the " provisions of this Act and to the satisfaction of such requirements " as to proof and otherwise as may be prescribed, the Minister of " Agriculture and Fisheries (in this Act referred to as ' the

(1) 16 T.C. 333.

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" ' Minister ') shall, out of moneys provided by Parliament, make " advances to the companies specified in the first column of the " First Schedule to this Act in respect of sugar manufactured by " them from home-grown beet during the period of one year com- " mencing on the first day of October, nineteen hundred and " thirty-one, in the factories specified in the second column of the " said Schedule ". That is clear enough. That is a provision that in one year the Minister is to make advances to the companies. Then Section 2 is of vital importance, and indeed, to my mind, the case turns upon it. " (1) The provisions of this section shall have " effect with respect to the manner in which, and the extent to " which, advances made to a company under the last preceding " section shall be repayable. (2) Until the total amount of the " advances made to any company is repaid, deductions calculated " in accordance with the relevant provisions of the Third Schedule " to this Act shall, while the market price of imported sugar is " sufficiently high to bring those provisions into operation, be made " from any subsidies payable to the company under the British " Sugar (Subsidy) Act, 1925, in respect of sugar manufactured " during the period of two years beginning on the first day of " October, nineteen hundred and thirty-two ". It is convenient there just to look at Clause 6 in this Third Schedule which says this : " No deduction shall be made from the subsidy payable under the " Act of 1925 in respect of sugar manufactured by a company " unless the relevant market price exceeds the basic price for that " company, but if the relevant market price exceeds the basic price, " one seventy-eighth part of the subsidy so payable shall be deducted " for every penny (or fraction of a penny) of the amount by which " the one price exceeds the other ". I do not think it is necessary to go into the not very easy definitions of relevant market price and basic price. What that means is, I think, quite clear. If the relevant market price exceeds the basic price, then, in that event, this advance—I do not wish to use the word " loan "—is to be repaid, to some extent at all events. The method of repayment is by a deduction from the subsidy, but that I regard as mere machinery. I think the case is the same as if the Legislature had chosen to provide that, if the relevant market price exceeded the basic price, then there should be a direct repayment. The meaning of that, as I say, is tolerably clear. Once you find that condition fulfilled, then there is to be, either in whole or in part, a repayment of this advance.

Now I go to Sub-section (3) of Section 2, which is also important : " If within the period of three years commencing on the first day " of October, nineteen hundred and thirty-one, a winding up order " is made, or a resolution for a voluntary winding up is passed, " with respect to the company, or possession is duly taken of any " of the company's property by or on behalf of the holders of any

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" debentures secured by a floating charge, or a receiver or manager " of the company's business is duly appointed, the total amount " of the advances made to the company shall, so far as not previously " repaid under the last preceding subsection, become due and pay- " able to the Minister by the company ". Sub-section (4) I will also read. Mr. Hills quite naturally called attention to it : " Save " as aforesaid, the advances shall not be repayable ".

Sub-section (3) does seem to be important, and I have myself not been able to get over the difficulty which I think it causes to the Crown. It makes it quite clear that if a company receives this advance and then goes into liquidation, or a receiver for the debenture holders is put in, or anything of that sort happens, then in that event the advance is to be at once repaid. I think (I put it to Mr. Hills and in spite of the answer which he made I still think) that it is a startling thing if a sum is to be liable to tax on its receipt by the company, and then, on an event which might happen a week after the receipt, is liable to be repaid by the company. The Crown would get tax and get it on a sum which it would then recover. That certainly, I think, is a startling result.

That is really the whole of the material, and on that the question is whether I can say that the Special Commissioners in their decision have gone wrong. On the whole, I have indicated, though not without doubt, that I agree with them. What they say is that these sums were in their nature loans. It is not necessary, I think, to use the word " loan ", but what I do think one can see if one looks at it is that they were not sums paid and paid irrevocably to the Company. They were not subsidies or grants to assist the Company in their business; they were sums advanced and sums which were in some contingencies at all events repayable.

On the whole, taking the view as I do that a subsidy would, generally speaking, be subject to tax—I say " generally speaking " for the reason that I have not failed to observe, as I indicated earlier, the decision of the House of Lords in the *Seaham Harbour Dock* case(1)—that, I think, shows that one has got to consider the facts in each case, and shows further, as one would expect on what is largely a question of fact, that decisions on one case are not a very great help in deciding another case, except, of course, as far as they lay down any question of principle. But, repeating that I am willing to assume and do assume that a subsidy, such as the subsidy under the 1925 Act, is properly brought into account for taxation purposes, I think that, following the view which commended itself to the Special Commissioners, I ought to hold that the sums here were rather in the nature of loans by reason of the provisions made for repayment than in the nature of gifts or sums irrevocably handed over.

(1) **16 T.C. 333.**

(Finlay, J.)

On this ground, which I have tried to express as accurately as I can, I am of opinion that the argument for the Respondents here succeeds, and accordingly the appeal is dismissed.

Mr. Borneman.—I ask that the appeal be dismissed with costs.

Finlay, J.—Yes.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Wright, *M.R.*, and Romer and Greene, *L.JJ.*) on the 3rd, 4th and 5th December, 1935. On the last named date judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Roy E. Borneman for the Company.

JUDGMENT

Lord Wright, M.R.—This is an appeal from a judgment of Finlay, J., given on a Case stated by the Special Commissioners under the Income Tax Acts in a dispute between E. J. Smart, the Inspector of Taxes, and the Lincolnshire Sugar Company, Limited. As the learned Judge has observed, the case raises a point of some nicety and a point which can only be decided by a careful examination of the provisions of an Act of 1931, the short title of which is the British Sugar Industry (Assistance) Act. The Respondents here, the taxpayers, are the Lincolnshire Sugar Company, Limited, and they are a company engaged in the industry of making sugar out of beet. It is familiar to most people now that that industry has been the subject of considerable subsidy, dating from the year 1925. Before I come to consider the Act of 1931, I should like very shortly to state the effect of the earlier Act of 1925. I shall refer to the Acts in future as the Act of 1925 and the Act of 1931.

Under the Act of 1925, it was provided that out of public moneys there should be paid a subsidy in respect of every hundredweight of molasses or sugar manufactured in Great Britain during a period of ten years from the 1st October, 1924, and the rate of the subsidy (I need not refer to various conditions in the Act) for the period with which we are now concerned, that is to say, on and after the 30th September, 1931, was fixed at 6*s.* 6*d.* per hundredweight of sugar manufactured. The ten years were up on the 30th September, 1934; then the subsidy under this Act was to come to an end and, in fact, did come to an end, and during

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the last three years, as I have already said, the rate was 6*s*. 6*d*. per hundredweight. That was a subsidy pure and simple in terms without any qualification or condition. The Respondent Company were in the enjoyment of that subsidy at all material times, but certain companies found that even with the subsidy they were, or were likely to be, in some difficulties in carrying out their trade or industry in the way in which it was desired by Parliament that it should be carried out. I refer in particular to the desire of Parliament that the growers of sugar beet should be paid certain rates for the beet which they grew. In the interval between 1925 and 1931, the price of sugar had fallen enormously; according to the Case, it had fallen from 22*s*. in 1924 to 7*s*. in 1930, though the rate of the subsidy had diminished very considerably during that period. Then, as the Case finds, " certain companies engaged " in the manufacture of sugar from sugar beet grown in Great " Britain (of which the Company was one) would have found " themselves in difficulties in 1931 if called upon to pay the prices " contracted to be paid to the growers of the sugar beet without " receiving further assistance from His Majesty's Government ". It was in that state of facts that the Act of 1931 was passed. Now under that Act provision was made for what, for the moment, rather inaccurately perhaps, I might call a further subsidy. I use that word without begging the question, because the main dispute in this case is whether the payment provided for under the Act of 1931 is really a subsidy or a payment which comes within the general principles of a subsidy, or whether it is something else, namely, a loan. The Act of 1931 has not only a long description, but it has also a preamble, and I think I must read both. It is described as: " An Act to provide for the making of advances " to certain companies in respect of sugar manufactured by them " in Great Britain during a period of one year beginning on the " first day of October, nineteen hundred and thirty-one, from beet " grown in Great Britain; to provide for the recovery in certain " events of the whole or some part of the advances so made, and " for the remission of any balance thereof not so recovered; and " for purposes incidental to, or consequential upon, the matters " aforesaid ". That is the long title. The preamble is: " Whereas His Majesty's Government have, subject to the approval " of Parliament, offered to grant assistance by way of advances, " to the extent and subject to the conditions mentioned in this Act, " to such persons engaged in the manufacture in Great Britain " of sugar from beet grown in Great Britain as might be prepared " to accept those conditions, and the said conditions have been " accepted by the companies specified in the First Schedule to " this Act ". That includes the Respondent Company. Then it is enacted as follows.

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Now the Act is of a temporary character in this sense, that it only deals with sugar manufactured during the period of one year commencing on the 1st October, 1931, and only deals with the factories mentioned in the Schedule, that is to say, the factories of those companies who have accepted the provisions of the Act. Out of moneys provided by Parliament, Section 1 of the Act says, the Minister of Agriculture and Fisheries shall make advances to those companies in respect of the sugar manufactured by them during the year which I have specified. A maximum is fixed as applicable to each factory or concatenation of factories, and then comes, in Section 1, Sub-section (4), the primary condition of the payment, and, as the evidence and the circumstances seem to show, the purpose of the payment. " An advance shall not be made " under this section to any company unless the Minister is satisfied, " as respects all sugar manufactured, or to be manufactured, by " the company from home-grown beet during the year commencing " on the first day of October, nineteen hundred and thirty-one, " that the price paid, or agreed to be paid, to the grower of the " beet represents a rate not less than the price per ton specified " in the Second Schedule to this Act ". That price is, so far as the standard of the price is concerned, a minimum price of 38*s.* a ton, subject to adjustment in view of circumstances; and the payment is to be made in respect of the output of each week and as soon as may be after the amount payable has been ascertained. That is the first Section, which deals with the payment to the companies.

Then comes Section 2 which is of very great importance and is of primary importance in this case, and that Section 2 gives effect to a part of the title of the Act, which is embodied in the words which I have already read; that is " to provide for the " recovery in certain events of the whole or some part of " the advances so made, and for the remission of any balance " thereof not so recovered ". Sub-section (1) is in these terms: " The provisions of this section shall have effect with respect to " the manner in which, and the extent to which, advances made " to a company under the last preceding section shall be repayable ". Then Sub-section (4) is: " Save as aforesaid, the advances shall " not be repayable ". Now the cases in which the advances are said to be repayable are twofold. Under Sub-section (2) provision is made that there shall be repayment of the advances in this form, namely, by certain deductions from the subsidies payable to the company under the Act of 1925, but that provision is only to operate up to the period, and can only operate during the period, during which the subsidies are payable under the Act of 1925, and that is expressed by the language of Sub-section (2), namely, that it is to be in effect " in respect of sugar manufactured during the " period of two years beginning on the first day of October, " nineteen hundred and thirty-two ". So that that will end on

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the 30th September, 1934; and deductions in this way are only to be made while the market price of imported sugar is sufficiently high to bring those provisions into operation. That refers to the Schedule which gives rather elaborate rules, which I need not discuss, about the way in which the market price is to be ascertained and a basic price is to be ascertained, and in this way market prices are to be ascertained. The calculation of the deductions is found in the Third Schedule, and I need not refer to it in detail, except to this extent: it prescribes the circumstances under which the deduction is to be made from a subsidy payable under the Act of 1925, and(1): "No deduction shall be made from the "subsidy payable under the Act of 1925 in respect of sugar manu- "factured by a company unless the relevant market price exceeds "the basic price for that company". These are the two prices which have been ascertained in the earlier part of the Schedule. Then it goes on: "but if the relevant market price exceeds the "basic price", then there is to be deducted "one seventy-eighth "part of the subsidy so payable . . . . for every penny (or fraction "of a penny) of the amount by which the one price exceeds the "other". That shows the close relationship between the subsidy amount of 6*s*. 6*d*. a hundredweight and the moneys to be paid under this Act now in question. Sub-section (2) of Section 2 is to operate until the total amount of the advances made to any company is repaid. That is the one set of circumstances under which repayment is to be made in respect of the advances made under the 1931 Act; the other set of circumstances is provided for in Section 2, Sub-section (3). That Sub-section is limited by the same period as the other Sub-section, that is to say, it is only to be in application for a period of three years commencing on the 1st October, 1931; it is only to operate up to the 30th September, 1934, and the provision is that if "a winding up order is made, or a resolution "for a voluntary winding up is passed, with respect to the "company", or the debenture holders enter into possession of the company's property, "or a receiver or manager of the com- "pany's business is duly appointed, the total amount of the "advances made to the company shall, so far as not previously "repaid under the last preceding subsection, become due and "payable to the Minister by the company". One other Section I may refer to, and that is Section 4, which provides for the recovery by the Minister as a civil debt summarily of advances made to the company under this Act, to which or to any part of which the company was not lawfully entitled, and that any such amount may be recovered by process of law.

Now the question, as I have said, is whether the payments which were made under this Act were to be regarded as loans, in which case obviously they could not be brought into computation

(1) *I.e.*, Clause 6 of the Third Schedule.

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in assessing the balance of profits and gains of the Company during the year in question, which is the year ending 31st March, 1932, or whether they are not loans, but are receipts or income in course of the Respondent Company's trading, in which case they would have to be dealt with; and how they should be dealt with I may discuss a little later. I need not refer to the other findings of the Special Case, except the following. The Special Case finds that: " Between 18th October, 1931, and 3rd January, 1932, the " Company received weekly advances under the said Act of 1931 in " respect of sugar manufactured by it in its factory at Bardney (the " factory specified in the First Schedule to the said Act) amounting " in all to £17,494 5*s.* 7*d.*", and that amount was shown in the Company's accounts for the years ending 31st March, 1932, 1933 and 1934, in the balance sheet as a liability. The Case goes on to find that: " In the events which happened neither the said " £17,494 5*s.* 7*d.* nor any part thereof is repayable under the said " Act ". Under those circumstances, an assessment of £45,000 was made upon the Company for the year under appeal, that is, the tax year 1932–33. That sum was treated as a trading receipt of the Company's year ending 31st March, 1932. Now the assessment was made, but the matter did not come before the Special Commissioners until 1935, and thereupon they issued their Special Case dated 31st May of that year. Before that hearing had taken place, there had been some correspondence between the Inspector and the Company, and in the result I may refer to two letters, one of the 9th October, 1933, from the Company, in which they said: " I now write to say that after consultation with the other Sugar " Factory companies, we have come to the conclusion that we " will no longer contest the taxability of the special assistance. " I would point out that in the course of about three months from " now the whole question will be automatically settled by the " efflux of time during which sugar prices have remained below " the level at which we should have had to repay the amount of " the special assistance ". In answer to that the Inspector writes back: " I thank you for your letter of the 9th October. I should " like to be quite clear on your proposals before recommending " the cancelling of the appeal meeting on the 28th inst. " (1) You agree to pay tax on the net receipts under the Assistance " Act of 1931, that is, after taking into account any possible return " to the Government in accordance with the provisions of that " Act. (2) You wish to hold up the payment of this tax until " the end of the present campaign ". However, notwithstanding that, the appeal seems to have been heard before the Commissioners, but when the appeal was heard the period ending the 30th September, 1934, had run out, and the price of sugar had never been such as to make effective any obligation of the Company to make repayments in respect of the advances provided for in Section 2, Sub-section (2), nor had the Company gone into

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liquidation, nor had any of those events happened, such as the taking possession of the Company's property on behalf of the debenture holders. The result was that no money had become due at all by way of repayment from the Company to the Government, and no money can ever become due or payable in that way.

Now the learned Judge agreed with the finding of the Commissioners, which was that the advances made to the Company under the Act were in their nature loans and were not trading receipts, and he did not find it necessary to consider the further point which was raised, namely, if they were trading receipts whether the proper period in which they should be brought into account was some period not prior to the 30th September, 1934. That was the view which the Commissioners had taken in the alternative, though it was not necessary for them to express any opinion about it in view of the fact that they had held that they were loans.

Now in the argument before us we have been very much pressed with the use of the word " advance ", and advance, it was said, naturally means a loan. A further argument was used, that the whole essence of this transaction was that the money constituting the advance should be paid subject to an obligation to repay, and that, it was said, was a conclusive indication that the payment was made by way of a loan. Against that it was argued on behalf of the Crown that that was not so; that the true meaning of the word " advance " in this connection was not a loan; it merely meant that a payment was made in anticipation or by way of prepayment, and that was put in two different ways. It was said, first of all, that the payment was made in advance or by way of prepayment of the subsidies which would fall due under the Act of 1925, and it was pointed out that there could be no question of any repayment at all unless the price of sugar was at such a rate that Section 2, Sub-section (2), would come into effect. It was also said that under those circumstances the word " advance " was not merely colourless, was not merely neutral, but was in fact appropriate to the special circumstances of the case; in other words, the payments under the Act of 1931 were in advance of a payment which might become due in the future. It was further pointed out that under no circumstances except one, which I will deal with in a moment, was any money to be paid out by way of repayment from the Company to the Government. All that would happen if the price of the sugar rose in the way which was defined by Section 2, Sub-section (2), was that the Company would receive less subsidy than they would otherwise have received. It was further pointed out that there were none of the marks of a loan in this Act; no interest was payable; there was no firm obligation or unqualified obligation to repay the money; there was merely a promise to pay in the manner and to the extent specified in the Act.

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As between these two contentions the decision must turn upon the particular facts of the case. This case is clearly in its nature quite anomalous; it is not an ordinary mercantile transaction of loan; it is in truth a statutory bargain, and all the circumstances have to be borne in mind. These advances were made to help to tide over the companies who became parties and agreed to come into the scheme embodied in this Act and who are named in the Schedule; those companies were to be helped in their trading operations, that is to say, in carrying on their business, their trade of making sugar, by the moneys which were to be given to them over and above the subsidy which they were receiving from the Government then. That money was paid in respect of a limited period, and it was only to be repaid if the difficulty which led to its being paid in the first instance, namely, the fall in the price of sugar, was surmounted during the remaining years of the currency of the Act of 1925. The two things were bound up together, and under those circumstances the repayment which was provided was not such as one would expect in any case of a loan, nor were the terms of the Act such as one would have expected in the case of a loan. There was to be a very limited payment by the reimbursements in a very limited state of things, namely, if the need for this additional assistance during the period up to 1934 had ceased to operate. Now so far, to my mind, this very peculiar and anomalous state of things bears no resemblance to a loan at all. I think it is a payment of money subject to a contingent liability in certain events to repay, or perhaps more strictly, to submit to a deduction, in the very limited circumstances which I have specified, of an amount which might or might not, if it ever eventuated, come in any way within the same sums as the amounts which were paid. It is quite clear in the events that happened that no amounts ever became repayable; that is to say, there was no occasion to deduct any amounts from the Company's subsidies, because the price of sugar never did rise, but quite apart from that there was no obligation on the Company to carry on their business after they had received the sums under the 1931 Act, and if they did not carry on their business there would not be even the possibility of any repayment being made of the sums advanced under the 1931 Act.

I have not so far referred to the second condition under which the repayment was provided for, and that is under Section 2, Subsection (3), in the event of a winding up or a receiver being appointed or debenture holders entering into possession. That, however, I regard as in no way affecting the general conclusion which I have arrived at, namely, that this was not a loan, but was an advance, a payment of a special kind subject to a contingent liability to repay. That was a quite natural provision. The Government were giving extra help to this Company with the

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others to carry on their trade of making sugar in accordance with the conditions that the Government desired, that is to say, the condition to pay the prescribed rate to the growers, and if the purpose of that demand failed, that is to say, if the Company found themselves financially unable to go on with their business and were wound up or were otherwise in liquidation, then it was quite natural and quite consistent with the purpose of the Government that they should provide that the moneys that they had not paid in this way should not be made available for the general body of the creditors. They are not given any priority. The Government would merely have to prove as ordinary creditors in a liquidation. Under those circumstances, this very special provision, quite naturally for the reasons which I have indicated, does not seem to me to have changed the transaction or to carry me to the conclusion that the transaction should be treated as one of loan. In my opinion, the moneys which were paid in 1931 were in their inception and in their character not loans at all, but were payments made in cash out and out, subject only to the contingent liabilities which I have indicated.

Now, under those circumstances and upon that view of the position, there is really not much more to be said. An argument has been put forward, though not perhaps very strongly pressed, that this subsidy was to be regarded not as revenue, not as income in the sense of revenue derived from a trade, but as a payment in the way of capital, and reference was made to the *Seaham Harbour* case(1). I cannot myself see any ground for regarding these payments as other than payments made to the Respondent Company in the way of their trade. I think they are what are often called, not perhaps very satisfactorily, " trading receipts ". They were made for the definite purpose of enabling the Company to surmount the difficulties in the carrying on of their trade to which they might otherwise have been exposed.

The only other question that might be raised is, " What is the " proper way of dealing with the moneys actually paid in the year " in question, the year ending 31st March, 1932? How are those " moneys to be treated for the purpose of assessment, having regard " to the fact that the payment was subject to a contingent " liability?" There has been a good deal of discussion, and several cases have been referred to, raising very interesting questions as to what is to be done when a sum of money which is put in the accounts of one year, the year of the transaction, is afterwards subject to increase or reduction, and it has been debated whether the proper course is not to keep the matter of assessment open, or whether, if the assessment has been made, the proper course is

(1) 16 T.C. 333.

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not, if it is the Government who are complaining, the making of an additional assessment as in the year in which the transaction took place, or if it is the taxpayer who is complaining, whether his proper course is not to take action and exercise the rights given to him, if he can, by Section 24 of the Finance Act of 1923.

Now I had not thought it necessary to discuss these matters in this case. There was no question here of an assessment made before the true nature of the contingent liability had been ascertained. There was no case here of attempting to value the contingent liability in the year of charge because the circumstances were not such that its value could be definitely fixed. The appeal under the assessment did not come on and the matter was not discussed by the Special Commissioners and has not been discussed before this Court except in the circumstances that the extent of this contingent liability has been fully ascertained, and it has turned out quite definitely that it is nothing at all. No circumstance requiring any repayment has ever arisen and, therefore, this liability has not matured. There may be cases in which these different questions which have been referred to may need to be examined and a decision given upon them, but I do not think that this is such a case. I think it is enough to say here that the Company did receive during the year in question this sum of money; they received it in cash; they received it as a contingent liability, but that contingent liability has proved from its nature and in the events that have happened to be one which can be disregarded, and therefore there is nothing to abate or to set against the money actually received during the year.

Under those circumstances, with great deference to the Special Commissioners and to the learned Judge, I think that this appeal should succeed, and that the Company should be assessed on the basis of this money being brought into account as a profit or gain, as income, during the year in which it was received.

Romer, L.J.—I agree, but as we are differing from Finlay, J., I should like, out of respect for him, to state as shortly as may be my own reasons for doing so.

The question we have to determine is as to whether this sum of £17,494 odd, which is referred to in the Special Case, ought to be treated as a trading receipt of the Company's year ending the 31st March, 1932. The learned Judge, with some doubt, came eventually to the conclusion that this sum was rather in the nature of a loan than in the nature of a trading receipt. With great deference to him, I have arrived at the conclusion, though after feeling some doubt during the course of the argument, that this sum is rather in the nature of a trading receipt than in the nature of a loan. The reason why I think that it is in the nature of a trading receipt is because I have formed the opinion that this

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sum is in the nature of a subsidy, paid in certain events in advance of the subsidies payable under the Act of 1925 for the two years ending the 30th September, 1933, and the 30th September, 1934, and in other events it is an additional subsidy, that is to say, a subsidy paid in addition to those payable under the Act of 1925.

Now it was admitted by Mr. Borneman for the purposes of this case that the subsidies payable under the Act of 1925 are trading receipts for the years in which the subsidies are paid. In my opinion, he was right in making that admission. The case differs altogether from that of the *Seaham Harbour* case, 16 T.C. 333, in which this Court and the House of Lords arrived at the conclusion that the moneys there paid by the Government were not trading receipts of the company to whom they were paid. The moneys in that case were paid by the Government in pursuance of a scheme for diminishing unemployment in this country, and they were paid to the Seaham Harbour Dock Company not for the purposes of enabling that company to trade to greater advantage, but in order that that company might build a new dock, and, by employing a number of men in so doing, reduce the number of unemployed in this country. Now Lord Atkin, in the course of his speech in the House of Lords, after referring to the Appropriation Act of 1924, which gave authority to make the payments in question, and in which the payments were authorised under this heading, " For grants to local " authorities in Great Britain for assistance in carrying out approved " schemes of useful work to relieve unemployment ", said this, at page 353 : " It would appear to me to be a remarkable proposition " that Parliament assented to that sum being appropriated for " that purpose, but intended, in certain events at any rate, only " fifteen shillings in the pound to be appropriated for that purpose, " five shillings in the pound of the full amount coming back in " the way of Income Tax. I do not think that that was the " effect. It appears to me that when these sums were granted " and when they were received, they were received by the appro- " priate body not as part of their profits or gains or as a sum which " went to make up the profits or gains of their trade. It is a " receipt which is given for the express purpose which is named, " and it has nothing to do with their trade in the sense in which " you are considering the profits or gains of the trade ". In the present case, it seems to me reasonably plain that it is to be regarded as part of their profits or gains, and is a sum which was to go to make up the profits or gains of their trade. I think it is reasonably apparent, after reading the Act of 1925, that the object of the Legislature was, amongst other things, to encourage the growth of beet in the country, and that these sums paid by way of subsidy under the Act were to be paid to the beet sugar manufacturers for

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the purpose of increasing the manufacturers' trading profits, so that the manufacturers might continue to carry on business and still pay the minimum price for beet that was fixed by the Act. The fact that the Act referred to it as a subsidy seems to me to have nothing to do with the matter. I should have arrived at the same conclusion even if the Act of 1925 had referred to the payments as advances. I should also have arrived at the same conclusion even if the Legislature in that Act had provided, as very reasonably it might have provided, that if a company, say in the first year after the first subsidies had been paid, instead of continuing to carry on business, went into liquidation, the sums paid to them before going into liquidation by way of subsidy should be repaid to the Government.

Now this Act of 1931, the Act with which we are concerned, was passed, as we know, to meet a certain emergency. The market price of sugar had fallen, so that it was difficult, in some cases no doubt impossible, for the manufacturers of sugar beet to continue to carry on business at a profit, and still pay the price which the farmers were demanding for their beets. That being so, the Legislature appears to have thought that for the year beginning on the 1st October, 1931, a payment should be made to certain of these manufacturers, a payment paid in the same way, more or less, paid at the same time as the subsidy already provided by the Act of 1925, but it was contemplated that the market price of sugar might rise, in which case, if it rose sufficiently high, there would be no need for this additional payment to be made to the beet sugar manufacturers; and so we find in the Third Schedule to the Act it is provided that, if the relevant market price is or exceeds 7*s*. 9*d*., no advance shall be made. Payment, therefore, was only to be made during those weeks in which the market price of sugar was under 7*s*. 9*d*. But it also occurred to the Legislature, as I read the Act, that the price of sugar might rise in the next two years, and that in that case it was not reasonable that this additional sum should be paid under the Act of 1931 as well as the subsidy provided by the Act of 1925 for the years ending the 30th September, 1933, and the 30th September, 1934, and so we find provisions in this Act that in that event, that is to say, in the event of sugar during those years rising beyond a certain price, the subsidies payable under the Act of 1925 shall be diminished by deductions being made, such deductions being specified in the Third Schedule to the Act. It appears also, as I read the Act, to have occurred to the Legislature that if a company were to receive this additional payment for the year ending 30th September, 1932, it was not fair or reasonable that the company should thereafter go into liquidation and not face the

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years 1933 and 1934, and so we find it is provided that in that event the moneys paid under the Act of 1931 shall be refunded to the Minister.

Now it is true that the sums in the Act of 1931 are referred to as advances. It matters not, to my mind, what the Legislature calls these sums. What we have to ascertain is what in truth and in fact they are. Looking at the Act, and construing it to the best of my ability, I arrive at the conclusion, notwithstanding the use of the word " advance ", notwithstanding the provisions in a certain event for repayment, that these sums are in truth and in fact subsidies—subsidies, as I have said, in a certain event, depending upon the price of sugar, which are to be taken in anticipation, and, therefore, in advance of the subsidies payable under the Act of 1925, and if the price of sugar does not rise, they are to be treated as subsidies additional to those payable under the 1925 Act.

For these reasons, I agree that this appeal must succeed.

Greene, L.J.—I agree, but out of respect for the learned Judge, I would like to add a few words.

In my opinion, it is not possible to extract from the word " advance ", or any other words in the Act which emphasize one aspect of the transaction, the proposition for which the Respondents contend. The true nature of the payments made under the Act of 1931 must, in my opinion, be considered, and when the Act of 1931 is regarded in the light of the then existing position under the Act of 1925, the answer in my opinion is that the true nature of the payments is a subsidy. It is to be observed that the financial results to the recipient companies of the moneys which were paid to them under the Act of 1931 would depend upon the events which might happen in the future. Let me take the case which the Act certainly contemplates, and which the Legislature no doubt hoped might arise, where the whole of the payments made would be recouped out of future subsidies paid under the Act of 1925. If that event had happened, the result would simply have been this, that the companies affected by the Act of 1931 would have received in advance payment of subsidy under the Act of 1925; and comparing their position with that of the companies which were not affected by the Act of 1931, the only difference in the two positions would have been that the latter companies would have got their subsidy in the appropriate year, under the Act of 1925, whereas the other companies, those under the Act of 1931, would have received part of their subsidy in advance. Now that being the position which the Legislature was quite clearly contemplating might happen (and indeed it would have happened, if the price of sugar had risen sufficiently), it seems to me impossible to place any construction on the Act of 1931 which would lead to a result under which the companies under the Act of 1931 would

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escape Income Tax on that part of their subsidy which they received in advance, and that any argument which leads to that construction is one which cannot be accepted. It would give to them an additional benefit beyond what the Legislature appears to have contemplated, and would introduce between them and the other companies a difference in treatment which would be something more than a mere difference in the time of payment, because the other companies would have to bring into account for Income Tax purposes the whole subsidy which they received under the Act of 1925, whereas the companies who took advantage of the Act of 1931 would only have to bring into account that portion of the 1925 subsidy which remained after deducting what they had received under the Act of 1931. It is not, in my opinion, legitimate to stress the word " advance ", and the similar words in the Act, if it is going to produce that result. The true nature of the transaction is, in my opinion, what I have said, and it is intelligible that the Legislature, in choosing the language of the Act, chose language which emphasized one aspect of the transaction rather than another. Now that being so, I am unable to accept the view that these payments can escape taxation altogether. The only question that remains is which, in the events which have happened, is the year in respect of which they should be brought into account for the purpose of ascertaining the balance of profits and gains.

Now on the facts of this case, I do not think it necessary to accept to the full the proposition that only the actual receipt must be looked at, *i.e.*, that for the purpose of ascertaining the balance of profits and gains the sum received must be treated at 100 per cent. of its value, without any deduction for the possible contingency of repayment which is involved in the terms on which it was received. I express no view as to whether that is right or wrong; but however that may be, the receipt is, in my opinion, unquestionably a receipt for the year in which it was received, and it may be that if the matter were strictly worked out, the proper way of dealing with it for the purpose of ascertaining the balance of profits and gains would be to discount that sum in the hands of the Company by some allowance or other in respect of the contingency of a possible future refund. That may, or may not, be so, but in my judgment the true view is that the receipt was a receipt for that year, and whether or not, if the matter had fallen to be dealt with before the facts were known, a deduction ought to have been made for the possible contingency, or whether the parties might have left the matter open until the true value of that sum in the Company's hands had been ascertained when the time had run out, appears to me, on the facts of this case, to be immaterial, because at the time when the matter came to be decided, the facts were known, the contingencies under which

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deduction from future subsidy or repayment in cash was to take place had not happened, and the sum which the Company had received in the year in question had proved to be what in truth and in substance under the Act in the circumstances it was bound to be, an additional subsidy to the Company.

I agree that the appeal should be allowed.

Lord Wright, M.R.—The appeal will be allowed with costs.

The Attorney-General.—And the case will be remitted to the Commissioners to make the correct assessment unless the correct amount can be agreed. I think it is only a question of adding back the £17,000, if your Lordship will make the Order in that form.

Mr. Borneman.—Certainly, my Lord; I see no reason why it should not go back to the Commissioners.

The Attorney-General.—It will go back to the Commissioners, to correct the assessment, unless the amount is agreed.

Lord Wright, M.R.—Certainly.

Mr. Borneman.—My Lord, I wish to have leave to appeal in this matter, if your Lordship will grant it to me.

Lord Wright, M.R.—Yes, we think so.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lords Atkin, Thankerton, Russell of Killowen, Macmillan and Roche) on the 27th and 29th October, 1936, when judgment was reserved. On the 21st January, 1937, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Raymond Needham, K.C., and Mr. Roy E. Borneman 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 Atkin.—My Lords, I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan. I agree with it, and have nothing to add.

Lord Russell of Killowen.—My Lords, I, too, have had that advantage, and I concur in the conclusions which my noble and learned friend has reached, and also in the grounds upon which those conclusions are based.

Lord Macmillan.—My Lords, I am requested by my noble and learned friend **Lord Thankerton** to express his concurrence in the views which I have embodied in my opinion about to be read.

My Lords, during the period to which this appeal relates the Appellants, the Lincolnshire Sugar Company, Limited, (now in liquidation) carried on at Bardney in Lincolnshire the business of manufacturing sugar from beet grown in Great Britain. Between the 18th October, 1931, and the 3rd January, 1932, the Company received payment of sums amounting to £17,494 5*s*. 7*d*. under the British Sugar Industry (Assistance) Act, 1931, out of moneys provided by Parliament. The question for determination is whether those sums ought to be taken into account as trade receipts in computing the balance of profits and gains of the Company for the year 1931–32, on which was based the assessment of their income for tax purposes for the year 1932–33 under Case I of Schedule D to the Income Tax Act, 1918.

By a previous Statute entitled the British Sugar (Subsidy) Act, 1925, it was provided that out of moneys provided by Parliament a subsidy at prescribed rates should be paid in respect of every hundredweight of sugar or molasses manufactured during a period of ten years beginning 1st October, 1924, from beet grown in Great Britain. It was made a condition of the payment of the subsidy that the price paid for the beet used in the manufacture should not be less than a minimum rate per ton prescribed by the Act. The rate of subsidy diminished by stages during the ten years period.

Under the Act of 1925 the Company duly received payment of subsidies which were carried to the credit of their profit and loss accounts as trade receipts. These subsidies were included in the computation of the Company's profits and gains for Income Tax purposes, and it was conceded, for the purposes of the present case, that they were rightly so included.

In the year 1931, in view of the heavy fall in the price of sugar and the diminution in the rates of subsidy, further State aid was afforded to certain of the companies (including the Appellants) engaged in the British sugar beet industry which would otherwise have experienced difficulty in paying the prices contracted to be paid to the growers of the beet. This further assistance did not take the form of increasing the subsidies payable under the Act of 1925, but was provided under a statutory scheme embodied in the British Sugar Industry (Assistance) Act, 1931, whereby "advances" were to be made to the named companies in respect of sugar manufactured by them from home-grown beet during the period of one year from 1st October, 1931.

As the question whether the payments received by the Company under the Act of 1931 were or were not trade receipts depends upon the character and incidents of these payments, it is necessary to examine the relative provisions of the Act.

(Lord Macmillan.)

The title of the Act of 1931 is in marked contrast with the title of the Act of 1925. Whereas the latter is entitled "An Act " to provide for the payment of a subsidy in respect of sugar and " molasses manufactured in Great Britain . . . . ", the former is entitled "An Act to provide for the making of advances to certain " companies in respect of sugar manufactured by them in Great " Britain during a period of one year beginning on the first day of " October, nineteen hundred and thirty-one, from beet grown in " Great Britain; to provide for the recovery in certain events of the " whole or some part of the advances so made, and for the remis- " sion of any balance thereof not so recovered ". The preamble recites that His Majesty's Government have " offered to grant " assistance by way of advances, to the extent and subject to the " conditions mentioned in this Act, to such persons engaged in the " manufacture in Great Britain of sugar from beet grown in Great " Britain as might be prepared to accept those conditions ", and that these conditions have been accepted by the companies specified in the First Schedule to the Act (among whom are the Appellants).

The first Section provides for the making of the advances. They are to be paid by the Minister of Agriculture and Fisheries out of moneys provided by Parliament. The maximum quantity of sugar in respect of which advances may be made to any one factory is fixed at 300,000 hundredweights, and the amount of the advance to be made in respect of each hundredweight of sugar is to be calculated in the manner prescribed in the Third Schedule to the Act and is in no case to exceed 1*s*. 3*d*. per cwt. It is further provided that no advance is to be made unless the Minister is satisfied that the price paid to the grower of the beet is not less than the price per ton specified in the Second Schedule to the Act.

Having thus in Section 1 made provision for the payment of the advances, the Act proceeds in Section 2 to make provision " with " respect to the manner in which, and the extent to which, advances " made to a company under the last preceding section shall be repay- " able ". First it is enacted in Sub-section (2) as follows: " (2) Until the total amount of the advances made to any company " is repaid, deductions calculated in accordance with the relevant " provisions of the Third Schedule to this Act shall, while the " market price of imported sugar is sufficiently high to bring those " provisions into operation, be made from any subsidies payable to " the company under the British Sugar (Subsidy) Act, 1925, in " respect of sugar manufactured during the period of two years " beginning on the first day of October, nineteen hundred and " thirty-two ".

Then in Sub-section (3) it is provided as follows: " (3) If within " the period of three years commencing on the first day of October, " nineteen hundred and thirty-one, a winding up order is made,

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" or a resolution for a voluntary winding up is passed, with respect " to the company, or possession is duly taken of any of the com- " pany's property by or on behalf of the holders of any debentures " secured by a floating charge, or a receiver or manager of the " company's business is duly appointed, the total amount of the " advances made to the company shall, so far as not previously " repaid under the last preceding subsection, become due and pay- " able to the Minister by the company ".

The Section concludes by providing that : " (4) Save as afore- " said, the advances shall not be repayable ".

It is unnecessary to particularise the elaborate methods of calculation prescribed in the Second and Third Schedules to the Act for arriving at the minimum price of beet and for calculating advances and deductions. It is sufficient to note that the question whether any advance is to be made to a company, and if so, the extent of the advance, is to depend on the current market price of sugar and that no deduction under Section 2 (2) is to be made from the subsidy payable under the Act of 1925, by way of repayment of advances, unless the market price of sugar exceeds a certain figure.

As it happens, the critical date, namely, 1st October, 1934, came and went without the Company being called upon under Section 2 (2) to suffer any deductions from the subsidies received by them under the Act of 1925—presumably because the market price of sugar throughout the relevant period did not rise above the specified figure—or under Section 2 (3) to make any repayment of advances, because none of the contingencies mentioned in that Sub-section happened in the relevant period. The payments had thus in fact become irrevocable by the time when the matter came before the Commissioners.

My Lords, it is scarcely surprising that payments of so anomalous a character should have occasioned diversity of opinion as to the legal category to which they should properly be referred. The Commissioners came to the conclusion that they " were in their nature " loans and were not trading receipts ". Finlay, J., did not think it necessary to use the word " loan ", but dwelt on the feature that the payments " were not sums paid and paid irrevocably to " the Company. They were not subsidies or grants to assist the " Company in their business; they were sums advanced and sums " which were in some contingencies at all events repayable "(1). So he held(1) that they were " rather in the nature of loans " and affirmed the decision of the Commissioners. The Court of Appeal

(1) *See* page 652 *ante*.

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took a different view. Lord Wright, M.R., was definitely of opinion that the payments " were in their inception and in their " character not loans at all, but were payments made in cash out " and out, subject only to the contingent liabilities which I have " indicated "(1). Both Romer, L.J., and Greene, L.J., were of opinion that the payments were in truth subsidies, notwithstanding the contingencies of repayment(2). And the Master of the Rolls and Greene, L.J., both emphasised the fact that before the question came to judgment the contingencies had ceased to operate and the payments had become irrevocable(3).

If the nature of the payments were to be determined solely by the terminology of the Statute there might be much to be said for the view adopted by the Commissioners and by Finlay, J., for the draftsman has done his best to persuade us that the payments were loans. He has not used that word, but he calls them " advances ", and he speaks of their " recovery " in whole or in part and of the " remission " of any balance not recovered. I agree that the word " advances " is ambiguous and may either refer to prepayments of what will become due in future or be a polite euphemism for loans; but when " advances " are declared to be " repayable " (though only conditionally) they certainly lean to the side of loans.

But in my view the question ought not to be decided on merely verbal arguments. What to my mind is decisive is that these payments were made to the Company in order that the money might be used in their business. Here I definitely part company from Finlay, J., who thought that they " were not subsidies or grants to assist " the Company in their business "(4). We are told in the Stated Case that it was because of an apprehension that the companies might not be able to pay to the growers of beet the prices they had contracted to pay that this further assistance was given by the Government. It is true that the Appellants apparently did not actually require to have recourse to the " advances " they received, for in their accounts for the relevant years, which have been produced, the advances are not carried into profit and loss account but are entered as liabilities in the balance sheet, and the profit and loss accounts show a balance of trading profit without taking the " advances " into account. But if the Company had not happened to be able to pay for their raw material otherwise they could properly have used the " advances " for this purpose. It was with the very object of enabling them to meet their trading obligations

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(1) *See* page 660 *ante*. (2) *See* pages 664 and 666 *ante*.

(3) *See* pages 661 and 665/6 *ante*. (4) *See* page 652 *ante*.

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that the " advances " were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency. If the " advances " had in any year been carried to the credit of the Company's trading account, as might properly have been done, and the trading account had in consequence shown a profit instead of a loss, can it be doubted that the credit balance would rightly have entered into the computation of the Company's profits or gains for tax purposes? In the year with which your Lordships are concerned, namely, the year 1931–32, " advances " were received by the Company which were intended to be used and could properly have been used to meet their current trading obligations, and in that year the contingency of possible repayment did not in fact arise. In my opinion the " advances " ought accordingly to be taken into account in computing the balance of the Company's profits and gains for that year. If in a subsequent year down to 1st October, 1934, Section 2 (2) had come into operation (as it did not), then what would have happened would have been that the Company would in that year have received proportionately less subsidy, resulting in a corresponding diminution of assessable income under this head. That is to say, the " advances " would have proved in the event to have been in effect prepayments of subsidy and so deductible from future subsidy. The contingency of repayment in the events mentioned in Section 2 (3) does present a more difficult feature of the case, but I do not think that it called for an estimate of that contingency being made in the year 1931–32 and debited as a contingent liability.

It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bwllfa and Merthyr Dare Steam Collieries (1891), Limited* v. *Pontypridd Waterworks Company*, [1903] A.C. 426, to the effect that a Court ought not to shut its eyes to the true facts if it subsequently knows them although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view and with what the Master of the Rolls and Greene, L.J., have to say on the point(1). But I do not find it necessary to rest my judgment on wisdom after the event. I prefer to rest it on my view of the business nature of the sums in question which the Company received

(1) *See* pages 661 and 665/6 *ante*.

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in 1931-32. I think that they were supplementary trade receipts bestowed upon the Company by the Government and proper to be taken into computation in arriving at the balance of the Company's profits and gains for the year in which they were received.

I am accordingly in favour of dismissing the appeal with costs.

Lord Roche.—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 that this appeal be dismissed with costs.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue; Romer, Skan & Brashier.]

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