COURT OF SESSION (FIRST DIVISION)—29TH NOVEMBER AND 7TH DECEMBER, 1956

HOUSE OF LORDS—20TH AND 21ST JANUARY, AND 27TH FEBRUARY, 1958

Commissioners of Inland Revenue

v.

South Georgia Co., Ltd.[1]

Profits Tax—Trading loss exceeding franked investment income, which exceeds gross relevant distributions—Calculation of "profits computed without abatement and including franked investment income"—Whether distribution charge incurred—Finance Act, 1937 (1 *Edw.* VIII *&* 1 *Geo.* VI, *c.* 54), *Fourth Schedule, Paragraph* 7; *Finance Act,* 1947 (10 *&* 11 *Geo.* VI, *c.* 35), *Sections* 30 (3), 32 *and* 34 (2).

For its chargeable accounting period ended 31*st October,* 1953, *the Respondent Company incurred a trading loss of* £602,000, *received franked investment income of* £272,000, *and paid dividends of* £181,000. *The Commissioners of Inland Revenue took the view that the proviso to Section* 34 (2), *Finance Act,* 1947, *applied and assessed the Company to a Profits Tax distribution charge on* £181,000 *for the period.*

On appeal to the Special Commissioners the Company contended that the "profits computed without abatement and including franked investment income" should be calculated by adding the franked investment income to the profits, if any, and, since the gross relevant distributions (£181,000) *did not exceed the profits* (*nil*) *plus franked investment income* (£272,000), *the proviso to Section* 34 (2) *did not apply; alternatively, that if the profits were taken as a minus figure in computing the net relevant distributions under the proviso to Section* 34 (2), *the computation resulted in a minus figure. For the Crown it was contended that the "profits computed without abatement and including franked investment income" were minus* £330,000 (*minus* £602,000 *plus* £272,000), *which should be taken as nil, as should the profits not including franked investment income; and that accordingly the proviso to Section* 34 (2) *applied and the net relevant distributions thereunder were the sum of nil and the excess of the gross relevant distributions over nil, viz.,* £181,000. *The Commissioners upheld the Company's primary contention and allowed the appeal.*

Held, *that the "profits computed without abatement and including franked investment income" for the relevant period were nil and the distribution charge was correctly made.*

CASE

Stated for the opinion of the Court of Session as the Court of Exchequer in Scotland, under the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64.

(1) Reported (C.S.) 1957 S.L.T. 115; (H.L.) [1958] 2 W.L.R. 492; 102 S.J. 214; [1958] 1 All E.R. 593; 225 L.T. Jo. 138; 1958 S.L.T. 99.

I. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Edinburgh on 12th October, 1955, for the purpose of hearing appeals, the South Georgia Co., Ltd. (hereinafter called " the Company "), which has for many years carried on business as whalers, appealed against an assessment to the Profits Tax for the chargeable accounting period 1st November, 1952, to 31st October, 1953, in the sum of £36,363 12*s.* (tax).

II. The question for our determination was whether, in the circumstances hereinafter mentioned, the Company was liable to a distribution charge under the provisions of Section 30 (3) and (4) of the Finance Act, 1947. Sub-section (3) of that Section (as amended) imposes a distribution charge upon the amount by which the net relevant distributions to proprietors are greater than the profits for any relevant accounting period. Gross relevant distributions are defined in Section 35 (1) of the Finance Act, 1947. Broadly stated, the gross relevant distributions are the total of those distributions made to proprietors during any chargeable accounting period which are either—

(*a*) dividends which were declared not later than six months from the end of the period and which are expressed to be paid in respect of the period ; or

(*b*) distributions (other than dividends which under (*a*) *supra* are to be related to an earlier period) made in the period.

The net relevant distributions are stated in Section 34 (2) of the said Act to be so much of the gross relevant distributions for the particular accounting period as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income, subject to the proviso hereinafter mentioned. Franked investment income is the name given to certain income which has already been subject to the Profits Tax. It is referred to in Section 32 (1) of the said Act and may be broadly stated to be income derived from the profits of companies carrying on a trade or business the profits of which are chargeable to Profits Tax.

III. The contest before us related solely to the construction of the proviso to Section 34 (2) of the said Act, the Company contending that the said proviso did not apply and the Crown contending (in view of the provisions of Paragraph 7 (1) and (1A) of the Fourth Schedule to the Finance Act, 1937, as amended by Section 32 (1) of the Finance Act, 1947) that it did. The said proviso reads as follows :

> " Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(*a*) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income ; and (*b*) the amount of the excess."

The said Paragraphs are as follows :

> " 7.—(1) Income received from investments or other property shall be included in the profits except—(*a*) income received directly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which section nineteen of this Act applies ; and (*b*) income so received from any other body corporate, being income received indirectly by way of dividend or distribution of profits from a body corporate carrying on such a trade or business as aforesaid ; and (*c*) income to which the persons carrying on the trade or business are not beneficially entitled : Provided that the profits of a body corporate which, either alone or in conjunction with any statutory undertakers carrying on a trade or business to which subsection (5) of the said section nineteen applies, has a controlling interest in any other body corporate, being such statutory undertakers as aforesaid, shall not in any case include any income received from that other body corporate.

(1A) Any reference in any enactment relating to the profits tax to franked investment income shall be construed as a reference to the income which would be included in the profits if paragraphs (*a*) and (*b*) of the preceding sub-paragraph had been omitted, and, in computing profits for the purposes of so much of any such enactment as refers to profits including franked investment income, the said sub-paragraph shall have effect as if the said paragraphs (*a*) and (*b*) were omitted."

IV. The relevant figures in the case before us for the accounting period ending 31st October, 1953, were as follows :

(*a*) The accounts, as computed for Profits Tax and excluding franked investment income, showed a loss of £602,000.

(*b*) Gross relevant distributions (i.e., dividends) amounted to £181,000.

(*c*) Franked investment income amounted to £272,000.

A copy of the Company's accounts for the year ended 31st October, 1953, was produced to us. It was not referred to but is available for the use of the Court if required.

(*d*) The assessment in the sum of £36,363 12*s*. (tax) which was the subject of the appeal before us was a distribution charge (as defined by Section 30 (4) of the Finance Act, 1947) at the rate of 20 per cent. on the sum of £181,818.

V. It was contended on behalf of the Company that the proviso to Section 34 (2) did not apply since the gross relevant distributions (£181,000) did not exceed the profits (nil) plus franked investment income (£272,000), a total of £272,000. Even if the profits were taken as a minus figure in order to make the calculation set forth in the proviso, the result of the sum was that the excess of the gross relevant distributions (£181,000) over the profits including franked investment income (minus £602,000 plus £272,000=minus £330,000) was £511,000 which, when added to the profits for the period not including franked investment income (minus £602,000), gave a figure of minus £91,000 for the net relevant distributions. Accordingly the company contended that, whether the profits were taken as nil or as a minus quantity, the result was the same, *videlicet*, that the assessment on £181,818 was incorrect.

VI. It was contended on behalf of the Crown that the said proviso did apply because the gross relevant distributions (£181,000) did exceed the profits (minus £602,000) including franked investment income (£272,000), a total of minus £330,000. This total of minus £330,000 should be taken as nil. Since the proviso did apply, the net relevant distributions were (in accordance with its terms) to be the sum of (*a*) the profits computed with due regard to abatement but not including franked investment income: these should be taken as nil ; and (*b*) the excess of the gross relevant distributions (£181,000) over the profits including franked investment income (again to be taken as nil). Such excess was therefore £181,000, and the sum of (*a*) and (*b*) was £181,000, which had accordingly been correctly assessed on the Company, but in the exact amount of £181,818.

VII. We, the Commissioners, accepted the argument advanced on behalf of the Company. It seemed to us that where a company had made a loss and it was necessary to apply to its trade the word " profit " occurring in a statutory computation or calculation the proper amount of such profit was nil. The gross relevant distributions (£181,000) did not therefore exceed the profit (nil) plus franked investment income (£272,000). We found nothing in the Acts relating to the Profits Tax to indicate that under the scheme of such Acts a company could not distribute its franked investment income by way

of dividend without incurring a distribution charge. The argument of the Crown, which seemed to us to involve reading the word " profits " as including a minus quantity when ascertaining if the proviso applied, but taking the amount of a loss as nil when applying the word " profits " in the calculation prescribed under (*a*) and (*b*) in the same proviso, seemed to us to involve an inconsistency which showed such argument to be incorrect.

We accordingly discharged the assessment.

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

IX. The question of law for the opinion of the Court is whether our construction of Section 34 (2) of the Finance Act, 1947, was correct.

B. Todd-Jones
H. G. Watson
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.
6th June, 1956.

The case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Carmont, Russell and Sorn) on 29th November, 1956, when judgment was reserved. On 7th December, 1956, judgment was given unanimously against the Crown, with expenses.

The Solicitor-General for Scotland (Mr. William Grant, Q.C.) and Mr. W. R. Grieve appeared as Counsel for the Crown, and Mr. C. J. D. Shaw, Q.C., and Mr. A. M. Johnston for the Company.

The Lord President (Clyde).—This is an appeal by the Commissioners of Inland Revenue against the discharge by the Special Commissioners of an assessment upon the Respondent Company to Profits Tax for the chargeable accounting period 1st November, 1952, to 31st October, 1953. The amount of the tax demanded is £36,363 12*s*. The real issue between the parties depends upon the proper meaning to be attributed to the words " the profits computed without abatement and including franked investment income " occurring in the proviso to Section 34 (2) of the Finance Act, 1947, in a case where the company made a heavy loss on its trading in the year in question. Unless the Inland Revenue can bring the case within that proviso it is not disputed that the assessment was properly discharged.

In order to understand the meaning and effect of these words it is necessary briefly to consider their setting in the general scheme of the Profits Tax provisions. When Profits Tax was introduced in 1937 under the name of National Defence Contribution, it was to be levied at a flat rate percentage on profits: Finance Act, 1937, Section 19. The profits for the purposes of this tax were to be separately computed and were the actual profits arising in each chargeable accounting period: Fourth Schedule, Paragraph 1. They were to include all such income arising from the trade as is chargeable to Income Tax under Case I of Schedule D, subject to certain modifications. One of these modifications was (see Fourth Schedule, Paragraph 7 (1)) that

certain income received by way of distribution of profits from another body corporate carrying on a trade subject to Profits Tax was to be excluded from the profits of the receiving company. This was to avoid double taxation of that income. This income so excepted is described as "franked investment income" in the Finance Act, 1947. So far as the present case is concerned the Respondents had two possible sources of income, their trading and their investments. So far as the former is concerned I shall refer to it, in order to avoid confusion, as the trading profit. Such profit would be liable to tax under Paragraph 1 of the Fourth Schedule. So far as the latter source of income is concerned I shall refer to it as franked investment income. It would not be liable to Profits Tax in the Respondents' hands.

The 1947 Act introduced substantial changes in Profits Tax. In particular, it drew a distinction between distributed and undistributed profits, penalising the former more severely in order to encourage the ploughing back of profits and their retention by companies paying Profits Tax. This was effected by providing for a distribution charge which was leviable (see Section 30 (3)) on the excess of the "net relevant distribution" over the profits chargeable to Profits Tax for any chargeable accounting period. The distribution charge was in addition to any other Profits Tax chargeable on the profits.

Under the 1947 Act the profits of the company to be taken into account for the purposes of Profits Tax were, as before, what I have called the trading profits. Paragraph 7 (1) of the Fourth Schedule to the 1937 Act is repealed, but in its place is substituted a new Paragraph 7 (1) and (1A): see the 1947 Act, Section 32 (1). The new sub-paragraph (1) *inter alia* provides that income from investments or other property shall be included in the profits except franked investment income. This excludes franked investment income from, and treats it as separate from, what I have called the trading profits of the Respondent Company. Sub-paragraph (1A) *inter alia* provides that, in computing profits for the purposes of so much of any enactment as refers to profits including franked investment income, this franked investment income is to be included in the profits. Throughout these two sub-paragraphs therefore what I have called trading profits and franked investment income are treated as quite distinct and separate, and "profits" *per se* exclude any part of the franked investment income.

The purpose of this distinction is to concentrate the distribution charge on the trading profits distributed, and not on the distribution of franked investment income. This purpose was achieved by the computation of the "net relevant distribution" factor, which was to be used to ascertain the distribution charge. The net relevant distribution is different from the gross relevant distribution, which for the purposes of the present case is the dividend actually paid. The net relevant distribution is defined in Section 34 (2). It represents the same proportion to the dividend as the trading profits bear to the trading profits and the franked investment income, and thus enables the weight of the distribution charge to be laid on the portion of the dividend resulting from trading profits distributed. Section 34 (2) provides that

> "The net relevant distributions . . . for any chargeable accounting period . . . are so much of the gross relevant distributions . . . for that period . . . as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income".

The distribution charge in the present case is not based on this part of the Sub-section, and it is unnecessary to consider this part in greater detail. In the present case the distribution charge is based on a net relevant distribu-

(The Lord President (Clyde).)

tion computed under the proviso. The real question is whether that proviso applies. It was enacted primarily to deal with the situation where a company made a profit on its trading, received a franked investment income and paid a dividend greater than these two amounts. In that situation the net relevant distribution falls to be calculated in a different way from the calculation under the main part of the Sub-section. The proviso is as follows:

> "Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(*a*) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (*b*) the amount of the excess."

In the present case the Company, which carries on the highly speculative business of whalers, made during the relevant accounting period a trading loss of £602,000. The Company received during this period a franked investment income of £272,000, no question of abatement arose, and they made a gross relevant distribution (i.e., dividend payments) of £181,000. The figures are round figures to avoid unnecessary confusion.

Before the Special Commissioners the Crown sought to justify this assessment in terms of the proviso to Section 34 (2) by contending that the proviso applied because (*a*) the gross relevant distribution (£181,000) exceeded the profit (minus £602,000) including franked investment income (£272,000), a total of minus £330,000, and (*b*) this total should be taken as a nil profit. It therefore followed that, as £181,000 exceeded nil, the proviso applied. This construction of the proviso was rejected by the Special Commissioners upon the ground, which appears to me to be sound, that the construction involved reading the word "profits" as including a minus quantity when ascertaining if the proviso applied and giving the word "profits" a different meaning when it occurs in sub-heads (*a*) and (*b*) of the proviso which deal with the factors to be employed in working out the net relevant distribution in the cases where the proviso applies. In an endeavour to avoid this difficulty the Crown in their argument to us gave up the contention that a profit could include a substantial loss. They put forward a different and more subtle construction of the opening words of the proviso. They maintained that the proviso required a single calculation of profits, and in the present case the profits were nil even bringing into the computation the amount of the franked investment income.

The Respondents, on the other hand, contended that the words in the proviso "the profits computed without abatement and including franked investment income" meant that the franked investment income was to be added to the trading profit, if any; that in the present case there was no profit from trading, but the income from franked investments was £272,000, and that on this construction the proviso did not apply, since £181,000 did not exceed £272,000.

In my opinion the Crown's construction is unsound and the proviso does not apply to the present case. The issue all centres round the words "profits including franked investment income". If it could have been said that the Statutes had contemplated that the profits could only be ascertained after franked investment income had been taken into account, then there might have been plausibility in the Crown's argument. But this is not the situation. The profits referred to in the proviso are what I have called the trading profits of the Respondents and taken alone exclude franked investment income altogether: see Paragraph 7 (1) of the Fourth Schedule to the Finance Act, 1937, as amended by Section 32 of the Finance Act, 1947. What the Legislature

has contemplated, therefore, when describing "profits including franked investment income" is the addition to trading profits of something (franked investment income) which otherwise forms no part of these profits for the purpose of the tax. The interpretation of "including" as meaning "adding" fits much more convincingly into the scheme of Section 32 of the 1947 Act than does the Crown's contention.

But in the second place the Crown's contention when applied to the circumstances of the present case produces results which in my view demonstrate its unsoundness. On their construction of the word "profits" as being something which is not ascertained until franked investment income is taken into account there is a profit of nil in this case. But a profit of nil is not a profit at all, and its description as a profit is really a contradiction in terms. If, therefore, the Crown's construction of the language of the proviso is sound it shows that there was in the present case no profit, and the proviso would not apply. For the proviso can only apply if there is a profit once the franked investment income is included.

The matter can be viewed from another angle. If "including" does not mean "adding" but, as the Crown contend, the word connotes an inclusive calculation to ascertain "the profits", then in the present case this means including something (the franked investment income) in nothing, which is an impossibility. But if "including" does not require to be given this strained meaning but just means adding the franked investment income to the trading profit, if any, then there is no impossibility about adding £272,000 to nothing and arriving at the figure of profit including franked investment income of £272,000. This is just the Respondents' contention. I decline to give the words a meaning which leads to the results which the argument for the Crown necessarily seems to me to involve.

I am confirmed in this conclusion by one final consideration. The consequences of the Crown's construction are startling. If the Respondents' trading profits had been not a loss but a profit of £1, the profits including a franked investment income of £272,000 would have been greater than the dividends distributed, and the proviso could not have been invoked. It would be extraordinary if an assessment could not be made under the proviso in such circumstances but could be made where the trading loss is very substantial. After all, this is a Profits Tax.

No difficulties of this sort result from the simple and in my opinion correct construction of the proviso contended for by the Respondents. Moreover, applying their construction to the computation of the net relevant distribution under the proviso results in a distribution charge based on an intelligible calculation in line with one of the main purposes of the 1947 Act, which was to penalise by a distribution charge not franked investment income but trading profits distributed.

In my opinion the Special Commissioners reached the right conclusion, and I would answer the question put to us in the affirmative.

Lord Carmont.—I agree.

Lord Russell.—I agree.

Lord Sorn.—The decision of this case depends upon whether the proviso to Section 34 (2) of the Act of 1947 has any application to the situation which occurred in the affairs of the Respondent Company in the accounting period in question. In that period, taking round figures, the Company's trading

(Lord Sorn.)

showed a loss of £602,000, it received franked investment income amounting to £272,000, and it paid a dividend of £181,000. The question we have to answer depends upon a construction of the words of the proviso but, in construing them, it is legitimate to understand or to try to understand the legislative scheme of which the proviso forms part, and in this case it seems to me helpful to make the attempt.

Section 30 (1) of the 1947 Act imposes the tax on profits at a rate which was subsequently raised to 22½ per cent., and in what I have to say about the Act I will substitute that percentage for the original percentage. Section 30 (2) deals with the case where the profits have not been wholly distributed and gives a relief in respect of the undistributed portion. Undistributed profits have to bear tax only at the rate of 2½ per cent. Section 30 (3) passes on to the converse case, where more than the amount of the profits has been distributed, and imposes a " distribution charge " of 20 per cent. on the amount of the excess. If one meantime leaves the question of franked investment income aside, the idea underlying the distribution charge is not difficult to perceive. If more than the profit received during the accounting period has been distributed, where has the extra money come from? It could only have been taken from past undistributed profits, and so when these are distributed it is only proper that they should bear a balancing impost to make up, with the 2½ per cent. already paid, the full 22½ per cent. of the Profits Tax. Into this simple scheme there had to be fitted the fact that the company might have received, and distributed in whole or in part, investment income which had already borne Profits Tax at source. It was for this purpose, or partly for this purpose, that the conception of " net relevant distributions " was introduced.

It seems to me that the scheme, in its complete form, shows a consistent intention with regard to franked investment income and I will now re-examine more closely the provisions to which I have already referred from that point of view. First, there is Section 30 (1), which imposes the tax on the profits, and, by virtue of Paragraph 7 of the Fourth Schedule to the Finance Act, 1937 (as amended), franked investment income is wholly excluded. Then comes Section 30 (2), which gives relief for non-distribution ; and what the relief is given on is the difference between the profits chargeable to tax and the " net relevant distributions ". To get the net relevant distributions (see Section 34 (2)) you scale down the " gross relevant distributions " according to the proportion that profits bear to profits plus franked investment income. In other words, you eliminate from the distribution actually made, that portion of it which may be supposed to have come from franked investment income. The difference between the resulting figure and the profits is the amount of the profits which is treated as undistributed. The amount on which relief is given is thus not diminished because of the presence of franked investment income. Then we come to the case where the net relevant distributions exceed the profits and there is to be a distribution charge : Section 30 (3). In this connection the previous formula, which works all right so long as gross relevant distributions are within the combined amount of profit and franked investment income, had to be replaced by the proviso for the case where gross relevant distributions exceed that amount. But the proviso formula has the same underlying aim. The element of franked investment income is eliminated, though in a different way. Net relevant distributions are to be (*a*) the profits plus (*b*) the amount by which the gross relevant distributions exceed the combined sum of profit and franked investment income. That is to say, the element of franked investment income in the gross distribution is allowed for and eliminated and, in effect, the charge is only leviable on the

excess ; the excess being the only portion of the distribution which may be supposed to represent a dip into past undistributed profits. An examination of the scheme thus seems to show, not only with regard to the tax itself, but also with regard to relief for non-distribution and charge for over-distribution, a consistent intention that a company should not be taxed or denied relief in respect of the receipt or distribution of franked investment income.

Consistently with the foregoing view of the intention of the scheme, the Company here contended that, since the distribution was within the amount of the franked investment income, there was no taxable over-distribution and no occasion for a distribution charge, and that the proviso does not apply. The Crown, on the other hand, have contended that, because there happened to be a large trading loss within the period in question, the proviso does apply with the result that the whole of what was distributed is liable to distribution charge. The proviso runs as follows :

> " Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distribution shall be . . ."

The argument, which is not without plausibility, is that the phrase " the profits computed without abatement and including franked investment income " points to a single commercial computation of the financial result of the period, i.e., a loss of £602,000 and franked income of £272,000 making a minus quantity of £330,000 or, expressed in terms of profit, a nil profit. The distribution having exceeded nil, it would follow that the proviso applied. If the phrase were to be considered in isolation, and were to be interpreted commercially, I daresay it might be read in this way. But it cannot be so read in the context in which it occurs. It is " profits " and not " profit and loss " that is to be ascertained, and the scheme consistently shows that profits are to be calculated separately from franked investment income. No doubt, in the application of the scheme, profits have sometimes to be regarded by themselves and sometimes in aggregation with franked investment income, but that is quite a different matter. What the proviso means is that there is to be a computation of profits on the usual basis (i.e., on the basis of Paragraph 7 of the Fourth Schedule to the Act of 1937, as amended) and that there is to be included with the results so obtained the franked investment income. Applying that interpretation, we see that in the present case there were no profits ; but with that " nothing " there has to be included £272,000 of franked investment income, so that the answer is £272,000. The gross distribution of £181,000 did not exceed that figure and so the proviso does not apply.

The view which has commended itself to me and which I have adopted, namely, that " profits " are meant to be calculated separately from franked investment income, is, I think, confirmed by the use in sub-head (*a*) of the proviso of the converse expression, viz., " the profits for the period . . . but not including franked investment income ". It may be added that, even if the Crown were right in contending that the opening phrase of the proviso allowed them to introduce a minus figure of loss into a single calculation of profits, it would avail them nothing, because they could not achieve their goal unless they were allowed to change horses in the middle of the stream. The net relevant distributions are to consist of the aggregate of sub-heads (*a*) and (*b*). Sub-head (*a*) is the profits for the period. Riding the same horse, the Crown would have to put down minus £602,000 for this item and that would wipe out any question of there being a net relevant distribution at all.

(Lord Sorn.)

In conclusion, I would say that the anomaly underlying the Crown argument can be illustrated in this way. If the Company had come out level on its trading, or made a small profit, it is conceded that the proviso would not have applied, £1 plus £272,000 being greater than the distribution of £181,000, and that no distribution charge would have been leviable. But because the Company made a large trading loss, it is said that the charge is due on the whole amount distributed. As Counsel for the Company observed, if this were right the Company would have reason to complain that the tax should be re-christened and called, not a Profits Tax, but a " loss tax ". For these reasons I think that the Special Commissioners dealt quite correctly with the case and that we should so answer the question.

The Crown having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Reid, Tucker, Keith of Avonholm and Somervell of Harrow) on 20th and 21st January, 1958, when judgment was reserved. On 27th February, 1958, judgment was given unanimously in favour of the Crown, with costs.

The Solicitor-General for Scotland (Mr. William Grant, Q.C.), Mr. W. R. Grieve, Q.C., Mr. Alan Orr and Mr. A. J. Mackenzie Stuart appeared as Counsel for the Crown, and the Dean of Faculty (Mr. C. J. D. Shaw, Q.C.) and Mr. A. M. Johnston for the Company.

Viscount Simonds.—My Lords, in my opinion the Interlocutor against which the Commissioners of Inland Revenue have brought this appeal cannot be sustained. The relevant facts are few and not in dispute, nor is the point at issue susceptible of long discussion.

The Respondent Company have for many years carried on business as whalers. Their accounts for the chargeable accounting period of one year to 31st October, 1953, as computed for Profits Tax and excluding " franked investment income " (an expression which I will presently explain) showed a loss of £602,000. The franked investment income for the same period amounted to £272,000 and the gross relevant distributions (an expression which for the purpose of this case may be regarded as equivalent to dividends) for the same period amounted to £181,818, which has been in the Case stated at the round figure of £181,000. They were assessed to Profits Tax upon the footing that this sum represented a net relevant distribution under the provisions of Section 30 (3) and (4) of the Finance Act, 1947. The question is whether they were rightly so assessed, and the answer to that question turns on the correct interpretation of the statutory provisions relating to Profits Tax and particularly of the proviso to Section 34 (2) of the Act of 1947. The Commissioners for the Special Purposes of the Income Tax Acts determined that the assessment was wrongly made and in that determination were upheld by the First Division of the Court of Session.

It is necessary to refer briefly to the legislative background to the Sections which particularly require your Lordships' consideration. Profits Tax was first imposed by Section 19 of the Finance Act, 1937, under the name of National Defence Contribution ; its name was changed in 1946. It was levied at a flat rate percentage on profits arising in each chargeable accounting period from any trade or business to which the Section applied. Such profits were to be computed on Income Tax principles as adapted in

accordance with the provisions of the Fourth Schedule to that Act. I do not pause now to refer to these provisions and their subsequent amendment. Their importance in this case deserves detailed examination at a later stage.

The Finance Act, 1947, made considerable changes. In the first place, the tax was no longer to be imposed on a class of persons hitherto subject to it; with that change we are not concerned. In the second place, the tax was no longer imposed at a flat rate on all profits but a differential was established in order to discourage distribution and encourage retention by granting relief in respect of profits not distributed but retained. In the third place, it was provided that a tax, called a distribution charge, should be imposed on profits which, having been retained and having therefore enjoyed non-distribution relief, were distributed in a later accounting period. The effect of this legislation, as subsequently amended, at the relevant date was that the tax in respect of distributed profits was 22½ per cent., and in respect of undistributed profits was 2½ per cent. (a differential of 20 per cent.), and the distribution charge was 20 per cent.

I now turn to the Sections which demand closer examination, and first to the statutory provisions for the computation of profits. I have pointed out that they are to be computed on Income Tax principles as adapted in accordance with the provisions of the Fourth Schedule to the Finance Act, 1937, as subsequently amended. I think it necessary only to refer to Paragraph 7 of the Schedule as amended by Section 32 of the Finance Act of 1947. The relevant parts of it, as thus amended, are as follows:

> "7.—(1) Income received from investments or other property shall be included in the profits except—(*a*) income received directly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which section nineteen of this Act applies; and (*b*) income so received from any other body corporate, being income received indirectly by way of dividend or distribution of profits from a body corporate carrying on such a trade or business as aforesaid . . . (1A) Any reference in any enactment relating to the profits tax to franked investment income shall be construed as a reference to the income which would be included in the profits if paragraphs (*a*) and (*b*) of the preceding sub-paragraph had been omitted, and, in computing profits for the purposes of so much of any such enactment as refers to profits including franked investment income, the said sub-paragraph shall have effect as if the said paragraphs (*a*) and (*b*) were omitted."

My Lords, the meaning of this provision appears to have caused some difficulty, but I think that it is reasonably clear and means, so far as is relevant to our present purpose, no more than this, that when you find the expression "profits including franked investment income" you disregard for the purpose of your computation paragraphs (*a*) and (*b*) and include in it the income derived from all the investments and property of the company regardless of the fact that in a computation made in another connection and for another purpose you may have to exclude the income from some, but not all, of its investments. A single ordinary commercial computation of profits has to be made, of which the result may be to show some profit, no profit or a loss.

I come then to Section 34 of the Act and its all-important proviso. That Section provided by Sub-section (1) that it and the three next succeeding Sections should, subject as therein mentioned, determine what was to be taken, for the purposes of the provisions of the Act relating to reliefs for non-distribution and distribution charges, as the net relevant distributions for any chargeable accounting period, and by Sub-section (2) it provided as follows:

(Viscount Simonds.)

> "The net relevant distributions . . . for any chargeable accounting period . . . are so much of the gross relevant distributions . . . for that period . . . as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income: Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(*a*) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (*b*) the amount of the excess."

Upon this proviso, interpreted in the light of Paragraph 7 of the Schedule as amended, the Crown makes a very simple case: upon the undisputed figures the gross relevant distributions were £181,000, and the profits including franked investment income were nil (I may interpolate that the reference to abatement may throughout be disregarded); therefore the net relevant distribution must be the excess of £181,000 over nil, i.e., £181,000: nothing has to be brought in under (*a*) of the proviso, for there were no profits.

To the claim thus formulated the Respondents make as simple a reply. They say that the proviso has no application to the present case because it only applies where (1) there is a profit after including franked investment income and (2) the gross relevant distributions exceed such profit, and here there was no such profit. Therefore, they say, the proviso did not come into operation, and the assessment was wrongly made. I may observe here that it is common ground that, if the proviso is inapplicable, no charge can be imposed, for a calculation made in accordance with the formula contained in the body of Sub-section (2) would show no net relevant distribution.

Everything, therefore, turns on the meaning of the proviso and whether it is in effect a condition precedent to its application that there should be a profit when the franked investment income is included in the computation. As the learned Lord President said[1]:

> "the proviso can only apply if there is a profit once the franked investment income is included",

and Lord Sorn expressed a similar opinion. My Lords, I have already indicated my view upon what a computation of profits in the terms of the proviso involves. I will repeat that it involves not two operations, first the ascertainment of trading profit or loss and then the addition of franked investment income, but a single operation which takes into one account the trading profit or loss and the investment income whether franked or not. I cannot, with all respect to the Lord President, accept the view that to interpret "including" as meaning "adding" fits more convincingly into the scheme of Section 32 of the Act than does the Crown's contention. On the contrary, I think that the latter contention accords with the primary purpose of Section 34 of the Act, the relevant Section in this connection, which I understand to be to determine how much of an actual dividend paid for a particular period is to be regarded as having been paid out of (*a*) the chargeable profit of the period, (*b*) the franked investment income of the same period, and (*c*) the undistributed profits of an earlier period or periods. This result is achieved if a single computation is made which shows that the profits for a period including franked investment income are nil or a minus figure—it matters not which for this purpose—and a dividend for that period is nevertheless paid. For unless the contrary is shown it can only be assumed that that dividend has been paid out of undistributed

---

(1) *See* page 731 *ante*.

profits of earlier periods, which is itself the reason for a distribution charge being made. The proviso to Section 30 (3) of the Act will safeguard the taxpayer from being charged with an amount of tax in excess of the relief previously granted.

The learned Dean of Faculty on behalf of the Respondents urged, in support of the construction that he invited your Lordships to adopt, that it was really meaningless to speak of a nil profit or of adding something to it, and this plea found favour with the Lord President. As I understood it, this was only relevant if the view was accepted that there were two separate operations and not a single computation. In the view which I take, therefore, it does not arise, but I think it right to say that I see no impropriety of language in speaking of a nil profit where the question is whether any or what profit has been made. And the answer would be equally valid in the case of an exact balance or of a loss.

It was further urged, in an argument which I find it difficult to distinguish from that which I have already discussed, that, even if the proviso applies, upon its proper application the Respondents have been wrongly assessed. I quote from their formal Case:

> "Even if the Appellants were entitled to take the profits including franked investment income at a minus figure of £330,000 in order to make the calculations set forth in the proviso, the result of the sum was that the excess of the gross relevant distribution (£181,000) over the profits including franked investment income (minus £602,000 plus £272,000 = minus £330,000) was £511,000 which, when added to the profits of the period, gave a figure of minus £91,000 for the net relevant distributions."

I think that this argument does no more than deny the validity of the answer "profits nil" to the question "what profit is shown by a computation made in accordance with the terms of the proviso?" But in my opinion there is no need to go behind that simple answer and enquire whether the computation shows that even with the inclusion of franked investment income there is still a loss. The argument stated in this way does, however, illustrate that the Respondents' contention must have a result which defeats the essential purpose of the Act. For year after year a company could continue to pay dividends which could only come out of undistributed profits but would escape from any payment of distribution charge so long as even after including franked investment income it showed no profit. The Crown's contention on the other hand appears to me both to be in accord with the natural and primary meaning of the Section and to harmonise with the plain purpose of the Act.

I would therefore allow the appeal and declare that the Respondents were correctly charged to Profits Tax by way of a distribution charge for the chargeable accounting period 1st November, 1952, to 31st October, 1953, in respect of the sum of £181,818.

The Respondents must pay the Crown's costs in this House and in the Court of Session.

Lord Reid.—My Lords, the Profits Tax assessed in this case is a distribution charge. The general scheme of the Finance Act, 1947, is that if a company does not distribute the whole of its profits for a particular period it gets relief for non-distribution by paying a lower rate of Profits Tax in respect of that part of its profits which it has retained. But when such retained profits come to be distributed the company pays by way of distribution charges what it had saved by way of relief for non-distribution

(Lord Reid.)

while it retained the profits undistributed. The provisions of the Act are complicated, partly because Profits Tax may not be payable in respect of the whole of the company's profits. In particular, Profits Tax is not payable in respect of franked investment income, which consists, broadly speaking, of dividends received from its investments in other trading companies; the reason being that those other companies will already have paid Profits Tax on their profits, so that to subject them to Profits Tax again when they are received by another company as dividends would involve double taxation. The Act also deals with abatements, but this matter does not arise in the present case. Allowance is made for these factors in calculating the amount of reliefs for non-distribution and distribution charges. These are calculated not by reference to the total dividends paid by the company (the "gross relevant distributions") but by reference to the appropriate proportion of them (the "net relevant distributions"). Section 34 of the Finance Act, 1947, sets out alternative formulae by which net relevant distributions are to be calculated and this case depends on the proper interpretation of that Section.

In this case, during the relevant period the Respondent Company suffered a trading loss of £602,000 (in round figures), it received franked investment income amounting to £272,000 and it distributed dividends of £182,000. It had sufficient reserves which had enjoyed relief for non-distribution to enable it to pay this dividend. Admittedly the leading formula in Section 34 (2) cannot be applied. The question is whether the alternative formula set out in the proviso to Section 34 (2) can be applied. If it can this appeal must succeed; if it cannot then the Respondent succeeds and no distribution charge is payable. The proviso is in these terms:

> "Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(*a*) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (*b*) the amount of the excess."

It was argued that before the proviso can apply at all there must be a profit and that here there was a loss: even if the franked investment income is taken into account there was a loss of £330,000. I agree that a loss of £330,000 cannot be regarded as a profit of minus £330,000, but in my judgment it can in accordance with ordinary usage be regarded as a profit of nil. There was no profit, and to say that there was no profit appears to me to be the same thing as to say that the profit was nil. Then it was said that a sum cannot properly be said to "exceed" nil: it can only "exceed" another sum. But again, I think that in ordinary usage one can properly say that ten exceeds nil or nothing.

The difficult question in the case appears to me to be the meaning of the words "the profits computed without abatement and including franked investment income": what is it that the gross relevant distribution must exceed in order to bring the proviso into operation?

It is said for the Respondent that "profits" in the legislation dealing with Profits Tax means profits apart from franked investment income (which I shall call "trading profits" although that is not quite accurate); and that therefore what the proviso directs you to do is first to compute the trading profits and then to include, i.e., to add, the franked investment income. In this case the trading profits are nil, the franked investment income is £272,000 and adding these two together gives £272,000. The gross relevant distributions, £182,000, do not exceed £272,000, and therefore the proviso does not apply.

If Section 34 could be taken in isolation I might be inclined to accept this argument, but it cannot be so taken. The Fourth Schedule to the Finance Act, 1937, sets out modifications of the provisions of the Income Tax Acts which were to be applied in computing profits for the purposes of the National Defence Contribution. In 1946 the National Defence Contribution was renamed the Profits Tax and in 1947 extensive alterations were made. In particular Section 32 of the 1947 Act substituted new provisions for those of Paragraph 7 (1) of the Fourth Schedule to the 1937 Act. The new Paragraph 7 (1) appears to me to make it clear that whenever the word " profits " appears by itself in this legislation it means profits excluding franked investment income. But this is followed in Section 32 by a new sub-paragraph (1A), which is, I think, of vital importance in this case. The new provisions are in these terms:

> " 7.—(1) Income received from investments or other property shall be included in the profits except—(*a*) income received directly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which section nineteen of this Act applies; and (*b*) income so received from any other body corporate, being income received indirectly by way of dividend or distribution of profits from a body corporate carrying on such a trade or business as aforesaid; and (*c*) income to which the persons carrying on the trade or business are not beneficially entitled: Provided that the profits of a body corporate which, either alone or in conjunction with any statutory undertakers carrying on a trade or business to which subsection (5) of the said section nineteen applies, has a controlling interest in any other body corporate, being such statutory undertakers as aforesaid, shall not in any case include any income received from that other body corporate. (1A) Any reference in any enactment relating to the profits tax to franked investment income shall be construed as a reference to the income which would be included in the profits if paragraphs (*a*) and (*b*) of the preceding sub-paragraph had been omitted, and, in computing profits for the purposes of so much of any such enactment as refers to profits including franked investment income, the said sub-paragraph shall have effect as if the said paragraphs (*a*) and (*b*) were omitted."

Sub-paragraph (1) is not obscure. Leaving aside paragraph (*c*) and the proviso, which throw no light on the present question, it includes in " profits " for the purposes of Profits Tax all income from investments except such income as is described in paragraphs (*a*) and (*b*)—chiefly dividends from the company's investments in other trading companies. Put more simply, that means that such dividends are not to be included in " profits " for Profits Tax purposes. Sub-paragraph (1A) is more than a little obscure. The first part of it appears to be no more than a verbose way of attaching the name " franked investment income " to the kinds of income described in paragraphs (*a*) and (*b*) of sub-paragraph (1). (I follow the Statute in referring to parts of a sub-paragraph as paragraphs.) And at first sight the second part might seem to be no more than an elaborate statement of an obvious consequence of so naming those kinds of income. But on closer examination it appears to me that this second part has an operative effect which is really decisive of the present case.

In the legislation dealing with Profits Tax the word " profits " frequently occurs. Sometimes it is qualified by the words " including franked investment income "; often it is not so qualified. When it is not so qualified sub-paragraph (1A) can have no application, and if in these cases it is necessary to compute the profits then the computation must be made in the manner provided by sub-paragraph (1). But where the word " profits " is so qualified and the provision requires profits to be computed, then sub-paragraph (1A) applies and the computation must be made in the manner

(Lord Reid.)

provided by this sub-paragraph and not in the manner provided by sub-paragraph (1). Normally when the same word is used repeatedly in the same Section or group of Sections one presumes that it is intended to have the same meaning. But it appears to me that sub-paragraph (1A) treats the words " profits including franked investment income " as a composite phrase with a special meaning and effect: it directs that where profits have to be computed for the purposes of a provision in which this phrase is used the computation shall be made in the manner which would be provided by sub-paragraph (1) if paragraphs (*a*) and (*b*) were deleted from that sub-paragraph. Deleting these paragraphs and again leaving aside paragraph (*c*) and the proviso, sub-paragraph (1) would provide: " Income received from investments or other property shall be included in the profits ". In other words, all dividends received by the company are to be taken into account in making the computation of profits whether they are franked investment income or not.

There may have been good reason for adopting this cumbrous and unusual method of drafting—I do not know. I am very conscious of the fact that all the learned Judges of the First Division attach another and a simpler meaning to sub-paragraph (1A). The Lord President said[1]:

> " Throughout these two sub-paragraphs therefore what I have called trading profits and franked investment income are treated as quite distinct and separate, and ' profits ' *per se* exclude any part of the franked investment income " ;

and later[2]:

> " If it could have been said that the Statutes had contemplated that the profits could only be ascertained after franked investment income had been taken into account, then there might have been plausibility in the Crown's argument. But this is not the situation."

Lord Sorn said[3]:

> " the scheme consistently shows that profits are to be calculated separately from franked investment income."

But giving the best consideration I can to the matter I have been forced to a different conclusion. To my mind the compelling words in sub-paragraph (1A) are " *in computing profits* . . . the said sub-paragraph shall have effect as if the said paragraphs (*a*) and (*b*) were omitted."

I must now turn back to the proviso to Section 34 (2), and in particular the words

> " the profits computed without abatement and including franked investment income ".

Here the words " computed without abatement and " are interposed between " profits " and " including franked investment income ", but I do not think that that is material. It appears to me that this is an enactment which, in the words of sub-paragraph (1A), refers to profits including franked investment income. If the view which I have already expressed is right, then these profits must be computed as directed by sub-paragraph (1A) and franked investment income must be taken into account in making that computation. The trading loss being £602,000 and the franked investment income £272,000, the result of taking both into computation is that there were no " profits computed without abatement and including franked investment income ". I have already given my opinion that that is equivalent to saying that such profits were nil. If that be so it follows that the assessment in this case was properly made. In my judgment this appeal should be allowed.

---

(1) *See* page 729 *ante*. (2) *See* page 730 *ante*. (3) *See* page 733 *ante*.

Lord Tucker.—My Lords, I also agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friends.

Lord Keith of Avonholm.—My Lords, the object of the Profits Tax legislation is reasonably clear, though the effect of the formulae by which it is sought to achieve that object may not be so immediately apparent. Indeed the whole point of this appeal is whether one of the formulae is apt to achieve the object of the Statute. In imposing a Profits Tax upon the profits of a company Parliament has allowed a certain relief in respect of profits that are retained by the company and not immediately distributed to the shareholders, called relief for non-distribution, and has imposed a compensating charge upon these profits if they come to be subsequently distributed, called a distribution charge. That at least was Parliament's intention, though if the Respondents' contentions and the judgment of the Court below, as well as the determination of the Commissioners, are right, there is a gap in the legislation which prevents that intention, in present circumstances, from taking effect.

It is important to observe that "profits" of a company are not confined under the relevant Statutes to trading profits. While trading profits are to be computed for the chargeable accounting period on Income Tax principles, as they would be under Case I of Schedule D of the Income Tax Acts, there is to be included, with certain exceptions, in the profits assessable to Profits Tax income from investments or other property. This was so in certain cases under Section 20 and the original Paragraph 7 of the Fourth Schedule to the Finance Act, 1937, and though the original Paragraph 7 has now been replaced by a new Paragraph 7 in somewhat different terms this conception is still retained. As matters now stand there is to be included in the profits all income received from investments or other property except what is referred to as "franked investment income" and some other categories of income absent from this case. Franked investment income is income received from other bodies corporate on which Profits Tax has already been paid.

Section 19 of the Finance Act, 1937, is the provision under which the tax is charged. It was levied originally at the rate of 5 per cent., with no provision for relief in respect of non-distribution or compensating charge in respect of distribution. Section 30 (2) of the Finance Act, 1947, introduced non-distribution relief where

> "the net relevant distributions to proprietors . . . for any chargeable accounting period are less than the profits . . . for that period chargeable to the profits tax".

Sub-section (3) of the same Section prescribed a distribution charge where

> "the net relevant distributions to proprietors . . . for any chargeable accounting period are greater than the profits . . . for that period chargeable to the profits tax".

"Net relevant distributions" are explained in Section 34 (2) of the Act of 1947. I quote the Sub-section in full:

> "(2) The net relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body are so much of the gross relevant distributions to the proprietors for that period of that body corporate, society or other body (as defined by the next succeeding section) as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income: Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(*a*) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (*b*) the amount of the excess."

(Lord Keith of Avonholm.)

A few calculations will show that where the amount distributed as dividend to the shareholders is less than the profits plus the franked investment income, if any, of a company for the relevant accounting period the "net relevant distributions" calculated according to the first part of the Sub-section will always be less than the profits. A balance is attained where profits and franked investment income exactly meet the amount distributed as dividend. There is then a net relevant distribution equal to the profits. No occasion arises for non-distribution relief nor for a distribution charge. The profits excluding franked investment income are taxed at the full rate of charge and that is all. But where the dividend to the shareholders is greater than the profits including the franked investment income the formula so far applied breaks down. It takes no account of the sum drawn from reserves to make up the dividend, and so the figure brought out as the net relevant distribution will not be appropriate for the purpose of calculating the distribution charge under Section 30 (3) of the Statute. A new formula, as prescribed by the proviso, is accordingly introduced to be applied where the dividend paid out in any year is greater than the profits including franked investment income. This achieves, at least where there is a profit, that the full Profits Tax is charged. Tax at 22½ per cent. is charged on the profit for the year, excluding the franked investment income; the franked investment income which has already borne the full tax and is now distributed to help to make up the dividend pays nothing further; and on the balance, which *ex hypothesi* has been drawn from past profits to meet the dividend and has already borne tax at the rate of 2½ per cent. in respect of non-distribution relief, the company pays the distribution charge of 20 per cent.

So far the scheme of the Statute seems plain. But it is said for the Respondents, and has been held by the Court of Session and the Commissioners, to break down in the circumstances of this case because there are no profits to which the proviso can apply. There was in fact a substantial loss even including franked investment income. Further, it is said that if there are no profits franked investment income cannot be included in the profits. Franked investment income accordingly, if it falls to be brought in at all, falls to be brought in by itself, and as, added to nothing, it exceeds the amount of the dividend paid, the proviso does not apply.

My Lords, I have come to the opinion that the contentions of the Respondents and the reasoning of the learned Judges in the Court below are unsound. If the phrase found in the proviso, "profits computed without abatement and including franked investment income", were taken by itself without any aid from any other part of the Statute, I should have thought that it meant that profits and franked investment income were to be computed together to arrive at a total profit. If there is no profit with the inclusion of the franked investment income, then total profit, as I see it, would be nil. It is to be remembered that profit for the purpose of Profits Tax includes investment income which is not franked and that the exclusion of franked investment income from the profit is to prevent its being taxed a second time. This is, I think, clear from the provisions of Paragraph 7 (1) of the Fourth Schedule to the Act of 1937, as amended by the Act of 1947. But what is conclusive, in my opinion, is sub-paragraph (1A) of the same Paragraph, which in effect enacts that, in computing profits for the purposes of so much of any such enactment as refers to profits including franked investment income, franked investment income shall be included in the profits. In the opening words of the proviso franked investment income cannot therefore be treated as something standing outside or apart from profits or losses. It must be included in striking a balance of profit or loss.

(Lord Keith of Avonholm.)

That leaves the question whether if there is a loss after bringing in franked investment income the proviso applies. In my view the profits must then be regarded as nil and the calculation under the proviso must be made from this level. There is nothing in the proviso which excludes such an interpretation and such a reading is consistent with the whole object of the Statute. As already indicated, the formula of the proviso is designed to secure that any draft from past undistributed income to make up a distribution of dividend should bear its proper share of the distribution charge. This object would be entirely defeated if a company which operated in any year at a loss and paid a dividend out of past profits were to pay no distribution charge. An application of the formula in the proviso to such a case, by taking profits as nil, involves, I think, no straining of the statutory language.

I would allow the appeal.

Lord Somervell of Harrow.—My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack, and have nothing to add to it.

Questions Put :

That the Interlocutor appealed from be reversed.

The Contents have it.

That the question of law in the Case Stated be answered in the negative and that the case be remitted to the Court of Session with a declaration that the Respondents were correctly charged to Profits Tax by way of a distribution charge for the chargeable accounting period 1st November, 1952, to 31st October, 1953, in respect of the sum of £181,818.

The Contents have it.

That the Respondents do pay to the Appellants their costs here and in the Court of Session.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue (England), for Solicitor of Inland Revenue (Scotland) ; Thomas Cooper & Co., for Beveridge & Co.]