(1937) 03 CAL CK 0016

Calcutta High Court

Case No: None

NORTH BRITISH AND MERCANTILE INSURANCE CO.	APPELLANT
Vs	
RE.	RESPONDENT

Date of Decision: March 20, 1937

Acts Referred:

- Income Tax Act, 1922 - Section 59, 8

Citation: (1937) 5 ITR 349

Hon'ble Judges: Derbyshire, C.J; Panckridge, J; Costello, J

Bench: Full Bench

Judgement

DERBYSHIRE, C.J. - The facts of this case are set out very fully in the case which has been stated by the Commissioner of Income Tax and I do not propose to re-state them here. There are, however, two matters which were admitted by both sides during the argument. The first is that we have been asked by both sides to decide this matter as if the return of income tax by the North British Mercantile Insurance Company were made strictly under rules 25 and 35 made by the Central Board of Revenue under Sec. 59 of the Indian Income Tax Act, 1922.

Rule 25 provides :

"In the case of Life Assurance Companies incorporated in British India whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation, provided that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income tax assessment, and any Indian income tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation."

Rule 35 provides :

"The total income of the Indian branches of non-resident insurance companies (Life, Marine, Fire, Accident, Burglary, Fidelity, Guarantee, etc.) in the absence of more reliable data, may be deemed to be the proportion of the total income, profits or gains, of the companies, corresponding to the proportion which their Indian premium income bears to their total income. For the purpose of this rule, the total income, profits or gains of non-resident Life Assurance Companies, whose profits are periodically ascertained by actuarial valuation shall be computed in the same manner as is prescribed in Rule 25 for the computation of income, profits and gains of Life Assurance Companies incorporated in British India."

The second is that the tax-free securities in question are Government of India tax-free securities which come within the proviso to Section 8 of the Indian Income Tax Act of 1922, the words of which are :

"Provided that no income tax shall be payable on the interest receivable on any security of the Government of India issued or declared to be income tax free."

The North British Company made a return for the year 1934-35 of the profits of its Life Business in India and the Income Tax Officer asked the Company to produce a certificate as to the composition of the interest item entering into the Life Business for the quinquennium 1926-30 in reply to which the following statement signed by the London Actuary of the Company dated the June 5, 1934, was submitted.

INDIAN income tax -

Life profits 1926-30 - Indian Business, Liability		Rs.
January 1, 1926, including new bonus	...	1,93,31,960
Premiums	...	1,21,93,333
Interest	...	48,08,196
		3,63,33,489
Claims	...	76,52,860
Surrenders and Bonus surrenders	...	12,20,285
Commission and Expenses of Management	...	27,43,500
Liability December 31, 1930	...	2,20,92,009
Profit for Quinquennium	...	26,24,835
		3,63,33,489

Yearly profit for purpose of Indian Taxation 1931-32 to 1935-36, 1-5th of Rs. 26,24,835 ... 5,24,97

"The interest collected in India during the quinquennium 1926-1930 on our Indian Life investments amounted to Rs. 40,75,703 as will be seen from the accompanying statement A."

"The amount of interest considered to have been earned on the Indian Life business, however, during the same period, calculated at the average rate earned on the total Life funds of the Company, amounted to Rs. 48,08,196 and in computing the Indian Life Profits 1926-30 for the purposes of the valuation of our Indian Life business, an amount of Rs. 7,32,488 has been added to the amount of the interest Rs. 40,75,708 collect in India in order to arrive at the figure of Rs. 48,08,196 credited in the valuation statement."

The statement "A" shows that the following amounts were received free of Indian Income Tax;

		Rs.
1926	...	2,04,790
1927	...	2,04,790
1928	...	2,04,790
1929	...	1,95,911
1930	...	22,577
		8,32,858

It was stated by the assessees Counsel and accepted by the Advocate-General for the Income Tax authorities that the word "liability" in the table above should be read as "fund available to meet liability."

One-fifth of the amount of interest collected in India free of Income tax is Rs. 1,66,572. The assessees claim that this item of Rs. 1,66,572 comes within the exemption given by the proviso to Sec. 8 of the Act of 1922. The Income Tax authorities contend that the Income, profits gains are to be ascertained by rules 25 and 35, that those rules are a code complete in themselves and once the income, profits and gains have been ascertained under that code, it is not permissible in law to make any additions to or subtractions from that sum save in accordance with the provisions of rule 25. It is said that the total income so ascertained becomes only a

notional income and unless otherwise provided by the rules, it is not open to the Income Tax authorities to introduce any dissection or analysis of that total, so as to allow the proviso to Sec. 8 to operate. Great stress is laid by the Income Tax authorities upon the fact that the profits in the case of Life Assurance Companies are periodically ascertained by actuarial valuation.

It is, in my view, necessary to refer to the Life Assurance Companies Act (Act VI of 1912) for some indication as to what is the prescribed form and substance of that actuarial valuation. Sec. 7 of the Life Assurance Companies Act provides that every Life Assurance Company shall, at the expiration of each financial year, prepare -(c) a balance-sheet or balance-sheets in the form or forms set forth in the Third Schedule.

Sec. 8(1) provides -

"Every life assurance company shall once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form set forth in the Fourth Schedule."

The Fourth Schedule to the Act prescribes what is called "A consolidated revenue account for the.....years commencing.....and ending....."

The statement of the Indian Income Tax Life profits 1926-1930 rendered by the North British Company dated the June 15, 1934, set out at page 3 of the Reference referred to above in general follows the forms of this Consolidated Revenue Account. In the right hand column of the Consolidated Revenue Account the last item is as follows : "Amount of Life Insurance fund at the end of the period as per Third Schedule." In the Third Schedule of the Act are set out the assets and investments of the Company and in the specimen form are shown "Indian Government Securities" and a space is left for the amount thereof. In the left hand column of the Consolidated Revenue Account (sixth schedule there occurs this item "Interest" dividends and rents less income tax thereon."

It is clear, therefore, that the actuarial valuation prescribed for the Life Assurance Companies Act is not simply concerned with a final figure like the answer to an arithmetical sum but sets out the various assets of the company and the interest derived from them. In fact it informs and is intended to inform all concerned what the assets and the income and liabilities of the Company are in a way which goes much beyond the ordinary Company balance-sheet. It may be that the forms in Schedule 3 and Schedule 4 of the Act do not provide for each individual investment and item of interest to be set out. Nevertheless they do show the different classes of investment, the interest as a whole derived therefrom and the income tax paid thereon. If the assessee making a full and proper return chooses to show that he has certain tax-free investments and the income derived therefrom, it is in my view

impossible to say that he has not made a proper return in accordance with the Life Assurance Companies Act of 1912. Where the return shows that some of the interest has been derived from securities of the Government of India to be tax-free, it is impossible in my view for the Income Tax authorities to ignore the plain provisions of the proviso to Sec. 8 of the Income Tax Act which say that no income tax shall be payable on the interest receivable on any security of the Government of India issued or declared to be income tax free.

It was argued by the Income Tax authorities that rule 25 which is made under Sec. 59 of the Act has by sub-Sec. (5) thereof effect as if it were enacted in the Act. That is true. It was further argued that rule 25 overrules the provisions of Sec. 8 as far as Life Assurance Companies were concerned. I am unable to agree with that agrument. In the case of the Institute of Patent Agents v. Lockwood, rules were made under the Patents, Designs and Trade Marks Act. The Act declared that rules which were made in the prescribed manner were to be of the same effect as if they were contained in the Act. The House of Lords held that this provision precluded enquiry as to whether the rules were ultra vires or not. At page 360 (of 1894 A.C.) Herschell, L. C. said :-

"No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

Those words were cited with approval by Lord Dunedin in the case of Minister of Health v. The King.

In the conflict here between the Income Tax authorities contention under rule 25 and the assessees contention under the proviso to Sec. 8 of the Act, it seems to me that the true position is that in this particular case the actuarial valuation as prescribed by law discloses the existence of item of interest Rs. 48,08,196. That item of interest was (at the request of the Income Tax Officer) shown to contain an item of Rs. 8,32,858, interest derived from tax-free securities of the Government of India. That item of interest does not affect the liabilities of the company and clearly contributes pro tanto to the total profit concerned. In my view, therefore, it is not open to the Income Tax authorities to disregard that item or to say that it cannot be differentiated from that total. In my view that tax-free interest or its annual one-fifth part must be deducted from the income, profits, and gains and is not assessable to income tax. I am fortified in this conclusion by the decision in the recent case of Hughes v. Bank of New Zealand where Lord Justice Green said :-

"Section 46 of the Income Tax Act, 1918, provides that the interest of certain securities shall be exempt from tax and super-tax. The securities in question are securities which have been issued with a particular condition annexed to them, that condition being : that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, Speaking for myself, I find in that language a perfectly clear Legislative provision that, so long as the securities are in the beneficial ownership indicated in the section, no tax is to be levied in respect of the interest on them. To say, as has been said on behalf of the Crown, that the true effect of the section is merely that the interest is not to be taxed as interest but can be taxed as part of an aggregate of profits of trade, appears to me to override the perfectly plain language of the section."

In my view the answer to questions (1) and (2) propounded by the Commissioner of Income Tax is in the affirmative. The assessees may claim exemption from income tax in respect of such part of the income, profits and gains of the Life Assurance Company as they can show are due to interest from securities issued by the Government of India declared to be income-free.

Question (3) is as follows :

Whether, when income tax for any year is charged in respect of income, profits and gains of a Life Insurance Company computed in the manner prescribed by the rules referred to in question 1, the assessee can claim credit u/s 18(5) of the Indian Income Tax Act, for any deductions of tax made at the source."

Sec. 18 sub-Sec. (3) provides :

"The person responsible for paying any income chargeable under the head Interest on securities shall, (unless otherwise prescribed in the case of any security of the Government of India), at the time of payment deduct income tax (but not super-tax), on the amount of the interest payable at the maximum rate."

(There is a proviso which has nothing to do with the present case).

Sub-Sec. (5) provides :

"Any deduction made in accordance with the provisions of this section shall be treated as a payment of income tax (or super-tax) on behalf of the person from whose income the deduction was made, or of the owner of the security, as the case may be, and credit shall be given to him there, for in the assessment, if any, made for the following year."

The two sub-Sections refer entirely to deduction of tax at source by or on behalf of the Government of India and the giving of credit for such deduction when the assessees come to settle their final account for payment of income tax with the

Government in the following year. They decided on not depend upon the way in which the tax is assessed. They are simply machinery for deducting tax at source and giving credit for that deduction in adjusting the final account. Indeed the Advocate-General who appeared for the income tax authorities abandoned the contention which has been set out above by the Commissioner. In my view sub-Sec. (3) and sub-Sec. (5) of Sec. 18 apply equally whether the income of the assessees has been ascertained under rules 25 and 35 or not. In my opinion the answer to question (3) is in the affirmative.

The last question submitted by the Commissioner of income tax for our opinion is :

"Whether in any event, the Assistant Commissioner of income tax had jurisdiction to enhance the said assessment, having regard to the terms of the said notice u/s 34 and the general provisions of the Indian Income Tax Act, 1922."

In view of the answers I have given to the preceding questions it is not necessary for me to answer the last question.

The assessees are entitled to their costs in these proceedings.

COSTELLO, J. - The questions put for our consideration in this reference are of some complexity and difficulty. The matter which came to be argued before us arose out of the assessments made on the North British and Mercantile Insurance Company Limited for the years 1932-33, 1933-34 and 1934-35. The Commissioner of Income Tax stated that "the points at issue in respect of the assessments for the last two years are identical. Two further questions arise in respect of the assessment for the year 1932-33". These two questions were concerned with the legality of the action of the Income Tax Officer in initiating and making a supplementary assessment under Sec. 34 of the Income Tax Act and the legality of the Assistant Commissioners action in enhancing the original assessment when the case came before him on appeal is also challenged. The case stated by the Income Tax Commissioner related to the assessment for the year 1934-35 but it is clear that actually the questions we are required to answer are common to and govern the assessment for all the three years. The assessees case was that the total income for the previous year (namely, the tax year ending the December 31, 1933) amounted to the sum of Rs. 6,90,883 and such income included a sum of Rs. 5,24,967 which represents the profits of the companys Indian Life Insurance Business, being one-fifth of the previous quinquennial surplus as ascertained by actuarial valuation of the business done by the Company from the January 1, 1933, to the December 31, 1933. The assessees case was that in ascertaining that quinquennial surplus there had been taken into account interest on securities declared to be tax-free amounting in the aggregate to the sum of Rs. 8,32,860 of which one-fifth would be the sum of Rs. 1,60,572. The Company was assessed to income tax for the year 1934-35 on its aforementioned total income of Rs. 6,90,883 less the sum of Rs. 1,66,572, that is to say, on the sum of Rs. 5,24,311 which at 26 pies in the rupee amounted to the sum of Rs. 7,100-7 as.

The surcharge thereon amounted to Rs. 17,715-2 as, and the total liability to income tax for the year of assessment accordingly amounted to Rs. 88,715-9 as. The Company objected that they had already in point of fact paid income tax for the year ending the December 31, 1933, amounting to Rs. 1,16,953-1 anna 6 pies through deductions at source from interest on securities which deductions had been made by virtue of the provisions of Sec. 18 of the Income Tax Act. The Company put forward the objection that the Income Tax Officer in contravention and in disregard to the express provisions of sub-Sec. (5) of Sec. 18 had failed to give them credit for the full sum of Rs. 1,16,953-1-6 p. when making the assessment although the assessment should have been taken as an assessment for the following year within the meaning of that Sub-Section. The Income Tax Officer had, in fact, only given the Company credit for the sum of Rs. 51,332-6 as, and so the Company complained that they had suffered double taxation to the extent of the difference, namely, Rs. 65,620-11-6 pies. The contention of the Company as regards the meaning and effect of Sec. 18, sub-Sec. (5) of the Act was that the provision of that sub-Section was clear, unambiguous in its meaning and mandatory. The Company argued that the provisions of the Sections could not be varied or modified by any rules or directions in any way whatever and therefore they were entitled as of statutory right to full credit in the assessment for the whole amount of income tax paid by him by reason of deductions from interest on securities during the year ending the December 31, 1933. Accordingly when the Company appealed against the 1934 - 35 assessment they said that if proper credit had been given by the Income Tax Officer they would have been entitled to a refund of Rs. 28,202-8-6 pies but instead of that a demand was made on the Company for a further sum of Rs. 37,418-3 annas. The Company claimed in the appeal that their assessment ought to be reduced by giving them full credit of the tax previously paid in conformity with the precise provisions of Sec. 18 Sub-Sec. (5) of the Act and the Company claimed a refund accordingly. When the matter came on appeal before the Assistant Commissioner of income tax, he set out the issue he had to determine in this form. "The objection of the Appellant lies against credit of tax paid at source, being allowed to the extent of Rs. 51,332-6 as in lieu of Rs. 1,16,953-1-6 pies" and in giving his decision he made the following observations : "The Income Tax Officer in making the assessment, has allowed credit, under the terms of Rule 27, of a sum equivalent to the average tax deducted at source, on investments over the period covered by the actuarial valuation. The Company, in the calendar year prior to the year of assessment derived a certain income from interest on securities, and it contends that it is entitled, under the terms of Sec. 18(5) of the Act, to credit of a sum of Rs. 1,16,953-1-6 pies, this being the amount of tax paid at source in that year on account of income received by the Company in respect of securities. For reasons given by me in disposing of Appeal No. 25 of 1934-35-C-II, I am of opinion that the action of the Income Tax Officer was maintainable and that credit of the sum claimed, cannot be allowed. For reasons stated in my grounds of decision in Appeal No. 25 of 1934-35-C-II, I regard the total income of the Company as being taxable under the head business and not

dissectable in the manner in which the income tax Officer has dissected various sources of income in his assessment. This change in the classification of the head of income, has the effect of rendering the total income of Rs. 6,60,883 liable to tax at the maximum rate of 32 1/2 pies. The Company has been duly called on to show cause why the assessment should not be enhanced owing to the change in the classification of income. The cause shown in this case is identical with the cause which has been shown in Appeal No. 25 referred to above. For reasons recorded in that appeal, I am of opinion that the cause shown is not acceptable, and that the assessment is liable to enhancement."

The material part of the reasons given by the Assistant Commissioner of income tax was that he came to the conclusions that the whole of the life income of the assessees should be regarded as business income. The effect of that decision being that the assessees were liable to enhancement as the income previously regarded as accruing under the head tax-free securities would have to be charged to tax. It was consequent upon the order made by the Assistant Commissioner on the March 13, 1935, that the assessees requested the Commissioner of income tax to refer the questions of law arising out of the decision of the Assistant Commissioner under Sec. 66(2) of the income tax Act to the High Court. It was admitted that the returns made by the Company, although the Company was not registered in India, was upon the basis of Rules 25 and 35 made by the Board of Inland Revenue in exercise of the powers conferred by Sec. 59 of the income tax Act (XI of 1922) and promulgated by the Board of Inland Revenue Notification No. 3-I.T. dated the April 1, 1922, as subsequently amended. The rules in question are known as the Indian income tax Rules, 1922. It is the meaning and effect of these rules that we have to consider. It is not necessary that I should re-state the questions of law which were formulated by the Commissioner of income tax in the case stated by him under Sec. 66(2). Stated shortly, the points we have to consider and determine are these : How far, if at all, were the assessees entitled to claim credit in respect of taxes deducted at source from other securities held by them and lastly, what was the scope of the powers of the Assistant Commissioner of income tax as regards enhancing the assessment which originally came before him by way of appeal on an objection taken by the assessees themselves.

The contention on behalf of the Crown amounted to this : For the purpose of assessment to income tax of an insurance business Company its income, profits or gains are determined in the manner prescribed by rules 25 to 35, and the figure arrived at on such basis is not open to any analysis nor can it be looked into or, as the Assistant Commissioner puts it, "dissected" for the purpose of ascertaining or determining the several elements going to make up or constitute the total. The Commissioner of Income Tax expressed the opinion that the question of determining profit and loss of an Insurance Company is a very complex matter and it is with a view to avoid difficulties that "certain empirical rules were framed for assessment purposes" and that whatever might be the reason why the empirical

rules were so framed in the way they were, the income tax authorities are bound to apply those rules and nothing but the rules for the purpose of finding out the total income of an Insurance Company. The idea of the Commissioner of income tax is that the total income of Insurance Companies under the provisions of the relevant rules is only notional and unless it is otherwise provided by the rules themselves, it is not competent to the income tax authorities to attempt or even consider any analysis of the total sum arrived at upon the basis of an actuarial valuation. The Commissioner of income tax took the view that "Sec. 10 of the income tax Act which provides for computation of business income (other than of Insurance Companies) will therefore not apply. The rules are intended to be self-contained provisions for the assessment of Insurance Companies and "to a case where these rules apply the provisions contained in Secs. 6 to 12 shall have no application," and he further says that this is the intention of the law will be evident from rule 30 which provides for allowing depreciation on assets (otherwise allowable u/s 10) and losses which are not ordinarily allowed. Again, in Rule 25, there is a provision for adding to the average annual net profits, the tax deducted from investments of the Company during the valuation period. If the other provisions of the Act applied, this provision in rule 25 would be redundant, for according to Sec. 18(4) of the Act, the tax deducted at source is to be deemed to be income received. If the average annual net profits could be held as containing income from taxed securities, the provision of Section 18(4) would have been applicable to that portion of the income. It is because it is Life Assurance business income and not income from interest on securities or from dividends as one of its components that it has been necessary to make provisions for giving credit of income tax deducted from interest on the investments of a Company doing Life Assurance business. Further, The Commissioner of income tax is of opinion and it has been contend before us that Sec. 18(5) of the income tax Act has no application to a case where the assessment is not made under different heads of income specified in Sec. 6 and so Sec. 18 has no application to a case like this.

The matter may be summed up in this way. The opinion of the Commissioner of income tax was and the argument put forward before us on behalf of the Crown came to this that because a particular method is laid down by rules 25 and 35 for the ascertainment of the taxable income of the Companys Life Insurance business, the figure put forward upon the basis of a quinquennial valuation must be taken finally and conclusively as being amount of the profits or gains for the particular year in respect of which it is prepared. It is however not without significance that the Form to be used in making a return of the total income of Companies required under Sec. 22(1) (and the assessment originally made in the present case was under that section) is that prescribed by rule 18 of the Income Tax Rules, 1922. That Form contains this main heading :" Income, profits or gains as per profit and loss account for the year ending 19." Rule 18 requires that the Form should be accompanied by a copy of the profit and loss account referred to therein. Then there are on the Form

no less than twelve headings for stating additional items and then at the bottom of the Form there is in effect an instruction or at least an invitation to the Company making the return on the Form to deduct any amounts included in its accounts on account of

(a) Interest (net amount) on securities taxed at source...

(b) Interest on securities tax-free.....

(c) Dividends (net amount) from Companies taxed in British India...

(d) Other items already taxed at source (specifies details)...

It was argued on behalf of the assessee that although the total income, profits or gains of an Insurance Company in respect of its Life Insurance business are to be ascertained in the peculiar manner prescribed by Rule 25 or Rule 35, it is nevertheless possible and permissible for the Company to make all or any of the deductions specified in the Form and show deductions in respect in of the net amount of interest on securities taxed at the source and the interest on securities which are tax-free. An important point in favour of the case put forward on behalf of the assessees herein is that in Rule 25 itself there is a provision which enables those who are responsible for charging and collecting income tax to examine and probe the figure which is said to represent the amount of the average annual net profits disclosed by the last preceding actuarial valuation with a view to ascertaining whether any deductions had been made from the gross income in arriving at the actuarial valuations which are not admissible for the purpose of income tax assessment and there is also the further significant provision that any income tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation. It seems to me that if operations of an exploratory nature are available to one side, that is to say to the Crown, they should be equaly available to those acting on behalf of the assessees or to the assessees themselves. In other words, if the Crown are permitted to add, the assessees or their advisers may in proper circumstances subtract. Some little difficulty is created for the assessees by reason of that provision of Rule 28 which says that in the case of other classes of insurance business (fire, marine, motor car, burglary, etc.,) of a Company incorporated in British India, the income, profits or gains shall be determined in accordance with "the provisions of the Act," subject to the allowance specified in the rule next following. It might be said that the "provisions of the Act" are those contained in Secs. 6 to 12 which, as argued by the Commissioner of Income Tax and generally on behalf of the Crown, are to be altogether excluded from consideration as regards the assessment of Life Insurance Company, but I think Rule 28 can mean no more than that the income, profits or gains of a Company in respect of Insurance business carried on by it, other than Life Insurance business, are to be ascertained exactly in the manner as the income, profits or gains, that is to say the total income, profits or

gains of any other Company and so Rule 28 only operates as regards the first main item on the Form prescribed by Rule 18. If Rule 21 is against the assessees, there are other Rules which, in my opinion, are in their favour. For example, income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent. of such income shall be deemed to be the income, profits and gains liable to tax as laid down in Rule 24 and the income, profits and gains of companies carrying on Dividing Society or assessment business are to be dealt with in a special way as laid down in Rule 31. An argument put forward by the Commissioner of Income Tax and by the learned Advocate-General on behalf of the Crown in the hearing before us is this that Rules made under sub-Sec. (5) of Sec. 59 of the Income Tax Act, once published in the Gazette of India, take effect as if they were enacted in the Act itself. That is quite true but, all the same, Rules cannot take away rights conferred in the Act itself. This proposition, in my opinion, is so fundamental as to need no substantiation but it may not be inapt to recall in this connection the pregnant words of Mr. JUSTICE WILLS in the case of The Queen v. Bird and Others : Ex parte Needs where he said :

"I only desire to add one other remark : the cases cited in argument may be wholly disregarded : they have really nothing to do with the present case. I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification - the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

I would refer also to the judgment of LORD HERSCHELL, L.C., in the case of Institute of Patent Agents v. Joseph Lockwood, who in his speech in the House of Lords as appearing in page 360, said :

"No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

It follows from this that where a scheme is framed by rules, even though they may have statutory authority, if any part of the scheme conflicts with an express provision of the Act, the rule will have to be disregarded. In the matter before us none of the rule we have to consider can be said, in my opinion, to be in direct conflict with any express provision in the Act and certainly none of the rule in terms derogate from any of the provisions of the Act itself or detract from the full operative effect of any of the sections even as regards life insurance business. The

learned Advocate-General made what seemed to me an important admission when he suggested that as rules 25 and 35 contain directions for ascertaining the taxable income of life insurance companies (companies doing life insurance business), they should really find place somewhere in the region of Sec. 10 of the Act which deals with tax payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him. Under rules 25-35 the income, profits and gains of life assurance companies, incorporated in British India, are determined by taking the annual average of the total profits disclosed by the last actuarial valuation adding thereto any deductions made from the gross income in arriving at the actuarial valuation which are not admissible under the Income Tax Act, and adding also any Indian income tax deducted from or paid on income derived from investments before such income is received. If the Indian income tax deducted at the source from interest on investments exceeds the tax on profits thus calculated, a refund is permitted of the amount which the deduction from interest on investments exceeds the tax payable as profits.

In my view, therefore, Rule 25 to 35 should not be taken as having any further effect than that they provide a somewhat arbitrary, though convenient method of ascertaining the total profit or gain in respect of Life Assurance business and so do not prevent the assessees from claiming and exercising the statutory right conferred by the second proviso to Section 8, although that section primarily is concerned with tax payable by an assessee under the head "Interest on securities". Nor do the Rules exclude the operation of what seems to me to be the definite and unequivocal directions contained in sub-Sec. (5) of Sec. 18. The fact that Sec. 10 sets out deductions or allowances which are permissible in respect of an assessment made under the head "Business", whereas the proviso to Sec. 8 seems to operate only where tax is payable under the head "Interest on securities," is in my opinion without significance : for it seems clear from the observations of LORD WRIGHT, M.R., in the case of Hughes (Inspector of Taxes) v. Bank of New Zealand that a privilege or exemption ought always to be taken into account whether assessment is made under one part of a tax Act and or another part of the same Act. An examination of all the judgments of the Lords Justices in that case shows that it was held by the Court that the exemptions contended on behalf of the Bank of New Zealand were allowed upon that basis.

I accept the argument put forward by Mr. Isaacs on behalf of the assessees that as the Government of India securities held by the assessees are definitely and absolttely free from tax, the position of the North British and Mercantile Insurance Company, Limited, as regards the right to avail themselves of the second proviso of Sec. 3 of the Income Tax Act, ought to be deemed to be stronger than that of an assessee having securities which are merely free from tax in particular circumstances as for example in the case of non-residents.

Upon the question of whether the second proviso of Sec. 8 operates in relation to the tax-free securities possessed by the present assessees, the words of LORD JUSTICE GREENE appearing at page 1003 in the report of the above cited case are much in point. The learned Lord Justice there says :-

"Speaking for myself, I find in that language a perfectly clear legislative provision that, so long as the securities are in the beneficial ownership indicated in the section, no tax is to be levied in respect of the interest upon them. To say, as has been said on behalf of the Crown, that the true effect of the section is merely that the interest is not to be taxed as interest but can be taxed as part of an aggregate of profits of trade appears to me to override the perfectly plain language of the section. It is a matter of some satisfaction that this construction which I consider should be placed upon the section will enable the perfectly clear undertaking given in the prospectus when this War Loan was issued to the public to be kept both in the spirit and in the letter."

In my view the North British and Mercantile Insurance Company, Limited, are entitled to the benefits of the provisions of Section 8 and of Sec. 18(5) of the Indian Income Tax Act, 1922. Having regard to the view I take on these two main questions it is in my opinion neither necessary nor desirable that a definite answer should now be given on the other questions.

The result is that although I have felt some doubt in the matter, I agree with the judgment of my Lord the Chief Justice and I think the questions propounded by the Commissioner of Income Tax should be answered in the manner proposed.

PANCKRIDGE, J. - This is a reference made under Sec. 66(2) of Indian Income Tax Act, 1922, by the Commissioner of Income Tax, Bengal.

The assessees are an Insurance Company incorporated in Great Britain; the headquarters of their Indian business are at Calcutta, where they transact both Life and Fire Business.

Under Section 59(1) of the Act the Central Board of Revenue may make rules for carrying out the purposes of the Act and for the ascertainment and determination of any class of income, and under sub-Section (2)(a)(ii) such rules may prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of Insurance Companies. Under sub-Sec. (5) such rules have effect as if enacted in the Act. The Central Board in exercise of this power have framed certain rules and those dealing with Insurance Companies are among rules 25 to 35 (both inclusive). By rule 35 -

"The total income of the Indian branches of non-resident Insurance Companies (Life, Marine, Fire, Accident, Burglary, Fidelity, Guarantee, etc.,) in the absence of more reliable data may be deemed to be the proportion of the total income, profits or gains of the companies, corresponding to the proportion which their Indian

premium income bears to their total premium income. For the purpose of this rule, the total income, profits or gains of non-resident Life Assurance Companies whose profits are periodically ascertained by actuarial valuation shall be computed in the same manner as is prescribed in rule 25 for the computation of income, profits and gains of Life Assurance Companies incorporated in British India."

The assessees in this case are a non-resident Life Assurance Company within the meaning of rule 35.

Rule 25 is as follows :-

"In the case of Life Assurance Companies incorporated in British India whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the Life Assurance Business shall be the average annual net profits disclosed by the last preceding valuation, provided that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income tax assessment, and any Indian income tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation."

I take it the correct procedure would be to ascertain the profits of the assessees Life business all over the world by actuarial valuation in the manner contemplated by rule 25, and attribute to the assessees Indian Branch that proportion of the profits that the Indian premium income bears to the total premium income, and then to divide the result by the number of years covered by the valuation.

For some reason or other this was never done, and in every assessment the Indian Life Business of the assessees was treated as the Life Assurance business of a Life Assurance Company incorporated in British India is treated under rule 25.

Whether the result thus arrived at was considered to be "more reliable data" within the meaning of rule 35 is not clear, but the matter is of no importance as the procedure contemplated by rule 25 has been accepted as appropriate both by the assessees and by the Department.

Until the assessment for the year 1932-33 the Income Tax Officer appears to have assessed the Company on the following lines. He took a fifth of the profits as shown by the actuarial valuation of the profits of the last quinquennium (five years being the period for which it was the practice of the assessees to value the profits), and added thereto the profit on the Fire Business. This gave him the total income of the assessees as defined by Section 2(15) of the Act.

He then proceeded to make certain deductions based on figures furnished by the assessees at his request.

One of these deductions was one-fifth of the total of the receipts of the assessees during the quinquennium of interest on securities from which income tax had been

deducted at source u/s 18(3) of the Act.

The other deductions was one-fifth of the total of the receipts of the assessees during the quinquennium of interest on tax-free securities.

He then proceeded to treat what was left of the total income as taxable income for purposes of income tax.

In the year 1933 the assessees assessment came before the successor of the former income tax Officers; he noticed, as was undoubtedly the fact, that the deductions made from the interest on securities u/s 18(3) had been made in most cases, if not in all, at rates of tax lower than the rates appropriate to the year of charge.

He accordingly served the assessees with a notice u/s 34, calling on them for a fresh return of their income from all sources for the year ending March 31, 1933, and declared his intention of re-assessing the income at the correct rate.

Calling for the return was really an unnecessary formality, for there was no question as to the correctness of the figures in the assessees first return.

He proceeded to correct what he considered to be his predecessors error in the following way. He included one-fifth of the quinquenniums interest from taxed securities in the taxable income which he taxed at the rate of the year of charge after giving credit for one-fifth of the deductions at source actually made during the quinquennium. He followed the former assessments in excluding one-fifth of the interest on tax-free securities from the taxable income.

The assessees appealed against the order of re-assessment to the Assistant Commissioner of income tax.

In their appeal they questioned the power of the Income Tax Officer to re-open the assessment under Sec. 34, and also complained that whereas they had a sum of Rs. 81,414-8-1 deducted at source during the previous year i.e., the accounting year January 1, 1931, to December 1, 1931, they had only been given credit in the year of assessment 1932-33 for Rs. 51,332-6-0 (one-fifth of the quinquenniums deductions) in contravention of Section 18(5).

The Assistant Commissioner rejected the assessees contentions and in addition enhanced the assessment in exercise of his powers u/s 31(3)(a) by disallowing the deduction from the total income of one-fifth of the interest on tax-free securities received during the quinquennium, thus increasing the taxable income by Rs. 1,66,572.

The assessments for 1933-34 and 1934-35 have been made in accordance with the final assessment for 1932-33 after enhancement by the Assistant Commissioner.

The Commissioner has been required under Sec. 66(2) of the Act to refer certain questions of law to this Court and he has referred four questions. Three of these are

concerned with the assessments for the years 1932-33, 1933-34 and 1934-35, and the fourth only with the assessment for 1932-33.

The three questions which concern all the assessments have been formulated as follows :-

Question 1 -

Whether when the income, profits and gains of a Life Assurance Company are arrived at for the purpose of charging income tax for any year, in the manner prescribed by Rule 35 read with Rule 25 of the rules made by the Central Board of Revenue in exercise of the powers conferred by Sec. 59 of the Indian income tax Act (Act XI of 1922), it is open to the assessees to go behind this notional figure by referring to the actual sources of its receipts and claim exemption from taxation in respect of any portion of the income.

Question 2 -

Whether, when the income, profits and gains of a Life Assurance Company are arrived at for the purpose and in the manner specified in question 1, and income tax is charged in respect of such amount, it is open to the assessee to go behind this notional figure and refer to the actual sources of its receipts in order to claim that a portion of the total income calculated represented income chargeable under the head "interest on securities."

Question 3 -

Whether when income tax for any year is charged in respect of income, profits and gains of a Life Insurance Company computed in the manner prescribed by the rules referred to in question 1, the assessee can claim credit under Sec. 18 (5) of the Indian income tax Act, for any deductions of tax made at the sources.

Counsel for the assessees has objected to the form in which the questions have been raised, and I agree with him that it is open to criticism. Because a question is a question of law, it is not necessary to state it in a general form and indeed it is often preferable to formulate it with reference to the facts of the particular case. However, there really has been no doubt as to the substance of the dispute between the assessees and the Crown, and it would serve no useful purpose to remand the reference in order to have the form of the questions amended.

The first question is concerned with the interest received in respect of tax-free securities and I should have preferred to express it thus -

"Are the assessees entitled to deduct from their total income in each year of assessment a sum equal to one-fifth of the interest on tax-free securities received during the quinquennium as being free from income tax ?"

The assessees contended that if they are not allowed the deduction they are deprived of the advantages conferred by the second proviso to Section 8 which is as follows :-

"Provided further that no income tax shall be payable on the interest receivable of any security of the Government of India issued or declared to be income tax free.

They state, quite truly, that if their privilege is to be curtailed by the rules made under Sec. 59(2)(a)(ii), this must be done in unambiguous language, and that there is nothing in the rules that purports to curtail it.

Their submission is that the method of ascertaining the income, profits and gains laid down by rule 25 merely prescribes a way of arriving at or computing the total income of Life Assurance Companies, and that the income, profits and gains when so computed must be charged in accordance with Chapter III of the Act.

Now, in my opinion the primary charging section of the Act is Sec. 3 which provides that tax shall be charged in accordance with and subject to the provisions of the Act in respect of all income, profits and gains of the previous year.

The effect of this is to make all income, profits and gains of the previous year taxable, subject to the provisions of Chapter III in respect of those parts of them that can be brought under the heads of income, profits and gains, set out in Sec. 6.

It follows that before the assessees can complain that the assessment violates the second proviso to Sec. 8, they must show that the tax demanded is being demanded in respect of income, profits and gains which are covered by the section as being "interest on securities."

In my judgement the assessees have failed to establish this. What is to be assessed to tax is the annual average net profit disclosed by the last preceding valuation with the additions provided for by rule 25. I find it impossible to hold that any part of the annual average of the result of an actuarial valuation can be "interest on securities" within the meaning of Sec. 6 and Sec. 8 of the Act.

For the purposes of tax it does not seem to be feasible to attribute a portion of the actuarially ascertained figure to one particular factor among a number of factors forming the basis of the valuation.

I must notice one argument advanced by Counsel for the assessees which to my mind is misleading. On page 3 of the statement of the case by the Commissioner appears an analysis furnished at the income tax Officers request by the assessees London actuary. Counsel admitted to us that this analysis disclosed the fact that the so-called actuarial valuation is really nothing more than a profit and loss account over a period of five years in which the liabilities, though larger and more difficult of ascertainment, are in essence the same "contingencies" appearing in the ordinary trading firms accounts.

This however is not an accurate picture, since the interest shown - and interest is the very factor with which we are concerned - exceeds by almost one-fifth the interest actually received in India by the assessees in order to bring it up to the rate of interest received all over the world. I assume it involves a corresponding writing down at some other branch. In the absence of expert evidence I am by no means convinced that the statement is as simple as Counsel maintain.

Apart from the particular statement, however, there is no warrant for the assumption that all actuaries follow the same methods, and it is clear that the liability of any particular Life Insurance Company to tax cannot depend upon the possibility of tracing a particular factor in its actuarially ascertained valuation.

I expressed this opinion in the course of the argument, and I was certainly fortified in it when we came to deal with the reference concerning the Phoenix Assurance Company Limited, whose assessment is disputed on similar grounds. This Company follows the procedure under rule 35. That is to say, its Indian income, profits and gains are computed to be the part of its woke wide profits and gains actuarially ascertained, proportionate to that part of the premium income attributable to India. No attempt was made, and no attempt could in my opinion possibly be made, to identify any part of the Indian income, profits and gains thus ascertained with the interest on tax-free securities received in India during the quinquennium.

As regards the case of Hughes v. Bank of New Zealand where it was decided that a non-resident Bank was entitled to the exemption provided by Sec. 46(1) of the Income Tax Act 1918 in respect of the interest payable on 5 per cent War Loan and that such interest could not be taxed under Schedule D as part of the profits of a trade carried on in this country by the London Branch, it appears to me that what the Court of Appeal decided is what has never been questioned in India, and is indeed specifically recognised in the statutory forms of return prescribed under Rules 18 and 19.

This is that an assessee who has included in his trading accounts profits or income on account of (inter alia) "interest on securities tax-free" may deduct such profits and income from his total income and is only taxable on the balance.

The case however does nothing to help the assessee to surmount what in my opinion is the real difficulty in their way here, namely that, as they are a Life Assurance Company, their income, profits and gains are statutorily ascertained under the rules in such a way that they cannot be sub-divided under the heads of income in Sec. 6 of the Act and in consequence no part or proportion of them is interest on securities within the meaning of Sec. 8.

While considering the question of hardship, I wish to refer to an argument advanced by the learned Advocate-General which in my opinion is not easy to meet. In the ordinary business the income, profits and gains for any period are the excess of incoming over outgoing subject to such deduction as are allowed by the Act. Sums

placed to reserve are not permissible deductions, a fact which is recognised in the forms prescribed by Rules 18 and 19. Before however the income, profits and gains of Life Insurance business are computed the Company is permitted to transfer "liability" "Life Surplus" the sum necessary to bring that fund up to actuarial requirements.

The Advocate-General submits and I agree with him that there is no principle upon which the sum so transferred must be attributed to what in the case of an ordinary business would be taxable while the whole of the income derived from tax-free sources is to be held to be included in the balance liable to assessment.

It is not necessary to decide whether, as the learned Advocate-General has submitted, the rules from a complete and self contained code to the exclusion of Chapter III, or whether the income, profits and gains come under the head of "other sources" in Section 6.

It is sufficient to say that the assessees have not been able to show that Rs. 1,66,572 out of the income, profits and gains in the three years of assessment amounting to Rs. 5,24,967 is "interest on securities" within the meaning of Sec. 6. This being so, Section 8 and the proviso thereto have no application, and the first question in the form in which I have stated it, must be answered in the negative. I should add that I have reached the conclusions I have set out above with great hesitation, since they are at variance with those arrived at by the other members of the Court.

The second point for decision concerns the claims of the assessees to be given credit for the sums actually deducted at source from the interest on taxable securities in the assessment made in the year succeeding the accounting year in which deductions are made.

I think the issue is fairly raised by the third question as framed by the Commissioner. The second question appears to be unnecessary, and to be an attempt to bring the two contentions put forward by the assessees under one head. The points have however little or nothing to do with one another.

It is conceded by the Crown that if the deductions were made in accordance with the provisions of Section 18, then sub-Sec. (5) gives the assessees a right to claim credit in the following year.

It is further conceded that for the purposes of these assessments the "previous year" means the twelve months ending with the last day of the year last preceding the beginning of the year of charge.

The Advocate-General did not seek to support that part of the Commissioners opinion, where he says that "the previous year" in the case of Life Assurance Companies is not the preceding year, but a year of the preceding valuation period. I too am of opinion that the Commissioners opinion is erroneous in this respect. The Central Board of Revenue have never purported to determine the period u/s

2(11)(b), and I think that in any case the powers of the Board are confined to determining an actual period.

Indeed the phrase "average year" has really no meaning, though it is popularly used to describe a year, a particular characteristic of which, for example, birth rate, rainfall, or jute crop, does not markedly exceed or fall short of the average ascertained over a series of previous years.

At first I thought that if the Crown were right in the submission that the rules excluded Chapter III of the Act, the deductions could not be said to be made in accordance with the Act, and therefore Section 18(5) had no application. For, although Sec. 18 is not part of Chapter III, the words "income chargeable under the head of Interest on Securities" in Section 18 (2) must have reference to the classification in Section 6.

This would have been a most unsatisfactory position, for although it is possible that the assessees might have claims u/s 48-A to a refund of the deductions improperly made, their claims might be timed-barred u/s 50.

However the Advocate-General maintained that the deductions had been validly made u/s 18(3), and he was constrained to state that in face of that contention, although he was not in the position to make a formal admission, he could not usefully dispute the claim of the assessees to be given credit u/s 18(5).

It follows that the answer to the third question propounded by the Commissioner is in the affirmative.

The Commissioner has referred the following question with respect to the assessment for 1932-33 :...

"Whether in any event, the Assistant Commissioner of income tax had jurisdiction to enhance the said assessment, having regard to the terms of the said notice under Sec. 34 and the general provisions of Indian Income Tax Act, 1922."

This question occasions me considerable difficulty because having regard to the opinion that we hold as to the effect of Sec. 18(5), the action of the Income Tax Officer was based on a fundamental misconception of the law.

What the assessees were entailed to was credit in the year of charge for the deductions at source made in the preceding year, without any reference to the average of the deductions made during the quinquennium.

There was no question of any income escaping assessment, for it had all been checked and assessed. This is borne out by the notice given by the Income Tax Officer which begins as follows :-

"Whereas I have reason to believe that your income from interest on securities which has been assessed in the financial year ending March 31, 1933, has been

assessed at too low a rate and rate and I therefore propose to assess your income at the current rate...."

Now it is noticeable that under the Indian Act all taxable income pays at the rate or rates applicable to the total income of the assessee (see Sec. 3) and there is nothing in the Act corresponding to what is called the "slab" system of taxation.

It is therefore difficult to see how a particular part of an assessees income can be taxed at too low rate.

Be that as it may, the Income Tax Officer proceeded to reassess in the manner I have described, and the assessees appealed to the assistant Commissioner, questioning the jurisdiction of the Income Tax Officer to reassess under Sec. 34 and putting forward the contentions as regards the effects of Sec. 18(5) that we have found to be correct. The Assistant Commissioner supported the Income Tax Officer and also enhanced the assessment by disallowing the deduction of 1-5th of the interest on tax free securities.

The most comprehensive ground, on which the power of the Assistant Commissioner to enhance is questioned, is the submission that the words "In disposing of an appeal" in Section 31(3) confine the powers of enhancement to those items in the assessment which are the subject of the appeal.

In my opinion it is not necessary to give our decision as to the soundness of this argument, but my own view is that the language is too wide to permit of so restricted a construction. It may be that the words are intended to make it clear that the Assistant Commissioner has no power to act of his own motion but must have an appeal before him.

There is more to be said for the argument that when what is appended against is an assessment or re-assessment under Sec. 34, the Assistant Commissioner is bound to confine himself to what is covered by such assessment or re-assessment and cannot deal with matters covered by a previous assessment made under Sec. 23. I think argument is to some extent supported by the decisions in In re Satyendra Mohan Roy Chaudhari and Seth Kasinath Bagla v. The Commissioner of Income Tax, United Provinces. But although this principle is comparatively easy to apply when income that has originally escaped assessment has been assessed under Sec. 34, its application is more difficult when the Income Tax Officer has Purported to reassess on the basis that income has been assessed at too low a rate.

I prefer to base my decision that the Assistant Commissioner had no power in this case to enhance on the ground that the reassessment under Sec. 34 was on the face of it without jurisdiction and as such should have been annulled with the result that the original assessment under Sec. 23 would have stood.

What had happened was that credit has been allowed on a wrong basis, in this case to the detriment of the assessee. It appears to me that there could not properly be

said to be assessment at too low a rate or an escape from assessment so as to give the Income Tax Officer jurisdiction to reopen.

In saying this I must not be thought to be assenting to the view that an Income Tax Officer can only proceed under Sec. 34 where he can show affirmatively at the outset that income has escaped assessment, and is precluded, when he has reason to believe that there has been an escape from using the section as a basis of investigation. As to that I express no opinion. It does however seem to me that where an assessee rightly objects to an assessment or reassessment under Sec. 34 on the ground that the proceedings are bad on the face of them, the powers of the Assistant Commissioner cannot extend to enhancing an assessment, which the Income Tax Officer had no jurisdiction to make and must be limited to annulling it as made without jurisdiction.

In the result, questions 1 and 2, as framed by the Commissioner, subject to what I have said as to their from, ought in my opinion to be answered in the negative.

Question 3 must be answered in the affirmative.

Question 4 which deals with the Assistant Commissioners power to enhance must be answered in the negative.