HIGH COURT OF JUSTICE (CHANCERY DIVISION)—11TH AND 12TH OCTOBER, AND 2ND NOVEMBER, 1955

COURT OF APPEAL—1ST, 2ND, 3RD AND 17TH MAY, 1956

HOUSE OF LORDS—6TH, 7TH AND 8TH MAY, AND 4TH JULY, 1957

Sun Life Assurance Society

v.

Davidson (H.M. Inspector of Taxes)

Phoenix Assurance Co., Ltd.

v.

Logan (H.M. Inspector of Taxes)[1]

Income Tax—Life assurance company—Brokerage and stamp duties on changes of investments—Claim for relief in respect of expenses of management—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Section* 33.

The Appellants carried on life assurance business. They made claims to relief from Income Tax in respect of expenses of management and included in these claims sums representing brokerage and stamp duties disbursed in connection with purchases and sales of investments. The Special Commissioners held that these sums were not admissible as expenses of management.

Held, *that the decision of the Special Commissioners was correct.*

CASES

Sun Life Assurance Society v. *Davidson* (*H.M. Inspector of Taxes*)

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 1st and 8th February, 1954, Sun Life Assurance Society (hereinafter called "the Society") claimed under Section 33 of the Income Tax Act, 1918 (hereinafter called "Section 33") repayment of so much of the Income Tax paid by it for the year of assessment 1949–50

[1] Reported (Ch. D.) [1956] Ch. 524; [1956] 2 W.L.R. 71; 100 S.J. 34; [1955] 3 All E.R. 552; 220 L.T.Jo. 299; (C.A.) [1956] Ch. 524; [1956] 3 W.L.R. 238; 100 S.J. 449; [1956] 2 All E.R. 642; 221 L.T.Jo. 340; (H.L.) [1957] 3 W.L.R. 362; 101 S.J. 590; [1957] 2 All E.R. 760; 224 L.T.Jo. 39.

as was equal to the amount of tax on the sums disbursed as expenses of management for the year ended 31st December, 1949. The claim was objected to by the Respondent to the extent and on the ground that included in the expenses of management claimed there were sums which the Society disbursed by way of brokerage and stamp duties as hereinafter appears. The claim accordingly fell to be heard and determined by the Special Commissioners in like manner as in the case of an appeal against an assessment under Schedule D of the Income Tax Act, 1918.

2. The sole question raised by the appeal was whether sums paid or suffered by the Society in respect of brokerage and stamp duties amounting to £40,773 in the year ended 31st December, 1949, are expenses of management within the meaning of Section 33.

3. Evidence was given at the hearing before us by Mr. Reginald Murrell (general manager of and actuary of the Society), Mr. Stephen Lawrence Mears (secretary to the Society), Mr. William Guthrie Wardrop (one of Her Majesty's Senior Principal Inspectors of Taxes) and Mr. Frederick William Gower (a chartered accountant and the senior advisory accountant to the Board of Inland Revenue). The facts admitted or proved at the hearing are set out in paragraphs 4 to 11 inclusive of this Case.

4. The Society was constituted by a deed of settlement in 1810. The Sun Life Assurance Act, 1889, repealed the provisions of the deed of settlement and substituted laws and regulations of the Society. The Society was registered under the provisions of the Companies (Consolidation) Act, 1908, as an unlimited company.

5. The Society is a proprietary assurance company carrying on life assurance business within the meaning of Section 33. The business of life assurance consists of the granting of policies on human life under which, in return for premiums, either single or annual, a sum of money, with or without participation in the profits of the Society, is payable on the death of the life assured or, in certain cases, at the expiration of a fixed period of time. For the purposes of the Income Tax Acts life assurance is a trade, and the profits therefrom (including the profits, if any, on realisation of investments) are assessable under Case I of Schedule D of the Income Tax Act, 1918. No assessments have in fact been made upon the Society under Case I, as the Crown has elected to charge the Society upon its income from investments and not on its trading profits. In common with all assurance companies the Society is governed by the Assurance Companies Acts, 1909 and 1946. In accordance with the provisions of Section 3 of the Assurance Companies Act, 1909, the Society has kept a separate account of all receipts of its life assurance business and the receipts in respect of this business have been carried to and form a separate fund known as the life assurance fund.

6. The annual premiums payable on the policies issued by the Society are fixed at the date of issue of the policies and are unalterable throughout the life of the policies. The premiums are calculated on the basis that the Society will invest them at interest and continue to invest its income from investments. In fixing the premiums payable on its policies the Society assumes a net rate of interest or dividend after deduction of Income Tax and takes into account other factors such as mortality rates and the proportion of the expenses of management of its business which will have to be borne out of the premiums, less the Income Tax recoverable under Section 33 in respect of these expenses. The business of life assurance is highly competitive. It is therefore essential that, in order to keep its

premiums as low as possible, the Society should invest its premiums to the best advantage and, as necessary, change the investments from time to time. Moreover, it is necessary that the premiums should be invested to earn a rate of interest sufficient to meet the Society's obligations under its policies as well as to provide profits for the benefit of participating policy holders and of shareholders. A constant watch must also be kept on the Society's investments to avoid excessive depreciation which might jeopardise the security of the life assurance fund. Thus in the ordinary course of carrying on its business it is necessary for the Society to purchase investments and from time to time to sell or change such investments. The investments made by the Society are part of its circulating capital and do not constitute part of its fixed capital assets.

7. In order to carry out the day-to-day work in respect of the investment and reinvestment of its moneys in the life assurance fund the Society has a special staff of employees in the investment department. This department is concerned with buying investments quoted on the Stock Exchange and also with investing the Society's money privately, that is, not through the agency of members of the Stock Exchange. In addition the Society makes investments by advancing moneys at interest to policy holders on the security of their policies.

8. The amount of the salaries paid for the year ended 31st December, 1949, to all employees of the Society including the staff of the investment department and those dealing with advances to policy holders was included as part of the expenses of management in the Society's claim under Section 33 for the year of assessment 1949–50. No objection to any part of the amount so included was made by the Respondent. In addition to salaries of staff, which amounted to £513,678, no objection was raised by the Respondent to the inclusion among management expenses of the following amounts disbursed by the Society in the year ended 31st December, 1949, which management expenses were the subject of the claim under Section 33 for the year of assessment 1949–50:

	£
Travelling allowances	30,835
Staff catering	32,335
Rents, rates and taxes	43,536
Inland Revenue stamps on policies	22,901
Law charges for investigation of title to property mortgaged to the Society under a scheme for the purchase of houses by policy holders	20,213
Printing and stationery	20,695

9. The Respondent did, however, object to the inclusion in the claim under Section 33 of the sum of £40,773, being the amount included therein in respect of commission to stockbrokers and stamp duties disbursed by the Society in connection with the purchases and sales of investments such as are referred to in paragraph 6 above. Moreover, the Society had each year since the passing of the 1915 Finance Act, up to and including the year of assessment 1948–49, claimed and been allowed relief under Section 33 in respect of expenses which included similar amounts disbursed by way of brokerage and stamp duties, the Respondent not having objected to their inclusion as part of the expenses of management for such years.

10. In the books of the Society the sums paid or suffered as brokerage and stamp duties on the purchase or sale of investments in the year ended 31st December, 1949, were charged to a general expenses account. In the revenue account of the life assurance business of the Society for that year drawn up in the form prescribed by Section 4 (*a*) and the First Schedule to the Assurance Companies Act, 1909, the said sums are included in the amount debited for expenses of management. Any profits arising on the realisation of investments are passed to inner reserves and by virtue of a directors' resolution are reserved for policy holders. A copy of the Society's accounts for the year ended 31st December, 1949, marked "A", is attached to and forms part of this Case[1]. The accounts of 56 assurance companies had been examined by Mr. Wardrop, who ascertained that in the case of 48 of them the amounts expended on brokerage and stamp duties in connection with purchases and sales of investments were, in the case of purchases, treated as part of the costs of acquiring the investments in question and, in the case of sales, were treated as deductions from the proceeds of sales. Nevertheless, when computing their claim under Section 33 all such 48 companies included such brokerage and duties as part of their expenses of management. In the case of the remaining eight companies the amounts so expended were from the beginning charged as expenses in the revenue accounts of the respective life assurance businesses.

11. The following is a statement setting out particulars of the Society's claim under Section 33 for the year of assessment 1949–50 relating to its life assurance (and annuity) business:

		Life assurance (including annuity business)	
		£	£
	Commission		437,050
	Management expenses per accounts	946,480	
	Less rents to selves capital and other inadmissible expenses ...	20,897	
		925,583	
	Add net Schedule A assessments...	4,118	
I.T.A., 1945 ...	Capital allowance	5,539	
			935,240
			1,372,290
	Deduct		
F.A., 1923, s. 16(2)	Annuity profits	41,353	
I.T.A., 1918, s. 33	Fines and fees	1,453	
(1)(*b*)	Profits on reversions	Nil	
			42,806
			1,329,484
I.T.A., 1918, s. 33(5)	*Less* foreign life fund restriction...		144
			1,329,340

(1) Not included in the present print.

F.A., 1947, s. 25 ...	*Add* estimated Profits Tax ...	34,372
	Society's claim is in respect of expenses ... ... (subject to revision of Profits Tax at end of quinquennium 31.12.1951)	1,363,712
	Inspector objects to relief on Commissions to stockbrokers, stamp duty, etc., in connection with purchases and sales of investments, etc., included above in line 2	40,773
	Inspector agrees relief on ... (subject to revision of Profits Tax as above)	1,322,939

12. Copies of the following documents were produced to us at the hearing of the appeal and may be referred to:

(*a*) Sun Life Assurance Act, 1889, and laws and regulations of the Society;

(*b*) the Society's detailed claim for the year of assessment 1949–50 under Section 33.

13. It was contended on behalf of the Society:

(*a*) that it is reasonably clear that the expression "expenses of management (including commissions)" in Section 33, Income Tax Act, 1918, is derived from the two heads "Commission" and "Expenses of management" mentioned in the right hand side of the form of revenue account, marked "A", relating to life assurance business, in the First Schedule to the Assurance Companies Act, 1909;

(*b*) that there are no other heads in the said form of revenue account under which the brokerage commissions and stamp duties in question in this case could properly be put;

(*c*) that the purchases and sales of the stocks and shares giving rise to the payment of such commissions and stamp duties are a part of the ordinary day-to-day trading activities of the Society and the stocks and shares so purchased and sold are part of the ordinary trading assets of the Society;

(*d*) that in these circumstances the case is wholly distinguishable from that of *Capital and National Trust, Ltd.* v. *Golder,* 31 T.C. 265, where the stocks and shares purchased and sold were part of the capital assets of that company;

(*e*) that the expenses in question are properly treated as part of the "sums disbursed as expenses of management (including commissions)" within the meaning of Section 33;

(*f*) that the Society's claim should be allowed.

14. It was contended on behalf of the Crown that, on the authority of *Capital and National Trust, Ltd.* v. *Golder,* the sums in question were not expenses of management allowable under Section 33.

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

(1) The question for determination is whether sums disbursed by the Society for brokerage and stamp duties in connection with purchases and sales of investments are expenses of management within the meaning of Section 33 of the Income Tax Act, 1918.

(2) The Society carries on life assurance business which consists of the granting of policies on human life under which, in return for premiums, either single or annual, a sum of money, with or without participation in the profits of the life fund, is payable on the death of the life assured or, in certain cases, at the expiration of a fixed period of time. In the course of its business the Society grants policies, receives the premiums due thereunder and in due course pays out the sums due under policies. In the ordinary course of carrying on its business it is necessary for the Society to purchase investments out of its premium income and from time to time to sell or change such investments.

(3) The Society claims that the sums in dispute are expenses of carrying out trading transactions and are as much expenses of management of the Society as are the other expenses of the Society which are not in dispute. The Crown does not seek to dispute that the expenses incurred by the Society in connection with the granting of policies, the receipt of premiums and the payment of sums due under policies are expenses of management within the meaning of Section 33. It is said, however, that the sums in question were necessarily paid in the course of the transactions of the purchase of assets by the Society and that, on the authorities, irrespective of whether assets so purchased were or were not part of the fixed capital of the Society, these sums are not expenses of management.

(4) There is in the relevant legislation no definition of the phrase "expenses of management" and it must accordingly be given its ordinary every day meaning. We accept the proposition put forward by the Society that, following the decisions in *Southern* v. *Aldwych Property Trust, Ltd.*, 23 T.C. 707, and *London County Freehold and Leasehold Properties, Ltd.* v. *Sweet*, 24 T.C. 412, the words are to be interpreted as meaning expenses of management of the business of the Society. We also accept the proposition put forward by the Crown that some meaning must be given to the word "management"; in other words, not every expense incurred by the Society in carrying on its business can necessarily be taken to be an expense of management of that business.

(5) In *Capital and National Trust, Ltd.* v. *Golder*, 31 T.C. 265, expenses identical in kind with those in dispute were held not to be admissible as expenses of management. The Capital and National Trust, Ltd., was an investment trust company whose business consisted in the making of investments and the principal part of whose income was derived therefrom. The Society is not such a company but, as previously stated, it is a company which carries on life assurance business. In the case of the Capital and National Trust, Ltd., the investments formed part of its fixed capital. In the case of the Society the investments are part of its circulating capital and the purchases and sales of investments are made in the ordinary course of carrying on its day-to-day business activities. There is a fundamental difference in the nature of the businesses carried on by the two companies as well as in the quality of the acts of purchase and sale of investments. In the case of the Capital and National Trust, Ltd., the purchase and sale of investments were, in the words of Croom-Johnson, J., 31 T.C., at page 270, "no doubt inci-

dental to the business of an investment company" whereas in the case of the Society the purchase and sale of investments are an inherent part of their ordinary day-to-day business activities. The question therefore arises whether in view of these differences the sums in question are to be admitted to be expenses of management in the case of the Society although they were held not to be so admissible in the case of the Capital and National Trust, Ltd.

(6) In the case of the purchase of an investment by the Society the amount expended on brokerage and stamp duties is a sum necessarily paid in the course of the transaction of purchase. The amount paid by the Society as the price of the investment purchased is not an expense of management. The question for determination is whether brokerage and stamp duty must be regarded as so closely connected with the transaction of purchase that they equally with the purchase price are expenses incurred by the management in carrying out the business of the Society rather than expenses of management of that business. We have come to the conclusion, and we so hold, that the brokerage and stamp duties payable on the purchase of an investment, being not general expenses of conducting the Society's business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of management. If we draw a line between the moneys admittedly laid out by the Society for expenses of management and the moneys laid out for the price of an investment, we hold that the brokerage and stamp duties fall on the same side of the line as the latter. The fact that the purchase is necessarily made in the ordinary course of carrying on the Society's business does not of itself determine whether the sums in question are expenses of management of that business. In our view the disputed items are so closely linked with the transaction of purchase (being necessarily incurred in the course thereof) as to be considered part of the expenses of the purchase and not expenses of management of the Society's business. We hold also that the brokerage and stamp duties paid by the Society on the sale of an investment are not expenses of management.

(7) It follows and, we so hold, that the claim fails regarding the sum in dispute, viz., £40,773.

16. The representative of the Society immediately after the determination of the claim declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

17. The question of law for the opinion of the Court is whether on the evidence set out in paragraphs 4 to 11 of the Case we were right in holding that the sums in dispute are not expenses of management (including commissions) within the meaning of Section 33.

W. E. Bradley, } Commissioners for the Special Purposes
H. G. Watson, } of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

27th November, 1954.

Phoenix Assurance Co., Ltd. v. *Logan (H.M. Inspector of Taxes)*

The facts, the contentions of the parties and the decision of the Commissioners in this case were similar to those in the first case.

The cases came before Harman, J., in the Chancery Division on 11th and 12th October, 1955, when judgment was reserved. On 2nd November, 1955, judgment was given in favour of the Crown, with costs.

Sir James Millard Tucker, Q.C., Mr. L. C. Graham-Dixon, Q.C., and Mr. John Creese appeared as Counsel for the Sun Life Assurance Society; Mr. F. Heyworth Talbot, Q.C., and Mr. S. M. Young for the Phoenix Assurance Co., Ltd., and the Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. Roy Borneman, Q.C., and Sir Reginald Hills for the Crown.

Harman, J.—These two appeals raise the same point, which is one of some importance in that it affects to a considerable degree the Income Tax liability of all the life assurance societies carrying on business in this country.

As is well known, the Crown has long had the option of charging a life assurance society to tax either under Schedule D or by taxing the income of the society's investments without regard to its annual profits. In fact such profits are not easily ascertainable year by year and the Crown invariably takes advantage of its right to tax these companies on their investment income. The same principle has been applied in the case of what are known as investment companies and their position is described by Romer, L.J., in his judgment in *Simpson* v. *Grange Trust, Ltd.*, 19 T.C. 231, at page 246. As Romer, L.J., observed, it was appreciated in 1915 that this method of taxation deprived the company of the right which it would otherwise have of deducting its expenses before suffering tax, and accordingly, by the Finance Act, 1915, Section 14(1), some relief was given. This Section was reproduced by Section 33 of the Income Tax Act, 1918, which is the Section to be considered here, the relevant words being

> "sums disbursed as expenses of management (including commissions) for that year".

The provisos to Sub-section (1) are not here relevant.

From 1915 until the year 1949 companies coming within the Section had always treated as expenses of management deductible under it the sums paid to brokers and the stamp duties on transfers of investments made in the course of business. In the year 1949–50, with which these appeals are concerned, these two items amounted in the case of the Sun Life Society to over £40,000 and in that of the Phoenix to £62,000. Up to that year the Crown had always admitted these claims in the case of life assurance societies. The Crown had followed the same course in connection with investment companies until the previous year when it had obtained in *Capital and National Trust, Ltd.* v. *Golder*, 31 T.C. 265, a decision from the Court of Appeal that in the case of those companies these particular expenses, namely, brokerage and stamp duty on changes of investment, did not fall to be deducted as being expenses of management. Not unnaturally, the Crown seeks to extend this decision to the case of life assurance societies, and the question before me is whether it is entitled so to do.

(Harman, J.)

What then are sums "disbursed as expenses of management (including commissions)"? The taxpayer suggests that the origin of these words is to be found in the Assurance Companies Act, 1909, where in the First Schedule to the Act, prescribing statutory forms of account which assurance companies have to lay before the Board of Trade in each year, two of the headings under which deductions fall to be made on the revenue account are (1) commission and (2) expenses of management. It may very well be that this suggestion is correct, though it is to be remembered that Section 33 applies to companies other than assurance companies. If, however, I accept it I do not see that I am further on the road to ascertaining what the words mean when they reappear in Section 33. The large majority of assurance companies when making their returns under the Act of 1909 do not include brokerage and commission on purchases and sales under expenses of management or commission. A minority, including the Sun Life Society, do however show both brokerage and stamps under the former head. The way in which the companies keep their books seems to me immaterial. The Crown on the other hand argued that these words were meant to give somewhat less relief than if the company were being assessed under Rule 3 of Cases I and II of Schedule D. I do not find this at all helpful. Rule 3 is not a relieving provision but the contrary; it merely says what may not be deducted. Section 33 is a relieving Section and says what may be claimed by way of repayment.

The words are not a term of art and must, as it seems to me, bear their ordinary meaning. Looking at them first apart from all authority I should suppose them to mean the expenses to which the company acting by its board of directors is put or the commission for which it becomes liable in managing the business of the society. This does not of course mean that the cost of the article in which the company trades can be charged, but that the expense of buying or selling it may be. As I read the Commissioners' decision, they conclude that both brokerage and stamp duty ought to be treated as part of the cost of purchase and sale and not expenses of management, either because they were necessarily incurred and paid in the course of the transaction of purchase or sale or because they are not general expenses but expenses specifically referable to these purchases and these sales. I confess I cannot follow this reasoning at all. As to the first, brokerage is no necessary part of the cost of purchasing or selling shares, operations which may be performed, and often are performed in the case of new issues, outside the Stock Exchange. As to the second, many other items of expense are specifically so referable: for instance, stamps on the policies and legal costs of investigating titles on mortgage transactions. Again the Commissioners seek to distinguish between the management of the Society's business and the carrying on of its business, and this is a distinction I cannot see. In order to carry on the business you must manage it: the two functions are inseparable. If a man carrying on a draper's trade purchases a roll of cloth he will pay its cost to the wholesaler and probably a commission to the buyer. Neither of these are expenses of management, though the second is a commission, but everything else which the draper pays in connection with the roll of cloth, namely, its transport to his shop and the various operations necessary to bring about its sale, are, as it seems to me, expenses of management though they are also doubtless expenses of the conduct of the business.

The course of life assurance business is described in the Case Stated and is not in issue. The purchase and sale of shares is a day-to-day activity essential to a life assurance company and vital to the carrying out of its

objects, which are to maintain the life assurance fund, to provide the assured with his covenanted money, and to produce profits wherewith to pay bonuses to policy holders and dividends to shareholders. This day-to-day activity in practice involves the services of brokers. It also involves the services of solicitors where real estate or mortgage transactions are in question. I cannot see that the charge for the services of the brokers is any different from the charge for the services of the solicitors or the wages of the clerk who enters the transaction in the books or the salary of the skilled member of the staff who advises on the purchase or sale.

I do not feel the same confidence about stamp duties. These are disbursements no doubt in a sense, but they are imposed by the State by way of taxation and may truly be said to be part of the cost of each transaction to the company and be treated as such. If there were no authority I would therefore allow the appeal at any rate as regards brokers' fees, holding them to be expenses of management. I may say that neither side argued that the words in brackets "including commissions" applied to these fees.

In Revenue matters, however, the Court is rarely free from the shackles, or perhaps I should say deprived of the help, of authority. I turn then to examine the authorities said to cover these matters. The earliest case cited to me was *North British & Mercantile Insurance Co.* v. *Easson*, 7 T.C. 463. This was a Scotch case decided in 1919 on the Finance Act, 1915. The appellant company there had agreed to accept a certain class of insurance business at a discount and sought to deduct the discount as a management expense. The Lord President (Strathclyde) pointed out, at page 471, that this sum was not a disbursement at all—it was a discount and constituted a saving which the assurance company made in respect of a certain class of lives assured. Lord Mackenzie, at page 472, said this :

> "I think, upon the evidence led before them, the Special Commissioners were entitled to take the view that the £42,000 odds was not an expense of management including commission, and that the sum in question is not disbursed by the Company. The £42,000 odds represent 15 per cent. upon the premiums paid by policy holders under this special scheme of insurance. It was of the nature of a saving—an exceptionally favourable rate—granted to these policy holders in consequence of their coming in *en bloc*, and so saving to the Company expenses which otherwise it would have been put to had it dealt with these policy holders singly. The character of the payment must be gathered from the terms of the contract and I am unable to find any support for the view advanced by the Insurance Company either on the construction of Article 28, Article 29 or of Article 33 to which our attention was specially directed by Mr. Macmillan. The short view sufficient for the disposal of the Case is that it is impossible to treat as expenses of management expenses which have not in fact been paid out ".

This case throws no light on the present problem.

Next I was referred to *Bennet* v. *Underground Electric Railways Co. of London, Ltd.*, [1923] 2 K.B. 535 ; 8 T.C. 475. In that case a company, in order to meet the interest on bearer bonds payable in New York, was put to a considerable expense in purchasing dollars at an unfavourable rate of exchange. Rowlatt, J., says, at page 537(1) :

> "The object of s. 33 of the Income Tax Act, 1918, is to enable a holding company which, unlike a trading company, is not assessed and has no account

(1) 8 T.C., at p. 480.

(Harman, J.)

> into which its expenses of management can be brought, to obtain relief in respect of those expenses. I have therefore to consider whether the loss on exchange suffered by this company, which is a holding company, is an 'expense of management' within s. 33. The reason why the company suffered the loss in question was because, in order to carry on its business, it had to provide itself with money in New York and Amsterdam, and as it did not have money lying there it had to buy it at a high rate. If the company had been able to obtain the needed currency on favourable terms, its management would not have cost less, and on the other hand if, as happened, it could only obtain the necessary money on unfavourable terms, its management cannot be said to have cost more. In either case the cost of management is the same."

This was a clear enough case where the cost of complying with the company's obligations was greater than anticipated, but as the learned Judge pointed out this had nothing to do with management.

The next case was *Southern* v. *Aldwych Property Trust, Ltd.*(1), [1940] 2 K.B. 266. The argument here turned on whether the relief was obtainable under Schedule A, in which case it could not be demanded again under Section 33. This is irrelevant for my purpose. More pertinent perhaps is *London County Freehold and Leasehold Properties, Ltd.* v. *Sweet,* 24 T.C. 412, where an investment company incurred expense in reorganising its various classes of loan capital and this was held not to be an expense of management. Macnaghten, J., says this, at page 416 :

> "I think that expenses incurred in the rearrangement of the loan capital of a company stand on the same footing as expenses incurred in raising loan capital. Neither expenses incurred in raising loan capital nor expenses incurred in rearranging loan capital in a manner more satisfactory to the company can, in my opinion, be regarded as expenses of the management of the business of the Appellant Company."

So far the cases merely illustrate certain things as not being expenses of management ; they do not tell me what such expenses are, nor are they really pertinent to the present case.

I turn now to the case on which the Crown relied and which was no doubt the source of the present demand. I have already alluded to it as *Golder's* case(2). There the investment company was held not entitled to charge brokerage and stamp duties on changes of its investments as expenses of management within the 1918 Act. That was a decision of Croom-Johnson, J., upheld in the Court of Appeal, and unless there is some distinction to be found in the nature of the businesses it is clearly decisive of the matter in this Court. The Commissioners there found that changes of investments made by an investment company were incidental to its business, that business being the purchase and retention of investments and the distribution of income therefrom. The company charged the cost of brokerage and stamp duty to capital and the case might have been decided on the ground that these were capital transactions, and indeed Croom-Johnson, J., was tempted to do so but in the end refrained. The Commissioners decided upon the ground that brokerage and stamp duty were an integral part of the purchase price thus increasing the price to be paid. This view was not observed upon by Croom-Johnson, J., and Tucker, L.J., described it in the Court of Appeal as not quite accurate. Croom-Johnson, J., at page 270(3), made the following observations after saying he did not find it necessary to express an opinion on the point about capital:

> ". . . it seems to me that it is impossible for the Company here to say, on the facts as proved, not only that as a matter of law these payments are expenses of

(1) 23 T.C. 707. (2) 31 T.C. 265. (3) 31 T.C.

management but that the Commissioners ought to have been satisfied that they were. I do not think they are expenses of management at all. No doubt it was judicious for the Company or its directors to do what was done. If they are not expenses of management then the Section is not satisfied and the Company is not entitled to relief under Section 33. I cannot see how, giving the expression 'management' its ordinary everyday meaning, it can possibly be said with regard to an investment company that changing its investments, paying stamps on transfers, stamps on contract notes and brokers' remuneration can be said to be the management of the company. It is no doubt incidental to the business of an investment company but I do not think it is within the expression which is used, giving it, as I must give it, its ordinary meaning."

You observe the learned Judge does not say why he does not think it was an expense of management. In the Court of Appeal there was only one judgment. This consisted almost entirely of quotations from the evidence incorporated in the Case and from the Judge below. Tucker, L.J., says, at page 272, after reading the findings:

"Some criticism may be directed towards the reasoning which appears in those findings and in the statement that the sums paid in respect of brokerage and stamp duty constitute an integral part of the purchase price. That may perhaps not be quite accurate but they are certainly sums necessarily paid in the course of the transaction of purchase. The gist of the decision lies in the view expressed that the expenses of management in this case are mainly concerned with matters up to the time of the actual purchase or sale of an investment. I think that is the foundation of the Commissioners' findings."

I do not find that in the Commissioners' findings: that is what the learned Judge said. Tucker, L.J., appears therefore here to express the view that the management ends where executive action begins. At page 273 he adds these words:

"I would only add that Mr. Grant's argument as it seems to me is really this. He says these expenses were 'expenses of management' because they were expenses incurred by the management in carrying out the business of the Company. That seems to me a totally different thing. What we are concerned with here is the expenses of management, not expenses incurred *by* the management in carrying out the proper business of the Company."

With every respect, this is to use the word "management" in two totally different meanings in one sentence. In the second instance "the management" means the directors, and if those words are supplied I do not derive any help from the observation, which is really only, I think, a repetition of the Lord Justice's former view that executive action is the conduct of the business and not its management.

However that may be, here is a finding that brokerage and stamp duty paid by an investment company are not allowable under the Section. There is no actual decision that this applies to an assurance company, and Croom-Johnson, J., is careful to limit his judgment to investment companies, but unless a distinction can, as was argued before me, be based on the difference between the businesses of the two companies the decision must cover both. The Commissioners pointed out that there is what they style a "fundamental difference" between the nature of the businesses of the two companies. I quote from paragraph 15 (5) of the Stated Case in the *Sun Life* case:

"There is a fundamental difference in the nature of the businesses carried on by the two companies as well as in the quality of the acts of purchase and sale of investments. In the case of the Capital and National Trust, Ltd., the purchase and sale of investments were, in the words of Croom-Johnson, J., 31 T.C., at page 270, 'no doubt incidental to the business of an investment

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> company' whereas in the case of the Society the purchase and sale of investments are an inherent part of their ordinary day-to-day business activities."

I agree that this is a difference. In one case the investments are the fixed capital of the company and in the other circulating capital. One company buys investments in order to hold them and the other in order to trade with them. Assurance companies are carrying on a trade but investment companies are not: see *Liverpool and London and Globe Insurance Co.* v. *Bennett,* 6 T.C. 327, and compare the *Grange Trust* case, 19 T.C. 231, already alluded to. It was submitted to me that, if the carrying out of a particular transaction is an integral part of the company's day-to-day business, then the expense so incurred is an expense of management. I should be inclined to agree, but the transaction of buying and selling investments is part of the day-to-day business of both these classes of company, though with different ends in view, and I am unable to see how if not an expense of management in one case it can be such an expense in the other. I do not conceal the fact that I should not have reached this conclusion unaided, but the authority standing where it does binds me and is to my mind indistinguishable and I must loyally follow it. I therefore dismiss the appeal.

Mr. Roy Borneman.—Does your Lordship say each appeal will be dismissed with costs?

Harman, J.—Yes.

Appeals having been entered against the above decision, the cases came before the Court of Appeal (Singleton, Morris and Romer, L.JJ.) on 1st, 2nd and 3rd May, 1956, when judgment was reserved. On 17th May, 1956, judgment was given unanimously in favour of the Crown, with costs.

Sir James Millard Tucker, Q.C., Mr. L. C. Graham-Dixon, Q.C., and Mr. John Creese appeared as Counsel for the Sun Life Assurance Society; Mr. F. Heyworth Talbot, Q.C., and Mr. S. M. Young for the Phoenix Assurance Co., Ltd., and the Solicitor-General (Sir Harry Hylton-Foster, Q.C.), Mr. Roy Borneman, Q.C., and Sir Reginald Hills (Mr. Montagu Temple with them) for the Crown.

Singleton, L.J.—These two appeals raise the same points and were heard together at the request of Counsel, or perhaps I should say that after we had heard argument on one, Counsel in the other adopted the argument on that appeal and added some submissions on his case which, though short, were most useful. Both appeals are from a judgment of Harman, J., dismissing appeals from decisions of the Special Commissioners. I propose to deal generally with the appeal of the Sun Life Assurance Society.

The appeal arises from, or under, Section 33 of the Income Tax Act, 1918, which provides:

> "(1) Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I of Schedule D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is

> equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that—(*a*) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules";

and the question for decision is whether certain payments made by the Company fall within the words

> "any sums disbursed as expenses of management (including commissions)".

This Section took the place of a like provision in the Finance Act, 1915. The reason for, and the object of, the Section is clearly stated in the judgment of Romer, L.J., in *Simpson* v. *Grange Trust, Ltd.*, 19 T.C. 231, at page 246:

> "The object, or the general object, of the Section cannot be in doubt. There are many companies, the principal part of whose income is derived from investments, and in respect of those investments the companies have been taxed by deduction at the source or by direct assessment, but they never had an opportunity of bringing in against their profits—that is to say, deducting from their profits for the purposes of taxation—their management expenses, either because they were not trading companies at all, or because, being trading companies, the Crown had elected to tax them on the income of their investments rather than under Schedule D. It was that injustice—anything can be called an 'injustice' under the Income Tax Acts—that the Section was intended to remove";

and in the speech of Lord Wright, at page 250:

> "The Section reproduced Section 14 (1) of the Finance Act, 1915, which first gave relief in such cases. An ordinary trading company assessed on the balance of its profits and gains for the year under Schedule D, Case I, is entitled, in order to arrive at the balance, to an allowance for outlays incurred for the purpose of earning its profits: the companies or concerns enumerated in Section 33 (1), whose income is in the main taxed by deduction, would be placed at a disadvantage if no allowance was made to them for management expenses."

The Crown elected to tax both the Appellant Companies—and, I believe, all other British insurance companies—on the income from their investments rather than under Schedule D. Consequently, the companies so taxed have, since the year 1915, been entitled to the relief which is now given by Section 33 of the Income Tax Act, 1918. Whether sums disbursed are disbursed as expenses of management seems, at first sight, to be a question of fact, but it is not quite so simple as that, as the findings of the Special Commissioners show.

The history of the Society is set out in paragraph 4 of the Case and the nature of its business in paragraph 5. I must read paragraphs 6, 7, 8 and 9 of the Case:

> "6. The annual premiums payable on the policies issued by the Society are fixed at the date of issue of the policies and are unalterable throughout the life of the policies. The premiums are calculated on the basis that the Society will invest them at interest and continue to invest its income from investments. In fixing the premiums payable on its policies the Society assumes a net rate of interest or dividend after deduction of Income Tax and takes into account other factors such as mortality rates and the proportion of the expenses of management of its business which will have to be borne out of the premiums, less the Income Tax recoverable under Section 33 in respect of these expenses. The business of life assurance is highly competitive. It is therefore essential that, in order to keep its premiums as low as possible, the Society should invest its premiums to the best advantage and, as necessary, change the investment from time to time. Moreover, it is necessary that the premiums should be

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invested to earn a rate of interest sufficient to meet the Society's obligations under its policies as well as to provide profits for the benefit of participating policy holders and of shareholders. A constant watch must also be kept on the Society's investments to avoid excessive depreciation which might jeopardise the security of the life assurance fund. Thus in the ordinary course of carrying on its business it is necessary for the Society to purchase investments and from time to time to sell or change such investments. The investments made by the Society are part of its circulating capital and do not constitute part of its fixed capital assets.

7. In order to carry out the day-to-day work in respect of the investment and reinvestment of its moneys in the life assurance fund the Society has a special staff of employees in the investment department. This department is concerned with buying investments quoted on the Stock Exchange and also with investing the Society's money privately, that is, not through the agency of members of the Stock Exchange. In addition the Society makes investments by advancing moneys at interest to policy holders on the security of their policies.

8. The amount of the salaries paid for the year ended 31st December, 1949, to all employees of the Society including the staff of the investment department and those dealing with advances to policy holders was included as part of the expenses of management in the Society's claim under Section 33 for the year of assessment 1949–50. No objection to any part of the amount so included was made by the Respondent. In addition to salaries of staff, which amounted to £513,678, no objection was raised by the Respondent to the inclusion among management expenses of the following amounts disbursed by the Society in the year ended 31st December, 1949, which management expenses were the subject of the claim under Section 33 for the year of assessment 1949–50".

These items, as we see in the figures, included travelling allowances; staff catering; rents, rates and taxes; Inland Revenue stamps on policies; law charges for investigation of title to property mortgaged to the Society under a scheme for the purchase of houses by policy holders; printing and stationery.

"9. The Respondent did, however, object to the inclusion in the claim under Section 33 of the sum of £40,773 being the amount included therein in respect of commission to stockbrokers and stamp duties disbursed by the Society in connection with the purchases and sales of investments such as are referred to in paragraph 6 above. Moreover, the Society had each year since the passing of the 1915 Finance Act, up to and including the year of assessment 1948–49, claimed and been allowed relief under Section 33 in respect of expenses which included similar amounts disbursed by way of brokerage and stamp duties, the Respondent not having objected to their inclusion as part of the expenses of management for such years."

The objection to the items included in the figure of £40,773 was based on a decision of this Court in the case of *Capital and National Trust, Ltd.* v. *Golder,* 31 T.C. 265, to which I shall refer as *Golder's* case.

On behalf of the Society it was claimed that sums paid for brokerage charges (or commissions) and stamp duties were disbursements necessarily made by them in the ordinary day-to-day trading activities of the Society and that they were "sums disbursed as expenses of management (including commissions)" within the meaning of those words in Section 33. On behalf of the Crown it was contended that the case was governed by the decision in *Golder's* case, in which it was held that disbursements of a similar kind made by an investment trust company were not on the facts there found sums disbursed as expenses of management. The Special Commissioners held that the claim of the Society in regard to items comprised in the figure of £40,773 failed. Harman, J., dismissed the appeal of the Society from that decision, adding(1)

"I do not conceal the fact that I should not have reached this conclusion unaided, but the authority standing where it does binds me and is to my mind indistinguishable and I must loyally follow it."

(1) *See* page 342 *ante.*

(Singleton, L.J.)

On the appeal of the Society to this Court, Sir James Millard Tucker submitted that this case can be distinguished from *Golder's* case[1] and, while recognising that the judgment in that case is binding upon us, argued that in the case of an insurance company carrying on a trade or business which embraced day-to-day purchases and sales of stocks the disbursements to which objection was taken should be held to fall within the relief given by the Section.

In *Liverpool and London and Globe Insurance Co.* v. *Bennett*, 6 T.C. 327, at pages 357–8, Hamilton, J., used words which seem to me to be helpful in considering the activities of insurance companies generally:

> "There is another point with regard to the Insurance Company. It embarks its funds in its business simply by having money ready to pay its debts with. We are not here concerned with manufactories or the maintenance of a stock which is to be sold. The business of insurance consists in making promises to pay, by way of indemnity, *in futuro* and contingent sums in consideration of present payments of money, and the whole business therefore, apart from the wisdom and prudence with which it is conducted, consists in being ready to meet the liabilities if they accrue, and to the extent to which they accrue, out of one class of funds or another. Consequently the money is embarked in the business as soon as it is money which belongs to and is available to the Insurance Company. If they have paid it away in the shape of dividends, it is no longer available, but all their assets substantially are only possessed for the purpose of meeting the contingencies of losses on the policies if they should fall in. I am speaking of fire insurance only as an illustration, but I do not think that either indemnity business or, for this purpose, life business differs, although of course the calculation of risks and the mode of carrying out the transaction are enormously different.
>
> Now, the practice of English Insurance Companies, which is found to be the practice of the companies in question here, has, as far as I know, always been to start from the very first accumulating large accessible funds for the purpose of meeting losses. The advantages are numerous. It renders the calling up of unpaid capital an extremely improbable event; it presents to the insuring world an enormous reserve of security; it assures within the company a uniform dividend and a uniform state of solvency apart from the changes and chances of a business which is essentially a business of hazards, and consequently it is the very pivot of the conduct of a fire insurance business to build up with prudence, by not distributing surpluses of premiums as and when they are received, large reserve funds and to invest them, of course, so that they may not be fruitless while they are held in hand. That is the policy that is pursued here under Class C, and thanks to it and thanks to the usual policy of not putting all the eggs in one basket, either with regard to the risks or the investments, the companies have under all imaginable contingencies large available funds in different parts of the world readily realisable in case of need. As it appears from the case of the Liverpool and London and Globe that emergency practically does not arise. But the funds received from the investments are just as much part of the receipts of the business, and the making of the investments is just as much part of the mode of conducting the business, as the taking of the risks, and except to the extent to which the current account at the bank, fed by premiums on the one side and depleted by losses paid on the other, is sufficient to carry on the business, all these funds in their several degrees may have to be called upon at some time or in some way or other."

It is found in the Case that it is necessary for the Society in the ordinary course of carrying on its business to purchase investments and from time to time to sell or change such investments and that that is part of the day-to-day work of the Society.

What, then, is the meaning of the expression "any sums disbursed as expenses of management"? If it be contended that the words are limited to the head management, I would draw attention to *Rosyth Building &*

(1) 31 T.C. 265.

(Singleton, L.J.)

Estates Co., Ltd. v. *Rogers,* 8 T.C. 11, in which case the Lord President (Clyde), dealing with a claim under Section 14 of the Finance Act, 1915, at page 16 treated the expression as meaning

> " the expenses of managing its business "

incurred in the year in which it has been so charged; and Lawrence, J., in *Southern* v. *Aldwych Property Trust, Ltd.,* 23 T.C. 707, at page 711, said that the question was whether the costs of advertising were expenses of the management of the company's business.

The expression " expenses of management " is, I think, taken from the statutory forms in the First Schedule to the Assurance Companies Act, 1909, which are required under Section 4 of the Act and which have to be deposited with the Board of Trade (Section 7). I draw attention to Form A in the revenue account, First Schedule, in which the expression " expenses of management " appears. There was a similar provision in Section 5 of the Life Assurance Companies Act of 1870 and the statutory forms for revenue accounts in the different Schedules contain the same words " expenses of management ". The making of investments is, to use the words of Hamilton, J.[1],

> " part of the mode of conducting the business "

of the Society. Apart from the decision in *Golder's* case[2], I should have thought that the words " expenses of management " mean expenses properly incurred in the course of managing or conducting the business or, to put it in another way, the expenses of running the business.

The Special Commissioners in their findings set out in paragraph 15 recognise the fact that, in the ordinary course of carrying on its business, it is necessary for the Society to purchase investments out of its premium income and from time to time to change such investments. They say in paragraph 15 (5) that there is a fundamental difference between the business carried on by the Society and the business of an investment company such as was considered in *Golder's* case, but they hold in paragraph 15 (6) that brokerage and stamp duties

> " being not general expenses of conducting the Society's business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of the management."

On this ground they held that the claim of the Society failed.

It is necessary to ask oneself why, if it is part of the day-to-day business of the Society to purchase investments, the cost of carrying through the transaction is not part of the expenses of managing or conducting the business. Now, whenever the Society purchases stocks or shares it is of necessity bound to pay stamp duty and brokerage. The former is an obligation by Statute, and the latter is a well-recognised charge under the rules of the Stock Exchange, a charge which includes not only payment for the carrying through of the transaction but also remuneration to the broker for his advice for which he is not paid unless a transaction of buying or selling follows. If the purchase is part of the ordinary day-to-day business of the Society it is difficult at first sight to see why something which the Society has to pay in order to carry out the purchase is not an expense of the ordinary running of the Society's business. It is argued that the expenses of management end when a decision is made to buy, and thus that the cost of stamp or brokerage which takes place later is not an expense of management. That cannot be right, for someone on behalf of the Society

(1) 6 T.C., at p. 358. (2) 31 T.C. 265.

has to receive and to check the securities and the broker is under the duty of seeing to the transfers and forwarding the securities. That is a part of his work in return for the remuneration he receives by way of brokerage or commission. It seems to me to be impossible to split up the transaction in this way; to do so is to depart from common sense.

If there had not been any authority on the question I am inclined to the view that I should have said that the expenses here in question were expenses of management, but I find myself faced with two difficulties. The first is that which faced Harman, J., the decision of this Court in *Golder's* case(1) (to which I was a party), and the second is that the Solicitor-General did not submit any argument on whether that case was rightly decided or not, but rested his submission on the decision, which he submitted was conclusive of the appeal so far as this Court is concerned. In those circumstances it would not be right for this Court, in the absence of argument on one side, to express any opinion upon the decision. We are bound by it if it covers this appeal. Harman, J., was unable to distinguish this case from *Golder's* case. It was said on behalf of the Society that the decision in *Golder's* case was not conclusive on this appeal. Support for this can be found from paragraph 15 (5) of the Stated Case. It was pointed out that the Society is a trading concern and carries on different branches of business, and that its investment business is related to its circulating capital, whereas in *Golder's* case the purchases and change of stocks were in relation to that which I may describe as the capital of the company. In a case such as *Golder's* case the cost of changing from one form of security to another—be it from real property to stocks and shares, or from one stock to another—might well be a charge against capital and not an expense of management even though the management of the company had devoted time to the consideration of it. This, however, was not the basis of the judgment in *Golder's* case, as appears from the judgment of Tucker, L.J., 31 T.C., at page 273 :

> "I would only add that Mr. Grant's argument as it seems to me is really this. He says these expenses were 'expenses of management' because they were expenses incurred by the management in carrying out the business of the Company. That seems to me a totally different thing. What we are concerned with here is the expenses of management, not expenses incurred by the management in carrying out the proper business of the Company."

I think it right to say that the admirable argument we had on the activities of insurance companies cast new light on the position so far as I am concerned. It would have been of great advantage if this case had been heard before *Golder's* case came before the Court. The Crown now seeks to extend the decision in that case to insurance companies. At the moment only some of the expenses claimed by the Society are attacked by the Crown, after many years acceptance of them as legitimate, but from answers given during the argument it appears that other objections may follow and that much of that which has been regarded as within the relief given to insurance companies may disappear if the contention of the Crown is upheld.

I feel that it is the duty of this Court to say that upon the authority of the decision of this Court in *Capital and National Trust, Ltd.* v. *Golder* the appeal should be dismissed.

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(1) 31 T.C. 265.

(Singleton, L.J.)

In the appeal of the Phoenix Assurance Co., Ltd., Mr. Young submitted that the character of the purchases of stocks and shares was different from that in *Golder's* case(1). In the latter the purchaser was buying to hold whereas an insurance company bought for the purposes of its trade or business. He summed up the case in this way: If you cannot carry on a part of your trade without paying stamp duties the payment is a necessary expense of your trade or business. There is no material difference between the two appeals before the Court, and the appeal of the Phoenix Assurance Co., Ltd., should be dismissed.

Morris, L.J. (read by Singleton, L.J.)—Each of the Appellants is, in the wording of Section 33 (1) of the Income Tax Act, 1918,

> " an assurance company carrying on life assurance business ".

In the case of each

> " it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I of Schedule D ".

It follows, therefore, that in reference to its life assurance business, in respect of which there is the separation enjoined by Section 3 of the Assurance Companies Act, 1909, each

> " is entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) ".

Each Company made claims for repayment, and the only items in issue are sums paid in respect of brokerage and stamp duties in connection with the purchases and sales of investments. It is not in contest that amounts paid by the Appellants in respect of brokerage and stamp duties are " sums disbursed ". Nor do I understand that it is disputed that they are " sums disbursed as expenses ". The sole dispute is whether they are sums disbursed as expenses " of management ".

The Appellants, citing the decision in the Court of Session in *North British & Mercantile Insurance Co.* v. *Easson,* 7 T.C. 463, at page 473, submit that the words of Section 33 are expressed in ordinary and popular language upon which no special and technical meaning can be placed. The Appellants point to certain judicial phrases which have been employed and which it is submitted are helpful indications as to the ordinary meaning of the words. Thus in *Rosyth Building & Estates Co., Ltd.* v. *Rogers,* 8 T.C. 11, at page 16, the Lord President (Clyde) spoke of

> " the expenses of managing its business ".

So in *Southern* v. *Aldwych Property Trust, Ltd.,* 23 T.C. 707, at page 711, Lawrence, J., spoke of

> " expenses of the management of the Respondent Company's business ".

The case of *London County Freehold and Leasehold Properties, Ltd.* v. *Sweet,* 24 T.C. 412, proceeded on an acceptance of such an interpretation of the words. Macnaghten, J., at page 415, said:

> " It was said by Mr. King on behalf of the Appellant that the words 'expenses of management' in Section 33 must mean the expenses of the management of the business of the Company, and that view of the meaning of those words is not disputed by the Crown ".

The findings in the present cases show (*a*) that it is essential for the Appellants to purchase investments, to keep a constant watch on these investments and, as and when necessary, to sell or to change their investments; (*b*) that purchases and sales of investments form an inherent part of the ordinary day-to-day business activities of the Appellants; (*c*) that

(1) 31 T.C. 265.

amounts expended on brokerage and stamp duties are necessarily paid in the course of the transactions of purchase and sale. The Appellants submit that, as the " sums disbursed as expenses " (for instance the brokerage and stamp duties) are necessarily disbursed in the course of transactions which are necessary and which are inherent in the ordinary day-to-day business activities, they are sums disbursed as expenses " of management ". The Crown submit that in this Court the matter is concluded by the decision in *Capital and National Trust, Ltd.* v. *Golder,* 31 T.C. 265. The Solicitor-General submitted that that case is not distinguishable. He submitted that no occasion arose for him to rebut such contentions of the Appellants as involved criticism of it.

When considering these appeals it seems to me that attention must be focused upon an analysis of the transactions which are in question so that it can be decided whether sums disbursed as expenses are or are not expenses " of management ". The way in which entries are made in books cannot therefore be decisive. Nor is a decision advanced by considering what attitude the Crown have at any time adopted in regard to the items under immediate review or in regard to other items. Thus items of the kind now being considered were for many years accepted by the Revenue as qualifying for entitlement for repayment of tax. So also other items which possess features of similarity, such as law charges for investigation of title to property mortgaged under a house purchase scheme or Inland Revenue stamps on policies, have been accepted. These facts and circumstances do not advance the solution of the problem. Nor does it assist to have in mind that a private individual who buys shares may so closely associate what he pays for brokerage and stamps with what he pays for the shares that he may loosely refer to his total outlay as being what the shares have cost him.

When the Appellants purchase shares they have to pay the price of the shares and they have to expend sums in the course of the transaction of purchase. It is not suggested that the price paid for the shares could be regarded as being money " disbursed as expenses of management ". In *Golder's* case one point adverted to was whether sums which must necessarily be disbursed in the process of buying shares should be regarded as partaking of a capital nature and as being, for that reason, outside the ambit of the words " expenses of management ". This point was, however, not decided but was left open by Croom-Johnson, J., and by the Court of Appeal.

When it is said that sums paid in respect of brokerage and stamp duty are part of the cost of acquiring an investment, or are part of the cost of the investment, a new word, the word " cost ", is introduced which in turn calls for analysis. The " cost " will include price. The price paid for shares will be within the words " sums disbursed ", but not within the words " as expenses of management ". In regard to the sums disbursed for brokerage and stamp duty the question seems to be whether these sums are expenses which are merely the result of or consequent upon decisions made or actions taken in the managing of insurance business, so that these expenses are no part of the expenses " of management ", or, inasmuch as they are necessary expenses in the carrying out of a necessary function

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in the managing of insurance business, whether they are expenses "of management".

In approaching this question, it seems to me that the Solicitor-General is correct in submitting that it is essential to decide whether *Golder's* case[1], which is binding upon us, is distinguishable. It must be recognised that the functions of management may vary as between different concerns. It is to be noted also that in *Golder's* case there was no actual claim made for sums representing brokerage and stamp duties relating to investments by way of capital expansions, though there was no admission that such a claim could not lawfully be made. The claim was advanced in regard to sums representing brokerage and stamp duties in connection with changes of investments. It was held that such sums were not "expenses of management". It is said that assurance companies carry on a trade, whereas investment companies do not. It is said that the investments of assurance companies constitute circulating capital, whereas the investments of investment companies are their fixed capital. While these are differences they do not, in my judgment, form any basis for distinguishing the decision in *Golder's* case as being inapplicable to the present case. It is said that in the case of assurance companies investments are an inevitable inherent necessity of their trade and that the changing of investments is essential, whereas such changing is not essential in the case of investment companies. Stated otherwise, it was said that from the point of view of an investment company investments are rather of a static nature, whereas investing and the changing of investments is for an assurance company a dynamic activity. I doubt the significance of these contrasts. Both investment companies and insurance companies must constantly be concerned in buying and selling investments: the extent and degree of their activities may vary. I can see no reason why the decision in *Golder's* case does not govern the present cases. The question as to how in the absence of authority the issue which is raised might have been decided does not, therefore, arise and as we have not heard full argument on such question I express no opinion. I would dismiss the appeals.

Romer, L.J.—Notwithstanding the attractive provocation of Sir James Millard Tucker's submissions in opening his appeal, the Solicitor-General declined to allow himself to be drawn into a discussion as to the merits of *Golder's* case. The logic of his attitude in this respect is unassailable. If the decision in *Golder's* case is applicable to the cases now before us then we must apply it, whether the decision was right or wrong, whilst if it is inapplicable the soundness or otherwise of the decision becomes irrelevant; on either view, therefore, says the Solicitor-General, this is neither the time nor the place to put *Golder's* case upon its trial. Realising, as I do, the force of this, and having heard arguments on one side but not on the other, I express no opinion as to the validity of Sir James Tucker's impeachment of the decision.

The *ratio decidendi* of *Golder's* case, as it seems to me, was that the phrase "expenses of management", as used in Section 33 of the Income Tax Act, 1918, means, in effect, the expenses of the managers of a company (who would normally be the board of directors) and not the expenses incurred by the company in the general management of its business; in other words, the phrase is directed to the expenses involved in shaping policy and in other matters of managerial decision and does not extend to expenses subsequently and consequently incurred at lower levels of the company's executive structure. If this be so, I am unable to see any relevant distinction between the dis-

(1) 31 T.C. 265.

bursements which were disallowed in *Golder's* case[1] and those which are in issue upon the present appeals. It is just as much a part of the day-to-day business of an investment trust as it is of that of an assurance company to purchase and change the investments which represent its capital; and it appears to me that the question whether that capital is fixed or circulating is as immaterial to the present issue as is the difference in purpose which each type of company may have in mind when investing or reinvesting in stocks and shares. I therefore think that the principle of *Golder's* case governs the cases which are now before us and that the appeals must accordingly be dismissed. I would only add one further observation. The "expenses of management" which the Crown are challenging in these cases are only of a limited character. If, however, the challenge is well founded, as we must hold it to be, so many other expenses, hitherto undisputed but indistinguishable in quality, would appear to fall within its scope as to defeat in great measure the object of Section 33 as expounded by Romer, L.J., in *Simpson* v. *Grange Trust, Ltd.*[2]. This in itself, and apart from sundry other considerations, casts grave doubt, as it seems to me, upon the validity of the construction of the Section for which the Crown contend and lends corresponding force to the submissions of the Appellants.

Mr. Montagu Temple.—I take it that the appeals in both cases are dismissed with costs?

Singleton, L.J.—That is right.

Mr. F. Heyworth Talbot.—May it please your Lordships, on behalf of the Phoenix Company, may I crave leave to appeal to the House of Lords?

Singleton, L.J.—Yes, we think you ought to have it if you wish for it, Mr. Talbot.

Mr. Heyworth Talbot.—If your Lordship pleases.

Mr. L. C. Graham-Dixon.—I necessarily go along with my friend because the one judgment covers both cases.

Singleton, L.J.—You desire to walk further alongside with him?

Mr. Graham-Dixon.—We do.

Singleton, L.J.—We should be the last to stop you.

Mr. Graham-Dixon.—If your Lordship pleases.

Singleton, L.J.—There will be leave to appeal to each of the Appellants. You do not wish to say anything about that, Mr. Temple?

Mr. Temple.—My instructions are that we should leave it to the Court to decide.

Singleton, L.J.—Thank you.

Appeals having been entered against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Morton of Henryton, Reid, Keith of Avonholm and Somervell of Harrow) on 6th, 7th and 8th May, 1957, when judgment was reserved. On 4th July, 1957,

(1) 31 T.C. 265. (2) 19 T.C. 231.

judgment was given in favour of the Crown, with costs (Lord Reid dissenting in part).

The Hon. Charles Russell, Q.C., Mr. F. N. Bucher, Q.C., and Mr. John Creese appeared as Counsel for the Sun Life Assurance Society; Mr. F. Heyworth Talbot, Q.C., and Mr. S. M. Young for the Phoenix Assurance Co., Ltd., and the Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. Roy Borneman, Q.C., and Sir Reginald Hills for the Crown.

Viscount Simonds.—My Lords, this and the succeeding case, *Phoenix Assurance Co., Ltd.* v. *Logan,* raise a question of general importance to life assurance and some other companies. It is whether sums disbursed by them by way of brokerage and stamp duties in connection with the purchase and sale of investments in the ordinary course of carrying on their business are expenses of management in respect of which they are entitled to relief under Section 33 of the Income Tax Act, 1918. That Section runs as follows:

> "(1) Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I of Schedule D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that—(*a*) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules; and . . ."

The claim immediately under consideration is made by the Appellant Society in respect of the year of assessment 1949–50 and is for repayment of tax equal to the amount of tax paid on £40,773, being sums disbursed by it for brokerage and stamp duties on the sale and purchase of investments. The claim has been rejected by the Commissioners for the Special Purposes of the Income Tax Acts and by Harman, J., and the Court of Appeal.

The relevant facts are fully set out in the Case stated by the Special Commissioners for the opinion of the Court. I can refer to them shortly. The Appellant Society carries on the business of life assurance, which is a trade for the purpose of the Income Tax Acts. Its profits are therefore assessable under Case I of Schedule D of the Income Tax Act, 1918, but no such assessments have been made because the Crown has elected to charge it not upon its trading profits but upon its income from investments. It is bound by Section 3 of the Assurance Companies Act, 1909, to keep, and has always kept, a separate account of all receipts from its life assurance business and those receipts have been carried to and form a separate fund known as the life assurance fund. The maintenance of this fund is clearly of great importance to the Society. I quote from the Case:

> "The business of life assurance is highly competitive. It is therefore essential that, in order to keep its premiums as low as possible, the Society should invest its premiums to the best advantage and, as necessary, change the investments from time to time. Moreover, it is necessary that the premiums should be invested to earn a rate of interest sufficient to meet the Society's obligations under its policies as well as to provide profits for the benefit of participating policy holders and of shareholders . . . Thus in the ordinary course of carrying on its business it is necessary for the Society to purchase investments and from time to time to sell or change such investments. The investments made by the Society are part of its circulating capital and do not

constitute part of its fixed capital assets. In order to carry out the day-to-day work in respect of the investment and reinvestment of its moneys in the life assurance fund the Society has a special staff of employees in the investment department. This department is concerned with buying investments quoted on the Stock Exchange and also with investing the Society's money privately, that is, not through the agency of members of the Stock Exchange. In addition the Society makes investments by advancing moneys at interest to policy holders on the security of their policies."

It would seem, therefore, that the Society did not in the case of every investment have to pay brokerage, nor presumably did it in the case of an original subscription for stock or shares have to pay transfer stamp duty, but I do not think that this throws any light on the question whether when such charges were payable they were " expenses of management ".

The Society's right to relief cannot depend on the way in which it chooses to treat these payments in its books, but it is a matter to which reference has been made, and I therefore quote again from the Case:

> " In the books of the Society the sums paid or suffered as brokerage and stamp duties on the purchase or sale of investments in the year ended 31st December, 1949, were charged to a general expenses account. In the revenue account of the life assurance business of the Society for that year drawn up in the form prescribed by Section 4 (*a*) and the First Schedule to the Assurance Companies Act, 1909, the said sums are included in the amount debited for expenses of management. Any profits arising on the realisation of investments are passed to inner reserves and by virtue of a directors' resolution are reserved for policy holders . . . . The accounts of 56 assurance companies had been examined by Mr. Wardrop ",

one of H.M. Senior Principal Inspectors of Taxes,

> " who ascertained that in the case of 48 of them the amounts expended on brokerage and stamp duties in connection with purchases and sales of investments were, in the case of purchases, treated as part of the costs of acquiring the investments in question and, in the case of sales, were treated as deductions from the proceeds of sales. Nevertheless, when computing their claim under Section 33 all such 48 companies included such brokerage and duties as part of their expenses of management. In the case of the remaining eight companies the amounts so expended were from the beginning charged as expenses in the revenue accounts of the respective life assurance businesses."

I have thought it right to mention this matter but, as I have said, it is plainly irrelevant to the issue.

Nor, in my opinion, can greater importance be attached to the fact that it was only in 1949 that the claim of the Appellant Society to relief in respect of these charges was first refused. It is a fact which should deter me from saying what I otherwise might, that the matter is very clear; but it would be contrary to all experience to say that the Inland Revenue authorities cannot grow inveterate in error in granting as in refusing relief. I do not allow my judgment to be influenced by their previous willingness to grant this relief.

Nor, again, can I get much help from an argument forcefully pressed by learned Counsel for the Appellant Society that the Inland Revenue authorities have allowed other claims for disbursement in respect of large numbers of items amounting to £750,000, but have challenged these claims, which, as they alleged, were indistinguishable in quality; thus they say the way would be paved to a disallowance of other claims formerly admitted. The learned Attorney-General was in effect, therefore, invited to say where he proposed to draw the line and which, if any, of the items previously

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allowed he intended in the future to challenge. But he was, I think, well entitled to answer that he was concerned only with the items that had in fact been challenged and that future action might well depend on the decision given in this House in regard to them. It is in fact very clear that an expression like "expenses of management" is insusceptible of precise definition and that there must be a borderline or twilight area in which a conclusion one way or the other could easily be reached. That does not mean that there is not on either side of it an area of sunshine and of darkness.

The question is, then, whether these particular charges are expenses of management. I have so far ignored the fact that these words have in the Section an appendage "(including commissions)". It has been assumed on both sides that "commission" here refers to the payment made to the agent who obtains business for his society and does not include the brokerage payable to a stockbroker, which is often called commission. I am content without deciding it to make the same assumption. Under these circumstances I do not get any help from these words. "Commission" may be expressly included either because it would otherwise not be included or in order to make clear what might otherwise be in doubt. No light is thrown on what else is comprised in expenses of management.

Counsel for the Appellant Society further supported their submission by reference to the origin of the expression "expenses of management". It is to be found in the statutory form prescribed in the First Schedule to the Assurance Companies Act, 1909, and had in fact been incorporated in that Act from earlier Acts. The form, which is that of a revenue account, contains *inter alia* two headings of deduction, namely, (1) commission, (2) expenses of management. But I cannot infer from this that all disbursements made by the Society must fall under one or other of these headings. That would be to ignore both the fact that there is a third heading, "Other payments (accounts to be specified)", and the fact that as a matter of accounting such disbursements need not be and generally are not included in the item "Expenses of management".

The Special Commissioners in disallowing the claim expressed their opinion in a way that I find helpful.

> "We have come to the conclusion,"

they said,

> "and we so hold, that the brokerage and stamp duties payable on the purchase of an investment, being not general expenses of conducting the Society's business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of management. If we draw a line between the moneys admittedly laid out by the Society for expenses of management and the moneys laid out for the price of an investment, we hold that the brokerage and stamp duties fall on the same side of the line as the latter. The fact that the purchase is necessarily made in the ordinary course of carrying on the Society's business does not of itself determine whether the sums in question are expenses of management of that business. In our view the disputed items are so closely linked with the transaction of purchase (being necessarily incurred in the course thereof) as to be considered part of the expenses of the purchase and not expenses of management of the Society's business. We hold also that the brokerage and stamp duties paid by the Society on the sale of an investment are not expenses of management."

The Special Commissioners have recognised what I think is of first importance in interpreting the words in question, namely, that they are words of qualification or limitation. It is not all the expenses incurred by the Society, it is not their trading or general expenses, which are deductible. The Society is not being assessed on its trading profits under Case I of

Schedule D; on the contrary a special method of assessment is prescribed, and language is used which makes it clear that some only of the expenses which would be deductible under Case I and the relevant Rules are deductible under this special method. Counsel for the Society, though they contended that the expenses of management were the same as the expenses of conducting, carrying on or running its business, yet conceded that some qualification must be introduced and, quite illogically as it appeared to me, admitted that there could not be included in such expenses the cost of purchase of the investments themselves. I do not know why not, for the acquisition of the necessary stock-in-trade would appear to be a first expense of carrying on a business. A further refinement was indeed introduced and it was said that such an expense could only be excluded if, and to the extent to which, it was represented by an asset of the business. I do not follow and cannot give effect to this argument. The concession is nevertheless of value, for, if the expense of purchasing an investment is not an expense of management, I can see no valid ground of distinction between the price of the stock which is purchased and the stamp duty paid upon contract or transfer and the brokerage paid to the broker. Each item is an integral part of the cost of acquisition or, as the Commissioners put it, a part of the expenses of the particular purchase, not of the expenses of management. This is perhaps even more clearly seen upon a sale than upon a purchase of an investment, for in that case there is no disbursement at all but only a diminution of the sum received by the Society.

Harman, J., who would, but for the authority of *Capital and National Trust, Ltd.* v. *Golder,* 31 T.C. 265, to which I will again refer, have been disposed to allow the appeal from the Special Commissioners so far as it related to brokerage, distinguished between that expense and the expense of stamp duties. But it appears to me that the same reasoning applies with equal force to each expense. I agree with him that the payment of stamp duty is

> "imposed by the State by way of taxation and may truly be said to be part of the cost of each transaction to the company and be treated as such."(1)

But, if the machinery of the Stock Exchange is used for the purchase or sale of investments, the payment of brokerage is imposed by its rules and is equally part of the cost of each transaction. The same doubts were expressed in the Court of Appeal, but in that Court, too, *Golder's* case was regarded as an authority which was decisive in favour of the Crown. And so I think it was. For in *Golder's* case the Court of Appeal, affirming the judgment of Croom-Johnson, J., had held that charges for brokerage and stamp duties incurred by an investment company were not expenses of management within the Section and had so held on grounds which were no less applicable to a life assurance company than to an investment company. It was suggested that the decision could be justified on a ground not present in the instant case, namely, that the payments there made had the quality of capital expenditure. It may be so, but that was not the ground of decision. The judgment of Croom-Johnson, J., has been closely criticised, and, verbally at least, it is open to some criticism, but I think that the broad ground of his decision is precisely that of the Special Commissioners, that the price of the shares, the brokerage and the stamp duties are several parts of the

(1) *See* page 339 *ante.*

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cost of acquiring or disposing of an investment and cannot, the one more than the other, be regarded as expenses of management. I would here interpolate that, though in the Case Stated reference is made to a fundamental difference between the nature of the businesses carried on by a life assurance company and an investment company respectively, I agree with Romer, L.J., in thinking that there is no relevant distinction between the disbursement in the one case and the other.

There is little other authority upon the meaning of the relevant words, but I get some assistance from a decision of Rowlatt, J., in *Bennet* v. *Underground Electric Railways Co. of London, Ltd.*(1), [1923] 2 K.B. 535. The company, having to raise capital abroad, issued bonds which were payable in sterling in London or in foreign currency at a certain rate of exchange. In the event, in order to comply with its obligations, the company had to buy foreign currency and, suffering a loss in doing so, claimed that the loss was an expense of management. In language of which I seemed to hear an echo in this case, Counsel urged that the company in order to manage its business properly had to offer to pay its foreign creditors in their own country and currency: therefore the cost of exchange was an expense of management. Rowlatt, J., rejected the claim. He pointed out that the reason why the company had suffered a loss was because in order to carry on its business it had to provide itself with money in New York and Amsterdam and, as it did not have money lying there, it had to buy it at a high rate of exchange: that, if the company had been able to obtain the needed currency on favourable terms, its management would not have cost less, and if, as it happened, it could only obtain the necessary money on unfavourable terms, its management could not be said to have cost more: in either case the cost of management was the same.

It could be said of this decision that, though the learned Judge very incisively said that the loss incurred in the purchase of foreign currency was not an expense of management, his reason for saying so, namely, that the cost of management remained the same, really involved a *petitio principii*. For the cost of management could only remain the same if the loss was not an expense of management. But the value of the case lies in the reaction of a very learned Judge to the argument that an expense necessarily incurred in order to carry on a business properly is therefore an expense of management. And if on analysis it would seem that in effect the learned Judge said: This is not an expense of management because it is not an expense of management, I should not give any less weight to his authority. He did not attempt to define management in this context; to him the plain English word could not properly extend to cover such a payment, and at the end of the day I doubt whether any more cogent reason can be given.

In the present case I differ with reluctance from the opinion of Singleton, L.J. He took the view that—I quote his words(2)—

> "If the purchase is part of the ordinary day-to-day business of the Society it is difficult at first sight to see why something which the Society has to pay in order to carry out the purchase is not an expense of the ordinary running of the Society's business. It is argued that the expenses of management end when a decision is made to buy, and thus that the cost of stamp or brokerage which takes place later is not an expense of management. That cannot be right, for someone on behalf of the Society has to receive and to check the securities and the broker is under the duty of seeing to the transfers and forwarding the securities. That is a part of his work in return for the remuneration he receives by way of brokerage or commission. It seems to me to be impossible to split up the transaction in this way; to do so is to depart from common sense."

(1) 8 T.C. 475. (2) *See* page 346 *ante*.

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The case is thus put by the learned Lord Justice as cogently as it can be put. But it is, I think, vitiated by the initial mistake that he regards "management" as equivalent to running the company's business in a wide and almost colloquial sense. If it had this meaning, it would cover the price of the investment equally with the brokerage and stamp duties. But *ex concessis* it does not, and I would say with the greatest respect that it would be to depart from common sense to treat the three constituents of the cost of purchase differently.

I am of opinion that the appeal should be dismissed, with costs.

In the case of *Phoenix Assurance Co., Ltd.* v. *Logan* the appeal raises the same question as the preceding case, and the relevant facts are not distinguishable. In my opinion, the appeal should be dismissed, with costs.

Lord Morton of Henryton.—My Lords, the sole question in dispute on this appeal is whether certain sums disbursed by the Appellant Society by way of brokerage and stamp duty in connection with purchases and sales of investments, in the ordinary course of carrying on its business of life assurance, are "sums disbursed as expenses of management (including commissions)" within the meaning of Section 33 (1) of the Income Tax Act, 1918. That Section has already been read. Counsel for the Society contended that the sums in question were "expenses of management". They did not contend that the sums paid by way of brokerage were "commissions" within the meaning of the Section. For my part, I am not satisfied that the sum paid to a stockbroker on the purchase or sale of an investment is not a commission within the meaning of the Section, but I express no opinion on the point, as it has not been argued. The result is that I have to form an opinion as to whether brokerage and stamp duty, which are obviously expenses of the Society, fall into the category of "expenses of management" or into the category of other expenses of the Society.

It has been common ground between the parties throughout all Courts that "expenses of management" do not include the price of investments bought by the Society in the course of its business. Now it is clear that the sums now in question are not part of the price, for the price of an investment, purchased or sold, is the sum which is paid by the purchaser to the seller. These expenses are, however, so closely linked with the transaction of purchase that they may naturally be considered as items in the total cost of a purchase which has already been resolved upon by the management of the company, and not as expenses of management. This is the short and simple ground upon which the Special Commissioners decided the case in favour of the Crown, and I have arrived at the conclusion, though with considerable doubt, that it is a sound ground.

Until the year 1949–50, with which this appeal is concerned, the Crown had always admitted the claims to deduct these sums as expenses of management in the case of life assurance societies. The Crown had followed a similar line in the case of investment companies until the previous year, when the Court of Appeal decided in *Capital and National Trust, Ltd.* v. *Golder,* 31 T.C. 265, that in the case of those companies these sums could not be deducted as expenses of management. In the present case Harman, J., and the Court of Appeal thought that *Golder's* case was indistinguishable from the present case and they therefore followed

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it ; but Harman, J., and two members of the Court of Appeal indicated that they would have decided otherwise had they been free to do so. My Lords, I agree with both Courts that *Golder's* case(1) cannot be distinguished from the present case. It seems to me that the transaction carried out on the sale or purchase of an investment is exactly the same whether the company carrying it out is an investment company or a company such as the Society. It is true that in *Golder's* case the investments formed part of the fixed capital of the Capital and National Trust, Ltd., whereas in the case of the Society, to quote the Case Stated (paragraph 15 (5)),

> " the investments are part of its circulating capital and the purchases and sales of investments are made in the ordinary course of carrying on its day-to-day business activities."

This difference, however, does not seem to me to affect in any way the nature of the transactions carried out in buying and selling investments or the nature of the payments made to stockbrokers or to the Revenue on the occasion of such sales or purchases.

In my opinion *Golder's* case was rightly decided, but I cannot accept all the reasons given by Croom-Johnson, J., and the Court of Appeal for their decision. The reason why I am of opinion that *Golder's* case was rightly decided is the short and simple reason given by the Commissioners, which I have already quoted.

My Lords, having formed the view which I have already expressed, I am fortified by the fact, which appears in the Stated Case, that, out of 56 assurance companies whose accounts had been examined by Mr. Wardrop, one of Her Majesty's Senior Principal Inspectors of Taxes, 48 companies treated the amounts expended on brokerage and stamp duties in connection with purchases and sales of investments, in the case of purchases, as part of the costs of acquiring the investments in question and, in the case of sales, as deductions from the proceeds of sales. I could not, however, regard this fact as of any weight in arriving at a decision, especially as in the case of the remaining eight companies the amounts so expended were from the beginning charged as expenses in the revenue accounts of their respective life assurance businesses.

I would add two comments. First, that if I had been persuaded that brokerage was covered by the expression " expenses of management " I should still have inclined to the view that stamp duties were not so included. Secondly, although I would decide this appeal in favour of the Crown, I do not accept the very narrow view of the words " expenses of management " which was put forward by the Attorney-General. I think that these words should be given a wide construction, for the reasons about to be given by my noble and learned friend Lord Somervell of Harrow.

In *Phoenix Assurance Co., Ltd.* v. *Logan* Counsel were agreed that the case could not be distinguished from the *Sun Life Assurance Society's* case. I would dismiss the appeals for the reasons which I have given.

Lord Reid.—My Lords, we have to construe the phrase " sums disbursed as expenses of management (including commissions) " in Section 33 of the Income Tax Act, 1918. The relief afforded by this Section was first given in 1915, and I think that one can properly assume that the draftsman had regard to the fact that " expenses of management " and " commission " were items in the statutory form of accounts of life assurance companies provided by the Assurance Companies Act, 1909, and the Life Assurance Companies Act, 1870. But the relief given in 1915 was not limited to assurance companies ; it was also given to investment companies and savings

(1) 31 T.C. 265.

banks to which the Acts of 1909 and 1870 did not apply. And the combined phrase "expenses of management (including commissions)" is not the same as the separate items "expenses of management" and "commission" in the earlier Acts. So I do not think that one can solve the present question simply by considering whether the two items now in dispute—brokerage or commission paid to stockbrokers and stamp duty on transfers—ought to be included in one or other of the items "expenses of management" and "commission" in the Appellants' statutory accounts. One must take the words in Section 33 and read them in their context in the light of the apparent general object of the Section.

A trading company such as the Appellants may receive a large part of its income in the form of dividends out of which tax is payable by deduction or otherwise. Tax payable in this way may exceed the amount of tax which the company would have had to pay if the Crown had chosen to assess it under Case I of Schedule D. In calculating taxable profit under Case I the taxpayer can deduct a wide variety of expenses, but before 1915 if the Crown did not choose to proceed under Case I the trader had no right to deduct any expenses but must, like any other taxpayer, pay the whole tax deductible from dividends received. Apparently this was thought to be unjust and the relief was given which is enacted in Section 33. Section 33 does not apply to all traders, perhaps because the problem only arose acutely in the case of the three classes mentioned in the Section. But it is less easy to understand why the relief under Section 33 is extended to certain companies which do not engage in trade and to which the above-mentioned reason does not apply. They are given a preference over individuals who derive their income from investments, and indeed the relief to them is not even subject to the limitation which applies to trading companies: *Simpson* v. *Grange Trust, Ltd.*, 19 T.C. 231.

I do not get much assistance from these general considerations and I turn to consider the words used in Section 33. In the first place, not all expenses are included but only expenses of management. And secondly, it appears to me that the words in brackets "(including commissions)" are of considerable importance in determining what is meant by "expenses of management". I cannot believe that this form of drafting "expenses of management (including commissions)" could have been adopted unless it had been thought that commissions were at least so closely analogous to expenses of management that, without the words in brackets, it would have been doubtful whether commissions were or were not within the ambit of the leading words. That appears to me to be sufficient to negative one argument for the Crown—that expenses of management only include expenses involved in taking managerial decisions and exclude expenses involved in carrying them out in individual cases. Commissions arise from individual cases, and if expenses of management had this narrow meaning they would differ so radically in their nature from commissions that I cannot see any reasonable person merely bringing them in in a parenthesis. Moreover, even without this consideration I should find it very difficult to accept the view that no part of the administrative expenses involved in dealing with individual policies, from receipt of a proposal to final payment of policy moneys, was to be regarded as expenses of management.

It is convenient at this point to note that it has not been argued for the Appellants at any stage of this case that the payments of brokerage

(Lord Reid.)

to stockbrokers are commissions within the meaning of that word as used in this Section. I therefore express no opinion on that matter and I must deal with the case on the footing that if the Appellants are to succeed they must bring these payments within the scope of the words "expenses of management".

I do not think that it is possible to define precisely what is meant by "expenses of management". It has not been argued that these words have any technical or special meaning in this context. They are ordinary words of the English language, and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters. I cannot accept the argument for the Appellants that every sum spent by the company is an expense of management unless it can be brought within certain limited classes of expenditure which are admittedly not expenses of management, such as payments to policy holders and the purchase price of investments acquired by the company. It is not enough to show negatively that a particular sum does not fall into any other class; it must be shown positively that it ought to be regarded as an expense of management. But looking to the purpose and content of the Section it appears to me that the phrase has a fairly wide meaning, so that, for example, expenses of investigation and consideration whether to pay out money either in settlement of a claim or in acquisition of an investment must be held to be expenses of management. And the collocation of the words "(including commissions)" shows that a sum can be an expense of management whether the work in question is done by the company's staff or done by someone else on a commission basis, and it must follow that if work of an appropriate kind is done for a fixed fee that fee may also be an expense of management.

Admittedly the price paid for an investment is not an expense of management, and Counsel for the Appellants did not and could not reasonably withhold the admission that a sum spent on enhancing the value of a trading asset is not an expense of management. I do not think that it is practicable or reasonable to draw a rigid line between payments which enhance the value of an asset and payments which do not. For example, if a call is made in respect of shares not fully paid, paying the sum necessary would not be an expense of management, although there have been cases where shares remained of no value after becoming fully paid. It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition on the one hand or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management.

If that be the true test, then I have no doubt that the sums paid for stamp duty were not expenses of management. The companies could not acquire and hold shares without making these payments, and no matter of management was involved any more than it was in paying the price due to the seller. Buying the shares and paying the duty were inseparable. I do not say that no payment of duty can be an expense of management; for example, cheques are required for management and it seems to me that the cost of acquisition of cheque books must be an expense of management whether it arises from stamp duty or not. But where payment of duty is a necessary consequence of something which is not itself an expense of management, I do not see how the payment of duty becomes an expense of management.

(Lord Reid.)

The question as to payments of brokerage or commission to stockbrokers seems to me much more difficult. If it were possible for members of the companies' staffs to arrange purchases or sales direct with other sellers or buyers I cannot see how expenses involved in arranging sales or purchases could be other than expenses of management. And equally if the companies agreed to pay commission to persons who introduced sellers or buyers I think that commission earned in this way would also be expenses of management. But under modern conditions it may generally be impracticable to proceed in this way and buying and selling through stockbrokers subject to the rules of a stock exchange may be the only course to take. Nowadays an investor might well regard all payments to his stockbroker as simply parts of the cost of acquiring his shares and also regard the net sum received as the whole of what he has realised on a sale. But I do not think that these practical differences are sufficient to warrant payments to a commission agent and payments to a stockbroker being put in different categories and on this matter I think the Appellants are right. I would allow the appeals but only to the extent of allowing relief in respect of sums disbursed as brokerage.

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

Lord Somervell of Harrow.—My Lords, the option of the Crown to tax the profits of a trade under Case I of Schedule D or to tax the income from investments under Case III, IV or V has long been recognised. In respect of income which has suffered tax by deduction the exercise of the option leaves things as they are.

Notwithstanding the explanation that has been given (see *Revell* v. *Edinburgh Life Insurance Co.*, 5 T.C. 221, at page 226) it has always seemed to me anomalous to assess traders on a sum arrived at irrespective of all expenses of earning the profits, if any. It might be said to be in conflict with the one point which Lord Watson said was free from obscurity, namely, that the Legislature intended all traders whether in groceries, annuities or other articles of commerce to be assessed upon the same footing: *Gresham Life Assurance Society* v. *Styles*(1), [1892] A.C. 309, at page 318.

Parliament decided to deal with this anomaly in 1915. Assurance companies carrying on life assurance business, companies whose business consists mainly in the making of investments, and savings banks became entitled, on proof that they had been charged to tax by deduction or otherwise and not charged on their profits under Case I, to repayment of so much of the tax paid as equalled "the tax on any sums disbursed as expenses of management (including commissions)". Proviso (*a*) to Section 14 (1) of the Finance Act, 1915 (re-enacted as Section 33 (1) of the Income Tax Act, 1918) reads as follows:

> "relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules".

The Life Assurance Companies Act, 1870, provided, by Section 4, that a company carrying on life assurance and other business must keep a separate account in respect of its life assurance fund and prepare a revenue account

(1) 3 T.C. 185, at p. 191.

(Lord Somervell of Harrow.)

in the form set out in the First Schedule. On the right hand side of the form appear the items, "commission", "expenses of management", "other payments (accounts to be specified)". This Act was repealed and the above provisions re-enacted in the Assurance Companies Act, 1909.

Parliament having decided to deal with the anomaly, one would expect it to be removed wholly or substantially. There would seem to be no sense in leaving life assurance companies still liable to suffer tax on some sum over and above their profits. The formula "expenses of management (including commissions)" is clearly taken from the form of revenue account in the Schedule to the Life Assurance Companies Act. I would regard the words themselves as apt to cover the expenses which would normally be deductible in respect of its life assurance business if an assurance company carrying on life assurance business was assessed as a trader. There may be, as the Assurance Acts recognise, "other payments", which might or might not be deductible under Case I. The fact that these words are qualified by the words "accounts to be specified" is, I think, some indication that the words "expenses of management" and "commission" were regarded as covering all ordinary expenses. Proviso (*a*) contemplates that expenses of management (including commissions) may exceed in amount the expenses which would be deductible under Case I. This weighs heavily against the very restricted sense of management for which the Revenue contended. The Section has to operate by providing for a repayment of tax already suffered. The purchase price of the investment cannot enter into the computation as an expense. It would only come in if one was in search of the "profit" made subsequently by its realisation. Having regard to the intention of the Section to be gathered from its terms and to the statutory background, the words should be given, in my opinion, a wide construction. I wholly reject the distinction sought to be drawn between the management and the carrying on of the business, restricting the former to the head management.

The Section also refers to companies whose business consists mainly in making investments, and some reference was made to this in argument. Investment companies are, I think, commoner today than they were in 1915. In *Scottish Investment Trust Co.* v. *Forbes*, 3 T.C. 231, an investment company was held liable to pay tax on the net gains realised by selling investments at a profit. It was stated, and I accept, that there are today investment companies whose purchases and sales of securities do not constitute a "trade". In *Simpson* v. *Grange Trust Ltd.*, 19 T.C. 231, at page 239, it was admitted by the Inspector of Taxes that the company—an investment trust company—was not carrying on a trade. The memorandum and articles were exhibited but do not appear in the report. The question would turn, as it did in the *Scottish Investment Trust* case, on the wording of the articles and perhaps on the policy of the company. Life assurance companies were, in any case, the main subject-matter of Section 14 of the Finance Act, 1915, and I doubt whether Parliament had in mind that certain companies whose business consisted in the "making"—not, be it marked, the "holding"—of investments might be held to be outside Case I in respect of the profits of their dealings. I do not myself think that the possibility of such cases throws any light on the construction of the Section.

Unaided, I would, I think, have come to the conclusion that the items in issue here were expenses of management. The buying and selling of securities is clearly part of the business of the company, and a function of management.

(Lord Somervell of Harrow.)

No one would dispute that it was proper to buy and sell on the Stock Exchange. Might not the expenses of doing so be said to be expenses of management? This is plainly a possible view, as it was that taken by the Inland Revenue from 1915 to about 1950. It was also, I think, the view taken by some of the learned Judges below, although they held themselves bound by *Capital and National Trust, Ltd.* v. *Golder,* 31 T.C. 265. I am, however, impressed by the arguments on the other side as restricted to these two particular items. The brokerage and stamp duty, though not, as the Commissioners held in *Golder's* case, an integral part of the purchase price, are a direct and necessary part of the cost of a normal method of purchase. I therefore, with some hesitation, agree that they should not be treated as expenses of management and that the appeals should be dismissed.

Questions put:

Sun Life Assurance Society v. *Davidson* (*H.M. Inspector of Taxes*)

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

Phoenix Assurance Co., Ltd. v. *Logan* (*H.M. Inspector of Taxes*)

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Hair & Co. (for the Sun Life Assurance Society); Slaughter and May (for the Phoenix Assurance Co., Ltd.); Solicitor of Inland Revenue.]

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