COURT OF SESSION (FIRST DIVISION)—3RD, 4TH AND 16TH MAY, 1962

HOUSE OF LORDS—15TH JANUARY AND 20TH FEBRUARY, 1963

Frasers (Glasgow) Bank, Ltd.

v.

Commissioners of Inland Revenue [1]

Income Tax Schedule D—Sale of shares by bank at a profit—Whether capital or income.

The Appellant Company carried on a bona fide banking business on a restricted scale. It operated primarily to facilitate transactions within a group of companies controlled by its own chairman, managing director and controlling shareholder, F, but there were also a number of deposit and current accounts opened by persons who were not members of the group. It did not utilise the normal clearing-house facilities and met cheques drawn on it either by cash or by drawing a further cheque on a clearing-house bank, N Ltd., who were, in effect, its bankers.

In 1948, *F, for the purpose of maintaining the market price of stock in the parent company of his group, instructed the Appellant Company to buy* £800 *of the stock, and this, like a further purchase of* £187 10*s. of the stock in* 1952, *was financed by advances from N Ltd. By* 1958 *the Company owed some* £50,000 *to N Ltd., who asked it to reduce this indebtedness. In the meantime the* £987 10s. *stock which the Company had acquired in* 1948 *and* 1952 *had been converted to* £4,314 5s. *non-voting stock and a similar amount of voting stock, and in October,* 1958, *it sold the first of these holdings for* £23,199 *and the Company used this sum to reduce the amount owing to N Ltd. The surplus realised by this transaction was some* £18,300.

On appeal to the Special Commissioners against an assessment to Income Tax under Schedule D for the year 1959–60, *the Company contended that the surplus was a capital profit which did not fall to be taken into account in computing its profits for Income Tax purposes. The Special Commissioners held that the stock in question was bought and sold by the Company in the course of carrying on its trade, and therefore disallowed the appeal.*

Held, *that on the facts found by them the Special Commissioners were entitled to arrive at their decision.*

CASE

Stated for the opinion of the Court of Session, as the Court of Exchequer in Scotland, under the Income Tax Act, 1952, Section 64.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Glasgow on 19th April, 1961, for the purpose of hearing appeals, Frasers (Glasgow) Bank, Ltd. (hereinafter called "the Company"), appealed against an assessment to Income Tax made upon it under Case I of Schedule D in respect of profits as bankers in the sum of £100 for the year 1959–60. The question for our determination was whether the surplus arising on the sale of certain stock was a profit of the Company's trade of bankers.

[1] Reported (C.S.) 1962 S.C. 371; 1962 S.L.T. 273; (H.L.) 1963 S.L.T. 117.

I. The following facts were admitted or proved:

(1) The Company was incorporated on 18th July, 1936. A copy of its memorandum and articles of association, marked "1", is attached to and forms part of this Case(1). The share capital of the Company is £1,000 divided into 1,000 shares of £1 each. The Company issued 953 shares, of which 901 were and are owned by Sir Hugh Fraser and 50 by his wife. Sir Hugh Fraser has throughout been the chairman and managing director of the Company.

(2) The policy of the Company had been very much in the hands of its secretary, a Mr. Keenan, who died on 7th April, 1961. Evidence was given before us by his successor, Mr. W. E. Keymer, who is also assistant secretary of a company called House of Fraser, Ltd. The chairman and managing director of the Company did not give evidence before us.

When the Company first began to trade, its main business was to receive small deposits from employees of Fraser Sons & Co., Ltd. (later House of Fraser, Ltd.), and from a few retail customers of that business. Later it was found convenient to use the Company to facilitate inter-company transactions between House of Fraser, Ltd., and its associated companies (hereinafter referred to as "the Fraser group"). As time went on, the Company was used principally for making payments and collecting receipts which related to more than one company in the Fraser group. Such payments and collections were operated through current accounts which were opened for each member company of the Fraser group. At the end of each month the Company recovered from each member of the group its share of the payments made less the receipts collected.

The Company also opened current accounts for Sir Hugh Fraser and some of his friends and acquaintances, and also for some employees of House of Fraser, Ltd.

The Company paid no employees or directors. It has never declared a dividend. Its trade was carried on from a room in the building of Fraser Sons & Co., Ltd., where an employee of House of Fraser, Ltd., dealt with the Company's moneys. There were also two small offices in the buildings belonging to Muirheads and Arnott-Simpsons, two members of the Fraser group. In the former an employee of House of Fraser, Ltd., accepted deposits from employees and customers and allowed small withdrawals. In the latter deposits from employees were accepted, but no withdrawals were made.

The Company did not advertise its banking facilities. A customer might find out its existence and could use its deposit facilities. Employees of the Fraser group were aware of the Company's facilities. About 80 individuals had current accounts with the Company, and some 300 had deposit accounts. Interest was allowed to depositors and to certain of the individual holders of current accounts. Holders of current accounts might be allowed to overdraw their accounts, and interest was charged on the amounts overdrawn. No interest was credited or charged to the Fraser group in respect of their accounts with the Company.

Specimens of the Company's deposit account book (marked "2"), current account book (marked "3") and cheque book (marked "4") are attached to and form part of this Case(1).

(3) Cheques drawn on the Company were passed through the Glasgow bankers' clearing house. A messenger from the clearing house brought these cheques to the office used by the Company and was given either cash or a cheque drawn by the Company on the National Bank of Scotland, Ltd., to

(1) Not included in the present print.

meet the cheques drawn on the Company. The National Bank of Scotland, Ltd., acted as bankers to the Company.

(4) A copy of the Company's profit and loss account for the year ended 31st January, 1959, together with its balance sheet at the end of the year (marked "5") is attached to and forms part of this Case(1). There is also attached a statement (marked "6") showing, at 31st January in each of the years 1936 to 1959, the figures taken from the Company's balance sheets of cash at bankers and on hand, investments at cost, advances to customers, amounts due by the Company on current and deposit account and the Company's overdraft with its bankers, which statement forms part of this Case(1).

For each of the Income Tax years 1936–37 to 1958–59, inclusive, the Company was either assessed to Income Tax under Case I of Schedule D in respect of profits from its trade as bankers or was granted relief from Income Tax in respect of losses sustained in that trade.

In 1951 the secretary to the Company wrote to the Commissioners of Inland Revenue asking whether they were prepared to regard the Company as a bank carrying on a bona fide banking business in the United Kingdom within the meaning of Section 36, Income Tax Act, 1918. The Commissioners of Inland Revenue replied that they were prepared so to regard the Company, and it was accepted before us by both parties to the appeal that the Company was carrying on a bona fide banking business.

(5) In 1948 the Company acquired £800 stock in House of Fraser, Ltd., in the following circumstances. House of Fraser, Ltd., had been floated as a public company in 1947. The price on the Stock Exchanges of the units of its stock fell towards the end of 1947 and the beginning of 1948. Mr. Hugh Fraser, as he then was, supported the market in the stock by buying units. He gave instructions that £800 of the stock so purchased was to be registered in the name of the Company. The stock was paid for by the Company by means of advances from the National Bank of Scotland, Ltd. In 1952 further stock of £187 10*s.* was acquired by the Company in similar circumstances, and paid for in the same way.

In 1954 Mr. Hugh Fraser, as an individual, gave instructions to stockbrokers for the purchase of 53,600 ordinary shares in Phillips Furnishing Stores, Ltd., and 2,450 ordinary shares in Randfontein Estates Gold Mining Co., Ltd. He instructed that these shares should be registered in the name of the Company. The shares were paid for by the Company by means of advances from the National Bank of Scotland, Ltd.

All the stock and shares referred to in this sub-paragraph were beneficially owned by the Company. No other stock or shares have been acquired by the Company since its incorporation. No evidence was adduced as to why the Company, for its part, bought the stock and shares.

(6) In 1958 the Company owed some £50,000 to its bankers, who requested the Company to reduce its indebtedness. By that time the stock of £987 10*s.* in House of Fraser, Ltd., originally purchased by the Company had been converted to £4,314 5*s.* non-voting stock and £4,314 5*s.* voting stock. In October, 1958, the Company sold the non-voting stock for £23,199, which was used to reduce the amount owing to its bankers. The sum realised for this stock exceeded its cost by some £18,300, and it was this surplus which gave rise

(1) Not included in the present print.

to the question in issue before us. The said sale of non-voting stock in House of Fraser, Ltd., was the only sale of stock or shares in the Company's history.

II. It was contended on behalf of the Company that the surplus arising on the sale of non-voting stock in House of Fraser, Ltd., was a capital profit which did not fall to be taken into account in computing its profits for Income Tax purposes. Said surplus, it was argued, did not form part of the profits or gains of the trade carried on by the Company.

III. It was contended on behalf of the Commissioners of Inland Revenue that the said surplus formed part of the profits or gains arising from the Company's trade of bankers and fell to be taken into account in computing the Company's profits for Income Tax purposes.

The following cases were referred to:

Northern Assurance Co. v. *Russell* (1889), 16 R.461; 2 T.C.551.
Californian Copper Syndicate v. *Harris* (1904), 6 F.894; 5 T.C.159.
Hughes v. *Bank of New Zealand,* [1938] A.C. 366; 21 T.C. 472.
Punjab Co-operative Bank, Ltd., Amritsar v. *Commissioner of Income-Tax, Lahore,* [1940] A.C.1055.

IV. We, the Commissioners who heard the appeal, gave our decision in writing as follows:

1. The issue for our determination is whether the surplus arising on the sale of one of the Company's holdings of shares, viz., £4,314 5*s.* non-voting stock in House of Fraser, Ltd., was a profit of the Company's trade of banking or a profit on capital account. The shares in question were originally purchased by the Company because its chairman and managing director, who owned virtually all of its share capital, wanted to support the market in the shares of House of Fraser, Ltd. The shares were held for some years and were sold following a request by the Company's bankers that its overdraft with them should be reduced.

2. The Company is admitted to have carried on a bona fide banking business, albeit a somewhat unusually restricted one. Quite clearly, the purchase of the shares by the Company was not the setting aside in a readily accessible form of sums received from depositors, as happens in the case of an ordinary bank. The Company was not, however, carrying on an ordinary banking business; and we do not know why the Company, for its part, made its investments in general and the disputed one in particular.

3. In the absence of evidence as to the general investment policy of this somewhat unusual banking business, we have come to the conclusion that the shares in question were bought and sold by the Company in the course of carrying on its trade.

4. We accordingly dismiss the Company's appeal and leave figures to be agreed between the parties.

Upon the agreed figures being reported to us, we determined the appeal by increasing the assessment under Case I of Schedule D for the year 1959–60 to £14,442.

V. The representatives of the Company immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law, and in due course required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, which Case we have stated and signed accordingly.

VI. The question of law for the opinion of the Court is whether, on the facts found by us as set out in this Case, we were entitled to arrive at the decision set out in paragraph IV hereof.

W. E. Bradley
R. W. Quayle
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99 High Holborn,
London, W.C.1.
25th January, 1962.

The case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Carmont and Guthrie) on 3rd and 4th May, 1962, when judgment was reserved. On 16th May, 1962, judgment was given in favour of the Crown (Lord Guthrie dissenting).

Mr. I. H. Shearer, Q.C., and Mr. J. P. H. Mackay appeared as Counsel for the Company, and the Solicitor-General for Scotland (Mr. D. C. Anderson, Q.C.) and Mr. A. J. Mackenzie Stuart for the Crown.

The Lord President (Clyde).—In this case Frasers (Glasgow) Bank, Ltd. (hereinafter referred to as "the Company"), was assessed to Income Tax under Case I of Schedule D in respect that the surplus arising on the sale of certain stock previously bought by the Company was a profit of the Company's trade of banking. The Company appealed against the assessment to the Special Commissioners and maintained that the surplus was a capital gain which did not fall to be taken into account in computing the profits for the year in question (1959–60). The Special Commissioners, however, dismissed the appeal. Against this determination the Company has required a Case to be stated, and the question of law for our opinion is whether, on the facts found by the Special Commissioners, they were entitled to arrive at their decision.

The facts admitted or proved in the case are somewhat meagre and, in my view, justified the Special Commissioners in concluding that the Company had not established that this surplus was a gain on capital account, and the appeal therefore failed. This is the meaning and effect of the third paragraph, as I read it, of their decision, in statement IV of the Case. In an appeal by the taxpayer to the Special Commissioners against an assessment made under the Income Tax Acts on a taxpayer, the assessment stands good unless the taxpayer satisfies the Commissioners that the assessment is overcharged (see Section 52 (5) of the Income Tax Act, 1952). In such an appeal the onus is on the taxpayer to show that the assessment should not have been made (*Norman* v. *Golder*, 26 T.C. 293, *per* Macnaghten, J., at page 295), and the assessment stands unless and until the taxpayer satisfies the Commissioners that it is wrong (*per* Lord Greene, M.R., at page 297). (Compare *Eagles* v. *Rose*, 26 T.C. 427, *per* Macnaghten, J., at page 434; *Bird & Co.* v. *Commissioners of Inland Revenue* [1], 1925 S.C. 186, *per* Lord President Clyde, at page 191.) In my opinion, on the facts found in this case the Company has not discharged the onus of establishing that this surplus constituted a profit on capital account which would entitle the Company to have the assessment discharged. It was, however, strenuously argued to us by the Company that on the facts proved or admitted it had been established that the surplus in question was a profit

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[1] 12 T.C. 785, at pp. 794–5.

(The Lord President (Clyde))

on capital account and therefore not amenable to Income Tax; and I now turn to consider this argument. But in so doing, I approach the issue with this consideration in mind, namely, that the onus is upon the Company to satisfy the Court that the surplus is truly a profit on capital account. We can only decide the case in the Company's favour if we reach the conclusion that on the facts the Commissioners were disentitled to arrive at the conclusion to which they came.

The Company is a bank carrying on a bona fide banking business, but it was an unusually restricted one. The Company did not advertise its banking facilities to the public. Initially its main activity had been receiving small deposits from employees of House of Fraser, Ltd.; later it was found convenient to use the Company to facilitate inter-company transactions between the parent company and the other associated companies in the Fraser group. As time went on, the Company was used principally for making payments and collecting receipts which related to more than one of the companies in the group. The Company had issued 953 shares, 901 of which are held by Sir Hugh Fraser and 50 by his wife. The Company did not operate through the clearing-house like an ordinary bank. Cheques drawn on the Company by customers passed in the ordinary way to the clearing-house and were then sent to the Company, which met them by cash or by a cheque drawn by the Company on the National Bank of Scotland, Ltd. This latter bank acted, in effect, as the Company's bankers.

The transaction out of which the present question arises started with the purchase of certain stock by the Company. In 1947 House of Fraser stock was falling in price on the Stock Exchange. Sir Hugh Fraser decided to support the price of this stock by buying it. He gave instructions that £800 of the stock was to be bought by the Company. The Company did so and paid for the stock by advances to it from the National Bank. In 1952 a further £187 10*s.* of stock was purchased by the Company in similar circumstances and paid for in the same way. From these facts I find myself unable to conclude that the Company, in these two transactions, was making an investment on capital account. Quite clearly, these were not cases of investing bank capital in House of Fraser stock. The Company had not funds available, and, in place of using its own money, the Company borrowed cash for the purpose from the National Bank to finance the transactions. So far as appears from the Case, the only reason for the Company entering into these two transactions was to support the House of Fraser shares in the market, upon the success of which the whole trading operations of the Company depended. This appears to me to point strongly to a trading rather than a capital operation. It was an operation directly related to the Company's position as a unit in the Fraser group of companies. The overdraft was clearly just part of the Company's trading liabilities thereafter, and there is nothing in the Case to show that the Company acquired the shares, or meant to acquire them, in order to hold them as an investment on capital account. It was contended before us that Sir Hugh Fraser's object in these transactions must be dissociated from the Company's, since the latter was a separate *persona.* But I am unable to distinguish between the Company and its virtual controller, or to attribute some different purpose in the transactions on the Company's part from that of Sir Hugh Fraser. Even if I did, I should be left with no basis upon which I could infer that, whatever Sir Hugh's object was, the Company decided to purchase these two blocks of stock as a capital investment. There are just no facts in the Case which could require me to reach that conclusion, or justify me in so doing.

(The Lord President (Clyde))

The matter, however, seems to me to be clearer when the final stage of the process is reached, and the stock is sold. By 1958 this holding of £987 10*s.* in House of Fraser, Ltd., had been converted into £4,314 5*s.* non-voting stock and £4,314 5*s.* voting stock. In 1958 the Company's overdraft with its bankers, the National Bank, stood at roughly £50,000, and the latter requested the Company to reduce the indebtedness. In October, 1958, accordingly, the Company sold the non-voting stock holding for £23,199 and used this to reduce its overdraft. The sum realised on this stock exceeded its cost by a very substantial amount, and it is this surplus which is in issue in this case.

It seems to me clear that this sale, in these circumstances, was not just a mere realisation of a capital asset but an operation directly connected with and entered into in the course of carrying on the Company's business as bankers, and undertaken to enable that trade to be carried on. As was said in *Californian Copper Syndicate* v. *Harris*, 5 T.C. 159 (1),

> "enhanced values obtained from realisation or conversion of securities may be . . . assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

In the present case, the Company in the course of its normal business used the National Bank as its bankers, and to finance the Company's banking business it used money deposited with it (through an overdraft) by the National Bank. In *Punjab Co-operative Bank, Ltd., Amritsar* v. *Commissioner of Income-tax, Lahore*, [1940] A.C. 1055, Lord Maugham said, at page 1073:

> "If, as in the present case, some of the securities of the bank are realized in order to meet withdrawals by depositors, it seems to their Lordships . . . quite clear that this is a normal step in carrying on the banking business, or, in other words, that it is an act done in 'what is truly the carrying on' of the banking business."

In the present case it was not an ordinary customer whose demand for payment necessitated the realisation, but the ratio still applies. For, in the case of this special bank, its *modus operandi* in trading involved its obtaining liquid cash from the National Bank, which that bank made available to it; and it was to meet the demand of this special creditor in its trading operations that it had to find cash by realisation of the investment in question. The Company sought to assimilate the situation to that of an ordinary individual realising a capital investment to repay an overdraft. But this bank's trading set-up cannot be equiparated to that of an ordinary individual.

On the whole matter, therefore, in my opinion the Company has not shown that the profit on the sale was a capital gain, and the Special Commissioners were entitled to dismiss the Company's appeal against the assessment. The question of law should be answered in the affirmative.

Lord Carmont.—The Appellant—Frasers (Glasgow) Bank, Ltd.—was assessed to Income Tax under Case I of Schedule D in respect of certain profits made by it for the year 1959–60, when carrying on the business of bankers. It appealed to the Special Commissioners on the ground that the sum in question was not profit of its business but was a capital profit not liable to be brought into the computation for Income Tax.

In the first place, it seems to me to be idle to test the nature of the profit by reference to the nature of banking business in general, because, although

(1) *Per* the Lord Justice Clerk (Macdonald), at p. 166.

(Lord Carmont)

the Appellant carries on a bona fide banking business, it is found as a fact in the Case that the banking business was "a somewhat unusually restricted one." The question for us, therefore, is whether the sum in question was a profit of the business carried on, as the Appellant carried it on, without reference to its peculiarities in the realm of banking.

It should not, perhaps, be left out of account that although the Fraser Banking Company (as I shall refer to it) had a separate legal *persona,* it was truly the *alter ego* of Sir Hugh Fraser; and little attention seems to have been paid to whether he conducted the affairs of the Bank formally as a director or whether, because he controlled the whole share capital of the Banking Company, he *de facto* managed the Banking Company's affairs as an individual and imposed his wishes on the Company. The latter aspect seems to be borne out by the statement of facts in the Case. He (Sir Hugh) *acquired,* on more than one occasion, parcels of stock in a company called House of Fraser, Ltd., and *gave instructions* to register these parcels in the name of Frasers (Glasgow) Bank, Ltd. (the Company with which we are concerned in the present case). Again, in 1954, Sir Hugh as an individual *purchased* blocks of shares through stockbrokers in concerns such as Phillips Furnishing Stores, Ltd., and Randfontein Gold Mining Co., Ltd., and *he instructed* these shares to be registered in the name of Frasers (Glasgow) Bank, Ltd., although the Frasers (Glasgow) Bank, Ltd., had no money to pay for the shares and had to obtain money on overdraft to pay for the various shares from another bank (the National Bank of Scotland). In this way Frasers (Glasgow) Bank, Ltd., was able to appear as the beneficial owner of the shares so acquired. In 1958, in order to reduce the amount (some £50,000) due on overdraft to the National Bank, when that was requested by the National Bank, the Fraser Banking Company sold part of the shareholding put in its name on the instructions of Sir Hugh Fraser in 1948 and 1952. When Sir Hugh Fraser, in 1948 and 1952, arranged for the House of Fraser shares to be put into the name of the Fraser Banking Company, that Bank then paid for them £987 10*s.* by means of the overdraft with the National Bank. When the Fraser Banking Company was called on to reduce its overdraft in 1958, it sold part, but only part, of this shareholding; and that sale of part of the shareholding produced £23,199, that is to say at least £18,300 more than the whole amount which the Fraser Bank had to pay when the whole shareholding was put into the Fraser Banking Company's name on the instructions of Sir Hugh in 1948 and 1952. It is in regard to this surplus of £18,300 that the question is raised in the present case, and it was argued for the Fraser Banking Company that it did not form part of the profits or gains of the business carried on by the Company, and the Crown submitted the opposite contention. The onus is on the Fraser Banking Company to show that the said sum was a profit on capital account.

The case is taken on the footing that the Fraser Banking Company, which was incorporated in 1936, carried on a bona fide banking business, "albeit a somewhat unusually restricted one", by which I take it to be meant by the parties that the banking business was an unusual one in character, and that its operations were unusually restricted in certain ways as compared with the procedure of ordinary banks. As regards the character or nature of the Fraser Banking Company, it is found that it paid no director or employee; that it did no advertising but left its activities to be discovered by members of the public, as distinguished from the employees of the unit companies of the Fraser group; that its affairs were managed by an employee of the House of Fraser company in a room of the House of Fraser's offices; and that, although styled bankers, Frasers (Glasgow) Bank, Ltd.,

(Lord Carmont)

really did its banking by invoking the services of the National Bank of Scotland to finance it. So far as the activities of the Fraser Banking Company were concerned, it received deposits of money from the employees of the Fraser group of companies and from non-employees, called "customers", who came to be aware of the existence of the Bank. There were some 300 depositors, who were paid interest at 3 per cent. In addition to the deposit accounts, the Fraser Banking Company ran about 80 current accounts on which it received interest when overdrawn by the customer and, in certain states of accounting, paid interest to the customer when the account was kept in credit. Among the customers having current accounts were the unit companies of the Fraser group, but in their case no interest seems to have been taken into account either way. The accounts produced with the Case show that the advances to customers of the Fraser Banking Company during the five years from January, 1955, varied from £100,000 to £150,000, and the amounts due by the Fraser Banking Company to its depositors and customers were, over the same period, correspondingly high or even higher. In groping about for a sense of direction after considering the activities of Frasers (Glasgow) Bank, Ltd., I note the finding in the Case that it has never declared a dividend.

In ordinary banking operations, money received on deposit is liable to be uplifted after stated periods and on pre-arranged terms; and to enable a bank to meet its obligations to repay, funds are held by it in investments readily realisable. When, in order to meet withdrawals by depositors or for some other reason, realisation takes place which shows an appreciation in value compared with the cost of the investment when made, that all takes place in the ordinary course of carrying on of the banking business, and the increase in value on the investment so realised forms part of the profits of the business as carried on and is therefore liable to tax. I refer to the decision of the Privy Council in the case of *Punjab Co-operative Bank, Ltd., Amritsar* v. *Commissioner of Income-tax, Lahore,* [1940] A.C. 1055, and to what is said by Lord Maugham when quoting from the Judge of first instance, at page 1073:

> "'... the purchase and sale of shares and securities are so much linked with the deposits and withdrawals of clients that, with the existing Articles of Association, the purchase and sale of shares and securities are as much part of the assessee's business as receiving deposits from clients and paying them off are, and that, therefore, the profits which arise from the former transactions are as much business profits as the profits arising from the latter transaction are.'"

Turning to the facts of the present case, I find a Banking Company with only a small capital accepting deposits of money to an amount of the order of £150,000 from its employees and the public, and lending even greater sums than it takes in annually and covering the difference, when necessary, by borrowing on overdraft from another bank (the National Bank of Scotland). If the Fraser Banking Company's investments had to be used in reduction and relief of the overdraft as occasion demanded, that fact would seem to link the Company's investments so used with its receipt and use of the deposited money. If profits were made when making changes in such investments of the Fraser Banking Company from time to time, they would appear to be as much to be deemed business profits as are the profits which directly resulted from the receipt by the Banking Company of the money paid in by the depositors and lent out to borrowers from the Bank.

I turn now to the facts which appear in the Case which bear on the history of the £18,300, which is the basic figure on which the Crown claim as being liable to tax. It results from the sale of half of an original investment made by the Fraser Banking Company. That original investment was the before-men-

tioned purchase by the Fraser Banking Company of units of the House of Fraser company, made *quoad* £800 in 1948, and *quoad* £187 10*s.* in 1952. Further purchases were made in 1954, first of 53,600 ordinary shares in Phillips Furnishing Stores, Ltd., and then of 2,450 ordinary shares in Randfontein Estates Gold Mining Co., Ltd. I leave out of my consideration the Phillips shares and the Randfontein shares, as the Case does not disclose what the Fraser Banking Company paid for them, and for aught that appears, the Fraser Banking Company still holds them.

The £987 10*s.* stock of the House of Fraser so purchased was converted by the House of Fraser company some time before 1958 into voting stock and non-voting stock, each kind being then valued at £4,314 5*s.* When the Fraser Banking Company's overdraft with the National Bank had become swollen to about £50,000 by the Fraser Banking Company having lent to its customers more than it had received from its depositors, the Fraser Banking Company sold its non-voting stock in the House of Fraser company to pay off or reduce the overdraft. As that non-voting stock realised in the market £23,199, the result was that the Fraser Banking Company got from its purchase of £987 10*s.* of House of Fraser company stock in 1948 and 1952 (and apart from the value of the voting stock which the Fraser Banking Company continued to hold) a profit in 1958 of nearly £23,000. The Crown very generously state the Fraser Banking Company's profit on the sale of the non-voting stock at £18,300, but this seems to me to be a mistake. The Banking Company acquired the whole of the stock it got in the House of Fraser company for £987 10*s.*, but as this purchase included what became the voting stock as well as the non-voting stock, only half of the £987 10*s.*, at most, can be attributed to the non-voting stock as its cost to the Banking Company. Half of £987 10*s.* is £493 15*s.*, and that last-named sum deducted from the £23,199 obtained for the non-voting stock when sold, shows a profit of £22,705 5*s.* The lesser sum of £18,300 brought out by the Crown as the profit obtained from the sale of the non-voting stock may have been reached by deducting from the sum realised by the sale of the non-voting stock the estimated value of the holding of non-voting stock when the conversion was made. That does not seem to me to be justifiable, but even so taking it, £18,300 still appears to be less than the actual profit made on the sale of the non-voting shares. I proceed, however, on the basis that the sum realised was only £18,300, and I enquire as to its character—whether a capital or an income return.

The purchase of the £987 10*s.* worth of stock in House of Fraser, Ltd., by the Fraser Banking Company was plainly within the scope of the objects of the Banking Company as set out in that Company's memorandum of association, as also was the borrowing of the money on overdraft such as was resorted to by getting facilities in 1947–48 from the National Bank of Scotland to pay for the £987 10*s.* House of Fraser stock. The Fraser Banking Company was also entitled by its memorandum either to hold any shares it purchased, or to realise them. Of the accounts produced, No. 6 shows in the year beginning 1949 there is for the first time an item of investments at cost stated at £3,891. At this time there was due to the National Bank on overdraft £5,956, which fact points away from the investments stated at £3,891 being part of the capital of the Banking Company.

Taking the position at January, 1958, it would appear that the amount due to the Fraser Banking Company's depositors, and to its customers on current account, and to the National Bank on overdraft, was £219,512. Taking against this what was due to the Banking Company by customers

(Lord Carmont)

(£179,420), a balance is left of £40,092 outstanding against the Banking Company, which sum could not be met by the Banking Company's cash in hand, and at its bankers (in all £1,211). What the Banking Company sets out as its investments at cost (£41,061) would have to be used, as a matter of ordinary course of the Fraser Banking Company's business, to balance its accounts. In these circumstances, I would have great difficulty in treating the investments as capital, as they seem to be merely money laid aside to be available and necessary for meeting the Banking Company's obligations to depositors in ordinary course of the business of running the bank. The state of matters disclosed by the accounts seems to me to be far removed from the position of a trader who sells his private dwelling house to meet his business obligations after a period of unfortunate trading, and then finds to his surprise that the dwelling house sells for a sum greatly in excess not only of what is necessary to put his business into safety, but also greatly in excess of what he paid for the house. It may well be that excess in value of the house could only be treated as a capital profit in such circumstances. On the other hand, the holding of the House of Fraser shares by the Fraser Banking Company was a vital part of the banking machinery which enabled the Fraser Banking Company to borrow and to lend, and so formed part of its trading assets as a bank. The Fraser Banking Company investments were made with money which temporarily could be set aside, but which had to be available to meet the Bank's current obligations as they might emerge from time to time in the running of the business of the Fraser Banking Company.

From what I have written, it seems to me to be a modest conclusion to reach that the Special Commissioners were entitled to arrive at the decision they did, adverse to the contention put forward on behalf of the Fraser Banking Company.

Lord Guthrie.—The Appellant is a limited company carrying on business as bankers in Glasgow. It is agreed by the parties that the business is a bona fide banking business. The Company was incorporated on 18th July, 1936. Its objects include to carry on the business of bankers and in association therewith the business of an investment society, and to acquire, hold and realise shares, stocks, debentures, etc. Nearly all the shares are owned by the chairman and managing director, Sir Hugh Fraser. At first the Company's main business was to receive deposits from employees of another company, now House of Fraser, Ltd. Later it was used to facilitate inter-company transactions of House of Fraser, Ltd., and its associated companies. It made payments and collected receipts which related to more than one company in the group, and received monthly from each member company the appropriate share of the payments made less the receipts collected. Each member company had a current account with the bank. Sir Hugh Fraser, some of his friends and some employees of House of Fraser, Ltd., had also current accounts. About 80 individuals had current accounts, and about 300 had deposit accounts. The National Bank of Scotland, Ltd., acted as bankers to the Appellant Company, which had an overdraft with its bankers. In 1947 and early in 1948 the price on the Stock Exchange of units of the stock of House of Fraser, Ltd., fell. Mr. (later Sir) Hugh Fraser supported the market in the stock by buying units. He instructed that £800 of these units was to be registered in the name of the Appellant Company, which paid for the stock by advances from its bankers. In 1952 further stock to the amount of £187 10*s.* was acquired by the Company in similar circumstances and paid for in the same way. In 1954 Mr. Hugh Fraser, as an individual, instructed stockbrokers to purchase ordinary shares in a furnishing company and in a gold mining

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company. He instructed that these shares should be registered in the name of the Appellant Company, and they were again paid for by the Company by advances from its bankers. All these stocks and shares were beneficially owned by the Appellant Company. It is found in fact in the Case that no other stock or shares have been acquired by the Company since its incorporation. By 1958 the stock of £987 10*s.* in House of Fraser, Ltd., had been converted into £4,134 5*s.* non-voting stock and £4,134 5*s.* voting stock. In 1958 the Appellant Company owed its bankers some £50,000, and was asked to reduce its indebtedness. Accordingly, in October, 1958, the Company sold the non-voting stock for £23,199, which exceeded its cost by £18,300. The proceeds were used to reduce the debt to the bankers. This sale was the only sale of stock or shares in the history of the Company.

The question for decision by the Special Commissioners was whether the realised surplus on the sale of the non-voting stock was a profit of the Company's trade of banking, or a profit on capital account. They held that the shares in question were bought and sold by the Company in the course of carrying on its trade. The question of law for this Court is whether they were entitled to arrive at that decision. The Special Commissioners stated the ground of their decision thus:

> "In the absence of evidence as to the general investment policy of this somewhat unusual banking business, we have come to the conclusion that the shares in question were bought and sold by the Company in the course of carrying on its trade."

In the circumstances of this case I find that reason unconvincing. There were only four purchases of stocks and shares in the history of the Company. The facts found show that these purchases were not only few, but made in special circumstances. In particular the purchases of stock in 1948 and 1952 were made on the instructions of Mr. (later Sir) Hugh Fraser to meet crises in the affairs of House of Fraser, Ltd. Further, the sale of the non-voting stock was also a measure to meet an emergency, the call by the bankers to reduce the Company's debt to them. As there were no other purchases or sales of investments, there was no need for the Company to formulate a general policy. A general policy would not have had a bearing on these purchases and that sale, since they were isolated and special transactions. Therefore, evidence as to a general investment policy would not have assisted in the solution of the problem before the Special Commissioners, and I do not think that the absence of such evidence afforded a correct ground of decision.

Counsel for the Crown contended that the ground of decision quoted inferred that the Appellant had failed to satisfy the Special Commissioners that the assessment should be discharged, and maintained that the assessment should stand good in accordance with Section 52 (5) of the Income Tax Act, 1952.

In my opinion, if the evidence adduced before the Special Commissioners had left the material facts in doubt, the Crown would be entitled to rely upon that Sub-section, and the Appellant would fail. But I have reached the conclusion that the facts found by the Special Commissioners require that the question of law should be answered in favour of the Appellant, and therefore that it cannot be held that the Appellant failed to discharge the onus upon it before the Special Commissioners.

The business of the Company is a genuine banking business, although unusual and restricted. Latterly, it was chiefly used as a kind of clearing-house for the companies belonging to the Fraser group. Now, the purchases of the

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stock with which we are concerned were in no way connected with the orthodox banking side of the business, the receipt of moneys from clients and the payment of moneys to them. Counsel for the Crown submitted that the purchases were "of the same genus" as the part of the business which facilitated the operations of the members of the Fraser group. But this is clearly incorrect. The transactions were wholly dissimilar from the receipt and payment of moneys on behalf of the members, and the periodical settlement of their accounts. The purchases were made to maintain the value of House of Fraser stock in the market, an object wholly divorced from the normal activities of this Company. Again, the realisation of the stock was not made to meet the demands of customers as part of an ordinary banking business, nor was it made to assist in the settlement of accounts between members of the Fraser group. It was made to meet an emergency, the demand of the bankers for a reduction of the overdraft. Even if the reduction of debt were regarded as for the purposes of the Company's trade, that fact would not of itself make the surplus realised on the sale of the stock a profit of the trade. It is necessary to consider the circumstances in which an investment had been made as well as those in which it has been realised in order to decide whether a realised surplus on sale is a profit of trade. A tradesman may sell his dwelling house to enable him to meet the demands of his trade creditors, but that purpose does not make the purchase and sale of his house transactions in the course of his trade. In my opinion the profit on the sale of the stock was profit made on the realisation of a capital asset, and the transaction was not in the course of the Company's trade.

The facts of the present case are in marked contrast to those discussed by Viscount Maugham in *Punjab Co-operative Bank, Ltd., Amritsar* v. *Commissioner of Income-tax, Lahore,* [1940] A.C. 1055, at page 1073. There his Lordship was dealing with investments made by a bank with moneys received in the ordinary course of its business, and realised as occasion required to meet the withdrawals by its customers. Profits on such transactions are clearly made in the course of the trade of banking, but the present case deals with very different facts. This is not a case where

> " '. . . the purchase and sale of shares and securities are . . . linked with the deposits and withdrawals of clients' ".

On the facts found by the Special Commissioners I would answer the question of law in the negative.

The Company having appealed against the above decision, the case came before the House of Lords (Lord Dilhorne, L.C., and Lords Reid, Jenkins, Guest and Pearce) on 15th January, 1963, when judgment was reserved. On 20th February, 1963, judgment was given unanimously in favour of the Crown, with costs.

Sir John Senter, Q.C., and Mr. J. P. H. Mackay appeared as Counsel for the Company, and the Solicitor-General for Scotland (Mr. D. C. Anderson, Q.C.), Mr. Alan Orr and Mr. A. J. Mackenzie Stuart for the Crown.

Lord Dilhorne, L.C.—My Lords, I have had the advantage of reading the opinion about to be expressed by my noble and learned friend Lord Reid, with which I fully agree and have nothing further to add.

Lord Reid.—My Lords, the Appellant (which I shall call "the Company") is one of a group of companies of which the best known is House of Fraser, Ltd. It is a small Banking Company, and most of its customers were other

companies of the group or their employees. At all relevant times it was controlled by Sir Hugh Fraser, who owned 90 per cent. of its capital and was chairman and managing director.

Towards the end of 1947 the price on the Stock Exchange of stock units of House of Fraser began to fall. Sir Hugh Fraser decided to support the market. He caused the Company to buy £800 of the stock, and the Company financed the purchase by overdraft on its ordinary trading account with the National Bank of Scotland, Ltd. In 1952 £187 10*s.* further stock was acquired by the Company in similar circumstances and paid for in the same way. At that time the Company held no other stocks or shares. But in 1952 Sir Hugh Fraser purchased two considerable parcels of shares, which were registered in the name of the Company and paid for by advances to the Company by the National Bank of Scotland. In 1958 the Company owed some £50,000 to its bankers, who requested the Company to reduce its overdraft. By that time the stock of House of Fraser had greatly appreciated in value and the holding of the Company had been converted into £4,314 5*s.* of non-voting stock and the same amount of voting stock. The Company sold the non-voting stock for £23,199, which was used to reduce the overdraft.

The Company was assessed to Income Tax under Case I of Schedule D on the basis that the £18,300 profit made on the sale of the non-voting stock was a trading profit. The Special Commissioners upheld this assessment, and their decision was affirmed on 16th May, 1962, by the First Division of the Court of Session (the Lord President (Clyde) and Lord Carmont; Lord Guthrie dissenting). The Company now appeals, and maintains that the purchase and sale of this stock were not trading transactions but that its profit is a capital profit not assessable to tax.

My Lords, I have no doubt that the decision of the Special Commissioners was right. The reasons given by the Special Commissioners are not very adequate, and the majority of the First Division of the Court of Session reached their decision on the facts without relying on the decision of the Special Commissioners. I would take the same course. They cited the opinion of the Lord Justice Clerk (Macdonald) in *Californian Copper Syndicate* v. *Harris,* 5 T.C. 159, at page 166, that

> "enhanced values obtained from realisation or conversion of securities may be . . . assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

They also cited the judgment of the Privy Council in *Punjab Co-operative Bank Ltd., Amritsar* v. *Commissioner of Income tax, Lahore,* [1940] A.C. 1055.

The argument for the Company was that the purchases of the stock were in no way connected with its banking business and that the object of maintaining the value of House of Fraser stock in the market was wholly divorced from the normal activities of the Company. I cannot accept that argument. The Company had to use its trading facilities with its bankers to finance the purchases, and the continued prosperity of House of Fraser was a vital interest of the Company as traders because, as I have said, its banking customers were, in the main, companies of the Fraser group and their employees. And then the sale of this stock was made in order to put its trading bank account in better shape.

(Lord Reid)

The question whether particular operations were acts done in carrying on the taxpayer's trade is not one that can be answered by applying any definite rule or criterion. The answer must depend on a consideration and evaluation of all the relevant facts. Here it appears to me that all the facts point in the same direction. When the stock was bought the Company had no funds to invest. The object of the purchase was to support its chief customer in its trade. And the stock was sold because of the requirements of its trade. That appears to me to be amply sufficient to support the decisions of the Commissioners and of the First Division of the Court of Session, and therefore I am of opinion that this appeal should be dismissed with costs.

Lord Jenkins.—My Lords, I entirely agree with the opinion just expressed by my noble and learned friend Lord Reid, and agree with him that this appeal should be dismissed.

Lord Guest.—My Lords, I concur.

Lord Pearce.—My Lords, I concur.

Questions put:

That the Interlocutor appealed from be recalled.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Baileys, Shaw & Gillett, for John C. Brodie, Cuthbertson & Watson, W.S., Edinburgh; Solicitor of Inland Revenue (England) for Solicitor of Inland Revenue (Scotland).]