

BETWEEN:

1937
May 25 & 26.

HARRY C. HATCH APPELLANT;

AND

1938
May 20.

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

Revenue—Income tax—Income War Tax Act, secs. 2(i), 2(k), 10 and 21—“Taxpayer”—Personal corporation—Company engaging in more than one activity—Business of the company—Determination of income—Deductions—Expenses of business—Tax paid under protest not recoverable by appeal from decision of the Minister—Petition of right only procedure available.

Appellant included in his income tax return for the year 1931 a sum of money received by him from Trinity Securities, Limited, a private company incorporated, in 1925, under the laws of the Province of Ontario, of which appellant owned all the outstanding shares, except four qualification shares, and which he controlled. The principal objects for which Trinity Securities, Limited, was incorporated were to operate ranches or farms for live stock, dairying or agriculture; to breed, raise, keep, render marketable and deal in horses, cattle and live stock; to undertake, carry on and execute transactions as financial or commercial brokers or agents; to invest moneys of the company not immediately required for the purposes of the company in such investments as, from time to time, may be determined. Appellant transferred to it a large quantity of securities in exchange for shares of the company. During the first year of its existence and for some months in 1927, the company merely held investments and collected interest and dividends thereon. In the spring of 1927 it acquired a farm, the first horses were purchased and breeding operations commenced; the number of horses owned by it increased from 2 in 1927 to 70 in 1937. The company also, from time to time, disposed of some of its securities and purchased others.

Trinity Securities, Limited, is a personal corporation within the meaning of par. (1) of s. 2 of the Income War Tax Act, R.S.C., 1927, c. 97, as enacted by 23-24 Geo. V, c. 14, s. 1. The income tax return for Trinity Securities, Limited, for the year 1931 included *inter alia* in deductions therein set forth an item reading “farm and stable expenses, \$85,492.38.” The appellant’s tax return for the year 1931 showed a taxable income of \$83,517.48. The Commissioner of Income Tax refused to allow the deduction for farm and stable expenses from the gross income of Trinity Securities, Limited, and assessed appellant for this amount. The Minister of National Revenue confirmed the assessment and appellant appealed to this Court. The appeal deals with the income tax of appellant for the years 1931, 1932, 1933 and 1934.

Respondent contends that the chief occupation, trade or business of Trinity Securities, Limited, is that of an investment company, holding revenue bearing securities and its income shall be deemed to be not less than the income derived from such chief occupation, trade or business; that its operations were those of appellant and were performed by him, or, if by the company, then the company was the

agent or instrument of appellant; that the expenses on account of the farm and stable were personal and living expenses of appellant and not deductible; that such expenses were not wholly, exclusively and necessarily laid out for the purpose of earning the income of appellant.

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- Held:* That Trinity Securities, Limited, being a personal corporation, is not a taxpayer within the meaning of the Income War Tax Act.
2. That Trinity Securities, Limited, carried on one business only, that of operating a breeding farm and a racing stable. The investment of its funds was not in itself a business.
 3. That the disbursements and expenses laid out in connection with the business of Trinity Securities, Limited, must be deducted from the profits or gains realized therefrom and, if necessary, from the revenue derived from the investments in order to determine the amount liable to income tax.
 4. That appellant cannot by an appeal from the decision of the Minister of National Revenue, claim a refund of taxes paid under protest.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

C. P. Fullerton, K.C. and *Peter Wright* for appellant.
F. P. Varcoe, K.C. and *J. R. Tolmie* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (May 20, 1938) delivered the following judgment:

The present case relates to four appeals from as many assessments for the taxing years 1931, 1932, 1933 and 1934 made by the Commissioner of Income Tax on July 24, 1936, and affirmed by the Minister of National Revenue, acting and represented by the Commissioner of Income Tax, on January 6, 1937. The appeals are brought under sections 58 and following of the Income War Tax Act (R.S.C., 1927, chap. 97). I shall deal with the appeal concerning the year 1931; the facts and questions of law with regard to the three other years are identical, the only difference being in the sums involved. The decision shall apply to the four taxing periods in question.

On April 30, 1932, the appellant, Harry C. Hatch, delivered to the Minister of National Revenue, in compliance with section 33 of the Act, a return showing an income for the year 1931 of \$90,522.48. Included in this amount

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was a sum of \$60,717.78 received from Trinity Securities, Limited.

Trinity Securities, Limited, was incorporated by letters patent issued on November 23, 1925, under the authority of The Ontario Companies Act, by the Provincial Secretary of the Province of Ontario; a copy of the letters patent was filed as exhibit 1. I may note that Trinity Securities, Limited, is a private company.

The purposes and objects of the company are, among others, the following:

(a) To operate ranches or farms for live stock, dairying or agriculture; to breed, raise, keep, render marketable and deal in horses, cattle and live stock of all kinds and to produce, buy, sell, manufacture and deal in all products and by-products thereof and all agricultural products;

(e) To undertake, carry on and execute transactions as financial or commercial brokers or agents;

(g) To acquire, lease, construct, improve, maintain, own, use, operate, sell, let and deal in dwelling houses, lodging houses and hotels; to operate ranches or farms for live stock, dairying or agriculture; to breed, raise, keep, render marketable and deal in horses, cattle and live stock of all kinds and to produce, buy, sell, manufacture and deal in all products and by-products thereof and all agricultural products;

(i) To invest the moneys of the company not immediately required for the purposes of the company in such investments as, from time to time, may be determined.

The capital of the company is fixed at \$100,000, divided into 1,000 shares of \$100 each. The head office of the company is said to be situate at the City of Toronto, in the Province of Ontario.

Trinity Securities, Limited, was at all times material herein controlled by the appellant; he owned all the outstanding shares, with the exception of four which were merely qualification shares.

Trinity Securities, Limited, is, and was in 1931, a personal corporation within the meaning of paragraph (i) of section 2 of the Act, as enacted by 23-24 George V, chapter 14, section 1, and made retroactive to the 15th of June, 1926, by section 10 of the said statute:

(i) "personal corporation" means a corporation or joint stock company, irrespective of when or where created, whether in Canada or elsewhere, and irrespective of where it carries on its business or where its assets are situate, controlled, directly or indirectly, by one individual who resides in Canada, or by one such individual and his wife or any member of his family, or by any combination of them or by any other person or corporation or any combination of them on his or their behalf, and whether through holding a majority of the stock of such corporation or in any other manner whatsoever, the gross revenue of which is to the

extent of one-quarter or more derived from one or more of the following sources, namely:—

(i) From the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property.

(ii) From the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend, or

(iii) From or by virtue of any right, title or interest in or to any estate or trust.

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The income tax return of Trinity Securities, Limited, for the year 1931, a copy whereof was filed as exhibit 2, contains in brief the following statement:

Total income	\$153,150 65
Total deductions	92,432 87
Net income	60,717 78
Statutory exemption	2,000 00
Amount of income subject to tax	\$ 58,717 78

No amount is set down opposite the words "Amount of tax at 10 p.c.", because Trinity Securities, Limited, is a personal corporation and personal corporations are not assessable for income tax save with respect to the portion of their income deemed to be distributed to non-residents: see sections 21 of the Act.

The sum of \$153,150.65, representing the gross income, is made up as follows:

Interest on call loans	\$ 1,488 82
Interest on mortgages	6,267 03
Interest on bonds	2,000 10
	<hr/>
	\$ 9,755 95
Dividends from Canadian corporations (specified in schedule attached)	92,082 95
Dividends from British and foreign corporations (specified in schedule attached)	51,311 75
	<hr/>
	\$153,150 65

The sum of \$92,432.87, representing the deductions, comprises the following items:

General expenses	\$ 346 78
Farm and stable expenses	85,492 38
Expenses re mortgage collections	188 01
Salaries	3,600 00
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	\$ 89,627 17

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Depreciation					
Office furniture and fixtures—					
Cost	Rate per cent	Amount in	Amount		
	per annum	previous years	this year		
\$913 26	10%	\$197 46	\$91 33		91 33
Allowance on account of dividends (specified in schedule)					2,714 37
					<hr/>
					\$92,432 87

On April 30, 1932, the appellant sent his income tax return for the year 1931 and included in his income the sum of \$60,717.78 as income derived from Trinity Securities, Limited.

The computation of the tax in the appellant's return, which forms part of the documents transmitted to the Registrar of this Court in compliance with section 63 of the Act, is made up as follows:

Gross income	\$90,522 48	
Deductions	3,105 00	
	<hr/>	
	\$87,417 48	
Less statutory exemption.....	\$2,400	
Allowance for 3 dependent children under 21 years of age at \$500 each	1,500	
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	3,900 00	
Income subject to tax	\$83,517 48	
Tax		\$ 19,170 77
5% additional where net income in excess of \$5,000.		958 54
		<hr/>
		\$ 20,129 31

The appellant paid this sum of \$20,129.31 in due course.

On February 18, 1935, the Commissioner of Income Tax sent to the appellant a notice of assessment for the year 1931 altering the amount of the tax; the statement included in the notice is made up as follows:

Total income	\$112,750 76	
Deductions	3,105 00	
	<hr/>	
	109,645 76	
Statutory exemption	\$2,400	
Dependents	1,500	
	<hr/>	
	3,900 00	
	<hr/>	
	\$105,745 76	
Tax		\$ 27,035 93
Additional 5% tax		1,351 79
		<hr/>
		\$ 28,387 72

Then comes a summary which reads thus:

	Tax	Interest	Total
Amount levied	\$28,387 72	\$ 1,428 09	\$29,815 81
Amount paid on account..	20,129 31	20,129 31
	<hr/>	<hr/>	<hr/>
Balance due	\$ 8,258 41	\$ 1,428 09	\$ 9,686 50

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On February 26, 1935, the appellant's solicitor wrote to the Commissioner of Income Tax in part as follows:

I have just received from Mr. Hatch's office an amended notice of assessment in regard to his income tax for 1931, dated February 18th, 1935.

In effect the reassessment has disallowed \$21,243 91 of the loss incurred by Trinity Securities, Limited, in the operation of the farm and racing stable.

It is my recollection that this matter was settled without a reassessment down to the end of the taxation period of 1931, but it was understood that you would make a readjustment in the year 1932, and Mr. Hatch could appeal if he saw fit. In connection with this I am enclosing herewith copy of letter from the Inspector of Taxation at Toronto, dated October 4th, 1932, which refers to these expenses for the year 1932 and subsequently.

I wish you would advise whether or not the reassessment for 1931 was issued in error.

On March 15, 1935, the Commissioner replied as follows:

With reference to your letter of the 26th ultimo, the matter is under consideration and you will be advised further in due course. Meanwhile you may wish to preserve your client's rights by the filing of an appeal.

On March 16, 1935, the appellant caused a notice of appeal to be served upon the Minister by his solicitors.

On March 23, 1935, the Commissioner wrote to the appellant's solicitors acknowledging receipt of the notice of appeal and adding:

An investigation is being made into this matter and you will be advised further in due course. Meanwhile, it is suggested that the assessment as levied be paid in order to avoid the accrual of interest under the provisions of the Income War Tax Act, subject to a refund at a later date should an adjustment reducing the assessment be subsequently made.

On May 14, 1936, the Minister rendered his decision affirming the assessment.

On or about June 12, 1936, the appellant mailed a notice of dissatisfaction in accordance with the provisions of section 60 and duly filed security for costs as required by section 61.

This appeal has since remained in abeyance; I may note that we are not concerned with it in the present instance.

<p>1938 <u>HARRY C. HATCH</u> <i>v.</i> MINISTER OF NATIONAL REVENUE. <u>Angers J.</u></p>	<p>On July 24, 1936, the Commissioner of Income Tax sent to the appellant another notice of assessment for the year 1931; it contains in substance the following items:</p>
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Total income	\$176,499 23	
Deductions	3,105 00	
		\$173,394 23
Statutory exemption and dependents ..	3,900 00	
		\$169,494 23
Tax		\$ 52,597 57
Additional 5% tax ..		2,629 88
		\$ 55,227 45

There follows a summary which reads as follows:

	Tax	Interest	Total
Amount levied	\$55,227 45	\$ 9,092 71	\$64,320 16
Amount paid on account..	20,129 31	20,129 31
Balance due	\$35,098 14	\$ 9,092 71	\$44,190 85
Amount payable as at August 24th, 1936.....			\$44,190 85

The difference between the amount of the total income in the notice of assessment of the 24th of July, 1936, and the amount of the total income in the appellant's return of the 30th of April, 1932, consists almost entirely of the farm and stable expenses of Trinity Securities, Limited, for the year 1931, amounting to \$85,492.38, which the Commissioner of Income Tax declined to allow as deduction from the gross income of the company for that year.

On or about August 18, 1936, Hatch served a notice of appeal upon the Minister, in accordance with the provisions of section 58 of the Act.

On January 6, 1937, after several letters from the appellant's solicitors to the Commissioner of Income Tax, dated September 11 and 29, October 9 and December 29, 1936, and January 4, 1937, respectively, all of which form part of exhibit 10, the Minister, acting by the Commissioner of Income Tax, rendered his decision confirming the assessment and notified the appellant accordingly.

On or about January 20, 1937, the appellant sent to the Minister a notice of dissatisfaction, in accordance with the requirements of section 60 of the Act.

On March 31, 1937, the Minister mailed his reply denying the allegations contained in the notice of dissatisfaction and confirming the assessment under appeal for the reasons set forth in his decision.

Pleadings were filed pursuant to an order of the Court dated the 21st of April, 1937.

[The learned Judge referred to the pleadings and continued.]

The proof establishes beyond doubt that Trinity Securities, Limited, is a personal corporation within the meaning of paragraph (i) of section 2 of the Act. It is a corporation created, as we have seen, by letters patent issued by the Provincial Secretary of the Province of Ontario and is controlled by the appellant, Harry C. Hatch, who resides in the City of Toronto, through holding a majority of the stock of the corporation, the gross revenue of which is, to the extent of more than one-quarter, derived from the ownership of bonds, stocks and mortgages.

The respondent submits that Trinity Securities, Limited, has income from more than one source by reason of exercising two trades or businesses: (a) the holding of bonds, stocks and mortgages; (b) the operation of a breeding farm and racing stable. The respondent contends that, in the circumstances, Trinity Securities, Limited, is subject to the provisions of section 10 of the Act, which reads as follows:

10. In any case the income of a taxpayer shall be deemed to be not less than the income derived from his chief position, occupation, trade, business or calling.

2. Where a taxpayer has income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, the Minister shall have full power to determine which one or more, or which combination thereof shall, for the purpose of this Act, constitute the taxpayer's chief position, occupation, trade, business or calling, and the income therefrom shall be taxed accordingly.

3. The determination of the Minister exercised pursuant hereto shall be final and conclusive.

It was urged on behalf of the appellant that section 10 does not apply to Trinity Securities, Limited, because the company is not a taxpayer.

Prior to the coming into force of the statute 24-25 George V, chapter 55, assented to on the 3rd of July, 1934, personal corporations paid no income tax whatever; their income was deemed to be distributed on the last day of each year to their shareholders and the latter were taxable each year as if the income had been effectively distributed. Section 21 of the Income War Tax Act, as contained in chapter 97 of the Revised Statutes of Canada, 1927, governing personal corporations, comprised six subsec-

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tions; three of these only are material in the present instance; they read as follows:

21. The income of a personal corporation, in lieu of being assessed the tax prescribed by section nine of this Act, shall on the last day of each year be deemed to be distributed as a dividend to the shareholders thereof and shall in their hands constitute taxable income for each year in the proportion hereinafter mentioned, whether actually distributed by way of dividend or not

2. Each shareholder's taxable portion of the income of the corporation, deemed to be distributed to him as above provided for, shall be such percentage of the income of the corporation, as the value of all property transferred or loaned by such shareholder or his predecessor in title to the corporation is of the total value of all property of the corporation acquired from the shareholders.

3. The value of the property transferred by each shareholder or his predecessor in title shall be the fair value as at the date of the transfer of such property to the corporation, and the total value of the property of the corporation acquired from its shareholders shall, for the purpose of determining the percentage referred to in the last preceding subsection, be taken as at the date of acquisition thereof by the corporation; and in ascertaining values under this subsection, regard shall be had to all the facts and circumstances, and the decision of the Minister in that respect shall be final and conclusive.

In virtue of section 3 of chapter 14 of 23-24 George V, subsection 1 of section 21 was repealed and the following substituted therefor:

21. (1) The income of a personal corporation, whether the same is actually distributed or not, shall be deemed to be distributed on the last day of each year as a dividend to the shareholders, and the said shareholders shall be taxable each year as if the same had been distributed in the proportions hereinafter mentioned.

By section 10 of said chapter 14 it is declared that the provisions of the Income War Tax Act shall be read and construed as if the amendments enacted by, among others, said section 3, had been contained therein since the 15th of June, 1926, and that the Income War Tax Act as amended shall apply to the income of the 1925 taxation period, the fiscal periods ending in 1925 and all subsequent periods.

In virtue of section 4 of said chapter 14, subsections 7, 8 and 9 were added to section 21; these subsections read as follows:

(7) The shareholder of a personal corporation who controls such corporation shall file with his income tax return a statement of the assets, liabilities and income of the personal corporation.

(8) Any such shareholder who fails to file the statement required by the last preceding subsection at the time and in the manner prescribed, shall be taxed on double the amount of his proportion of the income of such personal corporation.

(9) The rates of tax applicable to corporations, as in this Act provided, shall not be imposed on any personal corporation.

By section 10 it is enacted that section 4 shall apply to the income of the 1932 taxation period, the fiscal periods ending in 1932 and all subsequent periods.

In virtue of section 11 of chapter 55 of 24-25 George V, subsection 9 of section 21 of the Income War Tax Act, as enacted by section 4 of chapter 14 of 23-24 George V, was repealed and the following subsection substituted therefor:

9. The rates of tax applicable to corporations as in this Act provided shall be payable by a personal corporation on that portion only of its income which is deemed to be distributed to non-residents.

By section 18 of said chapter 55 it is enacted that section 11 shall be applicable to income of the 1933 taxation period, the fiscal periods ending therein and all subsequent periods.

The evidence shows that Trinity Securities, Limited, never had non-resident shareholders; consequently it never was liable to pay income tax.

The definition of "taxpayer" in paragraph (k) of section 2 of the Act reads thus:

"taxpayer" means any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.

A personal corporation does not, in my opinion, come within the ambit of that definition.

The object of subsection 9 of section 21, as enacted by 24-25 George V, chapter 55, section 11, is to tax at the source income payable to non-residents; it does not make a personal corporation a taxpayer in the sense of the above definition; the personal corporation merely collects the tax for the Minister and remits it to him.

A taxing act is not to be interpreted differently from any other act, but it must be construed strictly: effect must be given to the intention of the legislature. The subject is not taxable by inference or analogy; the tax must be imposed in categorical and unambiguous terms; in case of doubt the construction of the act must be resolved in favour of the taxpayer: *Cox v. Rabbits* (1); *Partington v. Attorney-General* (2); *Tennant v. Smith* (3); *Commissioners of Inland Revenue v. The Duke of Westminster* (4); Maxwell on the Interpretation of Statutes, 7th ed.

(1) (1878) 3 A.C. 473, at 478.

(2) (1869) L.R. 4 H.L. 100 at

(3) (1892) A.C. 150 at 154.

(4) (1936) A.C. 1 at 24.

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p. 246. I deem it apposite to quote an extract from the judgment of Lord Russell of Killowen in the case of *Commissioners of Inland Revenue v. The Duke of Westminster* (*ubi supra*, at p. 24):

I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partington v. Attorney-General* (1869) L.R. 4 H.L. 100, 122): "As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India v. Scoble* ([1903] A.C. 299); that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine.

I do not think that Trinity Securities, Limited, was a taxpayer within the meaning of the Act.

The appellant's contention that Trinity Securities, Limited carried on only one business seems to me well founded. The evidence discloses that, during the first year of its existence, i.e., 1926, and the first few months of 1927, the corporation merely held investments and collected the interest and dividends thereon. The appellant transferred to the company a large quantity of securities and in exchange received shares of the company. In the spring of 1927 the farm was acquired, the first horses were purchased and the breeding operations were commenced.

The company from time to time disposed of some of its securities and purchased others presumably with the object of improving its investments and augmenting its income. From the day it started to operate its farm and racing stable, the company gradually increased the number of its horses; it had three in 1927 and in 1937 it owned about seventy.

In his examination for discovery, put in evidence, the appellant, speaking of the activities of Trinity Securities, Limited, says:

A. It holds a goodly number of investments and it operates that farm out there and the racing stables; that is about the extent of its activities

Q. And its securities are one hundred per cent securities of yours; that is, they were securities transferred—

A. Are you asking about mine or the company's now?

Q. Well, they are securities that reached the company through you. Is that correct?

A. Through me. Yes.

Q. When the company was first brought into existence you transferred to the company—

A. Some securities in exchange for its shares.

Q. In exchange for its shares?

A. Yes.

Q. And then from time to time, I suppose, the company acquired other securities?

A. Well only through the sale of some it had and changing investments.

Further on in his testimony Hatch deals with the farm and racing stable; it seems to me expedient to quote therefrom the following extracts:

Q. Now, when did you acquire the farm and racing establishment?

A. Just about the same time—around 1926 or 1927. I guess maybe 1927, I think I started the racing business.

Q. Well, the farm, was that farm registered in your name for a time?

A. I think it is yet perhaps.

Q. It is still in your name; the corporation is simply—

A. They paid for it and I have it in trust for them.

The witness was later examined about the financial aspect of the operations of the farm and racing stable; I may perhaps cite a passage from his deposition on the subject:

Q. You were closely in touch with the operations of the stable from a financial point of view?

A. Very closely.

Q. And you arranged for the meeting of the losses or the payment of the expenses from time to time; I mean you were called on to do that, I suppose?

A. I supervised them. I should know what they were.

Q. Trinity Corporation paid for this farm and I suppose paid for the extensions and improvements that you have made from time to time. Is that so, Mr. Hatch?

A. That is right.

Q. Then how was that financed? What was the financial—

A. Trinity Securities had a fairly decent income and they paid for that out of their income.

Q. It paid for the farm out of income, did it?

A. Well, the records will show that. I expect they did. I don't know.

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Ward Wright, examined *de bene esse* on behalf of appellant, stated that he had been solicitor for Hatch since about 1924 and that he had been intimately connected with his affairs for the last ten years. He is a director and vice-president of Trinity Securities, Limited. He did not incorporate the company but, immediately after its organization, he got into it; he was elected a director in August, 1927, and he has held that position ever since; he was made vice-president in 1932.

Asked what the business of Trinity Securities, Limited, involved, the witness replied:

A. Well, the chief business that we do is operating the breeding farm; that is where the loss, as far as there is any loss, really comes in, I think. We had certain very definite ideas about the class of horse that we wanted to breed in Canada; the farm has gradually developed, the establishment has gradually developed and as it has developed the racing stable has also developed. The racing stable is a necessary adjunct to the breeding farm; you have got to—just like showing stock—you have to demonstrate what you have and in the thoroughbred business the demonstration takes place on a race track.

After stating that the company employed twenty-two men in 1931 and that it probably had the same number in 1937, Wright added:

A. They are all engaged in connection with the operations of the farm at Sullivan's Corners and with branches of the racing stable, wherever they are. Of course, at the present time we will have some men in other places; we have four—(when I use the term "horses" it means horses, mares and foals)—we have four horses in Kentucky and twenty-three in California and we have twenty-three at Woodbine Park at the moment and eighteen at the farm. We have about sixty-eight or seventy horses now all together

Referred then to the subject of investments, the witness gave the following version:

A. Well, we have a very large portfolio which we invested and it stays invested; there is no business except we now and again make up our minds to change investments, as, for instance, in 1933 we decided to get out of United States investments and we did. We had about a million and a half in United States at that time and we sold that and reinvested in Canada. We try to keep our surplus funds invested in as well paying companies as we can and we have gradually got them into things that we are largely interested in ourselves, other companies.

Q. Does it buy and sell stocks frequently?

A. Oh, no, we have never done any buying and selling of stock except when necessary changes had to be made in the investment portfolio.

Q. Has it ever bought and sold for others?

A. Oh, no, we have never done anything like that.

* * * * *

Q. Has the company ever received any commissions for the sale or purchase of stock?

A. No, the company's whole income is limited to the income from the breeding farm and racing stable and income from our investments; the investments are very diversified; they include stocks and mortgages and sometimes if we have surplus money we have made call loans.

It was argued on behalf of the respondent that the operations of the breeding farm and racing stable were not business operations but were recreational operations carried on by the appellant himself, the corporation being merely a screen or device to shield the appellant. In support of this proposition counsel cited: *Thacker v. Lowe* (1); *Deering v. Blair* (2); *Fisher v. Commissioner of Internal Revenue* (3); *Commissioner of Internal Revenue v. Field* (4).

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In the last mentioned case, Manton J., delivering the judgment of the Circuit Court of Appeals, which affirmed the decision of the Board of Tax Appeals, said (p. 877):

The Board of Tax Appeals found that both the farm and racing stable were conducted as businesses for profit and that the losses in connection therewith were deductible in computing his net income.

If the findings of the Board have evidence to sustain them, we may conclude that the enterprises were conducted as businesses for profit and therefore the losses were properly deducted. *Comm'r v. Widener*, 33 F. (2d) 833 C.C. A. 3; *Wilson v. Eisner*, 282 F. 38 (C.C. A. 2). In *Flint v. Stone Tracy Co.*, 220 U.S. 107, 171, 31 S. Ct. 342, 357, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, the court repeated a definition of business as "That which occupies the time, attention and labour of men for the purpose of a livelihood or profit." It is not essential that the taxpayer be engaged solely in one business. He may have interests in several enterprises among which he divides his time. His intention is important. *Thacker v. Lowe* (D.C.) 288 F. 994.

* * * * *

In the instant case, there is substantial evidence that the enterprises were conducted as a business for profit and with an expectation of ultimate profits. We cannot say that the expectation of profits is unreasonable or forecast continuous losses in the light of experience in cattle or horse breeding and racing. If the right to deduct losses under the statute required that profit appear to the court to be possible, that requirement would be quite general and would be applicable to any enterprise, whether it was farming, manufacturing, or promotion of any character. We may not, in this way, foredoom any business venture. Cattle breeding and horse racing projects are old. Some have been profitable; others have not. It is a matter of intention and good faith, and all the circumstances in the particular case must be our guide. In this case we think the respondent embarked in these enterprises with the expectation of making profits; at least he did so with an earnest and honest intention.

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| (1) (1922) 288 Fed 994. | (4) (1932) 26 US Board of Tax |
| (2) (1927) 23 Fed. (2nd) 975. | Appeals Rep 116; 67 Fed. |
| (3) (1934) 29 U.S. Board of Tax | (2nd) 876. |
| Appeals Rep 1041; 74 Fed | |
| (2nd), 1014. | |

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The testimonies of the appellant and of Ward Wright satisfy me that the farm and stable were operated in good faith for profit and constituted a business.

In support of his contention that Trinity Securities, Limited, was engaged in the business of investment, counsel for respondent cited the case of *Commissioners of Inland Revenue v. Korean Syndicate Ltd.* (1) and referred to the judgment of the Master of the Rolls, Lord Stern-dale, at page 272, quoting therefrom the following observations:

The word "business" as defined in that section is therefore the governing word here, and it has the widest possible meaning. It is a trade or business of any description owned or carried on in any other place than the United Kingdom by persons ordinarily resident in the United Kingdom. It seems to me that if a company comes into existence for the very purpose of acquiring concessions and turning them to account, it is impossible to say that that is not such a business as is contemplated by and referred to in s 39 of the Act.

The remarks of the Master of the Rolls particularly in point are included in the preceding paragraph on the same page and read thus:

In my opinion the effect of that agreement is that it is a carrying out of the object which the Syndicate undertook to attain, and which is mentioned in sub-clause 1 of clause 3 of memorandum which I have already read, of acquiring a concession and working, exploiting and turning the same to account, the same words as are used in the agreement of February 7, 1905. That is not in any way like the case of a person who holds certain investments and merely draws the interest from them, or of an owner of mines who simply leases them in consideration of the payment to him of royalties. It is nothing in the least like either of those cases, but it is a carrying out of that object mentioned in the memorandum, and which the Syndicate hopes to attain.

Counsel also referred to the judgment of Lord Atkin at page 276, where the latter makes certain comments on the definition of the word "business" given by Rowlatt J. in the case of *Commissioners of Inland Revenue v. Marine Steam Turbine Company Limited* (2).

I do not think that the case of *Commissioners of Inland Revenue v. Korean Syndicate Ltd* supports the contention expressed by counsel for respondent; I feel inclined to believe that it is rather the contrary.

On the other hand, counsel for appellant relied on the following decisions: *Smith v. Anderson* (3) and *Liverpool and London and Globe Insurance Co. v. Bennett* (4). It

(1) (1921) 3 K.B. 258.

(2) (1920) K.B. 193 at 203.

(3) (1880) 15 Ch. D. 247.

(4) (1911) 2 K.B. 577, at 589;

(1912) 2 K.B. 41 at 52;

(1915) A.C. 610 at 616

seems convenient to quote a brief extract from the judgment of the Master of the Rolls, Sir George Jessel, in the case of *Smith v. Anderson* (p. 260):

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You cannot acquire gain by means of a company except by carrying on some business or other, and I have no doubt if any one formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained. But whether that be so or not, I am clearly of opinion that where investment is made a business, or where the dealing in securities is made a business, it is a business within the purview of this Act. There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which would be so called when carried on by a number of persons. That is a distinction not to be forgotten, even if we were trying the question by the ordinary use of the English language.

* * * * *

When you come to an association or company formed for a purpose, you say at once that it is a business, because there you have that from which you would infer continuity; it is formed to do that and nothing else, and, therefore, at once you would say that the company carried on a business. So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business. But when you have an association formed, or where an individual makes it his continuous occupation—the business of his life to buy and sell securities—he is called a stock-jobber or share-jobber, and nobody doubts for a moment that he is carrying on business. So, if a company is formed for doing the very same thing, that is, for investing money belonging to persons in the purchase of stocks and shares, and changing them from time to time, either with limited or unlimited powers, I should say there can be no question that they are carrying on a business, whether you call it a business of investment or a business of dealing in securities, or, as in the case before me, both the business of investment and the business of dealing in securities.

I am satisfied that Trinity Securities, Limited, did not carry on two separate businesses and that the investment of its funds was not in itself a business. The only business exercised by the company was the operation of its breeding farm and, as an adjunct, its racing stable. Mere investment for investment's sake is not a business.

In its income tax return for 1931, Trinity Securities, Limited, indicated the nature of its business as "Racing and Stud Farm"; in its returns for 1932, 1933 and 1934 it mentioned "Investments." I do not think that we need attach much importance to this indication; the nature of the business of Trinity Securities, Limited, must be determined according to the facts disclosed in the evidence.

After a minute perusal of the evidence, documentary and oral, and a careful review of the precedents, I have reached

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the conclusion that Trinity Securities, Limited, carried on, during the period with which we have to deal, only one business, to wit, that of operating a breeding farm and a racing stable; the disbursements and expenses laid out in connection with the said business must be deducted from the profits or gains realized therefrom and, if necessary, from the revenues derived from the investments in order to determine the amount liable to income tax.

It was urged on behalf of the appellant that an arrangement had been arrived at between the appellant and the respondent whereby the full expenses of Trinity Securities, Limited, for the years 1930 and 1931 were to be allowed. I may say that I am not satisfied that such an arrangement was made; however, seeing the conclusion which I have reached on the main issue, this question offers no interest.

For the reasons aforesaid I believe that the appeal in connection with the year 1931 must be maintained and that the assessment of the 24th of July, 1936, must be set aside. For the same reasons, a similar decision, *mutatis mutandis*, applies to the years 1932, 1933 and 1934; the amendments made by 23-24 George V, chapter 14, and 24-25 George V, chapter 55, do not give rise to a different conclusion.

The appellant is claiming a refund of the sum of \$27,314.60, which he paid under protest; I do not think that a refund can be sought by an appeal against the decision of the Minister; the only procedure available is the petition of right; *Lovibond v. Grand Trunk Railway Company et al.* (1); *Attorney-General for Ontario et al. v. McLean Gold Mines Ltd.* (2).

The appellant will have his costs against the respondent.

Judgment accordingly.